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EDITOR

Rajeev Bali
Director,
H.P. Judicial Academy,
16 Mile, Shimla-Mandi National Highway, Distt. Shimla

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Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973**- Section 24- D.O. Notes for securing transfer- Public Prosecutors procured demi official notes from the local M.L.A. for securing their transfers- Held- The working of the Prosecutors has to be free from any executive or political interference- Since both the petitioner as also the private respondent are beneficiaries of the D.O. Notes, they are directed to be posted out of district Kangra- Petition dismissed. (Para 25 to 30) Title: Tarsem Kumar vs. State of H.P. **(D.B.)** Page-461

Constitution of India, 1950- Article 226- Employment on compassionate grou Held- it is well settled principle of law that there is no right to compassio appointment- Case of the petitioner rejected on the basis of income criteria- Pet dismissed. (Para 12, 14) Title: Naresh Kumar vs. State of H.P. Page-405

Constitution of India, 1950- Article 226- **EPF and CPF Schemes**- Pensionary benefits- Held- After the absorption of petitioner in the establishment of Deputy Commissioner, Una, that too in the year 2015, which absorption is prospective, cannot stake a claim to be governed by the CCS (Pension) Rules, 1972, simply on the ground that they were in job before 14.5.2003- It is reiterated that their being in job before 14.05.2003 for the purpose of being governed by the CCS (Pension) Rules, 1972 would have been of relevance only if they were governed by the CCS (Pension) Rules, 1972 in their parent Organization also, which admittedly, they were not- This renders the contention of the petitioners qua quashing of Annexure A-1 and also qua issuance of a mandamus to the respondents to treat the petitioners to be governed by the CCS (Pension) Rules, 1972 to be unacceptable in law. During the course of arguments, it could not be substantiated by the petitioners before this Court that their service conditions have been altered to disadvantage by taking away their right to receive pension under the CCS (Pension) Rules, 1972, to which they were entitled to under their erstwhile employer- Petition dismissed. (Para 19) Title: Mahesh Chand & others vs. State of H.P. Page-514

Constitution of India, 1950- Article 226- **H.P. Land Revenue Act, 1954**- Section 14- Condoning the delay in filing the appeal- Held- By allowing the application for condonation of delay, in the given facts and circumstances no illegality or material irregularity can be said to have been caused to the petitioner- Petition dismissed. [Para 4(vi)] Title: Sabrina vs. Financial Commissioner (Appeals) & others Page-397

Constitution of India, 1950- Article 226- **H.P. State Administrative Tribunal Act 1985** - Section 21- Grievance of the petitioner is that though she was promoted as TGT from the post of Language Teacher but she could not avail the benefit thereof since the transfer order was never conveyed to her- Held- Plea of petitioner that she was not aware about transfer order till 2016 does not appear to be factually correct and as per record she had become aware about her promotion order on 9.3.2006 when she approached the Principal where she was posted- Petitioner had waived off her right to promotion- Petition hit by delay and latches- Petition dismissed. (Para 7 to 10)Title: Anitee Sood vs. State of H.P. Page-379

Constitution of India, 1950- Article 226- **Part Time Multi Task Worker Policy, 2020**- Appointment of Part Time Multi Task Worker in Government Schools of H.P.- As per policy, 8 marks are allocated for candidates whose families have donated land for school- Term 'Family' has been challenged being contrary to the spirit of parent policy- Held- The "family" as defined in the Policy cannot be said to be bad in law merely because it is different than the definition of "family" in the Himachal Pradesh Panchayati Raj Act- Petition dismissed. (Para 12) Title: Urmil vs. State of H.P. **(D.B.)** Page-413

Constitution of India, 1950- Article 226- **Part Time Multi Task Worker Policy, 2020**- Appointment of Part Time Multi Task Worker in Government Schools of H.P.- As per policy, 8 marks are allocated for candidates whose families have donated land for school- Term 'Family' has been challenged being contrary to the spirit of parent policy- Held- The "family" as defined in the Policy cannot be said to be bad in law merely because it is different than the definition of "family" in the Himachal Pradesh Panchayati Raj Act- Petition dismissed. (Para 12) Title: Khimi Devi vs. State of H.P. **(D.B.)** Page-417

Constitution of India, 1950- Article 226- **Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995**- Section 32- Held- There is a clear mandate of law to every appropriate

government to appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each is mandatorily required to be reserved for persons suffering from hearing impairment, blindness and locomotor disability or cerebral palsy- Petitioner was entitled to be appointed on regular basis from very inception- Petition allowed. (Para 10, 13 to 15). Title: Nitin Kumar vs. State of H.P. Page-823

Constitution of India, 1950- Article 226- Petitioner appointed Lecturer Physical Education in DAV College, Daulatpur Chowk, District Una- Later on services of petitioner were taken over as Lecturer (School Cadre) instead of Lecturer (College Cadre)- Petitioner approached H.P. State Administrative Tribunal but no relief was given- During service petitioner acquired Master's Degree- Held- It was too late for respondent to allege that petitioner did not have the requisite qualification even at the time of initial appointment in the College and on acquisition of Master's Decree, the petitioner had acquired the requisite qualification- Ld. Tribunal erred in holding that petitioner was not having requisite qualification for the post of Lecturer (College cadre) as prevalent at the time of taking over of the College- Petition allowed. (Para 11 to 14) Title: Rachhpal Singh Dadhwal vs. State of H.P. **(D.B.)** Page-782

Constitution of India, 1950- Article 226- Petitioner not granted benefits of medical leave for 395 days- Delay and latches- Held- Latches- Subsequent rejection of representation will not furnish a cause of action or revive a dead issue or time barred dispute- Petition dismissed. (Para 12) Title: Sada Ram vs. State of H.P. **(D.B.)** Page-388

Constitution of India, 1950- Article 226- Promotion to the post of Superintendent Grade-I- Held- Petitioner could not claim right to be considered for promotion before expiry of the period of penalty- No fault can be found in the administrative action of official respondents in this regard- Petition dismissed. (Para 8, 9) Title: Sohan Lal Verma vs. State of H.P. & another Page-501

Constitution of India, 1950- Article 226- Recasting the seniority of Forest Guards for their promotion to the posts of Deputy Ranger- Recruitment and Promotion Rules, 2003- Held- Employer has a right to determine transparent, fair and impartial criteria for selection to a post through appointment or by way of promotion amongst appointees of one and the same recruitment process inter-se seniority is determined on the basis of merit in selected list

prepared in the said recruitment process- Seniority of one and the same recruitment process is to be determined on the basis of merit- Petition disposed of with direction to respondents. (Para 18 to 24) Title: Intzar & others vs. State of H.P. & others Page-536

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules- Promotion to the post of Assistant Engineer- Petitioner challenged the seniority list- Promotional quota- Petitioner sought to quash the order dated 26.04.201 vide which their representation was rejected- Held- All such persons are on equal footing as they were inducted as diploma holder Junior Engineers, thereafter all of them acquired higher qualification during service *albeit* on different dates and on completion of three years after acquisition of such qualification became eligible for promotion to the post of Assistant Engineer and aforesaid 10% quota- So all such persons, who had acquired higher qualification during service and also had completed three years' service as such will fall in zone of consideration for promotion, however, their earlier service as diploma holder, where they held their own seniority, cannot be washed away- Petition allowed- Order dated 26.04.2021 and seniority list are quashed- Directions to prepare fresh seniority list. (Para 21 to 25) Title: Shashi Kant & others vs. State of H.P. & others Page-422

Constitution of India, 1950- Article 226- Redrawing the seniority list of Kanungo of District Mandi- Assigning seniority to petitioners by counting their service since their initial appointment- Representation rejected- Principles of No Work No Pay- Held- Petitioners have not been promoted to the next higher posts(s), for no fault on their part, but on account of wrong seniority assigned to them, they were kept away by authorities for no fault on their part, therefore, it is not a case where petitioners remained away from the work for their own reasons despite offer to them for performing the work but he was refrained on account of act of the employer- Principles of No Work No Pay not applicable- Petitioners are held entitled for consequential benefits including promotion on the basis of revised seniority list. (Para 20, 21) Title: Om Parkash & others vs. State of H.P. & others Page-811

Constitution of India, 1950- Article 226- Regularization of service- Petitioner a daily wage beldar engaged in the year 2001 and has rendered continuous service of 240 days in each calendar year – Service of the petitioner not regularized as per policy- Held- Petition allowed and respondents are directed

to extend the benefit of regularization to the petitioner in terms of regularization policy framed by the State Government. (Para 12, 13) Title: Vikram Singh vs. State of H.P. Page-372

Constitution of India, 1950- Article 226- Regularization policy- Petitioner a pharmacist on contract basis regularized after 10 years, whereas he claimed to have been regularized on completion of eight years of contract employment in terms of regularization policy dated 31.08.2012- Held- Respondents are directed to take into consideration the contractual service rendered by the petitioner for the purpose of regularization of his service- Petition allowed. (Para 8) Title: Kailash Chand vs. State of H.P. Page-864

Constitution of India, 1950- Article 226- Regularization policy- Petitioner appointed pharmacist on contract basis on 19.09.2005 and was regularized on 6.8.2015- Petitioner claimed to have been regularized on 1.4.2012 on completion of 6 years of contract employment in terms of regularization policy- Held- Instant case is fully covered by the judgment passed in CWPOA No. 7370 of 2019 and reasoning provided therein shall apply mutatis mutandis to the facts of the present case-Petition allowed. (Para 7) Title: Amit Sharma vs. State of H.P. Page-988

Constitution of India, 1950- Article 226- Respondents cancelled the entire selection process when only appointment letters in favour of selected persons left to be issued- Held- The appointments due to the petitioners against the posts of Firemen cannot be denied to them on the ground that subsequent to their selection, rules/policy of recruitment had undergone change- In the facts of the case, the new policy/rules can be applied only prospectively and not retrospectively to the recruitment process already conducted under different set of rules/policy- Petition allowed. [Para 3(i), 3(ii)(b)] Title: Boby Mehta & others vs. Union of India **(D.B.)** Page-728

Constitution of India, 1950- Article 226- Setting aside the auction of truck and further fresh auction as per guidelines- Held- Respondent 4 and 5 is a private entity against whom alone the reliefs have been claimed do not fall within the meaning of State under Article 12 of the Constitution and they are not financially, functionally and administratively dominated by or under the control of the Government- Petition dismissed. (Para 2,3, 6, 7) Title: Sanjay Kumar vs. State of H.P. **(D.B.)** Page-738

Constitution of India, 1950- Article 226- Setting aside the impugned transfer order of petitioner working as Assistant Engineer with the respondent Board- Held- It is more than settled that transfer is an administrative act and writ Court while exercising jurisdiction under Article 226 of the Constitution is not normally required to interfere with such orders of transfer until or unless malafides in the matter in breach of statutory provisions are established, which is not the fact situation obtaining in the present case- Petition dismissed. (Para 11) Title: Bhagat Ram vs. HP State Electricity Board Ltd. & another **(D.B.)** Page-383

Constitution of India, 1950- Article 226- The financial benefits were granted to petitioner w.e.f. 23.08.2016 when he was regularly promoted, however, petitioner sought that these benefits ought to have been given w.e.f. 30.06.2014- Held- The petitioner worked as Assistant Director (Legal) with effect from 30.06.2014- It cannot be said that he worked as a Law Officer on the post which did not exist after 30.06.2014- Hence, financial benefit for the period from 30.06.2014 to 23.08.2016 cannot be denied to the petitioner merely because of the fact that the Recruitment & Promotion Rules for the post of Assistant Director (Legal) were framed only on 19.07.2016 and benefit of regular promotion against the post of Assistant Director (Legal) was granted to the petitioner only from 23.06.2016- Petition allowed. [Para 4(d)] Title: Narinder Singh Chauhan vs. State of H.P. Page-792

Constitution of India, 1950- Article 226- Transfer policy- Petitioner aggrieved against his transfer has sought quashing of transfer order being in violation of Comprehensive Guiding Principles, 2013- Petitioner physically disabled- Held- Petitioner at the verge of retirement and physically disabled as such at this stage his transfer cannot be said to be justified- Petition allowed. (Para 11, 12) Title: Pawan Kumar Salaria vs. State of H.P. **(D.B.)** Page-445

Constitution of India, 1950- Article 226- Work charge status after completion of eight years service- Held- Relief claimed by the petitioner in the instant proceedings has been already extended to similar situated Nepalee employees and petitioner being similar situated person is also entitled for similar benefit- Petition allowed. (Para 5, 6) Title: Tirath Bahadur vs. State of H.P. Page-789

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 39 Rule 1 and 2- Petitioner has assailed the order passed by Ld.

Additional Judge in Civil Misc. Appeal- Ld. Civil Judge directed the parties to maintain status quo and in appeal Ld. Additional District Judge set aside the order and dismissed the application of the plaintiff for interim injunction- Suit land joint – Held- Ld. Additional District Judge has passed order on the basis of fact on record and the same is not perverse- Principle of equity has duly been considered- Petition dismissed. (Para 15) Title: Dumnu Ram vs. Baldev & another Page-156

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 39 Rule 1 and 2- Order 43 Rule 1- Petitioner has assailed the order of Additional District Judge, whereby appeal of respondent filed under Order 43 Rule 1 against the order passed by Ld. Trial Court was allowed and cross-objections preferred by the petitioner were dismissed- Ld. Trial Court directed the parties to maintain status quo- Held- No prima facie case exist in favour of petitioner to claim title and possession over the suit land to seek restraint order- Ld. Additional District Judge has passed order on the basis of fact on record and the same is not perverse- Principle of equity has duly been considered- Petition dismissed. (Para 14) Title: Namdhari Sangat Mandi Trust vs. Sahib Kaur Page-163

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 8 Rule 1A(3)- **H. P. Debt Reduction Act, 1976**- Section 8- Petitioner assailed the order of Trial Court vide which application under Order 8 Rule 1A(3) for production of documents was dismissed- Held:

A. Due Diligence- Suit at the stage of arguments and petitioner did not exercise due diligence at all in moving the concerned application. (Para 5(I).

B. Relevancy of documents- Document sought to be produced are not at all necessary and relevant for that adjudication of the list. [Para 5 (II) (d)]

C. Maintainability of petition under Article 227 of the Constitution of India, 1950- Power is to be exercised where there is no evidence at all to justify or the finding is so perverse- Findings of Trial Court not perverse. [Para 5(III)]

D. Abuse of Process of Court- Frivolous and groundless filings constitute a serious menace to the administration of justice- Petitioners have abused process of Court at the stage of arguments - Petition is dismissed with costs of Rs.25,000/-. [Para 5(IV)] Title:Santa Singh & others vs. Mahinder Kaur & others Page-170

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**-

Order 41 Rule 27- District Judge dismissed the application under Order 41 Rule 27 CPC to lead additional evidence- Held- Ld. Appellate Court decided the application independently and not alongwith the main appeal- On this count, petition allowed with direction to Ld. Appellate Court to decide the same with the main appeal. (Para 5) Title: Somi Lal vs. Surjeet Singh & others Page-339

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973**- Section 482- **Indian Penal Code, 1860**- Sections 406, 410, 420, 120-B and 34- Held- Evidentiary material on record, if accepted would not reasonably connect the petitioner with crime. Neither there is sufficient evidence to conclude that petitioner had an intention from very beginning to cheat the bank nor there is any material to suggest that petitioner unauthorizedly/illegally sold the property/machinery entrusted to it by the bank- Chances of conviction of petitioner are very remote and bleak- Petition allowed. (Para 30, 31) Title: Akshay Kumar Goel vs. State of H.P. & others Page-64

Constitution of India, 1950- Article 227- Departmental promotion in the Police Department- Petitioner acquitted in the case under Prevention of Corruption Act and was considered for promotion as Sub-Inspector but his fresh departmental inquiry was ordered- Petitioner sought to quash the order for fresh departmental inquiry and expunge adverse remarks in ACR entered due to Court case- Held- Mere use of expression in judgment that prosecution has been not able to prove complicity of petitioner beyond reasonable doubt cannot be construed acquittal of the petitioner on technical grounds- Acquittal held to be honourable acquittal- Adverse entry relating to specific incidents should ordinarily not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident- Petition allowed. (Para 16, 25, 26) Title: Bhupinder Pal vs. State of H.P. Page-107

Constitution of India, 1950- Article 227- Petition to set aside DPC being not as per SOP and to hold fresh DPC- Non-communication of adverse entries in the ACRs for the last five years- Held- Since factum with regard to non-communication of adverse entries for the last five years was very much in the knowledge of the petitioner before her having participated in the selection process, she instead of participating in the selection process could represent authorities for communication of adverse entries, so that authorities could

decide her representation, if any, before her having participated in the selection process- No illegality in DPC- Petition dismissed. (Para 9, 10) Title: Sunita Chandel vs. Union of India & others Page-101

Constitution of India, 1950- Article 227- Post of Pharmacist (Allopathy) OBC category- Petitioner though opted to apply online as OBC category but since portal did not show the option of OBC category, she applied against general category- Petitioner sought to change her category from general to OBC- Held- Category once claimed cannot be allowed to be changed subsequently- Petition dismissed. (Para 5) Title: Pooja Kaushal vs. H.P. Staff Selection Commission Page-128

'H'

H.P. Urban Rent Control Act, 1987- Section 14(3)(c)- Revision- Eviction- Bonafide requirement for rebuilding and reconstruction- Held- Approval of plan of reconstruction by the statutory authority is not a condition precedent for ordering the eviction of a tenant on the ground referred to in Section 14(3)(c) of Rent Act- Eviction order rightly passed- Revision dismissed. (Para 12, 16) Title: Suman Dawar & another vs. Surinder Singh Khera Page-897

Himachal Pradesh Panchayati Raj (Election) Rules 1994- Rule 28 (8)- **Constitution of India, 1950**- Article 243D (6)- Reservation in Panchayati Raj elections- Held- Notification dated 30.4.2022, issued by respondent No.4 cannot be sustained for the reasons firstly that it has been issued in a mechanical manner, without due application of mind and secondly that the same is in violation of instructions dated 24.9.2020 issued by the Secretary Panchayati Raj, Government of Himachal Pradesh and lastly violates the right of proportionate representation available to persons belonging to backward classes under Section 125(3) of the Act and Article 342D(6) of the Constitution- Notification and consequent initiation of election process are quashed and set aside. (Para 25, 26) Title: Reeta Devi & another vs. State of H.P & others **(D.B.)** Page-766

'I'

Income Tax Act, 1961- Appeal – Assessee claimed 100% deduction under section 80IC (2)(ii) of Income Tax Act, 1961- Assessing Officer denied the deduction- Assessee assailed the assessment order in appeal- Appeal

dismissed- Income Tax Appellate Tribunal allowed the appeal of assessee and said order has been assailed- Held- The finding of fact recorded by the Assessing Officer to above effect were concurred by the CIT (A) in ITA No. 24 of 2010 and reversed in ITA No. 6 of 2012- Though the ITAT had also concurred with the findings of fact that most of the work constituting production of Anchors was got done by the assessee from Ludhiana by outsourcing the jobs, it, nevertheless, held that the assessee was involved in manufacture and production of Anchors- The findings by the ITAT in this behalf have evidently been returned without going into the question as to whether assessee was not entitled for deduction under Section 80IC merely by indulging into the small part of process at Parwanoo out of the entire lengthy process of production and also consequent necessary legal implication arising therefrom- Appeals partly allowed- Appeals remanded back to Income Tax Appellate Tribunal, Chandigarh to decide afresh. (Para 25 to 29) Title: Commissioner of Income Tax, Shimla vs. M/s Usha Infrasystems **(D.B.)** Page-342

Industrial Disputes Act, 1947- Section 25G- Illegal termination- Appropriate Government did not make any reference of the industrial dispute to the Tribunal on the ground of delay- No error in rejection of the dispute by the Ministry on the ground of delay- Petition dismissed. (Para 6) Title: Sohan Lal vs. Union of India Page-329

'L'

Land Acquisition Act, 1894- Section 18- Award of Ld. Additional District Judge, in land reference petition whereby the reference petition filed under Section 18 of the Land Acquisition Act was dismissed-

A. Just and fair compensation- Held- The Courts are not restricted to awarding only that amount as has been claimed by the land owners in their application- There is no cap on maximum rate of compensation. (Para 7)

B. Ld. Reference Court has failed to exercise the jurisdiction vested in it under law- It was incumbent upon to determine the just and fair market value of first and second floors- Matter remanded back to reference Court to decide afresh. (Para 9, 10) Title: Subhash Chand vs. Land Acquisition Collector & others Page-937

Land Acquisition Act, 1894- Section 18- Award of Ld. Presiding Officer, Fast Track Court, Mandi, in Reference No. 166 of 2003 whereby compensation amount was enhanced at the rate of Rs.30000/- per biswa has been assailed

by the appellants- Held- Total development has taken place in village Kangu and surrounding areas after 1989, therefore, the market value assessed at Rs.30000/- per biswa can be taken to be just and fair market value. (Para 10) Title: The Principal Secretary (PWD) & others vs. Jai Gopal & others Page-925

'M'

Motor Vehicle Act, 1988- Section 173- Appeal- Ld. Motor Accident Claims Tribunal, awarded compensation of Rs. 12,11,000/- to claimants- Liability has been fastened on the insurer- Deceased Driver having monthly income of Rs. 9000/- per month- Held- Amount of income of the deceased not unreasonable- Award modified- Owner is saddled with the liability to pay to the claimants penalty to the tune of 50% of the amount awarded. (Para 23, 24) Title: Shriram General Insurance Co. Ltd. vs. Kala Devi & others Page-363

Motor Vehicle Act, 1988- Section 173- Appeal-Motor Accident Claims Tribunal saddled the insurance company with the liability to pay compensation of Rs.15,29,472/- to claimants- Deceased, 45 years of age was a Government Employee and his monthly income was Rs.15000/- - Held- Multiplier of 14 instead of 13- Amount of compensation enhanced to Rs.17,64,816/- to be paid by the insurer. (Para 22 to 24) Title: Oriental Insurance Company Ltd. vs. Nisha Kumari & others Page-355

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 52A- Appellants assailed conviction- Charas 2.032 Kg.- Held- No material on record to show or suggest the samples drawn were representative samples- Sample of 26 gms. examined at State Forensic Science Laboratory, Junga, was not representative of entire bulk of substance- Appellants convicted for having been found in conscious possession of small quantity of charas- Sentence accordingly modified. (Para 18, 19, 26, 27) Title: Taj Deen vs State of H.P. **(D.B.)** Page-219

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 50 and 52A- Appellants assailed conviction- Charas 1.600 Kg.- Held- Joining of independent witnesses is not mandatory and it depends on the fact situation of each and every case- Recovery was affected from the bag carried by appellant, as such, Section 50 of the Act was not required to be complied with-

No infirmity or illegality in the impugned judgment- Appeal dismissed. (Para 24, 27, 28) Title: Avtar @ Tarri vs. State of H.P. **(D.B.)** Page-254

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'L'

L. Krishna Reddy v. Stateby Station House Officer and Ors, (2014) 14 SCC 401;

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Lalita Kumari vs. Government of Utter Pradesh and others, (2014)2 SCC 1;

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'M'

M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal);

Madishetti Bala Ramul (dead) by LRs vs. Land Acquisition Officer (2007) 9 SCC 650;

Magma General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram and others (2018) 18 SCC 130;

Mahadeo Prasad vs. State of West Bengal AIR 1954 S.C.724);

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

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Mohinder Singh vs. Chief Election Commissioner, AIR 1978 SC 851;

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'N'

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Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466;

Narinder Singh and others vs State of Punjab and another (2014)6 SCC 466;

National Insurance Company Ltd. vs. Pranay Sethi and others (2017) 16 SCC 680;

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'P'

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Pappu Deo Yadav vs. Naresh Kumar and others, AIR 2020 (SC) 4424;

Phool Singh vs. The State of Rajasthan and others, 1993 Criminal Law Journal 3273;

Pokar Ram v. State of Rajasthan and others, (1985) 2 SCC 597;

Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, *(2019) 9 SCC 608;*

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'R'

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'S'

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Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another (2009) 6 SCC 121;

Satpal Singh vs. State of Punjab, 2018 (13) SCC 813;

Satyender Kumar Antil vs. CBI, 2022, SCC Online SC 825;

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Serious Fraud Investigation Office Vs Rahul Modi & Ors 2022 (3) Scale 1;

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Shiv Kumar vs. Hukam Chand and another, (1999) 7 SCC 467;

Shiva Kumar Vs. Sharanabassapa (2021) 11 SCC 277;

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State of Tamil Nadu vs. R Vasanthi Stanley (2016) 1 SCC 376;

State of U.P. and another vs. Johri Mal (2004) 4 SCC 714;

State of Bihar and others vs. Madhu Kant Ranjan and another JT 2021 (12) SC 262;

State of Goa vs. Fauziya Imtiaz Sheikh & another, 2021 (8) SCC 401;

State of Gujarat and another vs Suryakant Chunilal Shah (1999)1 SCC 529;

State of Gujarat vs. Jaswantlal Nathalal, (1968) 2SCR 408;

State of H.P. & another vs. Sanjeev Kumar and another Latest HLJ 2010 (HP) 172;

State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335;

State of Himachal Pradesh and another vs. Shashi Kumar (2019) 3 SCC 653;

State of Karnataka vs. L. Muniswamy and others,1977 (2) SCC 699;

State of Kerala & another vs. Rajesh & others, 2020 (12) SCC 122;

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State of Madhya Pradesh and another vs. Syed Naseem Zahir and others 1993 Supp.(2) SCC, 225;

State of Madhya Pradesh and others vs. AMIT SHRIVAS (2020) 10 SCC 496;

State of Madhya Pradesh vs. Laxmi Narayan, (2019) 5 SCC 688;

State of Orissa and another Vs. Mamata Mohanty (2011) 3 SCC 436;

State of Punjab Vs. Baljinder Singh & anr.(2019) 10 SCC 473;

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State of Uttar Pradesh and others vs. Prem Lata (2022) 1 SCC 30;

Subrata Roy Sahara Vs. Union of India (2014) 8 SCC 470;

Surender Kaushik and others vs. State of Uttar Pradesh & Others, (2013) 5 SCC 148;

Suresh Chandra Jha vs. State of Bihar and others, (2007)1 SCC 405;

Suresh Kumar Bhikhamchand Jain Vs State of Maharashtra and another (2013) 3 SCC 77;

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'T'

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Tek Singh vs. Shashi Verma and another, 2021 (1) Him.L.R. (SC) 158;

The Nalagarh Dehati Cooperative Transport Society Ltd. vs. Beli Ram etc. AIR 1981 HP 1;

Thomas Daniel Vs. State of Kerala & Others, 2022 AIR (SC) 2153;

Trimukh Maroti Kirkan Vs State of Maharashtra (2006) 10 SCC 681;

'U'

Umarmila @ Mamumia vs. State of Gujarat, (2017) 2 SCC 731;

Umesh Kumar Nagpal vs. State of Haryana (1994) 4 SCC 138;

Union of India and others vs. C.Girija and others (2019) 15 SCC 633;

Union of India and others vs. E. G. Namburdiri A.I.R. 1991 S.C. 1216;

Union of India and others vs. M.K. Sarkar (2010) 2 SCC 59;

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

Union of India vs. K.V Janki Raman n (1991) 4 SCC 109;

Union of India vs. Mohan Lal (2016) 3 SCC 379;

Upkar Singh vs. Ved Prakash & Others, (2004) 13 SCC 292;

'V'

Varala Bharath Kumar and Anr v. State of Telangana and Anr, 2017 AIR (SC) 4434;

Viluben Jhalejar Contractor (dead) by LRs vs. State of Gujarat (2005) 4 SCC 789;

Vimla Kumar Jain vs. Labour Court, Kanpur AIR 1988 SC 394;

'W'

Wasim v. State (NCT of Delhi) (2019) 7 SCC 435;

'Z'

Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others (2004) 4 SCC 158;

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

Between:-

AMAR CHAND, SON OF SHRI DEVI RAM, RESIDENT OF VILLAGE SAI, POLICE STATION BAROTIWALA, DISTRICT SOLAN, H.P.

...APPELLANT

(MR. VINAY THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

...RESPONDENT

(M/S DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 01 of 2010
Decided on:27.06.2022

Code of Criminal Procedure, 1973- Section 374- Appellant has challenged judgment and order passed by Ld. Additional Sessions Judge, Solan, in terms whereof Ld. Court while setting aside the acquittal passed by Ld. Additional Chief Judicial Magistrate, Kasauli, convicted him for commission of offence punishable under Section 354 of Indian Penal Code- Jurisdiction- Held- The appeal which was filed by the State against the judgment passed by Additional Chief Judicial Magistrate with regard to an offence cognizable and bailable at the relevant time, before the Court of Ld. Sessions Judge was not maintainable- The appeal could have been filed only before the High Court- Appeal allowed- Judgment of conviction set aside being without jurisdiction. (Para 8)

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

J U D G M E N T

By way of this appeal, the appellant has challenged judgment and order dated 18.11.2009/25.11.2019, passed by the Court of learned Additional Sessions Judge, Solan, District Solan, Himachal Pradesh in Criminal Appeal No. 9-S/10 of 2009, titled as *State of Himachal Pradesh Vs. Amar Chand*, in terms whereof, learned Appellate Court while setting aside the judgment of acquittal dated 04.02.2009, passed in favour of the appellant by the Court of learned Additional Chief Judicial Magistrate, Kasauli in Criminal Case No. 183/2 of 2000, titled as *State Vs. Amar Chand*, convicted him for commission of offence punishable under Section 354 of the Indian Penal Code and sentenced him to undergo simple imprisonment for one year and to pay fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for one year.

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

FIR No. 71 dated 04.11.1999 under Section 354 of the Indian Penal Code was lodged against the appellant by one Smt. Champa Devi, who alleged that on 01.11.1999, one of her four daughters, after returning from School, i.e., Primary School at Patta Mahlog was crying, who on her query, informed her that appellant had physically molested her in the fields. Pursuant to the lodging of FIR, investigation was carried out and *challan* was filed in the Court. As a *prima facie* case was found against the accused, therefore, he was tried for commission of offence punishable under Section 354 of the Indian Penal Code, as at the stage of framing of charge, the appellant pleaded not guilty. In terms of judgment dated 04.02.2009 passed

by the Court of learned Additional Chief Judicial Magistrate Kasauli, District Solan, H.P., the appellant was acquitted by the learned Trial Court by holding that on the basis of the evidence led by the prosecution, it had failed to prove its case against the accused beyond the shadow of doubt. Learned Trial Court held that the statements of prosecution witnesses were contrary and further, delay in lodging the FIR was also not satisfactorily explained. This judgment was challenged by the State by way of an appeal before the Court of learned Additional Sessions Judge, Solan, District Solan, H.P. In terms of judgment dated 16.11.2009, passed by the Court of learned Sessions Judge, Solan, which has been assailed by way of this appeal, the judgment of acquittal was set aside and the appellant was convicted for commission of offence punishable under Section 354 of the Indian Penal Code.

3. Learned Counsel for the appellant has argued that the judgment in issue is *per se* void and not sustainable in the eyes of law for the reason that the same has been delivered by the Court which in terms of the provisions of the Code of Criminal Procedure was having no jurisdiction to entertain and adjudicate an appeal of acquittal passed by the Court of Judicial Magistrate 1st Class.

4. To substantiate his arguments, he has drawn the attention of this Court to the provisions of Section 378(1) of The Code of Criminal Procedure, which provide as under:-

> *"**378. Appeal in case of acquittal**.-(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5), -*
> *(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;*
> *(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal*

> *passed by any Court other than a High Court not being an order under Clause (a) or an order of acquittal passed by the Court of Session in revision……"*

On the basis of language of said Section, learned counsel for the appellant has argued that in the case of acquittal by the Court of learned Judicial Magistrate 1st Class, where the offence is cognizable and non-bailable, the appeal lies to the Sessions Court and in other cases, where the offence is non-cognizable but is bailable, as was an offence under Section 354 of the Indian Penal Code at the time when same was alleged to have been committed, the appeal could be filed only before the High Court. On these basis, learned counsel submitted that without going into the merits of the judgment, the same is liable to be set aside because the same has been passed by the court which was not having jurisdiction either to entertain the appeal or to adjudicate upon the same on merit. On this count, learned counsel prays that the judgment and order dated 18/25.11.2009 passed by the Court of learned Additional Sessions Judge, Solan, District Solan, Himachal Pradesh in Criminal Appeal No. 9-S/10 of 2009 be set aside.

5. Learned Additional Advocate General submitted that the ground which has been raised by learned counsel for the appellant was never raised by the appellant before the learned Appellate Court and now after suffering the judgment of conviction, the appellant cannot be permitted to assail the same on the said ground. Learned Additional Advocate General further argued that when the appellant was duly represented by the learned counsel before the Court of learned Additional Sessions Judge, Solan, it was duty of the appellant to have had pin-pointed this fact before the learned Appellate Court and in the absence of the appellant doing so, it has to be deemed that the appellant submitted himself to the jurisdiction of said Court and, therefore, now the appellant cannot be permitted to raise this objection. On these grounds, learned Additional Advocate General argued that the findings returned by the

learned Appellate Court otherwise being borne out from the record of the case, call for no interference.

6. I have heard learned counsel for the parties and have also gone through the judgments passed by the learned Courts below.

7. In the present case, the FIR was lodged against the appellant under Section 354 of the Indian Penal Code on 04.11.1999. The provisions of Section 354 of the Indian Penal Code, as they stood at the time when the alleged occurrence took place and the FIR was lodged, provided that whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. Accordingly, the classification of this offence was cognizable, bailable, non-compoundable and triable by any Magistrate. Thereafter, Section 354 was amended w.e.f. 03.02.2013 and the offence has now been made cognizable and non-bailable offence.

8. Section 378 of The Code of Criminal Procedure deals with appeal in case of acquittal. This Section provides that District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a ***'cognizable'*** and ***'non-bailable offence***'. Section 378 (1)(b) further provides that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court, not being an order under Clause (a) or an order of acquittal passed by the Court of Session in revision. Order under Clause (a) is the one contemplated to have been passed by a Magistrate in respect of a cognizable and non-bailable offence. In this view of the matter, this Court has no hesitation in holding that the appeal which was filed by the State against the judgment passed by the Court of learned Additional Chief Judicial Magistrate with regard to an offence which was

cognizable and bailable at the relevant time, before the Court of learned Sessions Judge, was not maintainable. The appeal could have been filed only before the High Court and not before the learned Sessions Judge. That being the case, the judgment of conviction having been passed against the present appellant by a Court, which by virtue of statutory provisions of Section 378 of the Code of Criminal Procedure was not having any jurisdiction to entertain and adjudicate an appeal, without doubt is void, being without jurisdiction. Objection of jurisdiction not raised by accused cannot cure the said illegality. On this short count, this appeal is allowed and the judgment and order of conviction dated 18.11.2009/25.11.2019, passed by the Court of learned Additional Sessions Judge, Solan, District Solan, Himachal Pradesh in Criminal Appeal No. 9-S/10 of 2009, titled as *State of Himachal Pradesh Vs. Amar Chand*, is set aside, as being without jurisdiction.

9. At this stage, learned Additional Advocate General submits that in view of the findings which have been returned by this Court in this appeal, opportunity be given to the State to assail the judgment dated 04.02.2009, passed by the Court of learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P. in Criminal Case No. 183/2 of 2000 before an appropriate Court, because may be not before the appropriate Court, but the State was pursuing its remedy *bonafidely* in a Court. On the said request, all that this Court can observe is that it is not for this Court either to allow or restrain a party from filing an appeal etc. If it has a right to file the same, it can always do so subject to the legal rights of the other party. The appeal stands disposed of in above terms, so also pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:

VINAY KUMAR S/O SH. BALDEV SINGH, R/O VILL THARU (SARON) P.O. KANGU-KA-GEHRA-TEH SARKAGHAT, DISTT MANDI, H.P. AGED 35 YEARS

…PETITIONER

(BY MR. ASHOK KUMAR VERMA)

AND

1. H.P. UNIVERSITY, GIAN PATH, SUMMER HILL, SHIMLA-5,H.P. THROUGH ITS REGISTRAR.
2. EX-SERVICEMEN CELL, HIMACHALPRADESH, SAINIK WELFARE DEPARTMENT, ARMSDALE BUILDING, H.P. SECRETARIAT SHIMLA-2 THROUGH ITSSECRETARY.
3. SANJEEV KUMAR S/O SH. ROSHAN LAL, PRESENTLY WORKING AS ASSISTANT PROFESSOR (HINDI) IN HP UNIVERSITY REGIONAL CENTRE AT DHARAMSHALA, H.P.

…RESPONDENTS

(BY MR. SURENDER VERMA, ADVOCATE, FOR R-1)

(BY MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL AND MR. VINOD THAKUR, ADDITIONAL ADVOCATE GENERAL, FOR R-2)

CIVIL WRIT PETITION
NO. 4496 OF 2022
Decided on: 08.07.2022

Constitution of India, 1950- Article 226- Appointment of petitioner for the post of Assistant Professor (Hindi)- Post lying vacant, as such, petitioner sought directions be issued to respondent University to fill up the same as petitioner is only qualified and eligible- Held- Petition not maintainable for the reason that a person by merely applying for a particular post is not entitled for appointment- Petition dismissed. (Para 8 & 9)

Cases referred:

Shankarsan Dash versus Union of India", 1991(3) SCC 47;

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

O R D E R

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

> (a) Direct the respondent No. 1 to appoint the petitioner for the post of Assistant Professor (Hindi) in the H.P. University Department of Evening Studies under un-reserved (Ex-Servicemen) category where the post of same is lying vacant;
> (b) Direct the respondent University to declare the waiting list of the candidates who appeared in the interview of the post of Assistant Professor (Hindi) under un-reserved (Ex-Servicemen) category in the H.P. University, Regional Centre, Dharamshala and HP University Department of Evening Studies held on 10.1.2022;
> (c) The appointment of the respondent No. 3 be quashed and set aside as he has already availed the Ex-Servicemen Quota for the post of Assistant Professor (Hindi) in college cadre;
> (d) That the respondent University be directed to cancel the advertisement of Assistant Professor (Hindi) in the H.P. University Department of Evening Studies under wards of Ex-Servicemen quota whereas the petitioner is fully eligible candidate under the Ex-Servicemen quota for the said post."

2. The petitioner had applied against the advertisement dated 30.12.2019 for the post of Assistant Professor (Hindi) under un-reserved Ex-Servicemen category in H.P. University Department of Evening Studies and in HP University Regional Centre Dharamshala. In addition to the petitioner, one Dr. Sanjeev Kumar also applied for the post in question.

3. The University notified the policy and programme for appointment of Assistant Professor in the University under point No. 4, which is as under:

> "(i) For one vacancy maximum of 15 (fifteen) candidates shall be invited.

(ii) Interview be held if at least 5 (five) eligible applications have been received and 3 (three) shortlisted candidates report for the interview."

4. The respondent-University scrutinized the applications of both the aforesaid candidates and conducted interview for both the posts on 10.1.2022. On the basis of such interview, name of only Dr. Sanjeev Kumar was recommended by the selection committee for both the institutes i.e. Department of Evening Studies and HPU Regional Centre at Dharamshala.

5. Dr. Sanjeev Kumar, thereafter, joined the post of Assistant Registrar (Hindi) under general Ex-Servicemen category at Regional Centre Dharamshala, whereas the post of Assistant Professor (Hindi) in the department of Evening Studies was decided to be re-advertised.

6. Now, the case of the petitioner is that since the post in question is lying vacant, a direction be issued to the respondent-University to fill up the same as the petitioner is duly qualified and eligible.

7. We have heard learned counsel for the parties and gone through the material placed on record.

8. At the outset, we find the instant petition to be clearly mis-conceived and not maintainable for the reasons that a person by merely applying for a particular post is not entitled for appointment. Eligibility and entitlement are entirely two different things. Merely eligibility does not give rise to entitlement as a matter of right for being appointed.

9. It is settled position of law that writ of mandamus and/or certiorari can only be filed by a person for enforcement of his right under the law. Merely by applying for the post or being eligible would not create any right in favour of the applicant. Equally settled is the proposition that mere existence of vacancy does not give a legal right to the candidate to be selected for appointment. Since, the petitioner fails to disclose any infraction or infringement of his right, therefore, the petition is not maintainable and liable to be dismissed in limine.

10. A constitutional Bench of Hon'ble Supreme Court in "**Shankarsan Dash versus Union of India"**, 1991(3) SCC 47 has held that the notification merely amounts to an invitation to qualified candidates to apply for recruitment and even on their selection, such candidate do not acquire any right to the post. It would be apt to reproduce para-7 of the judgment (supra), which reads as under:

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."

11. Here as observed above, the petitioner has not been recommended for selection and therefore, cannot claim infringement or violation of his rights.

12. Consequently, the petition is misconceived and accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, are also disposed of.

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

Between:-

1. NIKHIL SHARMA, S/O SH. PRATAP CHAND, R/O VILLAGE JAHU KALAN, P.O. JAHU, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

2. MANISH KUMAR, S/O SH. HARI SINGH, R/O VILLAGE YORA, P.O. DOHAG, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

...PETITIONERS

(BY SHRI SANJEEV BHUSHAN, SENIOR ADVOCATE, WITH SHRI RAKESH CHAUHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH CHIEF SECRETARY TO THE GOVERNMENT OF HIMACHAL PRADESH.

2. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH.

3. DIRECTOR GENERAL OF POLICE, HIMACHAL PRADESH, SHIMLA.

4. HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR THROUGH ITS SECRETARY.

...RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL & MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL FOR R-1 TO R-3.
MR. ANGREZ KAPOOR, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)

No.6368 of 2020
Decided on: 29.06.2022

Constitution of India, 1950- Article 226- Appointment of applicants as Steno Typists on regular basis- Held- Act of the respondents of treating similarly situated candidates differently obviously amounts to both arbitrariness as well as discrimination- Petition allowed mandamus issued. (Para 8)

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

O R D E R

By way of present petition, the petitioners have primarily prayed for the following relief:-

> *"(i) That the respondents may very kindly be directed to appoint the applicants as Steno Typist on regular basis on and with effect from May, 2018, with all consequential benefits including the salary as well as seniority from May, 2018 alongwith interest on the arrears @ 9% per annum, in the interest of law and justice."*

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

The Himachal Pradesh Staff Selection Commission issued Advertisement No. 32-2/2016 in the month of May 2016, inviting applications for various posts advertised therein, which included 28 posts of Steno-Typist also. These posts were available in various Departments of the Government, as depicted in the Advertisement, including the Police Department. A copy of the Advertisement is on record as Annexure A-1. It is not in dispute that subsequently, 62 more posts were clubbed with the already advertised posts of Steno-Typist and the respondent-Commission undertook the skill test for recommending the names of eligible candidates, who were to be recruited both

on regular as well as on contract basis depending upon the Departments for which the recruitment was being made. In terms of Annexure A-4, which is copy of Press Note released by the respondent-Commission dated 29.11.2017, 80 candidates were shortlisted for further selection process on the basis of merit of written objective type screening test. This was followed by the issuance of Notification dated 12th April, 2018, in terms whereof, the candidates mentioned therein were recommended for appointment against the posts of Steno-Typist in various Departments by the respondent-Commission. The names of the petitioners were reflected at Sr. Nos. 4 and 5, respectively in the said Notification and they were recommended for regular appointment against the posts of Steno-Typist in the Police Department. Alongwith the present petitioners, three other incumbents, whose names were reflected at Sr. Nos. 46, 73 and 75 were also recommended for recruitment against the said posts in the Police Department. On the basis of the recommendations of the respondent-Commission, appointment letter was issued to petitioner No. 1 by the office of Director General of Police, Himachal Pradesh on 06.06.2018, copy whereof is appended with the petition as Annexure A-6. In terms of this communication, the appointment was offered to the petitioner against the post of Steno-Typist. Similarly, as far as petitioner No. 2 is concerned, his appointment letter (Annexure A-7) was dated 31.05.2018 to the same effect. Similar appointment orders were also issued to the other incumbents who were recommended by the respondent-Commission for being appointed against the post in issue in the Police Department.

3. The grievance of the petitioners is that though one of the other recommended candidates, namely, Anil Kumar, who was also offered appointment vide letter dated 06.06.2018 (Annexure A-8) was allowed by the respondent-Department to join his duties w.e.f. 06.06.2018, however, the petitioners, for no obvious reasons, were denied joining, though they were always willing to join the services of the respondent-Department after receipt

of the appointment letters. As despite various requests of theirs, the petitioners were not permitted to submit their joining reports, they filed the present proceedings, initially before the erstwhile learned Himachal Pradesh State Administrative Tribunal as Original Application, which after abolition of learned Tribunal now stands transferred to this Court. During the pendency of present proceedings before the learned Tribunal, interim directions were passed by the learned Tribunal vide order dated 05.03.2019 to give effect to letters of appointment dated 06.06.2018 and 31.05.2018, respectively and in compliance thereto, the Court stands informed that the petitioners were allowed to join their duties against the posts of Steno-Typist w.e.f. 06.07.2019.

4. Learned Senior Counsel appearing for the petitioners has argued that the act of respondent-Department of not permitting the petitioners to join the posts for which appointment letters were issued to them is arbitrary for the reason that whereas there was no obvious reason to deny joining to them, as they stood duly recommended for appointment to the posts in question by the respondent-Commission and were also issued appointment letters, said act of the respondent-Department is discriminatory also, as incumbent, namely, Anil Kumar, who was also issued appointment letter on 06.06.2018, was allowed to join duties on the same date. Learned Senior Counsel thus argued that as this act of the respondent violates Article 14 of the Constitution of India, therefore, the present petition be allowed and respondents be directed to treat the appointment of the petitioners as from the date when other incumbent was allowed join his duties by the Department, with all consequential benefits.

5. Learned Additional Advocate General on the other hand has defended the act of the respondent-Department on the strength of the reply which has been filed by the Department by submitting that though with the passage of time, the petition has been rendered *infructuous*, as the petitioners have already joined their duties, but otherwise also, there was no arbitrariness

on the part of the Department, as alleged by the petitioners, because the petitioners were not allowed to join as there was some confusion as to whether the appointments of the petitioners were to be accepted on regular basis or on contract basis. As per him, as soon as this issue was clarified, the Department was willing to offer appointment to the petitioners, but in the meanwhile they approached learned Tribunal and thereafter on the strength of the order passed by the learned Tribunal, they were allowed to join on regular basis. Accordingly, he prayed that the petition be dismissed.

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

7. The sole ground which is pressed before this Court by the respondents to justify their act is the alleged confusion as to whether the petitioners were to be offered appointment on regular basis or on contract basis. As has been mentioned hereinabove, respondent-Commission recommended the name of five candidates for recruitment on regular basis against the posts of Steno-Typist in the Police Department. Pursuant thereto, petitioner No. 1 was issued appointment letter by the respondent-Department on 06.06.2018 and petitioner No. 2 was issued appointment letter earlier, i.e., on 31.05.2018. One Shri Anil Kumar, whose name was also recommended by the respondent-Commission alongwith the petitioners for appointment against the posts of Steno-Typist was also offered appointment letter on 06.06.2018 (Annexure A-8). Whereas Shri Anil Kumar was permitted to join duties as Steno-Typist w.e.f. 06.06.2018 itself on the strength of the appointment letter which was so issued to him by the respondent-Department, as is evident from his joining report appended with the petition as Annexure A-9, the same was denied to the petitioners.

8. The Court fails to understand as to how Shri Anil Kumar was permitted by the Department to join his duties on the basis of the recommendations of the respondent-Commission, if there was actually any

confusion as to whether the candidates who were so recommended by the respondent-Commission were to be offered appointment on regular basis or on contract basis. As both the petitioners as well as Shri Anil Kumar were sailing on the same boat, then prudence demanded that either joining of any of the candidates ought not to have been accepted or joining of all should have been accepted. Here the act of the respondents of treating similarly situated candidates differently obviously amounts to both arbitrariness as well as discrimination. Respondent-Department being a model employer could not have discriminated between similarly situated persons. Though the Court is not doubting the *bonafides* of the respondent-Department with regard to the delay which occurred in allowing the petitioners to join their duties, which also was on the strength of the interim order passed by the learned Tribunal, yet this act of the respondents cannot be condoned by the Court. The result of this discrimination which was exercised by the Department vis-a-vis similarly situated persons has now resulted in an anomalous situation wherein persons who were recommended for appointment against the posts of Steno-Typist by the respondent-Commission under the same recruitment process have joined duties almost one year apart. The contention of learned Additional Advocate General that because the petitioners have now been permitted to join their duties and that too on regular basis, therefore, the petition has been rendered *infructuous*, is without any merit, for the reason that the grievance which has been raised by the petitioners with regard to the effect of their not being permitted to join duties immediately after issuance of the appointment letters still requires redressal from the Court. As this Court has already held that the act of the respondent-Department of not permitting the petitioners to join their duties as Steno-Typist forthwith on the basis of appointment letters issued to them on 06.06.2018 and 31.05.2018 is arbitrary and discriminatory, especially one another incumbent similarly situated as the petitioners, was allowed to join his duties on the basis of appointment letter dated 06.06.2018

on 06.06.2018 itself, therefore, this petition succeeds. Accordingly, a mandamus is issued to the respondent-Department to treat the date of joining of the petitioners as Steno-Typist to be 06.06.2018 itself, i.e., the date on which other incumbent who was selected under the same process was permitted to join duties by the respondent-Department. This deemed date of joining will be with all consequential benefits, including seniority and pay fixation etc., but the monetary benefits shall be notional till the date when the petitioners actually joined their duties and from the said date, the benefits will be actual. As far as the seniority *intra* the persons who are selected under the same process is concerned, but obvious, the same shall be determined on the basis of merit, as was determined of the said candidates by the respondent-Commission. With these observations, the petition stands disposed of, so also pending miscellaneous applications, if any.

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

Between:

ALAM CHAND S/O SH. RAGHUBIR SINGH, R/O VILLAGE KUTAHCHI, P.O GOHAR, TEHSIL CHACHYOT, DISTRICT MANDI, H.P.

....PETITIONER

(BY MR. MOHAR SINGH ADVOCATE)

AND

CHAMAN LAL S/O SH.SHIV RAM, R/O VILLAGE AND PO MOVISERI, TEHSIL CHACHYOT, DISTRICT MANDI, H.P.

....RESPONDENT

(BY MR. SANDEEP SHARMA, ADVOCATE)

CRIMINAL REVISION
No. 183 of 2021
Decided on:15.6.2022

Code of Criminal Procedure, 1973- Section 397, 401- Negotiable Instruments Act, 1881- Sections 118, 138 & 139- Criminal revision to challenge the judgment of Ld. Additional Sessions Judge passed in criminal appeal affirming the judgment of conviction and order of sentence passed by Ld. Judicial Magistrate First Class- Presumption- Held- Since, issuance of cheque as well as signature thereupon has been not denied by the accused, there is presumption in favour of the holder of the cheque, as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability- No doubt, aforesaid presumption is rebuttable and can be rebutted by the accused by raising probable defence- Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant- Accused failed to rebut such presumption- No error of law as well as of fact committed by the Courts below- Petition dismissed. (Para 11, 13, 14)

Cases referred:

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

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

O R D E R

Instant Criminal Revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, lays challenge to judgment dated 28.2.2020, passed by learned Additional Sessions Judge-I, Mandi, District Mandi, H.P., in Criminal Appeal No.208 of 2017, affirming the judgment of conviction and order of sentence dated 31.01.2017/4.2.2017, passed by learned Judicial Magistrate 1st Class, Chachiot at Gohar, District Mandi, H.P. in criminal case No.197-I/2014/120-III/2014, whereby learned trial Court while holding petitioner-accused guilty of having committed an

offence punishable under Section 138 of the Negotiable Instruments Act, convicted and sentenced him to undergo simple imprisonment for a period of three months and pay compensation to the tune of `4,80,000/- to the complainant.

2. Precisely, the facts of the case as emerge from the record are that respondent/complainant ***(for short 'complainant')*** filed a complaint under Section 138 of the Negotiable Instruments Act (***for short 'Act')*** in the competent court of law, alleging therein that accused with a view to discharge his legal liability issued a cheque bearing No.456713 (Ex. CW1/B) dated 13.06.2014, amounting to `4,00,000/- in his favour drawn at Punjab National Bank Chail-Chowk Branch, District Mandi, H.P. However, fact remains that aforesaid cheque on its presentation was dishonoured on account of insufficient funds in the account of the accused, as is evident from return memo Ex. CW1/D, dated 20.8.2014. Though, complainant served accused with legal notice (Ex.CW1/F), calling upon him to make the payment good within the stipulated time, but same was not received by the accused and as such, same was returned to the complainant as undelivered Ex.CW1/G and Ex.CW1/H.

3. Complainant with a view to prove his case examined himself as CW-1 as well as another person namely, Gurdev Singh, whereas though opportunity was given to the accused to lead evidence, but he failed to avail the same. Accused in his statement recorded under Section 313 Cr.P.C. denied the case of the complainant in toto and claimed himself to be innocent.

4. Learned trial Court on the basis of the evidence adduced on record by the respective parties, held accused guilty of having committed the offence punishable under Section 138 of the Act, and accordingly convicted and sentenced him as per the description given hereinabove.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence recorded by learned trial court, present petitioner-accused preferred an appeal in the Court of learned Additional Sessions Judge-I, Mandi, District Mandi, H.P., which also came to be dismissed vide judgment dated 28.02.2020, as a consequence of which, judgment of conviction and order of sentence recorded by learned trial Court came to be upheld. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for his acquittal after quashing and setting aside the impugned judgments and order passed by learned Courts below.

6. Vide order dated 24.08.2021, this Court suspended the substantive sentence imposed by the court below subject to petitioner-accused depositing 50% of the compensation amount awarded by court below, but fact remains that despite repeated opportunities, no amount ever came to be deposited in the Registry of this Court. On 18.05.2022, this Court while allowing the application bearing Cr.MP No.2256 of 2021, having been filed by the petitioner-accused, seeking therein extension of time to comply with order dated 24.08.2021 extended time till today, but made it clear that in case amount is not deposited on or before the next date of hearing, interim protection granted by this Court vide order dated 24.08.2021 shall come to an end.

7. Today, during the proceedings of the case, learned counsel representing the petitioner-accused states that despite repeated communications, petitioner-accused is not coming forward to impart instructions and as such, this Court may proceed to decide the petition on its own merit.

8. Having heard learned counsel representing the parties and perused the grounds taken in the petition vis-à-vis reasoning assigned by the

learned courts below while holding petitioner-accused guilty of having committed an offence punishable under Section 138 of the Act, this Court sees no force in the submission of learned counsel for the petitioner that judgment of conviction and order of sentence passed by learned court below is not based upon the proper appreciation of evidence as well as law, rather evidence led on record by the complainant clearly reveals that he has successfully proved on record that petitioner-accused with a view to discharge his lawful liability issued cheque Ex.CW1/B, amounting to `4,00,000/- in his favour, but same was dishonoured on account of insufficient funds in the account of the accused, as is evident from return memo Ex.CW1/D. Though, accused in his statement recorded under Section 313 Cr.P.C claimed that he did not issue any cheque, but he nowhere disputed his signature on the cheque. Needless to say, there is presumption in favour of the holder of the cheque that same is issued in favour of the bearer for discharge of lawful liability. Sections 118 and 139 of the Act, raises presumption in favour of the holder of the cheque. No doubt, aforesaid presumption is rebuttable, but for that purpose, accused is required to raise probable defence.

9. Interestingly, in the case at hand, though accused claimed that at no point of time he issued cheque, but failed to explain that in case cheque was not issued by him how it came in the hands of the complainant. There is nothing on record that report, if any, qua loss/misplacement of cheque book of accused ever came to be lodged with the police. Similarly, there is no mention that cheque book of accused was stolen by the complainant.

10. Leaving everything aside, accused has nowhere disputed his signature on the cheque, meaning thereby he had issued signed cheque in favour of the complainant, especially when accused has not been able to dispute his liability to pay sum of `4,00,000/- to the complainant. Interestingly, accused in the case at hand though attempted to carve out a case that complainant had no capacity to advance loan to the tune of

`4,00,000/-, but he was unable to substantiate his aforesaid plea. No doubt, in the case at hand record reveals that complainant was unable to produce on record income tax return showing withdrawal of `4,00,000/- , if any, by him from the bank for further paying the same to the accused, but he categorically stated that amount advanced by him to the accused was uncounted cash amount and was not shown in the income tax return. Mere fact that complainant failed to produce the income tax return or other documents showing that he had sufficient means to advance loan is not sufficient to rebut the presumption attached to the cheque. Once signature on the cheque are not disputed and accused has not been able to prove that cheque under signature either was stolen by the complainant or was misused,complainant being holder of the cheque is entitled to benefit of presumption as available under Sections 118 and 139 of the Act.

11. Since, issuance of cheque as well as signature thereupon has been not denied by the accused, there is presumption in favour of the holder of the cheque, as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability. No doubt, aforesaid presumption is rebuttable and can be rebutted by the accused by raising probable defence. Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant.

12. The Hon'ble Apex Court in ***M/s Laxmi Dyechem V. State of Gujarat***, 2013(1) RCR(Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely on the materials submitted by the complainant. Needless to say, if the accused/drawer of the cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, statutory presumption under Section 139 of the

Negotiable Instruments Act, regarding commission of the offence comes into play. It would be profitable to reproduce relevant paras No.23 to 25 of the judgment herein:-

2. ***"23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.***

3. ***24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in***

some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

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

13. Having carefully scanned the entire evidence available on record, this Court is convinced and satisfied that complainant has successfully proved on record by leading cogent and convincing evidence that cheque in question Ex.CW1/B was issued by accused in his favour. Return memo Ex.CW1/D, dated 20.8.2014 clearly reveals that cheque was dishonoured on account of insufficient funds in the account of the accused. He also proved that notice Ex.CW1/F was issued on 22.08.2014, whereby the demand was made to refund `4,00,000/-The notice was issued by way of post and postal receipt is Ex.CW1/F. On the other hand, accused despite opportunity failed to produce any positive evidence to rebut the evidence available in favour of the complainant that cheque signed by the accused was issued in his favour by the accused for discharge of his liability. Though, in the case at hand accused disputed the service of notice but record reveals that notices were issued on both the addresses of the accused and postman concerned had visited time and again to find out him. As a matter of the fact the accused is a Govt. employee and the notice was also sent on his address of employment but the endorsements on the letters clearly proves that the accused intentionally avoided the service of notice. It is not the requirement of law to state in the complaint that the notice was served on a particular date as notice is deemed to have been served with the addressee or he is deemed to have the knowledge of the notice unless and until contrary is proved at the stage of evidence. Hence, it cannot be concluded that courts below have committed any illegality and infirmity while holding accused guilty of having committed offence punishable under Section 138 of the Act. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs.***

Puttumana Illath Jathavedan Namboodiri" *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> 5. ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***
> 6.

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

15. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but learned counsel representing the accused has failed to point out any

material irregularity committed by the courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below.

16. Having scanned the entire evidence be it ocular or documentary led on record, this Court finds it difficult to agree with the submission of learned counsel for the petitioner-accused that judgments passed by learned courts below are not based upon the proper appreciation of facts as well as evidence led on record, rather this court finds that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever in the present matter.

17. Consequently, the present revision petition is dismissed being devoid of any merit and judgments passed by learned courts below are upheld. The petitioner is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court, if not already served. Interim direction, if any, stands vacated. Pending applications, if any, also stand disposed of.

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

Between:

PURAN DUTT , SON OF SH. TULSI RAM, RESIDENT OF VILLAGE GAJYO, P.O. SHARGAON, TEHSIL RAJGARH, DISTRICT SIRMOUR, H.P.

....PETITIONER

(BY MR. NARESH K. TOMAR, ADVOCATE)

AND

1. STATE OF H.P.
2. SEWA RAM CHAUHAN, SON OF SH. SURAT SINGH, RESIDENT OF VILLAGE AND POST OFFICE SHARGAON, TEHSIL RAJGARH, DISTRICT SIRMAUR, H.P.

….RESPONDENTS

(MR. NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL FOR R-1)

(MR. SUDHIR THAKUR, SENIOR ADVOCATE
WITH MR. KARUN NEGI, ADVOCATE FOR R-2)

CRIMINAL REVISION
No. 280 of 2018
Decided on: 30.05.2022

Code of Criminal Procedure, 1973- Section 397, 401- Negotiable Instruments Act, 1881- Sections 118, 138 & 139- Criminal revision to challenge the judgment of Ld. Sessions Judge passed in criminal appeal affirming the judgment of conviction and order of sentence passed by Ld. Judicial Magistrate First Class - Presumption- Held- Since, issuance of cheque as well as signature thereupon has been not denied by the accused, there is presumption in favour of the holder of the cheque as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability- No doubt, aforesaid presumption is rebuttable and could be rebutted by the accused by raising probable defence- Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant- Accused failed to rebut such presumption- No error of law as well as of fact committed by the Courts below- Petition dismissed. (Para 7, 17, 19)

Cases referred:

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

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

O R D E R

Instant Criminal Revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment, dated 3.4.2018 passed by learned Sessions Judge Sirmaur District at Nahan, H.P., in Criminal Appeal No. 86-Cr.A/10 of 2017, affirming the judgment of conviction and order of sentence dated 12.8.2017/12.10.2017, passed by learned Judicial Magistrate Ist Class, Rajgarh, District Sirmaur, H.P. in criminal complaint No.73/3 of 2015, whereby learned trial Court while holding petitioner-accused guilty of having committed an offence punishable under Section 138 of the Negotiable Instruments Act, convicted and sentenced him to undergo simple imprisonment for a period of one year and pay compensation to the tune of `9,00,000/- to the complainant and in default of payment of compensation to further undergo simple imprisonment for 30 days.

18. Precisely, the facts of the case as emerge from the record are that respondent No.2/complainant ***(for short 'complainant')*** filed a complaint under Section 138 of the Negotiable Instruments Act (***for short 'Act')*** in the competent court of law, alleging therein that on 24.10.2014, respondent/complainant lent sum of `8,00,000/- to the accused on his request, enabling him to pay money to those persons, who had filed 3 or 4 complaints against him under Section 138 of the Act. With a view to discharge his liability, accused issued post dated cheque Ext. CW2/B, amounting to `8,00,000/- in favour of the complainant drawn on H.P. State Co-operative Bank Limited, Habban, but fact remains that aforesaid cheque on its presentation came to be dishonoured vide memo dated 25-2-2015 Ex.CW1/C on account of insufficient funds in the account of the accused. Complainant after receipt of memo from the bank concerned, served accused with legal notice Ex.CW2/D, calling upon him to make the payment good within the stipulated time, but since accused failed to make the payment within the time stipulated in the notice, complainant was compelled to

institute the complaint under Section 138 of the Act in the competent court of law.

19. Learned trial Court on the basis of the evidence adduced on record by the respective parties, held accused guilty of having committed the offence punishable under Section 138 of the Act, and accordingly convicted and sentenced him as per the description given hereinabove.

20. Being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence recorded by learned trial court, present petitioner-accused preferred an appeal in the Court of learned Sessions Judge, Sirmaur at Nahan, which also came to be dismissed vide judgment dated 3.4.2018, as a consequence of which, judgment of conviction and order of sentence recorded by learned trial Court came to be upheld. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for his acquittal after quashing and setting aside the impugned judgments and order passed by learned Courts below.

21. Vide order dated 6.8.2018, this Court suspended the substantive sentence imposed by the court below subject to petitioner-accused depositing `2,00,000/- in the Registry of this Court and furnishing personal bond in the sum of `1,00,000/- with one in the like amount to the satisfaction of trial Court within a period of four weeks. However, fact remains that aforesaid order never came to be complied with despite repeated opportunities. To enable the petitioner-accused to deposit the amount of compensation, case at hand came to be adjourned on 10 dates. Finally, on 8.4.2021 learned counsel for the petitioner informed this Court that sum of `2,00,000/- stands paid directly to respondent No.2/complainant by way of demand draft and parties are in process of settling the dispute amicably *interse* them and as such, this Court adjourned the matter and stayed the warrants of execution issued by the executing court below. After passing of order dated 8.4.2021,

case at hand came to be repeatedly adjourned on 10 dates, enabling the petitioner-accused to make the payment of compensation. However, as of today, sum of `4,00,000/-, out of total amount of ` 8,00,000/- awarded by the court below stands paid to the respondent No.2/complainant. On 8.4.2022, this court having taken note of the fact that the petitioner-accused is ready and willing to make the entire payment of compensation awarded by the court below, adjourned the matter for today's' date with the direction to the petitioner-accused to deposit the remaining amount within a period of six weeks, but neither aforesaid balance amount has been paid nor petitioner has come present in Court and as such, this Court has no option, but to decide the case at hand on the basis of the material already available on record.

22. Having heard learned counsel representing the parties and perused the material available on record, this Court finds it difficult to agree with the submission of learned counsel for the petitioner-accused that judgments passed by learned courts below are not based upon the proper appreciation of facts as well as evidence led on record, rather this court finds that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever in the present matter.

23. Interestingly in the case at hand, there is no denial, if any, on the part of the petitioner-accused with regard to issuance of cheque as well as signature thereupon, as a consequence of which, there is presumption in favour of the complainant as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability. No doubt, aforesaid presumption is rebuttable and could be rebutted by the accused by raising probable defence. Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant. However, in the case at hand petitioner has not been able to raise probable defence and as such, no

illegality can be said to have been committed by the courts below while holding petitioner-accused guilty of having committed the offence punishable under Section 138 of the Act.

24. Interestingly, accused in his statement recorded under section 313 Cr.P.C stated that he was well known to the complainant, but he denied that he had requested complainant to advance loan of `8,00,000/- to him. He also denied that complainant has advanced loan of `8,00,000/- to him on 24.10.2014 and he has executed the receipt regarding receipt(Ex.CW2/C) of such amount. Though, accused in his statement recorded under section 313 Cr.P.C denied factum with regard to issuance of post dated cheque bearing dated 25.2.2015 for `8,00,000/- , but he feigned his ignorance that cheque when presented for collection on 25.2.2015 and 22.4.2015 was dishonoured by the drawee bank for "exceeds arrangement. Interestingly, in the case at hand efforts came to be made on behalf of the accused to setup a case that cheque book containing 15 cheques was misplaced and to prove this fact he also examined police official, who admitted that report with regard to missing of cheque book was registered, but rapat (Ex.DW2/A) placed on record, nowhere contains details with regard to cheque allegedly misplaced by the accused. Interestingly, aforesaid defence setup by the accused while making statement under section 313 Cr.P.C, is totally contrary to the suggestion put to the complainant during his cross-examination, wherein it came to be put to the complainant that he had obtained cheques for insurance purpose. The aforesaid suggestion put to the complainant in his cross-examination itself establishes factum with regard to issuance of cheque by the accused.

25. Apart from above, accused has taken a defence that he had issued letter i.e. mark D-1 to the Manager of the bank concerned, requesting therein to stop the payment, but such fact never came to be proved in accordance with law by the accused, rather return memo Ex.CW1/F dated

22.4.2014 clearly reveals that cheque in question came to be dishonoured on account of insufficient funds in the account of the accused.

26. In the case at hand, complainant while examining himself as CW-2 has fully corroborated the allegations as contained in the complaint by stating that accused is well known to him and he is an agriculturist and is also doing the business of flowers and his income is about `18 to ` 20 lacs per annum. He stated that accused was in dire need of money as many cases/complaints regarding dishonour of the cheques were pending against him in the Court. He deposed that on 19.10.2014 accused approached him and demanded ` 8 lacs as loan. However, he paid sum of `8 lac on 24.10.2014 to the accused. He further deposed that accused assured to return the said amount within four months and also issued a post dated cheque, Ext. CW2/B ,amounting to `8 lacs in his favour drawn at H.P. State Co-operative Bank, Habban. He deposed that cheque was filled in and signed by the accused and the accused has also executed a receipt, Ext. CW2/C regarding such payment. He also deposed that he deposited the cheque on 25-2-2015 for encashment with the drawee bank, but the same was returned as unpaid by the drawee bank on account of "exceeds arrangement" vide memo, Ext. CW1/C dated 25-2-2015 and thereafter he contacted the accused and told him about dishonouring of the cheque, who asked him not to take any legal action on account of dishonouring of the cheque and assured that cheque would be encashed after a period of 1½ months and on such assurance of the accused, he again presented the cheque for collection on 22-4-2015 with the drawee bank, but the same was again dishonoured by the drawee bank vide memo Ext. CW1/F dated 22-4-2015 on account of "exceeds arrangement". He has further stated that on receipt of information from the bank regarding dishonouring of the cheque for the second time, he got legal notice, Ext. CW2/D issued to the accused through his Counsel on 27-4-2015 under registered cover, Ext. CW2/F vide postal receipt, Ext. CW2/E intimating

therein factum to accused with regard to dishonouring of the cheque and also demanded payment of the cheque amount from the accused, which notice, the accused intentionally refused to receive and he also also failed to make payment of the cheque amount to him.

27. Cross-examination conducted upon this witness nowhere suggests that defence was able to extract something contrary to what this witness stated in his examination-in-chief. Interestingly, during his cross-examination, this witness clarified that accused has executed receipt, Ext. CW2/C on the same date on which cheque in question was handed over to him by the accused. He specifically stated that cheque, Ext. CW2/B was signed by the accused in his presence. It is denied by him that receipt, Ext. CW2/C is a forged document. He has further stated that he has financially helped about 15 or 20 persons so far and he has advanced loan to such persons who are in a position to return the same, regarding which, he also used to obtain receipts from such persons. He has denied that the accused has not taken any loan from him. It is also denied by him that he used to do the work of insurance and he has obtained the cheque in question from the accused on account of insurance, which has been subsequently misused by him.

28. Complainant also examined Arun Kumar (CW1), Manager of H.P. State Co-operative Bank Habban, who admitted the factum with regard to deposition of cheque in the bank on 25-2-2015 for encashment, but the same was dishonoured on account of "exceeds arrangement" vide memo, Ext. CW1/C and was returned to the complainant vide letter, Ext. CW1/D. He deposed that on 22-4-2015 the cheque, Ext. CW1/A was again deposited in the bank for collection by the complainant, but it was again dishonoured on account of "exceeds arrangement" vide memo, Ext. CW1/F and was returned to the complainant vide letter, Ext. CW1/G. In his cross-examination, nothing contrary could be elicited from him. He admitted that letter, copy of which is

mark D-1 dated 23-4-2013 bears the signatures of the then branch Manager Sh. D.D.Sharma in red circle 'A'. He admitted that the cheques No. 5409966 and 5409967 were reported to have been lost and prayer was made to stop the payment of such cheques. However, he clarified that in case any information is received from the customer regarding loss of cheque or any instruction is received from the customer regarding stop payment, then entry is made in the computer and while dishonouring the cheque, in such cases, the reason assigned is payment stopped by the drawer. However, in the case at hand, as has been taken note hereinabove, there is no such endorsement in the cheque returning memo, Ext. CW1/C and Ext. CW1/F.

29. The complainant has also examined Jai Raj Sharma (CW2), the official of the Baghat Urban Co-operative Bank Solan to prove that he is having account in the said bank and certified copy of the statement of account is Ext. CW2/A. As per the statement of the account, complainant withdrawn a sum of `10 lacs from his account on 10.10.2014. In his cross-examination, this witness stated that the complainant is having FOD limit of `30 lacs. He has also stated that after withdrawal of `10 lacs from his account by the complainant, he has deposited a sum of `10 lacs in his account on 14-10-2014.

30. Complainant also examined Shashank (CW4), official of PNB, Mall road, Solan to prove statement of his account, Ext. CW4/A. Perusal of statement of the account of the complainant Ex.CW4/A clearly establishes that complainant was financially sound and he has sufficient funds in his account with PNB, Solan.

31. Krishan Dutt, CW5, who is a Criminal Ahlmed in the Court of ld. JMIC, Rajgarh deposed that there were seven cases under Section 138 of the Act pending against the accused in the Court, out of which, four have been decided and three cases are pending adjudication in the Court, thereby

corroborating/supporting the plea of the complainant that the accused was in dire need of money as some cases on account of dishonouring of cheques were pending against him in the Court.

32. Leaving everything aside, it has come in the statement of the accused recorded under Section 313 Cr.P.C., that there are four complaints under Section 138 of the Act pending adjudication against him, whereas three complaints have already been decided. To the contrary, complainant by leading cogent and convincing evidence proved on record that cheque Ex. CW2/B was issued by the accused for discharge of his lawful liability. While inviting attention of this court to the cross-examination conducted upon the complainant, learned counsel for the accused argued that once complainant admitted factum with regard to issuance of cheque by the accused on three occasions qua one liability, cheque Ex.CW2/B could not have been considered to be issued for discharge of lawful liability by the court below. However, this Court is not impressed by the submission of learned counsel for the petitioner because there is no probable defence ever came to be raised on behalf of the accused that he did not issue this cheque for discharge of his lawful liability and this cheque did not contain his signatures. Apart from above, accused never set up a defence that sum of `8 lac was ever paid by him to the complainant.

33. Since, issuance of cheque as well as signature thereupon has been not denied by the accused, there is presumption in favour of the holder of the cheque as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability. No doubt, aforesaid presumption is rebuttable and could be rebutted by the accused by raising probable defence. Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant.

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

7. ***"23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.***

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

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

35. Having carefully scanned the entire evidence available on record, this Court is convinced and satisfied that complainant successfully proved on record by leading cogent and convincing evidence that cheque in question Ex.CW2/B was issued by accused towards discharge of his lawful liability and he has further successfully proved that cheque issued by the accused on its presentation to the bank concerned was returned on account of insufficient funds. Hence, it cannot be concluded that courts below have committed any illegality and infirmity while holding accused guilty of having committed offence punishable under Section 138 of the Act. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> 10. ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***
>
> 11.

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

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

38. Consequently, the present revision petition is dismissed being devoid of any merit and judgments passed by learned courts below are upheld. The petitioner is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court, if not already served. Interim direction, if any, stands vacated. Pending applications, if any, also stand disposed of.

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

Between:

1. VAJID ALI, S/O SH. FAKEER AHMED, R/O VILLAGE KALBASAWASHING, POST OFFICE KATKALSIA, TEHSIL CHHACHHRAULI, DISTRICT YAMUNANAGAR, HARIYANA, AGE 26 YEARS.

2. MOSHINA (MINOR) AGE 17 THROUGH HER FATHER SH. FURKAN AGE 45 YEARS, SON OF LATE SH. KAHALEEL AHMED, R.O VILLAGE AND POST OFFICE MISSERWALA, PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

3. SH. FURKAN AGE 45 YEARS, SON OF LATE SH. KAHALEEL AHMED, R.O VILLAGE AND POST OFFICE MISSERWALA, PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

....PETITIONERS

(BY SUNIL THAKUR & MR. MUKESH SHARMA, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH ITS SECRETARY(HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2. SUPERINTENDENT OF POLICE, DISTRICT SIRMAUR, HIMACHAL PRADESH.

3. SHO, POLICE STATION MAJRA, DISTRICT SIRMAUR, HIMACHAL PRADESH.

....RESPONDENTS

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CR.P.C NO.300 of 2022
Decided on:22.06.2022

Code of Criminal Procedure, 1973- Section 482- Protection of Children from Sexual Offences Act, 2012- Section 6- Indian Penal Code, 1860- Sections 376 & 506- Quashing of F.I.R. on account of marriage interse accused and victim- Mohammedan Law- Article 195 and 251- Held- Victim/prosecutrix has already solemnized marriage with petitioner No.1 and she is living happy married life, it would be in the interest of justice to accept the prayer made on behalf of the petitioner/accused for quashing of the FIR as well as consequent proceedings, which if otherwise allowed to sustain may disturb the happy married life of the petitioner No.1 and victim/prosecutrix- No doubt, while accepting prayer for

quashing of the FIR in heinous crime like rape, etc. interest of society at large is to be kept in mind rather than the interest of an individual, however in the facts and circumstances of the case, as detailed hereinabove, interest of victim/prosecutrix appears to be of paramount importance, if is not protected and petitioner No.1/accused is left to be prosecuted for his having committed the offence punishable under Sections 376, 506 of IPC and Section 6 of POCSO Act, ultimate loser would be petitioner No.2 (victim/prosecutrix)- Petition allowed. (Para 19, 20, 21)

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 303;
Narinder Singh and others vs State of Punjab and another (2014)6 SCC 466;
State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376;
State of Madhya Pradesh vs. Laxmi Narayan (2019) 5 SCC 688;

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

O R D E R

On the oral request of learned counsel representing the petitioners, the father of the petitioner No.2 (victim/prosecutrix) is impleaded as petitioner No.3 in the array of the parties. Registry is directed to carry out necessary correction in the memo of the parties.

2. By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioners for quashing of FIR No. FIR No. 127 of 2021, dated 29.08.2021 under Sections 376, 506 of IPC and Section 6 of POCSO Act, registered at police Station, Majra, District Sirmaur, H.P., as well as consequent proceedings, if any, pending adjudication in the competent court of law on account of subsequent

development i.e. marriage interse petitioner No.1 and petitioner No.2 (hereinafter referred to as the victim/prosecutrix).

3. Precisely, the facts of the case as emerge from the record are that FIR sought to be quashed in the instant proceedings came to be lodged at the behest of petitioner No.2-victim/prosecutrix, who alleged that last year while she had gone to her maternal uncle's house at Kot, Tehsil Chhachhrauli, she came into the contact of petitioner No.1. She alleged that petitioner No.1 told her that he is an employee of police department and wants to solemnize marriage with her. She alleged that petitioner No.1 firstly on the pretext of marriage sexually assaulted her against her wishes and thereafter clicked her obscene photographs. She alleged that on 26.08.2021, petitioner No.1 told her that in case she comes out of her house, he would return her obscene photographs, but thereafter sexually assaulted her in a Kayarda Hotel. Though, after completion of the investigation, police presented the challan in the competent court of law, but before same could be taken to its logical end, petitioner No.1/accused and petitioner No.2 i.e. victim/prosecutrix solemnized marriage as per Muslim rights and ceremonies and as such, have filed present petition jointly, praying therein for quashment of FIR as well as consequent proceedings, if any, pending in the competent Court of law.

4. Pursuant to the notice issued in the instant proceedings, respondent-State has filed reply, wherein prayer having been made on behalf of the petitioners has been opposed on the ground that petitioner No.1 has committed heinous crime of rape that too with minor and as such, prayer made on his behalf for quashment of FIR is not maintainable in terms of the law laid down by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 466,** wherein it has been categorically ruled that High Court while exercising power under Section 482 Cr.P.C may not quash proceedings in the cases involving mental depravity, murder, rape, dacoity etc.

5. Pursuant to order dated 26.5.2022, petitioners have come present. Petitioner No.2/victim/prosecutrix, who has come alongwith her father Fukran, states on oath that she of her own volition and without there being any external pressure has entered into the compromise, whereby she as well as petitioner No.1 have solemnized marriage. She states that FIR sought to be quashed in the instant proceedings, is result of misunderstanding. She states that she herself wanted to solemnize marriage with petitioner No.1 but since at one point of time petitioner No.1 refused to solemnize marriage with her, she was compelled to lodge the FIR sought to be quashed. She states that since petitioner No.1 has already solemnized marriage with her and she is living happy married life, she shall have no objection in case prayer made in the instant petition for quashment of FIR as well as consequent proceeding in the competent court of law is accepted. Her statement is taken on record.

6. Petitioner No.3,Furkan, father of petitioner No.2-victim/prosecutrix, states on oath that petitioner No.1 and his daughter have solemnized marriage as per Muslim customs and rights at Qutub Masjid, as is evident from marriage certificate ***(Nikhanama)*** placed on record (Annexure P-2). He states that since his daughter has already solemnized marriage with petitioner No.1 and is living happy married life, he shall have no objection in case prayer made in the instant petition is accepted and FIR lodged against petitioner No.1 is quashed and set-aside. His statement is taken on record.

7. After having heard aforesaid statements made by petitioner No.2 and her father Furkan, Mr. Sunny Dhatwalia, Assistant Advocate General states that though victim/prosecutrix has solemnized marriage with petitioner No.1, but keeping in view the gravity of the offence alleged to have been committed by petitioner No.1, coupled with the fact that there is complete bar to accept the compromise in cases of rape, prayer made on behalf of the petitioner may not be accepted. In support of his submission, learned

Assistant Advocate General has placed reliance upon the judgment passed by Hon'ble Apex Court in ***Narinder Singh case(supra).***

8. True, it is that as per the law laid down by Hon'ble Apex Court in Narinder Singh case(supra), compromise, if any, arrived interse parties in a criminal case involving offence punishable under Section 302 and 376 of IPC, is not to be accepted, but if aforesaid judgment is read in its entirety, High Court while exercising power under Section 482 Cr.P.C can permit the parties to enter into the compromise in the peculiar facts and circumstances of the case. No doubt, in the case at hand petitioner No.1 allegedly sexually assaulted petitioner No.2 against her wishes on the pretext of marriage, but now since petitioner No.1 and victim/prosecutrix i.e. petitioner No.2 have already solemnized marriage, as is evident from "Nikahnama" placed on record and they are living happy married life, it may be too harsh and impractical to not accept the prayer made on behalf of petitioners No.1 and 2 jointly for quashing of FIR as well as consequent proceedings. Moreover, as has been taken note hereinabove, father of the victim/prosecutrix has also stated on oath before this Court that since both petitioner No.1 and his daughter (petitioner No.2) have solemnized marriage and they are living happy married life, he shall have no objection in case the prayer made in the petition is allowed.

9. Learned Assistant Advocate General states that since victim/ prosecutrix (petitioner No.2) is 17 years of age, marriage without the consent of father cannot be said to be valid or otherwise also consent of father is necessary in case, the girl is less than 15 years of age and the marriage without consent of father is void.

10. Learned counsel representing the petitioners while inviting attention of this Court to Article 195 of Mahomedan Law from the book "Principles of Mahomedan law, argued that every Mahomedan of sound mind, who has attained puberty, can enter into a contract of marriage. He argued

that puberty is presumed in the absence of evidence on completion of the age of fifteen years. Since, in the case at hand, petitioner No.2/-victim/prosecutrix at the time of marriage was 17 years old, marriage solemnized interse petitioner No.1 and petitioner No.-2victim/prosecutrix cannot be said to be void. In support of his aforesaid submission, learned counsel for the petitioner has placed reliance upon the judgment rendered by Hon'ble Punjab and Haryana High Court in case tilted **Mohd. Samim** vs. **State of Haryana and others**, Criminal Writ Petition No.523 of 2018, decided on 26.09.2018, wherein it has been held as under:-

> "The arguments raised by learned State counsel as well as counsel for respondent No.4 are not applicable to the present case as both the parties belong to Muslim religion/community. The factum of marriage has not been denied by learned counsel for the petitioner as well as counsel for respondent No.4. The Delhi High Court in the case of *Rukshana vs. Govt. of NCT of Delhi 2007(3) R.C.R. (Criminal) 542,* while relying on the judgment of Md. Idris's case (supra) while reflecting on the Mohammedan Law in somewhere similar situation, as the present one, has held that the Criminal Writ Petition No.532 of 2018 (O&M) -8- Sessions Judge was right in directing that she was at liberty to live with her husband. The observations made by the Delhi High Court is reproduced as under:-

11.

> "7. Learned counsel for the petitioner submitted that as per Mohammedan Law, a girl who had attained the age of puberty could marry without consent of her parents and had right to reside with her husband even when she was less than 18 years of age and thus otherwise a minor girl. In support of this, he referred to the judgment of Patna High Court in the case of Md.Idris v. State of Bihar and others 1980 Crl. L.J.
>
> 764. That was a case where girl in question was 15 years of age and had married respondent No. 4 without the consent of her parents. Complaint was

filed that respondent No. 4 had enticed away the girl in question (respondent No. 5) and minor daughter of the petitioner in that case with a view to marry her forcibly. On this complaint, respondent No. 5/girl was produced before a Magistrate before whom she stated that she had gone with respondent No. 4 with her own accord and without enticement and married him with her own volition. The medical evidence showed that she was above 15 years but below 18 years, the Magistrate ordered the custody of respondent No. 5 to the petitioner as she minor.

However, in the revision, the Sessions Judge ordered the custody of the girl to her husband/respondent No. 4 whom she claimed to have married. Challenging this order, father filed writ petition before the Patna High Court. The High Court dismissing the writ petition held that though respondent No. 5 on relevant date may he minor under the Indian Criminal Writ Petition No.532 of 2018 (O&M) -9-

Majority Act or within the meaning of Section 361 I.P.C., still under Mohammedan Law she could have married without consent of her natural guardian as she had attained the age of puberty. In such a situation, Sessions Judge was right in directing that she was at liberty to live with her husband. The following observations from this judgment would be worth quoting:

"Whether respondent No. 5, who was below 18 years of age, could have married without the consent of her parents is another question which was seriously contended before us. But, as I shall immediately indicate, under the Mohammedan Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection

> reference can be made to Article 251 or Mulla's Principles of Mohammedan Law which says that every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, in absence of evidence on completion of the age of 15 years. Even in Tyabji's Muslim Law under Article 27 it is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. Article 268 of Mulla's Principles of Mohammedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man or the woman as his wife. Article 90 of Tyabji's Muslim Law also says that a marriage is to be presumed on the acknowledgment of either party to the marriage. As such, it has to be held that under Mohammedan Law a girl, who has reached the age of puberty, i.e., in Criminal Writ Petition No.532 of 2018 (O&M) -10- normal course at the age of 15 years, can marry without the consent of her guardian."

11. Reliance is also placed upon the judgment rendered by Hon'ble Punjab and Haryana High Court in case titled **Gulam Deen and another vs. State of Punjab and others** passed in CRWP No.5744 of 2022, decided on 13.06.2022, wherein it has been held as under:-

> "Learned counsel for the petitioners would contend that this is the first marriage of both the petitioners. He has relied upon the decisions by this Court in 'Kammu vs. State of Haryana & Ors.' [2010(4) RCR (Civil) 716]; 'Yunus Khan vs. State of Haryana & Ors.' [2014(3) RCR (Criminal) 518] and 'Mohd. Samim vs. State of Haryana & Ors.' [2019(1) 1 RCR (Criminal) 685] to contend that in Muslim law puberty and majority are one and the same and that there is a presumption that a person attains majority at the age of 15 years. It is further contented that a Muslim boy or

Muslim girl who has attained puberty is at liberty to marry any one he or she likes and the guardian has no right to interfere.

Learned counsel for the petitioners contends that the life and liberty of the petitioners is in grave danger at the hands of respondent Nos.5 to 7. It is further contended that the petitioners have also moved a representation dated 09.06.2022 (Annexure P-4) to the Senior Superintendent of Police, Pathankot (respondent No.2). However, no action has been taken thereon. Learned counsel for the petitioners submits that he limits his prayer in the present petition and would be satisfied at this stage if directions are issued for deciding the said representation (Annexure P-4) in a time-bound manner in accordance with law.

This Court has taken note of the judgments cited on behalf of the petitioners and also the fact that the girl in the instant case i.e. petitioner No.2 is aged more than 16 years. In the case of ***Yunus Khan(supra***) it has been noted that the marriage of a Muslim girl is governed by the personal law of the Muslims. Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla' has also been reproduced in the said decision which Article reads as under :

> "**195. Capacity for marriage** - (1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.
>
> (2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.
>
> (3) A marriage of a Mahomedan who is sound mind and has attained puberty, is void, if it is brought about without his consent.
>
> Explanation - Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years."

The law, as laid down in various judgments cited above, is clear that the marriage of a Muslim girl is governed by the Muslim Personal Law. As per Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla', the petitioner

> No.2 being over 16 years of age was competent to enter into a contract of marriage with a person of her choice. Petitioner No.1 is stated to be more than 21 years of age. Thus, both the petitioners are of marriageable age as envisaged by Muslim Personal Law. In any event, the issue in hand is not with regard to the validity of the marriage but to address the apprehension raised by the petitioners of danger to their life and liberty at the hands of the private respondents and to provide them protection as envisaged under Article 21 of the Constitution of India. Article 21 of the Constitution of India provides for protection of life and personal liberty and further lays down that no person shall be deprived of his or her life and personal liberty except as per the procedure established by law. The Court cannot shut its eyes to the fact that the apprehension of the petitioners needs to be addressed. Merely because the petitioners have got married against the wishes of their family members, they cannot possibly be deprived of the fundamental rights as envisaged in the Constitution of India."

12. Having taken note of aforesaid law laid down by the Hon'ble Punjab and Haryana High Court and Articles 195 and 251 of Mahomedan Law, which have been reproduced hereinabove, this Court finds sufficient force in the submission of learned counsel for the petitioner that petitioner No.2 being Muslim girl can perform marriage after her having attained puberty, which otherwise in the absence of evidence is presumed to have been attained at the age of 15 years. In the case at hand, it is not in dispute that petitioner No.2- victim/prosecutrix is 17 years of age and as such, marriage solemnized by her with petitioner No.1 cannot be said to be void.

13. This Court, after having carefully perused the compromise, which has been duly effected between the parties, sees substantial force in the prayer having been made by the learned counsel for the petitioners that offences in the instant case can be ordered to be compounded.

14. Since the petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 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 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 under Section 482 Cr.P.C 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".

15. 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 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.*
>
> *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 se 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."

16. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another***, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in ***Narinder Singh's*** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to the power under Section 482:

> "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in **State of Tamil Nadu v R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

> "...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of

Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has bee inherent n settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transac mental tions with an essentially civil flavour

may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

17. The Hon'ble Apex Court in (2019) 5 SCC 688, titled as ***State of Madhya Pradesh vs. Laxmi Narayan*** , has held as under:-

" 15 . Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1 That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved 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;

15.3 Similarly, such power is not to be exercised for the offences under the special statutes like 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;

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

15.5 While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/ compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

18. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove, Hon'ble Apex Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C. must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriately be quashed though the victim or the family of the victim have settled the dispute, but it has also observed that while exercising its powers, 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. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in ***State of Tamil Nadu*** *supra*, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the

ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

19. Since, in the case at hand, petitioner No.2- victim/prosecutrix has already solemnized marriage with petitioner No.1 and she is living happy married life, it would be in the interest of justice to accept the prayer made on behalf of the petitioner/accused for quashing of the FIR as well as consequent proceedings, which if otherwise allowed to sustain may disturb the happy married life of the petitioner No.1 and victim/prosecutrix. No doubt, while accepting prayer for quashing of the FIR in heinous crime like rape, etc. interest of society at large is to be kept in mind rather than the interest of an individual, however in the facts and circumstances of the case, as detailed hereinabove, interest of victim/prosecutrix appears to be of paramount importance, if is not protected and petitioner No.1/accused is left to be prosecuted for his having committed the offence punishable under Sections 376, 506 of IPC and Section 6 of POCSO Act, ultimate loser would be petitioner No.2 (victim/prosecutrix and as such, no fruitful purpose would be served in continuing with the criminal proceedings.

20. Consequently, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the FIR as well as consequent proceedings pending in the competent Court of law.

21. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, FIR No. 127 of 2021,

dated 29.08.2021 under Sections 376, 506 of IPC and Section 6 of POCSO Act, registered at police Station, Majra, District Sirmaur, H.P., as well as consequent proceedings, if any, pending adjudication in the competent court of law, are quashed and set-aside and the petitioner-accused is acquitted for the charges framed against him.

22. The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Between:

SH. AKSHAY KUMAR GOEL, S/O SHRI VINOD GOEL, R/O ASHOK BHAWAN OPP. D.C. OFFICE THE MALL SOLAN, HIMACHAL PRADESH.

....PETITIONER

(BY MR. GEORGE, ADVOCATE)

AND

4. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH SECRETARIAT SHIMLA 171002.

5. SENIOR SUPERINTENDENT OF POLICE UNA, DISTRICT UNA, HIMACHAL PRADESH.

6. SH. UMA SHANKAR KUMAR BRANCH MANAGER VIJAY BANK UNA, DISTRICT UNA, HIMACHAL PRADESH.

....RESPONDENTS

(BY MR. MR. SUDHIR BHATNAGAR
ADDITIONAL ADVOCATE GENERAL
FOR R-1 & 2)

(MR. DEEPAK BHASIN, ADVOCATE FOR R -3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 Cr.P.C No.347 of 2020
Decided on: 13.06.2022

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973**- Section 482- **Indian Penal Code, 1860**- Sections 406, 410, 420, 120-B and 34- Held- Evidentiary material on record, if accepted would not reasonably connect the petitioner with crime. Neither there is sufficient evidence to conclude that petitioner had an intention from very beginning to cheat the bank nor there is any material to suggest that petitioner unauthorizedly/illegally sold the property/machinery entrusted to it by the bank- Chances of conviction of petitioner are very remote and bleak- Petition allowed. (Para 30, 31)

Cases referred:

Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Department of Home and Anr*, AIR 2019 SC 210;*

Central Bureau of Investigation, SPE, SIU (X), New Delhi vs. Duncans Agro Industries Ltd, Calcutta (1996) 5 SCC 591;

Joseph Salvaraj A vs. State of Gujarat and others AIR 2011 SC 2258;

Mahadeo Prasad vs. State of West Bengal AIR 1954 S.C.724);

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 Gujarat vs. Jaswantlal Nathalal, (1968) 2SCR 408;

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 admission after notice this day, the Court passed the following:

O R D E R

By way of instant petition filed under Section 482 Cr.P.C., read with Section 227 of the Constitution of India, prayer has been made on behalf of the petitioner for quashing of FIR No.129, dated 12.04.2019, registered at police Station, Una Sadar, District Una, H.P., under Sections 406, 410, 420, 120-B and 34 of IPC as well as consequent proceedings pending before the competent court of law.

2. For having bird's eye view, facts leading to the registration of FIR sought to be quashed in the instant proceedings are that the Branch Manager, Vijaya Bank, Una, District Una, H.P., sanctioned the loan amount of `10,00,000/-on dated 12.01.2015 to the petitioner, who in turn, executed an agreement/ deed of hypothecations dated 12.01.2015 and hypothecated the machinery in favour of the bank. Since the petitioner allegedly committed default in repayment of loan and had committed serious irregularities in the operation of the accounts, bank, as detailed hereinabove, firstly called upon the petitioner to make the payment regularly, but subsequently debt of the petitioner was classified as "NPA" on 30.9.2018. On 7.6.2018, notice for the recovery of loan was issued by the bank to the petitioner, but despite that he made the default in payment. Thereafter, demand-cum re-possession seizure notice was issued to the petitioner and to the surety on 01.10.2018. The authorization letter for re-possession/ seizure of machinery was issued to seizure agent on 30.10.2018, but by that time allegedly petitioner had absconded with the hypothecated machinery and it was not found at the place of business. The letter by recovery agent addressed to the Regional Manager for (Recovery) Vijaya bank dated 29.11.2018, is annexed with as **Annexure R-2** with the reply filed by Superintendent of Police Una, wherein he reported that borrower has disposed off the machinery, therefore FIR for fraud may be lodged against the borrower. In the aforesaid backdrop, respondent No.3, Uma

Shankar Kumar, Branch Manager, Vijaya Bank, Una lodged complaint in the police station, but it appears that no action was taken by the police on the complaint of the bank and as such, it was compelled to file complaint under Section 156(3) Cr.P.C in the Court of Judicial Magistrate 1st Class, Court No.III, Una, praying therein to order for registration of the case against the petitioner under Sections 406, 410, 420, 120-B and 34 of IPC. In the aforesaid background, FIR sought to be quashed in the instant proceedings came to be lodged against the petitioner, who as per the reply filed by respondent No.1 stands declared proclaimed offender in the case vide order dated 29.01.2021 passed by court below.

3. Precisely, the grounds, as has been raised in the petition and further canvassed by Mr. George, learned counsel representing the petitioner for quashing of FIR, are that once petitioner has already repaid the entire amount of loan alongwith up-to -date interest, he cannot be prosecuted for his being allegedly committed the offence of criminal breach of trust punishable under Section 406 of IPC. Learned counsel for the petitioner while inviting attention of this Court to Sections 405 and 406 IPC, argued that if any person entrusted with any property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law, such person can be said to have committed the offence of criminal breach of trust punishable under section 406 of IPC. Learned counsel for the petitioner further argued that at no point of time machinery alleged to have been sold by the petitioner was entrusted to him by the complainant, rather same as per own case of the complainant was hypothecated by petitioner with the bank. Learned counsel for the petitioner further argued that though machinery or other property kept as collateral security in lieu of loan was hypothecated with the bank, but always remained in the ownership of the petitioner and as such, there is no question, if any, of entrustment of property by the bank to the

petitioner. If it is so, no case much less under Section 405 of IPC, is made out against the petitioner. While referring to Section 420 of IPC, learned counsel for the petitioner argued that there is no material on record to suggest that petitioner committed cheating and dishonestly induced respondent-bank to deliver its property to any person, or any part of a valuable security, which is capable of being converted into a valuable security. He argued that to attract Section 482 Cr.P.C, there has to be dishonest intention from very beginning, which is sine qua non to hold the accused guilty for the commission of said offence. He argued that as per own case of respondent-bank, petitioner was regular in making repayment of loan for some time, but subsequently on account of irregular payments, his account was classified as "NPA' on 30.9.2018. He argued that had petitioner had an intention to cheat the bank from very beginning, he would have not paid single installment after availing loan facility from the respondent bank, rather he kept on paying installments regularly, but subsequently on account of some financial crunch became irregular in payment but that does not mean that he had an intention from very beginning to cheat and misappropriate the loan amount. Learned counsel for the petitioner further argued that since no case much less substantial is made out against the petitioner under Sections 405 and 406 of IPC for the reasons stated hereinabove, no fruitful purpose would be served by keeping the FIR sought to be quashed alive. He argued that to the contrary, petitioner, who is innocent and has not committed any offence as is being alleged against him, would be put to great hardship. He argued that moreover entire loan amount now stands repaid and as such, otherwise also, no case is made out against the petitioner and as such, prayer made in the instant petition deserves to be allowed. In support of his aforesaid contention, learned counsel for the petitioner has placed reliance upon the following judgments passed by Hon'ble Apex Court:-

i). ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335.***

ii) Anand Kumar Mohatta and another vs. State (Government of NCT of Delhi) Department of Home and Anr, AIR 2019 SC 210 and

iii) Judgment dated 3.1.2019 passed by Hon'ble Apex Court in case titled Satishchandra Ratanlal Shah versus State of Gujarat and another in Criminal Appeal No.9 of 2019 (arising out of SLP(CRL). No.5223 of 2018).

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General and Mr. Deepak Bhasin, learned counsel representing respondents No.1 to 3, refuted the aforesaid submissions made by learned counsel representing the petitioner, by stating that since machinery alleged to have been sold by petitioner was under hypothecation, he had no authority to sell the same and as such, no fault, if any, can be said to have been committed by the police while registering criminal case under Section 406 and 420 IPC. Above named counsel representing the respondents further argued that loan account of the petitioner was classified as "NPA" on 30.9.2018 and when he sold machinery hypothecated in favour of the bank, sum of ` 5, 14, 982/- with interest was payable by him and as such, it cannot be said that he has not committed any offence punishable under Sections 406 and 420 of IPC. Learned counsel for the respondents further argued that hypothecation means that till the time entire loan amount is repaid, property hypothecated in favour of the bank would be considered as property of the bank and as such, it cannot be contended/submitted that during hypothecation person in whose favour loan is advanced can claim him/herself to be owner of the property under hypothecation. They further argued that till the time entire loan amount is not repaid property moveable or immoveable hypothecated in favour of the bank

would be deemed to have been entrusted to the loanee by the bank and he cannot dispose of the same till the time property is released from the hypothecation. Lastly above named counsel representing respondents argued that whether petitioner had an intention from very beginning to cheat is a question which need to be determined/answered on the basis of the totality of evidence led on record by the respective parties during trial and as such, it would be too premature at this stage to conclude that petitioner has not committed any offence punishable under Section 420 of IPC.

5. Learned counsel for the respondents further argued that High Court while exercising power under Section 482 Cr.P.C cannot adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented, rather limited question for determination in these proceedings can be whether on the face of FIR, the allegations constitute as a cognizable offence, if yes, then power under section 482 cannot be exercised to quash the FIR. They further argued that since prima-facie FIR discloses cognizable offence alleged to have been committed by the petitioner, this Court may not exercise power under Section 482 Cr.P.C.

6. I have heard learned counsel representing the parties and perused the record of the case.

7. Close scrutiny of the FIR sought to be quashed in the instant proceedings as well as reply to the petition filed by the respondents, reveal that petitioner vide application dated 12.01.2015 applied to Vijaya bank, Una for term loan to the extent of Rs.10 lac, which was sanctioned in his favour on 12.01.2015 itself. Petitioner submitted certain documents required by the bank and thereafter loan amount was released in favour of the petitioner. From January 2015 to middle of the year 2018 petitioner continued to repay the loan amount through installments along with interest, but thereafter became irregular in payment. Since despite repeated notices, petitioner failed to repay the remaining amount, his loan account was classified as “NPA” on

30.09.2018 and recovery notice of loan was issued on 7.6.2018. Since despite notice of recovery, petitioner failed to make the payment, bank issued authorization letter to its agent for re-possession and seizure of machinery, who in turn, reported vide communication dated 29.11.2018 that petitioner has absconded with the machinery and as such, in this backdrop FIR sought to be quashed in the instant proceedings came to be lodged against the petitioner.

8. Though, as per the reply filed by the respondents, sum of `5,14,982/- with up-to- date interest was payable at the time of lodging of the FIR, but during proceedings of the case, it was informed that as of now entire loan amount stands recovered, which fact has been duly acknowledged by learned counsel representing the respondent-bank.

9. Precisely, the case of the prosecution against the petitioner is that he fraudulently without any authority sold the machinery hypothecated in favour of the bank. As per prosecution, till the time property was hypothecated, it was deemed to have been entrusted to the petitioner by the bank, which advanced loan to the tune of `10,00,000/-. Apart from above, another allegation against the petitioner is that he intentionally with a view to commit fraud upon the bank sold the hypothecated property, which was property of the bank till the time entire loan amount was not repaid.

10. Before considering the prayer made in the instant petition for quashing of FIR, this Court deems it necessary to discuss/elaborate the scope of this Court to quash the FIR as well as criminal proceedings while exercising power under Section 482 Cr.P.C.

11. 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.P.C., 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.

12. 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.

13. 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."

14. 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.

15. 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.

16. Recently, the Hon'ble Apex Court in case tilted **Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Department 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."

17. 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."

18. 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. Precisely question, which needs to be decided in the instant case, is whether property/machinery hypothecated in favour of the bank can be presumed/ termed to be entrusted in favour of the petitioner by the bank by advancing him loan to buy that property.

19. Before exploring answer to aforesaid question, it would be apt to take note of Section 405 of IPC, which reads as under:-

> *"***405. <u>Criminal breach of trust</u>.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such**

trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

20. Bare reading of aforesaid provisions of law clearly reveals that the person, who in any manner entrusted with property, or with any dominion over property, if dishonestly misappropriate or converts to its own use that property, or dishonestly uses or disposes of that property would deem to have been committed criminal breach of trust as prescribed under Section 405 of IPC. If allegation of criminal breach of trust is proved, person against whom such allegation is proved, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both in terms of the provisions contained in section 406 of IPC.

21. Though, learned Additional Advocate General argued that entrustment of physical possession of the property is not essential for the offence defined under Section 405 of IPC because the expression "whoever being in any manner entrusted with property or with any dominion over property" clearly negatives the contention that since physical possession was not exclusively transferred to the bank, there cannot be a case of entrustment but after having carefully read section 405 of IPC, this Court finds it difficult to accept the aforesaid contention of learned Additional Advocate General. The term 'entrusted' found in section 405 IPC governs not only the words "with the property" immediately following it but also the words" or with any dominion over the property" occurring thereafter, meaning thereby before there can be any entrustment, the entrustment carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. A mere transaction of sale cannot amount to an entrustment. Reliance in this regard is placed upon the judgment rendered by Hon'ble Apex Court in **State of Gujarat vs. Jaswantlal Nathalal**, (1968) 2SCR 408,wherein it has been held as under:-

The term "entrusted" found in S. 405 IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter-see Velji Raghvaji Patel v. State of Maharashtra [1965] 2 S.C.R. 429.Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust (see Jaswantrai Manilal Akhaney v. State of Bombay(1965 SCR 483). The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that properly is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust.

22. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in case titled **Central Bureau of Investigation,_SPE, SIU (X), New Delhi** vs. **Duncans Agro Industries Ltd, Calcutta** (1996) 5 Supreme Court Cases 591, wherein it has been held as under:-

"26. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the respective counsel for the parties, it appears to us that for the purpose of quashing the complaint, it is necessary to consider whether the allegations in the complaint prima facie make out an offence or not. It is not necessary to scrutinize the allegations for the purpose of deciding whether such allegations are likely to be upheld in the trial. Any action by way of quashing the complaint is a action to be taken at the threshold before evidences are led in support of the complaint. For quashing the complaint by way of action at the threshold. It is, therefore, necessary to consider whether no the face of the allegations, a criminal offence is constituted or not. In recent decisions of this Court, the case of Bhajan Lal (supra), since relied on by Mr. Tulsi, the guiding principles in quashing a criminal case have been indicated.

27. In the instant case, a serious dispute has been raised by the learned counsel appearing for the respective party as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression 'entrusted with property' or 'with any dominion over property' has been used in wide sense in Section 405 I.P.C. Such expression includes all case in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted appearing in Section 405 I.P.C. is not necessarily a term of law. It has wide and different implication in different context. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'Trust' in Section 405 I.P.C. is a comprehensive expression and has been used to denote various kinds of relationship like the relationship of trustee and beneficiary, bailer and bailee, master and servant, pledger and pledger. When some goods are hypothecated by a person to another person. the ownership of the goods still remains with the person who has hypothecated such goods. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in other person and the offender must hold such

> property in trust for such other person or for his benefit. In a case of pledge, the pledged article belongs to some other person or for his benefit. In a case of Pledge, the pledged article belongs to some other person but the same is kept in trust by the pledgee. In the instant case, a floating charge was made on the goods by way of security to cover up credit facility. In our view, in such case for disposing of the goods covering the security to cover up credit facility. In our view, In such case for disposing of the goods covering the security to cover up credit facility. In our view, in such case for disposing of the goods covering the security against credit facility the offence of criminal breach of trust is not committed. In the facts and circumstances of the case, it, however, appears to us that the Respondents moved the High Court only in 1991 although the first Fir was filed in 1987 and the second was filed in 1989. The CBI, therefore, Got sufficient time to complete the investigation for the purpose of framing the charge".

23. It is quite apparent from the reading of aforesaid law laid down by Hon'ble Apex Court that expression "entrusted with property" or "with any dominion over property" has been used in a wide sense in section 405 IPC, which includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. To attract case under section 405 IPC, it is necessary that ownership and beneficial interest in the ownership of the property entrusted in respect of which offence alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

24. It has been categorically held in the aforesaid judgment that if some goods are hypothecated by a person to another person, the ownership of the goods still remains with the person, who has hypothecated such good, whereas to constitute offence, if any, under section 405 IPC the property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused. In the case at hand, admittedly the property in respect of which criminal breach of trust alleged to

have been committed by the petitioner was his own property not of the bank. As has been observed hereinabove, during hypothecation ownership of the hypothecated goods remains with the person, who has hypothecated the such goods and as such, there appears to be merit in the case of the petitioner that no case much less under sections 405 and 406 of IPC is made out against him. Similarly, this court finds that no case is sustainable against the petitioner under section 410 of IPC, which reads as under:-

> **"410. Stolen property:-** Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "Stolen property" [whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without [India]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property".

25. In the case at hand, property which was hypothecated and was further sold cannot be said to have acquired/transferred by theft or extortion or by robbery. Since the petitioner despite his having hypothecated property/machinery continued to be owner of the property, as has been discussed hereinabove, he cannot be said to have criminally misappropriated or committed criminal breach of trust as defined under section 405 IPC. No case under section 420 of IPC can be said to be sustainable against petitioner. Section 420 of IPC reads as under:-

> **"420. Cheating and dishonestly inducing delivery of property.-** whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable

> security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

26. It is none of the case of prosecution that the petitioner dishonestly induced bank to deliver any property/ machinery which he allegedly further sold to other person during hypothecation, rather it is admitted case of the prosecution that property alleged to have been sold by the petitioner during hypothecation was entrusted to him by the bank. Though, hypothecated property does not fall in the meaning of entrustment as defined under section 405 IPC, as has been discussed hereinabove, but even if it is presumed as is being claimed by the prosecution that such property was entrusted to petitioner and he fraudulently sold the same would not make petitioner liable to be tried under section 420 of IPC, which clearly provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security shall be punished with imprisonment of term which may extend to seven years.

27. Leaving everything aside, to constitute offence under section 420 of IPC, prosecution is required to prove that there was dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence. Reliance in this regard is placed upon the judgment rendered by Hon'ble Apex Court in **Joseph Salvaraj A** vs. **State of Gujarat and others** AIR 2011 SC 2258, wherein it has been held as under:-

> "21. Criminal breach of trust is defined under Section 405 of the IPC and 406 thereof deals with punishment to be awarded to the accused, if found guilty for commission of the said offence i.e. with imprisonment for a term which may extend to three years, or with fine, or with both.

> 22. Section 420 of the IPC deals with cheating and dishonestly inducing delivery of property. Cheating has been defined under Section 415 of the IPC to constitute an offence. Under the aforesaid section, it is inbuilt that there has to be a dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence. Categorical and microscopic examination of the FIR certainly does not reflect any such dishonest intention ab initio on the part of the appellant".

28. In the case at hand, even if the allegations made in the complaint are accepted to be true and correct, petitioner cannot be said to have committed the offence of cheating. Offence of cheating is established when the accused whereby induced the person to deliver any property or to do or omit to do something, which he would not do if he were not so deceived. (See judgment **Mahadeo Prasad** vs. **State of West Bengal** AIR 1954 S.C.724).

29. Recently Hon'ble Apex Court in ***Satishchandra Rattanlal Shah(supra)*** held that mere inability of the person to return loan amount cannot give arise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. The relevant paras No.12 to 15 of the judgment are as under:-

> ***"12.Having observed the background principles applicable h erein, we need to consider the individual charges against the appellant. Turning to Section 405 read with 406 of IPC, we observe that the dispute arises out of a loan transaction between the parties. It falls from the record that the respondent no.2 knew the appellant and the attendant circumstances before lending the loan. Further it is an admitted fact that in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/ investment of money and entrustment of money or property. A mere breach of a***

promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment.

13.In this context, we may note that there is nothing either in the complaint or in any material before us, pointing to the fact that any property was entrusted to the appellant at all which he dishonestly converted for his own use so as to satisfy the ingredients of Section 405 punishable under Section 406 of IPC. Hence the learned Magistrate committed a serious error in issuing process against the appellants for the said offence. Unfortunately, the High Court also failed to correct this manifest error.

14. Now coming to the charge under Section 415 punishable under Section 420 of IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. (See Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168). In the case before us, admittedly the appellant was trapped in economic crisis and therefore, he had approached the respondent no. 2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or 8 dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred.

> ***15. Moreover, this Court in a number of cases has usually cautioned against criminalizing civil disputes, such as breach of contractual obligations [refer to Gian Singh v. State of Punjab, (2012) 10 SCC 303]. The legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and inefficient transfers, under Section 415 of IPC".***

30. Leaving everything aside, this Court after having perused the material available on record has no hesitation to conclude that evidentiary material on record, if accepted would not reasonably connect the petitioner with crime. Neither there is sufficient evidence to conclude that petitioner had an intention from very beginning to cheat the bank nor there is any material to suggest that petitioner unauthorizedly/illegally sold the property/machinery entrusted to it by the bank, rather as per own case of the prosecution same was hypothecated. Since ownership of the goods hypothecated in favour of the bank continues to be remained with the person, who has hypothecated such goods, no offence can be said to have been committed by the petitioner under sections 405 IPC. The expression "entrusted" used in section 405 IPC, makes it clear that ownership or beneficial interest in the ownership of property entrusted in respect of which offence alleged to have been committed must be in some person other than the accused. Similarly to constitute the offence under section 420 of IPC, cheating as defined under section 415 of IPC is required to be proved, which consists of fraudulently and dishonestly inducing a person by deceiving him to deliver any property or to do or omit to do anything which he would not do or omit if he were not so deceived. Two essential ingredients of offence would be (i) to make a false statement so as to deceive any person (ii) fraudulently and dishonestly inducing the person to deliver any property or to do or omit to do something. Both the aforesaid

essential ingredients are totally missing in the case at hand and as such, no case otherwise is sustainable against the petitioner under section 420 of IPC. Hence, no fruitful purpose would be served by allowing the proceedings, if any, based upon the FIR sought to be quashed in the instant proceedings, to continue.

31. To the contrary, petitioner 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 provisions contained under sections 405 and 420 of IPC. Moreover, chances of conviction of petitioner are very remote and bleak on account of the facts and circumstances, as detailed hereinabove, as such, prayer made on behalf of the petitioner for quashing of FIR as well as consequent proceedings deserves to be accepted and in case proceedings based upon the FIR sought to be quashed are allowed to sustain, petitioner would be unnecessarily put to ordeals of protected trial, which ultimately may lead to his acquittal.

32. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, present petition is allowed and FIR No. 129, dated 12.04.2019, registered at police Station, Una Sadar, District Una, H.P., under Sections 406, 410, 420, 120-B and 34 of IPC as well as consequent proceedings, if any, pending before the competent court of law are quashed and set-aside Accordingly, the present petition is disposed of, so also pending applications, if any.

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

Between:

RAVI KUMAR @ MANI, S/O SH. PREM SINGH RESIDENT OF Q-1, SARDARNI LINE, N.S. NIS PATIALA, POLICE STATION CIVIL LINE, DISTRICT PATIALA, PUBJAB, AGED ABOUT 24 YEARS THROUGH HIS FATHER SH. PREM SINGH

S/O LATE SH. GURDIAL SINGH RESIDENT OF Q-1, SARDARNI LINE, N.S.NIS PATIALA, POLICE STATION CIVIL LINE, DISTRICT PATIALA, OCCUPATION GOVT. EMPLOYEE AS WATCHMAN IN N.S.NIS PATIALA, AGED ABOUT 55 YEARS.

….PETITIONER

(BY SH. MAN SINGH CHANDEL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

….RESPONDENT

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
No. 1274 OF 2022
Decided on: 27.06.2022

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376, 506- Bail- Victim aged 29 years well acquainted with the petitioner- Held- Victim who is major and 29 years old had been meeting the bail petitioner of her own volition with a view to solemnize marriage and F.I.R. was lodged after almost two years of alleged incident- Normal rule is of bail and not jail- Bail is not be withheld as a punishment- Bail petition allowed. (Para 6, 9, 12)

Cases referred:

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

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

O R D E R

Bail petitioner namely, Ravi Kumar, who is behind the bars since 15.5.2022**,** has approached this Court in the instant proceedings filed under

Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR No. 24/2022, dated 12.05.2022 under Sections 376 and 506 of IPC, registered at Woman police Station, Baddi, District Solan, H.P.

2. Pursuant to order dated 13.06.2022, respondent-State has filed the status report and ASI Gian Chand has also come present alongwith the record. Record perused and returned.

3. Close scrutiny of the record/status report reveals that on 12.05.2022, victim/prosecutrix, aged 29 years (***name withheld to protect her identity),*** **lodged** a complaint at woman police Station, Baddi District Solan, H.P., alleging therein that she had come in the contact of bail petitioner on 14.02.2020 through social media, whereafter bail petitioner repeatedly requested her to meet him in Pinjore Garden, Panchkulla. Victim/prosecutrix alleged that on 18.02.2020, on the request of the bail petitioner, she went to Pinjore garden and there bail petitioner proposed her for marriage. She alleged that bail petitioner requested her to meet his mother, but she refused. She alleged that after some time bail petitioner requested her to meet her mother and as such, she made him to meet Smt. Sharda Devi, who had adopted her. She alleged that bail petitioner made proposal of marriage with her to her mother and her mother, who is a cancer patient, agreed for her marriage. She alleged that while in connection with her employment, she used to live at Barotiwala on 14.04.2020 bail petitioner came to her room and sexually assaulted her against her wishes on the pretext of marriage. However, on 16.11.2021 after the death of mother of victim/prosecutrix, bail petitioner and his family members started making excuses. She alleged that bail petitioner stopped talking with her, whereas her parents blocked her number and now she has come to know from somebody that bail petitioner is likely to marry somebody else. In the aforesaid background, FIR as detailed hereinabove, came to be lodged against the present bail petitioner and since 15.05.2022, he is behind the bars. Since investigation in the case is complete 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 view the gravity of offence alleged to have been committed by him, he does not deserve any leniency and as such, prayer made on his behalf for grant of bail may be rejected outrightly. Learned Additional Advocate General further submits that since report of RFSL is still awaited and as such, it may not be in the interest of justice to enlarge bail petitioner on bail, who in the event of being enlarged on bail may not only flee from justice, but can also tamper with the prosecution evidence. While making this Court to peruse the record of investigation, Mr. Bhatnagar, states that there is overwhelming evidence adduced on record suggestive of the fact that the bail petitioner taking undue advantage of innocence of the victim/ prosecutrix had been sexually assaulting her for so many years on the pretext of marriage and as such, it cannot be said that he has been falsely implicated.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that as per own version given by victim/prosecutrix she had prior acquaintance with the bail petitioner and she had been talking to him since April 2020. As per own case of the victim/prosecutrix, she was sexually assaulted against her wishes on 14.4.2020 on the pretext of marriage but yet she chose not to file any complaint either to police or her parents, rather she on the askance of bail petitioner made bail petitioner to meet her mother for finalization of their marriage. As per own case of the victim/prosecutrix, family of the bail petitioner and victim/prosecutrix had agreed for marriage and as such, victim/ prosecutrix of her own volition had been regularly meeting the bail petitioner, who is otherwise younger than the victim/prosecutrix.

Victim/prosecutrix in her statement given to police has stated that on 16.11.2021 her mother expired and thereafter bail petitioner and his family started finding excuses for not solemnizing her marriage with petitioner. She stated that bail petitioner stopped giving her call regularly, whereas other family members blocked her calls and she has apprehension that bail petitioner is likely to marry somebody else.

6. Having carefully perused status report, especially statements of victim/prosecutrix, this Court has no hesitation to conclude that victim/prosecutrix, who is major and 29 years old, had been meeting the bail petitioner of her own volition with a view to solemnize marriage and alleged incident of sexual assault had occurred on 14.4.2020. Now after almost two years of the alleged incident, victim/prosecutrix has lodged the FIR stating therein that on 23.1.2022 while she had gone to the house of the bail petitioner for collecting her certain documents, she was again subjected to forcible sexual intercourse by bail petitioner, but aforesaid version made by the victim/prosecutrix appears to be highly doubtful for the reasons that initially she herself stated that after 16.11.2021 when her mother expired, bail petitioner stopped talking to her, if it is/ was so there was no occasion, if any, for the victim/prosecutrix to visit the house of the bail petitioner on 23.1.2022.

7. Having noticed conduct of the victim/prosecutrix, which is apparent from her statements made to the police as well as judicial Magistrate, this Court finds it difficult to agree with contention of learned Additional Advocate General that bail petitioner taking undue advantage of innocence of the victim/prosecutrix exploited her against her wishes, rather as has been noticed hereinabove, victim/prosecutrix of her own volition had been meeting with bail petitioner with a view to solemnize marriage with him. Since

bail petitioner has now shown reluctance to marry her, FIR as detailed hereinabove came to be lodged against the bail petitioner.

8. Though, case at hand is to be decided by the learned court below in totality of facts and evidence collected on record, but having taken note of aforesaid glaring aspects of the mater, this Court sees no reason to let bail petitioner incarcerate in jail for indefinite period during the trial, especially when nothing remains to be recovered from him. . Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions.

9. Hon'ble Apex Court as well as this Court have held in catena of cases that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law and as such, this Court sees no reason to curtail the freedom of the bail petitioner for indefinite period during the trial, especially when nothing remains to be recovered from him

10. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr***.,decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a

judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a***

charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

11. 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."***

12. 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.

13. 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:

> 12. ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
>
> 13. ***nature and gravity of the accusation;***
>
> 14. ***severity of the punishment in the event of conviction;***
>
> 15. ***danger of the accused absconding or fleeing, if released on bail;***
>
> 16. ***character, behaviour, means, position and standing of the accused;***
>
> 17. ***likelihood of the offence being repeated;***
>
> 18. ***reasonable apprehension of the witnesses being influenced; and***
>
> 19. ***danger, of course, of justice being thwarted by grant of bail.***

14. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail, subject to his furnishing personal bond in the sum of Rs. 1,00,000/- with one local surety in the like amount, to the satisfaction of the learned trial Court, with following conditions:

i. ***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;***

ii. ***He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

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

iv. ***He shall not leave the territory of India without the prior permission of the Court.***

15. It is clarified that if the petitioner misuses his 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.

16. 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 bail petition stands disposed of accordingly.

17. Learned counsel for the petitioner is permitted to produce copy of order downloaded from the High Court website before the concerned

authority, who shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

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

Between:

SMT. SUNITA CHANDEL W/O SHRI ANIL CHANDEL, R/O VILLAGE & P.O. SARAKAR, TEHSIL AND DISTRICT HAMIRPUR, H.P.

....PETITIONER

(BY MR. B.N. MEHTA, ADVOCATE)

AND

1. UNION OF INDIA THROUGH SECRETARY DEFENCE, GOVT. OF INDIA, NEW DELHI.

2. THE CHAIRMAN, LOCAL BOARD OF ADMINISTRATION FOR SAINIK SCHOOL, SUJANPUR TIHRA, H.P.

3. PRINCIPAL SAINIK SCHOOL, SUJANPUR TIHRA, H.P.

4. MS. INDU PURI W/O SH. RAJEEV PURI, TGT (ENGLISH), SAINIK SCHOOL, SUJANPUR TIHRA.

.....RESPONDENTS.

(MR. SHASHI SHIRSHOO, CGC, FOR R-1 TO 3).

(MR. ABHINAV PUROHIT, ADVOCATE, FOR R-4).

CIVIL WRIT PETITION
NO. 1869 OF 2018
Decided on: 24.06.2022

Constitution of India, 1950- Article 227- Petition to set aside DPC being not as per SOP and to hold fresh DPC- Non-communication of adverse entries in

the ACRs for the last five years- Held- Since factum with regard to non-communication of adverse entries for the last five years was very much in the knowledge of the petitioner before her having participated in the selection process, she instead of participating in the selection process could represent authorities for communication of adverse entries, so that authorities could decide her representation, if any, before her having participated in the selection process- No illegality in DPC- Petition dismissed. (Para 9, 10)

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

O R D E R

By way of present petition, petitioner has prayed for the following main relief(s):

> "(i). That the petitioner in the facts and circumstances prayed that the Civil Writ Petition may very kindly be allowed and this Hon'ble Court may very kindly be pleased to set aside and quash the outcome of the DPC as per Annexure P-9 after calling for the scrutiny of entire DPC record w.e.f.24.02.2018 to 25.07.2018 for the kind perusal of this Hon'ble Court.
>
> (ii) That after quashing and setting aside the promotion of the respondent No.4, the respondents may be directed to hold fresh DPC by assessing the merit of the candidate by perusing the 5 years ACR's or in the alternative since the school of respondents is situated in the territorial jurisdiction of this Hon'ble Court the respondents should follow the conduct of DPC as is application in HPPSC."

2. Precisely, the facts of the case as emerge from the record are that petitioner herein was appointed as Assistant Master (English) at Sainik School, Sujanpur Tihra, District Hamirpur, H.P., on 01.01.2011. One Sh. S.K. Chadda, a regular TGT (English) performing the duties against this post till January 2018, applied for voluntary retirement from service with effect

from 26.04.2018. On 23.01.2018, Sainik School originated proposal to fill up aforesaid post of PGT (English) by way of promotion and accordingly vide communication dated 23.01.2018 requested to Hony Secy Sainik Schools Society, MOD, New Delhi to release the vacancy of PGT (English) with effect from 26.04.2018. Before vacancy could be released by the society, respondent-school with the sole objective of sounding the eligible candidates and allowing them sufficient preparation time, decided to issue letter No. SSST/DPC/2018, dated 24.02.2018 to the two eligible candidates for the Departmental Promotion Committee i.e. petitioner and respondent No.4, who was appointed as Assistant Master (English) on 4.4.2011. Vide aforesaid letter, the provisions of the Society Rule Book about composition of Departmental Promotion Committee as well as the tests planned to be conducted as part of the Departmental Promotion Committee were intimated. The Syllabus of written examination was also specified and finally the Sainik School Society vide their letter No.10(5)/2011/D(SSC) dated 27.04.2018 released the vacancy of Master (English). On 7.05.2018 respondent-school as per Rule 5.27 of Rule Book issued by the Board of Governors, Sainik School Society constituted the Departmental Promotion Committee comprising of the following members:-

i)	Principal, Sainik School	: President Officer
ii)	Vice Principal, Sainik School	: Member
iii)	Representative from State Administration	: Member
iv)	Representative of Chairman LBA	: Member.
v)	Subject Expert	: Member.

3. Though, the meetings of all the Departmental Promotion Committee in Sainik School are to be conducted in accordance with the provisions of the SOP on the subject issued vide Sainik Schools Society letter No.14(22)/SSS/2017, dated 24.08.2017, but since SOP does not specifically

lay down details, such as syllabus for the written exam, the maximum marks for the written exam, the qualifying marks for written exam, details of what is to be assessed during the Teaching demonstration, and whether an interview is to be conducted or not, DPC member with a view to ensure transparency and fair play, decided to keep the DPC candidates updated about the syllabus and the suggested scheme of examination. The standard Operating Procedure (SOP) provided that relative weightage of various elements such as written test, teaching demonstration, ACRs of the last five years are to be seen by DPC while considering the case of the candidate for promotion to the post of PGT. On 11.06.2018 DPC conducted written exam in accordance with provisions of SOP on the subject. Entire proceedings of DPC were video recorded to ensure total transparency. Teaching demonstration was held in the topic chosen by the candidates themselves. Answer sheets of written examination were evaluated by an independent subject expert detailed by the State Education Department. Subsequently, on the basis of overall merit respondent No.4, Ms.Indu Puri came to be promoted to the post of PGT(English), as is evident from the proceedings of the DPC placed on record as Annexure R-3 by respondent No.1.

4. Being aggrieved and dissatisfied with selection of respondent No.4, petitioner has approached this Court in the instant proceedings, praying therein for the reliefs, as have been reproduced hereinabove.

5. In nutshell, grouse of the petitioner, as has been highlighted in the petition and has been further canvassed by learned counsel for the petitioner is that DPC while conducting proceedings failed to adhere to the procedure prescribed under SOP. Learned counsel for the petitioner also argued that ACR's pertaining to last five years were not taken into consideration because bare perusal of the same clearly reveals that petitioner was on better footing then respondent No.4 and as such, she could not have been awarded less marks on account of assessment of ACR. Besides above, it

has been further argued on behalf of learned counsel for the petitioner that adverse entries never came to be communicated to the petitioner and as such, no reliance ought to have been placed by the DPC on the same while making assessment.

6. Mr. Shashi Shirshoo, Central Government Counsel representing respondents No.1 to 3 and Mr. Abhinav Purohit learned counsel representing respondent No.4, while supporting the selection of respondent No.4, contended that there is no illegality and infirmity in the DPC proceedings because same came to be conducted strictly on the basis of procedure laid down in SOP issued by the Society. Above named counsel argued that ACRs of last five years were assessed, as is evident from the DPC proceedings and if ACRs of the petitioner herein are perused juxtaposing ACRs of selected candidate respondent No.4, no illegality can be said to have been committed the DPC while awarding higher marks to respondent No.4 because ACRs for the last five years of respondent No.4 are/ were better than the petitioner.

7. Mr. Shashi Shirshoo, learned Central Government Counsel while inviting attention of this Court to the prayer made in the instant petition argued that at no point of time challenge ever came to be laid to the action of the respondent inasmuch as adverse entries in ACRs were not communicated, rather in the instant proceedings selection of respondent No.4 has been sought to be quashed on the ground that DPC has failed to assess the ACRs of both the candidates in terms of procedure laid down in the SOP. Lastly, learned counsel representing respondents No.1 to 4 stated that since respondent No.4 obtained higher marks in written examination than the petitioner, petition having been filed by the petitioner, seeking therein quashment of respondent No.4 is not maintainable, especially when petitioner participated in the proceedings and has approached this Court after having failed in the same.

8. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that in the instant proceedings action of respondents inasmuch as non-communication of adverse entries in the ACRs for the last five years has been not laid challenge, rather proceedings of DPC whereby respondent No.4 came to be promoted to the post of PGT has been laid challenge on the ground that DPC while assessing ACRs of the candidates have not followed the due procedure as laid down in SOP, which plea is totally contrary to the record, as is evident from the pleadings adduced on record by respondent No.1.

9. Proceedings of the DPC placed on record (Annexure R-3) by respondent No.1 clearly reveals that petitioner herein obtained less marks in written exam than respondent No.4. Though, petitioner obtained higher marks in teaching demonstration, but if result of last three years of CBSE is perused, respondent No.4 came to be awarded higher marks on account of her performance. As far as perusal/assessment of ACRs by DPC is concerned, no material worth credence has been led on record to suggests that the assessment made by DPC on the basis of which marks/grade came to be awarded, is not based upon procedure prescribed under SOP. It is not the case of the petitioner that ACR for the last one year was assessed by the DPC while conducing DPC proceedings for promotion to the post of PGT, rather ACRs of last five years of both the candidates i.e. petitioner and respondent No.4 came to be evaluated by the DPC, who after having found respondent No.4 on better footing recommended her for promotion. Since at no point of time, challenge, if any, qua the action of the respondents inasmuch non-communication of adverse entry came to be laid in the competent court of law, no benefit on account of aforesaid omission, if any, on the part of the respondents, can be granted to the petitioner, who otherwise has approached this Court after having failed in selection process. Since factum with regard to non-communication of adverse entries for the last five years was very much in

the knowledge of the petitioner before her having participated in the selection process, she instead of participating in the selection process could represent authorities for communication of adverse entries, so that authorities could decide her representation, if any, before her having participated in the selection process.

10. Having carefully perused the minutes of DPC placed on record, this Court finds no illegality in the same and as such, same are upheld. The present petition fails and same is dismissed accordingly. Pending applications, if any, stand disposed of.

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

Between:

BHUPINDER PAL SON OF SHRI PARAM DEV, R/O VILLAGE DRUBAL, PO KOT, (TUNGAL) KOTLI, DISTRICT MANDI, H.P. PRESENTLY WORKING AS ASI IN IRB PANDOH, DISTRICT MANDI, H.P.

....PETITIONER

(BY MR. ONKAR JAIRATH ADVOCATE WITH MR. MR. PRASHANT SHARMA AND MR. AJEET SHARMA, ADVOCATES)

AND

1. STATE OF H.P. THROUGH SECRETARY(HOME) GOVT. OF H.P. SHIMLA-2.
2. THE DIRECTOR GENERAL OF POLICE, SHIMLA, H.P.
3. INSPECTOR GENERAL, CENTRAL RANGE MANDI, DISTRICT MANDI, H.P.
4. SUPERINTENDENT OF POLICE, KULLU, DISTRICT KULLU, H.P.

….RESPONDENTS

(MR. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.2887 of 2019
Decided on:17.06.2022

Constitution of India, 1950- Article 227- Departmental promotion in the Police Department- Petitioner acquitted in the case under Prevention of Corruption Act and was considered for promotion as Sub-Inspector but his fresh departmental inquiry was ordered- Petitioner sought to quash the order for fresh departmental inquiry and expunge adverse remarks in ACR entered due to Court case- Held- Mere use of expression in judgment that prosecution has been not able to prove complicity of petitioner beyond reasonable doubt cannot be construed acquittal of the petitioner on technical grounds- Acquittal held to be honourable acquittal- Adverse entry relating to specific incidents should ordinarily not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident- Petition allowed. (Para 16, 25, 26)

Cases referred:

Davinder Singh vs State of Haryana and others, 2011(4) SLR 211;
S.Bhaskar Reddy and another vs Superintendent of Police, and another (2015)2 SCC 365;
State of Gujarat and another vs Suryakant Chunilal Shah (1999)1 SCC 529;
Union of India and others vs. E. G. Namburdiri A.I.R. 1991 S.C. 1216;

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

O R D E R

In the year 1983, petitioner was initially appointed as constable with the respondent-Department and was promoted to the post of A.S.I. on 14.07.2000. While he was posted as ASI in the office of Superintendent of Police, Kullu, FIR was lodged on 13.6.2005 against a foreigner namely, Kozi Tateno (Japanese) and the petitioner under Section 13(2) of the Prevention of

Corruption Act and Sections 201, 212, 217 and 120-B of IPC. Department after having placed the petitioner under suspension on 13.06.2005 initiated departmental inquiry. Inquiry Officer submitted the report stating therein that since the criminal case has been registered against the petitioner, he should not be proceeded departmentally on the same set of charges. Aforesaid report of inquiry was accepted by the Commandant, 1st Indian Reserve Battalion, Mangarh, District Una on 29.1.2007 vide Annexure P-2. Subsequently, petitioner was acquitted in corruption case vide judgment dated 22.08.2008/23.08.2008 passed by learned Special Judge, Kullu, District Kullu, H.P.(Annexure P-1). After acquittal of the petitioner in criminal proceedings, departmental inquiry was initiated on 16.6.2005 against the petitioner on the same set of charges. Interestingly, respondent No.3 after hounourable acquittal of petitioner in criminal proceedings, again directed respondent No.4 on 30.11.2009 to hold fact findings inquiry that in what manner pass port was handed over to Kozi Tateno. The fact finding inquiry was conducted by Superintendent of Police, Kullu, who submitted his report on 21.1.2010. On the basis of the report of fact finding inquiry, fresh inquiry was ordered to be instituted against the petitioner on 9.4.2010. However, same was withdrawn on 4.5.2010 and thereafter again fresh inquiry was instituted against the petitioner on 3.6.2010. However, petitioner was again absolved by the inquiry officer on 6.6.2011. The Departmental Promotion Committee met on 28.10.2011, wherein name of the petitioner was recommended for promotion to the post of Sub Inspector, however, when the matter went for approval of the recommendations of the Departmental Promotion Committee, respondent No.2 instead of approving the same, instituted fresh inquiry to be conducted by the Deputy Superintendent of Police (Headquarters) Kullu, District Kullu, H.P.

2. Being aggrieved and dissatisfied with the aforesaid action of respondent No.2, petitioner herein filed writ petition bearing Civil Writ Petition No.1145 of 2012-E, praying therein for following reliefs:

> "i). ***That the impugned order dated 22.2.2012 contained in Annexure P-13 vide which the respondent No.2 has ordered for fresh departmental inquiry may kindly be quashed and set-aside.***
>
> ***ii). That the respondents may be directed to expunge the adverse entry in ACR which was entered due to court case in the year 2006 as the petitioner has now been acquitted form the charges by the competent court of law as well as by the departmental inquiry.***
>
> ***iii) That the respondents may be directed to grant the all service benefits which has wrongly been withheld by the respondents due to the court case."***

3. This Court vide judgment dated 7.5.2013 quashed and set-aside the order of fresh inquiry issued by respondent No.2 and directed the respondents to accord the necessary approval to the recommendations of the Departmental Promotion Committee held on 28.10.2011 to promote the petitioner to the post of Sub Inspector from due date with all the consequential benefits. In terms of aforesaid judgment rendered by this Court petitioner though was promoted to the post of Sub Inspector, but with effect from 22.5.2010, whereas he was entitled to such promotion from 17.7.2008 i.e. when he was honourably acquitted in the criminal proceedings initiated against him.

4. On inquiry, it transpired that petitioner has not been given promotion with effect from 17.7.2008 on account of adverse entry in the ACR for the period of 2005-06, wherein it stands recorded that "*one criminal case is registered against the petitioner*". Being aggrieved and dissatisfied with the action of the respondents in as much as petitioner was not given promotion from due date, he filed representation to Director General of Police, Himachal Pradesh (Annexure P-9), praying therein to expunge adverse remarks made in his ACR pertaining to the year 2005-06 on account of his hounourable acquittal in the criminal case. However, aforesaid representation of him was rejected vide order dated 11.8.2010 (Annexure P-10) on the ground that the petitioner was acquitted because the prosecution could not prove the case against him beyond reasonable doubt. Apart from above, authority while passing order dated 11.8.2010, also recorded in the order that the then Superintendent of Police, Kullu had made adverse comments against the petitioner in his ACR on the basis of his personal knowledge leading to registration of case against the petitioner and stands by these comments even after the acquittal of the officer in the corruption case registered against him.

5. Being aggrieved and dissatisfied with the aforesaid order dated 11.8.2010 (Annexure P-10), petitioner approached this Court in the instant proceedings, praying therein for following reliefs:-

"i) **That the respondents may be directed to expunge the adverse entry in ACR which was entered due to court case in the year 2006 as the petitioner has now been acquitted from the charges by the competent court of law as the said order has attained the finality.**

ii) That the petitioner may be confirmed from 1.12.2005 when his juniors were confirmed.

iii) That the respondents may further be directed to comply with the order dated 7.5.2013 and promote the petitioner from the date when his juniors were promoted.

iv) That the respondents may be directed to grant all the consequential benefits including the seniority from the date of confirmation i.e.1.12.2005.

v) That Annexure P-8 and P-10 may kindly be quashed and set-aside."

6. It is pertinent to take note of the fact that prior to filing of the petition at hand, petitioner had filed CWP No.3304 of 2010 in this Court, laying therein challenge to order dated 3.6.2010 vide which, the respondents again initiated departmental inquiry after acquittal of the petitioner in criminal case. In the aforesaid case, petitioner besides seeking quashment of order dated 3.6.2010, also prayed that respondents be directed to expunge the adverse entry in ACR, which was entered due to court case in the year 2006. However, this Court having taken note of letter dated 14.6.2011, placed on record by learned counsel for the petitioner, wherein it stood recorded that the petitioner stands absolved of the charges framed against him in the disciplinary proceedings, closed the proceedings and ordered that consequences to ensue.

7. However, as has been taken note hereinabove, that though petitioner was acquitted in criminal as well as departmental proceedings, but yet he was denied promotion to the post Sub Inspector from due date i.e. 17.7.2008 on account of adverse entry in his ACR pertaining to the year 2005-06. Since representation having been filed by petitioner for expungement of adverse entries in the ACR for the year 2005-06, stands dismissed vide order dated 11.8.2010 (Annexure P-10), he is compelled to approach this Court in

the instant proceedings, praying therein for the reliefs, as have been reproduced hereinabove.

8. Reply to the petition stands filed on behalf of the respondents, wherein facts, as have been notice hereinabove, have not been disputed. However, in para-9 of the reply, respondents have submitted that in compliance of judgment /order dated 7.5.2013 the petitioner has been approved for promotion to the rank of Sub Inspector with effect from 22.5.2010. Respondents have further averred in the reply that plea of the petitioner that he was entitled for promotion w.e.f.17.7.2008 is incorrect because his ACR for the year 2005-06 was adverse and the impact of adverse ACR remained up to September, 2009. It has been stated in the reply that Deputy Inspector General of Police, Central Range Mandi, while deciding the representation of the petitioner, observed that the then Superintendent of Police, Kullu had made adverse comments against the petitioner in his ACR on the basis of his personal knowledge about the work performance leading to registration of case against the petitioner and these comments stand even after acquittal of the officer in the corruption case registered against him.

9. Having heard learned counsel representing the parties and perused the pleadings adduced on record by the respective parties, this Court finds that there is no dispute that in column No. 16 of the form of confidential report pertaining to the period 1.4.2005 to 1.2.2006, there is an adverse entry (Annexure P-7), which reads as under:-

> ***"Charged with corruption in a criminal case & departmentally."***

10. Apart from above, Superintendent of Police has also given remarks to the following effect that "***he was accused of corruption and in my own personal capacity I do not have a good opinion of him***". It is not in dispute that aforesaid entry with regard to corruption case as recorded in column No.16 of the form of confidential report (Annexure P-7) is based upon

registration of corruption case against the petitioner i.e. FIR lodged against him as well as foreigner namely Kozi Tateno on 13.6.2005, wherein he was charged under Section 13(2) of the Prevention of Corruption Act and Section 201,212, 213 and 120-B of IPC.

11. Careful perusal of judgment dated 22/23.8.2008 passed by learned Special Judge, Kullu, District Kullu, H.P.,(Annexure P-1) reveals that petitioner was acquitted of the charges framed against him under Sections 201,212, 217 and 120-B of IPC and Section 13(2) of the Prevention of Corruption Act. Though, repeatedly attempt was made by the respondent-department to initiate disciplinary proceedings on the same allegations as were part of FIR, but nothing ever came to be proved against the petitioner even in departmental proceedings and as such, he was acquitted in both the criminal as well as disciplinary proceedings. Similarly, it is not in dispute that meeting of Departmental Promotion Committee was held on 28.10.2011 for promotion to the post of Sub Inspector and the name of petitioner was also recommended for promotion. Though, petitioner was recommended for promotion, but recommendation of Departmental Promotion Committee were not approved by respondent No.2, rather he instituted fresh inquiry, which subsequently came to be quashed and set-aside by this Court vide judgment dated 7.5.2013 passed in CWP No.1145 of 2012-E, as a consequence of which, recommendation of Departmental Promotion Committee held on 28.10.2011 subsequently came to be approved. But since petitioner was not promoted from due date i.e. 17.07.2008, he inquired the matter and found that he has been not given promotion from due date i.e. 17.7.2008 for the reasons that there is adverse entry in his ACR pertaining to the year 2005-06. Since petitioner was honourably acquitted in both the criminal as well as departmental proceedings, he made representation to the competent authority, praying therein to expunge adverse entry. However, as has been

taken note hereinabove, aforesaid prayer made on behalf of the petitioner was rejected for the reason, as has been noticed hereinabove.

12. In the aforesaid backdrop, there appears to be merit in the contention of learned counsel for the petitioner that once petitioner was honourably acquitted in departmental as well as criminal proceedings, entry with regard to registration of corruption case recorded in the ACR pertaining to the year 2005-06 ought to have been expunged.

13. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while justifying the action of the respondents in rejecting the representation, vehemently argued that apart from recording factum with regard to registration of corruption case the then Superintendent of Police, Kullu has also recorded in the ACR that as per his personal knowledge petitioner was accused of corruption and he has not good opinion of him and as such, his acquittal in criminal proceedings is of no consequence because that entry still stare at him. Mr. Bhatnagar further submitted that otherwise also relief sought in the instant petition is hit by principal of constructive res-judicata. He stated that before filing petition at hand, petitioner had approached this Court by way of CWP No.3304 of 2010, praying therein for issuance of direction to the respondents to expunge the adverse entry in the ACR for the year 2005-06 but such plea of him was not accepted.

14. However, in the totality of facts and circumstances, as detailed hereinabove, this Court finds no merit in the afore submission of learned Additional Advocate General for the reasons that though petitioner in his earlier writ petition No.3304 of 2010 had prayed for issuance of direction to the respondents to expunge adverse entry in the ACR pertaining to the year 2005-2006, but before such plea of him could be decided by the Court below on its own merit, aforesaid writ petition filed by the petitioner came to be closed vide judgment dated 3.11.2011, perusal whereof reveals that this Court having taken note of the fact that petitioner has been absolved of the charges

against him in the disciplinary proceedings closed the petition, but definitely at no point of time returned findings, if any, with regard to second relief made in the petition i.e. direction to expunge the adverse entry. Had court returned any finding qua aforesaid plea/relief prayer/sought by the petitioner, this court would have permitted the respondents to raise plea of res-judicata

15. At this stage, Mr. Sudhir Bhatnagar, learned Additional Advocate General further argued that at no point of time petitioner ever came to be acquitted honourably, rather his acquittal is on technical ground and as such, benefit, if any, otherwise cannot be availed of judgment of acquittal recorded in his favour. However, having carefully perused the judgment dated 22.08.2008 (Annexure P-1) passed by learned Special Judge, Kullu, this Court sees no reason to be persuaded by aforesaid submission made by learned Additional Advocate General because if judgment is read in its entirety, it clearly suggests that prosecution was unable to prove that petitioner indulged in corrupt practice while unauthorizedly releasing pass port in favour of foreign national during pendency of criminal case against him and he made an attempt to destroy the evidence.

16. Mere use of expression by learned trial Court in para-29 of the judgment that prosecution has been not able to prove complicity of petitioner beyond reasonable doubt cannot be construed acquittal of the petitioner on technical grounds. Otherwise, in para-31, Special judge has acquitted the accused of the charges under Sections 201, 212, 213, 120-B IPC and Section 13(2) of the Prevention of Corruption Act. Till the time there is nothing to show that acquittal of the petitioner came to be recorded on technical grounds, acquittal recorded in his favour is necessarily required to be held as a hounourable acquittal, as a consequence of which, any entry recorded in the ACR with regard to registration of criminal case requires to be expunged. As has been taken note hereinabove, in the ACR pertaining to the year 2005-06, it has been recorded in column No.16 that "**charged with corruption in a**

criminal case and departmentally". With the acquittal of the petitioner in criminal and departmental proceedings aforesaid entry made in column No.16 of the ACR pertaining to the period from 1.4.2005 to 1.2.2006 is not sustainable.

17. Expression 'hounourable' acquittal has been not defined anywhere, but such expression came to be discussed and reported in the judgment passed by Hon'ble Apex Court in ***S.Bhaskar Reddy and another versus Superintendent of Police, and another*** (2015)2 Supreme Court Cases 365, wherein it has been held that if Court below has recorded the finding of fact on proper appreciation and evaluation of evidence on record and has held that the charges framed in the criminal case are not proved against the accused, it shall be deemed to be hounourable acquittal. In the aforesaid judgment Hon'ble Apex Court has held that it is difficult to define precisely what is meant by the expression "honorably 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. It would be profitable to take note of paras No.21 to 23 and 26 herein- below:-

> "21. It is an undisputed fact that the charges in the criminal case and the Disciplinary proceedings conducted against the appellants by the first respondent are similar. The appellants have faced the criminal trial before the Sessions Judge, Chittoor on the charge of murder and other offences of IPC and SC/ST (POA) Act. Our attention was drawn to the said judgment which is produced at Exh. P-7, to evidence the fact that the charges in both the proceedings of the criminal case and the Disciplinary proceeding are similar. From perusal of the charge sheet issued in the disciplinary proceedings and the enquiry report submitted by the Enquiry Officer and the judgment in the criminal case, it is clear that they are almost similar and one and the same. In the criminal trial, the appellants have been acquitted honourably for want of evidence on record. The trial judge has categorically recorded the finding

of fact on proper appreciation and evaluation of evidence on record and held that the charges framed in the criminal case are not proved against the appellants and therefore they have been honourably acquitted for the offences punishable under 3 (1) (x) of SC/ST (POA) Act and under Sections 307 and 302 read with Section 34 of the IPC. The law declared by this Court with regard to honourable acquittal of an accused for criminal offences means that they are acquitted for want of evidence to prove the charges.

22. The meaning of the expression "honourable acquittal" was discussed by this Court in detail in the case of Deputy Inspector General of Police & Anr. v. S. Samuthiram[3], the relevant para from the said case reads as under :-

> "24. The meaning of the expression "honourable acquittal" came up for consideration before this Court in RBI v. Bhopal Singh Panchal. 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."
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> (Emphasis laid by this Court)

After examining the principles laid down in the above said case, the same was reiterated by this Court in a recent decision in the case of Joginder Singh v. Union Territory of Chandigarh & Ors. in Civil Appeal No. 2325 Of 2009 (decided on November 11, 2014.

23. Further, in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Anr. (supra) this Court has held as under:-

"34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, "the raid conducted at the appellant's residence and recovery of incriminating articles there from". The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.

35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

24. (emphasis laid by this Court) Further, in the case of G.M. Tank v. State of Gujarat and Ors.(supra) this Court held as under:-

26. We have answered the alternative legal contention urged on behalf of the appellants by accepting the judgment and order of the Sessions Judge, in which case they have been acquitted honourably from the charges which are more or less similar to the charges levelled against the appellants in the Disciplinary proceedings by applying the decisions of this Court referred to supra. Therefore, we have to set aside the orders of dismissal passed against the appellants by accepting the alternative legal

> plea as urged above having regard to the facts and circumstances of the case."

18. Though, the personal opinion recorded by Superintendent of Police in remarks column is of no consequence, but even otherwise same is based upon the fact that accused was charged with the corruption case as has been recorded in the remarks column. Otherwise also, approach adopted by the authorities against the petitioner while deciding his representation is not free from bias because no cogent and convincing reasoning has been assigned for not accepting the prayer made on behalf of the petitioner, rather by stating that the then Superintendent of Police had personal knowledge with regard to conduct of the petitioner, efforts has been made to defeat the rightful claim of the petitioner, to which he has become entitled after his being honourably acquitted in criminal case vide judgment dated 22.8.2008.

19. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in **State of Gujarat and another** versus **Suryakant Chunilal Shah** (1999)1 Supreme Court Cases 529, wherein it has been held as under:-

> "27. The whole exercise described above would, therefor, indicate that although there was no material on the basis of which a reasonable opinion could be formed that the respondent had outlived his utility as a Govt. Servant or that he had lost his efficiency and had become a dead wood, he was compulsorily retired merely because of his involvement in two criminal case pertaining to the grant of permits in favour of take and bogus institutions. The involvement of a person in a criminal case does not mean that he is guilty. He is still to be tried in a court of law and the truth has to be found out ultimately by the court where the prosecution is ultimately conducted. But before that stage is reached, it would be highly improper to deprive a person of his livelihood merely on the basis of his involvement. We may, however, hasten to add that mere involvement in a criminal case would constitute relevant material for compulsory retirement or not would

depend upon the circumstances of each case and the nature of offence allegedly committed by the employee.

28. There being no material before the Review Committee, in as much as there were no adverse remarks in the character roll entries, the integrity was not doubted at any time, the character roll entries subsequent to the respondent's promotion to the post of Asstt. Food Controller (Class II) were not available, it could not come to the conclusion that the respondent was a man of doubtful integrity nor could have anyone else come to the conclusion that the respondent was a fit person to be retired compulsorily from service. The order, in the circumstances of the case, was punitive having been passed for the collateral purpose of his immediate removal, rather than in public interest. The Division Bench, in our opinion, was justified in setting aside the order passed by the Single Judge and directing reinstatement of the respondent."

20. Division Bench of Punjab and Haryana High Court in C. W. P. No. 15070 of 1993 – **Des Raj vs. State of Haryana and others**, decided on 28.11.1994, quashed the adverse entry pertaining to doubtful integrity in the ACR of the petitioner therein, on the ground that no reasons had been recorded nor any material produced before the Court to justify the recording of the adverse entry regarding doubtful integrity, by holding as under :-

> ".....In the present case, the respondents have completely failed to produce any material before the Court to justify the adverse remarks made by respondent no. 4 regarding the integrity of the petitioner. The respondents have not produced any written complaint or record indicating that oral complaints were received against the honesty and integrity of the petitioner and he had made a record of the same in some file of the department. In this fact situation, it has to be held that the adverse report regarding integrity has been made by respondent no. 4 without any basis and, therefore, his action will have to be held as arbitrary and unreasonable apart from being unfair."

21. Similarly, in C. W. P. No. 11695 of 1993 – **D. N. Dalal** vs. The **State of Haryana etc**., decided on 30.11.1994, while relying on the same circulars, as quoted above, it was held by a Division Bench of this Court as under :-

> "A perusal of the above quoted extracts of the circulars shows that while recognising the importance of the entries made in the annual confidential reports in general and remarks relating to honesty and integrity of the officials in particular, the Government has made it obligatory for the concerned officers to be careful while recording adverse remarks relating to integrity. The Government has emphasised that the reporting officer should fortify with reasons his remarks relating to integrity of an official. It has been further emphasised that non-committal remarks or baseless remarks should not be made by the reporting officers. The Government has gone to the extent of observing that truth about the subordinates should be known to the reporting officers and should be brought to the notice of the higher authorities. We may observe that though the instructions issued by the Government do not have the force of law, the administrative authorities subordinate to the Government as also the Government are bound to act in accordance with these instructions. A minor deviation from the procedural aspect of the instructions may not by itself be sufficient to vitiate the adverse remarks, but a whole sale or wanton breach of the instructions may lead to an inference that the remarks have been made without application of mind or the same are baseless. It may also indicate arbitrariness and casualness in the approach of the reporting/reviewing officer. It cannot be over emphasised that the column regarding integrity is most vital both to the Government servant as well as the public service. It is well recognised that the integrity of a public servant is as important as his efficiency. A dishonest public servant or one whose integrity is doubtful may cause greater injury to the public interest than an inefficient public servant. Adverse remarks regarding integrity ordinarily constitute sufficient material for superseding a senior official at the time of promotion, for

withholding of the efficiency bar and can be used for retirement before superannuation. Therefore, it is imperative that the column regarding integrity is filled with greatest care and caution. If the adverse remarks regarding integrity are found casual, perfunctory or cryptic or where it is found that the adverse entries have been made for extraneous considerations or there is non application of mind, the Court will have to scrutinise the challenge to such remarks with greater seriousness.

xx xx xx xx xx xx .....

..... Though entries in the annual confidential reports are made by a competent officer on the basis of subjective satisfaction, such subjective satisfaction has to be arrived at after an objective assessment of the material available with the reporting officer or reviewing officer. As and when adverse remarks are challenged in a Court of law, it becomes an onerous duty of the respondents to place before the Court full material which is available with them in justification of the adverse remarks. In ***Union of India and others vs. E. G. Namburdiri A.I.R***. 1991 S.C. 1216, the Supreme Court has held that even though a decision on representation against the adverse remarks need not contain reasons, the administrative authority is not at liberty to pass orders without there being any reason for the same. In the present case the respondents have completely failed to produce any material before the Court to justify the adverse remarks made by respondent No. 3 regarding the integrity of the petitioner. The respondents have not produced any written complaint or record indicating that oral complaints were received against the honesty and integrity of the petitioner or that respondent No. 3 had received any other information casting doubt on the integrity of the petitioner and he had made a record of the same in some file of the department. In this fact situation it has to be held that the adverse report regarding integrity has been made by respondent No. 3 without any basis and, therefore, his action has to be held as arbitrary and unreasonable apart from being unfair."

22. At this stage, learned Additional Advocate General has placed reliance upon the judgment rendered by Hon'ble Punjab and Haryana High Court in case titled **Davinder Singh** versus **State of Haryana and others**, 2011(4) SLR 211, to state that entry in the Annual Confidential report with regard to the doubtful integrity need not be supported by any accompanying record or detailed reasons and such an entry can be based on personal knowledge of the Reporting/Reviewing Officer. The relevant paras No. 11 to 13 of the aforesaid judgment are as under:-

> "11. Apart from the view of the Letters Patent Bench and the Division Bench, Hon'ble the Supreme Court in the case of State of State of U.P. v. Yamuna Shanker Misra v. Yamuna Shanker Misra, (1997) 4 SCC 7, has categorically laid down that the entry in the Annual Confidential Report with regard to the doubtful integrity need not be supported by any accompanying record or detailed reasons and such an entry can be based on personal knowledge of the Reporting/Reviewing Officer. It is, thus, established that the view taken by the learned Single Judge suffers from inherent malady of imposing restriction on the Reporting Officer for recording integrity doubtful entry. It is trite to mention that in a large number of cases there is lack of proof and material to reach a conclusion that the integrity of the employee is doubtful. More than often it is seen that the interest of the State are marginalised at the instance of a beneficiary of an illegal act which is facilitated by the public servant on extraneous consideration including acceptance of illegal gratification from the public and no one comes forward because there are no adversary to the public servant and the person who has obtained undue favour by paying illegal gratification. If a magistrate acquits an accused on extraneous consideration who would come forward. The accused would be happy. The State represented by a Public Prosecutor would feel helpless. However, the Reporting Officer during the reporting period keep on hearing such illegal activities of the public servant and on the basis of his subjective satisfaction he may have to reach an extreme conclusion that the public servant is indulging in corruption. In fact, this is the precise reason that expression 'doubtful' has been added with the expression 'integrity'. Had it been the case that there is material to impeach the integrity of

the officer then a full-fledged departmental inquiry or criminal action could be initiated and the result in such cases would be dismissal of the employee not simple pre-mature retirement which earns him all retiral benefits. For the aforesaid view we place reliance on the observation of the Division Bench of this Court in the case of Puran Singh Puran Singh v. State of Punjab v. State of Punjab, 1981 (1) SLR 338. The nature, substance, purpose and scope of AC 338 R is fundamentally different than the departmental inquiry. Speaking for a Division Bench of this Court, Chief Justice S.S. Sandhawalia made following learned observations:

> "Whilst the former is specifically for the internal assessment or estimate of the performance of a public servant by his superiors over the period of one year, the latter is intrinsically intended as the foundation for taking a punitive action against him if the charges come to be proved. The very nature and purpose of the two are consequently distinct and separate and to confuse them as either identical or similar, would to my mind be patently erroneous. An annual confidential report is in essence subjective and administrative whilst a departmental enquiry is inevitably objective and quasi judicial."

12. Therefore to insist on material, objectivity and reasons for recording 'integrity doubtful entry' is not within the legal parameters. Hence, the view taken by the learned Single Judge would not be sustainable.

13. Coming back to the reasoning adopted by the learned Single Judge, it has been held that the basis for adverse remarks has come to an end because the writ petitioner ASI Davinder Singh was not even arrayed as an accused in Criminal Case No. 143-1/08, filed in pursuance to FIR No. 4, dated 3.1.2007, although he was initially involved in the same. The learned Single Judge further felt that he was also exonerated in the departmental inquiry and, therefore, the basis for adverse remarks has come to an end. It has also been pointed out that the order rejecting the representation made by the writ petitioner was non-speaking and cryptic and counseling has been suggested after awarding the punishment. The learned Single Judge opines that there was no material before the reporting authority for recording an entry of integrity doubtful, which was requirement of instructions dated 12.12.1985."

23. Subsequently aforesaid judgment came to be distinguished by Hon'ble High Court of Punjab and Haryana in case titled **Sunil Dutt vs. The State of Haryana and others** passed in LPA No.224 of 2012, decided on 12.10.2012,wherein it has been held as under:

> "Insofar the judgment relied upon by the learned State counsel in **Davinder Singh's case (supra)** is concerned, in that case, Davinder Singh was appointed as a Constable in Haryana Police. The said official was conveyed adverse remarks in which his honesty was recorded as "doubtful". His representation was rejected on 29.05.2008 which order was challenged by him by way of writ petition but during the pendency of the writ petition, a show cause notice was served upon him proposing to retire him compulsorily in public interest which was put into effect, as a result of which the said official challenged the order of compulsory retirement by way of separate writ petition. He had submitted that one FIR No.4 dated 03.01.2007 was registered against him under Sections 344, 383 and 34 IPC at Police Station GRP, Hisar but in the final report, he was not named as an accused nor summoned by the Court and the Chief Judicial Magistrate, Bhiwani, acquitted him on 06.12.2008 in the said case and in the departmental inquiry also, he was eventually conveyed with the punishment of Censure on 16.07.2008. In the said case, grievance of the said official was that the adverse remarks were recorded in violation of Government instructions dated 12.12.1985 which requires that if adverse remarks of `doubtful integrity' are to be recorded then the reporting officer must clearly state that the officer is suspected of corruption or is believed to be corrupt. This opinion should also be supported by reasons by the reporting officer. The learned Single Judge agreed to the contention of the said official by placing reliance on instructions dated 12.12.1985 which requires recording of reasons in support of an entry concerning doubtful integrity, but the Division Bench found the view of the learned Single Judge unsustainable holding that to insist on material, objectivity and reasons for recording 'integrity doubtful entry' is not within the legal parameters.
>
> As a matter of fact, the judgment relied upon by the learned State counsel in Davinder Singh's case (supra) is not applicable to the facts

and circumstances of the present case in which reasons have been disclosed by the reporting officer in his order dated 09.09.2008 in which he has specifically said that because of the registration of criminal case against the appellant on account of accepting bribe he has been found to be dishonest and below average. Thus, all the remarks in the annual confidential report for the period 01.04.2006 to 31.03.2007 have originated from the registration of the criminal case under the P.C. Act in which the appellant has been honourably acquitted and has been exonerated for the said charge in the departmental inquiry. Thus, in our considered opinion, the judgment relied upon by learned counsel for the appellant in ***Randhir Singh, ASI's*** case (supra) is fully applicable instead of the judgment relied upon by the learned State counsel in **Davinder Singh's case (supra**)."

24. At this juncture, this Court deems it fit to take note of para para 19.18.3 of Handbook on personnel matters Vol-II, which reads as under:-

"19.18.3 **Adverse entries relating to a specific incident**.

A question has been raised wither an adverse entry relating to a specific incident can be made in a Government servant's confidential report without giving him an opportunity of showing cause against him especially when his work and conduct during the year or the period under report have otherwise been found to be satisfactory. The conclusions reached in this connected are as under:-

i) Adverse entries relating to specific incidents should ordinarly not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident.

ii) Even if the reporting officer feels that although the matter is not important enough to call for departmental proceedings it is important enough to be mentioned specifically in the confidential report of the officer concerned, he should, before making such an entry, satisfy himself that his won conclusion has been arrived at only after a reasonable opportunity has been given to the officer

reported on to present his case relating to the incident.

iii) Confidential reports should, as a rule give a general appreciation of the character, conduct and qualities of the officer reported on and reference to specific incidents should be made, if at all, only by way of illustration to support adverse comments of such a general nature, e.g. inefficiency, delay, lack of initiative or judgment etc."

25. Careful perusal of aforesaid provision clearly reveals that adverse entry relating to specific incidents should ordinarly not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident. Since in the case at hand though at first instance there is/was no requirement, if any, for Reporting Officer to take note of registration of corruption case in the ACR being solitary incident but even if same was recorded, same cannot be allowed to sustain for the fact that no punishment ever came to be awarded to the petitioner in criminal as well as in departmental proceedings.

26. Consequently, in view of the detailed discussion made hereinabove, this court finds merit in the present petition and accordingly same is allowed and order dated 11.08.2010 (Annexure P-10) is quashed set aside and adverse entries recorded in column No.16 and the remarks column in the ACR pertaining to the year 2005-06, are expunged. Consequences to follow. Pending application(s), if also, stands disposed of.

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

Between:

MS. POOJA KAUSHAL, D/O SHRI MAHENDER SINGH, RESIDENT OF VILLAGE & POST OFFICE KATOHAR KALAN, TEHSIL AMB, DISTRICT UNA,(H.P.)

....PETITIONER

(BY MR. BHUVNESH SHARMA AND MR.
RAMAKANT SHARMA, ADVOCATES)

AND

H.P. STAFF SELECTION COMMISSION, HAMIRPUR, DISTRICT HAMIRPUR (H.P) THROUGH IS SECRETARY.

....RESPONDENT

(MR. ANGREZ KAPOOR, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.6280 of 2020
Decided on: 31.05.2022

Constitution of India, 1950- Article 227- Post of Pharmacist (Allopathy) OBC category- Petitioner though opted to apply online as OBC category but since portal did not show the option of OBC category, she applied against general category- Petitioner sought to change her category from general to OBC- Held- Category once claimed cannot be allowed to be changed subsequently- Petition dismissed. (Para 5)

Cases referred:

J & K Public Service Commission vs Israr Ahmad and others, (2005)12 SCC 498;

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

O R D E R

Vide advertisement No.33-2/2017, respondent-Commission advertised various posts including the post of Pharmacist (Allopathy) bearing Code No.586 *(Annexure A-5),* petitioner being fully eligible for the post of Pharmacist (Allopathy) though intended to apply online as OBC category candidate, but since portal did not show the option of OBC category, she applied against the general category. Respondent-Commission after having

found petitioner eligible to participate in selection process, issued her admit card vide Annexure A-6 and assigned Roll No.586006120. The petitioner was declared qualified in written test and as such, was called for interview. On 29.12.2018, during interview petitioner claimed that she belongs to OBC category, but was compelled to apply under general category as on that day portal did not show OBC category. Respondent-Commission rejected aforesaid prayer made on behalf of the petitioner on the ground that once category opted cannot be changed subsequently that too after participation in written examination.

2. Being aggrieved and dissatisfied with the aforesaid decision of the respondent-Commission, petitioner filed representation, but same was rejected by the respondent vide letter dated 9.1.2019 (*Annexure* A-8) intimating therein that request of petitioner for change of her category from General un-reserved to OBC(UR) vide letter dated 29.12.2008 has not been accepted by the Commission as no change of category is allowed after submission of application for the post as per the terms and conditions of the advertisement. Petitioner was unable to secure place in merit list of general category (UR) and as such, after being rejected, she approached erstwhile H.P. State Administrative Tribunal by way of Original Application 340 of 2019, which now on account of abolishment of erstwhile H.P. Administrative Tribunal, came to be transferred to this Court and stands re-registered as CWPOA No.6280 of 2020, praying therein for following reliefs:-

> "i) ***That the letter, dated 9.1.2019, Annexure A-8, of rejection of the representation of the applicant for correction of her category from general category to OBC category for recruitment to the post of Pharmacist (Allopathic), may kindly be quashed and set aside, in the interest of justice.***
>
> ***ii) That the respondent Commission further be directed to consider the candidature of the***

applicant for recruitment to the post of Pharmacist (Allopathic) against OBC category for making recruitment as per advertisement at Annexure A-5."

3. Reply to the petition stands filed on behalf of the respondent, wherein it has been categorically stated that petitioner applied for the post in question as a general unreserved candidate. It is also stated in the reply that petitioner appeared in written examination under general unreserved category and at no point of time after submission of application form, she made request to change her category, but request for first time to change category came to be made on behalf of the petitioner at the time of interview, wherein admittedly she appeared as general unreserved candidate. Respondent-Commission while denying the claim of the petitioner that portal of the replying respondent was not showing the option of OBC category has specifically stated that 720 other candidates of OBC category filled up the form using the same portal.

4. Having heard learned counsel representing the parties and perused the material available on record, this court finds no merit in the present petition. It is quite apparent from the pleadings adduced on record by the respective parties that petitioner herself applied against the post in question under general unreserved category. It is also not in dispute that petitioner participated in the written test as general unreserved category. It is only at the time of interview she claimed that she belongs to OBC category, but since she had herself filled up form of the general unreserved category, she rightly came to be considered in that category.

5. By now it is well settled that category once claimed cannot be allowed to be changed subsequently. Though, in the instant case petitioner has claimed that on the date when she filled up the form, portal was not showing the option of OBC category, but such stand of her stands falsified

with the reply filed by the respondent, wherein it has been categorically stated that 720 other candidates belonging to OBC category filled up online form from the same portal from which the petitioner had filled up her form. Otherwise, it is not understood that in case petitioner was unable to apply online as OBC category, what prevented her to approach respondent commission immediately intimating therein that portal is not showing the option of OBC category. But interestingly in the case at hand she applied under general unreserved category and thereafter participated in the written exam also. Once, she participated in the written exam as general unreserved category, she is estopped at this stage to claim that respondent commission ought to have considered her in the category of OBC unreserved.

6. The Hon'ble Apex Court in **J & K Public Service Commission** versus **Israr Ahmad and others**, (2005)12 Supreme Court Cases 498, has category held that category once claimed cannot be changed and each direct recruitment is to be regulated by the terms of the advertisement. It would be profitable to reproduce para No.5 of the aforesaid judgment herein:-

> ***"5.We have considered the rival contentions advanced by both the parties. The contention of the first respondent cannot be accepted as he has not applied for selection as a candidate entitled to get reservation. He did not produce any certificate along with his application. The fact that he has not availed of the benefit for the preliminary examination itself is sufficient to treat him as a candidate not entitled to get reservation. He passed the preliminary examination as a general candidate and at the subsequent stage of the main examination he cannot avail of reservation on the ground that he was successful in getting the required certificate only at a later stage. The nature and status of the candidate who was applying for the selection could only be treated alike and***

once a candidate has chosen to opt for the category to which he is entitled, he cannot later change the status and make fresh claim. The Division Bench was not correct in holding that as a candidate he had also had the qualification and the production of the certificate at a later stage would make him entitled to seek reservation. Therefore, we set aside the judgment of the Division Bench and allow the appeal. No costs."

7. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds no merit in the present petition and accordingly, same is dismissed alongwith pending applications, if any.

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

Between:-

AJAY GROVER
S/O LATE SH. MANOHAR LAL GROVER,
R/O HOUSE NO.5857,
DUPLEX MODERN HOUSING COMPLEX,
PHASE III, MANIMAJARA,
CHANDIGARH, 161001,
AGED ABOUT 57 YEARS.

……PETITIONER

(BY MR. N.S.CHANDEL, SENIOR ADVOCATE WITH MR. LOVNEESH SINGH THAKUR, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH

……RESPONDENT

(BY MR. ARVIND SHARMA, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER SINGH THAKUR, DEPUTY ADVOCATE GENERAL AND MR. RAM LAL THAKUR, ASSISTANT ADVOCATE GENERAL.

SI MUNISH KUMAR, POLICE STATION SUNDERNAGAR, DISTRICT MANDI, PRESENT IN PERSON ALONGWITH RECORD)

CRIMINAL MISC. PETITION (MAIN)
No.923 of 2022
Reserved on:15.07.2022
Decided on: 22.07.2022

Code of Criminal Procedure, 1973- Section 439, 167(2)- **Indian Penal Code, 1860**- Sections 304, 308, 238, 420, 468, 201, 109 and 120-B- H.P. Excise Act, 2011- Sections 39, 40 and 41- Bail- Statutory bail- Seven person lost their lives due to spurious country made liquor- Held- Investigating Agency had not filed defective/incomplete police report before the learned Trial Court- Thus, petitioner not entitled for statutory bail – At this stage it cannot be said that the petitioner had no role to play in the offence alleged to have been committed in the F.I.R.- Petitioner has criminal track record- Petition dismissed. (Para 3, 4)

Cases referred:

Chapal alias Ramswaroop and another Vs State of Rajasthan (2019) 14 SCC 599;

Serious Fraud Investigation Office Vs Rahul Modi & Ors 2022 (3) Scale 1;

Suresh Kumar Bhikhamchand Jain Vs State of Maharashtra and another (2013) 3 SCC 77;

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

O R D E R

Due to consumption of illegally manufactured spurious country made liquor, seven persons lost their lives in January, 2022 and 14 others were injured. FIR No.15/2022 was registered regarding this on 19.01.2022 under Sections 304, 308, 328, 420, 468, 471, 201, 109 and 120B of the Indian Penal Code and Sections 39, 40 and 41 of the H.P. Excise Act at Police Station Sundernagar, District Mandi. Petitioner is one of the accused persons therein. He was arrested on 26.01.2022.

Vide order dated 05.05.2022, petitioner was granted interim bail for a period of 21 days in Cr.MP(M) No.819 of 2022 on account of alleged illness of his wife. In the present petition, his prayer is for release on regular bail. Even in this petition, Cr.MP No.1597 of 2022 was moved on 02.06.2022 seeking interim bail on the projected ground that petitioner's wife was diagnosed with 'cancer of endometrium' requiring chemotherapy and radiotherapy treatment. The reasons put forth in the application for grant of interim bail were strongly disputed on facts by the investigating agency in its status report. The application for interim bail was eventually not pressed by the petitioner and was dismissed as withdrawn on 20.06.2022.

2. Learned Senior Counsel for the petitioner has argued the instant bail petition on following two broad heads:-

(i). The petitioner deserves to be granted statutory bail under Section 167(2) of the Code of Criminal Procedure (Cr.PC).

(ii). On merits of the matter also, the petitioner deserves to be enlarged on bail.

For convenience, the above grounds are separately discussed hereinafter.

3. Statutory bail:-

For obtaining statutory bail, it was contended, **firstly**that a defective police report was filed in the learned trial Court by the investigating agency. Objection in this police report was pointed out by the learned trial Court. **Secondly**, that the police report was also incomplete. The report of Forensic Science Laboratory was not made part of the police report. The submission of learned Senior Counsel for the petitioner was that the defective police report was filed only to defeat petitioner's right to get statutory bail under Section 167(2) Cr.P.C. Petitioner has a right to bereleased on statutory bail.

3(i) In ***(2019) 14 SCC 599***, **Chapal alias Ramswaroop and another** Versus **State of Rajasthan**, Hon'ble Apex Court observed that Section 167 of the code has a definite purpose in that: on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed with the matter……. The letter and spirit behind enactment of Section 167 of the code mandates that investigation ought to be completed within the prescribed period……. It is further stipulated that on the expiry of period of ninety or sixty days, as the case may be, accused person shall be released on bail if he is prepared to furnish bail. In the said case, on the 90th day, there was no charge-sheet in terms of Section 173 of the code for the concerned magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. A charge-sheet filed on 05.07.2018, i.e. within the period prescribed under Section 167 of the Code, was returned to the investigating officer as the same was not in terms of the order passed by the High Court on 03.07.2018. Hon'ble Apex Court observed that the public prosecutor could have submitted before the High Court on 03.07.2018 that papers relating to the investigation were to be filed within the time prescribed and a call thereafter could be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the code or not. Recourse to this ideal situation was not resorted to. Since there were no papers of investigation before the Magistrate concerned as on completion of 90 days of prescribed period under Section 167 Cr.PC, therefore, the petitioners therein were held entitled to be admitted to bail in terms of Section 167(2) Cr.PC.

In **2022 (3) Scale 1,** titled **Serious Fraud Investigation Office**Versus **Rahul Modi &Ors**, the point that arose for consideration before the Hon'ble Apex Court was whether an accused was entitled for statutory bail under Section 167(2) Cr.PC on the ground that cognizance had not been taken by the Court before the expiry of 60 or 90 days as the case may be from the

date of remand. Taking note of its previous judgments including ***(2013) 3 SCC 77 (Suresh Kumar Bhikhamchand Jain*** *Versus* ***State of Maharashtra and another),*** Hon'ble Supreme Court held that once the charge-sheet is filed within the stipulated period, the right of the accused to statutory bail comes to an end. The accused thereafter would be entitled to pray for regular bail on merits. Taking of cognizance is not material to Section 167 of the code. Filing of a charge-sheet is sufficient compliance with the provisions of Section 167 Cr.PC and that an accused cannot demand release on default bail under Section 167(2) on the ground that cognizance has not been taken before expiry of sixty/ninety days as the case may be. The relevant parts from the judgment are as under:-

> *"8. The only point that arises for our consideration in this case is whether an accused is entitled for statutory bail under Section 167(2), CrPC on the ground that cognizance has not been taken before the expiry of 60 days or 90 days, as the case may be, from the date of remand. Section 167(2), CrPC reads as below:*
>
> > *167. Procedure when investigation cannot be completed in twenty-four hours.*
> >
> > *xxx xxxxxxxxxxx*
> >
> > *(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:*
> >
> > *Provided that —*

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the Page accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police. Explanation I.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail. Explanation II.— If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the

production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

9. *The issue is squarely covered by a judgment of this Court in Bhikamchand Jain (supra), as contended by the Appellant. It is necessary to closely examine the judgment passed in Bhikamchand Jain (supra). The petitioner in the said case was arrested on 11.03.2012 on the allegation of misappropriation of amounts meant for development of slums in Jalgaon City. The petitioner therein was accused of committing offences punishable under Sections 120-B, 409, 411, 406, 408, 465, 466, 468, 471, 177 and 109 read with Section 34, IPC and also under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The contention of the petitioner therein was that he could not have been remanded to custody in view of cognizance not being taken for want of sanction within the statutory period of 90 days. The scheme of the provisions relating to remand of an accused first during the stage of investigation and thereafter, after cognizance is taken, indicates that the legislature intended investigation of certain crimes to be completed within the period prescribed therein, according to this Court in Bhikamchand Jain (supra). This Court held that in the event of investigation not being completed by the investigating authorities within the prescribed period, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. This Court was of the firm opinion that if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. However, once the charge- sheet was filed within the stipulated period, the right of the accused to statutory bail came to an end and the accused would be entitled to pray for regular bail on merits. It was held by this Court that the filing of charge-sheet is sufficient compliance with the provisions of proviso (a) to Section 167(2), CrPC and that taking of cognizance*

is not material to Section 167. The scheme of CrPC is such that once the investigation stage is completed, the court proceeds to the next stage, which is the taking of cognizance and trial. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced, with such Magistrate being vested with power to remand the accused to police custody and/or judicial custody, up to a maximum period as prescribed under Section 167(2). Acknowledging the fact that an accused has to remain in custody of some court, this Court concluded that on filing of the charge-sheet within the stipulated period, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of Section 309, CrPC. This Court clarified that the two stages are different, with one following the other so as to maintain continuity of the custody of the accused with a court.

10. It is clear from the judgment of this Court in Bhikamchand Jain (supra) that filing of a charge-sheet is sufficient compliance with the provisions of Section 167,CrPCand that an accused cannot demand release on default bail under Section 167(2) on the ground that cognizance has not been taken before the expiry of 60 days. The accused continues to be in the custody of the Magistrate till such time cognizance is taken by the court trying the offence, which assumes custody of the accused for the purpose of remand after cognizance is taken. The conclusion of the High Court that the accused cannot be remanded beyond the period of 60 days under Section 167and that further remand could only be at the post-cognizance stage, is not correct in view of the judgment of this Court in Bhikamchand Jain (supra).

15 A close scrutiny of the judgments in Sanjay Dutt (supra), Madar Sheikh (supra) and M. Ravindran (supra) would show that there is nothing contrary to what has been decided in Bhikamchand Jain (supra). In all the above judgments which are relied upon by either side, this Court had categorically laid down that the indefeasible right of an accused to seek statutory bail under

> *Section 167(2), CrPC arises only if the charge-sheet has not been filed before the expiry of the statutory period. Reference to cognizance in Madar Sheikh (supra) is in view of the fact situation where the application was filed after the charge-sheet was submitted and cognizance had been taken by the trial court. Such reference cannot be construed as this Court introducing an additional requirement of cognizance having to be taken within the period prescribed under proviso (a) to Section 167(2), CrPC, failing which the accused would be entitled to default bail, even after filing of the charge-sheet within the statutory period. It is not necessary to repeat that in both Madar Sheikh (supra) and M. Ravindran (supra), this Court expressed its view that non-filing of the charge-sheet within the statutory period is the ground for availing the indefeasible right to claim bail under Section 167(2), CrPC. The conundrum relating to the custody of the accused after the expiry of 60 days has also been dealt with by this Court in Bhikamchand Jain (supra). It was made clear that the accused remains in custody of the Magistrate till cognizance is taken by the relevant court. As the issue that arises for consideration in this case is squarely covered by the judgment in Bhikamchand Jain (supra), the order passed by the High Court on 31.05.2019 is hereby set aside."*

3(ii) The first point raised by the petitioner is that it was a case of filing of defective police report as objection in it was pointed out by the learned trial Court, therefore, it cannot be construed to be a proper police report. Filing of improper and incomplete police report will not take away petitioner's right to get statutory bail.

Petitioner's contentions do not hold much substance. The FIR was registered on 19.01.2022. The petitioner was arrested on 26.01.2022. Police report under Section 173 Cr.PC was filed on 18.04.2022. This was within the period of 90 days provided under Section 167 Cr.PC for filing the police report. The investigating agency in its status report has submitted that learned Trial Court's objection to the police report was in respect of

handwritten statement of some of witnesses. This objection was met with by the investigating agency. Typed copies of statements of witnesses have since been supplied to the learned Trial Court. The learned Court did not point out any objection per-se in the police report.

3(iii) The direction of the learned trial Court to the investigating agency to supply typed copies of handwritten statements of certain witnesses accompanying the police report/challan cannot be construed to imply that the challan was defective. No objection was pointed out by the learned Trial Court in the police report. The typed copies of handwritten statements of the witnesses provided on the directions of the learned Trial Court were for facilitation of the Court. Such direction had no impact upon appropriateness or validity of the police report.

3(iv) The MLCs of deceased persons mention that deaths were caused due to methyl alcohol poisoning. All these persons and several others injured had consumed illegally manufactured spurious liquor. Chemical analysis report of RFSL Mandi reports detection of methyl alcohol in the dead bodies. CTL Kandaghat has found the liquor samples as not fit for human consumption due to presence of methyl alcohol. Chemical and forensic analysis reports concerning the alleged illegal and spurious liquor are yet awaited by the respondent. The report of State Forensic Science Laboratory (SFSL) regarding handwriting of accused persons is also awaited. The status report submits that the reports on their receipt will form part of the supplementary report to be presented before the Court. Non-filing of SFSL report alongwith police report presented by the investigating agency on 18.04.2022 will not make the police report defective as alleged for the petitioner. Section 173(8) Cr.P.C. provides for further investigation in respect of an offence after a report under Sub-Section 2 thereof have been forwarded to the magistrate. The investigating agency is entitled to not only carry out further investigation in respect of offences after submitting its report under

Section 173(2), but can also furnish further evidence oral or documentary and further report regarding such evidence. Provisions of Section 173(2) and (8) read as under:-

> *"2 (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-*
>
> *(a) the names of the parties;*
>
> *(b) the nature of the information;*
>
> *(c) the names of the persons who appear to be acquainted with the circumstances of the case;*
>
> *(d) whether any offence appears to have been committed and, if so, by whom;*
>
> *(e) whether the accused has been arrested;*
>
> *(f) whether he has been released on his bond and, if so, weather with or without sureties;*
>
> *(g) whether he has been forwarded in custody under section 170.*
>
> *(h) whether the report of the medical examination of the woman has been attached where investigation relates to an offence under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code.*
>
> *(ii) The officer shall also communicate, In such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.*
>
> *3 to 7. x xxxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *8. Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to*

the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).”

Taking into consideration all the above aspects, it cannot be said that the investigating agency had filed a defective/incomplete police report before the learned Trial Court. The petitioner, thus, is not entitled for statutory bail.

4. Merits of the bail petition:-

4(i) The prosecution case against the bail petitioner is that the main accused persons Gaurav Minhasand others during investigation divulged the details of role played by Ajay Grover (present petitioner) regarding supply of raw material for the illegal manufacture of spurious country made liquor. According to the prosecution, the investigation carried out by the police revealthat:-

4(i)(a) The petitioner had started a blending and bottling plant in the name of M/s Yamuna Beverages Private Limited at Paonta Sahib, District Sirmour. He ran it till the year 2011. The petitioner joined this plant again as a Manager.

4(i)(b) In the year 2019, the petitioner alongwith his close friend Bhupesh Gupta opened a firm under the name M/s Organic Liquor. The name of the firm was later on changed to Handoor Liquor.

4(i)(c) The petitioner and his friend Bhupesh Gupta started a firm by the name of M/s Akash Chemicals at Nalagarh. This was being run by them in a rented premises in the form of shed/store owned by one Dhani Ram. L-19 licence was procured by them from the Excise Department for storing and selling rectified spirit in M/s Aakash Chemicals. This spirit is used only for manufacture of sanitizers. Bhupesh Gupta got too occupied in ‘AakashHospital and Diagnosis’ at Nalagarh. For that reason, under an affidavit, he handed over the entire work of M/s Aakash Chemicals to the

petitioner. The petitioner was inducted as partner and manager in M/s Aakash Chemicals. Bhupesh Gupta executed a power of attorney on 11.10.2021, handing over the entire work relating to M/s Akash Chemicals to the bail petitioner.

4(i)(d) The bail petitioner used to look after the complete works of M/s Aakash Chemicals with the assistance of one Santosh Kumar(one of the co-accused persons in the FIR).

4(i)(e) As per record maintained by the Excise Department, rectified spirit was purchased by M/s Aakash Chemicals only till 31.05.2021. These facts have been corroborated in the statements of Bhupesh Gupta, Mahender, Bir Singh and Jamura.

4(i)(f) On 02.08.2021, the bail petitioner called co-accused Santosh, passed on a mobile number to him, informed that holder of that number was bringing 12000 litres of spirit tanker and directed him (Santosh Kumar) to get the said spirit unloaded in M/s Akash Chemicals store. Accordingly, Santosh Kumar unloaded the spirit with the assistance of Bir Singh, Ashok, Mahender and Jamura. This spirit was stored in M/s Aakash Chemicals and subsequently sold in different quantities on different dates to different accused persons, viz. Gaurav Minhas alias Goru, Virender alias Gagan, Gurdev and Anil Kumar alias Manu etc. The spirit was unloaded and loaded with the aid of labourers Bir Singh, Ashok Kumar, Mahender and Jamura. The spirit unloaded from the tanker by Santosh Kumar on the asking of the petitioner and sold to other co-accused persons was used for illegal manufacture of spurious liquor. On 04.01.2022, Gurmeet Singh workingas driver of accused Virender, died after directly consuming this spirit. Virender contacted Santosh Kumar and asked for getting the spirit checked up. Santosh Kumar got a bottle of spirit from Virender. It was sent to 'Auriga Lab' Nalagarh for checking under the name of M/s Yamuna Beverages Private Limited. Report in this regard received by Santosh Kumar on 12.01.2022 was forwarded by him

through whatsapp to the bail petitioner. The bail petitioner confirmed the report to be correct. Subsequently, using this spirit, the accused Virender alias Gagan illegally manufactured spurious liquor marked Santra. It was supplied in Salapar area causing deaths of several persons and injuries to various others.

4(i)(g) Financial transactions between the bail petitioner and co-accused Virender alias Gaganwere also detected by the investigating agency.Virenderhas been accused of illegallymanufacturing spurious liquor at Gujjar Hatti.

4(ii) Learned senior counsel for the petitioner contendedthat:-

4(ii)(a) The petitioner had no role to play in the offences alleged to have been committed in the FIR. He was neither involved in running of M/s Yamuna Beverages Private Ltd. at Paonta Sahib nor M/s Akash Chemicals at Nalagarh. The petitioner was appointed as authorized signatory of M/s Yamuna Beverages Private Ltd. on 22.02.2020. This authorization was withdrawn on 08.10.2021. The petitioner was not authorized signatory of M/s Aakash Chemicals. The firm was under the proprietorship of Bhupesh Gupta. It was Bhupesh Gupta, who had executed lease deed for renting the premises of Dhani Ram for the firm.

4(ii)(b) The petitioner had no links with accused Santosh Kumar, in so far as recovery and sale of spirit is concerned.

4(ii)(c) Rs.50,000/- via two transactions of Rs.25,00/- each were credited in the joint account of the petitioner and his wife. The petitioner was not aware that this amount was credited by accused Virender alias Gagan. In fact, the petitioner was in need of Rs.50,000/- to settle his loan amount under one time settlement scheme with the UCO Bank Panchkula. He requested Santosh Kumar “who became friend with the petitioner through Sohan Singh about two years back”. It was Santosh Kumar who had arranged for Rs.50,000/- to help the petitioner to clear his loan amount. But the petitioner

was not aware that the money actually came from the account of accused Virender alias Gagan.

4(ii)(d) The prosecution story otherwise stands on loose footing.12000 litres of spirit is said to have been purchased by Santosh Kumar for paltry amount of Rs.55,000/-. This is not believable. The spirit unloaded from the tanker is said to have been transferred to 170 drums. However, the same spirit is said to have been sold in 226 drums. There is apparent a mismatch.

4(ii)(e) During investigation, accused Virenderalias Gagan is stated to have disclosed that Santosh Kumar on 09.12.2021 provided him six drums of spirit and said that he had no spirit left with him. On 29.12.2021, he informed Santosh Kumar about his talks regarding purchase of 5 drums from one Ladi in Ludhiana, who had liquor vends in PhillaurNagar. During investigation, Virender Kumar is further stated to have informed Santosh Kumar on 04.01.2022 that his driver Gurmit Singh died after consuming the spirit purchased from Ladi. He requested Santosh Kumar for testing the spirit contained in 5 drums. At his insistence, Santosh sent one litre spirit sample obtained from these drums for testing to 'Auriga Lab.' Learned senior counsel for the petitioner argued that in any case, Gurmit Singh's death was caused after consuming the spiritpurchased from Ladi of Ludhiana and not from the spirit unloaded from the tanker. In nut shell, the case of the petitioner as projected by learned senior counsel is that the petitioner had absolutely no role whatsoever to play in the commission of offences alleged in the FIR.

Opposing the bail plea, on behalf of the State, it was pointed out that the petitioner was not a mere illegal supplier of rectified spirit, which was sold for illegal manufacture of spurious liquor, but was also involved with other accused persons in illegal manufacture of spurious liquor. Prosecution has enough evidence indicating petitioner's deep implication in the FIR. He has criminal track record. He has committed very serious and heinous offences against the society at large. Learned Additional Advocate General also

submitted that petitioner will also try to win over the prosecution witnesses and tamper the prosecution evidence if released on bail. Prayer was made for dismissal of the bail petition.

5. Observations

Though the evidence collected by the investigating agency is not to be discussed in detail while considering the bail petition, but for the purpose of deciding the instant bail petition on the specific points raised by learned senior counsel for the petitioner, reference to some investigation on *prima facie* basis has become necessary:-

(i) The petitioner and accused Santosh Kumar had exchanged 1286 calls in six months prior to the registration of FIR. The call detail record has been procured by the investigating agency. Both were in constant touch with each other. As per investigations, umpteenth number of whatsapp messages have been found to have been sent from the mobile phone number of accused Santosh Kumar to the mobile phone number of petitioner. However, these messages were not reflected in petitioner's number. It seems that petitioner has deleted the whatsappmessages, received from accused Santosh Kumar.

(ii) Accused Santosh Kumar is stated to have disclosed that the petitioner called him on 02.08.2021,passed on a particular cell number to him and informed that 12000 litresspirit tanker was coming to Baddi and he should unload that spirit at M/s Aakash Chemicals store Nalagarh. On the asking of petitioner, Santosh Kumar unloaded the spirit in 170 drums purchased by him from scrap dealer Gulshan. The tanker driver was paid Rs.55000/-. All this wasstatedlyreported by Santosh Kumar to the petitioner on phone.

(iii) The petitioner had links with M/s Yamuna Beverages Private Ltd. Paonta Sahib as well as M/s AakashChemicalsNalagarh. The petitioner was inducted as authorized signatory for M/s. Yamuna Beverages Private Ltd. on 20.02.2020. He was authorized signatory of this company on 02.08.2021

when he had directed Santosh Kumar to unload the spirit from the tanker. His authorization was revoked only on 12.10.2021. ExtraNeutralAlcohol (ENA) had lastreached in M/s Yamuna Beverages Private Ltd. on 30.06.2021. No further ENA was requisitioned in this company thereafter. At the time of last requisitioning of ENA in M/s Yamuna Beverages Private Ltd., the petitioner was the authorised signatory of the company. In M/s Aakash Chemicals, the petitioner was inducted as partner/manager by the proprietor Bhupesh Gupta. By executing a deed of power of attorney on 11.10.2021, Bhupesh Gupta authorized the petitioner to look after all works relating to M/s Aakash Chemicals. *Prima facie* it appears that the petitioner had deep involvement with the M/s Yamuna Beverages Private Ltd. Paonta Sahib as well as M/s Aakash Chemicals Nalagarhat the time of unloading of the spirit in question and its subsequent sale to persons who are accused of illegal manufacture of spurious liquor. According to the investigation carried out by the respondent, M/s AakashChemicals was authorised by the Excise Department under L-19 licence dated28.07.2020 for wholesale and retail sale of rectified spirit, ENA, Absolute alcohol, Sds, Ethyl Alcohol. The said licence was valid till 31.05.2021. The firm had surrendered this licence on 25.06.2021. ENA/spirit could not have been brought to M/s Aakash Chemicals after 25.06.2021, yet, the investigation *prima facie* shows that the spirit was stored and sold at M/s Aakash Chemicals.

(iv) The fact that the petitioner had strong links with M/s Aakash Chemicals is also borne out from the investigation carried out from Dhani Ram, the owner of the premises where M/s Akash Chemicals was being run on lease basis. He is said to have disclosed renting out the premises to Dr.Bhupesh Gupta at Rs. 15000/- per month. According to him, the rent for the month of September 2021 was paid by the petitioner as he was partner in the said firm. On31.12.2021 also,it was the petitioner who had transferred Rs. 20,000/- through RTGS in the account of Dhani Ram towards rent of the

premises. He is further stated to have disclosed that the petitioner used to work in M/s Aakash Chemicals with Santosh Kumar.

(v) Petitioner's case is that he had no links with one of the main accused personVirender @ Gagan. Financial transactions between the petitioner and the main accused Virender alias Gagan have also surfaced during investigation. Virender is one of the persons accused of having illegally manufactured spurious liquor. The story put forth by the petitioner that the petitioner had requested Santosh Kumar for loaning him Rs.50,000/- in order to clear his (petitioner's) loan amount of Rs.5,50,000/- in the UCO Bank and that Santosh Kumar without petitioner's knowledge had asked the main accused Virender alias Gagan to credit this amount into petitioner's account, at this stage, appears to be farfetched in view of the over-all evidence gathered in the investigation.

(vi) Insofar as petitioner's argument of unbelievable payment of paltry amount of Rs.55,000/- for the spirit is concerned, suffice to observe at this stage that it is not the case of the prosecution that Rs.55,000/- was paid for 12000 litres of spirit, rather as per the statement of co-accused Santosh Kumar, it was paid to the tanker driver. Whether it was in lieu of transportation charges or otherwise, is to be considered during trial.

(vii) It cannot be said at this stage that the deaths which took place on consumption of spurious liquor were not related to the spirit gotunloaded by co-accused Santosh Kumar on the asking of the petitioner and sold thereafter to persons accused of having illegally manufactured spurious liquor. All these are the aspects, which are to be proved during trial by leading cogent evidence. At this stage, there is sufficient evidence to link the petitioner with M/s Yamuna Beverages Private Limited Paonta Sahib, with M/s Aakash ChemicalsNalagarh, with the spirit unloaded on 02.08.2021 by accused Santosh Kumar,with co-accused persons Santosh Kumar and Virender alias Gagan, with illegal storage of the spirit, with illegal sale of illegally stored

spirit, and with illegal manufacturing of spurious liquor.Therefore,it cannot be said at this stage that the petitioner was innocent and has no role to play in the FIR. The petitioner has criminal track record. Four FIRs registered against him are still pending viz:- (i) FIR No. 83 of 2009, dated 28.05.2009, registered at Police Station New Shimla under Sections 341, 323 & 34 of the Indian Penal Code ; (ii) FIR No. 440 of 2017, dated 25.12.2017, registered at Police Station Zirakpur, District Mohali, Punjab under Section 61 of the Excise Act & 420 of Indian Penal Code ; (iii) FIR No. 6 of 2021, dated 16.10.2021, registered at State Vigilance &Anti-Corruption Bureau, Una H.P. under Sections 420, 467, 468, 471, 120-B of the Indian Penal Code and Section 39 of the H.P. Excise Act and (iv) FIR No. 733 of 2018 registered at PoliceStation GautamBudh Nagar, (U.P.) under Sections 60 & 63 of U.P. Excise Act are pending trial against him. Possibility of petitioner's winning over prosecution witnesses, tampering with prosecution evidence and influencing ongoing investigation, also cannot be ruled out at this stage.

In view of discussion made in para 3, petitioner is not entitled for statutory bail and in view of the investigations carried out by the respondent in the FIR thus far (para-5), no case for grant of regular bail to him is made out at this stage. The petition is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Between:-

HIRA NAND S/O LATE SH. SHIV NAND,
R/O SHOGHI BAZAR, P.O. SHOGHI,
TEHSIL AND DISTRICT SHIMLA, H.P.

..PETITIONER

(BY SH. B.R. KASHYAP, ADVOCATE)

AND

CHOTTEY LAL S/O LATE SH. SANT RAM,
R/O TARADEVI, P.O. TARADEVI,
SHIMLA, H.P.

... RESPONDENT.

(SH. G.C. GUPTA, SENIOR ADVOCATE,
WITH MS. MEERA DEVI, ADVOCATE.)

CIVIL REVISION
No. 48 OF 2022
Reserved on:01.07.2022
Decided on: 08.07.2022

Code of Civil Procedure, 1908- Section 115- Petitioner has assailed the order of Ld. Civil Judge whereby application of petitioner under Order 16 Rule 1(3) read with Section 151 of Code of Civil Procedure has been dismissed- Held- Petition is not maintainable as impugned order did not decide any issue in the course of suit or other proceedings- No illegality committed by Ld. Trial Court- Petition dismissed. (Para 6, 7)

Cases referred:
Tek Singh vs. Shashi Verma and another, 2021 (1) Him.L.R. (SC) 158;

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

O R D E R

This revision petition under Section 115 of the Code of Civil Procedure has been filed to assail the order dated 04.10.2021 passed by the learned Civil Judge, Court No.7, Shimla, H.P. in CMA No.241/2018 in C.S. No.109-1 of 2014, whereby the application of the petitioner herein under Order 16 Rule 1(3) read with Section 151 of the Code of Civil Procedure (for short "CPC") has been dismissed.

2. Petitioner herein is defendant before the learned trial Court in C.S. No.109-1 of 2014. An application under Order 16 Rule 1(3) read with Section 151CPC came to be filed by the petitioner/defendant with a prayer to allow the witnesses to be summoned as per the list attached. The reason assigned in the application for invoking jurisdiction under Order 16 Rule 1(3)

CPC was that due to inadvertence list of witnesses could not be filed and hence the petitioner/defendant intended to summon the witnesses detailed in the list attached. The list of witnesses attached by the petitioner/defendant included the name of the counsel representing the plaintiff in the case. It was stated that the counsel for the plaintiff had given reply to a legal notice sent to the plaintiff by the defendant, therefore, the examination of counsel for the plaintiff was required.

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

4. At the out-set, it is to be seen as to whether the instant petition under Section 115 CPC is maintainable?

5. In ***Tek Singh*** vs. ***Shashi Verma and another, 2021 (1) Him.L.R. (SC) 158***, the Hon'ble Supreme Court has held as under:

> *"**6)**. We are constrained to observe that every legal canon has been thrown to the winds by the impugned judgment. First and foremost, the 1999 amendment to the CPC added a proviso* Section 115 *which reads as follows:*
>
> > *"115. Revision-(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-*
> >
> > *(a) to have exercised a jurisdiction not vested in it by law, or*
> >
> > *(b) to have failed to exercise a jurisdiction so vested, or*
> >
> > *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:*

Provided that the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

2. Xxx xxxxxx

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.A reading of this proviso will show that, after 1999, revision petitions filed under Section 115 CPC are not maintainable against interlocutory orders.

***7**) Even otherwise, it is well settled that the revisional jurisdiction under Section 115 CPC is to be exercised to correct jurisdictional errors only. This is well settled.* In D.L.F. Housing & Construction Company Private Ltd., New Delhi vs. Sarup Singh and Others *(1970) 2 SCR 368 this Court held:*

"The position thus seems to be firmly established that while exercising the jurisdiction under Section 115*, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the*

> *agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal." at Pg.373."*

6. Thus, in view of the provision of Section 115 of CPC as well as aforesaid exposition of law, the petition is not maintainable. The impugned order did not decide any issue in the course of suit or other proceedings. Even if the prayer made in application under Order 16 Rule 1(3) CPC was allowed, it would not have finally disposed of the suit or any other proceedings.

7. The perusal of the impugned order otherwise also reveals that the same does not suffer from any jurisdictional error, which is *sine qua non* in exercise of jurisdiction under Section 115 of CPC. The learned trial Court has allowed the application of the petitioner/defendant except to the extentthe prayer was made to summon and examine learned counsel for the plaintiff/respondent. No illegality has been committed by the learned trial

Court in passing the impugned order, which is well reasoned. Even otherwise, the summoning of learned counsel for the plaintiff/respondent as a witness by petitioner/defendant was not necessary as the document sought to be proved through such witness, could be proved by the petitioner/defendant even in absence of examination of learned counsel for the plaintiff/respondent. Noticeably, the petitioner/defendant hasnot even started his evidence. Even the statement of petitioner/defendant has not been recorded. The prayer of the petitioner/defendant to examine learned counsel for the plaintiff/respondent as witness, in the given circumstances of the case, does not appear to be bonafide.

8. In view of the above discussion, the petition is held to be not maintainable and is also without any merit. The petition is accordingly dismissed, so also the pending miscellaneous application(s) if any.

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

Between:-

DUMNU RAM SON OF SH. ADAM, RESIDENT OF VILLAGE KHEEL, POST OFFICE NIHRI, DISTRICT MANDI, H.P.

....PETITIONER.

(BY MR. HEMANT KUMAR THAKUR, ADVOCATE)

AND

1. BALDEV, SON OF SH. KESHAV RAM,
2. KESHAV RAM, SON OF SH. DHANIA,
   BOTH RESIDENTS OF VILLAGE KHEEL, POST OFFICE NIHRI, DISTRICT MANDI, H.P.

....RESPONDENTS.

(BY MR. H.S. RANGRA, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO. 6 OF 2022
Reserved on: 01.07.2022
Decided on: 08.07.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 39 Rule 1 and 2- Petitioner has assailed the order passed by Ld. Additional Judge in Civil Misc. Appeal- Ld. Civil Judge directed the parties to maintain status quo and in appeal Ld. Additional District Judge set aside the order and dismissed the application of the plaintiff for interim injunction- Suit land joint – Held- Ld. Additional District Judge has passed order on the basis of fact on record and the same is not perverse- Principle of equity has duly been considered- Petition dismissed. (Para 15)

Cases referred:

Grament Craft vs. Prakash Chand Goel, (2022)4 SCC 181;

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

O R D E R

By way of instant petition, order dated 29.12.2021, passed by learned Additional District Judge, Sundernagar, in Civil Misc. Appeal no. 32/2021 has been assailed.

2. The Civil Misc. Appeal decided by learned Additional District Judge, Sundernagar, had arisen from an order dated 25.09.2021, passed by learned Civil Judge, Court No.-II, Sundernagar, in CMA No. 270/2021 in Civil Suit No. 118/2021.

3. The parties hereto shall be referred by the same status as they held before the learned trial Court. Petitioner herein is the plaintiff and respondents herein are the defendants.

4. Plaintiff has filed a suit against the defendants seeking following reliefs:-

> *"1. Pass a decree for permanent prohibitory injunction by restraining the defendants from digging the suit land, causing any sort of interference or change the*

nature of suit land by constructing a permanent structure in the shape of house over the suit land describe in para No.1 of the plaint in any manner may kindly be passed in favour of plaintiff and against the defendants.

2. *In case the defendants succeed in raising construction or changing the nature of the suit land in any manner during the pendency of the suit then a decree for mandatory injunction by directing the defendants to restore the suit land in its original position be passed in favour of the plaintiff and against the defendants."*

The suit was filed on the premise that the suit land detailed in para-1 of the plaint comprised in Khewat No.22 Min, Khatauni No.28 Min, Khasra Nos. 184 and 186 was jointly owned and possessed by the parties to the suit and other cosharers. The entire suit land was joint and partition had not been effected. The defendants had started making preparations for raising construction on a part of khasra No.186. It was also alleged that the defendants already had two houses in khasra No.186 and the new construction if allowed to be carried out, would be their third house. The conduct of the defendants in raising new construction was objected to on the ground that the same would adversely affect the rights of the plaintiffs.

5. Along with the suit, Civil Misc. Application for interim injunction restraining the defendants from raising construction on the suit land, till the pendency of the suit, was also filed.

6. Defendants are contesting the suit of the plaintiff. It is submitted on behalf of the defendants that the parties have much more joint land than the land detailed in para-1 of the plaint. The entire land in Khewat No.22 Min is stated to be about 84 bighas. The defendants have claimed their 1/8 share therein to the extent of 10-10-19 bighas. It is further submitted on behalf of the defendants that construction is being raised by them on less

than two biswas of land. Plaintiff and his sons are stated to have constructed their separate houses on the suit land.

7. Learned trial Court allowed the application of plaintiff and directed the parties to maintain status quo qua nature and possession of land bearing Khewat No.22 Min, Khatauni No.28 Min, Khasra Nos. 184 and 186, situated in Mohal Bahi/22, Tehsil Nihri, District Mandi, H.P.

8. In appeal, under Order 43, Rule 1(r) of the Code of Civil Procedure, learned Additional District Judge, Sundernagar, District Mandi, H.P., has set aside the order passed by the learned trial court and the application of the plaintiff for interim injunction has been ordered to be dismissed.

9. I have heard Mr. Hemant Kumar Thakur, learned counsel for the plaintiff and Mr. H.S. Rangra, Advocate, for the defendants, and have also carefully perused the record.

10. The scope of this Court to exercise jurisdiction under Article 227 of the Constitution of India is restrictive and well defined. This Court in exercise of aforesaid jurisdiction will not sit as Court of appeal to reappreciate and reweigh the evidence or facts upon which the determination under challenge is based. The jurisdiction is to be exercised only to set right grave dereliction of duty or flagrant abuse and violation of fundamental principles of law or justice. Recently, in ***Grament Craft vs. Prakash Chand Goel, (2022)4 SCC 181***, Hon'ble Supreme Court has reiterated the legal position in this behalf in following manner:-

> "*8. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first*

appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

9. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd.(2001)8 SCC 97 has observed:-

> ***"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or***

tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

11. Coming to the facts of the case, total joint land of parties is about 84 bighas, whereas plaintiff has filed suit in respect of only about 15 bighas, selecting khasra number 184 and 186 only. The share of the defendants in entire 84 bighas of joint land is stated to be more than 10 bighas 10 biswas. This fact has not been controverted. That being so, the plaintiff, in order to succeed in getting interim injunction against the defendants, had to specifically plead and *prima facie* satisfy the courts below that some exclusivity was attached to that portion of joint land which was being utilized by the defendants for raising construction or by doing so, the defendants would exceed their share. Undisputedly, there is nothing on record to suggest any of these pleas.

12. Further, the specific allegations in written statement of defendants is that the plaintiff and his three sons have constructed their separate houses on the suit land. Perusal of jamabandi also reveals that area

of about 14 biswas is under constructed houses in khasra number 186. It is not the case of the plaintiff that the entire constructed area of 14 biswas belongs to defendants or is occupied by them.

13. Learned Additional District Judge, Sundernagar, has specifically held that photographs Annexures P-2, P-3, P-5 and P-7 placed on record of Civil Suit were of houses raised by the plaintiff and his family members and this fact was neither categorically denied by the plaintiff in the replication nor disputed during course of arguments.

14. This primarily weighed with learned Additional District Judge, Sundernagar to hold that when plaintiff and his family members had already raised construction of so many houses, they had no right to object to the raising of construction by the defendants on an area which was less than two biswas.

15. Perusal of the impugned order reveals that the same has been passed by the learned Additional District Judge, Sundernagar in exercise of her lawful jurisdiction. The impugned order is based on facts available on record and hence it cannot be said to be suffering from vice of perversity. The principle of equity, which is cardinal while deciding the grant of equitable relief of injunction, has duly been considered.

16. Keeping in view the restrictive jurisdiction of this Court under Article 227 of the Constitution of India, as discussed above, and also by analysing the facts of the case, this Court does not find any merit in this petition and the same is accordingly dismissed. Consequently, the impugned order is affirmed.

17. All pending applications also stand disposed of.

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

Between:

NAMDHARI SANGAT MANDI TRUST, RAM NAGAR, MANDI, DISTRICT MANDI, H.P. THROUGH ITS AUTHORIZED TRUSTEE SH. PRITHI PAL SINGH.

.....PETITIONER/PLAINTIFF

(BY MR. TARA SINGH CHAUHAN, ADVOCATE)

AND

SMT. SAHIB KAUR, D/O SATGURU JAGJEET SINGH, R/O KHALIAR, MANDI TOWN, DISTRICT MANDI, H.P.

.....RESPONDENT /DEFENDANT

(BY MR. ASHOK SOOD, SENIOR ADVOCATE WITH MR. ABHISHEK BANTA, ADVOCATE)

CIVIL MISCELLANEOUS PETITION MAIN (ORIGINAL)
No. 24/ 2022
Reserved on:08.07.2022
Decided on: 15.07.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 39 Rule 1 and 2- Order 43 Rule 1- Petitioner has assailed the order of Additional District Judge, whereby appeal of respondent filed under Order 43 Rule 1 against the order passed by Ld. Trial Court was allowed and cross-objections preferred by the petitioner were dismissed- Ld. Trial Court directed the parties to maintain status quo- Held- No prima facie case exist in favour of petitioner to claim title and possession over the suit land to seek restraint order- Ld. Additional District Judge has passed order on the basis of fact on record and the same is not perverse- Principle of equity has duly been considered- Petition dismissed. (Para 14)

Cases referred:

Grament Craft vs. Prakash Chand Goel, (2022)4 SCC 181;

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

O R D E R

By way of instant petition, petitioner has assailed order dated 15.01.2022, passed by learned Additional District Judge-1, Mandi, District Mandi, H.P. in C.M.A. No.03/21 of 2021, whereby appeal of respondent filed under Order 43 Rule 1(r) against order dated 22.07.2021, passed by learned Trial Court in C.M.A. No.421 of 2021, was allowed and Cross-Objections preferred by the petitioner, were dismissed.

2. Brief facts of the case are that petitioner has filed Civil Suit No.255 of 2017,against respondent for following relief(s):-

> *"It is, therefore, respectfully prayed that keeping in view the facts and circumstances mentioned above, suit of the plaintiff may kindly be decreed in favour of plaintiff and against defendant and mutation No.1091 dated 11.08.2014 may kindly be declared as null and void ab-anitio and defendant or her agent or servant or family members may kindly be permanently restrained from causing any short of interference in the peaceful possession of plaintiff over suit land, and further be restrained from alienating or transferring or mortgaging the suit property in any manner. And/or any other relief, to which this Ld. Court may deem fit in the fact and circumstances of the case, be also awarded in favour of plaintiff and justice be done."*

3. The suit of the plaintiff is pending adjudication before learned Senior Civil Judge, Mandi (for short 'Trial Court').

4. Dispute has been raised by the petitioner in respect of the land comprised in Khata/Khatauni No. 37 min/40 min, Khasra No. 1212/88 and 146 kita 2 measuring 1014.27 Sq mtrs., situated in Mauza Khalyar, Tehsil

Sadar, District Mandi, H.P. (for short 'suit land'). Petitioner claims that the suit land was purchased by the petitioner in the name of his holiness Satguru Shri Jagjeet Singh Ji and in the name of Gurudwara Naamdhari Sangat. As per averments in the plaint, initially petitioner was a committee known as Gurudwara Naamdhari Sangat Mandi, which subsequently came to be registered as a Trust.

5. By way of Civil Suit No. 255 of 2017, petitioner has taken exception to mutation No. 1091, dated 11.08.2014, whereby, the suit land has been recorded in the name of respondent being the legal heir of Satguru Shri Jagjeet Singh Ji. The basis for such challenge is the claim of the petitioner to the title of the suit land alongwith respondent. Petitioner also claims the possession of suit land.

6. Petitioner, alongwith the plaint had also filed an application under Order 39 Rules 1 and 2 of CPC. Learned Trial Court had allowed the application of the petitioner on 20.08.2020 and respondent was restrained from alienating the suit land till the disposal of the suit. Respondent did not challenge the order dated 20.08.2020.

7. Another application for interim injunction came to be filed by the petitioner during the pendency of the suit, whereby a prayer was made to restrain the respondent from changing the nature of suit land and raising construction thereon. Learned Trial Court allowed the application on 22.07.2021. The parties were directed to maintain status quo qua construction, possession and interference over the suit land till the final disposal of the suit.

8. Aggrieved against the order dated 22.07.2021, passed by learned Trial Court in C.M.A. No. 421 of 2021, respondent preferred an appeal under Order 43 Rule 1(r) of CPC, which was registered as Civil Miscellaneous Appeal No. 03/2021 in the Court of learned Additional District Judge-1, Mandi (for short 'Appellate Court'). Petitioner also preferred cross-

objections against order dated 22.07.2021, passed by learned Trial Court, which were registered as Cross Objections No. 569 of 2021. Learned Appellate Court vide impugned order dated 15.01.2022, allowed the Civil Miscellaneous Appeal No. 03/2021 of respondent and dismissed the Cross Objections No. 569 of 2021 filed by the petitioner.

9. Hence, this petition.

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

11. The scope of this Court to exercise jurisdiction under Article 227 of the Constitution of India is restrictive and well defined. This Court in exercise of aforesaid jurisdiction will not sit as Court of appeal to re-appreciate and reweigh the evidence or facts upon which the determination under challenge is based. The jurisdiction is to be exercised only to set right grave dereliction of duty or flagrant abuse and violation of fundamental principles of law or justice. Recently, in ***Grament Craft vs. Prakash Chand Goel, (2022)4 SCC 181,*** Hon'ble Supreme Court has reiterated the legal position in this behalf in following manner:-

> *"8. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to re appreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse,violation of*

fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

9. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd.(2001)8 SCC 97 has observed:-

> *"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly*

come to such a conclusion,which the court or tribunal has come to."

12. Perusal of the plaint simply reveals that petitioner has claimed title to the suit land on the basis of purchase made in the name of the predecessor-in-interest of respondent and also Gurudwara Naamdhari Sangat Mandi. No details of the sale by virtue of which, petitioner claims to have purchase the suit land, have been provided in the plaint. It is trite that pleadings are the foundation of Civil Suit. However, in the instant petition, petitioner has placed on record document, Annexure P-9, which is a copy of sale deed dated 20.05.1996. This document recites that the suit land was sold for a consideration of Rs. 53,000/- by Sh. Rattan Singh in favour of Satguru Shri Jagjeet Singh, S/o late Sh. Satguru Pratap Singh Ji Maharaj, R/o Mandi Town, Tehsil Sadar, District Mandi, H.P. Addition of words "Gurudwara Naamdhari Sangat" also appears to be made in hand after the name of father of the purchaser. The words "Naamdhari Sangat" stands scored of. Learned counsel for the petitioner contended on the basis of aforesaid additional incorporation of words that the sale deed was executed jointly in favour of Satguru Shri Jagjeet Singh and Gurudwara Naamdhari Sangat. Such contention, however, does not *prima facie* appear to have any weight. Assuming that the words 'Gurudwara Naamdhari Sangat' were part of original sale deed, it does not transpire that 'Gurudwara Naamdhari Sangat' was also a co-purchaser with Satguru Shri Jagjeet Singh. The sellers have not been described as Satguru Shri Jagjeet Singh and Gurudwara Naamdhari Sangat. In any case, the sale deed relied upon by the petitioner as Annexure P-9, is not the subject matter of challenge in the Civil Suit filed by the petitioner before learned Trial Court, no declaration has been sought with respect to genuineness or otherwise of the contents of said sale deed dated 20.05.1996. In such view of the matter, no *prima facie* case existed in favour

of the petitioner to claim title and possession over the suit land and to seek restraint orders against respondent in respect of the suit land.

13. It is evident from the record that after execution of sale deed dated 20.05.1996, mutation No.625 was attested on 03.06.1996, whereby the suit land was recorded to have been transferred by way of sale, exclusively in the name of Satguru Shri Jagjeet Singh. The plaint is totally silent with respect to mutation No. 625, dated 03.06.1996. The only challenge has been made to mutation No. 1091, dated 11.08.1994, which came to be attested only after the death of Satguru Shri Jagjeet Singh. Mutation or the entires in record of rights are not the title documents. Be that as it may, it is not understandable, as to how, the petitioner can challenge mutation No. 1091, dated 11.08.1994, by way of Civil Suit, when mutation No. 625, dated 03.06.1996, recorded in favour of Satguru Shri Jagjeet Singh, had attained finality.

14. Perusal of impugned order passed by learned Appellate Court reveals that the same has been passed after taking into consideration material and relevant aspects. The assessment of the factors such as existence of *prima facie* case, balance of convenience and irreparable loss, has correctly been made on the basis of available material. No jurisdictional error has been committed by the learned Appellate Court. The impugned order cannot be said to be suffering from vice of perversity. The principle of equity, which is cardinal while deciding the grant of equitable relief of injunction, has duly been considered.

15. Keeping in view the restrictive jurisdiction of this Court under Article 227 of the Constitution of India, as discussed above, and also by analysing the facts of the case, this Court does not find any merit in this petition and the same is accordingly dismissed. Consequently, the impugned order is affirmed.

16. The observation made in this order shall confine for the purposes of adjudication of this petition and shall not be construed to be expression of opinion on the merits of the suit pending before learned trial court.

17. All pending applications also stand disposed of.

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

Between:-

1. SANTA SINGH
S/O SH. GULZAR SINGH,
R/O VILLAGE GHUTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

2. HARBHAJAN KAUR
D/O SH. GULZAR SINGH,
R/O VILLAGE GHUTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRAUR, H.P.

3. SURJEET SINGH
S/O SH. JASWANT SINGH,
S/O SH. GULZAR SINGH,
R/O VILLAGE GHUTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRAUR, H.P.

4. HARJEET SINGH
S/O SH. LAKHBIR SINGH,
R/O VILLAGE GHUTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRAUR, H.P.

……PETITIONERS/DEFENDANTS NO.1, 2, 5 & 6

(BY SH. KARAN SINGH KANWAR, ADVOCATE)

AND

1. MAHINDER KAUR
W/O SH. AJAYAB SINGH,
R/O S-120, A SCHOOL BLOCK,
SHAKARPUR, DELHI-92

2. CHANDER SINGH
(DELETED VIDE ORDER DATED 11.11.2021

OF HON'BLE COURT)

3. PRITAM SINGH
   S/O SH. JAGIR SINGH,
   THROUGH HIS GPA SH. SUKH DEV SINGH,
   R/O VILLAGE GIDAR PINDI,
   TEHSIL JAGRAON, DISTT. LUDHIANA

4. MAHINDER SINGH
   S/O SH. JAGIR SINGH,
   THROUGH HIS GPA SH. SUKH DEV SINGH,
   R/O VILLAGE GIDAR PINDI,
   TEHSIL JAGRAON, DISTT. LUDHIANA

5. BHUPINDER SINGH
   S/O SH. JAGIR SINGH,
   THROUGH HIS GPA SH. SUKH DEV SINGH,
   R/O VILLAGE GIDAR PINDI,
   TEHSIL JAGRAON, DISTT. LUDHIANA

6. SUKH DEV SINGH
   S/O SH. JAGIR SINGH,
   THROUGH HIS GPA SH. SUKH DEV SINGH,
   R/O VILLAGE GIDAR PINDI,
   TEHSIL JAGRAON, DISTT. LUDHIANA

7. SMT. PRITAM KAUR
   (SINCE DECEASED THROUGH HER
   LEGAL REPRESENTATIVES):-

   (a) MANDEEP SINGH
   S/O LATE SMT. PRITAM KAUR,
   R/O HOUSE NO.3, WARD NO.4B,
   RELIANCE SOCIETY ADIPUR, KUTCH,
   GUJARAT

   (b) SUKHPREET SINGH,
   S/O LATE SMT. PRITAM KAUR,
   R/O HOUSE NO.3, WARD NO.4B,
   RELIANCE SOCIETY ADIPUR, KUTCH,
   GUJARAT

   (c) MANPREET KAUR,
   D/O LATE SMT. PRITAM KAUR,

R/O HOUSE NO.3, WARD NO.4B,
RELIANCE SOCIETY ADIPUR, KUTCH,
GUJARAT

8. MAHINDER KAUR
D/O SH. JAGIR SINGH,
THROUGH HIS GPA SH. SUKH DEV SINGH,
R/O VILLAGE GIDAR PINDI,
TEHSIL JAGRAON, DISTT. LUDHIANA

.....RESPONDENTS/PLAINTIFFS

9. KRISHAN KAUR
D/O SH. GULZAR SINGH,
R/O VILLAGE GHUTUNPUR,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.

10. AMARJEET SINGH
(SINCE DECEASED THROUGH HIS
LEGAL REPRESENTATIVES):-

(a) SUMINDER KAUR
W/O AMARJEET SINGH,
R/O GHUTTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

(b) AVNEET KAUR (MINOR)
D/O AMARJEET SINGH,
THROUGH MOTHER AND NATURAL
GUARDIAN SMT. SUMINDER KAUR,
R/O GHUTTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

(c) JASKIRAN SINGH (MINOR)
S/O AMARJEET SINGH,
THROUGH MOTHER AND NATURAL
GUARDIAN SMT. SUMINDER KAUR,
R/O GHUTTUNPUR, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

11. KAMALJEET KAUR
WD/O SH. LAKHBIR SINGH,
R/O VILLAGE GHUTUNPUR, TEHSIL PAONTA

SAHIB, DISTRICT SIRMAUR, H.P.
PRESENTLY RESIDING AT MALAKPUR
KHADAR, TEHSIL CHHACHHRAULI,
YAMUNANAGAR

12. RANO D/O SH. JAI SINGH,
S/O SH. AMAR SINGH,
R/O PURUWALA, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.

13. KAMALEET KAUR D/O SH. JAI SINGH,
S/O SH. AMAR SINGH,
R/O PURUWALA, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.
14. BALJEET KAUR D/O SH. JAI SINGH,
S/O SH. AMAR SINGH,
R/O PURUWALA, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.

15. NIRANJAN KAUR D/O SH. JAI SINGH,
S/O SH. AMAR SINGH,
R/O PURUWALA, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.

16. AMARJEET KAUR D/O SH. JAI SINGH,
S/O SH. AMAR SINGH,
R/O PURUWALA, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.

17. JAS KAUR (DELETED VIDE ORDER
DATED 11.11.2021 OF HON'BLE COURT)

18. ISHWAR KAUR
W/O SH. PHOOL SINGH,
R/O HARIPUR TOHANA, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

19. SANGAT SINGH S/O SH. KALA,
R/O PURUWALA, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

20. SURJEET KAUR
W/O SH. GURDASS SINGH,

R/O AMARKOT, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR, H.P.

21. TARAN KAUR
W/O SH. DILBAG SINGH,
R/O PURUWALA, TEHSIL PAONTA
SAHIB, DISTRICT SIRMAUR, H.P.

.....PROFORMA RESPONDENTS

(MS. DEVYANI SHARMA, ADVOCATE, FOR
R-1, 3 TO 6, 7(a) TO 7(c) & 8,

MR. GURINDER SINGH PARMAR, ADVOCATE,
FOR R-12, 16, 18, 20 AND 21,

R-9, 10(a) TO 10(c), 11, 13, 14 & 19 EX-PARTE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.4092 of 2013
Reserved on:06.07.2022
Decided on: 15.07.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 8 Rule 1A(3)- **H. P. Debt Reduction Act, 1976**- Section 8- Petitioner assailed the order of Trial Court vide which application under Order 8 Rule 1A(3) for production of documents was dismissed- Held:

A. Due Diligence- Suit at the stage of arguments and petitioner did not exercise due diligence at all in moving the concerned application. (Para 5(I).
B. Relevancy of documents- Document sought to be produced are not at all necessary and relevant for that adjudication of the list. [Para 5 (II) (d)]
C. Maintainability of petition under Article 227 of the Constitution of India, 1950- Power is to be exercised where there is no evidence at all to justify or the finding is so perverse- Findings of Trial Court not perverse. [Para 5(III)]
D. Abuse of Process of Court- Frivolous and groundless filings constitute a serious menace to the administration of justice- Petitioners have abused process of Court at the stage of arguments - Petition is dismissed with costs of Rs.25,000/-. [Para 5(IV)]

Cases referred:

Bagai Constructions Vs Gupta Building Material Store (2013) 14, SCC1;
Dalip Singh Vs. State of Uttar Pradesh and Others 2010) 2 SCC 114;

Dnyandeo Sabaji Naik and another Vs Pradnya Prakash Khadekar and others (2017) 5 SCC 496;
Garmet Craft vs Prakash Chand Goel (2022) 4 SCC 181;
Kanshi Ram and another vs Lachhman and others, AIR 2001 SC 2393;
Ramrameshwari Devi and others Vs Nirmala Devi and others (2011) 8 SCC 249;
Sampooran Singh Vs Niranjan Kaur (1999) 2 SCC 679;
Singh Ram (Dead) through Legal Representatives Vs Sheo Ram and others (2014) 9 SCC 185;
Subrata Roy Sahara Vs. Union of India (2014) 8 SCC 470;

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

O R D E R

An application moved by defendants No.1 to 7 under Order 8 Rule 1A(3) of the Code of Civil Procedure (CPC) seeking to produce certain additional documents at the stage of arguments was dismissed by the learned Trial Court on 04.03.2013. This order has been questioned by the defendants by invoking supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

2. Before proceeding further, it will be appropriate to describe status of parties before the learned Trial Court alongwith gist of the case.

2(i)(a).Set No.1 (Plaintiffs):-

Jagir Singh and Chanan Singh, both sons of Jawahar Singh, were the predecessors-in-interest of the following plaintiffs, namely:-

1. Mahinder Kaur W/o Ajayab Singh
2. Chander Singh S/o Jagir Singh
3. Pritam Singh S/o Jagir Singh
4. Mahinder Singh S/o Jagir Singh
5. Bhupinder Singh S/o Jagir Singh
6. Sukhdev Singh S/o Jagir Singh
7. Pritam Kaur D/o Jagir Singh

8. Mohinder Kaur S/o Jagir Singh

Suit was filed by the above plaintiffs pleading that their predecessors-in-interest were owners in possession of the land bearing Khasra Nos.40, 41, 64, 65 Kite 4, total measuring 32-5 bighas, situated in Mauza Ghuttunpur, Tehsil Paonta Sahib, District Sirmour. They had mortgaged the suit land with possession in favour of predecessors of defendants No.8 to 18 (Set No.2).

2(i)(b).Set No.2 (Defendants No.8 to 18):-

Jagir Singh and Chanan Singh (predecessors-in-interest of set No.1) had mortgaged the suit land to set No.2 as under:-

(i) Amar Singh S/o Chuhar Singh
(ii) Hazor Singh S/o Chuhar Singh

Both predecessors in interest of defendants No.8 to 18 namely:-

8. Rupinder Singh
9. Smt. Rano
10. Smt. Kamaljeet Kaur
11. Smt. Baljeet Kaur
12. Smt. Niranjan Kaur
13. Smt. Amarjeet Kaur
14. Smt. Jas Kaur
15. Smt. Ishwar Kaur
16. Sangat Singh
17. Surjeet Singh
18. Smt. Taran Kaur

Plaintiffs' further contention in the civil suit was that Gulzar Singh, the predecessor-in-interest of defendants No.1 to 7 (Set No.3) purchased mortgagees' rightsover the suit land by paying mortgage debt/money amounting to Rs.466/- vide registered deed No.86 on 08.06.1951. Thus, Gulzar Singh became mortgagee with possession vide mutation No.104, dated 09.08.1951, i.e. the date he entered on the possession of the suit land.

2(i)(c).Set No.3 (Defendants No.1 to 7):-

Mortgagees' rights over the suit land were purchased by Gulzar Singh, predecessor-in-interest of defendants No.1 to 7, namely:-

1. Santa Singh S/o Gulzar Singh
2. Harbhajan Kaur D/o Gulzar Singh
3. Krishan Kaur D/o Gulzar Singh
4. Amarjeet Singh, GS of Gulzar Singh
5. Surjeet Singh, GS of Gulzar Singh
6. Harjeet Singh S/o Lakhbir Singh
7. Kamaljeet Kaur W/o Lakhbir Singh

2(i)(d). The case of the plaintiffs was that set No.3 (defendants No.1 to 7) had earned many times more profit than the mortgaged money from the mortgaged land. Set No.3 was not entitled to any more amount at the time of restoration of possession of the suit land to the plaintiffs (set No.1) as per Section 8 of the Himachal Pradesh Debt Reduction Act, 1976 (in short 'Debt Act'). That there was no limitation under the Debt Act for redemption of mortgage and redeeming the property. That mortgage could be redeemed at any time under the said Act. The mortgaged amount paid by set No.3 to set No.2, the mortgage debt of plaintiffs (set No.1), falls under the definition of loanunder the Debt Act. The plaintiffs also alleged that cause of action had accrued to them from the date of execution of the mortgage deed/attestation of mutation, i.e. 08.06.1951 and 09.08.1951, respectively. It was stated to be continuing at the time of filing of the civil suit on 21.05.2007. With these basic averments, the plaintiffs filed the civil suit seeking decree for restoration of possession of the suit land measuring 32-5 bighas as described above. In the alternative, a decree for possession on the strength of title was also prayed for.

2(ii). In the written statement filed on behalf of Set No.3, preliminary objections of suit being barred by limitation and the plaint disclosing no cause of action were taken. On merits, Set No.3 did not dispute that they were legal heirs and successors of deceased Gulzar Singh. They also did not dispute that Gulzar Singh had paid the mortgage amount to Set No.2 (defendants No.8 to

18). They refuted the contentions of Set No.1 (plaintiffs) that they were not entitled for the mortgaged money. The other defendants filed separate written statement almost on similar grounds.

2(iii). The matter reached the stage of arguments. An application was moved by Set No.3 on 16.04.2012 for leading additional evidence. The application was allowed. The matter was again fixed for arguments. Again an application was moved by Set No.3 for leading additional evidence in form of documents. This application was dismissed by the learned Trial Court on 04.03.2013. Hence, instant petition.

3. Contentions:-

3(i). Sh. Karan Singh Kanwar, learned counsel for the petitioners (some of the defendants from Set No.3) contended that Set No.3 wanted to place on record documents establishing that Jawahar Singh S/o Sh. Diwan Singh-Grandfather of Set No.1 (plaintiffs) had mortgaged the suit land in favour of one Phillo on 19.01.1910. Heirs of Phillo, namely Dulla, Abrahim and Husandeen created mortgage in favour of Amar Singh and Hazoor Singh sons of Chuhar Singh (Set No.2) on 19.06.1944. Learned counsel submitted that it was from Set No.2 that the suit land had come to Set No.3. That the documents in respect of creation of mortgage deeds dated 19.01.1910 and 19.06.1944 would have established that the suit filed by the plaintiffs (Set No.1) was barred by limitation. The plea of limitation had already been set up by Set No.3 in its written statement. These documents would have demonstrated that the mortgage of the suit property was first created in 1910, whereas the plaintiffs had started the events in their plaint from 1951 onwards. Another contention raised was that the plaintiffs in alternative, had claimed relief of possession on the strength of title. The new documents sought to be placed on record by Set No.3 would have gone to show that the mortgaged land had already changed handsin the intervening period. The plaintiffs had lost their title over the suit land, therefore, they were not entitled

to the alternative prayer as well. Learned counsel argued that the documents being material, should have been allowed to be produced in evidence. Learned Trial Court erred in rejecting petitioners' (Set No.3) application moved under Order 8 Rule 1A(3) CPC.

3(ii). Ms. Devyani Sharma, learned counsel for the plaintiffs (Set No.1) argued that the suit was already at the stage of arguments when Set No.3 had moved the application for producing additional evidence in form of documents. Set No.3 did not exercise due diligence. No cogent explanation was furnished as to why the documents sought to be produced by them at the fag end of trial could not be produced earlier. It was also argued that the documents intended to be produced by Set No.3 were wholly irrelevant for deciding the controversy raised by Set No.1 (Plaintiffs). It was also submitted that under the guise of moving the application under Order 8 Rule 1 (3-A) CPC for producing additional record, an altogether new plea in respect of plaintiffs' lack of title was being attempted to be raised by Set No.3, which was not permissible. Learned counsel also argued that filing of the present petition was an abuse of the process of the Court and that such application was not even maintainable under Article 227 of the Constitution of India.

4. I have heard learned counsel for the parties and gone through the case file.

5. Observations:-

The application wasmoved under Order 8 Rule 1A(3) CPC, which reads as under:-

> *"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.- (1)Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the*

document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents-

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

I. Due diligence:-

It will be pertinent to take note of following observationsregarding late production of documents made in ***(2013) 14, SCC1***, titled ***Bagai Constructions Vs Gupta Building Material Store,*** in reference to Order 18 Rule 17 and Section 151 CPC:-

"15. After change of various provisions by way of amendment in CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed d those two applications before the trial court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed

both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still e the plaintiff has not placed those bills on record. It further shows that final arguments were heard on a number of times and the judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC."

Admittedly, the suit was at the stage of arguments when Set No.3 moved the application in question for producing additional documents. The only reason put forth by Set No.3 for delayed production of documents is that they became aware about the existence of documents in question only when the old record was got searched by them through their Advocate in the office of Sub-Registrar, Paonta Sahib. The assigned reason leads to the question as to why the petitioners (Set No.3) got their Advocate to examine the old record, that too specifically of the years 1910 and 1944. The obvious reason perhaps is that Set No.3 was aware of existence of these documents from the very beginning and it is for this reason that the record specific to the years 1910 and 1944 was allegedly got searched by them through their Advocate. The fact can also not be lost sight of that Gulzar Singh, Predecessor-in-interest of Set No.3 is stated to be the Grandson of Jawahar Singh, who is also the Grandfather of Set No.1. Therefore, it is even otherwise difficult to believe that Set No.3 was not aware of the existence of the documents at the time of filing of the written statement. Additionally, the application does not give any date as to when Set No.3 got the old record searched in the office of Sub-Registrar, Paonta Sahib, District Sirmour as alleged by them. It is also an admitted fact that Set No.3 had previously also moved an application for leading additional evidence on 16.04.2012. That application was allowed. Had Set No.3 exercised due diligence even at that time, they could have made the prayer contained in

the present application at that time. Looking from any angle, there is, thus, no escape from the conclusion that Set No.3 did not exercise due diligence at all in moving the concerned application.

II. Relevancy of Documents:-

The mortgage deeds sought to be placed on record by Set No.3 pertain to the years 1910 and 1944. According to the learned counsel for Set No.3 (present petitioners), these two documents would go on to prove that the suit filed by Set No.1 was beyond limitation and that Set No.1 had lost title over the suit land.

II(a). In the facts of the case, learned Trial Court was justified in observing that the documents sought to be placed on record by Set No.3 were totally irrelevant for deciding the issues raised by Set No.1 in their plaint. The civil suit was filed on the strength of mortgage deed dated 08.06.1951. In case the suit was to be filed within the limitation period of thirty years as contended by Set No.3, then the suit filed on 21.05.2007 would have been barred even if the starting point of limitation is construed from 1951. The documents pertaining to the years 1910 and 1944 sought to be produced now would not add any impact on the plea of limitation.

II(b). Otherwise also, the suit was filed under the provisions of the H.P. Debt Reduction Act. Hon'ble Apex Court in ***Kanshi Ram and another Versus Lachhman (Dead) through LRs and others, AIR 2001 SC 2393***, has held that there is no period prescribed for redemption of mortgage under the H.P. Debt Reduction Act. Relevant observations from the judgment regarding this are as under:-

> *"16. In the backdrop of the above the question of limitation is to be considered. The reason given by the High Court in support of the finding that the suit was barred by limitation is that more than 30 years had elapsed since the date of the mortgage (February, 1946) when the suit was filed in 1981. Therefore the mortgagor had lost his right to redeem the property mortgaged.*

The provisions in Section 27 of the Limitation Act have been considered in support of the finding. This reasoning appears to us to be fallacious. It defeats the object and the purpose of the statute enacted by the legislature specially to give relief to debtors in the State. The first appellate Court had given cogent reasons in support of its finding in favour of the appellants. The Court held and in our view, rightly that the suit was one for recovery of possession from the mortgagee who was in unauthorised possession of the mortgaged property after the mortgage loan was satisfied. The cause of action for filing such a suit under the Act arose when the enactment was enforced in 1979. Viewed from that angle the suit was filed in time and the trial Court and the first appellate Court rightly recorded the findings to that effect. The High Court erred in reversing the concurrent finding of the Courts below on the erroneous assumption that the suit was one for redemption of the mortgage simpliciter. It is relevant to note here that the present suit is not one filed under Section 60 or 62 of the Transfer of Property Act. It is a suit filed for relief on the basis of the Himachal Pradesh Debt Reduction Act 1976."

II(c). It is also not in dispute that the mortgage in question was a usufructuary mortgage in terms of Section 58(d) of the Transfer of Property Act, 1882. In ***(2014) 9 SCC 185***, titled***Singh Ram (Dead) through Legal Representatives Versus Sheo Ram and others,***the Hon'ble Supreme Court held that mere expiry of period of 30 years from the date of creation of the mortgage does not extinguish the right of mortgagor to recover possession under Section 62 (pertaining to usufructuary mortgage) of the Transfer of Property Act. Relevant para is as follows:-

"12. A perusal of the above provisions shows that Article 61 refers to the right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the TP Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage.

> *The said right of usufructuary mortgagor though styled as "right to recover possession" is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the TP Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the TP Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the TP Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the TP Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the TP Act."*

In ***Civil Appeal No.89 of 2012***, titled ***Harminder Singh (D) Thr. LRs Versus Surjit Kaur (D) Thr. LRs & Ors.***, the mortgage was not redeemed by the mortgagor within a period of thirty years. The mortgagee filed a suit for declaration that she had become the owner after extinguishment of the mortgagor's rights and also for permanent injunction. Her suit was decreed by the learned Trial Court. Such decree was affirmed by the learned First Appellate Court. In second appeal, the suit was dismissed by the High Court relying upon a judgment of the Hon'ble Apex Court in ***(1999) 2 SCC***

679, titled ***Sampooran Singh Versus Niranjan Kaur.*** While dismissing the appeal preferred by the mortgagee, the Hon'ble Apex Court held as under:-

> *"After the judgment was rendered by the Single Judge Bench, the Full Bench of the Punjab and Haryana High Court in 'Ram Kishan & ors. Vs. Sheo Ram & ors.' Reported in AIR 2008 P&H 77 held that once a usufructuary mortgage is created, the mortgagor has a right to redeem the mortgage at any point of time on the principle that once a mortgage always a mortgage. Such judgment was affirmed by this Court in 'Singh Ram (Dead) Through Legal Representatives Vs. Sheo Ram & ors.' reported in (2014) 9 SCC 185."*

II(d). No plea was taken by Set No.3 refuting title of the plaintiffs over the suit land. Under the pretext of producing new documents, Set No.3 cannot be allowed to take up a new plea at the stage of arguments, which was not raised by them in their written statement.

From the above, it is evident that the documents sought to be produced by the defendants (Set No.3) were not at all necessary for the adjudication of the lis.

III. Maintainability of Petition under Article 227 of the Constitution of India:-

It would be beneficial to refer here to ***(2022) 4 SCC 181,*** titled ***Garmet Craft vs Prakash Chand Goel***, wherein the nature and scope of exercise of supervisory jurisdiction under Article 227 was reiterated. The Hon'ble Apex Court held that while exercising supervisory jurisdiction under Article 227 of the Constitution of India, the High Court does not act as a Court of First Appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. Power under Article 227 is to be exercised where there is

no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly came to such a conclusion arrived at by the Courts below. Relevant paras of the judgment read as under:-

> *"15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.*
>
> *16. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd.2 has observed: (SCC pp. 101-102, para 6)*
>
> > *"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the*

jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

In the instant case, learned Trial Court has exercised the jurisdiction in accordance with law while considering and deciding the application under Order 8 Rule 1 (3-A) of the Code of Civil Procedure. The observations made in the order are based upon appreciation of facts and law. The same cannot be held out as perverse.

IV. Abuse of process of Court:-

Hon'ble Apex Court in ***(2011) 8 SCC 249***, titled ***Ramrameshwari Devi and others Versus Nirmala Devi and others***, has cautioned against uncalled for and frivolous litigation and emphasized upon taking following steps:-

"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully

scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavor to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of

> *on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.*
> *J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."*

Any attempt by a litigant to abuse the process of the court must be viewed with disfavour. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth..... Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Productive resources which should be deployed in the handling of genuine cases are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay [Re: ***(2017) 5 SCC 496***, titled ***Dnyandeo Sabaji Naik and another Versus Pradnya Prakash Khadekar and others***].

In ***SLP(C) No.11030/2022***, titled ***Charu Kishor Mehta Versus Prakash Patel & Ors.***, decided on 22.06.2022, while upholding the order

passed by the Bombay High Court dismissing the appeal with costs of Rs.5 Lakhs, Hon'ble Apex Court reiterated its earlier observations in ***(2010) 2 SCC 114***, titled ***Dalip Singh Vs. State of Uttar Pradesh and Others***and ***(2014) 8 SCC 470,*** titled ***Subrata Roy Sahara Vs. Union of India,*** as under:-

> *"19. The Supreme Court in Dalip Singh Vs. State of Uttar Pradesh and Others, reported in (2010) 2 SCC 114 has this to say for methods adopted at the hands of litigants under similar circumstances. Paragraph nos.1 and 2 as produced below:*
>
> > *"1. For many centuries, Indian society cherished two basic values of life i.e., `Satya' (truth) and `Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
> >
> > *2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*
>
> *20. We may record here that we were initially persuaded in this case, to initiate contempt proceedings against the Petitioner, considering that there has been a deliberate attempt on her part in the non-disclosure of absolutely relevant facts before this Court. We are not doing so purely due to the age of the*

> *Petitioner as she is a lady of 78 years of age. The present petition is no doubt an abuse of the process of law and has caused harm to the other parties to the litigation, some of whom may have been needlessly drawn into the litigation. We may refer here an observation given in the case of Subrata Roy Sahara Vs Union of India (2014) 8 SCC 470:*
>
> > *"191. The Indian judicial system is grossly afflicted, with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims. One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without any fault on his part."*

The facts of the case make it loud and clear that the petitioners (Set No.3) have unnecessarily delayed the conclusion of the civil suit. Repeated applications one after the other have been moved for leading additional evidence at the stage of arguments. Apart from suffering with complete lack of diligence, the application in question in the present petition was totally frivolous. The documents sought to be produced at the stage of arguments were irrelevant to the controversy involved and do not leave any impact on the defence set up in the written statement of the petitioners (Set No.3). An altogether new defence not put forth in the written statement, in the facts of the case, cannot be allowed at the stage of arguments. The civil suit instituted in the year 2007 and at the stage of arguments in the year 2013, because of concocted and incoherent pleas of the petitioners (Set No.3), is still at that stage. Petitioners have abused process of Court.

In view of above discussion, present petition is dismissed with costs of Rs.25,000/-. The costs be paid by the petitioners to the plaintiffs before the learned Trial Court. Parties through learned counsel, are directed to appear before the learned Trial Court on ***01.08.2022.***

It is, however, clarified that above order shall remain confined to the adjudication of the present petition and shall have no bearing on the merits of the matter. Learned Trial Court shall decide the main matter on its own merit without being influenced by any of the observations made above.

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

Between:-

CHAND KISHORE SON OF SH. JAGDISH PASWAN, RESIDENT OF VILLAGE AND POST OFFICE, UTESRA, TEHSIL AND POLICE STATION, SALKHUA BAZAAR, DISTRICT SAHRSA, BIHAR.

....APPELLANT.

(BY MS. VEENA SOOD, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT.

(BY MR. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 254 of 2020
Reserved on:21.07.2022
Decided on:27.07.2022

Code of Criminal Procedure, 1973- Appeal - **Indian Penal Code, 1860**- Sections 302, 306, 201- Appellant assailed judgment and sentence passed by Ld. Sessions Judge, Kinnaur- Circumstantial evidence- Last seen theory- Held- Findings and conclusions drawn by the Ld. Trial Court are not based on legal evidence, rather were result of mere surmises and conjunctures- The cardinal principle of criminal jurisprudence has remained impassive- The prosecution has to prove its case beyond all reasonable doubts. Appearance of serious doubt in the prosecution case only helps the case of accused- More serious the offence, more arduous is the duty cast upon prosecution to discharge its burden strictly in accordance with law- In absence of direct

evidence, circumstances relied upon by the prosecution have to satisfy the same standard of proof i.e. beyond all reasonable doubts- A close scrutiny of the material on record would disclose that the circumstances relied upon by the prosecution to prove the guilt of the appellant were not proved and also failed to form a complete chain of events leading to the conclusion that in all human probability the murder must have been committed by the appellant- Appeal allowed. (Para 16, 25, 27, 30)

Cases referred:

Anjan Kumar Sarma v. State of Assam, (2017) 14 SCC 359;

Babu vs. State of Kerala (2010) 9 SCC 189;

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

J U D G M E N T

The appellant has assailed judgment and sentence dated 21.12.2016 passed by learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushehr, H.P., in Sessions Trial No. 0000024/2014, whereby the appellant has been convicted and sentenced as under:-

Offence(s)	**Substantive sentence**	**Fine**	**Default Punishment.**
302 of the IPC	Imprisonment for life.	Rs.10,000/-	Simple imprisonment for two years
363 of the IPC	Rigorous imprisonment for seven years	Rs. 5,000/-	Simple imprisonment for one year.
201 of the IPC	Rigorous imprisonment for seven years.	Rs. 5,000/-	Simple imprisonment for one year.

All the substantive sentences have been ordered to run concurrently. In case of realization of fine, the same has been ordered to be paid to the mother of the child.

2. The prosecution case in a nutshell was that PW-1 Ganga Devi had telephonically informed Police Station, Nirmand, District Kullu, H.P., at about 8.30 PM on 22nd April, 2013 that her son, aged about 4 years, was missing since 4-4.30 P.M from village Nirmand. The Police had helped complainant in searching the child but could not trace him. A missing report vide DDR No. 35-(A), dated 22.04.2013 **Ext. PW-13/A** was recorded at the police station concerned at about 10.30.PM. Despite efforts, the child could not be traced and finally on 24.04.2013 at about 2.15 P.M., FIR Ex.PW1/A was registered under Section 363 of the IPC.

3. On 24.04.2013, at about 4.30 PM, the dead body of the child (Master Sumit) was found, packed in a gunny bag, in a field near Ambika Public School. Suspicion was entertained that the offence might have been committed by some labourer working in the area belonging to Bihar. Accordingly, the police had instructed all the labourers from Bihar, residing in the area, not to leave the place.

4. On 25.04.2013, a team of forensic experts and a dog squad was also associated in the investigation. On the lead provided by the dog squad, the appellant was suspected to have committed the crime.

5. It was also found that the appellant had tried to abscond from the village during early morning hours of 25.04.2013. He was chased and apprehended by the villagers at a distance of about 8-10 kilometers from the village. The appellant was handed over to the police. He was arrested. Police recorded a disclosure statement of the appellant, **Ex.PW3/B** on 25.04.2013, in presence of PW-3 Padam Singh and Yogesh Bhargav, whereby he disclosed that he could get recovered the *"Pyjama"* (lower apparel) of deceased from a

place where it had been hidden. On the basis of such disclosure statement, recovery of *"Pyjama"* was made from the rented room of the appellant.

6. On the same day i.e. on 25.04.2013, a team of forensic experts also examined the spot where the dead body was lying as also the rented room of appellant. Certain incriminating articles were collected and seized from both the places by the police, on the instructions of the forensic experts. The forensic experts had also prepared their spot inspection report **Ex.PW10/A**. The material collected by police was sent to RFSL, Mandi and SFSL, Junga, for scientific examination and analysis. The reports in this regard were produced in evidence as **Ex. PW10/B, Ex.PW11/A, Ex.PW11/B, Ex.PW19/A, Ex.PW19/B** and **Ex.PW23/C.**

7. On completion of investigation, "*challan"* was presented. Appellant was charged for offences under Sections 302, 201, 363 and 102-B of the IPC. Along with appellant, one Manohar Lal was also charged for offences under Sections 202, 201 and 120-B of the IPC. It was alleged against said Manohar Lal that he had acquired prior knowledge of the commission of offences committed by the appellant, but he did not report the matter to the police or authorities. He had also helped the appellant in destroying the evidence.

8. Learned trial Court acquitted Manohar Lal of all the charges. However, the appellant has been convicted and sentenced, as noticed above.

9. We have heard Ms. Veena Sood, learned counsel for the appellant (*legal-aid)* and Mr. Kamal Kant, learned Deputy Advocate General for the respondent and have also carefully perused the entire record.

10. The prosecution based its case on circumstantial evidence. The circumstances alleged against the appellant were ***firstly***, that on the disclosure statement of appellant, *"Pyjama"* of deceased was recovered from the rented room of the appellant, ***secondly***, the child was last seen in the company of the appellant on 22.04.2013, ***thirdly***, appellant had tried to

abscond from the village after discovery of the dead body of child and ***fourthly***, the articles found in the gunny bag in which dead body was found as also littered around the place, matched with the articles seized from the rented room of the appellant.

11. The learned trial Court did not find circumstances *firstly* and *secondly* as proved. However, the circumstances detailed above as *thirdly* and *fourthly* were held proved and made basis to convict the appellant.

12. The circumstance that the appellant made the disclosure statement and in pursuance thereto got recovered *"Pyjama"* of deceased was not found proved on the premise that the evidence led by the prosecution was contradictory and not convincing. Referring to the statement of PW-3 Padam Singh, one of the witnesses to the making of disclosure statement and also recovery of *"Pyjama"*, learned trial Court held that the same was in irreconcilable contradiction with the other material on record. Learned trial Court found that according to PW-3, the room of appellant was locked from outside when he (appellant) had led the police party for recovery of "*Pyjama"*, there was only one brick in the room behind the door and one side of *"Pyjama"* was visible. Whereas PW-6 Bhaskra Nand (father of deceased) had contradicted PW-3 by stating that door of the rented room of appellant was found bolted only from outside and not locked. According to this witness, even *"Pyjama"* was not visible underneath the brick. PW-22 Praveer Thakur (Dy.S.P) had stated that room of the appellant was found locked and was opened with the help of key provided by the appellant. Learned trial Court also took notice of that part of statement of PW-6 Bhaskra Nand where he had stated that room of the appellant had been searched by the police even on 24.04.2013 and nothing had been found. Further PW-10 Dr. B.R. Rawat, one of the members of team of forensic experts had stated that the forensic experts including himself had inspected the rented room of appellant from inside and at that time the orange coloured *"Pyjama"* was visible underneath the brick.

As per this witness, he had visited the room at around 12.00 noon. PW-18, Inspector Prem Lal contradicted PW-10 by stating that the police had inspected the room of appellant along with forensic experts at about 2.30 p.m. According to PW-3 Shri Padam Singh, *"Pyjama"* was recovered on the disclosure of appellant at about 11.00 A.M. Taking notice of all these facts, learned trial Court held that if the *"Pyjama"* was recovered at 11.00 A.M., how the forensic team could notice *"Pyjama"* at about 12.00 noon or 2.30 P.M., as the case might have been. Looking from another angle, in case forensic expert team had visited the room before the recovery of *"Pyjama"* on disclosure and had noticed *"Pyjama"*, there was no secret left for the hiding of *"Pyjama"* and the forensic expert could themselves have seized or instructed the police to seize the article there and then.

13. The prosecution had sought to prove the circumstance that deceased was last seen in the company of the appellant on the basis of statements of PW-5 Sh. Yugal Kishore and PW-9 Sh. Moti Ram. PW-5 Yugal Kishore was a Shopkeeper in the village. This witness had stated that on 22.04.2013 at about 4.00 PM, the appellant had visited his shop and purchased a packet of biscuits and a chocolate. He denied that the appellant had given the biscuits and chocolate to any one in his presence. PW-5 was declared hostile but nothing material could be elicited from him. PW-9 stated that he was running a Dhaba in village Nirmand. On 22.04.2013, at about 2.30 p.m., the appellant had visited his Dhaba with a boy, aged around 3-4 years. The boy had his lunch whereas the appellant did not. Thereafter, both left the Dhaba and it was on 25.04.2013 that this witness had come to know that a boy from the village was missing.

14. Learned trial Court held the statements of PW-5 and PW-9 to be insufficient to conclude that the deceased was in the company of appellant on 22.04.2013. The reasons assigned for such conclusion by the learned trial Court were that PW-5 did not notice any child with the appellant and PW-9

had also not identified the child to be the deceased. It was also held that according to PW-9, the child accompanying the appellant had visited his Dhaba at 2.30 P.M., whereas the complainant i.e. the mother of the deceased, PW-1 had stated that the child was with her till 4.00-4.30 P.M. and had gone missing thereafter.

15. On perusal of evidence on record and the material relied upon by learned trial Court for holding the aforesaid circumstances *firstly* and *secondly* not proved, we are convinced with the findings recorded by learned trial Court and do not have reasons to differ.

16. Now coming to the circumstance that the appellant had tried to escape from the village despite instructions to the contrary, we find that the findings and conclusion drawn by learned trial Court are not based on legal evidence, rather were result of mere surmises and conjectures. Learned trial Court placed reliance on the fact that the police had got lead with the help of dog squad, which was sufficient to raise suspicion regarding the involvement of the appellant. Statement of PW-8 Tek Chand, to the effect that police had taken help of dog squad, the dog had tracked the route upto the accommodation of appellant and also that police had issued instructions that no *"Bihari"* labourer would leave the village, apparently weighed with learned trial Court. The appellant has been held to defy such a command. We find such view of learned trial Court to be erroneous. Indubitably, the dog squad had visited the spot on 25.04.2013 along with the team of forensic experts. Reference in this behalf can be had from the statements of PW-18 Inspector Prem Lal and PW-22 Dy. S.P, Praveer Thakur. Thus, the lead, if any, could have been provided by dog squad only after its visit on 25.4.2013. In such circumstance, the reason for raising suspicion against *"Bihari"* labour in general and against appellant in particular, especially on 24.04.2013 remained unexplained. What was the other reason to suspect *"Bihari"* labour or the appellant has not come forth, hence, there was no reason for the police

to have commanded all the labour class from Bihar, residing in the village or the area, not to leave the village. Further, there is no evidence on record to suggest that what was the mode of communicating said command by police to Bihari labour, especially to the appellant. In fact, the communication of such command by police to the appellant has not been proved. Even while examining the appellant under Section 313 Cr.P.C, the appellant was not confronted that he was under instructions not to leave the village. *Vide* question number 25 of said statement appellant was asked about the instructions issued to *"Bihari"* labourers in general, regarding which he had answered, "I do not know".

17. Appellant was stated to have been apprehended at a distance of 8-10 Kms. from village Nirmand in the morning of 25.04.2013. As per PW-2 Ram Krishan, he was approached by Manohar Lal (*the acquitted co-accused*) on 25.4.2013 in the morning and was apprised that appellant had confessed before him (Manohar Lal) that the victim child had been murdered by appellant. PW-2 had further stated that while Manohar Lal was conversing with him a telephonic call was received by Manohar Lal regarding the factum of appellant having absconded in the meanwhile. PW-8 Tek Singh stated that on 25.04.2013, at about 8.30 P.M., one Bihari Labourer asked this witness as to whether he had seen some Bihari labourer. On inquiry by PW-8, the Bihari labour told that they all would be implicated as one of their native fellow had absconded. On such information, this witness apprehended the appellant at village Daropa at a distance of about 10 kilometers from Nirmand at about 10.30 A.M. PW-8 was also accompanied by other co-villagers for apprehending the appellant including PW-20 Ghanshyam. From the statement of PW-8, it was not clear as to why the appellant was chased when none was named by the person who had informed PW-8 about the fleeing of a Bihari labourer. It also remained unexplained as to who disclosed about the direction where the appellant had gone. Similarly, reliance has been placed on

the statement of PW-20 Ghanshyam, who had stated that he noticed appellant running towards Daropa and PW-8 Tek Singh was following him, so he also followed Tek Singh. As per this witness, the appellant had confessed his crime after his apprehension.

18. The statements of PW-2, PW-8 and PW-20 have to be looked at with some circumspection as they could be said to be interested witnesses being residents of same village and also emotionally charged at the happening of gruesome murder of the child. It was not the case that PW-2 had informed PW-8 about the information supplied by Manohar Lal. PW-8 Tek Singh had stated that he had telephonically informed PW-20 Ghanshyam and another person about the fact of appellant having escaped, whereas PW-20 did not say so. According to PW-20, appellant had confessed his crime, but PW-8 did not confirm such fact. Thus, the prosecution evidence in this regard was not very cogent. Yet, what was inferable from statements of above noted witnesses was that the appellant had left the village in the morning.

19. In given circumstances could it be assumed that appellant had intended to escape? Simply because he was found at some distance from the village in the morning, was not such a circumstance on the basis of which the allegations against the appellant could be said to have been proved. PW-8 had further stated that when appellant was apprehended at Daropa, he was drunk and was carrying a bottle of liquor in his hand. Had the appellant left the village with intent to abscond, he would not be found in drunken state in the early hours of the morning with a bottle of liquor in his hand. He would have tried to be as far away as possible from the village. In addition to above, the prosecution case was that there was rage and emotional burst in the entire village after discovery of dead body of the victim child. PW-18, the Investigating Officer of the case, had been categoric about such fact. Had the appellant being apprehensive of his implication, he could have easily taken the

benefit of night intervening 24th – 25th April, 2013, to abscond and would not have waited for the sun to rise next morning.

20. Learned trial court had further based the conviction of the appellant on the hypothesis that articles found from the gunny bag, from surroundings of spot where dead body was found and also recovered from the room of appellant had similarities. We do not find such premise to have backing of legal evidence. It is worth noticing that even the evidence in this respect was not convincing and free from suspicion.

21. There was glaring evidence on record that the room of appellant was accessible even on 24.04.2013. PW-6 stated that the room was searched even on 24.04.2013 by the police and nothing was found therein. It being so, how the alleged incriminating material came to be placed in the room thereafter is a mystery. Even otherwise, it was not the case that the appellant had not used his room during intervening night of 24th -25th April, 2013. On the next date i.e. 25.04.2013 also as per available evidence the room was only bolted from outside. Meaning thereby, that room could be opened and accessed by anyone. The reason for making search in the room of appellant on 24.04.2013 have remained unexplained. In case of any suspicion the said room should have been preserved immediately.

22. The emergence of facts regarding, articles found in the gunny bag or around the spot of discovery of dead body, again was not beyond suspicion. Immediately after discovery of dead body, the police had made inquest reports **Ex.PW18/B** and **Ex.PW18/C**. The time of receipt of the information by police is recorded as 6.30 P.M, whereas as per statement of PW-18 Inspector Prem Lal he had received telephonic information from C. Pritam Singh at about 4.30 PM. The inquest papers despite having specific columns requiring the police to provide details regarding the articles found near the dead body, were completely silent about any article found from the gunny bag or the surroundings. The trial Court has placed reliance on

photographs **Ex.PW18/A-1** to **Ex.PW18/A-6**, allegedly clicked by the police at the time of discovery of dead body, but there is no convincing evidence that these photographs were clicked on 24.04.2013. Another fact which could not be ignored was that in case such articles were found in the gunny bag or near the place of discovery of dead body, why the police did not seize such articles immediately on 24.04.2013? It was only during the inspection of the spot by the forensic experts on 25.4.2013 that such articles were taken into possession. Strangely, no document of recovery and seizure of body of the child and articles found therewith was prepared on 24.4.2013. Ext. PW-2/A, the recovery and seizure memo, in this regard, bears the date 25.4.2013. PW-18 stated that the spot of recovery of body of deceased was preserved and protected till 25.4.2013 but again no positive evidence had been led in that behalf. None of the prosecution witness had come forward to depose that he had witnessed the discovery of gunny bag with dead body. Even C. Pritam Singh, who had allegedly informed the investigating officer telephonically regarding this fact, had not been examined as witness.

23. Even otherwise, the scientific laboratory reports **Ex. PW10/B, Ex.PW11/A, Ex.PW11/B, Ex.PW19/A, Ex.PW19/B** and **Ex.PW23/C** obtained during investigation did not suggest, any strikingly incriminating evidence against the appellant, from analysis of articles allegedly found in the gunny bag as also near the spot. Though, the butt of *"Beedi"* found on the spot had generated sufficient DNA but it had not matched the DNA of appellant. What only had been found similar in both sets of articles, from the scientific laboratory reports, was the pieces of card board with words *"Binola No.1 Nirol Soap"* printed thereon. Undisputedly, this is a brand name of Soap and the card boards were nothing but packing material of the product, which would be same if found at different places. Thus, similarity found between these pieces of card board could not be taken as an incriminating

circumstance against the appellant especially in light of various other attending facts having emerged on record and as noticed above.

24. Thus, the evidence, in our considered view was completely lacking and insufficient as also unconvincing to hold the circumstances *thirdly* and *fourthly,* as noticed above, proved against the appellant. The findings and conclusions drawn by learned trial court, to sustain conviction of appellant on the basis of available material, cannot be sustained. The facts considered hereinabove appears to have escaped the attention of learned Sessions Judge, which have led to the conviction of appellant on the material which in our considered opinion is not sufficient to hold him guilty.

25. The cardinal principle of criminal jurisprudence has remained impassive. The prosecution has to prove its case beyond all reasonable doubts. Appearance of serious doubt in the prosecution case only helps the case of accused. More serious the offence, more arduous is the duty cast upon prosecution to discharge its burden strictly in accordance with law. In absence of direct evidence, circumstances relied upon by the prosecution have to satisfy the same standard of proof i.e. beyond all reasonable doubts. Once this barrier is successfully crossed, it is to be shown that all the circumstances form a complete chain of facts suggesting only one hypothesis i.e. the guilt of the accused.

26. **In *Anjan Kumar Sarma* v. *State of Assam*, (2017) 14 SCC 359** Hon'ble Supreme Court held as under:

> *"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;*

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

27. We are governed by rule of law. No conviction can be recorded on assumption. Prosecution has to discharge its burden by proving the guilt of accused beyond all reasonable doubts and for such purposes, it has to prove the fact in issue on the basis of relevant and admissible evidence. Merely, because police get knowledge about the culprit either from illegal confession extracted from him or from any other source will not absolve the prosecution from its duty to prove the guilt of the accused in accordance with law.

28. In the instant case, the prosecution has also failed to attribute and prove any motive to the appellant for commission of crime in question. In ***Babu*** vs. ***State of Kerala (2010) 9 SCC 189***, the Hon'ble Supreme Court has held as under:

*"**25**. In State of U.P. vs. Kishanpal and others (2008) 16 SCC 73, this Court examined the importance of motive in cases of*

circumstantial evidence and observed: (SCC pp.87-88, paras 38-39).

> *"38….. the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.*
>
> *39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."*

***26**. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused."*

29. Though, the absence of motive may not be a determinative factor, yet it is an important link to complete the chain of circumstance, which is wholly missing in the present case.

30. A close scrutiny of the material on record would disclose that the circumstances relied upon by the prosecution to prove the guilt of the appellant were not proved and also failed to form a complete chain of events

leading to the conclusion that in all human probability the murder must have been committed by the appellant.

31. In light of above discussion, there is merit in the appeal and the same is accordingly allowed. The judgment dated 21.12.2016 and consequent sentence order of the same day, passed in Sessions Trial No. 0000024/2014, whereby, the appellant has been convicted and sentenced for commission of offence under Sections 302, 363 and 201 IPC is set aside. The appellant is acquitted of all charges and is directed to be set free forthwith, if not required in any other case.

32. In view of the provisions of Section 437 of Code of Criminal Procedure, 1973, appellant is directed to furnish his personal bonds in the sum of Rs.25,000/- with one surety in the like amount, before the learned Registrar (Judicial) of this Court, which shall be effective for the period of six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of leave, the appellant, on receipt of notice thereof, shall appear before the Supreme Court.

33. The appeal is accordingly disposed of so also pending misc. applications, if any.

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

Between:-

1. RAMESH KUMAR, SON OF
SHRI RAJESH KUMAR,
AGED ABOUT 37 TEARSM
VPO BAGLIM ODDA NO.9
ANCHAL BAGMATI NEPAL A/P
LABOUR KOTKHAI BAZAAR,
DISTRICT SHIMLA, H.P.
PRESENTLY LODGED AS CONVICT
IN MODEL CENTRAL JAIL KANDA,

DISTRICT SHIMLA, H.P.

2. MAN BAHDUR SON OF
SHRI BHADRA BAHADUR,
AGED ABOUT 55 YEARS,
RESIDENT OF VPO GHETMA ODDA
NO.8 DISTRICT RUKKAM, ANCHAL
RAVATI, NEPAL A/P NALTINAL
P.O. NOGLI, TEHSIL RAMPUR,
DISTRICT SHIMLA, PRESENTLY
LODGED AS CONVICT
IN MODEL CENTRAL JAIL KANDA,
DISTRICT SHIMLA, H.P.

….APPELLANTS

(BY SH. MALAY KAUSHAL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 280 of 2020
Decided on:11.07.2022

Code of Criminal Procedure, 1973- Appeal - **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 29 and 52A- Appellants have assailed judgment and sentence passed by Ld. Special Judge, Kainnaur at Rampur whereby appellants have been convicted and sentenced under Section 20 and 24 of NDPS Act- Charas 4.210 Kg- Held- No material on record to show or suggest the samples drawn were representative samples- Sample of 25 gms. examined at State Forensic Science Laboratory, Junga, was not representative of entire bulk of substance- Appellants convicted for having been found in conscious possession of small quantity of charas- Sentence accordingly modified. (Para 14, 15, 22, 23)

Cases referred:

Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa AIR 1993 SC 1456;

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

J U D G M E N T

By way of instant appeal, appellants have assailed judgment and sentence order dated 17.3.2020, passed by the learned Special Judge-II, Kinnaur at Rampur Bushehar, H.P. in Case No. 17 of 2018, whereby appellants have been convicted and sentenced under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act) as under:

Sr. No.	Name of the appellant	Sentence of imprisonment.	Fine	In Default of payment of fine.
1.	Ramesh Kumar	To undergo rigorous imprisonment for 10 years for commission of offence punishable under Section 20 of the NDPS Act.	Rs. 1,00,000/-	In default of payment of fine, to undergo simple imprisonment for six months.
2.	Man Bahadur	To undergo rigorous imprisonment for 10 years for commission of offence under Section 29 of the NDPS Act	Rs. 1,00,000/-	In default of payment of fine, to undergo simple imprisonment for six months.

2. The prosecution case in brief is that on 8.8.2018, PW-3 SI Ranjeet Singh, PW-8 ASI Man Dev, PW-4 Constable Sumit Thakur along with ASI Yoginder Singh and HHG Tilak Raj were on patrol duty toward Nirmand

Bazaar, Awera etc. At about 5.45 a.m., the police party consisting of aforesaid police officials found appellants approaching Deodhank. On noticing the police party, both of them got perplexed and tried to escape. Appellant Ramesh Kumar threw a bag held by him in his hand, on noticing the police officials. The bag was checked and 4.210 kg charas was recovered. Recovery and seizure proceedings were conducted vide recovery and seizure memo Ext. PW-3/A. Part of NCB Form Ext. PW-3/B was filled up on spot. Rukka Ext. PW-3/D was prepared and sent to Police Station for registration of FIR. FIR Ext. PW-7/A was accordingly registered. The appellants were formally arrested. Case property and appellants were taken to Police Station. Case property was deposited in "Malkhana".

3. On 10.8.2018, PW-3 SI Ranjeet Singh along with PW-7 HC Vikram Singh No. 61 presented an application before learned JMFC, Anni for drawing proceedings under Section 52A of the Act. Order Ext. PW-3/G came to be passed by learned JMFC, Anni recording that two representative samples of 25 grams each were drawn in his presence from the bulk charas and were sealed in two separate small cloth parcels bearing four seals each with seal impression 'O'. The remaining charas was also re-sealed with four seals bearing seal impression 'O'. The inventory was thus certified.

4. One of the sample drawn during proceedings under Section 52A of the Act was sent to SFSL, Junga and was found to be charas vide examination report Ext. PX. The bulk weighing 4.166 kg was destroyed on 28.5.2019 and certificate Ext. PY was issued in this behalf.

5. On completion of investigation, challan was prepared and presented before the Court and the appellants were tried in Case No. 17 of 2018 by the learned Special Judge-II, Kinnaur at Rampur Bushehar, H.P. and sentenced, as noticed above.

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

7. Prosecution examined total eight witnesses. PW-3 SI Ranjeet Singh, PW-8 ASI Man Dev and PW-4 Constable Sumit Thakur were examined as spot witnesses. PW-1 Constable Dalip Singh No. 424 was examined to prove the safe transit and custody of the sample in sealed parcel from SFSL Junga to Police Station Nirmand on 16.9.2018. PW-2 was examined to prove the receipt of special report sent by PW-3 to Sub Divisional Police Officer, Anni on 8.8.2018. PW-5 Ram Singh No. 666 proved the safe custody and transit of sample from Police Station Nirmand to SFSL, Junga on 13.8.2018. PW-6 LC Bhishma No. 91 proved Daily Diary Report Ext. PW-6/A to Ext. PW-6/C. PW-7 HC Vikram Singh No. 61 proved the safe custody and transit etc. of the case property and sample in the Malkhana and also proved the extract of Malkhana Register Ext. PW-7/D. This witness also proved photograph Ext. PW-7/F-1 to Ext. PW-7/F-3 clicked during the proceedings conducted under Section 52A of the Act.

8. Mr. Malay Kaushal, learned counsel representing the appellants has raised an argument that the sample sent to SFSL, Junga was not the representative samples. He contended that there is no evidence on record to suggest that the sample so sent to SFSL, Junga was representative of entire bulk and hence the appellants cannot be stated to be in possession of the entire bulk of charas.

9. The recovery and seizure memo Ext. PW-3/A reveals that black coloured chocolate shape substance was recovered. The substance was found in multiple of masses. On counting sixteen full pieces and one half piece was found. The spot witnesses PW-3 SI Ranjeet Singh, PW-4 Constable Sumit Thakur No. 648 and PW-8 ASI Man Dev have deposed in unison that the substance recovered from the appellants was in sixteen full pieces and one half piece. The physical features of substance recovered is also noticeable from photographs Ext. PW-7/F-2 and Ext. PW-7/F-3. Learned JMFC Anni has also noticed in his order Ext. PW-3/G that the carry bag was found to

contain flat chocolate shaped rectangular pieces of charas/cannabis each separately wrapped in transparent polythene. The charas/cannabis pieces were counted and were found to be sixteen full and one half piece. On weighing the entire substance alongwith the transparent polythene wrappers, the total weight was found to be 4 kg 216 grams.

10. Thus, it is quite evident from the statements of spot witnesses, recovery and seizure memo Ext. PW-3/A, photographs Ext. PW-7/F-2 and Ext. PW-7/F-3 as also the contents of order Ext. PW-3/G, recorded by the learned JMFC, Anni that the substance found from the possession of the appellants was not a single mass. The evidence on record clearly reveals that police had seized the plurality of masses from the possession of the appellants.

11. Section 52A, sub-Section (2) of the Act reads as under:

> "(2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—
>
> (a) certifying the correctness of the inventory so prepared; or
>
> (b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn".

12. As per requirement of above noted provision of the Act, the Officer incharge of Police station is required to prepare an inventory of the Narcotic Drugs Psychotropic Substance seized, containing details relating to description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars, as may be considered relevant, by the officer concerned and is further required to make an application to the Magistrate for the purposes specified in sub-section (2) of Section 52A of the Act, including permission to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

13. The case of the prosecution is that on 10.8.2018, the recovered and seized substance was presented before the learned JMFC, Anni with an application for drawing proceedings under Section 52A of the Act. PW-3 SI/SHO Ranjeet Singh and PW-7 HC Vikram Singh No. 61 were present before the learned JMFC, Anni at the time of drawing of proceedings under Section 52A of the Act. PW-3 in his deposition before the learned trial Court has not uttered even a single word with respect to mode and manner in which the sample was drawn. Similarly, PW-7 has also remained silent on this aspect of the matter. Though, in order Ext. PW-3/G, learned JMFC, Anni has recorded that two representative samples of 25 grams each were taken in his presence from the aforesaid bulk charas, but again nothing has been stated as to how the sample was made representative. On weighing scale shows in photograph Ext. PW-7/F-1, the weight of the piece of substance is recorded as 25 grams on the display screen of weighing scale and the piece of substance shown does not appear to be a homogeneous sample of entire bulk. Photographs PW-7/F-2 and PW-7/F-3 clearly reveal that the chocolate shape of other pieces of

recovered substance was not disturbed and were lying wrapped in polythene. The SFSL report Ext. PX reveals that it had received a sample weighing 33.19 grams including weight of cloth parcel. However, the total weight of sample without cloth parcel and polythene wrapper was 25.746 grams. The sample received in SFSL, Junga as per Ext. PX, was found in the form of polythene wrapped and unwrapped irregular shaped masses. No such sample is visible in photographs clicked at the time of drawing proceedings under Section 52A of the Act.

14. There is no material on record to show or even suggest that the samples drawn were representative samples. When the substance included plurality of mass, it was incumbent upon the prosecution to prove that the samples were representative of entire seized substance. The representative samples could be said to be available only when the seized substance was made homogeneous.

15. There is nothing in the prosecution evidence that any specific procedure was adopted for drawing a representative sample. This creates doubt about the very legitimacy of the case of the prosecution. To have credence, the sample had to be the representative samples of entire 4.166 k.g. of substance, failing which, it can be a case of recovery of only 25 grams of charas or at the most 50 grams of charas by including weight of second sample having entirely different legal consequences.

16. In **AIR 1993 SC 1456**, titled **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa**, it has been held as under:-

> "5. The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much

of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send

> the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

17. We consider it appropriate to reproduce hereunder the observations and conclusions rendered by different Division Benches of this Court while dealing with identical or akin proposition from time to time.

18. In ***Khek Ram*** Vs ***NVB*** Criminal Appeal No. 450 of 2016 decided on 29.12.2017, paras 78 to 80 read as under:

> "78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.
>
> 79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in absence of there being chemical examination of whole quantity, can be held to be charas.
>
> 80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon'ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145, wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned

trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

19. In ***State*** Vs ***Naresh Kumar*** Criminal Appeal No. 782 of 2008 decided on 28.6.2019, paras 23 to 25 read as under:

> "23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.
>
> 24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.
>
> 25. Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may

extend the six months or with fine which may extend to Rs.10,000/- or/with both.

20. In ***State of HP*** Vs ***Sultan Singh and Others*** Criminal Appeal No. 324 of 2008, decided on 22.4.2016 para 16 reads as under:

> "16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

21. In ***State of Himachal Pradesh*** Vs ***Sohan Singh*** Criminal Appeal No. 259 of 2009 decided, on 23.12.2015 para 16 reads as under:

> "16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in

> the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL."

22. Thus, from the entirety of evidence available on record, we are convinced that the sample of 25 grams examined by SFSL, Junga was not representative of entire bulk of substance and hence, the appellants cannot be held to have been found in conscious possession of 4.166 k.g. of charas. The appellants can only be held to be in possession of 25 grams or at the most 50 grams of charas by including the weight of other sample, which as per Act is small quantity.

23. Accordingly, appellant Ramesh Kumar is held guilty of offence under Section 20 of the Act for having been found in conscious possession of only small quantity of charas and is sentenced to undergo rigorous imprisonment for one year. Similarly, appellant Man Bahadur is held guilty of offence under Section 29 of the Act in respect of only small quantity of charas. Accordingly, the impugned judgment and sentence order passed by the learned trial Court is modified.

24. The appellants were arrested on 8.8.2018. They remained in custody throughout the period of investigation and were under trial thereafter till conclusion of the trial. Appellants are further undergoing the sentence after passing of impugned judgment and sentence order. Since the appellants have already undergone much more sentence than could be inflicted upon them, the appellants are ordered to be released immediately, if not required in any other case. The Registry is directed to prepare the release warrants forthwith. Records be sent back. The appeal is accordingly disposed of. Pending applications, if any, also stand disposed of.

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

Between:-

TAJ DEEN, S/O SH. NOOR MOHAMMAD,
AGED ABOUT 35 YEARS, R/O VILLAGE
KARMUND, P.O. TIKRIGARH, TEHSIL
CHURAH, DISTRICT CHAMBA, H.P.
PRESENTLY LODGED IN DIST. JAIL
CHAMBA, H.P.

....APPELLANT

(BY SH. N. K. THAKUR, SR. ADVOCATE WITH MR. DIVYA RAJ SINGH, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 289 of 2021
Decided on: 05.07.2022

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 52A- Appellants assailed conviction- Charas 2.032 Kg.- Held- No material on record to show or suggest the samples drawn were representative samples- Sample of 26 gms. examined at State Forensic Science Laboratory, Junga, was not representative of entire bulk of substance- Appellants convicted for having been found in conscious possession of small quantity of charas- Sentence accordingly modified. (Para 18, 19, 26, 27)

Cases referred:

Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa AIR 1993 SC 1456;

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

J U D G M E N T

By way of instant appeal, appellant has assailed judgment dated 7.8.2021 and sentence order dated 31.8.2021, passed by the learned Special Judge, Chamba Division Chamba, H.P. in Sessions Trial No. 62 of 2018, whereby appellant has been convicted under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act) and has been sentenced to undergo rigorous imprisonment for a period of twelve years and to pay fine of Rs. 1,50,000/-. In default of payment of fine, to further undergo rigorous imprisonment for a term of one year.

2. The prosecution case in brief is that on 7.7.2018 a police party belonging to State Narcotic Crime Control and Field Unit Kangra, while on routine patrolling duty had apprehended the appellant at place Zero Point Jassourgarh on Tikarigarh to Chamba Road at about 7.00 a.m. He was carrying a bag in his right hand. On search of the bag, 2.032 kg *charas* was recovered. The recovered contraband was seized and kept in the same bag, which was sealed with six seals of seal 'N'. The seizure memo Ext. PW7/D was prepared. NCB form Ext. PW18/A in triplicate was filled. Facsimile of sample seal was preserved as Ext. PW7/C.

3. PW-18 SI Nirmal Singh prepared "Rukka" Ext. PW7/E and sent the same to Police Station Tissa, through PW-7, MHC Manohar Lal, for registration of FIR. The investigation was handed over to PW-17, ASI Surjeet Singh, who had reached on spot along with other police officials on receiving information about recovery of contraband. PW-17, ASI, Surjeet Singh was incharge of Police Post Nakrad, falling within the jurisdiction of Police Station, Tissa, District Kangra, H.P. ASI, Surjeet Singh reached the spot. Appellant was formally arrested. The case property along with appellant were taken to Police Station, Tissa and handed over to PW-14, SHO/ Inspector Surinder

Kumar. The case property was re-sealed with six seals of TD and was deposited with PW-2, HC Pawan Kumar, who was posted as MHC, Police Station, Tissa. The requisite entry Ext. PW2/A was made in *Malkhana* Register.

4. On 8.7.2018, PW-17, ASI Surjeet Singh produced the case property before JMFC, Chamba for conducting proceedings under Section 52A of the Act. Application Ext. PW17/D with Annexure Ext. PW17/E was presented to the learned JMFC, Chamba, who passed order Ext. PW17/F and issued certificates Ext. PW17/G and Ext. PW17/H. Two samples of 26 grams each were drawn. The samples and remaining bulk were separately sealed with seal impression JM Chamba. Photographs of Court proceedings Ext. PW13/A to Ext. PW13/D were taken.

5. One sample was sent to SFSL, Junga for chemical examination on 9.7.2018 through PW-6 and after the chemical analysis was received back in Police Station on 20.7.2018 through PW-12. The sample was found to be charas by SFSL, Junga vide report Ext. PX.

6. The bulk weighing 1.980 k.g. was destroyed in accordance with law on 28.9.2018 and certificate in this behalf was issued as Ext. PW14/C.

7. On completion of investigation, challan was prepared and presented before the Court. Appellant was tried in Sessions Trial No. 62 of 2018 and was convicted and sentenced, as noticed above.

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

9. Prosecution examined total 18 witnesses. PW-18, SI Nirmal Singh, PW-7, HHC Manohar Lal, PW-8 HHC Mohammad Aslam and PW-15, Constable Rockey Kumar were examined as spot witnesses. PW-17 ASI Surjeet Singh was the Investigating Officer. PW-2 HC Pawan Kumar deposed about the safe keeping of contraband in the *Malkhana*, its transit and receipt, entry in *Malkhana* Register Ext. PW2/A. PW-6 HHC Dharminder Kumar and

PW-12 Constable Suresh Kumar proved the transit and safe custody of the sample from Police Station Tissa to SFSL Junga and back.

10. Sh. N. K. Thakur, learned Senior Advocate, representing the appellant raised the issue as to the mode and manner in which the sample was drawn during investigation of the case. He contended with vehemence that the sample sent to SFSL Junga was not the representative sample and hence the entire bulk allegedly recovered from the appellant cannot be stated to be the charas. As per him, at the most, the appellant can be said to have been found in possession of 26 grams of charas or at the most 52 grams of charas by taking weight of both the samples.

11. Recovery and seizure memo Ext. PW7/D reveals that the substance recovered from the bag found in possession of the appellant was in shape of sticks and bundle, which was solid and black in colour. All the spot witnesses i.e. PW-18, SI Nirmal Singh, PW-7, HHC Manohar Lal, PW-8, HHC Mohammand Aslam and PW-15, Constable Rockey Kumar have described the substance recovered from the appellant as black coloured hard substance in sticks and bundle shape, during their respective depositions before the learned trial Court.

12. The substance recovered from the appellant was seized on spot on 7.7.2018 vide memo Ext. PW7/D and was produced before learned JMFC, Chamba on the next day i.e. 8.7.2018 by PW-17, ASI Surjeet Singh for proceedings under Section 52A of the Act. Thus, in addition to the above noted spot witnesses, JMFC, Chamba had the occasion to observe the substance produced before him. The order Ext. PW17/F recorded by learned JMFC, Chamba also described as under: “Inside the bag there was hard black coloured substance, in the shape of sticks, which was rolled up together in the balls, which was stated to be cannabis”.

13. Thus, it is quite evident from statements of spot witnesses, recovery and seizure memo Ext. PW7/D and order passed by the learned

JMFC, Chamba Ext. PW17/F that the substance found from the possession of appellant was not a single mass. It was in the shape of sticks and bundle. The nature of the substance found was hard. The evidence on record goes to show that police had seized plurality of mass from possession of the appellant.

14. The prosecution has also relied upon spot photographs Ext. PW15/C and Ext. PW15/D. In both the photographs, the bag from which the substance was seized is visible in open form and the substance contained therein again does not appear to be a single mass. The remainder of the bulk substance left after drawing of sample was destroyed vide certificate Ext. PW14/C on 28.9.2018. The photographs evidencing destruction procedure have been placed on record as Ext. PW16/A to Ext. PW16/D. Perusal of these photographs also clearly reveals that the substance was having the plurality of mass.

15. Section 52A, sub-Section (2) of the Act reads as under:

> "(2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—
>
> (a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn".

16. As per requirement of above noted provision of the Act, the Officer incharge of Police station is required to prepare an inventory of the Narcotic Drugs Psychotropic Substance seized, containing details relating to description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars, as may be considered relevant, by the officer concerned and is further required to make an application to the Magistrate for the purposes specified in sub-section (2) of Section 52A of the Act, including permission to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

17. The case of prosecution is that on 8.7.2018, PW17 ASI Surjeet Singh presented application Ext. PW17/D to learned JMFC, Chamba for the purposes of drawing proceedings under Section 52A (2) of the Act. The statement of PW-17 reveals that two samples of 26 grams each were separated by learned JMFC, Chamba. This witness does not state the mode and manner in which the samples were drawn. Learned JMFC, Chamba has not been examined as witness. No other witness has stated on record that what was the mode and manner for drawl of samples. As per Section 52A (2) of the Act, the officer incharge is required to seek permission of Magistrate to draw representative samples. The order passed by the learned JMFC, Chamba Ext. PW17/F does not reveal that the proceedings have been conducted in accordance with law. Ext. PW17/F simply states that out of the bulk cannabis, two samples of 26 grams each were taken out and were placed in

two separate pieces of white paper, which further were sealed in cloth parcels. From the order Ext. PW17/F, it appears that the samples were drawn by learned JMFC, Chamba himself.

18. There is no material on record to show or even suggest that the samples drawn were representative samples. When the substance included plurality of mass, it was incumbent upon the prosecution to prove that the samples were representative of entire seized substance. The representative samples could be said to be available only when the seized substance was made homogeneous.

19. There is nothing in the prosecution evidence that any specific procedure was adopted for drawing a representative sample. This creates doubt about the very legitimacy of the case of the prosecution. To have credence, the sample had to be the representative samples of entire 2.032 k.g. of substance, failing which, it can be a case of recovery of only 26 grams of charas or at the most 52 grams of charas by including weight of second sample having entirely different legal consequences.

20. In **AIR 1993 SC 1456**, titled **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa**, it has been held as under:-

> "5. The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to

have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered

should be sent for chemical examination under a regular panchnama and as per the provisions of law.

21. We consider it appropriate to reproduce hereunder the observations and conclusions rendered by different Division Benches of this Court while dealing with identical or akin proposition from time to time.

22. In ***Khek Ram*** Vs ***NVB*** Criminal Appeal No. 450 of 2016 decided on 29.12.2017, paras 78 to 80 read as under:

> "78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.
>
> 79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in absence of there being chemical examination of whole quantity, can be held to be charas.
>
> 80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon'ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145, wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

23. In ***State*** Vs ***Naresh Kumar*** Criminal Appeal No. 782 of 2008 decided on 28.6.2019, paras 23 to 25 read as under:

"23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.

24. In ***State of HP*** Vs ***Sultan Singh and Others*** Criminal Appeal No. 324 of 2008, decided on 22.4.2016 para 16 reads as under:

"16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

25. In ***State of Himachal Pradesh*** Vs ***Sohan Singh*** Criminal Appeal No. 259 of 2009 decided, on 23.12.2015 para 16 reads as under:

"16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL."

26. Thus, from the entirety of evidence available on record, we are convinced that the sample of 26 grams examined by SFSL, Junga was not representative of entire bulk of substance and hence, the appellant cannot be held to have been found in conscious possession of 2.032 k.g. of charas. The appellant can only be held to be in possession of 26 grams or at the most 52 grams of charas by including the weight of other sample, which as per Act is small quantity.

27. Accordingly, appellant is held guilty of offence under Section 20 of the Act for having been found in conscious possession of only small quantity of charas and is sentenced to undergo rigorous imprisonment for one year. The impugned judgment and sentence order passed by the learned trial Court is accordingly modified.

28. The appellant was arrested on 7.7.2018. He was ordered to be released on bail by Single Bench of this Court vide order dated 6.3.2019 and in compliance thereof, finally released on 8.5.2019. In this manner, the appellant had remained in custody from 8.7.2018 till 8.5.2019 i.e. for a period of ten months. Appellant is further undergoing the sentence, after passing of impugned judgment and sentence order. Since the appellant has already undergone much more sentence than could be inflicted upon him, the appellant is ordered to be released immediately, if not required in any other case. The Registry is directed to prepare the release warrant forthwith. Records be sent back. The appeal is accordingly disposed of. Pending applications, if any, also stand disposed of.

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

BETWEEN:-

RAKESH VERMA
SON OF SHRI SHAMA NAND,
AGED 33 YEARS,

R/O VILLAGE MAJHARANA,
POST OFFICE BHARANA, TEHSIL THEOG, DISTRICT SHIMLA, HIMACHAL PRADESH.

....PETITIONER

(BY SH. R.K. BAWA, SENIOR ADVOCATE WITH
MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH. ....RESPONDENT

(BY SH. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL REVISION
No. 330 OF 2021
Decided on: 22.07.2022

Code of Criminal Procedure, 1973- Sections 397 and 401- **Indian Penal Code, 1860**- Sections 354, 341, 506- Petitioner assailed the judgment passed by Ld. Additional District Judge in appeal vide which conviction of petitioner has been upheld- Compromise between the parties during the pendency of the revision- Whether can be accepted- Held- Offences alleged to have been committed by the petitioners do not involve offences of moral turpitude or any grave/heinous crime, rather same are petty offences, as such, this Court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that the accused and complainant have compromised the matter *inter se* them, in which case, no fruitful purpose would be served in continuing with the criminal proceedings- Petition allowed. (Para 18)

Cases referred:

Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389;
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497;
Gian Singh vs. State of Punjab and anr. (2012) 10 SCC 303;
Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466;
State of Tamil Nadu vs. R Vasanthi Stanley (2016) 1 SCC 376;

State of Madhya Pradesh vs. Laxmi Narayan, (2019) 5 SCC 688;

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

O R D E R

By way of instant Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, challenge has been laid to judgment, dated 23.9.2021, passed by learned Additional Sessions Judge-cum-Special Judge (CBI) Shimla, H.P., in Criminal Appeal No. 10-T/10 of 2016, affirming the judgment of conviction dated 29.2.2016 and order of sentence dated 9.3.2016, passed by learned Additional Chief Judicial Magistrate, Theog, Distt. Shimla, H.P., in Case No. 71-1 of 2013 in FIR No. 125, dated 17.8.2012, registered at Police Station Theog, Distt. Shimla, H.P. under Sections 354, 341 and 506 of the Indian Penal Code, whereby learned trial Court while holding petitioner-accused (hereinafter referred to as the accused), guilty of having committed offences punishable under Sections 354, 341 and 506 of IPC, convicted and sentenced him, as per the description given herein below:-

Sr. No.	Offence	Sentence	Fine Amount (`)	Sentence of imprisonment in default of fine to undergo SI
1.	354 of IPC	RI for three months	₹5000/-	--
2.	341 of IPC	--	₹500/-	--
3.	506 of IPC	SI for three months	₹500/-	--

2. Since during the pendency of the aforesaid Revision Petition before this Court, accused entered into compromise with the complainant, they filed an application under Section 482 Cr.PC bearing Cr.M.P. No. 1156 of 2022, praying for quashing of aforesaid FIR as well as judgments of conviction and order of sentence passed by the Courts below, on the basis of the compromise arrived *inter se* parties (Annexure A-1) and thereby acquitting the accused of the charges framed against him.

3. Before considering the prayer made on behalf of the accused for quashing of FIR, certain facts which may be relevant for the adjudication of the case at hand are that the complainant lodged FIR bearing No. 125, dated 17.8.2012, at Police Station Theog, Distt. Shimla, HP, alleging therein that she is student of 10th Class at G.S.S.S. Gadha Kufri. She alleged that accused used to propose her for marriage, to which she always refused yet accused used to tease her. She alleged that that on 16.8.2012 when she was going back to her home in bus after visiting a fair at Theog, the accused was also travelling in the same bus and at about 5 p.m. when she alighted at Majhrana and started going towards her home, the accused wrongfully restrained her and caught hold of her from her arm. She alleged that the accused took her alongside the passage and proposed for marriage and when she refused, the accused slapped her and tried to tear her clothes. On the basis of aforesaid complaint, police lodged the FIR, which ultimately culminated into a trial of the accused, wherein trial Court on the basis of the evidence adduced on record by the prosecution, held him guilty for his having committed offences punishable under Sections 354, 341 and 506 ICC and accordingly convicted and sentenced him as per the description given herein above.

4. Being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence recorded by trial Court, accused preferred an

appeal in the Court of learned Addl. Sessions Judge-cum- Special Judge (CBI), Shimla, but same was dismissed vide judgment dated 23.9.2021.

5. In the aforesaid background, accused has approached this Court in the instant Criminal Revision under Section 397 read with Section 401 Cr.P.C., praying therein for his acquittal after quashing and setting aside the impugned judgments and order of sentence passed by learned Courts below. But before the same could be decided on its own merits, parties entered into compromise wherein they resolved the dispute *inter se* themselves as such, accused filed an application under Section 482 Cr.P.C. praying for quashing of FIR in question as well as judgment of conviction and sentence recorded against him.

6. Having taken note of the submissions contained in the aforesaid application as well as compromise placed on record, this Court deemed it necessary to cause presence of the parties so that the factum with regard to the correctness and genuineness of the compromise placed on record could be ascertained. Pursuant to the directions issued by this Court, complainant came present before this Court on 30.6.2022 and got her statement recorded, on oath, wherein she stated that she of her own volition and without any external pressure has entered into compromise with the accused and both the parties have decided to settle their dispute amicably. She stated that since the accused has apologized for his misbehavior and misconduct and undertaken not to repeat such act in future, she shall have no objection in case the accused is acquitted of the charges framed against him for his having committed offences punishable under Section 354, 341 and 506 of IPC. While admitting contents of the compromise (Annexure A-1) to be correct she admittedher signatures on the same. Her aforesaid statement, on oath, is already on record.

7. Sh. R.K. Bawa, learned Senior Counsel, representing the accused while drawing attention of this Court to the statement of the

victim/complainant recorded on 30.6.2022 as well as compromise (Annexure A-1) states that since the parties have settled the dispute *inter se* them, this Court while exercising power under Section 482 Cr.P.C. can proceed to compound the offences and acquit the accused of the charges framed against him. He argued that the High Court has enormous powers under Section 482 Cr.P.C. to quash the FIR and proceedings in non-compoundable cases and, as such, offences alleged to have been committed by the accused in the case at hand, which are compoundable can always be quashed and set aside by this Court. While inviting attention of this Court to the judgmentstitled*Ramgopal & anr. vs. State of Madhaya Pradesh,* Cr. Appeal No. 1489 of 2012, decided on 29th September, 2021 and *Ramawatar vs. State of Madhya Pradesh,* 2021 SCC OnLine SC 966 decided on 25th October, 2021, Mr. R. K. Bawa, learned Senior Counsel submits that power under Section 482 Cr.P.C. can be exercised by this Court even in those cases where the accused stands convicted and, as such, payer made in the instant petition may be accepted.

8. After having carefully perused the compromise placed on record (Annexure A-1) and statement made, on oath, by the complainant, Mr. Narender Guleria, learned Additional Advocate General states that though in the instant case parties have entered into compromise but since such compromise came to be recorded after recording of judgments of conviction and order of sentence, prayer in the instant petition cannot be accepted by this Court in terms of the judgment passed by the Hon'ble Apex Court in *Narinder Singh & others vs. State of Punjab & another,* (2014) 6 SCC 466 wherein it has been categorically held that the Court should not exercise power under section 482 Cr.P.C. for accepting compromise recorded after recording of judgment of conviction and sentence. Lastly, Mr. Narender Guleria, learned Additional Advocate General submits that otherwise also the offences alleged to have been committed by the accused falls in the category of

heinous crime and, as such, this Court otherwise may not exercise power under Section 482 Cr.P.C. for quashing the proceedings arising out of the FIR in question.

9. Having heard learned Counsel for the parties and perused the material on record, this Court finds that the accused in the case at hand already stands convicted for having committed offences under Sections 354, 341 and 506 of IPC but after his conviction he has entered into compromise with the complainant, wherein both the parties have settled the dispute *inter se* them, as such, question which needs to be determined at the first instance is "Whether this Court in the instant proceedings can accept the prayer for accepting the compromise and compounding offence made on behalf of the accused, after recording of the judgment of conviction or not ?" No doubt, if the judgment passed by the Hon'ble Apex Court in *Nareinder Singh* (supra)is seen in its entirety, there appears to be bar in accepting the compromise after recording of conviction of accused, but, if the subsequent judgments passed by the Apex Court in *Ramgopal and Ramawatar* (supra),as pressed into service by Mr. R.K.Bawa, learned Senior Advocate, are taken into consideration, this Court while exercising power under Section 482 Cr.P.C. can proceed to accept the compromise arrived *inter se* the parties even after the recording of the judgment of conviction against the accused. At this stage, Mr. Narender Guleria, learned Additional Advocate General submits that the judgments passed by the Hon'ble Apex Court in *Ramgopal and Ramawatar* (supra)have been passed under Article 142 of the Constitution of India, but, having carefully perused the aforesaid judgments, this Court finds that in both the judgments the Apex Court has categorically held that power exercised by the High Court under Section 482 Cr.P.C. is akin to power exercised under Article 142 of the Constitution of India. Since in both the above cases, High Court while exercising power under Section 482 Cr.P.C. had refused to quash the criminal proceedings, the Hon'ble Apex Court while

holding that under Section 482 Cr.P.C. High Court can accept compromise after recording of conviction, quashed the criminal proceedings in the cases pending before it exercising power under Article 142 of the Constitution of India.

10. This Court, after having carefully perused the compromise, which has been duly effected between the parties, sees substantial force in the prayer having been made by the learned counsel for the accused that offences in the instant case can be ordered to be compounded.

11. Since the petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another*** **(2014)6 Supreme Court Cases 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 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:

29.1 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 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 under Section 482 Cr.P.C 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".

12. The Hon'ble Apex Court in case ***Gian Singh vs. 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 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.

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 se 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."

13. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another***, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in ***Narinder Singh's*** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to the power under Section 482:
>
> > "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and

> was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in **State of Tamil Nadu vs. R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

> "...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in

trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has bee inherent n

settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transac mental tions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

14. The Hon'ble Apex Court in (2019) 5 SCC 688, titled as ***State of Madhya Pradesh vs. Laxmi Narayan***, has held as under:-

"15 . Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1 That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved 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;

15.3 Similarly, such power is not to be exercised for the offences under the special statutes like 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;

15.4 Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely

because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5 While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/ compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

15. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred herein above, Hon'ble Apex Court has categorically held that Court while exercising inherent

power under Section 482 Cr.P.C. must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriately be quashed though the victim or the family of the victim have settled the dispute, but it has also observed that while exercising its powers, 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. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in ***State of Tamil Nadu*** *supra*, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16. The Hon'ble Apex Court in ***Ramgopal & anr. vs. State of Madhaya Pradesh,***Cr. Appeal No. 1489 of 2012, decided on 29th September, 2021, has held as under:-

> "19. We thus sum-up and hold that as opposed to Section 320 Cr.P.C. where the Court is squarely guided by the compromise between the parties in respect of offences 'compoundable' within the statutory framework, the extraordinary power enjoined upon a High Court under Section 482 Cr.P.C. or vested in this Court under Article 142 of the Constitution, can be invoked beyond the

metes and bounds of Section 320 Cr.P.C. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations.

20. Having appraised the afore-stated para-meters and weighing upon the peculiar facts and circumstances of the two appeals before us, we are inclined to invoke powers under Article 142 and quash the criminal proceedings and consequently set aside the conviction in both the appeals. We say so for the reasons that:

Firstly, the occurrence(s) involved in these appeals can be categorized as purely personal or having overtones of criminal proceedings of private nature;

Secondly, the nature of injuries incurred, for which the Appellants have been convicted, do not appear to exhibit their mental depravity or commission of an offence of such a serious nature that quashing of which would override public interest;

Thirdly, given the nature of the offence and injuries, it is immaterial that the trial against the Appellants had been concluded or their appeal(s) against conviction stand dismissed;

Fourthly, the parties on their own volition, without any coercion or compulsion, willingly and voluntarily have buried their differences and wish to accord a quietus to their dispute(s);

Fifthly, the occurrence(s) in both the cases took place way back in the years 2000 and 1995, respectively. There is nothing on record to evince that either before or after the purported

compromise, any untoward incident transpired between the parties;

Sixthly, since the Appellants and the complainant(s) are residents of the same village(s) and/or work in close vicinity, the quashing of criminal proceedings will advance peace, harmony, and fellowship amongst the parties who have decided to forget and forgive any ill-will and have no vengeance against each other; and

Seventhly, the cause of administration of criminal justice system would remain un-effected on acceptance of the amicable settlement between the parties and/or resultant acquittal of the Appellants; more so looking at their present age."

17. The Hon'ble Apex Court in ***Ramawatar vs. State of Madhya Pradesh,*** Cr. Appeal No. 1393 of 2011, decided on 25th October, 2021 [2021 SCC OnLine SC 966], has held as under:-

"9. Having heard learned Counsel for the parties at some length, we are of the opinion that two questions fall for our consideration in the present appeal. First, whether the jurisdiction of this Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a 'non-compoundable offence? If yes, then whether the power to quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act?

10. So far as the first question is concerned, it would be *ad rem* to outrightly refer to the recent decision of this Court in the case of *Ramgopal & Anr v. The State of Madhya Pradesh*, wherein, a two Judge Bench of this Court consisting of two of us (N.V. Ramana, CJI & Surya Kant, J) was confronted with an identical question. Answering in the affirmative, it has been clarified that the jurisdiction of a Court under Section 320 Cr.P.C cannot be construed as a proscription

against the invocation of inherent powers vested in this Court under Article 142 of the Constitution nor on the powers of the High Courts under Section 482 Cr.P.C. It was further held that the touchstone for exercising the extraordinary powers under Article 142 or Section 482 Cr.P.C., would be to do complete justice. Therefore, this Court or the High Court, as the case may be, after having given due regard to the nature of the offence and the fact that the victim/complainant has willingly entered into a settlement/compromise, can quash proceedings in exercise of their respective constitutional/inherent powers.

11. The Court in *Ramgopal* (Supra) further postulated that criminal proceedings involving non-heinous offences or offences which are predominantly of a private nature, could be set aside at any stage of the proceedings, including at the appellate level. The Court, however, being conscious of the fact that unscrupulous offenders may attempt to escape their criminal liabilities by securing a compromise through brute force, threats, bribes, or other such unethical and illegal means, cautioned that in cases where a settlement is struck post-conviction, the Courts should, *inter alia*, carefully examine the fashion in which the compromise has been arrived at, as well as, the conduct of the accused before and after the incident in question. While concluding, the Court also formulated certain guidelines and held:

> "19... Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: *(i) Nature and effect of the offence on the conscious of the society; (ii)*

Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations." [Emphasis Applied]

12. In view of the settled proposition of law, we affirm the decision of this Court in *Ramgopal* (Supra) and re-iterate that the powers of this Court under Article 142 can be invoked to quash a criminal proceeding on the basis of a voluntary compromise between the complainant/victim and the accused.

13. We, however, put a further caveat that the powers under Article 142 or under Section 482 Cr.P.C., are exercisable in post-conviction matters only where an appeal is pending before one or the other Judicial forum. This is on the premise that an order of conviction does not attain finality till the accused has exhausted his/her legal remedies and the finality is sub-judice before an appellate court. The pendency of legal proceedings, be that may before the final Court, is *sine-qua-non* to involve the superior court's plenary powers to do complete justice. Conversely, where a settlement has ensued post the attainment of all legal remedies, the annulment of proceedings on the basis of a compromise would be impermissible. Such an embargo is necessitated to prevent the accused from gaining an indefinite leverage, for such a settlement/compromise will always be loaded with lurking suspicion about its bona fide. We have already clarified that the purpose of these extraordinary powers is not to incentivise any hollow-hearted agreements between the accused and the victim but to do complete justice by effecting genuine settlement(s)."

18. In the case at hand also, offences alleged to have been committed by the petitioners do not involve offences of moral turpitude or any grave/heinous crime, rather same are petty offences, as such, this Court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that the accused and complainant have compromised the matter *inter se* them, in which case, no fruitful purpose would be served in continuing with the criminal proceedings.

19. Accordingly, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, FIR No. 125, dated 17.8.2012, under Sections 354, 341 and 506 of IPC registered at Police Station Theog, Distt. Shimla, Himachal Pradesh as well as judgment, dated 23.9.2021, passed by learned Additional Sessions Judge-cum-Special Judge (CBI) Shimla, H.P., in Criminal Appeal No. 10-T/10 of 2016, affirming the judgment of conviction dated 29.2.2016 and order of sentence dated 9.3.2016, passed by learned Additional Chief Judicial Magistrate, Theog, Distt. Shimla, H.P., in Case No. 71-1 of 2013, are quashed and set-aside. Resultantly, the petitioner-accused is acquitted of the charges framed against him. His bail bonds are ordered to be discharged and interim order, if any, is vacated.

The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Between:

AVTAR @ TARRI, AGE ABOUT 47 YEARS, SON OF SH. MEET RAM, RESIDENT OF VILLAGE DENOWAL, POST OFFICE BHANGWAIN, TEHSIL GARHSHANKAR, DISTRICT HOSHIARPUR, PUNJAB.

.....APPELLANT

(BY MR. SURAM SINGH RANA ANDMR. PAWAN GAUTAM, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BYMR. KAMAL KANT, DEPUTY ADVOCATE GENREAL)

CRIMINAL APPEAL
No. 386 of 2020
Reserved on:22.07.2022
Decided on: 27.07.2022

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 50 and 52A- Appellants assailed conviction- Charas 1.600 Kg.- Held- Joining of independent witnesses is not mandatory and it depends on the fact situation of each and every case- Recovery was affected from the bag carried by appellant, as such, Section 50 of the Act was not required to be complied with- No infirmity or illegality in the impugned judgment- Appeal dismissed. (Para 24, 27, 28)

Cases referred:

Raveen Khan Vs. State of H.P. 2020 12 Scale 138;
Rizwan Khan Vs. State of Chattisgarh (2020)9 SCC 627;
State of Punjab Vs. Baljinder Singh & anr.(2019) 10 SCC 473;
State of Punjab vs. Makhan Chand (2004)4 SCC 453;
Surinder Kumar Vs.State of Punjab (2020)2 SCC 563;
Union of India vs. Mohan Lal (2016) 3 SCC 379;

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

J U D G M E N T

Appellant assails judgment and sentence order dated 16.11.2019, passed by learned Special Judge(1), Mandi, District Mandi, H.P., in Sessions Trial No. 28 of 2016, whereby the appellant has been convicted for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'ND&PS' Act) and to pay a fine of Rs. One lac, in default of payment of fine, appellant has to undergo further simple imprisonment for one year.

2. The case of prosecution in nutshell was that on 31.01.2016, the team of police officials comprising of PW-12 ASI Jeet Singh, PW-10 C. Harash Chand No. 572, PW-11 HC Durga Dass No. 408, PW-13 HHC Balwant Singh No. 363 alongwith HHG Khem Raj, HHG Khem Singh and HHG Dinesh Kumar, left police post Balichowki for routine patrol duty, vide DDR No. 3. Ext. PW6/A.

3. *'Nakka'* was laid at place known as Shilli-Larji, at about 10:45 am. Within ten minutes, the appellant was noticed by PW-12 ASI Jeet Singh, at some distance, who was approaching towards the police party. However, on noticing the police, the appellant had turned back and started walking briskly. Appellant was holding a bag in his right hand.

4. The place where appellant was apprehended was secluded and immediately no independent witness was available. An attempt was made by PW-12 ASI Jeet Singh to search for independent witness through PW-10 C. Harash Chand, but none was available. PW-11 HC Durga Dass and PW-13 HHC Balwant Singh, were associated as witnesses.

5. PW-12 ASI Jeet Singh with the help of other police officials, apprehended the appellant, who got perplexed. A suspicion was entertained from the conduct of the appellant. PW-12 ASI Jeet Singh gave option to the appellant to be searched either before some gazetted officer or the Magistrate. Appellant consented to be searched by the police party. Consent memoExt. PW11/A was prepared. Police officials offered their search vide memo Ext. PW11/B.

Thereafter, the bag carried by the appellant was searched and *charas* was found therein. Recovered *charas* was weighed and found 1kg 600grams.

6. The recovered *charas* was repacked in the same bag and was placed in a white cloth parcel and sealed with nine seals with impression 'T'. Recovery and seizure memo Ext. PW11/C was prepared. Facsimile of sample seal Ext. PW11/B was preserved. Column Nos. 1 to 8 of NCB Form Ext. PW7/A were filled by PW-12 ASI Jeet Singh.

7. '*Rukka'* Ext. PW8/A was prepared and was sent to Police Station through PW-10 C. Harash Chand. PW-8 S.I. Pritam Singh received Rukka Ext. PW8/A at Police Station, Aut and FIR Ext. PW8/B was accordingly registered. PW-10 C. Harash Chand, brought the case file to spot for further investigation. Appellant was formally arrested. Accused alongwith sealed parcel(case property), NCB form and sample seals etc. were taken to police station and handed over to PW-7 Insp. Lokender Negi. PW-7 re-sealed the sealed parcel containing contraband with six seals of impression 'A'. He issued re-sealing certificate Ext. PW7/C. The case property alongwith NCB form and sample seals, were handed over to PW-9 HC Santosh Kumar, for safe custody in '*Malkhana*' of Police Station, Aut.

8. On 02.02.2016, PW-12 ASI Jeet Singh, prepared special report under Section 57 of the Act and sent the same to PW-2 ASP Mandi through PW-4 HHC Duni Chand. Special report Ext. PW2/A was received on the same day by PW-2 ASP Mandi and entry to this effect was made by PW-3 HC Laxman Dass in relevant register,abstract of which has been exhibited as Ext. PW-3/A.

9. On completion of investigation, the challan was prepared. Appellant was charged as under:-

> *" That on 31.01.2016 at about 10:45 pm at place Shilli Larji road Ravinda, Distt. Mandi, H.P. you were found in exclusive and conscious possession of 1kg 600 gram charas and you thereby committed an offence punishable under Sections 20 of ND & PS Act and within the cognizance of this Court."*

Appellant pleaded not guilty and claimed trial.

10. Prosecution examined total 13 witnesses. Appellant was examined under Section 313 Cr.PC. He did not choose to lead defence evidence. On conclusion of trial, the appellant was convicted and sentenced, as noticed above.

11. We have heard Mr. Suram Singh Rana, learned counsel for the appellant as well as Mr. Kamal Kant, learned Deputy Advocate General and perused the record.

12. The manner and sequence of events which led to apprehension of appellant and recovery of 1kg600 grams of *charas* has been narrated by PW-10, PW-11, PW-12 & PW-13 through their statements on oath made before learned Trial Court. All of them were spot witnesses and had stated in unison that a team of police officials left police post Balichowki on 31.01.2016, at 9:00 am for routine patrol duty and reached place known as Shilli-Larji, at about 10:45 am.

13. A '*nakka'* was laid. After about 10 minutes, PW-12 ASI Jeet Singh, noticed appellant approaching the police party, but abruptly he turned back and started walking briskly. Police got suspicious and apprehended the appellant. Option was given to the appellant to be either searched before gazetted officer or Magistrate. He offered himself to be searched by police officials. His consent was obtained, vide consent memo Ext. PW-11/A. Police officials offered their search, vide memo Ext. PW11/B. Thereafter, the bag carried by appellant was searched and *charas* weighing 1kg 600 grams was recovered. The recovered*charas* was repacked and placed in a white cloth parcel sealed with nine seals of impression 'T'. Recovery and seizure memo Ext.PW-11/C, was prepared. Sample seal was preserved, vide memo Ext. PW11/D. Relevant columns of NCB form Ext. PW7/A were filled. '*Rukka'* Ext. PW8/A was prepared and sent to Police Station, on the basis of which, FIR Ext. PW-8/B was registered. Appellant was formally arrested and brought to police

station alongwith seized contraband, NCB form and sample seals. The sealedparcel was re-sealed by PW-7Ins. Lokender Negi. He issued re-sealing certificate.

14. The spot witnesses were cross-examined on behalf of the appellant at length, but nothing material could be elicited, so as to doubt their statements. No material contradictions could be pointed out from their statements by learned counsel for the appellant.

15. PW-6 HHC Khem Singh proved the recording of DDR No.3, dated 31.01.2016, Ext. PW6/A evidencing the departure of the team of police officials alongwith Home Guards for routine patrol duty. The mode by which police team reached Shilli-Larji has also been stated in one voice by all the witnesses when confronted in cross-examination. It was stated that police team had reached the spot by using services of Tata-Sumo vehicle. The driver of the vehicle had acceded to the request of police party and had dropped them on spot. It is not the case of the appellant that he was not apprehended at Shilli-Larji. From the perusal of statements of the spot witnesses, it has been found that such statements are convincing and trustworthy as nothing contrary has been stated by either of them to the prosecution case.

16. Though, the compliance of Section 50 of the Act was not required for carrying out search of the bag carried by appellant yet the police by way of abundant caution had given the option to the appellant who had consented to be searched by police party, vide consent memo Ext. PW-11/A. The police party had also offered their search, vide Ext. PW11/B. This is not the case where any material has been placed on record to suggest even remotely the false implication of the appellant. It has also been proved by convincing evidence that seized contraband was properly sealed in a cloth parcel and was taken in such preserved condition to the Police Station, where the SHO again re-sealed the same with six seals of impression 'A'. Re-sealing certificate Ext. PW7/C was

issued. The evidence brought on record to this effect has not been shattered in any manner.

17. Further, the case property was kept by PW-9 HC Santosh Kumar in safe custody of '*Malkhana*' register alongwith sample seals and NCB Form. The entry to this effect made in '*Malkhana*' register has been proved by producing on record the abstract of such entry,vide Ext. PW-9/A. There is nothing on record to suggest that the case property was tampered while in custody of '*Malkhana*'. Similarly, the transit of case property from Police Station, Aut to S.F.S.L. Junga and its return after chemical analysis has been proved by PW-5 C. Mitter Dev and PW-1 Shashi Kumar. Again, their testimonies regarding safe custody of contraband during transit have remained unshaken.

18. The entire bulk of *charas* recovered from the appellant was sent to S.F.S.L., Junga, which after examination submitted its report Ext. PA confirming the substance to be extract of '*cannabis*' and sample of *charas*.

19. Thus, the recovery of 1kg600 grams of *charas* has been duly proved from the conscious possession of the appellant, which is an offence punishable under Section 20 of the ND &PS Act. Laboratory report Ext. PA proved the substance recovered from the appellant to be the *charas*. The compliance of Section 57 of the Act has also been proved by PW-2ASP Mandi, PW-4 HHC Duni Chand and PW-3 HC Laxman Dass. Special report Ext. PW/2/A was prepared by PW-12 on 02.02.2016 and was sent through PW-4 HHC Duni Chand to be handed over to PW-2 ASP Mandi. It has been proved from the statement of PW-2 that he had received special report Ext. PW2/A on 02.02.2016 and had handed over the same to his Reader PW-3 HC Laxman Dass for placing the same on record. PW-3 HC Laxman Dass has also confirmed aforesaid fact and also has proved the abstract of relevant register Ext. PW3/A.We have also perusedthe impugned judgment. Learned Special Judge has considered the entire oral as well as documentary evidence in right perspective. The findings and conclusion drawn by learned Special Judge are borne out from the records.

Such findings and conclusion need to be confirmed on the basis of analysis made herein.

20. Learned counsel for the appellant submitted that the evidence of police witnesses could not be relied upon for the reasons, firstly, they were interested witnesses and secondly, there was sufficient opportunity for the police to have associated independent witnesses. He referred to the cross-examination of spot witnesses, who had admitted that the Larji Dam is at the distance of about 200 mtrs. from the spot and police could have easily managed the association of independent witnesses. It has also been submitted that the spot, where the *'nakka'* was laid, was on a busy highway having regular vehicular traffic. Association of independent witnesses could have easily been managed by stopping some vehicle passing through the spot.

21. As regards, the first leg of the argument so raised by learned counsel for the appellant, it can be safely said that in view of the settle legal proposition, the statements of police witnesses cannot be discarded or ignored on the allegation that they are interested witnesses. In ***Surinder Kumar*** *Vs.****State of Punjab (2020)2 SCC 563,*** Hon'ble Supreme Court has held 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 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 State (NCT of Delhi) v. Sunil & Anr. 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".*

22. In ***Rizwan Khan*** *Vs.* ***State of Chattisgarh (2020)9 SCC 627,*** the legal positon has been summarized 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."*

23. In ***Raveen Khan*** *Vs.* ***State of H.P. 2020 12 Scale 138,*** reiteration of aforesaid exposition has been made as under:-

> *"19. It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case. However, such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinizing the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."*

24. As regards the second leg of argument raised by learned counsel for the appellant, it cannot be said to be of much relevance in the given facts of the case. The fact situation was that police party had laid the '*nakka*' and immediately thereafter had spotted appellant at some distance, who got perplexed and started walking back. The conduct of appellant was sufficient to raise suspicion in the minds of police officials. At that stage, had the appellant not been apprehended immediately, police could have lost the opportunity to recover the contraband. Looking from another angle, the relevance of independent witnesses could be there, when such witnesses were immediately available or had already been associated at the place of '*nakka*'. These, however are not mandatory conditions and will always depend on the fact situation of each and every case. The reason is that once the person is apprehended and is with police, subsequent association of independent witnesses, may not be of much help. In such events, the manipulation, if any, cannot be ruled out.

25. The Courts, for the above reasons, are mandated to scrutinize the statements of police witnesses minutely and scrupulously and in case, such statements are found convincing and trustworthy, can rely upon such statements in light of the exposition of law, detailed above.

26. Learned counsel for the appellant had further contended that there was no compliance of Section 52-A in the case and hence, the proceedings were vitiated. He has placed reliance on the judgment passed by learned Supreme Court in ***Union of India*** *vs.* ***Mohan Lal (2016) 3 SCC 379***. However, the perusal of said judgment reveals that no such mandate has been issued by the Supreme Court.On the other hand, reference can be made to ***State of Punjab*** *vs***. *Makhan Chand (2004)4 SCC 453*** in which it has been clearly held that non-compliance of Section 52-A will not vitiate the proceedings or the trial. The purpose of Section 52-A is to provide a mechanism, whereby there is no misuse of the contraband recovered by the authorities and the same is kept in safe custody and/or destroyed with promptitude.

27. It has further been contended on behalf of the appellant that the trial against the appellant was vitiated for non-compliance of Section 50 of the Act. We, however, disagree with such contentions for the reasons that the compliance was made in this case as evident from the statements of the witnesses as well as documents Ext. PW-11/A and Ext. PW11/B. The recovery was made from the bag carried by appellant. In such a situation, Section 50 of the Act was not required to be complied with. In ***State of Punjab*** *Vs*. ***Baljinder Singh& anr.(2019) 10 SCC 473,*** it has been held as under:-

> *"15. As regards applicability of the requirements under Section 50 of the Act are 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 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's case, 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 said judgment in Dilip's case is not correct and is opposed to the law laid down by this Court in Baldev Singh and other judgments".

28. On the basis of above analysis, we are of the considered view that there is no infirmity or illegality in the impugned judgment holding appellant guilty of offence under Section 20 of ND&PS Act. We, therefore, affirm the impugned judgment and uphold the conviction and sentence of appellant as imposed by learned Special Judge(1), Mandi, District Mandi, H.P. vide judgment and sentence order dated 16.11.2019, in Session Trial No. 28 of 2016.

Accordingly, the appeal is dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

NDUBUISI BENEDICT
SON OF SH. CULUT NEGERM AGED ABOUT 38 YEARS,
RESIDENT OF MENIRU STREET, AKWUANANAW,
ENUGU, NIGERIA AT PRESENT R/O PILLAR NO.-744
MOHAN GARDEN A-72, UTTAM NAGAR, POLICE
STATION, UTTAM NAGAR EAST, NEW DELHI.

....PETITIONER

(BY MR. RAJAN KAHOL, ADVOCATE)

AND

STATE OF HIMACHAL

..RESPONDENT

(MR. P.K. BHATTI, ADDL. A.G)

CRIMINAL MISC. PETITION (MAIN)
No. 1270 of 2022

Reserved on:01.07.2022
Decided on: 05.07.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21, 27 and 29- Held- Rigors of Section 37 of NDPS Act not attracted- Pre-trial incarceration is not the Rule- Petition allowed. (Para 6, 9 and 16)

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

O R D E R

Petitioner has approached this Court for grant of bail under Section 439 Cr.P.C in case FIR No. 65 of 2021 dated 15.09.2021 registered at Police Station New Shimla, District Shimla, H.P. under Sections 21, 27 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985. Petitioner was arrested on 24.09.2021 and since then is in custody.

2. On 15.09.2021, official of Police Station, New Shimla raided a residential house in Sector-2 of New Shimla on the basis of secret information that narcotic substances were being sold from the said house.

3. Five persons, all of young age, were found inside the house. Material found on the bed, inside the house, suggested use of heroin. On their personal search, nothing incriminating was recovered, however, 1.93 grams of heroin was found in a pouch on the bed. The case was registered.

4. During investigation, it was found that one of the persons found inside the house had procured the heroin from the co-accused Brahmjeet @ Jeeta from Chandigarh. Said Brahmjeet @ Jeeta was also arrested and interrogated. 10.34 grams heroin was recovered from him. He further disclosed that he had been procuring the heroin from Delhi from a person from Nigeria. Police team alongwith Brahmjeet @ Jeeta visited Delhi to nab the person belonging to Nigeria, whose name was disclosed as Ndubuisi Benedict (petitioner). On search, petitioner was found, who after noticing

Brahmjeet @ Jeeta in the company of police officials immediately took out a packet from his pocket and threw the same in the drain. Petitioner was apprehended by the police. 9.22 gram heroin was recovered from the packet thrown by the petitioner in the drain. Petitioner was arrested.

5. Challan has been presented after completion of investigation. All other persons arrayed as accused in the case have already been released on bail.

6. I have heard learned counsel for the petitioner and learned Additional Advocate General for the respondent-State and have also gone through the record carefully.

6. The intermediate quantity of heroin is alleged to have been recovered from the petitioner. Rigors of Section 37 of the NDPS Act will not be applicable in the case.

7. The only evidence regarding the involvement of petitioner in the sale of contraband is the statement of co-accused Brahmjeet @ Jeeta. Though this Court will not minutely scan the evidence collected by the police during investigation, nonetheless, such material can be looked into for assessment of seriousness and gravity of allegations against the bail petitioner.

8. As noticed above, no other evidence except the statement of co-accused is available against the petitioner. The allegations of petitioner having thrown a packet containing the intermediate quantity of heroin on citing the police are yet to be proved.

9. Pre-trial incarceration is not the Rule. In the facts of given case, the prolonged incarceration of petitioner is not justified. He is already in custody for the last about nine months.

10. The prayer of the petitioner has been opposed on behalf of the petitioner on the ground that petitioner is a foreign national. He was involved in another case under the NDPS Act in Delhi and had remained in Tihar jail for about 14 months. It is apprehended that in case of release of petitioner on bail, he may

abscond and the trial may be affected adversely. It is mentioned in the status report filed on behalf of the respondent that despite repeated correspondence with the Nigerian Embassy, the details of passport and visa etc, of the petitioner have not been made available till date. It is also submitted that petitioner is trying to suppress his true identity.

11. To meet the objection of the respondent, learned counsel for the petitioner has stated that police had more than enough time to verify the antecedents of the petitioner. Petitioner is stated to be holder of Nigerian passport which according to learned counsel for the petitioner is in the records of Court of learned Special Judge at Delhi. A photocopy of the passport of petitioner has been placed on record. A copy of an order dated 11.03.2019 passed by learned Special Judge, NDPS, Dwarka Courts, New Delhi has also been placed on record, whereby the petitioner was granted bail in case FIR No. 102 of 2017 under Section 21-C of NDPS Act and Section 14 of the Foreigners Act. Perusal of order so placed reveals that the bail was granted to the petitioner in the case pending before learned Special Judge, NDPS, Dwarka Courts, New Delhi by holding as under:-

> *"Accordingly, in view of the above discussion, the present application stands allowed. The accused Ndubuisi Ngerem Benedict @ Bunny is granted bail on furnishing personal bond in the sum of Rs. 25,000/ with two sureties in the like amount each. The intimation be also got delivered to Nigerian Embassy as well as FRRO and receipt of bail order by them alongwith conditions imposed therein should be placed on the file before release of accused. Thereafter only, the bonds will be accepted and release warrants will be prepared. Accused is directed that he will not leave the country without the prior permission of this Court. Accused will attend the IO at his office once in a 15 days. LOC of accused be opened. The passport of accused be filed on record."*

12. Thus, there is sufficient material on record to suggest that passport of the petitioner was filed in the records of case pending before learned Special Judge, NDPS, Dwarka Courts, New Delhi. The respondent could have easily verified these facts even after the filing of the present petition. On 24.06.2022, respondent was specifically directed by this Court to place on record the information regarding status of the stay of bail petitioner in India, but the respondent has again come up with the plea that despite correspondence, they have not received any information from Nigerian Embassy.

13. Petitioner cannot be allowed to be incarcerated for indefinite period before conclusion of trial merely because the respondent has failed to fulfill its obligation. The apprehension of the respondent regarding possibility of petitioner fleeing from the course of justice can be taken care of by imposing appropriate conditions.

14. Merely because the petitioner is a foreign national cannot be taken as an impediment in grant of bail to the present petitioner. Admittedly, all other co-accused of petitioner have already been released on bail.

15. The petitioner is a foreign national, yet he will stay back for the purposes of trial may be at the risk of legal consequences of his over stay. Nothing has been produced on record to suggest that petitioner is in a position to influence the prosecution witnesses.

16. In the peculiar facts and circumstances of the case, the petition is allowed. Petitioner is ordered to be released on bail, in case FIR No. 65 of 2021 dated 15.09.2021 registered at Police Station New Shimla, District Shimla, H.P. under Sections 21, 27 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985, subject to his furnishing personal bond in the sum of Rs.1,00,000/- with one solvent surety in the like amount to the satisfaction of learned trial Court, which necessarily will be a permanent resident of State of

Himachal Pradesh or having immovable property in Himachal Pradesh. This order, however, shall be subject to the following conditions:-

i) *That the petitioner shall not leave India without permission of learned trial Court.*

ii) *That petitioner shall surrender his passport before learned trial Court, if not already submitted before any other Court/authority and the release of his passport will be subject to the outcome of the trial. In case passport of petitioner is lying in deposit with some authority/Court, petitioner shall deposit the same before learned trial Court immediately on its release by such authority/Court.*

iii) *That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police.*

iv) *That the petitioner shall provide his mobile number and address to the Station House Officer of Police Station, New Shimla, District Shimla, H.P. In case of any change in the mobile number or address of the petitioner during the pendency of trial, he shall immediately inform the SHO, Police Station, New Shimla.*

v) *That petitioner shall not delay the trial of the case and shall regularly attend the hearing, except in circumstances beyond his control.*

vi) *That upon his re-indulgence in criminal activity or in case of violation of any terms of this order, it shall be open to the prosecution to move this Court for cancellation of bail.*

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

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

Between:-

AMAN KUMAR BHARDWAJ SON OF
SH.PANKAJ BHARDWAJ, RESIDENT OF
VILLAGE DADI BHOLA, PEERSTHAN
NALAGARH, DISTRICT SOLAN, HIMACHAL
PRADESH.

....PETITIONER

(BY SH. B.C. NEGI, SENIOR ADVOCATE,
ALONGWITH MR.PRANAY PRATAP SINGH,
ADVOCATE.)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH DIRECTOR GENERAL OF
POLICE, NIGAM VIHAR, CHOTTA SHIMLA,
SHIMLA, HIMACHAL PRADESH 171002.

2. THE SUPERINTENDENT OF POLICE
SHIMLA, THE MALL ROAD, RAM BAZAR
SHIMLA, HIMACHAL PRADESH 171001.

3. ASHUTOSH GARG, DIRECTOR
INFORMATION AND TECHNOLOGY,
SHOGHI BYEPASS, BASANT VIHAR,
MEHLI, SHIMLA, HIMACHAL PRADESH.

....RESPONDENTS

(BY SH. HEMANT VAID, ADDITIONAL
ADVOCATE GENERAL.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 246 OF 2021
Reserved on:27.06.2022
Decided on: 13.07.2022

Code of Criminal Procedure, 1973- Section 482- Quashing of F.I.R. under Section 419, 468, 471 IPC and Section 66D of Information Technology Act, 2000- Held- No sufficient material for lodging the F.I.R. against the petitioner- Essential ingredients required to attract the the alleged offences not made out- Petition allowed. (Para 26)

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

O R D E R

Petitioner, invoking the provisions of Section 482 of the Code of Criminal Procedure (for short "Cr.P.C."), has approached this Court for quashing FIR No. 51 of 2021, dated 7.5.2021, registered in Police Station East, Shimla under Sections 419, 468, 471 of Indian Penal Code (for short "IPC"), Section 66(D) of Information Technology Act, 2000 (for short "IT Act") and Section 54 of Disaster Management Act, 2005 (for short "DM Act").

2. Petitioner is a journalist by profession, who, since 2017, remained associated with various media houses and has been working with Zee Media House since January, 2021 and is posted in Shimla.

3. During Covid-19 Pandemic, vide order dated 25.4.2021, Government of Himachal Pradesh through Secretary (Health), to the Government of Himachal Pradesh-cum-Mission Director (National Health Mission) had issued an order invoking provisions of Himachal Pradesh Epidemic Disease (COVID-19) Regulations 2020 and The Epidemic Disease Act, 1897 with certain direction to combat and control the spread of Covid-19 Pandemic. Besides other directions, there was a direction that all inter-state

movement into the State shall be monitored through registration in COVID e-pass software to monitor compliance with the quarantine requirements and facilitate contact tracing of persons in event of detection of COVID-19 positive cases and, therefore, all persons desirous of entering the State shall register themselves on online software and details of their arrival was to be shared with all concerned for the purpose of quarantine requirement and contact tracing.

4. It is the case of the petitioner that on noticing increase in interstate vehicular movement, despite imposition of strict restrictions on interstate movement of vehicles and prerequisite condition of generation of an e-pass for any kind of inter-state movement only on assigning a valid reason at the time of registration on the portal, petitioner, being a responsible Journalist and acting in larger interest of public, carried out an investigation about the claims of administration qua verification of registration forms of persons entering Himachal Pradesh in compliance of order dated 25.4.2021 and 5.5.2021. During this investigation, petitioner noticed that registration as well as generation of e-pass were being done in mechanical manner without any verification by the authorities and, therefore, he obtained requisite permission from his Bureau Chief to proceed further in order to highlight the discrepancy in the entire process and for which he conducted a reality check qua veracity of functioning of the web portal.

5. Petitioner filled two online registration forms on the portal for issuance of two e-passes for entering the State of Himachal Pradesh without assigning any valid reason. The registration so made was in the names of two renowned personalities, i.e. Amitabh Bachchan and Donald Trump. Names of renowned personalities were used with hope that names so mentioned would definitely be taken note of by the authorities during the process of verification.

6. It is further case of the petitioner that as identity proof he deliberately uploaded his own valid details, i.e. Adhaar Card number and

telephone number, for above mentioned registrations and also mentioned two random vehicle numbers alongwith other details.

7. Pursuant to afore registration, e-passes so applied in the names of Amitabh Bachachan and Donald Trump by the petitioner were generated which substantiated the fact that passes were being issued without, any verification of accompanying documents, in a mechanical manner.

8. It is the case of the petitioner that entire exercise was undertaken by him with a bonafide intention to unearth the truth and loopholes in the system behind the entire process of registration, for the larger public interest.

9. It is further case of the petitioner that generation of aforesaid two e-passes was brought by him to the notice of certain senior authorities of the State including the Director General of Police Himachal Pradesh and a Cabinet Minister prior to the story being televised by the petitioner on his news channel, but, finding no response, petitioner broadcasted the story on his News Channel.

10. The aforesaid broadcasting of the news lead to registration of FIR against the petitioner under Section 419, 468, 471 IPC, 66(D) of the Information Technology Act and Section 54 of the Disaster Management Act. Thereafter, petitioner was interrogated during investigation and his statements were recorded.

11. Feeling aggrieved by the aforesaid registration of FIR, petitioner has approached this Court.

12. In response to the petition, it has been submitted that admittedly petitioner applied for e-passes to enter the State of Himachal Pradesh by faking his identity and claiming to be a person which he was not and causing false propaganda as if everybody and anybody can enter the State on fake identity without being checked, whereas it was known to all including the petitioner that Police barriers were made operational at various places in the

State including entry points of the State to check the identity of individuals entering the State and to pass on the information to the concerned authorities to ensure that the individual is dealt with as per protocols and it has been stated that present petition is an attempt to thwart the investigation.

13. It is case of the respondents-State that petitioner impersonated himself as 'Amitabh Bachchan' and 'Donald Trump' and used fake registration numbers of vehicles by mentioning his own mobile number and Aadhaar Card as identity proof for generating fake and forged documents and, thus petitioner is liable to be tried and punished for the offences mentioned in the FIR and, therefore, present FIR is not liable to be quashed, rather Investigating Agency should be permitted to continue and complete the investigation in the matter.

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

15. As referred by learned counsel for the petitioner, certain provisions of IPC, IT Act and DM Act relevant for adjudication of present case, read as under: -

Indian Penal Code

"7. ***Sense of expression once explained****.—Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation.*

24. ***"Dishonestly"****.—Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".*

25. ***"Fraudulently"****.—A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.*

415. ***Cheating****.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which*

he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) *A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.*

(b) *A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.*

(c) *A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby, dishonestly induces Z to buy and pay for the article. A cheats.*

(d) *A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonored, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.*

(e) *A, by pledging as diamonds article which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.*

(f) *A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money. A not intending to repay it. A cheats.*

(g) *A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract*

and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

416. ***Cheating by personation****.—A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.*

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustration

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

419. ***Punishment for cheating by personation****.—Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

463. ***Forgery****.— Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.*

468. ***Forgery for purpose of cheating****. —Whoever commits forgery, intending that the [document or electronic record forged] shall be used for the purpose of cheating, shall be*

punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

471. ***Using as genuine a forged 1[document or electronic record****.—Whoever fraudulently or dishonestly uses as genuine any [document or electronic record] which he knows or has reason to believe to be a forged [document or electronic record], shall be punished in the same manner as if he had forged such 1[document or electronic record].”*

66(D) of IT Act

Punishment for cheating by personation by using computer resource*.-Whoever, by means for any communication device or computer resource cheats by personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.*

54 of Disaster Management Act*.*

Whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment with may extend to one year or with fine.”

16. Section 7 of IPC says that every expression which is explained in any part of IPC, is used in every part of IPC in conformity with the explanation. Sections 24 and 25 of IPC define expression ‘dishonestly’ and ‘fraudulently’, respectively. As per Section 24 IPC, ‘dishonestly’ means an act done with intention to cause wrongful gain to one person or wrongful loss to another person. Whereas, fraudulently means to do a thing with intention to defraud, but not otherwise. For the purpose of determining commission of offence under IPC, these expressions are to be used in terms of Sections 24 and 25 of IPC.

17. In present case, petitioner did not commit any act with intention to defraud, but for reality check and verifying the working of system of online

registration and generation of e-passes, regarding which it was claimed by State that e-passes would be generated after proper verification of documents uploaded with the online request. Petitioner filled the names of someone else as applicants and uploaded his own documents which would, in case of verification, have definitely been noticed by the persons or system verifying the documents with the details of Aadhar Card and Identity Card of the applicant, name of applicants and name in Identity proofs were not matching with each other. But it did not happen and requests for e-passes were not only registered, but e-passes were also generated. Petitioner never intended to use nor used these e-passes for entering in Himachal Pradesh. He brought this lapse in system to the notice of higher authorities. In given facts and circumstances it cannot be said an act done by the petitioner was with intent to defraud, therefore, it was not an act done 'fraudulently'.

18. The act by the petitioner was never done with intention of causing wrongful gain or wrongful loss to any person nor any such attempt was ever made by the petitioner and, therefore, in absence of such essential ingredients, as defined in Section 24 of IPC, act of the petitioner cannot be termed as an act done 'dishonestly'.

19. The necessary ingredient of 'cheating by personation' under Section 419 IPC is that there must be 'cheating'. 'Cheating' is defined in Section 415 and necessary ingredient for attracting commission of offence of cheating, there must be deceiving of any person, inducing such person fraudulently or dishonestly to deliver any property to any person or to consent to retain any property by any person, or intentionally inducing such person to do or omit to so anything which he would not do or omit if he were not so deceived and such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The basic requirement for 'cheating' is that there must be deceiving of a person with fraudulent or

dishonest or intentional inducement for a purpose referred in Section 415 IPC which is absent in present case.

20. In present case, both ingredients, i.e. 'dishonestly' or 'fraudulently', which are necessary for 'cheating' and 'cheating by personation', are missing. For absence of essential ingredients for 'cheating' and 'cheating by personation', there cannot be punishment for cheating under Section 419 IPC.

21. Section 468 IPC provides punishment for 'forgery for the purpose of cheating', whereas Section 471 provides punishment for 'using a forged document or electronic record as genuine'. For commission of offence under Section 468 IPC, there must be 'forgery' which has been defined in Section 463 IPC. The essential ingredient for commission of 'forgery' is that document or part thereof should be made with intention to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud. In present case, intention, as required under Section 463 IPC, is absent and, therefore, petitioner cannot be said to have committed forgery. As discussed supra ingredient for terming the act of petitioner as cheating is also absent. Therefore, in absence of 'forgery' and 'cheating', Section 468 IPC is not attracted.

22. For commission of offence under Section 471 IPC, there must be 'fraudulent' or 'dishonest' use of a 'forged document' as a genuine document. As discussed supra, there is no forgery committed in present case. Therefore, there is no forged document. For not only absence of forged document but also for absence of fraudulent and dishonest use of the document much less of a forged document and also for the reasons that petitioner did not use the alleged forged document as a genuine at any place, rather brought generation of document to the notice of senior authorities and persons in power, it cannot be said that petitioner has committed an offence under Section 471 IPC.

23. Section 66D of Information and Technology Act provides punishment for 'cheating by personation'. As observed supra, in present case ingredients necessary for terming the act of the petiotner as 'cheating by personation', are missing. Therefore, Section 66D of Information and Technology Act is also not attracted.

24. Section 54 of the Disaster Management Act provides punishment for false alarm or warning. In present case, petitioner had demonstrated not only possibility of registration of request for generation of e-pass by filling up misleading details but also generation of e-pass on the basis of such faulty request. All this was done by petitioner, with permission of his Bureau Chief, in order to verify and check the claim of the State authorities and working of the system and he demonstrated it by doing it practically. Therefore, broadcasting news about it, that too after bringing it in notice of authorities, cannot be said a false alarm or warning, rather reporting and news was true and genuine. Act of the petitioner based on the fact revealed to him by undertaking a practical exercise and after informing about it to the senior authorities, Director General of Police, Cabinet Minister and other responsible persons in the Government, would not amount to circulation of a false alarm or warning as to disaster or its severity or magnitude, leading to panic. Petitioner had tried to raise alarm and warning to the authorities so as to improve the system to avoid disaster or to increase severity or magnitude of spread of Covid-19 Pandemic by restricting entry of unwanted persons in the State in terms of restrictions imposed by the State Government to take appropriate steps to improve in order to provide foolproof/flawless system.

25. Petitioner was having doubt about proper working of verification system of State at the time of registration of online request for e-pass and generation of e-passes. He was not having any other via-media to check and verify the system except submitting a misleading request. It is evident that in entire episode intention of petitioner was neither dishonest nor fraudulent as

immediately after generation of e-passes, which otherwise could not have been used by any person, petitioner brought it to the notice of concerned authorities and persons.

26. In view of above discussion, I am of the considered opinion that there was no sufficient material for lodging FIR against the petitioner of offences under Sections 419, 468 and 471 of IPC, Section 66(D) of IT Act, 2000 and Section 54 of Disaster Management Act, 2005 for absence of essential ingredients required for attracting these Sections. It is apparent that allegations made in complaint/FIR even if they are taken at their face value and accepted in entirety do not, prima facie, constitute any offence or make out a case against the accused. Therefore, finding merit in the petition, FIR No. 51 of 2021, dated 7.5.2021 registered against the petitioner in Police Station East Shimla and consequential proceedings arising thereto, if any, are quashed.

The petition stands allowed and disposed of in aforesaid terms.

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

Between:-
SUMIT KUMAR SON OF SH. BHIM SINGH,
RESIDENT OF HOUSE NO. DP 489/3,
POLICE STATION CITY PALWAL,
DISTRICT PALWAL, HARYANA,
AGED 22 YEARS, PRESENTLY IN
JUDICIAL CUSTODY IN DISTRICT JAIL,
KULLU, H.P.

….PETITIONER

(BY SH. ARVIND NEGI, ADVOCATE)
AND
STATE OF HIMACHAL PRADESH….RESPONDENT.

(SH. KUNAL THAKUR, DEPUTY
ADVOCATE GENERAL.)

CRIMINAL MISC.PETITION (MAIN)
No. 1259 of 2022
Reserved on:15.07.2022
Decided on: 20.07.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 22- Recovery of LSD papers- Held- Rigors of Section 37 of the Act attracted as the accused was found to have conscious possession of commercial quantity of LSD- Bail petition dismissed. (Para 11, 12)

Cases referred:

Hira Singh and another vs. Union of India and another (2020) 20 SCC 272;

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

O R D E R

Petitioner is accused in case FIR No. 349 of 2021, dated 17.12.2021, registered at Police Station Sadar, Kullu, District Kullu, H.P. under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short NDPS Act).

2. Petitioner was apprehended by the police on 17.12.2021 at about 7.40 P.M. near Kasol (Goz) Mashroom Café on Manikaran road within the jurisdiction of Police Station Sadar, Kullu. On noticing police, petitioner allegedly took out a packet from the pocket of his trouser and threw the same on the road. The packet so thrown by petitioner was checked, which was transparent polythene packet containing 20 LSD papers, which after weighing were found to be 0.21gm. The petitioner was arrested. The papers recovered and seized from the petitioner were sent for analysis to SFSL, Junga. The Laboratory report described the papers as LSD papers being sample of Lysergide (LSD). The weight of the LSD including the papers constituted

commercial quantity. After investigation, the challan has been presented and the trial is pending before the learned Special Judge, Kullu.

3. Petitioner has submitted that even as per the case of prosecution, no recovery was made from his conscious possession. The petitioner was arrested merely on assumptions and is in custody since 17.12.2021. The petitioner is only 22 years of age and his prolonged incarceration shall be prejudicial to his career. As per petitioner, he has not been involved in any other case and is first offender. It has also been contended on behalf of the petitioner that as per SFSL report, the amount of LSD was found to be 1.49 mg/217.0mg w/w of LSD papers. The commercial quantity of LSD is 0.1 gram, therefore, the petitioner is alleged to have been found in possession of only small quantity of LSD.

4. I have heard learned counsel for the petitioner and learned Deputy Advocate General for the State and have also gone through the status report.

5. The question that arises for consideration is whether the paper containing the LSD can be said to be the integral part of LSD drug? In case the weight of LSD including paper is considered, it exceeds commercial quantity.

6. Learned counsel for the petitioner has submitted that the weight of paper cannot be taken into consideration for determining the quantity of LSD because the paper by itself does not form either Narcotic Drug or Psychotropic Substance.

7. Learned counsel for the petitioner has placed reliance on an order dated 7.12.2020 passed by the learned Single Judge of the High Court of Judicature at Bombay in Criminal Bail Application No. 352 of 2020, titled ***Hitesh Hemant Malhotra*** vs. ***State of Maharashtra***, in which the learned Single Judge has proceeded to grant bail to the petitioner therein by holding that the paper was not a neutral substance and its weight cannot be included

for the purpose of determining the quantity of drug. Accordingly, the learned Single Judge of Bombay High Court distinguished the case on facts from the dictum of Supreme Court in ***Hira Singh and another*** vs***. Union of India and another (2020) 20 SCC 272.***

8. The order relied upon by learned counsel for the petitioner, however, has been held to have no binding effect in a later judgment passed by learned Single Judge of Bombay High Court in ***Criminal Writ Petition No. 2077 of 2021***, titled ***Narcotics Control Bureau, Mumbai Zonal Unit*** vs. ***Anuj Keshwani and another***, decided on 29th November, 2021, in following terms:

> *"**35**. Having regard to the findings of the Apex Court in Hira Singh (Supra), the object and legislative intent behind enacting the NDPS Act and the discussion as stated aforesaid, I am of the view that the blotter paper forms an integral part of the LSD, when put on a blotter paper for consumption and, as such, the weight of the blotter paper containing LSD will have to be considered i.e. actual weight, for the purpose of determining small or commercial quantity of the offending drug. This Court, in Hitesh Malhotra (Supra) and Harsh Meshram (supra) has not considered the aforesaid and hence, the said orders cannot be said to have any binding effect."*

9. The Hon'ble Supreme Court in ***Hira Singh*** (supra), after analyzing the object and reasons of NDPS Act as also all other relevant factors held as under:

> ***"12.2**. In case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the narcotic drugs or psychotropic substances."*

10. LSD is an extremely potent hallucinogen made from lysergic acid. It is used as the doses in microgram. LSD is commonly distributed for illicit use on paper which is absorbent as a blotter paper. The paper is also consumable and LSD is consumed by the user alongwith the paper. In such circumstances to hold that the weight of paper will not be included for determining the small or commercial quantity of the offending drug, will be against the clear import of Hira Singh (supra) as also the objects and reasons for which the act has been enacted.

11. In light of the above discussion, the petitioner is accused of keeping in his conscious possession commercial quantity of LSD, which attracts the rigors of Section 37 of the NDPS Act.

12. That being so, the petitioner is not held entitled for bail in the instant case as this is not a case where the Court may be in a position to prima-facie hold the petitioner not guilty of offence alleged against him. Further, the very fact that petitioner, who originally belongs to State of Haryana, was found with the dangerous drug like LSD in remote area of Kullu District of Himachal Pradesh, speaks for itself. In these circumstance, it cannot be presumed that in case of release of petitioner on bail, he will not indulge in commission of crime during the period of his release on bail.

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

14. 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.

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

Between:-

SUKHDEV AGED ABOUT 54 YEARS,
S/O SHRI GURDYAL CHAND,

RESIDENT OF FAUJI PAHARI, DAMTAL,
TEHSIL INDORA, DISTRICT KANGRA,
H.P.

....PETITIONER

(BY SH. VIJENDER KATOCH, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION MAIN
NO. 1310 OF 2022
Reserved on:01.07.2022
Decided on: 05.07.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21, 22 and 29- Recovery of capsules of "Tramadol Hydrochloride" and 6.96 gm heroin- Held- Rigors of Section 37 of the Act are attracted in the facts of the case- Accused involved in many such cases- Petition dismissed. (Para 6, 10, 16)

Cases referred:

Satpal Singh vs. State of Punjab, 2018 (13) SCC 813;
State of Kerala & another vs. Rajesh & others, 2020 (12) SCC 122;
Union of India vs. K.A. Najeeb, 2021 (3) SCC 713;

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

O R D E R

Petitioner has approached this Court for grant of bail under Section 439 Cr.P.C. in case FIR No. 113 of 2020 dated 13.8.2020 under Sections 21, 22 and 29 of the Narcotics and Psychotropic Substances Act,

1985, (for short the Act), registered at Police Station, Damtal, District Kangra, H.P. Petition is in custody since 13.8.2020.

2. The trial against petitioner is pending before learned Special Judge, Kangra at Dharmshala. The case against petitioner is that on 12.8.2020 at about 7.15 p.m., he was spotted by a police party near Ram Gopal Temple on road leading to "Fauji Pahari" Damtal, District Kangra, H.P. He was identified to be the same person, who was involved in FIR No. 105 of 2020 under Section 21 of NDPS Act, registered at the same police station i.e. Police Station, Damtal, District Kanga, H.P.

3. On noticing police officials, petitioner took out a packet from underneath his T-shirt and after throwing it towards the bushes, started walking briskly. Petitioner was apprehended by the police officials. On inquiry about the thrown packet, petitioner got perplexed. The packet thrown by the petitioner was got picked from him and on its search, 600 capsules were recovered. Further personal search of petitioner was conducted in presence of a gazetted officer and heroin weighing 6.96 grams was recovered. After recovery and seizure proceedings, "Ruka" was sent to police station and FIR No. 113 of 2020 was registered.

4. After chemical analysis, the capsules were found to contain "Tramadol Hydrochloride". Total weight of the capsules was 387.600 grams and the net weight of powder contained therein was found 382.200 grams. The substance found from the person of petitioner was analyzed as heroin. Petitioner was formally arrested.

5. I have heard Mr. Vijender Katoch, learned counsel for the bail petitioner and Mr. Kunal Thakur, learned counsel for the respondent-State and have also gone through the record carefully.

6. The contraband "Tramadol Hydrochloride" recovered in the case is commercial quantity and heroin recovered is intermediate quantify. The rigors of Section 37 of the NDPS Act are applicable in the facts of the case.

7. In ***State of Kerala & another*** vs. ***Rajesh & others, 2020 (12) SCC 122*** Hon'ble Supreme Court has held as under:-

> *"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.*
>
> *20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for".*

8. Similarly, in ***Satpal Singh*** vs. ***State of Punjab, 2018 (13) SCC 813***, the three Judges of Hon'ble Supreme Court has held as under:-

> *"4. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is*

> *not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused are to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court".*

9. Thus, in the teeth of Section 37 of NDPS Act accused can be released on bail in the cases involving commercial quantity of contraband if all three conditions are satisfied vis-à-vis opportunity of opposing the bail is granted to the prosecutor, court records satisfaction to the effect that there are reasonable grounds for believing the accused not guilty of such offence and that he/she with certainty can be believed not to commit same offence during the period of bail.

10. Coming to the facts of the case, there is nothing to suggest that the implication of petitioner in the present case is false. Petitioner was noticed throwing a packet by the police officials and commercial quantity of Tramadol Hydrochloride was recovered therefrom. His personal search is stated to have been conducted in presence of a gazetted officer which lead to recovery of 6.96 grams of heroin. Though, the evidence collected by investigating agency is not to be scanned minutely, nonetheless, it can be taken into account for the purposes of prima-facie assessment as to seriousness and gravity of allegations against the bail petitioner. On the basis of material on record, it cannot be said that there are grounds for believing that petitioner is not guilty of offence under the Act by keeping in possession a commercial quantity of contraband.

11. The status report submitted on behalf of respondent further reveals that petitioner is accused in three cases under the NDPS Act besides others under different acts. Noticeably, petitioner was apprehended in a case registered vide FIR No. 105 of 2020 on 5.8.2020 for commission of offence under Section 21 of NDPS Act by the police officials of Police Station, Damtal. Again after one week i.e. on 12.8.2020, he was apprehended in the present case. The repeated indulgence of petitioner in commission of offences affords reason to hold that petitioner cannot be believed to not to commit the offence during the period of bail, if so released.

12. Mr. Vijender Katoch, learned counsel for the petitioner has placed reliance upon an order passed by a Coordinate Bench of this Court in Cr.MP(M) No. 1768 of 2021 dated 22.9.2021, titled as Prem Sagar @ Pema vs. State of H.P., wherein the accused possessing commercial quantity of contraband was enlarged on bail. With due deference to the judgment relied upon by the learned counsel for the petitioner, the same cannot serve the cause of petitioner for the reasons, firstly that it does not settle the law and secondly, the order was passed in peculiar facts of the case. The petitioner therein was found to be suffering from prolonged illness and such reason had prevailed upon the Hon'ble Court to enlarge the petitioner therein on bail.

13. Learned counsel for the petitioner has further tried to persuade this Court with the plea that it has been almost one year and ten months since the petitioner is in custody. It has been submitted that even the charges have not been framed as yet in the trial. On this score, this Court has been called upon to exercise its constitutional powers to protect the right of freedom of the petitioner. Reliance has been placed on a judgment passed by three Judges Bench of Hon'ble Supreme Court in ***Union of India*** vs. ***K.A. Najeeb***, ***2021 (3) SCC 713*** and specifically paragraph18 thereof, which reads as under:-

> *"18. It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA perse does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial".*

14. After considering the above noted judgment in K.A. Najeeb, this Court is of considered view that petitioner cannot draw any help even from the same. In that case, the accused was already in custody for more than five and half years. His co-accused had been sentenced to undergo imprisonment ranging upto eight years. 276 witnesses remained to be examined. All these factors had persuaded the Hon'ble Supreme Court to concur with the order of High Court of Kerala granting the right of liberty to the accused therein in the peculiar facts of the case.

15. Hon'ble Supreme Court in K.A. Najeeb (supra) has drawn distinction between Section 43-D(5) of UAPA and Section 37 of NDPS Act. Section 43-D(5) of UAPA was the subject of interpretation in K.A. Najeeb, yet purposely, Hon'ble Supreme Court has drawn distinction of said provision with Section 37 of NDPS Act. In paragraph-20 of K.A. Najeeb, the Hon'ble Supreme Court has held as under:-

> "*20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that*

prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under the UAPA. Instead, Section 43D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc".

16. As already held above, this is not a case where there is no prima-facie material against the petitioner. Additionally, the repeated indulgence of petitioner in various offences including offence under the NDPS Act is an important factor to determine that petitioner can be believed not to commit the same offence during the period of bail.

17. In light of above discussion, petitioner is not held entitled for bail. Accordingly, the bail petition is dismissed.

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

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

BETWEEN:

DEEPAK BUDA MAGAR, SON OF SHRI ANANTE BUDE, AGE ABOUT 22 YEARS, R/O VILLAGE PIPAL, POST OFFIE SUKAMI, KHULANA, TEHSIL MUSHIKOTN, DISTRICT RUKAMAI NEPAL(UNDER CUSTODY) PRESENTLY THROUGH HIS NEXT FRIEND RAMAN AGE 24 YEARS, S/O SH. JAI BHAGWAN, R/O C/O JAI BHAGWAN H.NO. 2896, PANA LAKHYAN, BADLI(72) JHAJJAR, HARYANA.

.....PETITIONER

(BY MS. KIRAN KANWAR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.....RESPONDENT

(BY SHRI P.K. BHATTI & SHRI BHARAT BHUSHAN ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION(MAIN)
Nos. 1097 of 2022
Decided on:01.07.2022

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 and 29- Bail- Recovery of 8 Kg. charas- Held- Rigors of Section 37 of the Act, will apply- Bail petition dismissed. (Para 6)

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

O R D E R

Petitioner is an accused in case FIR No. 55/2020, dated 17.02.2020,underSection 20 & 29 of Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS Act'), registered at Police Station Bhuntar, District Kullu, H.P.

2. On 17.02.2020, police officials of Police Station Bhuntar, District Kullu, H.P., stopped H.R.T.C. Bus No.HP-18B-9785 on Manikaran-Bhuntar road, which was enroute from Manikaran to Haridwar. The driver and conductor of the bus were associated as witnesses. While checking the passengers and luggage, police noticed that passengers sitting on seat Nos. 15,16,20 and 21 were perplexed. On inquiry, the persons sitting on seat No. 15 disclosed his name as Tul Bahadur Buda and person on seat No.16 disclosed his name as Deepak Buda Magar i.e. petitioner. Seat Nos. 20 and 21 were occupied by Ash Kumari and Ram Bahadur, respectively. The persons of

above noted four passengers were searched. 4Kg110grams charas was recovered from the person of Ash Kumari and 4 Kg 19 grams charas was recovered from the person of Ram Bahadur. On investigation, it was found that all the above noted passengers occupying seat Nos. 15,16,20 & 21 were traveling on a single ticket. The case was registered and all above noted persons were arrested. The investigation is complete and challan has been presented before the learned Special Judge, Kullu, H.P.. Charges have been framed and the case is fixed for recording the statements of prosecution witnesses.

3. Learned counsel for the petitioner has submitted that the petitioner is innocent. He was not aware about the contraband being carried by Ash Kumari and Ram Bahadur. It has also been contended on behalf of the petitioner that nothing was recovered from him and it cannot be presumed that petitioner had any role in the commission of alleged crime.

4. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report as well as record of the case.

5. The fact that petitioner alongwith other three citizens of Nepal including Ash Kumari and Ram Bahadur were traveling on a single ticket, *primafacie* reveals that all the four persons were traveling together.

6. Huge quantity of more than 8 Kg of charas has been recovered from two of the persons, out of four persons traveling together. Merely because, no recovery was effected from the petitioner, it cannot be inferred at this stage that the petitioner had no knowledge about the factum of huge contraband being carried by his associates. Conspiracies to commit crime are rarely visible to the naked eye. These are hatched under dark cover, so that, no one easily comes to discover. Section 29 of ND&PS Act prescribes the same punishment to a conspirator, which is applicable to the perpetrator

of the crime. The quantity recovered in the case is not only commercial but a huge quantity. Thus, rigors of Section 37 of ND&PS Act, will apply.

7. In light of above-said analysis, it is not a case where there is no *prima facie* material against petitioner to connect him with the crime. Petitioner also belongs to Nepal as his other associates are. It is not a case where petitioner could produce on record any material to suggest that he had no acquaintance with the persons from whom the contraband was recovered.

8. Keeping in view the entirety of circumstances, petitioner is not entitled to be released on bail. Petitioner is a resident of Nepal and has no permanent abode in India. In such circumstances, the release of the petitioner on bail is likely to prejudice the trial of the case adversely in all probabilities.

9. Accordingly, the instant petition is dismissed.

10. 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.

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

Between :-

SMT. HIRA DEVI, DAUGHTER OF SHRI CHET RAM, RESIDENT OF VILLAGE CHHATERA, AT PRESENT EMPLOYEE IN DAV SCHOOL, SUNNY SOLAN, TEHSIL AND DISTRICT SOLAN, H.P.

…APPELLANT

(BY MR. SUDHIR THAKUR, SENIOR ADVOCATE
WITH MR. KARUN NEGI, ADVOCATE)

AND

1. SHRI KIRPA RAM, SON OF SHRI DAYA RAM, RESIDENT OF VILLAGE CHAPLA, P.O. RAURI, VIA DHARAMPUR, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

2. SMT. KAUSHALYA, WIFE OF SHRI KISHAN LAL, RESIDENT OF VILLAGE JABLU, P.O. BALERA, TEHSIL ARKI, DISTRICT SOLAN, H.P.

3. SMT. PADMA, WIFE OF SHRI NAND LAL, RESIDENT OF VILLAGE DOHRA, P.O. BADHALAG, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

.....RESPONDENTS

(BY MR. BHUPENDER GUPTA,
SENIOR ADVOCTE,WITH MR. VEDANT RANTA, ADVOCATE)

REGULAR SECOND APPEAL
No. 617 OF 2014
Decided on: 08.07.2022

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- **Indian Evidence Act, 1872**- Section 106- Suit for declaration- Will- Held- Defendant failed to establish that she had solemnized marriage with Bhagat Ram after death of her previous husband Ram Lal- Long cohabitation between defendant and Bhagat Ram much less as husband and wife is not established- Findings arrived at by the Ld. First Appellate Court cannot be held as perverse- Appeal dismissed. [Para 4(i) to (iv)]

Cases referred:

Abdul Hussein Khan Vs. Mst. Bibi Sona Dero and another AIR 1917 Privy Council 181;

Badri Prasad Vs. Dy. Director of Consolidation and others AIR 1978 SC 1557 ;

Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others (1999) 3 SCC 722;

Maro (dead) through L.R. Paramjeet Kaur (Smt.) wife of Shri Om Prakash Vs. Khillo wife of Tirath Ram 2012 (2) Shim. LC 869;

Nazir Mohamed Vs. Kamala and ors 2020(10) Scale 168;

Ranganath Parmeshwar Panditrao Mali and another Vs. Eknath Gajanan Kulkarni and another AIR 1996 SC 1290;

S. Subramanian Vs. S. Ramasamy and others (2019) 6 SCC 46;

Smt. Lachhmi Vs. Bali Ram and others 1997 (2) Sim L.C. 145;

Trimukh Maroti Kirkan Vs State of Maharashtra (2006) 10 SCC 681;

This appeal coming on for pronouncement of judgment this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua****, delivered the following :*

J U D G M E N T

One Bhagat Ram died on 22.02.1999. Mutation No. 75 concerning his property was entered and attested on 18.01.2002 in favour of Hira Devi as widow of Bhagat Ram. Civil suit was filed by the respondents (Kirpa Ram, Kaushalya and Padma) seeking declaration that mutation No. 75 dated 18.01.2002 was wrong, illegal and void. That Hira Devi (defendant) was not widow of Bhagat Ram. She had no right, title or interest in the estate of Bhagat Ram. That the plaintiffs had succeeded to Bhagat Ram's estate on the basis of a will dated 07.02.1999 executed by him during his lifetime. Alternatively, a prayer was made that if for any reason, the will dated 07.02.1999 was held to be illegal, in that eventuality, the plaintiffs being legal representatives of Bhagat Ram are entitled to succeed to his estate in equal shares.

Learned trial Court returned the findings that will (Ex. PW-6/B) was shrouded with suspicious circumstances. This factual finding has been affirmed by the learned first appellate Court. No appeal concerning validity of the will has been preferred by the plaintiffs. Hence, findings on this issue have become final.

Regarding Hira Devi being wife of Bhagat Ram, learned trial Court held that she was widow of Bhagat Ram and entitled to succeed to his estate. Mutation No. 75 qua Bhagat Ram's inheritance, entered and attested in her favour on 18.01.2002 was legal and valid. Learned first appellate Court reversed this finding and held that defendant Hira Devi could not prove that she had solemnized marriage with Bhagat Ram after the demise of her first husband Ram Lal. Accordingly, the appeal preferred by the

plaintiffs was allowed by the learned first appellate Court. The learned appellate Court held mutation No. 75, dated 18.01.2002 sanctioned in favour of the defendant to be wrong and illegal. Plaintiff No. 1 Kirpa Ram was held entitled to succeed to the suit land alongwith other class II heirs , if any existing at the time of death of Bhagat Ram. Aggrieved, defendant Hira Devi has preferred the present regular second appeal under Sectio 100 of the Civil Procedure Code.

The parties hereinafter are being referred to according to their status before the learned trial Court.

2. This appeal was admitted on 11.05.2015 on the following substantial questions of law :-

1) Whether on account of misappreciation of the pleadings and misreading of the oral as well as documentary evidence available available on record the findings recorded by learned lower appellate Court are erroneous and as such the judgment and decree impugned in the main appeal being perverse and vitiated is not legally sustainable ?

2) Whether the first appellate Court has wrongly shifted the burden to prove the alleged marriage of defendant/present appellant herein with one Ram Lal on her, whereas the same was the pleadings of the plaintiffs/present respondents herein ?

3. Contentions

Whether defendant Hira Devi was lawfully married to Bhagat Ram is the central question around which learned Senior counsel for the parties advanced their submissions.

3(i) On behalf of defendant Hira Devi it was argued that it was for the plaintiffs to prove that Hira Devi was not the wife of Bhagat Ram. Plaintiffs had failed to discharge the burden placed upon them. Learned trial Court had correctly decided the issue against the plaintiffs. Learned first

appellate Court had erred in law in placing the burden of proving her marriage with Bhagat Ram upon the defendant/Hira Devi. In support of such submission, Sections 35, 50, 74, 102 and 106 of the Indian Evidence Act were pressed. Learned Senior counsel for defendant-appellant Hira Devi also submitted that fact of Hira Devi being wife of Bhagat Ram was proved not only by the documents placed on record but also by the oral evidence led by her. By referring to copies of electoral rolls prepared for the year 1981 and 1983 as well as copy of family register, learned Senior counsel argued that name of Hira Devi was reflected therein as wife of Bhagat Ram. Attention was also drawn to an application moved by Hira Devi under Section 125 of the Code of Criminal Procedure (Cr.P.C.) in the year 1993 claiming maintenance from Bhagat Ram as well as to the order passed thereupon by the concerned Gram Panchayat. Besides referring to the oral evidence led by Hira Devi, learned Senior counsel contended that even otherwise long cohabitation between Hira Devi and Bhagat Ram as husband and wife dispensed with the requirement of any formal proof of marriage between the two. Learned counsel prayed for acceptance of the appeal.

3(ii) Learned Senior counsel for the plaintiffs, respondents herein, contended that the appeal does not involve any substantial question of law. It only raises questions of facts. The learned first appellate Court after appreciating the pleadings and the evidence has exercised its jurisdiction in accordance with law and decided the case. The findings returned by the learned first appellate Court are not perverse. The regular second appeal preferred by defendant Hira Devi is not maintainable. It was also argued that Hira Devi in her pleadings has not denied the assertion of the plaintiff that she was married to one Ram Lal. In the pleaded facts of the case, it was for her to prove that she was lawfully married to Bhagat Ram. Therefore, no error was committed by the learned first appellate Court in holding that it was for the defendant to discharge the burden of her being lawfully married to Bhagat

Ram and that she failed to discharge this burden. It was also argued that there was variation in the pleadings and the proof put forth by Hira Devi. Regarding her so called marriage with Bhagat Ram, she pleaded one thing, but tried to prove entirely a different aspect regarding mode and manner of solemnization of her marriage with Bhagat Ram. The evidence produced by her, documentary or ocular, did not corroborate her pleaded version. Learned Senior counsel for the plaintiffs/respondents prayed for dismissal of the appeal.

4. Having heard learned Senior counsel for the parties and with their assistance on going through the record, I am not inclined to interfere with the findings recorded by the learned first appellate Court. This is for the following reasons :-

(i) Substantial Question of Law No. 2

(i) (a) The plaintiffs/respondents in para 4 of the plaint specifically averred that :-

> "Hira Devi was married to one Ram Lal of village Teli, Tehsil Kandaghat. At no point of time her marriage was solemnized with late Sh. Bhagat Ram. The defendant cannot claim the status that of a widow of late Bhagat Ram. Defendant No. 1 is not legal heir or successor of late Bhagat Ram @ Bhagat Singh and cannot succeed to his estate in any manner".

(i) (b) In reply to the above factual assertion, defendant Hira Devi in her written statement pleaded that :-

> "Contents of para No. 4 of the plaint as alleged are wrong and denied. Ram Lal died long long back and after his death, the defedant's marriage was arranged by her brothers with Bhagat Singh as per custom of the village. The parties to the suit are agriculturists and Rajputs by caste and governed by the custom which is prevailing in the area till date and followed by people".

(i) (c) Learned Senior counsel for defendant Hira Devi has argued that the above defence cannot be construed to be an admission on part of Hira Devi of having solemnized a marriage with Ram Lal. It was contended

that in the above defence, the only thing that is pleaded by the defendant was that her marriage was solemnized with Bhagat Ram by her brothers. On the basis of this factual argument, learned Senior counsel thereafter referred to the provisions of the Indian Evidence Act, in particular Sections 35, 50, 74, 102 and 106 thereof to contend that the onus to prove her marriage with Bhagat Ram was wrongly placed by the learned first appellate Court upon the defendant.

(i) (d) I am afraid, the argument raised on behalf of the defendant cannot be countenanced. The plaintiffs had specifically pleaded in para 4 of the plaint that the defendant was married to one Ram Lal. Identity of Ram Lal was also described in the plaint as resident of village Teli, Tehsil Kandaghat. The plaintiffs had also pleaded that no marriage was ever solemnized between the defendant and Bhagat Ram. It was for the defendant to emphatically refute plaintiffs' factual assertions. In her written statement to para 4 of the plaint, defendant No. 4 pleaded that Ram Lal had died long ago and after his death, her marriage was arranged by her brothers with Bhagat Ram @ Bhagat Singh as per village customs. The defendant had not denied her marriage with Ram Lal. The only logical inference that can be drawn from para 4 of her written statement is the one drawn by the learned first appellate Court and that being she was married to Ram Lal at one point of time. Having not denied her marriage to Ram Lal, it was for the defendant to prove that her marriage with Bhagat Ram was solemnized after the death of Ram Lal and that solemnization of her marriage with Bhagat Ram was in accordance with law.

(i) (e) Section 106 of the Indian Evidence Act says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws light on the content and scope of this provision and reads as under :-

"(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

{Re: (2006) 10 SCC 681 titled Trimukh Maroti Kirkan Versus State of Maharashtra}

In the present case, the plaintiffs specifically pleaded that the defendant had never solemnized any marriage with Bhagat Ram and that she was rather married to one Ram Lal, resident of Village Teli. Defendant in her written statement did not dispute the fact that she was at one point of time married to Ram Lal. Her defence was that after Ram Lal's death her brothers had solemnized her marriage with Bhagat Ram. Solemnization of her marriage; solemnization of her marriage with Bhagat Ram after the death of her first husband Ram Lal and ; solemnization of her marriage as per village customs with Bhagat Ram (as pleaded by her) after the death of her first husband Ram Lal, were the facts in her special knowledge.

The defendant had pleaded solemnization of marriage with Bhagat Ram after Ram Lal's death as per village custom. In view of her specific pleadings in the written statement, Section 106 of the Indian Evidence Act, 1872 comes into play. The Section provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the nature of the stand taken by the defendant, considered in the light of Section 106 of the Indian Evidence Act, the onus definitely shifted upon the defendant to prove that she had solemnized marriage with Bhagat Ram after the death of her first husband Ram Lal as pleaded by her. The defendant had also pleaded that her marriage was solemnized with Bhagat Ram as per custom of the village. These facts were required to be proved by her by leading cogent evidence. Substantial question of law No. 2 is answered accordingly against the defendant-appellant. The evidence produced by her be now examined to answer question of law No. 1.

(ii) Substantial Question of Law No.1

Documentary Evidence

(ii) (a) The defendant placed reliance upon copies of Electoral rolls prepared for the year 1981 (Ex.DW-3/A) and for the year 1983 (Ex. DW-3/B) to prove that she was wife of Bhagat Ram. In these two documents tendered in evidence by DW-3 the then Election Kanungo, the defendant has been mentioned as wife of Bhagat Ram.

The Electoral rolls Ex. DW-3/A and Ex. DW-3/B will not prove that the defendant was lawfully married to Bhagat Ram. DW-3, Election Kanungo, during his cross examination, stated that the entries in Electoral rolls are made on the basis of oral information supplied by any adult member of the family. There was no specific evidence on record to show at whose instance these entries were made. The entries though have been made by the public servant in discharge of the public duty and are relevant in terms of Section 35 of the Indian Evidence Act, but these entries which might have been recorded on the basis of oral information supplied by any family member including the defendant herself will not prove that the defendant had solemnized a lawful marriage with Bhagat Ram after the death of her previous husband Ram Lal.

(ii) (b) The defendant has also placed reliance upon Ex. DW-1/A i.e. copy of family register (Parivar register). It appears that in this register, initially name of the defendant was mentioned as wife of Bhagat Ram, but the same thereafter was crossed and smeared. Pushpa-the Panchayat Secretary, who appeared as PW-3, PW-4 and also as DW-1, expressed her lack of knowledge as to how and under what circumstances, the name of defendant was entered, crossed and smeared. Even this document would not advance defendant's claim of solemnizing lawful marriage with Bhagat Ram after the demise of her first husband Ram Lal.

(ii) (c) The last documentary evidence referred to on behalf of the defendant is a petition preferred by her on 02.12.1993 claiming maintenance amount of Rs. 5,000/- per month from Bhagat Ram. This petition (Ex. PW-4/A) bearing No. 78/4 of 1993 was instituted under Section 125 of the Criminal Procedure Code. Learned Senior counsel for the defendant submitted that this was the document presented by the defendant at the time when there was no dispute between her and Bhagat Ram regarding her capacity as his wife and proves that the defendant was Bhagat Ram's wife.

The document Ex. PW-4/A i.e. the petition filed by defendant under Section 125 of the Criminal Procedure Code claiming maintenance from Bhagat Ram leads her case nowhere insofar as the present controversy is concerned. The reply filed by Bhagat Ram to the petition under Section 125 of the Criminal Procedure Code is also on record as Ex. PW-4/B. This is the only document available on record which is executed by Bhagat Ram himself. In this reply, Bhagat Ram denied performing any marriage with Hira Devi. It will be appropriate to extract in verbatim his factual assertion made in para 1 of the reply on merits :-

> *"neither legal marriage was performed nor any marriage according to the custom in area was performed as alleged. Since there is no custom prevailed in the area regarding marriage hence the question of cohabitation does not arise. However, the respondent has parental house and a small piece of land at village Chapala. It is pertinent to mention here that the petitioner has resided at the house of the mother of the respondent for two, or three years as a domestic servant. Moreover, the petitioner is a legally married woman, which marriage took place about 26 years ago. The petitioner was married with Sh. Ram Lal, son of not known, resident of Village Sulani, Tehsil Kandaghat, Distt. Solan, H.P. about 26 years ago."*

The maintenance claim case of defendant Hira Devi was decided by Gram Panchayat Dharamasan on

24.12.1999. The Panchayat in this decision (Ex. PW-4/L) concluded that Bhagat Ram was never married with Hira Devi. She was not entitled to any maintenance from Bhagat Ram. She was further not held entitled to the property of Bhagat Ram. In the face of the reply filed by Bhagat Ram to the maintenance claim of defendant Hira Devi, it cannot be concluded that the defendant has been able to prove that she was lawfully married to Bhagat Ram.

Ocular evidence

(ii) (d) Learned Senior counsel for the defendant next contended that defendant has been able to prove having solemnized lawful marriage with Bhagat Ram by leading oral evidence. Reference in this regard was made to the statement of defendant as DW-4 and to that of one Ram Singh who appeared as DW-5.

The defendant had pleaded solemnizing marriage with Bhagat Ram as per village customs. There is no presumption in favour of custom. In each case, existence of custom must be proved. {Re: **AIR 1917 Privy Council 181** titled **Abdul Hussein Khan** Vs. **Mst. Bibi Sona Dero and another**}.

Custom is a fact which if pleaded has to be proved in accordance with law by authoritative pronouncements or by instances in which it had been followed or by some other clear and cogent evidence. The onus to prove a certain, invariable and legally binding custom lies upon a party setting up the plea of custom. {Re: **1997 (2) Sim L.C. 145**, titled **Smt. Lachhmi** Vs. **Bali Ram and others**}.

(ii) (e) The oral evidence produced by the defendant nowhere proves her pleaded case of marrying Bhagat Ram in accordance with prevailing custom of the village. Rather in her affidavit, exhibited as Ex. DW-

4/A, the defendant has sworn that she was married to Bhagat Ram in accordance with Hindu rights and customs. This claim was at variance with her pleaded case of solemnizing marriage with Bhagat Ram in accordance with village customs. While appearing as DW-4 during cross examination, she has stated that her marriage with Bhagat Ram was solemnized in accordance with usual customs about 30/35 years ago. She has further feigned her ignorance about the place of her residence after her so called marriage with Bhagat Ram. She also stated that she remained with Bhagat Ram and resided with him throughout till his death. She has also stated that she always had cordial relations with Bhagat Ram. This statement of hers is in sharp contradiction to the statement of her own witness Ram Singh as DW-5. Ram Singh (DW-5) during his cross examination stated that defendant had been living in her matrimonial home for the last 25/30 years. This witness has also stated that Bhagat Ram was living with plaintiff Kirpra Ram. That it was plaintiff Kirpa Ram who was taking care of Bhagat Ram. That it was plaintiff Kirpa Ram who had performed the last rights of Bhagat Ram. In fact, conduct of the defendant is such that in her cross examination she even denied her signatures on the maintenance petition preferred by her under Section 125 of the Criminal Procedure Code in the year 1993.

In view of oral and the documentary evidence on record considered in light of the pleadings of the parties, the defendant could not establish that she had solemnized marriage with Bhagat Ram after the death of her previous husband Ram Lal.

Long Cohabitation

(iii) Learned counsel for the defendant/appellant also raised an argument that long cohabitation between a man and a woman living as husband and wife strongly raises the presumption in favour of the wedlock. Citing **AIR 1978 SC 1557** titled **Badri Prasad** Vs. **Dy. Director of Consolidation and others** and **AIR 1996 SC 1290** titled **Ranganath**

Parmeshwar Panditrao Mali and another Vs. **Eknath Gajanan Kulkarni and another**, it was argued that in such circumstances, proof to the factum of marriage by examining priest and other witnesses is not necessary.

The above line of argument does not fit in the facts of the case in hand. Long cohabitation between the defendant and Bhagat Ram much less as husband and wife is not established from the record. Defendant's oral testimony of living with Bhagat Ram as his wife till Bhagat Ram's death is falsified by her own witness DW-5 Sh. Ram Lal. DW-5 stated that (i) defendant had been living in her matrimonial home around 30 years prior to Bhagat Ram's death (ii) Bhagat Ram had been living with plaintiff No. 1 – Kirpa Ram prior to his death. Bhagat Ram had been living with Kirpa Ram even at the time of his death (iii) His last rites were performed by Kirpa Ram. The fact that defendant and Bhagat Ram had not been living together as husband and wife is amplified by Ex. PW-4/A the application moved by defendant on 02.12.1993 under Section 125 of Criminal Procedure Code seeking maintenance from Bhagat Ram wherein she had submitted that she lived with Bhagat Ram only for 5 years. Her material averments concerning this aspect are as under :-

> "1. That marriage between the petitioner and respondent was performed according to the customs of the area and applicable to the parties about 17-18 years back. They lived together and cohabited as husband and wife for about 5 years in Village Chapla where the respondent has parental house and landed property.
>
> 2. That after 5 years the respondent under the influence of his brother started maltreating, misbehaving, beating and abusing the petitioner and thus she was ousted from the house by the respondent without any reasonable cause and thus for the last 10 years the petitioner has been deserted by the petitioner and under such circumstances, she has taken shelter in the house of her brother at Chatera. The respondent has not made

> any provision of maintenance to the petitioner nor has paid even a single penny as maintenance to the petitioner. On the contrary, the petitioner was subjected to cruelty and was advanced threats not to come back to his house. In order to avoid dependence upon her brothers the petitioner thought to work in a factory at Solan and accordingly she joined Asian Biscuit Factory at Chambaghat where she was given wages @ 250 P.M. in the beginning and the employer of the petitioner has now closed the factory and retrenched the petitioner. Even otherwise, the petitioner is not maintaining good health and is not able to work hard any more, as a result of which she has come back to her parent's house and thus living in Village Chhatera with her brothers."

The reply filed by Bhagat Ram to the above application denying solemnization of any marriage between him and Hira Devi and decision of the application, have already been referred to in para 4(ii)(c) supra.

The plaintiffs have strongly come out with their plea that defendant was never married to Bhagat Ram. Bhagat Ram in his reply filed to the application had not only denied solemnizing any marriage with the defendant but also denied living together with her much less as husband and wife.

The evidence on record does not substantiate the plea that there was long habitation between the defendant and Bhagat Ram as husband and wife which dispenses putting forth formal proofs of marriage between the two.

(iv) **Section 100 C.P.C.**

In **(1999) 3 SCC 722** titled **Kondiba Dagadu Kadam** Vs. **Savitribai Sopan Gujar and others**, Hon'ble Supreme Court held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact being the first appellate Court.....In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High

Court in second appeal.....unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of applicable law or contrary to the law as pronounced by the apex Court or was based upon inadmissible evidence or arrived at without evidence.

The above was reiterated in **(2019) 6 SCC 46** titled **S. Subramanian** Vs. **S. Ramasamy and others** wherein it was inter-alia held that High Court is not required to re-appreciate the entire evidence on record and to come to its own finding when the findings recorded by the Courts below, more particularly the first appellate Court are on appreciation of evidence. In **2012 (2) Shim. LC 869**, titled **Maro (dead) through L.R. Paramjeet Kaur (Smt.) wife of Shri Om Prakash** Vs. **Khillo wife of Tirath Ram**, following circumstances were held not sufficient for interfering with findings of first appellate Court :-

> "20.The Apex Court has held that the High Court cannot set aside findings of the first Appellate Court in the following circumstances;
>
> (i) No point of law pleaded before the Courts below {V. Pechimuthu vs. Gowrammal,(2001) 7 SCC 617, Hero Vinoth (Minor) vs. Seshammal, (2006) 5 SCC 545};
>
> (ii) to arrive at a different conclusion on reappraisal of evidence, to adjudge the adequacy or sufficiency of evidence to sustain the conclusion of facts, {Ramanuja Naidu (supra)},
>
> (iii) mere equitable consideration, {Kondiba Dagadu Kadam (supra)};
>
> (iv) the first Appellate Court did not advert to all the reasons given by the trial Court, {Arumugham (dead) by LRs & Ors. vs. Sundarambal & Anr. (1999) 4 SCC 350};
>
> (v) where two inferences are possible, the one drawn by the lower Appellate Court is binding on the High Court, {Kondiba Dagadu Kadam (supra), Karnataka Board of Wakf vs. Anjuman-E-Esmail Madris-Un-Niswan, (1999) 6 SCC 343 and Hero Vinoth (supra)};

(vi) Another view is possible on re-appreciation of the same evidence, {Navaneethammal vs. Arjuna Chetty (1996) 6 SCC 166}."

In **2020(10) Scale 168,** titled **Nazir Mohamed** Vs. **Kamala and ors.,** Hon'ble Supreme Court reiterated the principles relating to Section 100 CPC as under:-

"37. The principles relating to Section 100 CPC relevant for this case may be summarised thus :

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered 5 AIR 1963 SC 302 on a material question, violates the settled position of law.

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;(ii) the courts have drawn wrong inferences from proved facts by applying the law

> erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

In the instant case, learned first appellate Court after correct appreciation of evidence led by the parties, both documentary and ocular, in light of pleadings of the parties arrived at the just conclusion. Findings arrived at by the learned first appellate Court cannot be held as perverse.

For all the aforesaid reasons, I find no reason to interfere with the findings recorded by the first appellate Court. The appeal is accordingly dismissed. All pending application)s, if any, stand disposed of.

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

Between:-

CHANDU RAM
SON OF SHRI TITU,
RESIDENT OF VILLAGE SULTANPUR
PARGNA SACH, TEHSIL AND DISTRICT
CHAMBA HP.

....APPELLANT

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

AND

1. STATE OF HIMACHAL PRADESH
   THROUGH CHIEF SECRETARY TO THE
   GOVERNMENT OF HIMACHAL PRADESH,
   SHIMLA-2.

2. THE COLLECTOR, CHAMBA,
   DISTRICT CHAMBA, HP.

..RESPONDENTS

(MR. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

REGULAR SECOND APPEAL
No. 122 OF 2007
Reserved on:01.07.2022
Decided on: 08.07.2022

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- **Himachal Pradesh Nautor Land Rules, 1968**- Suit for declaration partly decreed by Ld. Trial Court, however, Ld. First Appellate Court dismissed the suit- Plaintiff claimed ownership of suit land on the basis of "Patta" granted in his favour under Himachal Pradesh Nautor Land Rules, 1968- Ld. First Appellate Court held grant of "Nautor" in favour of plaintiff to be bad in law- Held- The 1968 Rules did not authorize the grant of Nautor land inside the towns, the order passed by the SDO(C) Chamba on 24.03.1972 allowing the application of plaintiff for grant of Nautor land, was clearly without jurisdiction- It is true that mutation or entries in the record-of-rights are not determinative of rights of the parties- Appeal dismissed. (Para 20, 26)

Cases referred:

Ajudh Raj and others vs. Moti s/o Mussadi (1991) 3 SCC 136;

This appeal coming on for hearing this day, the Courtpassed the following:-

J U D G M E N T

Appellant/plaintiff (for short 'plaintiff') filed Civil Suit No. 74 of 2003 before the learned Civil Judge (Senior Division), Chamba (for short 'trial Court') seeking following reliefs:-

> *"1. Decree for declaration to this effect that change of ownership right in favour of defendants vide mutation No.1196 dated 28-10-94 and subsequent revenue entries regarding 1 and measuring 1.18 Bighas comprised in Khasra No.349 Kh/kh. No.286/337 situated in MohalSultanpurParg, Sach Tehsil and District Chamba is wrong, illegal, null and void upon the rights of plaintiff.*

2. *In alternative Decree for possession of land comprising of Khasra No.349 but if on the basis of Wong mutation, entries, the plaintiff is dispossessed during pendency of suit and not found in possession, in such eventuality suit for possession of land measuring 118 Bighas comprised in Khasra No.349 Kh/kh. No.286/337 as recorded in the jamaband for the Year 1991-92 situa ted in MohalSultanpurParg. Sach Tehsil and District Chamba-HP.*
3. *Any other relief to which the plaintiff may be found entitled under the law."*

2. Learned trial Court partly decreed the suit of the plaintiff and relief in the following terms was allowed:-

> *"15. As sequel to my findings on issues No. 1 to 7, suit of the plaintiff is partly decreed in favour of the plaintiff against the defendants declaring change of ownership right in favour of the defendants vide mutation No. 1196 dated 29-10-1994 and subsequent entries in favour of defendants to be illegal, null and void and not binding on plaintiff. It is hereby ordered that SDO (C), Chamba before passing order of review shall afford an opportunity of being heard to the plaintiff and thereafter he would pass an appropriate order with regard to modification, or cancelling allotment in favour of the plaintiff under the .P. Nautor Land Rules, 1968. As there is no iota of evidence that plaintiff has been dispossessed during the pendency of the suit relief of possession is declined and suit to this extent is partly dismissed. In the peculiar circumstances of the case, the parties are left to bear their own costs. A decree sheet be drawn and the file, after its needful be consigned to records."*

3. The respondents-defendants herein (for short 'defendants') assailed the judgment and decree passed by learned trial Court before the learned Additional District Judge, Fast Track Court, Chamba, H.P. in Civil Appeal No. 11 of 2006 (for short 'First Appellate Court'). Learned First

Appellate Court allowed the appeal of the defendants and dismissed the suit of the plaintiff vide judgment and decree dated 20.01.2007.

4. By way of instant appeal, a challenge has been laid by the plaintiff to the judgment and decree dated 20.01.2007 passed by learned 1st Appellate Court in Civil Appeal No. 11 of 2006.

5. This appeal was admitted by this Court on 24.04.2008 on the following substantial questions of law:-

1. *Whether there has been misreading of evidence oral as well as documentary by the learned appellate Court?*
2. *Whether the allotment/Patta issued in favour of the plaintiff, Ex. P.4, could have been cancelled without proving or establishing any breach of terms and conditions of the grant?*

6. I have heard Mr. N.K. Thakur, learned Senior Advocate assisted by Mr. Divya Raj Singh, Advocate and Mr. Kunal Thakur, learned Deputy Advocate General for the respondents and have also gone through the record carefully.

7. Plaintiff claimed ownershipand possession of suit land on the basis of '*Patta'* Ext. P-4 granted in his favour under Himachal Pradesh Nautor Land Rules, 1968 (for short '1968 Rules'). Records-of-rights were accordingly updated and entries to this effect were carried continuously from 1975-76 to 1991-92 in such records.

8. Plaintiff had averred in the plaint that mutation No. 1196 dated 28.10.1994 was attested by defendant No.2 surreptitiously at his back and based on that the suit land was wrongfully shown in records of rights to be owned and possessed by defendants. It was contended that once the rights of plaintiff were recorded in the record-of-rights, defendants had no power to cancel that. As per plaintiff,it was only the Civil Court which had the jurisdiction to declare the entries in the record-of-rights as null and void.

9. Plaintiff had filed the suit in June, 2003 by alleging that he had attained knowledge about the attestation of mutation No. 1196 only in the month of January, 2003. Thereafter, he had issued notice under Section 80 of the Code of Civil Procedure to the defendants. The notice having remained un-addressed, the suit was filed for the reliefs, as noticed above.

10. Defendant through their written statement challenged the locus-standi of the plaintiff to file the suit. Objections as to the jurisdiction of Civil Court, non-joinder and mis-joinder of parties, want of cause of action etc. were also raised. On merits, it was submitted that the suit land, at the time of making of grant in favour of plaintiff, fell within the jurisdiction of municipal limits of Chamba, as such, could not be granted under 1968 Rules. Additionally, it was submitted that plaintiff had failed to put the suit land to the use for which it was granted and also that he had misled the Collector regarding his status as a landless person. The mutation No. 1196 dated 19.02.1994 was sought to be justified on the aforesaid grounds.

11. Learned trial Court had framed the following issues:-

1) *Whether the mutation No. 1196 dated 28-10-1994 is illegal, null and void as alleged? OPP.*
2) *Whether the subsequent entries made on the basis of mutation are wrong as alleged? OPP.*
3) *Whether the land was never occupied and claimed by the plaintiff as alleged, if so, its effect? OPP.*
4) *Whether the land fallen within the area of Municipal Committee was not subject to allotment by the plaintiff by grant of 'Patta' as alleged? OPD.*
5) *Whether the allotment was made in favour of the plaintiff as he mislead the Collector that he was landless, whereas, he was not so as alleged? OPD.*
6) *Whether the suit is not maintainable in the present form as alleged? OPD.*
7) *Whether this Court has got no jurisdiction to decide the case of alleged? OPD.*
8) *Relief.*

12. Issues No. 1, 2 and 4 were decided in affirmative, whereas, remaining issues were decided in negative. A relief, in terms, as noticed above, was allowed in favour of the plaintiff.

13. Learned trial Court granted relief to plaintiff on the premise that plaintiff was not heard before the attestation of mutation No. 1196 dated 28.10.1994.

14. Noticeably, learned trial Court also returned specific finding of fact that at the time of grant of '*Patta*' in favour of the plaintiff, the suit land was within the municipal limits of Chamba town. Learned first appellate court also concurred with such finding of fact and accordingly held the grant of 'Nautor' in favour of plaintiff to be bad in law. Thus, denial of opportunity of hearing to the plaintiff before the attestation of mutation No. 1196 was held to be of no value as the initial allotment made in favour of the plaintiff was held to be patently wrong and illegal.

15. The concurrent finding of fact that suit land, at the time of its grant in favour of plaintiff, fell within the municipal limits of Chamba has not been assailed in the instant appeal. Nothing has been contended on behalf of the appellant at the time of hearing of the appeal assailing such finding. That being so, it becomes imperative to evaluate the effect thereof on the merits of the claim of the plaintiff.

16. Plaintiff had applied for grant of 'Nautor land' under 1968 Rules. The order allowing his application was passed by the SDO(C) Chamba on 24.03.1972 and the '*Patta*' Ext.P-4 was accordingly issued.

17. Rule 3(a) of 1968 Rules read as under:-

> *"3(a) "Nautor Land" means the right to utilize with the sanction of the competent authority, waste land owned by the Government, outside the towns, outside the reserved and demarcated protected forests and outside such other areas as may be notified from time to time by the State*

Government in this behalf for any of the purposes, mentioned in the Rule 5."

18. Rule 16 of the aforesaid Rules empower SDO(C) of the concerned Sub Division to grant 'Nautor' land. It is in exercise of aforesaid power that SDO(C) Chamba had purportedly granted suit land in favour of plaintiff by way of '*Patta*' Ext. P-4.

19. As per definition of 'Nautor land' provided in 1968 Rules, the waste land which could be utilised with the sanction of competent authority, was mandatorily required to be outside the towns, outside the reserved and demarcated protected forests, and outside such other areas as might have been notified from time to time by the State Government. Exceptions were carved out for grant of Nautor land in demarcated protected forest as also in reserved forests, however, no such exception was there for grant of Nautor land inside the town.

20. Since the 1968 Rules did not authorize the grant of Nautor land inside the towns, the order passed by the SDO(C) Chamba on 24.03.1972 allowing the application of plaintiff for grant of Nautor land, was clearly without jurisdiction. The 1968 Rules no-where vested SDO(C) with power or jurisdiction to grant '*Patta*' of Government land under the aforesaid Rules within the territorial limits of town. There is no dispute that Chamba town had Municipality. The suit land has also been concurrently held to be part of municipal area of Chamba.

21. Thus, the order dated 24.03.1972 passed by SDO(C) allowing the grant of Nautor land in favour of the plaintiff was without jurisdiction, it was *nonest,* a nullityand non-existent in the eye of law.Consequentially, such order could not have made a valid transfer of rights in favour of the plaintiff. *Patta* Ext.P-4 issued in pursuanceto order dated 24.03.1972 was also having no legal

sanctity. In these circumstances, no right, title or interest was transferred in suit land in favour of the plaintiff.

22. Reference can be made to judgment in ***Ajudh Raj and others*** vs. ***Moti s/o Mussadi (1991) 3 SCC 136*** in which Hon'ble Apex Court while dealing with the provisions of Himachal Pradesh Abolition of Big Landed Estate and Land Reforms Act, 1953 held as under:-

> *"5. The principle for deciding the question of limitation in a suit filed after an adverse order under a Special Act is well-settled. If the order impugned in the suit is such that it has to be set aside before any relief can be granted to the plaintiff the provisions of Article 100 will be attracted if no particular Article of the Limitation Act is applicable the suit must be governed by the residuary Article 113, prescribing a period of three years. Therefore, in a suit for title to an immovable property which has been the subject matter of a proceeding under a Special Act if an adverse order comes in the way of the success of the plaintiff, he must get it cleared before proceeding further.* ***On the other hand if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eye of law and it is not necessary to set it aside; and such a suit will be covered by Article 65.*** *In the present case the controversial facts have been decided in favour of the plaintiff-appellant and the findings were not challenged before the High Court. The position, thus, is that the plaintiff was the owner in cultivating possession of the land and the defendant Moti was merely a labourer without any right of a tenant or sub- tenant. The question is as to whether in this background it is necessary to set aside the order passed in favour of the respondent under Section 27(4) of the Act before the suit can be decreed or whether the plaintiff can get a decree ignoring the said order as void, in which case the suit undoubtedly will be governed by Article 65.*

6. ***The provisions of Section 27(4) of the Act as also the other provisions are limited in their scope. The preamble indicates that the object of the Act is to provide for the abolition of the big landed estates and to reform the law relating to tenancies in the Himachal Pradesh. The expressions 'tenant', 'sub-tenant' as also other similar expressions have to be understood in the sense they have been used in the other statutes dealing with the relationship of landlord and tenant in agricultural lands. Section 27 of the Act provides for a transfer by the law of the right title and interest of the land owner to the State Government under sub-section (1) Sub-section (2) is by way of an exception with respect to land under the personal cultivation of the land owner. Sub-section (4) directs that the right, title and interest of the land owner thus acquired, shall be transferred by the State, On payment of compensation, to the tenant who cultivates such land. Under this provision, the order in the present case was passed in favour of Moti. If Moti was not a tenant or sub-tenant he was not entitled to the benefits under the sub-section. If the land was in cultivating possession of the plaintiffs, as held in the present suit, the Compensation Officer did not have the jurisdiction to pass any order in defiance of sub- Section (2) and the land did not vest in the State at all. Further, for the additional reason that Moti was not a tenant of the land the order passed in his favour under Section 27(4) was again without jurisdiction. In absence of the conditions necessary for the exercise of power under Section 27(4) the Officer lacked jurisdiction to act and it was not necessary for the civil court to formally set aside his order before passing a decree.*** *What necessitated the plaintiff to come to the civil court was the challenge to his title, and the suit must be held to be covered by Article*

65, and, therefore, not barred by shorter periods of limitation either under Article 100 or Article 113.

23. In absence of existence of any lawful transfer of rights in favour of plaintiff, the revenue entries recorded in his favour were inconsequential. He could not derive any benefit merely on the basis of entries in records of rights which had no legal basis.

24. Substantial question of law as framed at Serial No. 2 above is accordingly answered. The *Patta*Ext. P-4 being non-existent in law did not require any cancellation.

25. Alternatively, assuming *Patta*Ext. P-4 to be lawful, still the plaintiff was bound to fail for the reason that learned trial Court and also learned First Appellate Court took notice of an order dated 12.02.1974, Ext.D-5, passed by the SDO(c) Chamba whereby, the grant of Nautor land allowed in favour of the plaintiff vide 'Patta' Ext.P-4 was reviewed and cancelled.

26. Ext.D-5 came to be placed on record by defendant's witness, DW-2 Sh. Bhuvneshwar Kumar, who had placed on record copies of file No.1496/T.N.The same numberi.e. 1496/ T.N. was available on order Ext.D-5. The statement of this witness was recorded on 28.12.2005 and on the same day, the document was marked as Ext.D-5. Thus, plaintiff had the notice of order Ext.D-5 atleast w.e.f. 28.12.2005, but he did not choose to assail the said order at any stage of the proceedings of Civil Suit No. 74 of 2003. It is trite that mutation or entries in the record-of-rights are not determinative of rights of the parties. The challenge to mutation No. 1196, in absence of challenge to order Ext.D-5 at the instance of plaintiff, was meaningless.

27. The finding of learned trial court that recording of mutation No. 1196 was not sustainable, in absence of grant of opportunity of being heard to the plaintiff, cannot be sustained on the basis of what has been held hereinabove on either of the counts. Firstly, the plaintiff had acquired no right, title or

interest on the basis of an order without jurisdiction and secondly/alternatively plaintiff had failed to assail the order Ext.D-5.

28. However, the finding of learned trial court in respect of possession of plaintiff on suit land was based on evidence available on record. Plaintiff as his own witness had asserted his possession on the suit land and was further supported by his witness PW-2. Records of rights also contained consistent entries as to possession of plaintiff from 1975-76 to 1991-92. Though these entries have been held to be having no legal basis yet these could be looked into for collateral purposes as there was no reason for plaintiff to have not occupied the land immediately after grant of *Patta* Ext P-4 in his favour, especially when the cancellation order Ext. D-5 was not passed immediately thereafter. Further, there is nothing on record to suggest an inference that order Ext. D-5 was passed by associating the plaintiff or he subsequently was made aware of such order. On the other hand the findings recorded by learned first appellate court on the possession of plaintiff were result of surmise only.

29. In view of findings recorded above, substantial question of law at Serial No. 1 becomes redundant.

30. Accordingly, the Regular Second Appeal filed by the plaintiff is dismissed with no orders as to costs. All pending application(s), if any, are also disposed of.

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

Between

THE KANGRA CENTRAL COOPERATIVE BANK
DHARAMSALA LTD;
THROUGH ITS MANAGING DIRECTOR,
HEAD OFFICE DHARAMSALA,
DISTRICT KANGRA, H.P.

…APPELLANT

(BY SH. RAKESH KUMAR THAKUR, ADVOCATE)

AND

1. SUBASH CHAND
   S/O SH. PREM CHAND,
   R / O VILLAGE KANDROH,
   P.O. & TEHSIL SANDHOL,
   DISTRICT MANDI, H.P.
   PRESENTLY WORKING AS PEON CUM-CHOWKIDAR,
   THE KANGRA CENTRAL COOPERATIVE BANK LTD;
   BRANCH BEED-BAGHEDA,
   DISTRICT KANGRA, H.P.

…RESPONDENT

2. REGISTRAR OF CO-OPERATIVE SOCIETIES,
   H.P. CO-OPERATIVE DEPARTMENT,
   KASUMPTI, SHIMLA, H.P.

…PERFORMA-RESPONDENT

(BY SH. JAGDISH THAKUR, ADVOCATE FOR
RESPONDENT NO.1)

(BY SH. RAJU RAM RAHI, DEPUTY ADVOCATE
GENERAL FOR RESPONDENT NO.2)

REGULAR SECOND APPEAL
NO.117 OF 2020
Reserved on:27.05.2022
Decided on: 31.05.2022

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Appellant has assailed judgment and decree passed by Ld. District Judge, Kangra at Dharamshala, whereby judgment and decree passed by Civil Judge-II, Dharamshala, has been affirmed- Special drive against the quota of ex-service man- Plaintiff, a general category candidate but ex-serviceman- Held- Despite applicability of 200-Point Roster and availability of vacant posts for Ex-servicemen as per the said Roster, there was no provision made in the

Application Form to enable Ex-serviceman Sub-Staff employees to apply against the post meant for Ex-serviceman in the 200-Point Roster- No illegality or perversity in judgment and decree- Appeal dismissed. (Para 12 to 14)

This appeal coming on for pronouncement this day, the Court delivered the following:

J U D G M E N T

In present appeal, filed by the defendant-Bank - appellant (hereinafter referred to as 'defendant-Bank'), judgment and decree dated 26.12.2019, passed by learned District Judge, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Civil Appeal No.56-D/XIII/2019, tilted as **The Kangra Central Co-operative Bank v. Subhash Chand and another,** whereby judgment and decree dated 27.5.2019, passed by Civil Judge-II, Dharamshala, District Kangra, Himachal Pradesh, in Civil Suit No.523 of 2013, titled as **Subhash Chand v. The Kangra Central Co-operative Bank and another,** has been affirmed partly, directing that plaintiff-respondent No.1 (hereinafter referred to as 'plaintiff') is entitled for declaration that he is entitled for the post in the special drive against the quota of Ex-serviceman and the defendant-Bank shall, after ascertaining quota of Ex-serviceman and the vacant roster points available on that day when the posts were advertised for other categories, if any vacant roster point was available for Ex-serviceman, consider the plaintiff for appointment against that post as per Rules by giving him all consequential benefits, with further direction to the defendant-Bank to carry out such exercise within two months from the passing of the judgment and decree, i.e. 26.12.2019.

2. Defendant-Bank has filed the present appeal by proposing the following Substantial Questions of Law:

> "a. Whether the learned lower appellate court ignored the settled law that once a candidate had applied for the post

under one category he cannot claim for the same post under any other category?

b. Whether the learned lower appellate court being last court of fact has failed to consider the entire oral as well as documentary evidence and law applicable in this behalf, as the post for which plaintiff had put forward was to be advertised through Special Ex servicemen Cell in the labor and employment department of the State Government?

c. Whether the impugned judgments and decrees are the result of complete misreading, misinterpretation of statement of DW-1 Sh. Navneet Sharma?"

3. For request made on behalf of the parties, appeal has been heard at admission stage.

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

5. Plaintiff, who is an Ex-serviceman, is a Sub-Staff employee of the defendant-Bank and has been appointed against post meant for Ex-serviceman. Admittedly, in the posts of Grade-IV advertised by the defendant-Bank to be filled from amongst eligible Sub-Staff of the defendant-Bank under 15% quota (one time relaxation), governed by 200-Point Roster for reservation, not even a single post was advertised as post reserved for Ex-serviceman and in the Procedure and Application Form circulated vide Communication dated 2.6.2012 (Ex. P-7), there was no provision and/or Column in the Procedure or in Application Form to tick the category and sub-category as Ex-serviceman. In the categories mentioned in the Application Form, there are only four vertical categories, i.e. General, SC, ST, OBC, whereas in sub-category only category is PH-Ortho. Plaintiff being a General Category candidate, but an Ex-serviceman, thus, was having no other option but to mention his category as 'General'.

6. Plaintiff made representation by issuing Legal Notice, under Section 72 of the H.P. Co-operative Societies Act, 1968 (Ex. P-8) to the defendant-Bank, asking the defendant-Bank to apply 200-Point Roster to the proposed Grade-IV posts to be filled from amongst the eligible Sub-Staff and to provide posts to the Ex-serviceman serving in the Sub-Staff.

7. Reply dated 10.12.2012 (Ex.P-10) to the aforesaid notice was given by defendant-Bank, stating therein that the Bank has conducted Limited Direct Recruitment for the posts of Grade-IV from amongst the eligible Sub-Staff and there is recognized Policy for the recruitment of candidates belonging to Ex-serviceman Category and further that as per Policy the posts reserved for Ex-serviceman shall have to be filled through sponsorship of the Ex-serviceman Cell.

8. Plea of the defendant-Bank is either misconceived or mischievous. Plaintiff has also placed on record Ex.P-12, an advertisement issued by H.P. Subordinate Service Selection Board, Hamirpur, with respect to Limited Direct Recruitment to the post of Clerk from eligible Class-IV employees of various departments. Reservation of posts indicated in the said advertisement clearly depicts that in such recruitment posts of Ex-servicemen are to be identified and advertised/circulated enabling the in-service Ex-serviceman candidates to apply for those posts. No such posts were identified and advertised or provided by the defendant-Bank in the recruitment drive undertaken by it despite applicability of 200-Point Roster wherein posts for Ex-servicemen are identified.

9. Functioning of Special Cell of Ex-servicemen, sponsoring the names of Ex-servicemen for various Departments/Corporations/Boards/Bank etc., has been placed on record as Ex. DW-1/B, wherein it is provided that names registered in the Special Ex-servicemen Cell are required to be renewed after three years. Definitely, where a candidate is sponsored and is appointed in the Department/Corporation/ Board/Bank, there shall be no occasion or

reason for renewal of his name in the Special Ex-serviceman Cell. Therefore, as recruitment process was initiated for in-service candidates and no requisition was sent to the Special Ex-servicemen Cell for sponsoring the names, rather it was not required as there was no occasion for the Ex-servicemen Cell to sponsor the names of Ex-serviceman candidates who are already serving with defendant-Bank. It is also noticeable that no posts were identified for Ex-servicemen in the recruitment process which is contrary to the Policy of the State as well as 200-Point Roster, which is stated to have been applied by the defendant-Bank for conducting the recruitment in reference.

10. DW-1 Shri Navneet Sharma, in his examination-in-chief, has reiterated that defendant-Bank conducted Limited Direct Recruitment for the post of Grade-IV from amongst the eligible Sub-Staff. In his cross-examination, he has admitted that with respect to these appointments no requisition was sent to Special Ex-servicemen Cell and in this recruitment process neither names were requisitioned from the Employment Exchanges nor any advertisement was given in the Newspaper, because these posts were to be filled from amongst in-service Sub-Cadre as it was a special recruitment process for the employees of Sub-cadre who had more than five years regular service with the Bank. He has admitted that for reservation of these posts 200-Point Roster was to be made applicable and in the Application Form circulated during recruitment process there is no Column for Ex-serviceman. He has also admitted that it has been mentioned in Ex. P-7 that for recruitment process 200-Point Roster was applied. He has admitted that posts meant for Ex-servicemen in the 200-Point Roster were kept vacant.

11. Nothing has been brought on record to show that the judgments and decrees, passed by the Courts below, are result of complete misreading,

misinterpretation of statement of DW-1 Shri Navneet Sharma rather on perusal it has been found appreciated correctly.

12. From the aforesaid facts and circumstances, it is apparent that despite applicability of 200-Point Roster and availability of vacant posts for Ex-servicemen as per the said Roster, there was no provision made in the Application Form to enable Ex-serviceman Sub-Staff employees to apply against the post meant for Ex-serviceman in the 200-Point Roster and further that for filling up posts from amongst in-service candidates names were not to be sponsored by the Special Ex-servicemen Cell but such posts were to be identified in the recruitment process and option to the Ex-serviceman in-service candidates was to be provided to apply against such posts and DW-1 Shri Navneet Sharma, in his statement, has admitted the aforesaid facts and procedure required to be adopted.

13. There is no illegality or perversity in impugned judgment and decree warranting framing of Substantial Questions of Law as proposed.

14. In view of above discussion, I find that no Question of Law, muchless Substantial Question of Law, is made out for admission and adjudication of the appeal. Consequently, judgment and decree dated 26.12.2019, passed by learned District Judge, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Civil Appeal No.56-D/XIII/2019, tilted as **The Kangra Central Co-operative Bank v. Subhash Chand and another,** whereby judgment and decree dated 27.5.2019, passed by Civil Judge-II, Dharamshala, District Kangra, Himachal Pradesh, in Civil Suit No.523 of 2013, titled as **Subhash Chand v. The Kangra Central Co-operative Bank and another,** has been affirmed partly, is upheld, and the defendant-Bank is directed to complete the recruitment process on or before 30.6.2022.

The appeal is dismissed and disposed of, so also pending application, if any.

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

Between:-

SOHAN LAL S/O SH. MAST RAM VILL. CHARI, P.O. REWALSAR, TEHSIL BALH, DISTRICT MANDI,L H.P. AGED 48 YEARS.

.....PETITIONER

(BY MR. NAVEEN KUMAR BHARDWAJ, ADVOCATE)

AND

1. UNION OF INDIA THROUGH ITS SECRETARY, MINISTRY OF COMMUNICATIONS AND IT SANCHAR BHAVAN ROAD, NEW DELHI-1.
2. BHARAT SANCHAR NIGAM LIMITED THROUGH ITS CHAIRMAN CUM MD DIRECTOR, 6TH FLOOR, SANCHAR BHAVAN, 20 ASHOKA ROAD, NEW DELHI.
3. THE GENERAL MANAGER BSNL MANDI, HP.
4. THE MINISTRY OF LABOUR & EMPLOYMENT SHRAM SHAKTI BHAVAN RAFI MARG, NEW DELHI-1.

.....RESPONDENTS

(MR. LOKINDER PAUL THAKUR, SENIOR PANEL COUNSEL FOR R-1 AND 4;
MR. VIJAY ARORA, ADVOCATE FOR R-2 AND 3)

CIVIL WRIT PETITION
No. 1578 OF 2020
Decided on:06.05.2022

Industrial Disputes Act, 1947- Section 25G- Illegal termination- Appropriate Government did not make any reference of the industrial dispute to the Tribunal on the ground of delay- No error in rejection of the dispute by the Ministry on the ground of delay- Petition dismissed. (Para 6)

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

J U D G E M E N T

The petitioner is aggrieved by Annexure A-5, which is the copy of order dated 15.02.2019, in terms whereof the industrial dispute raised by the petitioner was held by the Ministry not fit for adjudication on the ground of delay.

2. Brief facts necessary for the adjudication of the present petition are that as per the petitioner, he was engaged as a daily waged Labourer/Majdoor by BSNL in the office of Telecom Officer, SDE, Joginder Nagar, in the month of October, 1995 and he continued to serve as such till June, 1996, when his services were terminated without notice with the assurance that whenever vacancy for daily waged labourer will become available, he will be considered by the Department for re-engagement. As per the petitioner, he made a representation against his illegal termination and kept on waiting for years but as his representation was not even decided till the year 2017, therefore, he raised an industrial dispute by way of demand notice Annexure P-3, dated 18.08.2017. As reconciliation proceedings failed, the report of failure was referred by the office of Deputy Chief Labour Commissioner to the Appropriate Government by way of Annexure A-4, dated 28th November, 2018, however, thereafter in terms of Annexure A-5, the Appropriate Government did not make any reference of the industrial dispute to the Tribunal on the ground that the workman has raised the dispute about his alleged illegal termination after 22 years without any cogent explanation with regard to delay.

3. Feeling aggrieved, the petitioner has filed the present writ petition praying primarily for the following reliefs:-

> *"i) Issue a writ of certiorari to quash the annexure P-5 and may kindly be quashed and set aside.*

ii) Issue a writ of mandamus against the respondent No. 4 to send the dispute for adjudication to the ld. Labour Court."

4. The petition is resisted by the respondents on the grounds that there was no record of engagement of the petitioner as daily waged labourer available in the office of SDO(T), Joginder Nagar, w.e.f. October, 1995 to June 1996. It was also denied by the respondents that the services of the petitioner were illegally terminated by giving any assurance as alleged in the petition or any representation etc. was received from him. It was also the stand of the respondents that neither any documents were appended by the petitioner with the petition with regard to his alleged engagement with the respondents after the reconciliation failed as there was no occasion for the respondents to re-engage the petitioner in the absence of any record of his being earlier engaged and further the claim of the petitioner was hopelessly time barred.

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

6. Without going into this aspect of the matter as to whether the petitioner was engaged by respondent-BSNL or not, and by assuming that he was so engaged, fact of the matter still is that even as per the petitioner, his services were terminated in the month of June, 1996. The demand notice under the Industrial Dispute Act was issued by the petitioner on 18.08.2017. There is no explanation in the demand notice as to why the petitioner was silent with regard to his alleged illegal termination for a period of more than 20 years. It is not in dispute that the Appropriate Government is not powerless to reject a stale claim of a workman. Delay in raising an industrial dispute can be ignored provided the workman is able to explain the delay in raising the industrial dispute and further, if he is able to substantiate that in the interregnum, the dispute was not dead and stale but was alive in one way or the other. In the present case, no iota of evidence has been placed on record by the petitioner to demonstrate that as from June, 1996 up till the demand

notice was issued by the petitioner on 18.08.2017, the claim was alive in any manner whatsoever. That being the case, this Court finds no error in the rejection of the dispute by the Ministry on the ground of delay and the petition thus being without merit is dismissed.

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

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

Between:-

MISS MINAKSHI D/O SHRI BABLU, R/O ROOP NIWAS, VIKASNAGAR, SHIMLA, (H.P.).

.....PETITIONER

(BY MR. LAKSHAY PARIHAR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.....RESPONDENT

(BY M/S DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. AMIT KUMAR DHUMAL, DEPUTY AG AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 476 OF 2022
Decided on:24.06.2022

Code of Criminal Procedure, 1973- Section 482 – Relevance of documents impounded by Police- Ld. Court below mechanically adjourning the matter from one date to another- Held- Petition disposed of with the direction to Ld. Court below to list the matter on 29.06.2022 and thereafter decide the matter within 15 days. (Para 8)

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

O R D E R

Notice. Mr. Dinesh Thakur, learned Additional Advocate General accepts notice on behalf of the respondent.

2. With the consent of learned Counsel for the parties, the case is taken up for consideration today itself.

3. By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has prayed for the following substantive reliefs:-

> *"It is therefore most respectfully prayed that the document of the petitioner may kindly be released or the in alternative the ld. Court below adjudicating the release application may kindly be directed to disposed of the application pending before it. Any other relief which the Hon'ble Court deems fit may kindly be passed in the interest of justice and fair play."*

4. Mr. Lakshay Parihar, learned Counsel for the petitioner has submitted that the petitioner has preferred an application under Section 457 of the Code of Criminal Procedure for release of 5th and 6th Semester mark sheets, as also the migration certificate of the petitioner impounded by Police in case FIR No. 22/2020, dated 03.03.2020, registered under Section 420, 467, 468 read with Section 120-B of the Indian Penal Code, at Police Station Dharampur, District Solan, H.P. According to learned Counsel for the petitioner, as the documents mentioned in the petition were required by the petitioner for subsequent admission etc., it is in these circumstances that the application was filed for release thereof. Despite the fact that the application was filed as far back as in August, 2021, till date, no effective order has been passed by the learned Court below, and in these circumstances, the petitioner is invoking the extraordinary jurisdiction

vested in this Court under Section 482 of the Code of Criminal Procedure with the prayers enumerated therein.

5. Learned Counsel has also made available to the Court the certified copies of the *zimni* orders which have been passed by the learned Court below on the said application since 31st August, 2021 upto 10th of June, 2022. A perusal of the *zimni* orders demonstrates that the application was listed before the learned Court for the first time on 31st August, 2021 and as the Presiding Officer was on leave on said date, the case was ordered to be listed on 27.09.2022. On the said date, as none appeared for the applicant, therefore, notice was ordered to be issued to the applicant through Counsel for 05.10.2021. On the said date also, none appeared for the applicant and the matter was listed for 26.10.2021. The same story was repeated on the said date also and the case was ordered to be listed for 16.12.2021 by way of issuance of a fresh notice to the applicant through Counsel.

6. On 16.12.2021, Mr. Amit Vaid, Advocate, has appeared for the applicant and the case was ordered to be listed for consideration on 18.12.2021. On 18.12.2021, the case was again ordered to be listed for consideration on 31.12.2021. On 31.12.2021, the case was fixed for consideration for 02.03.2022, and on the said date, the case was ordered to be listed for consideration on 11.04.2022 on the basis of statement of one Constable that there were other applications too for release pending in the Court of learned ADJ, Solan.

7. Thereafter, on 11.04.2022, the case was ordered to be listed for consideration on 29.04.2022, and on the said date also, the case was ordered to be listed for consideration on 10.06.2022. Thereafter, the case has been now adjourned for 13.09.2022 for consideration.

8. This Court fails to understand as to why learned Court is shying away from taking a call on merit on the application which has been

filed by the petitioner for release of the documents under Section 457 of the Code of Criminal Procedure. Adjournment after adjournment is being given by the learned Court below without understanding and appreciating the anxiety of the applicant who happens to be a student. This Court is not making any observation as to what order should be passed on the application by the learned Court below but the Court at least should decide the same, rather than mechanically adjourning the matter from one date to another. Deciding such an application pertaining to release of the documents, in my considered view, is not likely to consume much time. Accordingly, in view of what has been observed hereinabove, this petition is disposed of with the direction to the learned Court below to pre-pone the case and list the said application at the first instance on 29.06.2022, and thereafter, a date be fixed for consideration and disposal of the said application on merit, which shall not be later than 15 days as from 29th June, 2022. It is made clear that this Court is not making any observation on the merit of the application and learned Court below shall be at liberty to pass appropriate orders on the same, in accordance with law, as it deems fit. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:-

SH. RAVI BHARDWAJ, S/O SH. KESHAV RAM BHARDWAJ, R/O VILLAGE REOTH, P/O QUINAL, TEHSIL KOTKHAI, DISTT. SHIMLA, H.P. PRESENTLY RESIDING AT SHIVANSH GENERAL STORE, PHOTOSTAT AND LAMINATION NEAR SDM COURT/ OFFICE, THEOG, DISTT. SHIMLA, H.P.

.....PETITIONER

(BY MR. D.N. SHARMA, ADVOCATE)

AND

SH. SEES RAM SINCE DIED THROUGH L.R.S

(A) SH. NARESH SHARMA, AGED 32 YEARS (SON)
(B) SH. SURESH SHARMA, AGED 30 YEARS (SON)
(C) SMT. USHA SHARMA, AGED 34 YEARS (DAUGHTER)

ALL RESIDENTS OF VILLAGE REHAN, PO DEVGARH, TEHSIL THEOG, DISTT. SHIMLA, H.P.

.....RESPONDENT

(BY MR. JEEVESH SHARMA, ADVOCATE)

CRIMINAL REVISION
No. 51 OF 2016
Decided on: 07.07.2022

Code of Criminal Procedure, 1973- Section 397- **Negotiable Instruments Act, 1881**- Section 138- Conviction and sentence of petitioner under Section 138 of Negotiable Instruments Act was upheld by the Ld. Appellate Court- Held- In exercise of revisional jurisdiction, it is settled law that the revisional Court is not to sit as an appellate authority and re-appreciate evidence etc. but its role is confined to correcting any perversity which may be there in the judgments passed by the learned Courts below- Findings returned by the Ld. Courts below is not perverse- Revision dismissed. (Para 7)

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

O R D E R

The petitioner herein is aggrieved by the judgment passed by the Court of learned Additional Chief Judicial Magistrate, Theog, District Shimla, HP, in Case No. 117/3 of 2010, titled as Sh. Sees Ram vs. Ravi Bhardwaj, dated 28.04.2015, in terms whereof, the petitioner was convicted for commission of offence punishable under Section 138 of the Negotiable

Instruments Act and was sentenced to undergo rigorous imprisonment for a period of six months and also to pay compensation to the tune of Rs.5,50,000/- to the complainant, as well as by the judgment passed by the Court of learned Additional Sessions Judge, Shimla-cum-Special Judge (CBI), Shimla, camp at Theog, in Criminal Appeal No. 10-T/10 of 2015, titled as Sh. Ravi Bhardwaj vs. Sh. Sees Ram, dated 31.10.2015, vide which, the judgment passed by learned Trial Court was upheld by the learned Appellate Court while dismissing the appeal filed by the present petitioner.

2. Brief facts necessary for the adjudication of the present petition are that the respondent/complainant (hereinafter to be referred as 'the complainant' for convenience) filed a complaint under Section 138 of the Negotiable Instruments Act against the present petitioner/accused on the ground that in the year 2009, the petitioner/accused (hereinafter to be referred as the 'accused' for convenience) borrowed a sum of Rs.5.00 Lac from the complainant and in discharge of said legal liability, he issued a cheque bearing No. 354718 for an amount of Rs.5.00 Lac (Ext. CW1/A) in favour of the complainant, drawn at Uco Bank, Theog. When said cheque was presented for encashment, the same was dishonoured vide memo Ext. CW1/B on the ground of insufficient funds. Thereafter, a legal notice Ext. CW1/C was issued by the complainant to the accused, calling upon the accused to make good the payment of cheque but as the same was not done, this led to filing of the complaint under Section 138 of the Negotiable Instruments Act by the complainant against the accused.

3. Learned Trial Court allowed the complaint and convicted the accused for commission of offence punishable under Section 138 of the Negotiable Instruments Act by holding that the complainant on the strength of evidence of two witnesses as well as the documents exhibited was able to prove that the cheque which was issued to him by the accused in discharge of his legal liability was dishonoured whereas the defense which was put forth

by the accused that he had handed over the cheque to the complainant for security purpose only was not substantiated by producing any evidence on record. Learned Trial Court also held that as the signatures upon the cheque were not disputed by the accused, therefore, presumption under Section 139 of the Negotiable Instruments Act was also attracted in the facts of the case and though said presumption was rebuttable, however, accused had failed to rebut the same.

4. In appeal, these findings were upheld by the learned Appellate Court by holding that a careful perusal of the evidence as well as the case law cited before the learned Trial Court clearly revealed that the complainant had established before the learned Trial Court the existence of a legal and enforceable liability on the part of the accused, in lieu whereof, cheque Ext. CW1/A was issued by him to the complainant. Learned Appellate Court also held that after the dishonour of the cheque, a legal notice was duly issued by the complainant to the accused but still payment of cheque in question was not made by the accused to the complainant. Learned Appellate Court thus held that record demonstrated that learned Trial Court had not committed any irregularity, infirmity and illegality in appreciating the evidence and convicting and sentencing the accused. On these bases, learned Appellate Court upheld the findings returned by learned Trial Court.

5. Feeling aggrieved by the said judgments passed by both the learned Courts below, the accused has filed this petition.

6. I have heard learned Counsel for the petitioner and perused the impugned judgments as also the other record appended with the pleadings.

7. In exercise of revisional jurisdiction, it is settled law that the revisional Court is not to sit as an appellate authority and re-appreciate evidence etc. but its role is confined to correcting any perversity which may be there in the judgments passed by the learned Courts below. During the course of arguments, learned Counsel for the petitioner, on the strength of the

record of the case, could not demonstrate that there was any infirmity in the judgments passed by the learned Trial Court or the learned Appellate Court. A perusal of the judgment passed by the learned Courts below demonstrates that the order of conviction was passed by learned Trial Court after appreciation of the statement of the complainant's witnesses as well as after taking into consideration the documents which were exhibited by the complainant, which included the cheque, dishonour memo, legal notice, postal receipts and acknowledgement thereof. In addition, statement of accounts was also exhibited by the complainant on record. On the other hand, no evidence was led by the accused to substantiate his defense. Therefore, in these circumstances, the findings which have been returned by both the learned Courts below cannot be termed to be perverse as the same are clearly borne out from the record of the case and further this Court has not found any misreading or mis-appreciation of evidence on the part of either of the Court in this regard.

Therefore, as this Court does not find any infirmity with the judgments passed by learned Courts below, this revision petition being devoid of any merit is dismissed. Pending miscellaneous application(s), if any also stand disposed of accordingly. Interim order stands vacated.

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

Between:-

SOMI LAL (NOW DECEASED) THROUGH HIS LEGAL REPRESENTATIVE AJEET KUMAR SON OF LATE SHRI SOMI LAL R/O KACHIARI, MAUZA KACHIARI, TEHSIL AND DISTRICT KANGRA, H.P.

.....PETITIONER

(BY MR. VIRENDER SINGH RATHOUR,
ADVOCATE)

AND

1. SURJEET SINGH SON OF SHRI GOPI CHAND;

2. KARAM CHAND S/O SHRI GOPI CHAND;

BOTH RESIDENTS OF VILLAGE NALSUHA, TEHSIL DEHRA, DISTRICT KANGRA, H.P.

3. POONAM DEVI WIDOW OF SUBHASH CHAND R/O VPO KACHIARI, TEHSIL AND DISTRICT KANGRA, H.P.

.....RESPONDENT

(*MR. RAJESH MANDHOTRA, ADVOCATE FOR R-1 AND 2;*
MR. MADAN GOPAL, ADVOCATE FOR R-3)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 250 of 2021
Decided on:27.06.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 41 Rule 27- District Judge dismissed the application under Order 41 Rule 27 CPC to lead additional evidence- Held- Ld. Appellate Court decided the application independently and not alongwith the main appeal- On this count, petition allowed with direction to Ld. Appellate Court to decide the same with the main appeal. (Para 5)

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

O R D E R

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order 17.04.2021 passed by the Court of learned District Judge, Kangra at Dharamshala, District Kangra, H.P. in terms whereof, an application filed under Order 41, Rule 27 of the Code of Civil Procedure filed by the present petitioner/appellant/defendant, has been dismissed by the learned Appellate Court.

2. Mr. V.S. Rathour, learned Counsel for the petitioner, while drawing the attention of the Court to the impugned order submits that a perusal thereof would demonstrate that the application which was filed by the petitioner to lead additional evidence was dismissed by the learned Appellate Court not while hearing the main appeal itself but earlier. This as per him is contrary to the law, as has been laid down by Hon'ble Supreme Court of India, in terms whereof an application filed under Order 41, Rule 27 of the Code of Civil Procedure has to be decided by the Court before which said application stands filed, alongwith main appeal. On this short count, learned Counsel for the petitioner submits that the petition be allowed and impugned order be set aside with further direction to the learned Appellate Court to take up the application at the time of final hearing.

3. Mr. Rajesh Mandhotra, learned Counsel for respondents No. 1 and 2, while justifying the order passed by learned Appellate Court submits that a perusal of the order would demonstrate that no case in fact was made out by the petitioner for leading additional evidence and as the attempt of the petitioner was just to linger on the case and further to fill up the lacunae left in his case, therefore, learned Appellate Court has rightly dismissed the application and order so passed calls for no interference.

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

5. It is not in dispute that the application filed under Order 41, Rule 27 of the Code of Civil Procedure, as per the mandate of Hon'ble Supreme Court of India, has to be decided by the Court concerned while hearing the main appeal. This is for the reason that at the stage of consideration of the main appeal, the Court can apply its judicial mind as to whether there is necessity to allow additional evidence or not. In the present case, this principle has been violated by the learned Appellate Court as the application under Order 41, Rule 27 of the Code of Civil Procedure has been decided by the

learned Appellate Court independently and not alongwith the main appeal. On this short count, the petition succeeds and the same is accordingly disposed of by setting aside order dated 17.04.2021 passed by learned District Judge, Kangra at Dharamshala, District Kangra, H.P. vide which application under Order 41, Rule 27 of the Code of Civil Procedure filed by the petitioner was dismissed. The application is ordered to be restored to its original number and learned Appellate Court shall decide the same alongwith the main appeal.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to costs. Interim orders, if any, stand vacated.

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

Between: -

COMMISSIONER OF INCOME TAX, SHIMLA.

....APPELLANT

(BY MR. VINAY KUTHIALA, SENIOR ADVOCATE
WITH MS. VANDNA KUTHIALA, ADVOCATE.)

AND

M/S USHA INFRASYSTEMS, 21-D,
SECTOR-1, PARWANOO THROUGH
ITS PARNTER KARAN SOOD.

..RESPONDENT

(MR. VISHAL MOHAN, ADVOCATE WITH MR. ADITYA
SOOD, ADVOCATE)

INCOME TAX APPEAL No. 6 of 2012

Between: -

COMMISSIONER OF INCOME TAX, SHIMLA.

....APPELLANT

(BY MR. VINAY KUTHIALA, SENIOR ADVOCATE
WITH MS. VANDNA KUTHIALA, ADVOCATE)

AND

M/S USHA INFRASYSTEMS, 21-D,
SECTOR-1, PARWANOO THROUGH
ITS PARNTER KARAN SOOD.

..RESPONDENT

(MR. VISHAL MOHAN, ADVOCATE WITH MR. ADITYA
SOOD, ADVOCATE)

INCOME TAX APPEAL
No. 24 of 2010
Reserved on:12.07.2022
Decided on: 07.2022

Income Tax Act, 1961- Appeal – Assessee claimed 100% deduction under section 80IC (2)(ii) of Income Tax Act, 1961- Assessing Officer denied the deduction- Assessee assailed the assessment order in appeal- Appeal dismissed- Income Tax Appellate Tribunal allowed the appeal of assessee and said order has been assailed- Held- The finding of fact recorded by the Assessing Officer to above effect were concurred by the CIT (A) in ITA No. 24 of 2010 and reversed in ITA No. 6 of 2012- Though the ITAT had also concurred with the findings of fact that most of the work constituting production of Anchors was got done by the assessee from Ludhiana by outsourcing the jobs, it, nevertheless, held that the assessee was involved in manufacture and production of Anchors- The findings by the ITAT in this behalf have evidently been returned without going into the question as to whether assessee was not entitled for deduction under Section 80IC merely by indulging into the small part of process at Parwanoo out of the entire lengthy process of production and also consequent necessary legal implication arising therefrom- Appeals partly allowed- Appeals remanded back to Income Tax Appellate Tribunal, Chandigarh to decide afresh. (Para 25 to 29)

Cases referred:
Aspinwall and Co. Ltd. v. Commissioner of Income Tax, 251 ITA 323;
Commissioner of Income Tax-V, New Delhi vs. Oracle Software India Ltd., (2010) 2 SCC 677;
Income Tax Officer vs. Arihant Tiles and Marbles, 2010(2) SCC 699;

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

J U D G M E N T

Both the appeals have been heard and are being decided together as common questions of law and facts arise therein.

2. Respondent in both the appeals (hereinafter referred to as the 'assessee') had begun production of Foundation Anchor Rods for Windmills (for short, "Anchors") w.e.f. 29.06.2004 in Industrial Area Parwanoo, District Solan, H.P.

3. The assessee, for the first time, claimed 100% deduction on the income under sub-clause (ii) of Sub Section (2) of Section 80IC of the Income Tax Act, 1961 (for short 'the Act") for the assessment year 2005-06. The Assessing Officer denied the deduction so claimed and vide assessment order dated 30.11.2007 passed under Section 143(3) of the Act assessed total income of assessee at Rs.1,66,61,240/-. The assessee assailed the assessment order in appeal No. IT/212/2007-08/SML. The appeal of assessee was dismissed by CIT(A), Shimla on 29.04.2009. The assessee filed further appeal before the ITAT, Chandigarh which was allowed on 30.11.2009 as ITA No. 499/Chd, 2009. Revenue assailed the order dated 30.11.2009 passed by the ITAT Chandigarh in ITA No. 15/2010 before this Court, which later came to be withdrawn by the Revenue on 22.12.2021 on account of involvement of low tax effect.

4. The point in issue in the aforesaid litigation was whether the process undertaken by the assessee in its industrial unit at Parwanoo

amounted to 'manufacture' or 'production' of the Anchors so as to qualify the requirements of Section 80IC of the Act? Whereas, the Assessing Officer and CIT(A) concurrently held that since the substantial process involved in production of Anchors was being got done by the assessee from Ludhiana on work order basis and only a small part of it was being done at Parwanoo, the assessee could not be said to have the necessary qualification to avail deduction under Section 80IC of the Act. The ITAT, however, reversed such findings and held the assessee eligible for deduction under the aforesaid provision of the Act.

5. The assessment proceedings for the assessment year 2006-07 also met the same fate before the AO, CIT(A) and ITAT. ITA No. 24/2010 arising therefrom is one of the matters under adjudication herein. The Assessing Officer again had held the assessee to be not entitled for the deduction under Section 80IC for the same reasons as were recorded in assessment order dated 30.11.2007. CIT(A) vide its order dated 06.11.2007 in ITA No. 244/08-09/SML concurred with the assessment order dated 21.11.2008. The ITAT reversed the order of CIT(A) vide its order dated 29.01.2010 in ITA No. 1158/Chd/2009.

6. For the assessment year 2007-08 the Assessing Officer, vide his order dated 30.12.2009 again held the assessee not entitled to deduction under Section 80IC. The CIT(A), in appeal No. IT/503/2009-10/SML preferred before it by the assessee, this time reversed the assessment order dated 30.12.2009. The ITAT concurred with the order of CIT(A) and accordingly dismissed the ITA No. 78/Chd/2011 filed by the Revenue vide its order dated 03.03.2011. Revenue has further assailed the aforesaid order dated 03.03.2011 of ITAT in ITA No. 6/2012 before this Court, which is the other appeal decided herein.

7. The substantial questions of law framed by this Court in ITA No. 24 of 2010 and ITA No. 6 of 2012 are common and read as under: -

1) *Whether the process of threading and painting of anchor rods carried out by the assessee at Parwanoo amounted to manufacture or production, and consequently whether the assessee was eligible for deduction u/s 80IC of the Income Tax Act ?*
2) *Whether the making of anchor rods by third parties in job work basis could be considered as part of the manufacturing operations of the assessee, especially when such job work was not carried out under the direct control and supervision of the assessee?*
3) *Whether the ITAT disregarded the mandate of section 80IA (10) read with section 80IC(7) of the I.T. Act and erroneously held that the entire profit declared by the assessee was allowable as deduction u/s 80IC?*
4) *Whether ITAT has misconstrued and misunderstood the facts on record while setting aside the clear finding that the profit had been inflated by the assessee for the purpose of deduction u/s 801C.*

8. We have heard Mr. Vinay Kuthiala learned Senior Advocate with Mrs. Vandana Kuthiala Advocate for the appellants and Mr. Vishal Mohan Advocate learned counsel for the assessee and have also gone through the records.

Questions Nos. 3 and 4

9. Questions Nos 3 and 4, as noted above, are being taken up for consideration by us in the first instance. The consideration of these questions requires us to briefly recapitulate the material on record.

10. The Assessing Officer had found that the assessee, in the assessment year 2006-07 had declared total sale of Rs. 15,63,28,569/- and had shown profit of Rs.6,10,30,054/- which gave gross profit rate at 39.04% and net profit rate at 32.54%. The Assessing Officer, by making a comparison between the assessee and M/s Kay Pee Industries in respect of their sales during the relevant year and expenses incurred, held that the assessee had not fully debited expenses and profit shown by the assessee was not acceptable. Further, it was held by the Assessing Officer that since nothing was shown to

have paid by the assessee to its sister concern for the technical know-how and goodwill and marketing facilities, 5% each of the total sales of the assessee were ordered to be deducted as profits were shown by the assessee were held to be inflated to that extent. Thus, a sum of Rs.1,55,32,856/- was ordered to be treated as assessee's income from undisclosed sources. Thus, the Assessing Officer had concluded that there existed direct relation between the assessee and Kay Pee Industries as far as the enterprise of assessee claiming manufacture of Anchors at Parwanoo was concerned and as such provision of section 80IA(10) of the Act was applied.

11. Further, a sum of Rs.2,40,000/- on account of salary to partners and Rs.20,71,949/- on account of interest on capital were reduced from the profit of the assessee. The Assessing Officer also found shortage in stocks worth Rs.39,948/- and the same was also treated as income of assessee for the year under consideration. In this manner, total income of the assessee was assessed at Rs.5,11,16,590/-.

12. While passing the assessment order dated 21.11.2008 for assessment year 2006-07, the Assessing Office had further held that the threaded rods along-with nuts and bolts were being manufactured by M/s Kay Pee Industries, a sister concern of assessee. The part relating to hardening, straightening and threading of rods had been transferred to the assessee by the sister concern which itself continued to manufacture nuts and bolts. On the basis of these findings, the Assessing Officer held that it clearly was a case of splitting or re-construction of business already in existence and hence, the assessee had violated the conditions laid down in Section 801C (4) (i) of the Act.

13. In his Assessment Order dated 30.12.2009 for AY 2007-08, the Assessing Officer did not touch the above noted factors and had proceeded to deny the claimed deductions under section 80IC on the simple premise that

the process undertaken by the assessee did not qualify to be either 'manufacture' or 'production'.

14. The CIT(A) upheld the findings returned by the AO but ITAT reversed the same. Negating the applicability of Section 801A (10) of the Act to the facts of the case, ITAT held that the order of Assessing Officer to that effect was not sustainable as no discrepancy had been pointed out in the books of account and such books of account of the assessee had not been rejected under Section 145 of the Act. The Assessing Officer was held to have arrived at his conclusions merely on estimation. The basis for estimation of the GP & NP ratio that too in comparison with the M/s Kay Pee Industries was not held to be correct as there was no similarity in the products manufactured by two different concerns. The Assessing Officer, according to the impugned order passed by the ITAT, had estimated profits of assessee on estimation, conjectures and surmises. No basis was found in documents in assuming declaration of inflated profits by the assessee. Further, the deduction at the rate of 5% of total sales on account of non-payment of charges to M/s Kay Pee industries for technical know-how and deduction of equivalent amount on account of non-payment of charges for goodwill etc., to the said concern, as concluded by the Assessing Officer, have also been held to be without any basis.

15. Learned counsel for the appellant has not been able to show that findings recorded by the ITAT, as noticed above, were against the records or were perverse. The ITAT being the final fact finding authority, in our considered view, has drawn the conclusions on the basis of records. There is nothing in the order of Assessing Officer that the books of account of assessee were rejected. In the Assessment Order passed for Assessment Year 2006-07 the Assessing Officer had only observed that such books were not reliable, which cannot be taken to compliance of Section 145 of the Act. Further, the orders passed by Assessing Officer with respect to capping of profits earned by

the assessee at 7% only on the alleged basis of comparison of accounts of Kay Pee Industries coupled with deduction of amount equivalent to 10% of the total sales towards non-payment of know how charges and towards usage of goodwill etc. have rightly been rejected by the ITAT being without any legal material or evidence. The Appellate Tribunal found nothing on record which could warrant the conclusions drawn by the Assessing Officer. To that extent, we are in agreement with the findings recorded by the ITAT. Questions No. 3 and 4 are answered accordingly.

Questions Nos. 1 and 2:

16. Now coming to questions Nos. 1 and 2, the process undertaken by the assessee was not considered by assessing officer to be that of manufacture or production of Anchors for the reasons *firstly* that the process involved only threading of rods on both ends and its assembly with nuts and washers, therefore, the basic property of rod was not changed and *secondly* only small part of the entire process was undertaken at Parwanoo. Though the CIT(A) had concurred with the order of Assessing Officer for AY 2006-07, the said appellate authority had reversed the same for AY 2007-08. The ITAT, however, held the process undertaken by the assessee to be "manufacturing and production"

17. The Three Judges Bench of the Apex Court in case ***Aspinwall and Co. Ltd.*** v. ***Commissioner of Income Tax, 251 ITA 323*** has expounded that the word 'manufacture' has not been defined in the Act. In the absence of definition of the word "manufacture, it has to be given a meaning as is understood in the common parlance. It has to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the articles result in a new and different article, then it would amount to a manufacturing activity."

18. In ***Commissioner of Income Tax-V, New Delhi*** vs. ***Oracle Software India Limited, (2010) 2 SCC 677***, the Hon'ble Apex Court has further expounded as under: -

> *"12. In our view, if one examines the above process in the light of the details given hereinabove, commercial duplication cannot be compared to home duplication. Complex technical nuances are required to be kept in mind while deciding issues of the present nature. The term "manufacture" implies a change, but, every change is not a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the above process. If an operation/ process renders a commodity or article fit for use for which it is otherwise not fit, the operation/ process falls within the meaning of the word "manufacture".*

19. In ***Income Tax Officer*** vs. ***Arihant Tiles and Marbles, 2010(2) SCC 699***, it has been noted that the expression used in Section 80IA - which is analogous to the expression used in Section 801B, which uses words manufactures or produces, as applicable to the present case mandates the Court to consider not only word "manufacture" but also the connotation of word "production". Having noted this position, the Court went on to observe that the said expressions have wider meaning as compared to the word "manufacture". Further, the word "production", means manufacture plus something in addition thereto.

20. A Division Bench of this Court in ITA No. 2 of 2009, in case titled as ***Commissioner of Income Tax, Shimla*** vs. ***M/s Doon Valley Rubber Industries*** having taken notice of the various precedents has held that the test for determining whether manufacture can be said to have taken place is whether the commodity, which is subjected to a process, can no longer be

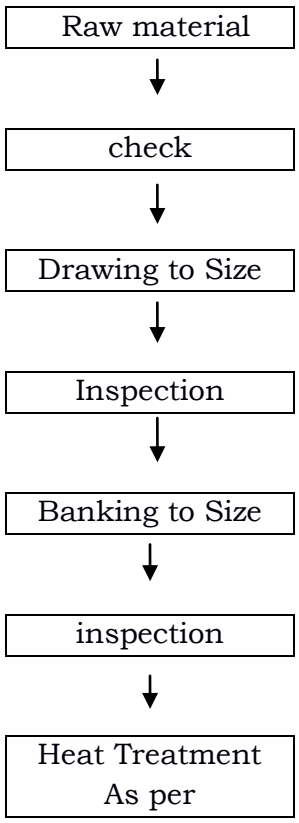
regarded as original commodity, but is recognized in trade as a new and distinct commodity. Further, the word "production", when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. The word "production" takes in all the by-products, intermediate products and residual products, which emerge in the course of manufacture of goods.

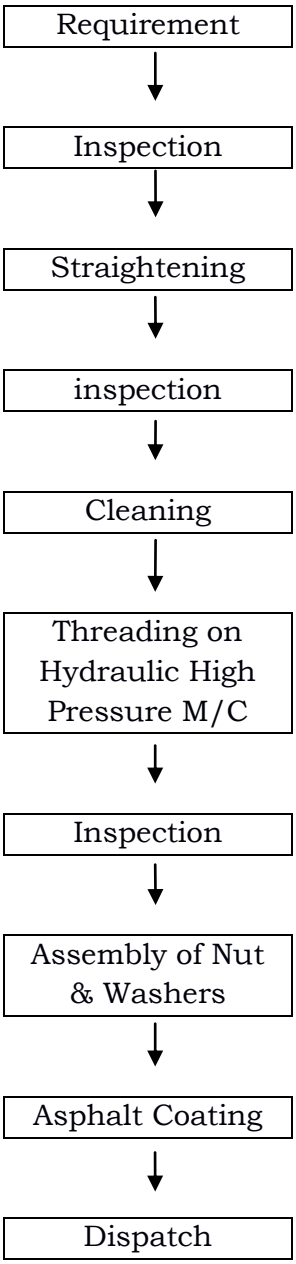
21. Keeping the aforesaid exposition of law in view, it will be too absurd to say that since the raw material for the product in question was the rod and the final product was also the rod, hence was not "manufacturing or production". The flow chart relied upon by the Assessing Officer itself suggests a series of processes undertaken before the raw material could be converted into the final product i.e. the Anchors used for windmills. The raw material might have been a raw steel rod but had to undergo the different processes like drawing to size, blanking to size, heat treatment as per requirement, straightening, cleaning, threading with hydraulic high pressure, assembly of nut and washers and asphalt coating before it took the final shape of foundation anchor. The change contemplated in ***Aspinwall (supra)*** cannot be taken to mean that it would always imply a production of an article from nothing. There has to be some raw material for production and in the case in hand, it was raw steel rods, which in its original form could not be used as foundation anchors for windmills. Thus, the ITAT has rightly come to the conclusion that production of foundation anchor for windmills by the assessee was a manufacturing process.

22. As noticed *supra*, there was yet another perspective that had weighed with the Assessing Officer for declining the benefit of section 80IC to the assessee for both the assessment years i.e. 2006-07 and 2007-08. It was held that the enterprise of assessee was not involved in the manufacture or production of Anchors at Parwanoo. Such finding was based on the premise that substantial work in the entire process of production was got done by the

assessee from Ludhiana in Punjab by outsourcing the jobs. Only minimal job was given effect to at Parwanoo which included threading of rods on both the ends, assembly of nuts/washers and application of asphalt coat thereon. The Assessing Officer, for arriving at such conclusion, had taken into consideration the findings of survey, report of Chartered Engineer, statements of partners of assessee recorded under Section 131 of the Act etc. Thus, there was clear finding of fact recorded by the Assessing Officer that only small part of entire process involved in production of the Anchors was done at Parwanoo and that by itself could not be considered sufficient to hold that the assessee was engaged in manufacture or producing the end product at Parwanoo.

23. The Assessing Officer had relied upon the following flow chart relating to manufacture of Anchors by the assessee:-





24. Thus, the Assessing Officer had held that the process from purchase of raw material to straightening, as shown in the above-mentioned flow chart, was got done by the assessee at Ludhiana. It was only the threading, assembly

of nut and washers and asphalt coating that was done at Parwanoo. In such view of the matter, according to Assessing Officer, the assessee could not be said to be manufacturing or producing the foundation bars/anchors at Parwanoo so as to claim benefit under Section 80IC of the Act.

25. The finding of fact recorded by the Assessing Officer to above effect were concurred by the CIT (A) in ITA No. 24 of 2010 and reversed in ITA No. 6 of 2012. Though the ITAT had also concurred with the findings of fact that most of the work constituting production of Anchors was got done by the assessee from Ludhiana by outsourcing the jobs, it, nevertheless, held that the assessee was involved in manufacture and production of Anchors. The findings by the ITAT in this behalf have evidently been returned without going into the question as to whether assessee was not entitled for deduction under Section 80IC merely by indulging into the small part of process at Parwanoo out of the entire lengthy process of production and also consequent necessary legal implication arising therefrom.

26. Section 80IC of the Act allows deduction from the profits and gains in computing the total income of the assessee in specific cases enumerated in said provision. The assessee should be an undertaking or enterprises, which had begun to manufacture or produce any article or thing not being an article or thing specified in 13th schedule, between 07.01.2003 to 01.04.2012 in an Industrial Area notified by the CBDT. In the State of Himachal Pradesh, the industrial area of Parwanoo was so notified by the CBDT vide Notification No. 273/2003 dated 04.11.2003.

27. The purpose of incorporation of Section 80IC manifestly was to invite long term investment, entrepreneurship etc. in the areas which were industrially backward. The incentive of deduction from the income generated from such enterprise for the limited years could not be used to negate the very purpose of the inclusion of Section 80IC. This facility could not be allowed to be used to camouflage the production by making only small investment in the

areas specified in Section 80IC on one hand and abandon the production after lapse of incentive period on the other. The very small quantum of capital investment made by the assessee in establishing its unit at Parwanoo had also weighed with the Assessing Officer as one of the reasons to hold as above.

28. In view of this matter, the term 'manufacture' or 'produce' used in Section 80IC has to be construed in the true context of the object and purpose of the said provision. The ITAT has failed to consider this important aspect which, in our considered view, necessarily was mixed question of fact and law required to be decided by the Appellate Tribunal in exercise of jurisdiction vested in it under law. The substantial questions of law at Serial No. 1 and 2 are answered accordingly.

29. Accordingly, ITA 24 of 2010 and ITA 6 of 2012 are partly allowed. Impugned orders dated 29.1.2010 in ITA 1158/CHD/2009 and dated 3.3.2011 in ITA 78/CHD/2011 and also the findings recorded by the ITAT in both the appeals, only to the extent of holding the assessee involved in 'manufacture' or 'production' of "Anchors" without considering the effect and implication of very small quantum of work done at Industrial Area Parwanoo, are set aside. Both the appeals are remanded back to ITAT Chandigarh to decide afresh in terms of observations made hereinabove.

30. The appeals are disposed of accordingly. All pending miscellaneous application(s), if any, shall also stand disposed of.

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

Between:-

ORIENTAL INSURANCE COMPANY
LIMITED, MYTHE ESTATE KAITHU,
SHIMLA – 171003, THROUGH ITS
SENIOR DIVISIONAL MANAGER.
THROUGH ITS SENIOR DIVISIONAL MANAGER.

…APPELLANT

(BY DR. LALIT K. SHARMA, ADVOCATE)

AND

1. NISHA KUMARI WD/O LATE SH. NIRANJAN SINGH;
2. SITTAL KUMAR, SON]
3. INDU BALA, DAUGHTER] OF LATE SH. NIRANJAN SINGH;
   ALL RESIDENTS OF VILLAGE KOHLA,
   P.O. KHABLI, TEHSIL DEHRA,
   DISTRICT KANGRA, H.P.

....RESPONDENTS/CLAIMANTS

4. PAWAN KUMAR S/O SH. DEVI CHAND,
   R/O VILLAGE KASLOG, DISTRICT SOLAN
   H.P. (DRIVER).
5. SURESH KUMAR S/O SH. DEVI CHAND
   R/O VILLAGE KASLOG, DISTRICT SOLAN,
   H.P. (OWNER).

.... RESPONDENTS.

(SH.NARESH KAUL, ADVOCATE, FOR R-1 TO R-3.

NONE FOR RESPONDENTS NO. 4 AND 5).

FIRST APPEAL FROM ORDER (FAO)
NO. 4130 OF 2013
Reserved on 08.07.2022
Decided on:15.07.2022

Motor Vehicle Act, 1988- Section 173- Appeal-Motor Accident Claims Tribunal saddled the insurance company with the liability to pay compensation of Rs.15,29,472/- to claimants- Deceased, 45 years of age was a Government Employee and his monthly income was Rs.15000/- - Held- Multiplier of 14 instead of 13- Amount of compensation enhanced to Rs.17,64,816/- to be paid by the insurer. (Para 22 to 24)

Cases referred:

Magma General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram and others (2018) 18 SCC 130;

National Insurance Company Ltd. vs. Pranay Sethi and others (2017) 16 SCC 680;

Pappu Deo Yadav vs. Naresh Kumar and others, AIR 2020 (SC) 4424;

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another (2009) 6 SCC 121;

This appeal coming on for pronouncement of judgment this day, the Court delivered the following:

J U D G M E N T

The appellant (hereinafter referred to as the 'insurer') has assailed award dated 22.5.2013 passed by learned Motor Accident Claims Tribunal-I, Kangra at Dharamshala (H.P.) in MACP (RBT) No. 67-G/II/2010/2007, whereby a sum of Rs.15,29,472/- along with interest at the rate of 7.5% per annum from the date of filing of petition till realization, was awarded in favour of respondents No.1 to 3 herein (for short 'claimants') and the insurer was saddled with liability to satisfy the award.

2. The claimants are the legal representatives of Sh. Niranjan Singh, who had died as the result of injuries received by him in a road accident.The compensation was claimed by the claimants under Section 166 of the Motor Vehicles Act, 1988 (for short the 'Act') by alleging that on 02.07.2006 at about 12.15 P.M. deceased Niranjan Singh was riding a scooter with one Sh. Rattan Singh on the pillion from Nadaun to Jwalamukhi. Truck No. HP-11B-0284, driven by respondent No.4 herein (for short 'driver') came from opposite side in a very high speed. The driver was driving the truck in a rash and negligent manner. He could not control the truck and hit the scooter ridden by deceased Niranjan Singh. Fatal injuries were received by Sh. Niranjan Singh and as a result thereof, he died on the spot. The truck was owned by respondent No.5 herein (for short 'the owner')

3. The claimants specifically made an averment that FIR No. 125 of 2006 registered at Police Station, Jwalamukhiwas not based ontrue facts and the same was lodged by the police in connivance with the owner and driver of the truck.

4. The deceased was stated to be 45 years of age at the time of death. As per the claimants, the deceased was a Government employee and was serving in Rural Development Department of Himachal Pradesh Government. His monthly income was stated to be Rs.15,000/- approximately.

5. The owner and driver of the truck contested the petition by filing reply *inter alia* raising preliminary objection as to maintainability of the petition. On merits, it was alleged that the truck No. HP-11B-0284 was stationary at the time of the accident. The deceased Niranjan Singh had lost control while riding scooter and had smashed the scooter against parked truck. It was further submitted that the truck was parked on the side of the road. FIR No. 125 of 2006 was lodged with allegations of rashness and negligence against deceased Niranjan Singh. The police had submitted cancellation report as Niranjan Singh had died.

6. The insurer also contested the claim petition of the claimants by filing a separate reply. It was alleged that the vehicle involved in the accident was being driven in violation of the terms and conditions of policy of insurance. The allegation of collusion between the claimants and owner of truck was leveled. Contributory negligence on part of deceased Niranjan Singh was also alleged.

7. Learned Tribunal framed the following issues:

1. *Whether on account of negligence and rashness on the part of respondent No.1 while driving HP-11B-0284 on 2.7.2006 caused death of Niranjan ?OPP*

2. *If issue No. 1 is proved, to what compensation the petitioners are entitled and from whom? OPP*

3. *Whether deceased Niranjan Singh was himself negligent in driving Motor Cycle HP-36-8373?OPR*

4. *Whether respondent No.1 was not holding valid and effective driving licence at the time of accident? OPR*

5. *Whether offending vehicle was being driven in violation of terms and conditions of the insurance policy?OPR*

6. *Whether deceased Niranjan Singh contributed towards the accident? OPR*

7. *Relief.*

8. Issues No.1 and 2 were decided in favour of the claimants and the award as noticed above was passed.

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

10. The fact in issue was whether the accident had occurred due to rash and negligent driving of deceased Niranjan Singh or of the driver of the truck?

11. In view of rival claims, the initial onus to prove rash and negligent driving of the driver of the truck rested on the claimants.

12. Sh. Jagdev Singh PW-2 was examined by claimants as their witness. Sh. Jagdev Singh had narrated the eye witness account of the accident by way of an affidavit Ext.PW-2/A, tendered in evidence. As per the version of PW-2, on 02.07.2006 at about 12.00 – 12.15 P.M he was on way to his home from Nadaun. When he reached village Fatehar, he noticed truck No. HP-11B-0284 coming from opposite side. The truck was being driven by at a high speed in a negligent manner due to which the driver of the truck lost control over the vehicle and hit the scooter ridden by Niranjan Singh with Rattan Singh on pillion. He further stated that Niranjan Singh was riding the scooter on his side at a slow speed.

13. From the trend of cross-examination of PW-2 on behalf of insurer, the presence of this witness on spot at the time of accident was not disputed. It was suggested to him that the truck was already parked and the

rider of the scooter was riding in high speed and as a result thereof had lost control and caused accident. Though towards the end, a suggestion was made to him that he was not present on the spot, which was denied by PW-2. A suggestion disputing the presence of PW-2 on spot at the time of accident, after testing his veracity as to spot position by making detailed cross-examination, will not help the case of insurer.

14. Thus, the claimants had discharged the initial burden.

15. On the other hand, respondents examined RW-1 Sh. Pawan Kumar, driver of the truck. In his examination-in-chief, RW-1 denied the occurrence of any accident with his vehicle. He further stated that at the time of accident, his vehicle was parked. In cross-examination on behalf of claimants, RW-1 admitted that an accident involving the scooter and truck had taken place and both the riders on the scooter had died. He further stated that police reached on spot after 15-20 minutes and he had got recorded the report with the police. RW-1 nowhere stated that PW-2 Jagdev Singh was not present on the spot at the time of accident. Further there is no corroboration to the version given by the driver of the vehicle. Admittedly, this witness was interested to see the success of defence raised by him. Moreover, much reliance could not be placed on the statement of this witness for the reasons firstly that he would definitely put forth a version which would save him and secondly, even the FIR Ext. PW-5/A did not mention the driver of the truck to be the informant.

16. Dr. Lalit K. Sharma, Advocate, learned counsel for the insurer placed strong reliance on the contents of FIR Ext.PW-5/A, wherein the factum of rash and negligent driving of deceased Niranjan Singh was mentioned as cause of accident. He further submitted that the claimants themselves had proved the FIR Ext.PW-5/A on record, therefore, the contents of the document have to be read in evidence.

17. It is trite that mere exhibition of a document will not by itself be sufficient to prove its contents. The record reveals that an official of Police Station, Jwalamukhi was examined as PW-5, who had brought the records summoned from him which included the original record of FIR No.125 of 2006. On such basis a photocopy of the FIR was exhibited as Ext.PW-5/A. In cross-examination on behalf of owner and driver, PW-5 had clarified that he did not investigate the case in pursuance to FIR No. 125 of 2006. He was not the scribe of the document.

18. The contents of FIR Ext.PW-5/A do not clearly reveal that who was the person who had informed the police officials regarding the cause of accident as recorded therein. The FIR records that some police officials were holding inquiry in relation with DDR No.12 dated 02.07.2006 and when they reached village Fatehar, they found the truck No. HP-11B-0284 standing on one side and scooter No. HP-36-8373 lying on its left side. Two persons named Niranjan Singh and Rattan Singh were found lying dead on the spot. On inquiry, it was found that the rider of scooter No. HP-36-8373 had lost control over the scooter as he was in high speed and hit the scooter on the left side of the truck.

19. H.C. Gurdeep Singh No.101 on whose information FIR Ext.PW-5/A was recorded has been examined as RW-3 before learned Tribunal. As per this witness, he was not an eye witness to the accident. He had reached the spot after half an hour when he had received telephonic information regarding the occurrence of accident. Noticeably, RW-3 had not disclosed the name of informant. Nothing has been stated by this witness as to what was the basis for arriving at hypothesis that the cause of accident was rash and negligent driving of the rider of the scooter. From the above evidence, it cannot be said that contents of FIR were duly proved.

20. In view of above analysis, the contents of FIR Ext.PW-5/A cannot be relied upon for adjudging the cause of accident. Rather, scrutiny of the

finding recorded by the learned Tribunal that the accident was caused due to rash and negligent driving of driver of the truck cannot be faulted especially keeping in view the statement of PW-2 and there being no effective rebuttal from the respondents.

21. Sections 166 and 168 of the Motor Vehicles Act, empowers to Tribunals and Courts with jurisdiction to award just compensation. The appeal is continuation of proceedings undertaken before the Tribunal constituted under the Act. It is the bounden duty of the Tribunals or/and Courts to conclude on just compensation on the basis of material on record. In ***Pappu Deo Yadav vs. Naresh Kumar and others, AIR 2020 (SC) 4424***, the Hon'ble Supreme Court has held as under:

> *"8. This court has emphasized time and again that "just compensation" should include all elements that would go to place the victim in as near a position as she or he was in, before the occurrence of the accident. Whilst no amount of money or other material compensation can erase the trauma, pain and suffering that a victim undergoes after a serious accident, (or replace the loss of a loved one), monetary compensation is the manner known to law, whereby society assures some measure of restitution to those who survive, and the victims who have to face their lives...."*

22. The insurer has not disputed the age of deceased Niranjan Singh to be 45 years at the time of death. As per judgment passed by the Hon'ble Supreme Court in ***Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another (2009) 6 SCC 121***, multiplier of 14 has been made applicable for the age between 41 to 45 years. In the instant case, learned Tribunal had assessed the dependency by applying the multiplier of 13 which should have been 14, therefore, an amount of Rs.9612 x 12 x 14 = 16,14,816/- is liable to be paid by the insurer to the claimants on account of loss of contribution.

23. Further keeping in view the ratio of judgments passed by the Hon'ble Supreme Court in ***National Insurance Company Limited vs. Pranay Sethi and others (2017) 16 SCC 680*** and ***Magma General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram and others (2018) 18 SCC 130***, the claimants are entitled to a sum of Rs.15,000/- under the head 'loss of estate', Rs.15,000/- for funeral charges and Rs.40,000/- to each claimant i.e. Rs.1,20,000/- under the head 'loss of consortium'.

24. Thus, the impugned award needs to be modified to the extent that the claimants are held entitled to following amounts:

1.Loss of contribution = Rs.9612X12X14 =Rs.16,14,816/-
2. Loss of estate = Rs. 15,000/-
3. Funeral charges = Rs. 15,000/-
4. Loss of consortium = Rs. 1,20,000/- (Rs.40,000X3)

Total = **Rs.17,64,816/-**

Claimants are further held entitled to interest at the rate of 7.5% per annum from the date of petition till its deposit or payment to the claimants whichever is earlier. It is clarified that the apportionment made by the learned Tribunal in the impugned award shall remain the same.

25. The appeal is accordingly disposed of. The impugned award is modified only to the extent as detailed above. The pending application(s), if any, also stands disposed of.

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

Between:-

SHRIRAM GENERAL INSURANCE COMPANY LIMITED, KANTA NIWAS,NEAR APPLE ROSE HOTEL, KACHI GHATI, SHIMLA, H.P., THROUGH ITS BRANCH MANAGER NEAR P.G. COLLEGE, HOUSE NO.-3, MAIN MARKET, BILASPUR, DISTRICT BILASPUR, H.P.

....APPELLANT.

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. SMT. KALA DEVI W/O LATE SH. TARA CHAND,
2. SH. PRAKASH S/O LATE SH. TARA CHAND,
3. MASTER NEERAJ S/O LATE SH. TARA CHAND,
4. MASTER VIKAS S/O LATE SH. TARA CHAND,
5. SMT. SARJU DEVI W/O SH. TEJ RAM,
6. TEJ RAM SHARMA, S/O LATE SH. PARAS RAM SHARMA,

RESPONDENTS NOS. 3 AND 4 ARE MINORS THROUGH THEIR MOTHER RESPONDENT No.1),

ALL RESIDENTS OF VILLAGE AND POST OFFICE MOHARI, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

...RESPONDENTS-PETITIONERS.

7. KUMARI NISHA CHAUHAN D/O SH. SITA RAM, R/O VILLAGE CHUKNA, POST OFFICE BHAKOL, TEHSIL KOTKHAI, DISTRICT SHIMLA, H.P.

....RESPONDENT.

(MR. RAMAN SETHI, ADVOCATE, FOR RESPONDENTS NO.1 TO 6.

MR. ROMESH VERMA, ADVOCATE, FOR RESPONDENT NO.7.)

FIRST APPEAL FROM ORDER
No. 137 of 2015
Reserved on: 24.06.2022
Decided on: 01.07.2022

Motor Vehicle Act, 1988- Section 173- Appeal- Ld. Motor Accident Claims Tribunal, awarded compensation of Rs. 12,11,000/- to claimants- Liability has been fastened on the insurer- Deceased Driver having monthly income of Rs.

9000/- per month- Held- Amount of income of the deceased not unreasonable- Award modified- Owner is saddled with the liability to pay to the claimants penalty to the tune of 50% of the amount awarded. (Para 23, 24)

Cases referred:

Chandra alias Chanda alias Chandraram and another vs. Mukesh Kumar Yadav and others, (2022)1 SCC 198;

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

J U D G M E N T

By way of instant appeal, the appellant (Insurer) has assailed award dated 06.01.2015, passed by the learned Motor Accident Claims Tribunal, Shimla, H.P. in M.A.C.C. No. 62-S/2 of 2014/10, whereby a sum of Rs.12,11,000/- has been awarded as compensation in favour of the claimants. Further, the claimants have also been held entitled to interest @7.5% from the date of filing of petition till realization of the entire amount. The liability to pay compensation has been fastened on the insurer.

2. The facts giving rise to filing of claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short "Act") are that Shri Tara Chand while driving truck No. HR-37A-6995 met with an accident on 9.2.2010 and died as a result of injuries suffered thereby. The truck was owned by respondent No.7 (for short "owner") and was insured by the appellant (for short "insurer").

3. The claim petition was filed by respondents No.1 to 6 herein (for short "claimants") as legal representatives of deceased Shri Tara Chand. It was averred in the claim petition that the cause of accident was abrupt latent defect in the vehicle and also that the vehicle was not properly maintained by the owner.

4. The owner contested the petition by denying the improper maintenance of the vehicle. However, the cause of accident was admitted to be development of latent defect in the vehicle.

5. The insurer contested the petition on the ground that the same was not maintainable as the accident was caused by rash and negligent driving of deceased driver Tara Chand. Collusion between the claimants and the owner and the breach of terms of insurance policy was also alleged.

6. Learned tribunal had framed the following issues:-

1. *Whether Sh. Tara Chand died in a road accident on account of the sudden mechanical snag in vehicle No. HR-37A-6995 at Dhalli P.S. Rajgarh, District Sirmour on 09.02.2010 at 7/7.30 P.M., as alleged? OPP*
2. *If issue No.1 is decided in affirmative whether the petitioners are entitled for compensation of Rs.15,00,000/- (Fifteen lacs)? OPP*
3. *Whether the petition is not maintainable?OPR.*
4. *Whether the petitioners are estopped by their act and conduct to file the present petition?OPR*
5. *Whether the petitioners have no locus standi to file the present petition?OPR.*
6. *Whether the petitioners have concealed the material facts in the court, as alleged?OPR.*
7. *Whether the vehicle was being driven in violation of terms and conditions of the policy?OPR-2.*
8. *Whether the driver was not holding valid and effective driving licence at the time of accident?OPR-2.*
9. *Relief.*

Issues No.1 and 2 were answered in affirmative and other issues were answered in the negative. The accident was held to be caused due to development of latent defect in the vehicle. The vehicle was also held to be not properly maintained by the owner. Accordingly, the compensation along with interest, as noticed above was awarded in favour of the claimants and insurer was saddled with liability to pay the same.

7. I have heard Mr. Jagdish Thakur, Advocate, for the appellant, Mr. Raman Sethi, Advocate, for respondents No.1 to 6 and Mr. Romesh Verma, Advocate, for respondent No.7 and have also gone through the entire record carefully.

8. Shri Jagdish Thakur, Advocate, learned counsel for the insurer has submitted that findings as to development of latent mechanical defect in the vehicle was without any evidence. The accident was result of rash and negligent driving of the driver, deceased Shri Tara Chand. Therefore, the claim petition on behalf of his legal representatives was not maintainable under Section 166 of the Act. He has further contended that the learned tribunal has considered the income of deceased at Rs. 9,000/- per month merely on surmises and conjectures, whereas there was no legal evidence to warrant such conclusion.

9. A perusal of the impugned award reveals that the learned tribunal has placed reliance upon document Ex.PW2/A, the report prepared by police mechanic, after examination of the vehicle involved in the accident. Learned tribunal has proceeded on the premise that the factum of development of latent defect in the vehicle was proved from report, Ex.PW2/A.

10. The author of Ex.PW2/A was examined as their witness by the claimants as PW2. He simply deposed that he was working as Motor Mechanic at Police Lines Nahan. On 26.02.2010, he had inspected truck No. HR-37A-6995 on the site of accident and had prepared mechanical report, Ex.PW2/A. In cross-examination on behalf of the owner, PW-2 admitted that breakage found in the vehicle was result of accident.

11. Perusal of Ex.PW2/A, nowhere suggests that accident was due to development of some latent defect in the vehicle. PW-2 had found most of the part of the vehicle broken. As per him, front left side tyre was found burst. His analysis was that in case the front tyre of a loaded vehicle bursts when the vehicle was in motion, the vehicle can tilt on the side of such burst. On the

basis of such material, the finding and conclusion drawn by the learned tribunal regarding cause of accident cannot be sustained. The hypothetical analysis drawn by PW-2 cannot be said to be sufficient to prove the cause of accident to be development of sudden mechanical fault in the vehicle. No such statement has been made by PW-2 while being examined by the learned tribunal. There was no opinion whether tyre burst was preceded by accident or the condition of the tyre was due to fall of vehicle into gorge, which according to this witness was about 100 feet down below the road. PW-2 had reported that he had examined the accident vehicle on spot and most of its parts were found broken. He admitted that parts had broken as a result of fall of vehicle into gorge. The same could be the cause of damage to the tyre also.

12. The onus to prove the factum of cause of accident being development of latent defect in the vehicle was on the claimants. Except examination of PW-2, the claimants had not led any further evidence to discharge the burden. No doubt, the learned tribunal was to apply the standard of preponderance of probabilities, yet the evidence led by the claimants cannot be said to be sufficient to discharge their burden.

13. When the claimants have been held by this Court to have failed in proving the cause of accident to be development of some abrupt latent defect in the vehicle, the claim petition under Section 166 of the Act cannot be said to be maintainable. Consequentially, in the facts of instant case, where the vehicle had abruptly rolled down will raise the presumption of rash and negligent driving as cause of accident by application of principle of *res ipsa loquitur.*

14. The origin and genesis of a right to file claim petition for claiming compensation with respect to loss suffered in a motor vehicle accident is under the law of tort. The basis of claim has to be a wrong done by a person other than the one for whose death the claim is made. The claim cannot be linked with the death of the person, who himself was responsible for

causing accident and consequently his own death, more so when the claim has been preferred by invoking jurisdiction of Motor Accident Claims Tribunal under Section 166 of the Motor Vehicles Act.

15. In above discussed circumstances, the fact whether the vehicle was properly maintained by owner or not loses relevance. The claimants could maintain a petition in case they could prove the cause of accident to be attributable to the owner, which they miserably failed, as noticed above.

16. There is no dispute on the fact that deceased Shri Tara Chand was the driver employed on vehicle No. HR-37A-6995 by the owner. That being so, the question arises whether the insurer can avoid the liability even under the Employees Compensation Act, 1923?

17. To examine the above noted question, provisions of Section 147 of the Act can be gainfully noticed. The Act mandates the policy of coverage of third party risk but at the same time, section 147 carves out an exception by way of proviso appended to sub-section thereto which reads as under:-

> *"Provided that a policy shall not be required—*
> *(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—*
> *(a) engaged in driving the vehicle, or*
> *(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or*
> *(c) if it is a goods carriage, being carried in the vehicle, or*
> *(ii) to cover any contractual liability."*

It is equally true that the Act only mandates the policy coverage for third party risks but at the same time does not prohibit the insurer to enter into a special contract of insurance with insured for coverage of risks of the persons and the

property over and above the statutory coverage as provided under Section 146 and 147 of the Act.

18. It is not the case of insurer that the death of late Shri Tara Chand in the accident in question, would not entitle his legal representatives to claim compensation even under the Employees Compensation Act. By virtue of proviso to sub-section (1) to Section 147 of the Act, the claimants will be so entitled. Thus, the question formulated above is answered accordingly.

19. The learned Tribunal has taken the income of deceased as Rs.9,000/- per month. To this effect, deposition of PW-4, the wife of deceased has been relied upon. Perusal of her statement reveals that Smt. Kala Devi, PW-4, had stated in her examination-in-chief that her husband was getting Rs.9,000/- per month as salary. This part of the statement of claimant Smt. Kala Devi has not been challenged on behalf of the insurer. Learned counsel for the appellant/insurer has submitted that the statement of claimant cannot be taken as a gospel truth and there has to be additional material to prove the income of the deceased. According to him, in absence of any specific proof regarding income, the same should be assessed by taking into consideration minimum wages notified by the State Government at the relevant time.

20. The deceased was driving a heavy commercial vehicle and there is no dispute as to the fact that he was having a valid driving licence to drive such vehicle. Once it is established, certain amount of guess working in assessing the income will not be out of place, especially when the insurer has not challenged the version of the wife of the deceased. There cannot be any better person than the wife, who know about the income of her husband. It also cannot be ignored that insurer had also not questioned the owner when she stepped into the witness box with respect to the salary being paid to the deceased. Reliance can be placed on a decision of the Hon'ble Supreme Court in a case titled as ***Chandra alias Chanda alias Chandraram and another***

vs. Mukesh Kumar Yadav and others, (2022)1 SCC 198 wherein it has been held that**:-**

> *"9. It is the specific case of the claimants that the deceased was possessing heavy vehicle driving licence and was earning Rs.15000/ per month. Possessing such licence and driving of heavy vehicle on the date of accident is proved from the evidence on record. 1 Though the wife of the deceased has categorically deposed as AW1 that her husband Shivpal was earning Rs.15000/ per month, same was not considered only on the ground that salary certificate was not filed. The Tribunal has fixed the monthly income of the deceased by adopting minimum wage notified for the skilled labour in the year 2016. In absence of salary certificate the minimum wage notification can be a yardstick but at the same time cannot be an absolute one to fix the income of the deceased. In absence of documentary evidence on record some amount of guesswork is required to be done. But at the same time the guesswork for assessing the income of the deceased should not be totally detached from reality. Merely because claimants were unable to produce documentary evidence to show the monthly income of Shivpal, same does not justify adoption of lowest tier of minimum wage while computing the income. There is no reason to discard the oral evidence of the wife of the deceased who has deposed that late Shivpal was earning around Rs.15000/ per month."*

21. Thus, the assessment of Rs.9,000/- per month as income of the deceased cannot be said to be unreasonable. The findings of learned tribunal to this effect are upheld.

22. The accident had taken place on 09.02.2010. The Employees Compensation amended Act 45 of 2009 came into force w.e.f. 18.01.2010, whereby explanation-II to Section 4 of the Employees Compensation Act, 1923 was deleted. Hence, the provisions of Section 4 as it stood after coming into

force the amending Act 45 of 2009 will apply to the case in hand. Meaning thereby, the capping of monthly wages of an employee at Rs.4000/- provided before coming into force of amending Act 45 of 2009 will not be applicable.

23. Deceased Tara Chand was 50 years of age at the time of his death. The findings to this effect rendered by learned tribunal have not been challenged. That being so, the factor of 153.09 as per Schedule-IV of Employees Compensation Act will apply. Thus, by taking amount equal to 50% of monthly wages of deceased employee i.e. 9000/2 =Rs.4500/- and multiplied by factor 153.09, the claimants are held entitled to compensation of Rs.6,88,905/- (Rs.4,500x153.09). Further the claimants are also held entitled to simple interest @12% per annum on the aforementioned calculated amount from the date of accident i.e. 09.02.2010 till its deposit in Court or payment to the claimants whichever is earlier. The award to above extent shall be satisfied by the insurer.

24. There is nothing on record which may justify the delay on the part of the owner to accept liability and to deposit the compensation amount as provisional payment under sub-section (2) of Section 4A of the Employees Compensation Act, therefore, the owner is saddled with liability to pay to the claimants penalty to the tune of 50% of the amount awarded hereinabove.

25. The impugned award is modified to the extent as detailed above. The appeal is accordingly disposed of. All pending applications also stand disposed of.

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

Between:-

VIKRAM SINGH, S/O SHRI BALBHADER SINGH,
RESIDENT OF VILLAGE HAAR, P.O. NURPUR,
TEHSIL NURPUR AND DISTT. KANGRA,
PIN 176202, PRESENTLY EMPLOYED IN
FRUIT PROCESSING AND TRAINING CENTRE

NURPUR, KANGRA, H.P.

....PETITIONER

(BY SH. ARUN KUMAR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS SECRETARY,
(HORTICULTURE), SHIMLA-2.

2. DIRECTOR, HORTICULTURE DEPTT.
NAVBAHAR, SHIMLA-2.

3. DY. DIRECTOR OF HORTICULTURE
DEPTT. KANGRA AT DHARMSHALA
H.P.

....RESPONDENTS

(SH. P.K. BHATT AND SH. BHARAT BHUSAN,
ADDITIONAL ADVOCATES GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.6748 of 2019
Reserved on:19.7.2022
Decided on:22.7.2022

Constitution of India, 1950- Article 226- Regularization of service- Petitioner a daily wage beldar engaged in the year 2001 and has rendered continuous service of 240 days in each calendar year – Service of the petitioner not regularized as per policy- Held- Petition allowed and respondents are directed to extend the benefit of regularization to the petitioner in terms of regularization policy framed by the State Government. (Para 12, 13)

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

O R D E R

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

> *"a) That the respondents may kindly be directed to regularize the services of the applicant after completion of 6 or 8 years as per policy of the state or if no policy is there, then to direct the respondents to formulate a policy being a model state; so the constitutional mandates provided for the welfare state be fulfilled and justice be done.*
>
> *b) that the respondents may kindly be directed not to give breaks to the applicant and allow him to work throughout the year.*
>
> *c) That the respondents may kindly be directed to grant consequential benefits such as seniority, arrears etc. and the original application may kindly be allowed with cost."*

2. The petitioner had originally filed O.A. No. 477 of 2016 before the learned H.P. State Administrative Tribunal in the year 2016 and after the abolition of the Tribunal, the Original Application of the petitioner was transferred to this Court and the same was registered as CWPOA No. 6748 of 2019.

3. The case of petitioner is that he was engaged as daily wage labourer/Contract beldar in the year 2001 in Community Fruit Processing-cum-Training Centre, Nurpur, District Kangra, H.P. He has rendered continuous service with 240 days in each calendar year from the date of his engagement till the date of filing of the petition. The respondents had regular work in Community Fruit Processing-cum-Training Centre, Nurpur, District Kangra, H.P. and petitioner has been assigned multiple works from time to time viz preparation of pickles, jams, jelly etc, to impart training to local residents, to clean and maintain the premises, attend counter sales, gardening work and duty as watchman. The working hours have been from 9.00 a.m. to 5.00 p.m.

4. Petitioner has sought relief of regularization as per the regularization policy of the Government of Himachal Pradesh. Petitioner along with his co-workers Ms. Asha Devi had represented to respondent No.2 on 23.12.2015. The grievance of the petitioner has not been redressed till date.

5. Respondents have contested the claim of the petitioner on the ground that he was engaged on hourly basis w.e.f. 19.3.2001 and he had been paid for the work performed by him on hourly basis. Petitioner was not entitled to regularization, as his engagement was not on Muster Roll basis. The regularization policy would not be applicable in the case of petitioner, who was engaged on hourly basis. It has also been submitted that the number of hours for which petitioner has worked were converted into number of days by the Incharge, Community Fruit Processing-cum-Training Centre, Nurpur, District Kangra, H.P. unauthorizedly and had thus issued mandays chart annexed by the petitioner as Annexure A-1.

6. I have heard Mr. Arun Kumar, learned counsel for the petitioner and Mr. P.K. Bhatti, learned Additional Advocate General for the respondents and have also gone through the record carefully.

7. The fact that the petitioner has been engaged since 2001 by the respondents at Community Fruit Processing-cum-Training Centre, Nurpur, District Kangra, H.P. has not been denied by respondents. There is no denial to the contents of mandays reflected in Annexure A-1. The only contention of respondents is that the petitioner was engaged on hourly basis and not on daily basis. This distinction is clearly superfluous. Respondents with their reply have annexed the documents, reflecting working hours of the petitioner. As per these documents, petitioner has been rendering service for seven hours every day and his employment was continuous. In these circumstances, the conversion of hours into days cannot be said to be unjustified or illegal.

8. The mandays chart Annexure A-1 annexed with the petition reveals that from 2006 onwards till 2015, petitioner had worked for more than

240 days in each calendar year. Petitioner has also placed reliance on a document annexed as Annexure'A', issued by the Incharge, Community Fruit Processing-cum-Training Centre, Nurpur, District Kangra, H.P. according to which, the same position continued from 2016 till 2021.

9. The claim of petitioner for regularization under regularization policy of the State, in the given circumstances, cannot be termed as unjustified. A Coordinate Bench of this Court vide judgment dated 1.12.2021 has determined an identical issue in favour of the petitioner therein. In the said case also petitioner was similarly situated, as the petitioner in the instant case. She was also employed by respondents in Community Fruit Processing-cum-Training Centre, Nurpur, District Kangra, H.P. since 12.3.2001. Petitioner therein had also rendered continuous service of 240 days in each calendar year since 2001. She had also joined the petitioner herein in representing their case jointly to respondent No.2 vide Annexure A-2. Document Annexure 'A' annexed by petitioner by way of CMP-T No. 640 of 2020 on record also reflects the status of Smt. Asha Devi who was petitioner in CWPOA No. 1833 of 2020. That being so, the case of petitioner herein and the petitioner in CWPOA No. 1833 of 2020 is similar in nature.

10. In CWPOA No. 1833, the respondents had raised same objections as raised in the present case. The Coordinate Bench after perusing the official records produced by the respondents held as under:-

> *"4. In the aforesaid documents, which are part of the record of the Government, petitioner, Smt. Asha Devi has been shown to be working as daily wager w.e.f.12.3.2001 and she has been shown to have worked for more than 240 days in the years, 2001, 2002, 2003, 2004, 2005, 2006, 2007,2008 and 2009. Though, in the aforesaid document alteration with pen has been made to make it appear that this seniority list-cum-yearwise days of engagement of daily wagers also pertains to seasonal workers, but learned Additional Advocate General was unable to dispute that all the persons named in this list were engaged on daily wage basis and*

if it is not then how the name of petitioner Smt. Asha Devi came to be reflected in the afore list, if she was given appointment on hourly basis. Besides above, Page No.34 of the record, as detailed hereinabove, reveals that in the years 2001 to 2015 petitioner worked for more than 240 days in a calendar year. In this document, it has been nowhere mentioned that petitioner herein was appointed on hourly basis and as such, there appears to be merit in the claim of the petitioner that she had been working regularly on daily wages since her initial appointment in the year, 2001. At this stage, learned Additional Advocate General made available some documents to demonstrate that petitioner herein had been working on hourly basis not on daily wage basis, however, having carefully perused the aforesaid documents, which otherwise appear to be a bill raised by Incharge of Fruit Processing-cum-Training Centre, Nurpur with regard to payment of the workers, reveals that petitioner as well as other similarly situate persons had been working for 7-8 hours every day, meaning thereby they like other daily wagers were also performing duties for the whole day and not on hourly basis. Needless to say, Government servant is obliged to work for 7 to 8 hours i.e.10 to 5 PM in the government offices of State of Himachal Pradesh. Though, having carefully scrutinized the entire record, as has been taken note hereinabove, this Court is fully convinced that petitioner had been rendering her services from the date of her initial appointment till date on daily wage basis, but still if aforesaid documents i.e. bills placed on record are taken into consideration even then petitioner cannot be said to be working on hourly basis, especially when respondents have not been able to refute/dispute that petitioner had been working for 7 to 8 hours per day.

5. Faced with the aforesaid situation, Mr. Sudhir Bhatnagar, learned Additional Advocate General argued that even as per policy of regularization petitioner is/was firstly required to be converted to daily wage basis from part time and thereafter she can claim benefit of regularization. But this Court is not impressed with the aforesaid submission made on behalf of learned Additional Advocate General, since it stands duly established on

record that from the date of her initial appointment petitioner has been working on daily wage basis, there is/was no requirement if any for respondents to first convert her services from part time to daily wage so as to make her entitled for claiming benefit of regularization in terms of policy of regularization framed by the Government of Himachal Pradesh from time to time.

6. Consequently, in view of the above, this Court finds merit in the present petition and accordingly same is allowed and respondents are directed to extend the benefit of regularization to the petitioner in terms of the regularization policy framed by the Government of Himachal Pradesh in the year, 2009, from the date she had completed 8 years daily wage service with 240 days in each calendar year. The consequential/ financial benefits shall however be restricted to three years prior to filing of the Original Application No. 374 of 2016"

11. Noticeably, the Coordinate Bench, while deciding CWPOA No. 1833 of 2020 had noticed in para-3 of judgment the details of petitioner therein and other similarly situated persons in respect of mandays of each of such incumbent. The name of present petitioner is also reflected therein at Sr. No. 4 and as per that record also, petitioner was shown to have completed 240 service in each calendar year w.e.f. 2006.

12. Thus, the case of petitioner herein is squarely covered by the judgment, passed by a Coordinate Bench in CWPOA No. 1833 of 2020, decided on 1.12.2021. The reasons detailed therein shall apply *mutatis-mutandis* to the present case.

13. Consequently, the petition deserves to be allowed. Respondents are directed to extend the benefit of regularization to the petitioner in terms of regularization policy framed by the State Government in the year 2009 from the date of petitioner had completed eight years of service with 240 days in each calendar year. Consequential/financial benefits shall, however, be restricted to three years prior to the filing of the Original

Application No. 477 of 2016. Pending applications, if any also stand disposed of.

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

Between:-

SMT. ANITEE SOOD, W/O SH. RAVINDER SOOD,
PRESENTLY POSTED AS L.T.G (b) SENIOR
SECONDARY SCHOOL, UNA, H.P. AND
RESIDENT OF VILLAGE AJNOLI, P.O.
KOTLA-KALAN, MAHADEV CHOWK, UNA, H.P.

....PETITIONER

(BY TEK CHAND SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY,
ELEMENTARY EDUCTION, H.P.
SECRETARIAT, SHIMLA-2.

2. DIRECTOR, ELEMENTARY EDUCATION,
STATE OF H.P. OFFICE AT SHIMLA.

3. PRINCIPAL G.S.S.S (B) UNA, AT UNA, H.P.

....RESPONDENTS

(SH. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.1813 of 2020
Reserved on:1.7.2022
Decided on:8.7.2022

Constitution of India, 1950- Article 226- **H.P. State Administrative Tribunal Act 1985** - Section 21- Grievance of the petitioner is that though she was promoted as TGT from the post of Language Teacher but she could not avail the benefit thereof since the transfer order was never conveyed to her- Held- Plea of petitioner that she was not aware about transfer order till 2016 does not appear to be factually correct and as per record she had become aware about her promotion order on 9.3.2006 when she approached the Principal where she was posted- Petitioner had waived off her right to promotion- Petition hit by delay and latches- Petition dismissed. (Para 7 to 10)

Case referred:

D.C.S. Negi vs. Union of India & others, 2018 (16) SCC 721;

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

O R D E R

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

> *"b) That the applicant may kindly be treated to be on the post of TGT for all intents and purposes since 25.7.2005 in view of Ann. P-1 and may kindly be granted all consequential seniority and financial benefits till date.*
>
> *c) That the applicant may kindly be deemed to be promoted to the post of PGT since 25.7.2016 when junior to the applicant has been promoted and salary of the applicant may kindly be reaffixed and arrears of differential of amount may kindly be directed to be paid to the applicant."*

2. Petitioner approached the erstwhile H.P. State Administrative Tribunal (for short the Tribunal) by way of O.A. No. 1486 of 2017. On abolition of the Tribunal, the Original Application was transferred to this Court and has been registered as CWPOA No. 1813 of 2020.

3. The grievance of the petitioner is that though she was promoted as Trained Graduate Teacher (TGT) from the post of Language Teacher vide

order dated 25.7.2005 (Annexure P-1), but she could not avail the benefit thereof since the transfer order was never conveyed to her. Petitioner approached the Tribunal only in the year 2017 on the pretext that she allegedly came to know about her colleagues, who had been promoted as TGTs on 25.7.2005, had further been promoted as PGTs vide order dated 25.7.2016.

4. In reply filed on behalf of the respondents, it is submitted that the Original Application filed by the petitioner was barred by limitation, as she had approached the Tribunal after a period of more than 12 years after the date of promotion orders, issued on 25.7.2005. It is further submitted that the petitioner was aware about her promotion orders to the post of TGT, issued in the year 2005. Petitioner had approached the Principal, GSSS, Badera-Rajputa, District Una, where she was posted in the year 2006 regarding her promotion orders, to which, the concerned Principal had replied on 9.3.2006 that no such promotion orders were received in the school.

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

6. Section 21 of the H.P. State Administrative Tribunal Act 1985 prescribes limitation for filing Original Application before the Tribunal, which reads as under:-

> *"**21. Limitation**. (1) A Tribunal shall not admit an application,-*
>
> *(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*
>
> *(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.*
>
> *(2) Notwithstanding anything contained in sub-section (1), where-*

> (a) *the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and*
>
> (b) *no proceedings for the redressal of such grievance had been commenced before the said date before any High Court,*
>
> *the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.*
>
> *(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period".*

7. The grievance of the petitioner that she was not aware about transfer order till 2016 does not appear to be factually correct. Document Annexure P-3 placed by the petitioner herself on record reveals that she had become aware about her promotion order at-least on 9.3.2006, when she approached the Principal of the school, where she was posted. Thereafter, petitioner did nothing and kept silent. Petitioner did not make any representation to her employer regarding non implementation of her promotion order, meaning thereby that petitioner had waived off her right to promotion.

8. The promotion of TGTs to the post of PGTs ordered vide Annexure P-4, dated 25.7.2016, could not have by any means, revived the cause of action, if any, in favour of the petitioner. Once the petitioner had not agitated her right for more than 12 years, she could not be allowed to raise her

grievance on the basis of promotion order of TGTs to the post of PGTs, issued on 25.7.2016.

9. The Hon'ble Supreme Court in case titled as ***D.C.S. Negi vs. Union of India & others***, ***2018 (16) SCC 721*** has held as under:-

> *"A reading of the plain language of the above reproduced section makes it clear that the Tribunal cannot admit an application unless the same is made within the time specified in clauses (a) and (b) of Section 21 (1) or Section 21 (2) or an order is passed in terms of sub-section (3) for entertaining the application after the prescribed period. Since Section 21 (1) is couched in negative form, it is the duty of the Tribunal to first consider whether the application is within limitation. An application can be admitted only if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21 (3)".*

10. Thus, in view of above discussion, the Original Application filed by the petitioner before the erstwhile Tribunal was hopelessly time barred. In any case, the petition is hit by un-explained delay and latches. Otherwise also, there is no merit in the instant petition and the same is dismissed. Pending application(s), if any, also stands disposed of.

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

Between:-

BHAGAT RAM SON OF SH. GOVIND RAM SHARMA, RESIDENT OF VILLAGE THANA,POST OFFICE KHAKHRIYANA, TEHSIL BALH, DISTRICT MANDI, H.P., PRESENTLY WORKING AS ASSISTANT ENGINEER (ELECTRICAL) AT ELECTRICAL SUB DIVISION REWALSAR, DISTRICT MANDI, H.P.

……PETITIONER.

(BY SH. DEVENDER K. SHARMA, ADVOCATE)

AND

1. HIMACHAL PRADESH STATE ELECTRICITY BOARD LTD., SHIMLA-4 THROUGH ITS EXECUTIVE DIRECTOR (PERSONNEL).

2. SH. CHINTAN PRAKASH SON OF NOT KNOWN O THE PETITIONER, PRESENTLY WORKING AS ASSISTANT ENGINEER (ELECTRICAL) AT ELECTRICAL SUB DIVISION REWALSAR, DISTRICT MANDI, H.P. .....RESPONDENTS.

(SH. ANIL KUMAR GOD, ADVOCATE, FOR RESPONDENT-1)

CIVIL WRIT PETITION
No.4958 of 2022
Decided on:25.7.2022

Constitution of India, 1950- Article 226- Setting aside the impugned transfer order of petitioner working as Assistant Engineer with the respondent Board- Held- It is more than settled that transfer is an administrative act and writ Court while exercising jurisdiction under Article 226 of the Constitution is not normally required to interfere with such orders of transfer until or unless malafides in the matter in breach of statutory provisions are established, which is not the fact situation obtaining in the present case- Petition dismissed. (Para 11)

Cases referred:

S.K. Nausad Rahaman & Ors. vs. Union of India and Ors., AIR 2022 SC 1494;

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

O R D E R

Notice confined to respondent No.1 only. Mr. Anil Kumar God, Advocate, appears and waives service of notice on behalf of respondent No.1.

2. The instant petition has been filed for the grant of following substantive relief:-

> "That the impugned transfer order dated 20.07.2022 as contained in Annexure P-1 may kindly be quashed and set aside and the petitioner may kindly be allowed to continue at the present place of posting in the interest of justice and fair play."

3. The petitioner was working as Assistant Engineer with the respondent-Board and was transferred and posted in Electrical Division, Rewalsar in District Mandi, on 12.06.2019 and now vide order dated 20.07.2022 has been ordered to be transferred to the Office of SE(D) P/H Electrical, Sundernagar, which too falls in District Mandi.

4. The only ground on which the instant petition has been filed is that the petitioner is currently aged about 56 years and is due to retire within one year and four months and moreover the parents of the petitioner are old-aged and ailing being 85 years old. According to the petitioner, the transfer is contrary to law, more particularly, Clause 5.4 of the Comprehensive Guiding Principles, 2013.

5. We have heard the learned counsel for the parties and gone through the material placed on record.

6. At the outset, it needs to be observed that as per settled law transfer is an incident of service. First, whether, and if so where, an employee should be posted are matters which are governed by the exigencies of service. An employee has no fundamental right or, for that matter, a vested right to claim a transfer or posting of his/her choice. Second, executive instructions and administrative directions concerning transfers and postings do not confer an indefeasible right to claim a transfer or posting. Individual convenience of persons, who are employed in the service is subject to the overarching needs of the administration. (Refer: ***S.K. Nausad Rahaman & Ors. vs. Union of India and Ors., AIR 2022 SC 1494***).

7. The sole claim of the petitioner is based on the Comprehensive Guiding Principles, 2013, which in terms of the aforesaid judgment of the Hon'ble Supreme Court do not confer any indefeasible right upon the petitioner to claim his transfer or posting of his choice and his individual convenience is subject to the overarching needs of the administration.

8. The petitioner currently is nearing 57 years of age and is fortunate to have his parents alive. Taking into consideration the age of the petitioner, his parents would, obviously, be in their 80s, as alleged. But, this in itself cannot be a ground to assail the transfer as, firstly, taking into consideration the age of the petitioner, his parents would obviously be in advanced-stages and would be facing age-related issues. But, then the petitioner despite his belonging to the State Cadre has been posed at a station which falls in District Mandi. We take a judicial notice of the fact that this part of the District Mandi is having a plain terrain and its topography is otherwise not difficult.

9. As a last ditch effort, the petitioner would urge that being a couple case, his transfer ought to be cancelled. Even this contention is without merit as the petitioner has failed to point out the station as also the name of the employer/department where his wife is stated to be working and currently posted.

10. The petitioner is serving in the Board and if his wife is serving in a government department, then it is for the wife to move the government seeking her transfer on the ground of being couple case as respondent No.1 has no jurisdiction or authority and is not vested with any authority much less power to order the transfer of an employee, who is not in the services of the Board. This authority vests only in the State Government.

11. Lastly and more importantly, it is more than settled that transfer is an administrative act and writ Court while exercising jurisdiction under Article 226 of the Constitution is not normally required to interfere with such

orders of transfer until or unless malafides in the matter in breach of statutory provisions are established, which is not the fact situation obtaining in the present case.

12. Thus, what can be deduced from the aforesaid discussion is that:-

(i) transfer is an incident of service;

(ii) no government servant including the servants of the Board, Corporation which falls within the meaning of State under Articles 12 and 226 of the Constitution has a vested right for posting at a particular station or to a particular post;

(iii) transfer is necessary in public interest and for efficient administration;

(iv) a public servant must comply with the transfer order, he can only approach against the transfer to higher authority;

(v) transfer of a public servant on administrative ground or in public interest is not to be interfered with unless it is in violation of the statutory rules or/and is malafide;

(vi) it is for the employer to decide when and where a public servant is to be transferred and the Court will have no jurisdiction to interfere unless transfer is malafide;

(vii) executive instructions and administrative directions concerning transfers and postings do not confer any indefeasible right to claim a transfer or posting;

(viii) an employee has no fundamental right or for that matter a vested right to claim transfer or posting of his choice;

(ix) individual convenience of a person, who is employed in the service is subject to the overarching needs of the administration.

13. Judged in light of the aforesaid exposition of law, we are not inclined to interfere with the order of transfer. Consequently, we find no merit in this petition and the same is accordingly dismissed.

14. Pending application, if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

SADA RAM SON OF SHRI KANSHI RAM, RESIDENT OF VILLAGE JALA DEVI JI, POST OFFICE SWAHAN, TEHSIL SHRI NAINA DEVI JI, DISTRICT BILASPUR, HIMACHAL PRADESH, RETIRED AS SENIOR ASSISTANT AT TEMPLE TRUST SHRI NAINA DEVI JI, DISTRICT BILASPUR, HIMACHAL PRADESH.

……PETITIONER.

(BY SH. ANUJ NAG, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY (EDUCATION)TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-171002.

2. STATE OF H.P. THROUGH SECRETARY (LANGUAGE & CULTURE) TO THE GOVT. OF HIMACHAL PRADESH.

3. THE CHAIRMAN TEMPLE TRUST, SHRI NAINA DEVI JI, DISTRICT BILASPUR, H.P.

4. TEMPLE OFFICER SHRI NAINA DEVI JI, DISTRICT BILASPUR, H.P.

……RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH.RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, SH. VINOD THAKUR, ADDITIONAL ADVOCATE GENERAL, SH. BHUPINDER THAKUR, SH. YUDHBIR SINGH THAKUR, DEPUTY ADVOCATE GENERALS AND SH. RAJAT CHAUHAN, LAW OFFICER, FOR RESPONDENTS-1 &2).

(SH. K.D. SOOD, SENIOR ADVOCATE
WITH SH. HET RAM, ADVOCATE, FOR
RESPONDENTS-3 & 4).

CIVIL WRIT PETITION
No.2829 of 2022
Decided on: 7.7.2022

Constitution of India, 1950- Article 226- Petitioner not granted benefits of medical leave for 395 days- Delay and latches- Held- Latches- Subsequent rejection of representation will not furnish a cause of action or revive a dead issue or time barred dispute- Petition dismissed. (Para 12)

Cases referred:

C. Jacob vs. Director of Geology and Mining and another (2008) 10 SCC 115;
Union of India and others vs. C.Girija and others (2019) 15 SCC 633;
Union of India and others vs. M.K. Sarkar (2010) 2 SCC 59;

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

O R D E R

Notice. Mr. Rajat Chauhan, learned Law Officer and Mr. Het Ram, Advocate, appear and waive service of notice on behalf of the respective respondents.

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

> "i) That this Hon'ble Court may kindly be pleased to issue writ to certiorari, mandamus or any other writ, order of direction in favour of the petitioner and against the respondents by quashing the impugned office order dated 03-01-2019 passed by the respondent No.2 that is annexure P-8 and 04-08-2014 that is annexure P-5 passed by the respondents as there is an error apparent on the face of the record.
>
> ii) That this Hon'ble Court may kindly be pleased to issue writ of mandamus or any other order of direction in favour of the petitioner and against the respondents to the effect by

directing them to grant salary for a period of 395 days treating it as a medical leave."

3. By medium of this petition, the petitioner has questioned the legality and validity of the action of the respondents vide which they have not granted the medical benefits of medical leave for 395 days i.e. with effect from 01.06.2013 to 30.06.2014.

4. Prima facie, the instant petition that was filed on 15.12.2020 is barred by delay and laches, as is also contended by the learned Law Officer for the respondents.

5. However, the learned counsel for the petitioner would argue that the instant petition is very much in time as the petitioner had earlier filed CWP No.1600/2017 in this Court which was disposed of vide order dated 15.05.2018 with a direction to the respondents to take a decision and it is only thereafter that the respondents have taken a decision by issuing Office Order dated 03.01.2019.

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

7. No doubt, a direction was issued by this Court in the earlier writ petition i.e. CWP No.1600/2017 to consider the case of the petitioner, but then as per settled law, the repeated rejections thereafter would not furnish a cause of action to the petitioner to file the petition by invoking the writ jurisdiction of this Court, more particularly, when the writ was already barred by delay and laches at the earlier occasion and despite this directions were issued to the respondents to take a decision.

8. In coming to such conclusion, we are duly supported by the judgment of the Hon'ble Supreme Court in ***C. Jacob*** *vs.* ***Director of Geology and Mining and another (2008) 10 SCC 115*** wherein it was held as under:

"9. *The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they*

assume that a mere direction to consider and dispose of the representation does not involve any `decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to `consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to `consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

9. The aforesaid legal position was thereafter reiterated by the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***M.K. Sarkar (2010) 2 SCC 59*** by observing as under:-

"The order of the Tribunal allowing the first application of the respondent without examining the merits, and directing the appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches. Moreover, a court to tribunal, before

> *directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court to tribunal deciding to direct "consideration" without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect."*

10. Similar, reiteration of law can be found in a judgment rendered by the Division Bench of this Court in ***LPA No. 89 of 2012*** titled ***Sainik Schools Society and another*** *vs.* ***R.C. Sharma***, decided on 17.06.2014.

11. The discussion on the subject would not be complete in case reference is not made to one of the fairly recent judgments of the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***C.Girija and others (2019) 15 SCC 633*** wherein it was held that mere filing of a belated representation in regard to a dead issue and time barred dispute will not give any fresh cause of action and consideration thereof cannot obviate bar of limitation and issue of delay and laches. It shall be apt to reproduce the relevant observations as contained in paragraphs 14 to 20 which read as under:-

> "14. From the submissions of the learned counsel of the parties and materials on record, following two issues arise for consideration:-
>
> **14.1. Whether the claim of the applicant to be included in the Panel dated 09.01.2001 for promotion as APO was barred by delay and laches?**
>
> **14.2. Whether under 30% quota of LDCE, all the 05 vacancies ought to have been made unreserved and notification dated 14.10.1999 making 04 vacancies unreserved and 01 vacancy reserved for SC was illegal?**

Issue No.1

15. There is no dispute between the parties that in the notification dated 14.10.1999 inviting applications for filling up of 05 posts under 30% LDCE quota, 04 vacancies were shown as unreserved and 01 as reserved for SC. The applicant submitted an application for participation in the selection but she could not be included against 04 unreserved vacancies, she being a general category candidate. There were certain complaints with regard to selection under 70% quota, with regard to which certain investigations were going on, which could be finalized in 2007. Applicant for the first time submitted representation to General Manager, Southern Railways on 25.09.2007 praying for inclusion of her name in the panel dated 09.01.2001. Copy of the representation filed by the applicant has been brought on the record, which indicate that applicant has in her representation relied on certain orders issued on 20.06.2007 and 05.09.2007 with regard to revision of the panel under 70% selection quota. With regard to 30% quota to be filled through LDCE, she stated that reserving 01 post for SC was totally against all norms. Representation was replied by Railways on 27.12.2007 stating that with regard to revision of the panel under 70% promotion quota, the applicant is not a party in any way. With regard to vacancy under 30% LDCE selection, it was indicated that the same was done as per the Rules prevalent at that time. O.A. No. 466 of 2009 was filed thereafter by the applicant, which has been decided by the Tribunal. Tribunal condoned the delay of 560 days in filing the O.A. The applicant has challenged the communication dated 27.12.2007 of the Railways which was given in reply to the representation of the applicant. The condonation of delay, thus, only meant that against the letter dated 27.12.2007, her O.A. was held to be within time. The Tribunal and High Court has not adverted to the delay, which accrued from the declaration of panel on 09.01.2001 and submitting her representation on 25.09.2007, i.e. after more than 06 years and 09 months.

16. This Court had occasion to consider the question of cause of action in reference to grievances pertaining to service matters. This Court in C.Jacob Vs. Director of Geology and Mining and

Another, (2008) 10 SCC 115 had occasion to consider the case where an employee was terminated and after decades, he filed a representation, which was decided. After decision of the representation, he filed an O.A. in the Tribunal, which was entertained and order was passed. In the above context, in paragraph No.9, following has been held: (SCC pp.122-23)

> **"9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any "decision" on rights and obligations of parties. Little do they realise the consequences of such a direction to "consider". If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to "consider". If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."**

17. This Court again in the case of Union of India and Others Vs. M.K. Sarkar, (2010) 2 SCC 59 on belated representation laid down following, which is extracted below: (SCC p.66, para 15)

> **"15. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's**

direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

18. Again, this Court in State of Uttaranchal and another Vs. Shiv Charan Singh Bhandari and others, (2013) 12 SCC 179 had occasion to consider question of delay in challenging the promotion. The Court further held that representations relating to a stale claim or dead grievance does not give rise to a fresh cause of action. In paras 19 and 23 following was laid down:- (SCC pp.184-85)

"19. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.

23. In State of T.N. v. Seshachalam, (2007) 10 SCC 137, this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus: (SCC p. 145, para 16)

'16. ... filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant.' "

19. This Court referring to an earlier judgment in P.S. Sadasivaswamy Vs. State of Tamil Nadu, (1975) 1 SCC 152 noticed that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. In paras No. 26

and 28, following was laid down: (Shiv Charan Singh Bhandari Case, SCC pp. 185-86)

> **"26. Presently, sitting in a time machine, we may refer to a two-Judge Bench decision in P.S. Sadasivaswamy v. State of T.N., (1975) 1 SCC 152, wherein it has been laid down that: (SCC p. 154, para 2)**
>
> > **'2. ... A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.'**
>
> *** * ***
>
> **28. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court."**

20. On the proposition as noticed above, it is clear that the claim of the applicant for inclusion of her name in the panel, which was issued on 09.01.2001 and for the first time was raked up by her, by filing representation on 25.09.2007, i.e., after more than 06 and half years. The claim of inclusion in the panel had become stale by that time and filing of representation will not give any fresh cause of action. Thus, mere fact that

representation was replied by Railways on 27.12.2007, a stale claim shall not become a live claim. Both Tribunal and High Court did not advert to this important aspect of the matter. It is further to be noted from the material on record that after declaration of panel on 09.01.2001, there were further selection under 30% promotion by LDCE quota, in which the applicant participated. In selection held in 2005 she participated and was declared unsuccessful. With regard to her non-inclusion in panel in 2005 selection, she also filed O.A. No. 629 of 2006 before the Tribunal, which was dismissed. After participating in subsequent selections under 30% quota and being declared unsuccessful, by mere filing representation on 27.09.2007 with regard to selection made in 2001, the delay and laches shall not be wiped out."

12. The ratio decidendi of all the aforesaid judgments is that the subsequent rejection of representation will not furnish a cause of action or revive a dead issue or time barred dispute.

13. In view of the aforesaid discussion, we find no merit in this petition and accordingly the same is dismissed. Pending application, if any, also stands disposed of.

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

Between:-

SABRINA
AGED: 62 YEARS,
W/O SH. INDER SINGH,
R/O VILLAGE SALAH, PO SUNDERNAGAR,
TEHSIL SUNDERNAGAR, DISTT. MANDI, HP,
PHONE NO.98166-98476

.....PETITIONER

(BY MR. VARUN RANA, ADVOCATE)

AND

1. FINANCIAL COMMISSIONER (APPEALS)
HIMACHAL PRADESH, SHIMLA-2

2. DIVISIONAL COMMISSIONER,
MANDI DIVISION, MANDI,

DISTRICT MANDI (HP)

3. SUB-DIVISIONAL COLLECTOR,
SUNDER NAGAR, DISTT. MANDI, H.P.

4. PAWAN KUMAR S/O SH. SHER SINGH

5. CHAMPA DEVI W/O SH. VIDYA SAGAR,
BOTH R/O VILLAGE DHAR, PO DESEHRA,
TEHSIL BALH, DISTRICT MANDI, H.P.

……RESPONDENTS

(MR. ARVIND SHARMA, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER SINGH THAKUR & MR. GAURAV SHARMA, DEPUTY ADVOCATES GENERAL AND MR. RAM LAL THAKUR, ASSISTANT ADVOCATE GENERAL, FOR R-1 TO R-3,

MR. K.D. SOOD, SENIOR ADVOCATE WITH MR. HET RAM THAKUR, ADVOCATE, FOR R-4 AND R-5)

CIVIL WRIT PETITION
No.2256 of 2019
Decided on: 22.07.2022

Constitution of India, 1950- Article 226- **H.P. Land Revenue Act, 1954**- Section 14- Condoning the delay in filing the appeal- Held- By allowing the application for condonation of delay, in the given facts and circumstances no illegality or material irregularity can be said to have been caused to the petitioner- Petition dismissed. [Para 4(vi)]

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

O R D E R

The Financial Commissioner (Appeals), Himachal Pradesh, vide order dated 14.08.2018, dismissed Revision Petition No.193/2017 preferred by the petitioner and her husband-the proforma respondent herein. Proforma respondent-Inder Singh has not chosen to assail the order dated 14.08.2018 passed by the Financial Commissioner (Appeals), Himachal Pradesh. In the

instant writ petition, questioning the order dated 14.08.2018, preferred by his wife, the proforma respondent was served on 23.09.2019. Despite the service of notice upon him, he has not madeany appearance in these proceedings. This writ petition was admitted on 01.09.2020. Subsequently, proforma respondent's wife, i.e. present writ petitioner, has not taken any steps till date for effecting post-admission service of petition upon her husband-the proforma respondent. In these facts and circumstances, considering that interest of proforma respondent is common with that of the petitioner, the fact that he himself has not chosen to contest the impugned order and despite notice of the writ petition at pre-admission stage, has not appeared, the writ petition is taken up for hearing at this stage.

2. An application moved by respondents No.4 and 5 for condoningthe delay in filing the appeal under Section 14 of the Himachal Pradesh Land Revenue Act, 1954 was allowed by the Collector, Sub-Division Sundernagar, District Mandi vide order dated 16.07.2014. This order was affirmed in appeal by the Divisional Commissioner, Mandi Division on 17.08.2016. Revision Petition preferred by the petitioner and proforma respondent against this order was dismissed by the Financial Commissioner (Appeals), Himachal Pradesh on 14.08.2018. Aggrieved against condoning the delay in filing the appeal preferred by respondents No.4 and 5, the petitioner has come up in this writ petition under Article 226 of the Constitution of India.

3. Learned counsel for the petitioner contended that all the Revenue Courts below committed illegality and material irregularity in condoning the delay in institution of appeal by respondents No.4 and 5. That no explanation, much less cogent one, was offered by respondents No.4 and 5 for condoning the delay of more than 12 years in institution of the appeal. The application filed by respondents No.4 and 5 seeking condonation of delay was bereft of material particulars. Inviting attention to the judgment passed by the Hon'ble

Apex Court in *AIR 2022 SC 332 (CivilAppeal No.7696 of 2021*, titled *Majji Sannemma @ Sanyasirao Versus Reddy Sridevi & Ors.)*, it was contended that instant was a case of gross negligence and want of due diligence on the part of respondents No.4 and 5 in preferring the appeal, which was barred by more than 12 years. Hence, the delay ought not to have been condoned. Learned counsel also submitted that while condoning the delay, the Revenue Courts have also embarked upon the merits of the matter, which was impermissible. Learned counsel prayed for setting aside all the orders passed by the Revenue Courts.

Learned Senior Counsel appearing for respondents No.4 and 5 defended the orders passed by the Revenue Courts condoning the delay in filing the appeal. It was also submitted that the appeal on merits is yet to be argued before the learned Collector, Sub-Division Sundernagar, therefore, no prejudice, whatsoever, has been caused to the petitioner under the impugned orders.

4. Having heard learned counsel for the parties and on going through the material available on record, I am of the considered view that the present petition deserves to be dismissed. This is on account of following reasons:-

4(i). Petitioner-Sabrina and proforma respondent-Inder Singh are husband and wife. It is the case of the petitioner that respondents No.4 and 5, i.e. Pawan Kumar aged 24 years at that time and Champa Devi, executed a General Power of Attorney (in short 'GPA') in favour of the proforma respondent-Inder Singh on 01.09.2000, authorizing him to sell/mortgage/exchange/enter into any agreement with any party on their behalf with regard to their owned land comprised in Khewat No.87, Khatouni No.118, Khasra No.678/570/2, measuring 3-7-2 bighas, situated in Mohal Thala/35, Tehsil Sundernagar, District Mandi. Twenty days after the execution of GPA in favour of proforma respondent, his wife (present

petitioner) moved an application in the Court of Assistant Collector 1st Grade, Sundernagar for recording her possession on the aforesaid land. Notice of this application moved by the petitioner on 21.09.2000 was not sent to the land owners, i.e. respondents No.4 and 5. Rather, petitioner's husband (proforma respondent) appeared in the Court of the Assistant Collector 1st Grade, Sundernagar as GPA of respondents No.4 and 5. He acknowledged his wife's (petitioner) claim over the land. On that basis, the Assistant Collector 1st Grade, Sundernagar allowed the application moved by the petitioner on 30.09.2000.

4(ii). The order passed by the Assistant Collector 1st Grade, Sundernagar on 30.09.2000, allowing the application moved by the petitioner, was challenged by respondents No.4 and 5 by filing an appeal before the Collector, Sub-Division Sundernagar under Section 14 of the H.P. Land Revenue Act. This appeal was filed on 06.03.2013. Alongwith the appeal, an application under Section 5 of the Limitation Act was also moved, seeking condonation of delay of a little over 12 years, which had occurred in the institution of the appeal. The ground mentioned in the application was that the applicants (respondents No.4 and 5 herein) became aware of the order dated 30.09.2000 only on 06.02.2013, when they visited the Patwar Khana of the concerned Mohal, hence, their appeal was within limitation from the date of knowledge of the order.

4(iii). Learned Collector, Sub-Division Sundernagar, while allowing the application for condonation of delay in terms of his order dated 16.07.2014, returned a factual finding that no summons were ever served upon respondents No.4 and 5 on the application moved by the petitioner on 21.09.2000. That the summon was though issued in the name of respondent No.4, but it was never served upon him, rather, it was received by his GPA, i.e. Inder Singh, husband of the applicant (petitioner herein). This factual finding has been affirmed by the learned Divisional Commissioner, Mandi Division in

his order dated 17.08.2016. The Financial Commissioner (Appeals), Himachal Pradesh has also maintained this factual position in his order dated 14.08.2018 passed in Revision Petition No.193/2017.

4(iv). During hearing of the instant writ petition, learned counsel for the petitioner has not disputed the fact that service of summons on petitioner's application dated 21.09.2000 moved before the Assistant Collector 1st Grade, Sundernagar, was never effected upon respondents No.4 and 5. That respondents No.4 and 5 were never served in the proceedings initiated by the petitioner for recording her possession over the land of respondents No.4 and 5. It is the admitted case of the petitioner that the summons meant for respondents No.4 and 5 were actually received by petitioner's husband (Inder Singh) and that it was Inder Singh, who had appeared in the proceedings initiated by his wife (petitioner). Learned counsel for the petitioner submitted that respondents No.4 and 5 had been made aware of the order dated 30.09.2000 by the proforma respondent. It was also contended that it cannot be believed that respondents No.4 and 5 remained unaware about passing of the order dated 30.09.2000 for twelve years. It was also argued that the proforma respondent-Inder Singh was duly authorized to receive summons on behalf of respondents No.4 and 5 as he was their lawful GPA. Attention in this regard was invited to Section 21(1) of the H.P. Land Revenue Act, which reads as under:-

> *"(1) A summons issued by a Revenue Officer shall if practicable, be served (a) personally, on the person to whom it is addressed or failing him (b) his recognised agent."*

A perusal of the above extracted provision of Section 21 clearly reflects that in the first instance, service is to be attempted upon the person, who is directly involved in the litigation. It is only in the event that service cannot be effected upon him that the service is to be attempted upon his recognised agent. In the instant case, service of notice/summons of the

application was never attempted upon respondents No.4 and 5. In fact, memo of parties prepared by the petitioner in her application dated 21.09.2000 shows that respondents No.4 and 5 were sued by her through their GPA-Inder Singh (petitioner's husband). Perhaps, in view of defective memo of parties, summons were neither sent to nor were ever received by respondents No.4 and 5. Service of notice of the application moved by the petitioner, in these circumstances, upon her husband-Inder Singh as the GPA of respondents No.4 and 5, cannot be deemed to be valid service upon respondents No.4 and 5. It cannot be presumed that respondents No.4 and 5 were aware of order dated 30.09.2000.

4(v). As already observed earlier, the petitioner and proforma respondent are wife and husband. On 21.09.2000, the petitioner moved an application for correction in the revenue entries for recording her possession over the land owned by respondents No.4 and 5. Nine days later, i.e. on 30.09.2000, her application was allowed by the Assistant Collector 1st Grade, Sundernagar. The land recorded in the ownership and possession of respondents No.4 and 5, in terms of this order, was ordered to be recorded in the possession of the petitioner.

4(vi). In the application moved for condoning the delay in filing the appeal against order dated 30.09.2000 passed by the Assistant Collector 1st Grade, Sundernagar, respondents No.4 and 5 had averred that they were not aware about the passing of order dated 30.09.2000 by the Assistant Collector 1st Grade, Sundernagar prior to 06.02.2013. Reply filed by the petitioner and proforma respondent to this application does not dispute this fact. In substance, the defence taken in the reply is that service of application upon the GPA of respondents No.4 and 5 in respect of the subject matter in dispute, is as good as service upon respondents No.4 and 5. As already observed, this contention reiterated by learned counsel for the petitioner cannot be accepted. Respondents No.4 and 5 were liable to be served in the first instance and it is

only in the event of failure to serve them with the notice that service by other modes including service upon their GPA should have been resorted to. Present is not a case, where there is lack of diligence on part of respondents No.4 and 5 in preferring the appeal against order dated 30.09.2000. There is also no question of holding respondents No.4 and 5 guilty of any negligence when the record demonstrates that they were neither served with nor were they aware of pendency of the application moved by the petitioner. It has also been mentioned in the reply filed to Section 5 application that respondents No.4 and 5 had been made aware of the order dated 30.09.2000. In the facts of the case, as discussed earlier, respondents No.4 and 5 cannot be said to be aware of order dated 30.09.2000. Therefore, the concurrent orders passed by the three Revenue Courts below, condoning the delay in filing the appeal by respondents No.4 and 5, are just, proper and in consonance with the facts and applicable legal position. Under the impugned orders concurrently passed by the Collector, Sub-Division Sundernagar on 16.07.2014, by the Divisional Commissioner, Mandi Division on 17.08.2016 and by the Financial Commissioner (Appeals), Himachal Pradesh on 14.08.2018, it is only the application for condonation of delay, which has been allowed. The matter on merits is still to be adjudicated upon by the Collector, Sub-Division Sundernagar. By allowing the application for condonation of delay, in the given facts and circumstances, no illegality or material irregularity can be said to have been caused to the petitioner or to the proforma respondent. No prejudice has been caused to them by condoning the delay, in the interest of justice, in moving the appeal by respondents No.4 and 5.

In view of the above, there is no merit in the instant writ petition and the same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

It is clarified that the observations made in the impugned orders as well as in this order shall remain confined only to theadjudication of the

application for condonation of the delay and will have no effect on the merits of the matter. Learned Collector, Sub-Division Sundernagar, shall decide the appeal on its own merits as expeditiously as possible, preferably within six months. Parties, through their learned counsel, are directed to appear before the learned Collector, Sub-Division Sundernagar, District Mandi on **16.08.2022**.

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

Between:-
NARESH KUMAR, S/O LATE
SHRI CHANDO RAM, RESIDENT OF
VILLAGE FAKET LAHAR, P.O. CHHUGHERA,
TEHSIL NAGROTA BAGWAN, DISTRICT
KANGRA, H.P.

……PETITIONER.

(BY SH. AJAY SHARMA, SENIOR ADVOCATE
WITH SH. ATHARV SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY
(PUBLIC WORKS) TO THE GOVERNMENT
OF HIMACHAL PRADESH, SHIMLA-171002.

2. THE ENGINEER-IN-CHIEF, H.P. PUBLIC WORKS
DEPARTMENT, NIRMAN BHAWAN, NIGAM VIHAR,
SHIMLA-171002.

3. THE EXECUTIVE ENGINEER, HPPWD DIVISION,
TANDA AT NAGROTA BAGWAN, TEHSIL NAGROTA
BAGWAN, DISTRICT KANGRA, H.P.

4. THE ASSISTANT ENGINEER, HPPWD SUB-DIVISION,
BAROH, TEHSIL NAGROTA BAGWAN, DISTRICT

KANGRA, H.P.

.....RESPONDENTS.

(SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL WITH SH. RAJAT CHAUHAN, LAW OFFICER)

CIVIL WRIT PETITION
No.2079 of 2021
Decided on: 15.07.2022

Constitution of India, 1950- Article 226- Employment on compassionate grounds- Held- it is well settled principle of law that there is no right to compassionate appointment- Case of the petitioner rejected on the basis of income criteria- Petition dismissed. (Para 12, 14)

Cases referred:

Indian Bank and others vs. Promila and another (2020) 2 SCC 729;
State of Himachal Pradesh and another vs. Shashi Kumar (2019) 3 SCC 653;
State of Madhya Pradesh and others vs. AMIT SHRIVAS (2020) 10 SCC 496;
State of Uttar Pradesh and others vs. Prem Lata (2022) 1 SCC 30;
Umesh Kumar Nagpal vs. State of Haryana (1994) 4 SCC 138;

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

O R D E R

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

> "That impugned letter dated 27.08.2019, Annexure P-3, may very kindly be quashed and set aside with directions to the respondents to provide employment to the petitioner on compassionate grounds forthwith without any further delay."

2. Father of the petitioner Shri Chando Ram was working as mason on regular basis in the respondent-department and unfortunately died on 10.01.2018. Thereafter, the petitioner being son of the deceased-Chando

Ram applied for employment on compassionate grounds in place of his father vide application dated 30.01.2019.

3. The case of the petitioner was considered by respondent No.3 and it was found that he does not come under the income criteria fixed by the Finance Department for providing job on compassionate grounds.

4. The Finance Department had fixed maximum limit of Rs.2,25,000/- per annum with an individual income of Rs.56,250/- per annum, whereas, the income of the family of the deceased government employee at the relevant time was Rs.2,66,408/- including monthly pension and other source i.e. agriculture land etc.

5. The income was considered by the respondents on the basis of a certificate submitted by the petitioner himself that had been issued by the Executive Magistrate, Nagrota Bagwan, on 20.04.2019. Since, the petitioner did not fall within the criteria to determine indigency as prescribed by the Government, his case was accordingly rejected compelling the petitioner to file the instant petition.

6. It is vehemently argued by Shri Ajay Sharma, Senior Advocate assisted by Shri Atharv Sharma, Advocate, for the petitioner that the impugned letter dated 27.08.2019 (Annexure P-3), whereby the case of the petitioner for grant of employment on compassionate grounds has been rejected, is highly illegal, arbitrary, harsh, oppressive and unconstitutional. It is further argued that the case of the petitioner could not have been rejected solely on the basis of the income criteria prevalent at the relevant time without taking into consideration that the income criteria is presuming a family of four persons and if applied to the family of six persons, then, rejection of the case of the petitioner again is bad in law. In a welfare State like ours, technicalities cannot be allowed to be pitched to non-suit otherwise an eligible person.

7. On the other hand, it is argued by the learned Senior Additional Advocate General that the case of the petitioner for employment on compassionate grounds has to be seen as per the scheme and criteria applicable on the date of application and since the petitioner did not fall under the said criteria, therefore, his case was rightly rejected by the respondents.

8. In order to appreciate the controversy in question, one needs to understand the principles governing the grant of appointment on compassionate grounds.

9. This issue has been considered in detail in a recent judgment of the Hon'ble Supreme Court in ***State of Uttar Pradesh and others*** *vs.* ***Prem Lata (2022) 1 SCC 30***, wherein it was observed as under:-

> "8. While considering the issue involved in the present appeal, the law laid down by this court on compassionate ground on the death of the deceased employee are required to be referred to and considered. In the recent decision this court in Karnataka & Anr. vs. V. Somashree (2021) 12 SCC 20, had occasion to consider the principle governing the grant of appointment on compassionate ground. After referring to the decision of this court in N.C. Santhosh vs. State of Karnataka and Ors. reported in (2020) 7 SCC 617, this Court has summarized the principle governing the grant of appointment on compassionate ground as under:(V. Somyashree case[4], SCC para 10)
>
> > "10.1. That the compassionate appointment is an exception to the general rule;
> >
> > 10.2. That no aspirant has a right to compassionate appointment;
> >
> > 10.3. The appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;
> >
> > 10.4. Appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy

and/or satisfaction of the eligibility criteria as per the policy;

10.5. The norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment."

9. As per the law laid down by this court in catena of decisions on the appointment on compassionate ground, for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

9.1 In the case of State of Himachal Pradesh and Anr. vs. Shashi Kumar reported in (2019) 3 SCC 653, this court had an occasion to consider the object and purpose of appointment on compassionate ground and considered decision of this court in case of Govind Prakash Verma vs. LIC reported in (2005) 10 SCC 289, it is observed and held as under: (Shashi Kumar Case[6], SCC pp. 665-68, paras 21 and 26)

"21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] . The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 139 40, para 2)

'2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of

appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which

> are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned.
> * * *
> "26. The judgment of a Bench of two Judges in Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 : (2008) 2 SCC (L&S) 1077] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."

10. Apart from the above, the Hon'ble Supreme Court has in a series of judgments held that the case for employment on compassionate grounds must be considered on the basis of the relevant scheme prevalent at the time of employment and subsequent schemes cannot be looked into.

11. Reference can conveniently made to the judgment of the Hon'ble Supreme Court in ***Indian Bank and others*** *vs.* ***Promila and another (2020) 2 SCC 729*** and to the recent judgment of the Hon'ble Supreme Court in ***State of Madhya Pradesh and others*** *vs.* ***AMIT SHRIVAS (2020) 10 SCC 496.***

12. Now as regards the contention of the petitioner that the impugned letter is highly illegal, arbitrary, harsh, oppressive and unconstitutional, it needs to be noticed that the case of the petitioner has been examined and thereafter rejected on the basis of the income criteria as

prevalent at the relevant time. Therefore, no exception to the rejection of the case of the petitioner can be taken by the petitioner.

13. As regards the fixing of the income criteria, such criterias have already been upheld by the Hon'ble Supreme Court from time to time and as regards the State of Himachal Pradesh, the issue is otherwise no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***State of Himachal Pradesh and another*** *vs.* ***Shashi Kumar (2019) 3 SCC 653*** wherein it was clearly held that fixing income slab in the policy for compassionate appointment subserves purpose of bringing objectivity and uniformity in the decision making process.

14. Adverting to the last contention of the petitioner regarding the policy being irrational, I really do not find any illegality in the same as it is more than settled that compassionate appointment is an exception to the general rule that appointment to any public post in the service of the State has to be made on the basis of the principles which accord with Articles 14 and 16 of the Constitution. Dependents of the deceased-employee of the State are made eligible by virtue of the policy on compassionate appointment. The basis of the policy is that it recognizes that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. The terms on which such application would be considered are subject to the policy which may be framed by the State. In that sense, it is well settled principle of law that there is no right to compassionate appointment.

15. In coming to such conclusion, I am duly fortified by these observations of the Hon'ble Supreme Court in ***Umesh Kumar Nagpal*** *vs.* ***State of Haryana (1994) 4 SCC 138*** and thereafter reiterated in ***Shashi Kumar's case*** (supra).

16. In view of the aforesaid discussion and for the reasons stated above, I do not find any merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

Between:-

SMT. URMIL W/O SH. VINOD KUMAR,
R/O VILLAGE SHANAI,
POST OFFICE, KOTLA BANGI,
TEHSIL PAJHOTA, TEHSIL RAJGARH,
DISTRICT SIRMAUR, H.P.

.....PETITIONER

(BY MR. CHANDER SHEKHAR THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
   THROUGH ITS PRINCIPAL SECRETARY
   (EDUCATION), TO THE GOVT. OF
   HIMACHAL PRADESH.

2. DIRECTOR ELEMENTARY EDUCATION,
   HIMACHAL PRADESH, LALPANI,
   SHIMLA, H.P.

3. DEPUTY DIRECTOR ELEMENTARY EDUCATION,
   SIRMAUR AT NAHAN, HIMACHAL PRADESH.

4. BLOCK ELEMENTARY EDUCATION OFFICER,
   RAJGARH, DISTRICT SIRMAUR, H.P.

5. SUB DIVISIONAL OFFICE (CIVIL) RAJGARH,
   DISTRICT SIRMAUR, H.P.

...RESPONDENTS

(BY MR. VIKRANT CHANDEL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 4440 OF 2022
Decided on: 06.07.2022

Constitution of India, 1950- Article 226- **Part Time Multi Task Worker Policy, 2020**- Appointment of Part Time Multi Task Worker in Government Schools of H.P.- As per policy, 8 marks are allocated for candidates whose families have donated land for school- Term 'Family' has been challenged being contrary to the spirit of parent policy- Held- The "family" as defined in the Policy cannot be said to be bad in law merely because it is different than the definition of "family" in the Himachal Pradesh Panchayati Raj Act- Petition dismissed. (Para 12)

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

ORDER

Heard.

2. By way of instant petition, petitioner has prayed for the grant of following reliefs:

> *(i) To award marks of land donation to the petitioner strictly as per Clause 7 of the Annexure P-1 as the Annexure P-7 has been issued seventeen days after the last of submission of the application form that too without any prior information.*
>
> *(ii) To quash and set-aside Annexure P-7, as it has been issued seventeen days after the last of submission of the application form with required documents whereas Annexure P-7 provides for more documents which can be submitted only if the date of submission of the application form is extended as averred by the petitioner regarding submission of certificate of a person living in extreme indigent conditions.*
>
> *(iii) To award three marks to the petitioner being member of BPL family separately in addition to three marks being member of OBC category."*

3. The case of petitioner is that the Government of Himachal Pradesh has framed and notified a policy "Part Time Multi Task Worker Policy, 2020 (for short "Policy") for the appointment of Part Time Multi Task Workers in the Government schools of Himachal Pradesh under Higher & Elementary Education Department. As per Clause 7 (iv) of the Policy, 8 marks are allocated for candidates whose families have donated land for school.

4. The petitioner applied for the post of Part Time Multi Task Worker lying vacant in Government Primary School, Kotla Bangi, Education Block, Rajgarh, District Sirmaur, H.P.

5. The grievance of the petitioner is that her grand father-in-law had donated land for Government Primary School, Kotla Bangi and she is a member of his family. She has been denied 8 marks under Clause 7 (iv) of the Policy and the action of respondents in that regard is arbitrary and illegal.

6. Sh. Chander Shekhar Thakur, learned counsel for the petitioner, has contended that the clarification issued by respondent No.2 on 24.05.2022 restricting the scope of members of family to "Land Donor or His/Her Spouse and their Children" under Clause 7 (iv) of the Policy, is bad in law. The action of respondents has been assailed to be bad in law as the meaning assigned to term members of the "family" in the Policy is in total contradiction with the definition of "family" provided under the Himachal Pradesh Panchayati Raj Act.

7. The nature of employment contemplated under the Policy is part time, that too, on contractual basis under the School Management Committees. The Part Time Multi Task Worker is entitled to consolidated honorarium of Rs.5625/- per month for ten months in an academic year. It has specifically been provided in Clause 16 of the Policy that the persons appointed as Part Time Multi Task Worker under the Scheme, will have no right/claim for regularization/ absorption/appointment as regular Class-IV employees of the State Government. In these circumstances, the post of Part

Time Multi Task Worker cannot be said to be a civil post. The Policy cannot be said to have any semblance of rules that can be framed under proviso to Article 309 of the Constitution of India. The Policy is an administrative measure of temporary nature. Therefore, the clarification dated 24.05.2022 issued by respondent No.2 cannot be said to be bad in law especially when the State Government has acted upon it.

8. Clause 7 (iv) of the Policy only provided for grant of 8 marks to those candidates whose families have donated land for school. The term "families" as noticed above, had been used in general term. No details were provided as to who would be included in term "families". In view of this, the clarification dated 24.05.2022, is only clarificatory in nature.

9. The Policy to appoint the Part Time Multi Task Worker has no relation to the provisions of the Himachal Pradesh Panchayati Raj Act. The Policy has not been framed keeping in view the aims and objectives of the said Act. Thus, the contention raised on behalf of petitioner that clarification dated 24.5.2022 violates against definition of "family" under the Himachal Pradesh Panchayati Raj Act, is wholly misconceived.

10. Section 2 (13-B) of the Himachal Pradesh Panchayati Raj Act, reads as under:

> "2(13-B)*"family" means a joint family of all persons descended from common ancestor including adoption, who live, worship and mess together permanently as shown in the parivar register of the Gram Panchayat."*

11. The purpose of defining "family" in aforesaid manner in the Himachal Pradesh Panchayati Raj Act is to achieve the objectives of the said Act. Whereas, the Policy has altogether different objectives viz.:

a) *To provide Part Time Multi Task Worker in all the schools in Himachal Pradesh through creation of new posts.*

b) *To encourage decentralization of powers by empowering the SMCs in the effective running of Govt. Schools.*

c) To provide an opportunity for the eligible unemployed candidates to earn honorarium at local level."

12. Thus, the "family" as defined in the Policy cannot be said to be bad in law merely because it is different than the definition of "family" in the Himachal Pradesh Panchayati Raj Act.

13. In view of above discussion, the petitioner has failed to make out any case for interference by this Court in exercise of jurisdiction under Article 226 of the Constitution of India.

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

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

Between:-

SMT. KHIMI DEVI W/O SH. SARV DAYAL,
AGED 32 YEARS, R/O VILLAGE BHADEULI,
POST OFFICE SACHANI, TEHSIL BHUNTER,
DISTRICT KULLU, HIMACHAL PRADESH.

……PETITIONER

(BY MR. ONKAR JAIRATH, ADVOCATE)

AND

2. STATE OF HIMACHAL PRADESH
THROUGH ITS SECRETARY
(EDUCATION), TO THE GOVT. OF
H.P. SHIMLA.

2. THE DIRECTOR OF ELEMENTARY EDUCATION,
LALPANI, SHIMLA, HIMACHAL PRADESH.

3. THE SUB DIVISIONAL OFFICER (CIVIL)
BHUNTER, DISTRICT KULLU, H.P.-CUM-
CHAIRMAN, PART TIME MULTI TASK

WORKER SELECTION COMMITTEE.

4. SMT. LEELA DEVI, W/O LATE SH. SHIBU RAM, R/O VILLAGE BHADEULI, POST OFFICE SACHANI, TEHSIL BHUNTER, DISTRICT KULLU, HIMACHAL PRADESH.

...RESPONDENTS

(BY MR. ASHWANI K. SHARMA, ADDITIONAL ADVOCATE GENERAL, FOR R-1 TO R-3).

CIVIL WRIT PETITION
No. 4197 OF 2022
Decided on:30.06.2022

Constitution of India, 1950- Article 226- **Part Time Multi Task Worker Policy, 2020**- Appointment of Part Time Multi Task Worker in Government Schools of H.P.- As per policy, 8 marks are allocated for candidates whose families have donated land for school- Term 'Family' has been challenged being contrary to the spirit of parent policy- Held- The "family" as defined in the Policy cannot be said to be bad in law merely because it is different than the definition of "family" in the Himachal Pradesh Panchayati Raj Act- Petition dismissed. (Para 12)

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

ORDER

Heard.

2. By way of instant petition, petitioner has prayed for the grant of following reliefs:

> *(A) That a writ in the nature of Certiorari or any other appropriate writ, order or direction may kindly be issued quashing and setting aside the impugned clarification dated 24.05.2022*

contained in Annexure P-2, whereby, the term "family" has been defined contrary to the spirit of the parent policy.

(B) That a writ in the nature of Mandamus or any other appropriate, writ, order or direction may kindly be issued directing the respondents to award 8 marks to the petitioner under the parameter, "Candidates whose families have donated land for school" and consequently select and appoint the petitioner as Part Time Multi Task Worker.

(C) That a writ in the nature of Certiorari or any other appropriate writ, order or direction may kindly be issued and setting aside the appointment of the private respondent on the post of Part Time Multi Task Worker."

3. The case of petitioner is that the Government of Himachal Pradesh has framed and notified a policy "Part Time Multi Task Worker Policy, 2020 (for short "Policy") for the appointment of Part Time Multi Task Workers in the Government schools of Himachal Pradesh under Higher & Elementary Education Department. As per Clause 7 (iv) of the Policy, 8 marks are allocated for candidates whose families have donated land for school.

4. The petitioner applied for the post of Part Time Multi Task Worker in response to public notice dated 25.04.2022, inviting applications from eligible candidates for the post of Part Time Multi Task Worker lying vacant in Government Primary School, Bhadeuli, District Kullu, H.P. Petitioner was called for personal interview and physical verification of documents and she accordingly appeared for the said purpose before the Sub Divisional Magistrate on 23.06.2022. However, petitioner remained unsuccessful and respondent No.4 was selected.

5. The grievance of the petitioner is that rejection of her candidature is arbitrary and illegal. The father-in-law of petitioner was a donor of land for the school and she was entitled for 8 marks being member of the family of her father-in-law.

6. Sh. Onkar Jairath, learned counsel for the petitioner, at the very outset contended that the clarification issued by respondent No.2 on 24.05.2022 whereby the term "family" for the purposes of Clause 7 (iv) of the Policy has been restricted to mean only "Land Donor or His/Her Spouse and their Children" is bad in law inasmuch as the same amounts to overriding the provision of a Policy framed under the provisions of Constitution of India. Such contention on behalf of petitioner is not sustainable on the basis of material on record. The notification, Annexure P-1, notifying the Policy does not specify as to under which provision of law the Policy has been framed. The nature of employment contemplated under the Policy is part time, that too, on contractual basis under the School Management Committees. The Part Time Multi Task Worker is entitled to consolidated honorarium of Rs.5625/- per month for ten months in an academic year. It has specifically been provided in Clause 16 of the Policy that the persons appointed as Part Time Multi Task Worker under the Scheme, will have no right, claim for regularization/ absorption/appointment as regular Class-IV employees of the State Government. In these circumstances, the post of Part Time Multi Task Worker cannot be said to be a civil post. Thus, the Policy cannot be said to have any semblance of rules that can be framed under proviso to Article 309 of the Constitution of India. The Policy is thus an administrative measure of temporary nature. Therefore, the clarification dated 24.05.2022 issued by respondent No.2 cannot be said to be bad in law especially when the State Government has acted upon it.

7. Clause 7 (iv) of the Policy only provided for grant of 8 marks to those candidates whose families have donated land for school. The term "families" as noticed above, had been used in general term. No details were provided as to who would be included in term "families". In view of this, the clarification dated 24.05.2022, is only clarificatory in nature.

8. Learned counsel for the petitioner further contended that the petitioner as per Family Register maintained under the Himachal Pradesh Panchayati Raj Act, is member of the family, which had donated land for the school. Reliance has been placed on Annexure P-5. The clarification dated 24.05.2022 in respect of Clause 7 (iv) of the Policy has been alleged to be bad in law being in violation of the definition of "family" provided in Section 2 (13-B) of the Himachal Pradesh Panchayati Raj Act, 1994.

9. The Policy to appoint the Part Time Multi Task Worker has no relation to the provisions of the Himachal Pradesh Panchayati Raj Act. The Policy has not been framed keeping in view the aims and objectives of the said Act. Thus, the contention raised on behalf of petitioner that clarification dated 24.5.2022 violates against definition of "family" under the Himachal Pradesh Panchayati Raj Act, is wholly misconceived.

10. Section 2 (13-B) of the Himachal Pradesh Panchayati Raj Act reads as under:

> "2(13-B)*"family" means a joint family of all persons descended from common ancestor including adoption, who live, worship and mess together permanently as shown in the parivar register of the Gram Panchayat."*

11. The purpose of defining "family" in aforesaid manner in the Himachal Pradesh Panchayati Raj Act is to achieve the objectives of the said Act. Whereas, the Policy has altogether different objectives viz.:

a) *To provide Part Time Multi Task Worker in all the schools in Himachal Pradesh through creation of new posts.*
b) *To encourage decentralization of powers by empowering the SMCs in the effective running of Govt. Schools.*
c) *To provide an opportunity for the eligible unemployed candidates to earn honorarium at local level."*

12. Thus, the "family" as defined in the Policy cannot be said to be bad in law merely because it is different than the definition of "family" in the Himachal Pradesh Panchayati Raj Act.

13. In view of above discussion, the petitioner has failed to make out any case for interference by this Court in exercise of jurisdiction under Article 226 of the Constitution of India.

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

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

Between:-

1. SHASHI KANT, S/O SH. J. D. SHARMA, R/O PANDIT BHAWAN NEAR B P PETROL PUMP GHUMARWIN DISTT. BILASPUR (H.P.

2. RAVINDER KUMAR SHARMA, S/O SH. DES RAJ SHARMA, R/O V&PO CHALALI TEH. DEHRA DISTT. KANGRA, (H.P.).

3. CHUNI LAL S/O SH. GOVIN RAM, R/O VILL. SILH PO LUHARWIN TEHSIL GHUMARWIN DISTT. BILASPUR (H.P.).

4. RAJESH SHARMA S/O SH. RAM DASS R/O MOHALLA PORIAN V&PO SUJANPUR TIRA DISTT. HAMIRPUR (H.P.).

....PETITIONERS

(BY SH. B. C. NEGI, SR. ADVOCATE WITH MS. SHALINI THAKUR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS ADDITIONAL CHIEF SECRETARY (PUBLIC WORKS DEPARTMENT) TO THE GOVERNMENT OF HIMACHAL PRADESH.
2. PANNA RAM NEGI S/O SH. GIALBO RAM.

3. SURESH KUMAR DHIMAN S/O SH. GURDAS RAM.

4. PROMOD KUMAR KASHYAP S/O SH. BHAGAT RAM KASHYAP.

5. PRITHI PAL SINGH S/O SH. RATNA SINGH.

6. MAN SINGH S/O SH. SHANKAR DASS.

7. ASHOK KUMAR SHARMA S/O SH. DIWAN CHAND.

8. VIJAY KUMAR VERMA S/O SH. HIMAL CHAND.

9. BALBIR SINGH S/O SH. BELI RAM.

10. RAJESH KUMAR KATOCH S/O SH. BANK CHAND.

11. RAJINDER SHEKHRI S/O SH. KEWAL KRISHAN SEKHRI.

12. DEVI RAM S/O SH. PENU RAM.

13. K.K. SHARMA, S/O SH. GIAN CHAND SHARMA.

14. AJAY SONI S/O SH. HEM RAJ SONI.

(RESPONDENTS NO. 2 TO 14 ALL ARE WORKING UNDER RESPONDENT NO.1 BE SERVED THROUGH RESPONDENT NO.1)

....RESPONDENTS

(SH. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL FOR R-1)

(SH. DILIP SHARMA, SR. ADVOCATE WITH MR. MANISH SHARMA AND SH. DEEPAK SHARMA, ADVOCATES FOR R-4, 7 TO 9 AND 11 TO 14).

CIVIL WRIT PETITION
No. 3773 of 2021
Reserved on:15.07.2022
Decided on: 22.07.2022

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules- Promotion to the post of Assistant Engineer- Petitioner challenged the seniority list- Promotional quota- Petitioner sought to quash the order dated 26.04.201 vide which their representation was rejected- Held- All such persons are on equal footing as they were inducted as diploma holder Junior

Engineers, thereafter all of them acquired higher qualification during service *albeit* on different dates and on completion of three years after acquisition of such qualification became eligible for promotion to the post of Assistant Engineer and aforesaid 10% quota- So all such persons, who had acquired higher qualification during service and also had completed three years' service as such will fall in zone of consideration for promotion, however, their earlier service as diploma holder, where they held their own seniority, cannot be washed away- Petition allowed- Order dated 26.04.2021 and seniority list are quashed- Directions to prepare fresh seniority list. (Para 21 to 25)

Cases referred:

Mohinder Singh vs. Chief Election Commissioner, AIR 1978 SC 851;
Shailendra Dania & others vs. S.P. Dubey& others 2007 (5) SCC 535;

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

O R D E R

By way of instant petition, petitioners have prayed for following substantive reliefs:

"*i) For quashing and setting aside Annexure P-13 rejecting representation of the petitioner.*

ii) for holding that review DPCs held by the respondents in respect of promotion of petitioners/private respondent JE (AMIE) to the post of Assistant Engineers (PWD) as well as the resultant re-drawn seniority list of AE vide Annexure P-7 dated 1.3.2014 and vide Annexure P-8 dated 1.3.2016 qua the petitioners and private respondents are illegal and may kindly be quashed and set aside. Consequently, all actions taken on the basis of these lists w.r.t. petitioners and private respondents be also declared illegal and void.

iii) for directing the respondents not to apply the judgment of SS Kutlehria for counting seniority."

2. The background facts of the present matter in brief are that prior to 27.4.1994, HPPWD was a unified unit as a department, which came to be bifurcated after said date into two separate units i.e. PWD (B&R) and I&PH.

3. The petitioners and private respondents No. 2 to 14 were inducted as Diploma Holder Junior Engineers in the unified HPPWD before its bifurcation. Recruitment & Promotion Rules for the post of Assistant Engineer in unified HPPWD were notified on 18.9.1978 (for short, '1978 Rules'). As per these rules, 40% quota was meant for direct recruitment and 60% by promotion. Out of 60% promotional quota, 10% was meant for the Graduate Junior Engineers, having three years regular or *ad-hoc* service or both as such and those Junior Engineers, who had passed Sections A and B of AMIE with five years regular or *ad-hoc* service or both as such.

4. The R&P Rules for the post of Assistant Engineer in HPPWD were amended on 11.6.1984 (for short, '1984 Rules') and in place of 10% quota by way of promotion for Graduate Engineers and AMIE, as noticed above, the following amendment was carried:-

> *"(iii) from amongst the Graduate Junior Engineers (University graduate or AMIE) having three years regular or ad-hoc service rendered upto 31.12.1983 or both as such..... 10%.*
> *Note:- For purposes of promotion, three years regular or ad-hoc service rendered upto 31.12.1983 shall be counted from the date of appointment of the Graduate Junior Engineers and from the date of passing Sections A & B of AMIE Examination by in service Junior Engineers respectively".*

5. The note appended to above said amendment became subject matter of challenge before the erstwhile H.P. State Administrative Tribunal and vide order dated 7.6.1991, the challenged *footnote* in 1984 Rules was struck down being discriminatory and anomalous.

6. After bifurcation of HPPWD, Recruitment & Promotion Rules for the post of Assistant Engineers (Civil) in PWD (B&R) were re-enacted in 1995

(for short, '1995 Rules'). Under these rules, a separate quota of 10% was provided for Graduate Engineers with three years of service and a distinct quota of 10% was prescribed by promotion from amongst JE (C), who acquired AMIE or its equivalent degree during service as JE (C), having three years regular or regular combined with continuous *ad-hoc* (rendered upto 31.3.199) service in the grade. 1995 rules in PWD (B&R) were subsequently amended from time to time in 2002, 2004, 2005 and 2010 but no change was effected so far as 10% quota for JE (C), who acquires AMIE or equivalent degree during service, was affected. Noticeably, a separate 45% quota was also prescribed for Diploma Holder Junior Engineers, who had rendered seven years regular or *ad-hoc* or both the services as such. A separate quota was also there for direct recruitment.

7. An *inter-se* dispute between Graduate Junior Engineers and those who had acquired AMIE or equivalent degree in service became the subject matter of ***CWP No. 1358 of 2008***, titled as, ***S. S. Kutlehria & others vs. State of H.P. & others***. The dispute had arisen in the context of the provisions of 1984 Rules, as existed prior to bifurcation of HPPWD. The issue considered by a Division Bench of this Court was whether three years service required for Junior Engineers who had acquired AMIE in service, would be reckoned from the date of acquisition of AMIE or initial date of their induction as JEs? *Vide* judgment dated 8.1.2010, the Division Bench held as under:-

> *"Coming to the merits of the case, we find that the Rule in this case is akin to the Rules in* ***Shailender Dania's*** *case. The Rules provide two categories from which promotions can be made i.e. Graduate Junior Engineers as well as Diploma Holder Junior Engineers who have obtained the degree of graduation i.e. AMIE during service. The Rules provide an equal experience of 3 years in both cases. This case is therefore squarely covered by the judgment of the Apex Court in* ***Shailendra Dania's*** *case and only the service rendered by the Diploma Holder Engineers after having*

passed both parts of AMIE can be taken into consideration for reckoning 3 years' experience".

8. Based on the verdict of aforesaid judgment in ***S.S. Kutlehria***, the seniority lists of Assistant Engineers were revisited, as a result thereof, petitioners were placed lower to private respondents No. 2 to 14 in revised seniority lists on the basis that respondents No. 2 to 14 had acquired AMIE/BE prior in time to the petitioners and hence by reckoning such date of acquisition of higher qualification as bar date, petitioners who had acquired qualification AMIE/BE on date later than private respondents were placed lower in seniority.

9. Petitioners took exception to such action of respondent No.1 and made representation. On rejection of their representation, petitioners approached this Court by way of CWPOA No. 2820 of 2020, which came to be decided by this Court by directing respondent No.1 to consider the representation of the petitioners. In pursuance to aforesaid judgment, petitioners preferred their representation but the same was rejected on 15.12.2020. This rejection order was again challenged in CWP No. 1958 of 2021. During pendency of CWP No. 1958 of 2021, a decision was taken by respondent No.1 to withdraw the rejection order dated 15.12.2020. Respondent No.1 was again issued directions by this Court to decide the representation of the petitioners afresh. Petitioners again preferred representation but the fate was not different. The representation of petitioners was rejected on 26.4.2021 by respondent No.1. By way of instant petition, the petitioners have laid challenge to the rejection order dated 26.4.2021 (Annexure P-13), besides seeking other reliefs.

10. The challenge made to Annexure P-13 by the petitioners primarily is on the ground that their representation has been rejected only on the ground that a Division Bench of this Court in ***S.S. Kutlehria (supra)*** had held that the eligibility of Junior Engineers who had acquired AMIE during

service could be reckoned from the date they acquired AMIE and thus the requisite three years would commence from such date. The grievance of the petitioners is that the ratio of ***S.S. Kutlehria*** has been wrongly applied against the petitioners, whereas, the case of the petitioners rested on entirely different facts than considered in ***S. S. Kutlehria***. The contention of the petitioners is that ***S.S. Kutlehria*** had considered the case of the parties therein in light of the R&P rules existing prior to bifurcation of HPPWD, whereas, the case of petitioners had completely different dimensions in view of 1995 rules framed by PWD (B&R), whereby a separate quota of 10% was created for Graduate Junior Engineers and a total distinct quota of 10% was created for JEs, who had acquired AMIE during service. It has further been contended that in ***S. S. Kutlehria*** the matter considered was of two different categories i.e. Graduate Junior Engineers and Junior Engineers having acquired AMIE during service falling in the same quota for promotion and the case of petitioners was clearly distinguishable as by virtue of 1995 Rules, a separate quota of 10% each was created for both the categories. Thus, according to petitioners they and respondents 2 to 12 formed a separate class as per post 1995 rules and the dispute now sought to be adjudicated is in respect of their *inter-se* seniority.

11. In response, the official respondent as well as private respondents, though have filed their separate replies but the submissions made by them are substantially identical. Their case is that ***S. S. Kutlehria*** squarely covers the case in hand. The foundation for respondents to take such defence is that the facts of present case cannot be distinguished from ***S. S. Kutlehria*** because still there is overlapping between two separate categories i.e. the Diploma Holder Junior Engineers who became eligible for promotion after seven years' service under a separate 45% prescribed quota for such category and the Diploma Holder Junior Engineers who acquired AMIE during service and thereby became eligible for promotion after three

years of such acquisition. As per respondents, in case the claim of petitioners is accepted, anomalous position shall be created as an example private respondents have tried to exemplify such perceived anomalous situation as under: -

> *"D) That this plea of the petitioners is fallacious and against the Division Bench judgment of this Hon'ble Court in SS Kutlehria. It is submitted that whether a Junior Engineer joined service on the basis of diploma or degree, does not materially affect the ratio of the judgment.*
>
> *For example, there may be a Junior Engineer joining on the basis of degree in the year 1990, another joining as diploma holder in 1989 and acquiring higher qualification in 1991 and still another JE joining service in 1988 and acquiring higher qualification in 1992. The diploma holder, for staking his claim for promotion against the quota prescribed for diploma holder Junior Engineers, will have to wait for 7 years from the date of his joining service with diploma. Thus, the second JE (supra) would become eligible in 1996 and the third JE would become eligible in 1995.*
>
> *On the other hand, on acquiring higher qualification, they would become eligible against 10% graduate quota in 1994 and 1995 on rendering 3 years' service after acquiring higher qualification.*
>
> *If the plea of the petitioner is accepted, then the second and third JEs would push down the 1st degree holder JE joining in 1990, on the strength of their joining service as diploma holders in 1998 and 1999.*
>
> *It is submitted that the 10 % promotion quota prescribed for graduate Engineers in the ATTESTFO 1984 Rules is a water tight compartment*
> *exclusively meant for the candidates having graduation in engineering. A diploma holder JE on acquiring higher qualification during service can opt for promotion from the graduate quota or from diploma holder's quota, but after staking his claim for promotion in degree holder's quota, he is required to be placed at the bottom of the seniority list and his case would be considered only after the cases of promotion of those who ED TODAY have*

been holding such degree qualification earlier to him have been considered. Otherwise, Registrar the qualified graduates, waiting their right of consideration for promotion in the compartment of 10% graduate quota, would be pushed downwards and unqualified late entrants on acquisition of higher qualification would steal a march over the earlier qualified Engineers.

This would be most unreasonable, arbitrary, irrational and against the mandate of Articles 14 and 16 of the Constitution of India.

It is submitted that a diploma holder JE, on acquiring higher qualification, does not lose his right of consideration for promotion against promotion quota of diploma holders even after acquiring higher qualification. But he has to ESTEC satisfy the criterion of 7 years qualifying service for being eligible in that quota. No additional is granted to him for acquiring higher qualification while in service, when he is being considered for promotion against the quota of diploma holders. Hence, on his opting for promotion against graduate promotion quota, the rule of seniority would apply as he acquired the qualification therefore subsequently".

12. I have heard Mr. B.C. Negi, learned Senior Advocate for the petitioners and Learned Advocate General and Mr. Dilip Sharma, Senior Advocate, for the respondents respectively and have also gone through the record carefully.

13. Perusal of impugned rejection order Annexure P-13 reveals that the representation of petitioners has been rejected only on the basis of the dictum of ***S. S. Kutlehria***. The relevant extract of rejection order reads as under:

"as the Hon'ble Court in S. S. Kutlehria case settled the issue with respect to the counting of the service rendered after obtaining the AMIE/BE qualification and issued directions to redraw the seniority list, therefore, in compliance to the directions of the Hon'ble High Court, passed in CWP No. 1358 of 2008, the PWD revised the seniority list of Assistant Engineers in accordance with the mandate of aforesaid judgment, passed by the Hon'ble High

Court and circulated the tentative seniority list in respect of Assistant Engineers on 1.3.2014. Objections to the seniority list were invited and after considering of the objections, the final seniority list was circulated on 1.3.2016. Thus, the seniority list was revised in accordance with the directions of the Hon'ble High Court, passed in above said judgment, which has attained finality".

14. On the aforesaid premise, the objections raised by petitioners were decided by holding as under:-

"The petitioners are aggrieved by implementation of the judgment passed in S.S. Kutlehria by the Hon'ble Court and according to them, the same is not applicable in their case. They have specifically contended that the judgment is applicable up to year 1995 when R&P Rules were amended and not thereafter. Such interpretation of the judgment given by the petitioner is not understandable as there is no justification for application of the judgment in part and in the manner as desired by the petitioner. The Hon'ble High Court in the judgment of S.S. Kutlehria has nowhere directed to apply the judgment upto 1995 and not thereafter. Simply question before the Hon'ble Court was as to how the service rendered by the diploma holder engineers acquiring AMIE/BE. During service is to be counted for the purpose of promotion etc. The Hon'ble High court has very clearly held that service rendered only after obtaining the degree of AMIE/BE can be counted for the purpose of promotion etc. and not the entire service from the date of entry is to be counted. Thus, there remains no doubt for any other interpretation of the judgment as is being anticipated by the petitioners.

Further contention of the petitioner that supplementary post can be created in order to adjust the officers who could not find place prior to 1995 is also not acceptable. Consequent upon the judgment stated above review DPC was held during May, 2013 for the vacancies which were available between the 1984 to 2012. The Govt. of India, Department of Personnel instruction dated 26.03.1980 do not allow the review DPC to increase number of vacancies already intimated in original DPC in particular case. Thus, the said plea is also not acceptable. The plea of the

petitioner that their entire service from the date of entry in to service is to counted for fixing the seniority is also without justification as the service of all other Junior Engineers who acquired AMIE/BE during the service has been counted in similar manner as that of petitioners and in accordance with the judgment rendered by the Hon'ble High Court. There cannot be a separate criterion in respect of the petitioner".

15. Thus, there is no doubt that the claim of the petitioners has been rejected by respondent No.1 solely on the basis of judgment passed by Division Bench of this Court in S.S. Kutlehria, CWP No. 1358 of 2008. Respondent No.1, while passing impugned order Annexure P-13 has nowhere discussed and decided the issues raised by the petitioners, especially relating to the distinction sought to be drawn by petitioners from the case of S. S. Kutlehria. Petitioners vide their representation Annexure P-12 had raised following grounds, which have remained unaddressed by respondent No.1:-

"We are making the present representation on following grounds:

INCORRECT INTERPRETATION OF S S KUTLEHRIA JUDGMENT

1. Final Seniority list of Graduate Junior Engineers(BE/AMIE) by taking into consideration date of acquiring higher qualification or date of joining (in case of Directly appointed as Graduate JE's) consequent upon the verdict of Hon'ble High Court in CWP 1358/2008 SS Kutlehria vs State of H.P and Others issued on 10-05-2010, replica issued on 1-12-2014 are totally wrong and incorrect as 5.5 Kutlehria judgment has been misinterpreted as this judgment is not applicable after bifurcation of department revised rules became effective which was not in consideration in SS Kutlehria judgment

NO DIFFERENT CADRE OF JUNIOR ENGINEERS

2. There is no different cadre for the post of Graduate Junior Engineers to which list above mentioned has been issued, there is only one Cadre of Junior Engineers possessing
Diploma/ITIcertificate/AMIE/BE/Btech/ME/M Tech etc. for further promotion of Assistant Engineers Civil as per R& P Rules of the department.
IN DPC date of joining not taken into consideration

3. Review DPC 2013 is incorrect on which basis 2014 DPC and 2016 DPC are also incorrect because the date of joining/entry into services of AMIE/BE diploma holder were not taken into account
Seniority has to be taken from date of joining in the department.

4. Sir we are submitting that for the Promotion of Assistant Engineers, promotion has to be made as per prevalent rules and senior most has to be given preference whereas we are aggrieved as the department has taken date of eligibility i.e. date of passing of degree which is valid only for eligibility not for seniority. Seniority has to be taken from date of joining in the department."

16. In light of above observations, the first issue for consideration before this Court arises whether the rejection of the representation of the petitioners by respondent No.1 vide Annexure P-13, solely on the basis of S.S. Kutlehria can be sustained?

17. Needless to say, that respondent No.1 now cannot be allowed to supplement the reasons for rejection and shall have to confine itself to the reasons provided in Annexure P-13. In ***Mohinder Singh vs. Chief Election Commissioner, AIR 1978 SC 851***, a Full Bench of Apex Court has held as under:-

> *"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity*

must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought, out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji:

> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."*

Orders are not like old wine becoming better as they grow older, A Caveat."

18. Coming to the facts of the case, it cannot be disputed that in ***S.S. Kutlehria***, the *inter-se* dispute was between two different categories i.e., Graduate Junior Engineers and Junior Engineers having acquired AMIE/BE during service and their claims for seniority falling within same promotional quota. The question before Division Bench, therefore, was as to whether by acquisition of AMIE/BE during service, the Junior Engineers could claim better avenues in the matter of promotion than those who had held the qualification as graduate since inception. However, in the present case, the dispute is with respect to the *inter-se* seniority of the Junior Engineers having acquired AMIE/BE during service and having their claims under the same quota.

19. The Division Bench while deciding S. S. Kutlehria relied upon ***Shailendra Dania & others vs. S.P. Dubey& others***, decided by three Judges Bench of Supreme Court, ***2007 (5) SCC 535***. In the context of

question, sought to be decided herein, it will be proper to quote the relevant extract of ***Shailendra Dania's*** case as under: -

> *"43. Taking into consideration the entire scheme of the relevant rules, it is obvious that the diploma-holders would not be eligible for promotion to the post of Assistant Engineer in their quota unless they have eight years' service, whereas the graduate Engineers would be required to have three years' service experience apart from their degree. If the effect and intent of the rules were such to treat the diploma as equivalent to a degree for the purpose of promotion to the higher post, then induction to the cadre of Junior Engineers from two different channels would be required to be considered similar, without subjecting the diploma-holders to any further requirement of having a further qualification of two years' service. At the time of induction into the service to the post of Junior Engineers, Degree in Engineering is a sufficient qualification without there being any prior experience, whereas diploma-holders should have two years' experience apart from their diploma for their induction in the service. As per the service rules, on the post of Assistant Engineer, 50% of total vacancies would be filled up by direct recruitment, whereas for the promotion specific quota is prescribed for a graduate Junior Engineer and a diploma-holder Junior Engineer. When the quota is prescribed under the rules, the promotion of graduate Junior Engineers to the higher post is restricted to 25% quota fixed. So far as the diploma-holders are concerned, their promotion to the higher post is confined to 25%. As an eligibility criterion, a degree is further qualified by three years' service for the Junior Engineers, whereas eight years' service is required for the diploma-holders. Degree with three years' service experience and diploma with eight years' service experience itself indicates qualitative difference in the service rendered as degree-holder Junior Engineer and diploma-holder Junior Engineer. Three years' service experience as a graduate Junior Engineer and eight years' service experience as a diploma-holder Junior Engineer, which is the eligibility criteria for promotion, is an indication of different quality of service rendered. In the given case, can it be said that a diploma-holder who acquired a degree during the tenure of his service, has gained*

experience as an Engineer just because he has acquired a Degree in Engineering. That would amount to say that the experience gained by him in his service as a diploma-holder is qualitatively the same as that of the experience of a graduate Engineer. The rule specifically made difference of service rendered as a graduate Junior Engineer and a diploma-holder Junior Engineer. Degree-holder Engineer's experience cannot be substituted with diploma-holder's experience. The distinction between the experience of degree-holders and diploma-holders is maintained under the rules in further promotion to the post of Executive Engineer also, wherein there is no separate quota assigned to degree-holders or to diploma-holders and the promotion is to be made from the cadre of Assistant Engineers. The rules provide for different service experience for degree- holders and diploma-holders. Degree-holder Assistant Engineers having eight years of service experience would be eligible for promotion to the post of Executive Engineer, whereas diploma- holder Assistant Engineers would be required to have ten years' service experience on the post of Assistant Engineer to become eligible for promotion to the higher post. This indicates that the rule itself makes differentia in the qualifying service of eight years for degree-holders and 10 years' service experience for diploma- holders. The rule itself makes qualitative difference in the service rendered on the same post. It is a clear indication of qualitative difference of the service on the same post by a graduate Engineer and a diploma-holder Engineer. It appears to us that different period of service attached to qualification as an essential criterion for promotion is based on administrative interest in the service. Different period of service experience for degree-holder Junior Engineers and diploma-holder Junior Engineers for promotion to the higher post is conducive to the post manned by the Engineers. There can be no manner of doubt that higher technical knowledge would give better thrust to administrative efficiency and quality output. To carry out technical specialized job more efficiently, higher technical knowledge would be the requirement. Higher educational qualifications develop broader perspective and therefore service rendered on the same post by more qualifying person would be qualitatively different.

44. After having an overall consideration of the relevant rules, we are of the view that the service experience required for promotion from the post of Junior Engineer to the post of Assistant Engineer by a degree-holder in the limited quota of degree-holder Junior Engineers cannot be equated with the service rendered as a diploma-holder nor can be substituted for service rendered as a degree-holder. When the claim is made from a fixed quota, the condition necessary for becoming eligible for promotion has to be complied with. The 25% specific quota is fixed for degree-holder Junior Engineers with the experience of three years. Thus, on a plain reading, the experience so required would be as a degree-holder Junior Engineer. 25% quota for promotion under the rule is assigned to degree-holder Junior Engineers with three years' experience, whereas for diploma-holder Junior Engineers eight years' experience is the requirement in their 25% quota. Educational qualification along with number of years of service was recognized as conferring eligibility for promotion in the respective quota fixed for graduates and diploma-holders. There is watertight compartment for graduate Junior Engineers and diploma-holder Junior Engineers. They are entitled for promotion in their respective quotas. Neither a diploma-holder Junior Engineer could claim promotion in the quota of degree-holders because he has completed three years of service nor can a degree-holder Junior Engineer make any claim for promotion quota fixed for diploma-holder Junior Engineers. Fixation of different quota for promotion from different channels of degree- holders and diploma-holders itself indicates that service required for promotion is an essential eligibility criterion along with degree or diploma, which is service rendered as a degree-holder in the present case. The particular years of service being the cumulative requirement with certain educational qualification providing for promotional avenue within the specified quota, cannot be anything but the service rendered as a degree-holder and not as a diploma- holder. The service experience as an eligibility criterion cannot be read to be any other thing because this quota is specifically made for the degree-holder Junior Engineers.

> *45.* ***As a necessary corollary, we are of the view that the diploma-holder Junior Engineers who have obtained a Degree in Engineering during the tenure of service, would be required to complete three years' service on the post after having obtained a degree to become eligible for promotion to the higher post if they claim the promotion in the channel of degree-holder Junior Engineer, there being a quota fixed for graduate Junior Engineers and diploma-holder Junior Engineers for promotion to the post of Assistant Engineers."***

20. Petitioners and private respondents undisputedly fall under the same bracket of 10% quota provided in 1995 R&P Rules for those diploma holder Junior Engineers, who acquired AMIE/BE during service, which reads as under: -

> *"by promotion from amongst Junior Engineers (Civil), who acquire AMIE or its equivalent degree during service as Junior Engineers (Civil), having three years regular or regular combined with continuous ad-hoc (rendered upto 31.3.1991) service in the grade".*

21. As is evident from the dictum of ***S.S. Kutlehria*** and ***Shailendra Dania***, in both these cases, implication had arisen out of the situation when an incumbent was made eligible to jump into another water tight compartment, which is not the case in the present *lis*. Here the petitioners are seeking seniority *vis-à-vis* the persons who also fall in the same bracket of 10% created by 1995 rules and have been given benefit of seniority as Assistant Engineers on the basis of the date of acquisition of AMIE/BE, irrespective of their total length of service in the grade. ***S.S. Kutlehria*** was decided by taking into consideration completely different set of Rules, which have undergone change post 1995. The petitioners have agitated their claim on the basis of post 1995 Rules, which refers to three years regular or regular combined with continuous *ad-hoc* service in the grade. The petitioners and private respondents prior to their promotion as Assistant Engineers belonged

to one grade i.e. the grade of Junior Engineers. No separate grade was created merely by acquisition of AMIE/BE during service. Such acquisition created a separate class only for the purpose of considering eligibility for promotion. In such situation, on acquisition of AMIE/BE during service, diploma holder Junior Engineers would become eligible for promotion through 10% special quota on completion of three years' service after such acquisition, but it will not mean and imply that their *inter-se* seniority will also date back to the date of acquisition of higher qualification because it did not create a new grade for them, they remained in the grade of Junior Engineers. All such persons are on equal footing as they were inducted as diploma holder Junior Engineers, thereafter all of them acquired higher qualification during service *albeit* on different dates and on completion of three years after acquisition of such qualification became eligible for promotion to the post of Assistant Engineer and aforesaid 10% quota. So all such persons, who had acquired higher qualification during service and also had completed three years' service as such will fall in zone of consideration for promotion, however, their earlier service as diploma holder, where they held their own seniority, cannot be washed away.

22. Once all similarly situated persons, as petitioners and private respondents who initially were inducted as Diploma Holder Junior Engineers and had acquired AMIE/BE during service, by virtue of such acquisition had only become eligible for being considered for promotion to the post of Assistant Engineers. Such separate class had the contest inter-se and not with the Graduate Junior Engineers.

23. As noticed above, though no additional reason can be allowed to be added or substituted to the reasons assigned in Annexure P-13 for rejecting the claim of the petitioners, yet in order to negate any chance of technicalities becoming obstruction in the course of justice, the contention of private respondents regarding creation of anomalous position is also being put to test.

24. The contention of private respondents that still there will be a contest between the Diploma Holder Junior Engineers having a quota of 45% of promotion after rendering seven years and the Diploma Holder Junior Engineers having acquired AMIE/BE during service and becoming eligible for promotion as JEs after three years, in my considered view deserves to be rejected for the reasons that both the categories have their separate quota and will not overlap. There may be a situation where a Diploma Junior Engineer having acquired AMIE/BE during service, gets no chance of promotion as AE in the first instance in 45% quota after having rendered seven years service or vice-versa but that cannot be called overlapping or jumping to other water tight compartment because both the categories have their separate quota, there being no provisions for intermingling of such quotas. Post of Assistant Engineers being a selection post, R&P rules provide for a twenty-point roster and each category has been provided separate roster point thereby negating any chance of sitting over the promotional avenues of another category.

25. Thus, in view of the above discussions, the order dated 26.4.2021 (Annexure P-13), cannot be sustained and is accordingly quashed. The eligibility condition of three years applicable to Junior Engineers having acquired AMIE/BE during service will not be an impediment in reckoning their inter-se seniority on the basis of entire length of service in the grade. Accordingly, seniority list dated 1.3.2014 (Annexure P-7) and seniority list dated 1.3.2016 (Annexure P-8) are quashed to the extent the petitioners were placed junior to respondents No. 2 to 14. Consequently, respondent No.1 is directed to revisit and redraw the seniority list of petitioners and respondents No. 2 to 14 by taking into consideration their entire length of service as Junior Engineers. Respondent No.1 is further directed to hold review DPC for promotion of Junior Engineers, who have acquired AMIE/BE during service to the post of Assistant Engineers in PWD (B&R) in terms of this judgment and to revisit and redraw the seniority list of Assistant Engineers thereafter.

26. In view of the above analysis, the present writ petition is allowed in aforesaid terms. Pending applications, if any, also stand disposed of.

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

Between:-

SMT. RAJ KUMARI W/O SH. BALWINDER PAL,
R/O VILLAGE & POST OFFICE, BHATOLI,
TEHSIL MEHATPUR BASDEHTA,
DISTRICT UNA, H.P.

……PETITIONER

(BY MS. LEENA GULERIA, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH
   THROUGH ITS PRINCIPAL SECRETARY
   (EDUCATION), SHIMLA-2, H.P.

2. THE DIRECTOR OF ELEMENTARY EDUCATION,
   HIMACHAL PRADESH, 171 001.

3. THE DEPUTY DIRECTOR OF
   ELEMENTARY EDUCATION, UNA,
   DISTRICT UNA, H.P.

...RESPONDENTS

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

CIVIL WRIT PETITION
No. 3129 OF 2020
Decided on:29.06.2022

Constitution of India, 1950- Article 226- Candidature of the petitioner for appointment to the post of L.T. contract basis on batch wise as scheduled caste category not considered- Held- The petitioner is not entitled to the relief claimed and the findings rendered by the Hon'ble High Court in *Subeena*

Sabri's case will apply mutatis mutandis to the instant case- Petition dismissed. (Para 8)

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

ORDER

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

(i) That the impugned act of omission and commission of the respondents not considering the candidature of the petitioner for appointment to the post of LT contract basis on batch-wise as SC category candidate in the counselling held on 18.06.2019 and letter dated 04.08.2020 Annexure P-8 treating the petitioner as general category candidate and rejecting the claim of the petitioner as SC category candidate on the basis on notification of 2012, Annexure P-9, may kindly be declared unjust, harsh, illegal, arbitrary, discriminatory, malafide, unconstitutional and against principles of natural justice and legitimate expectation.

(ii) That the notification of 2012, Annexure P-9, may kindly be held inapplicable in the case of the petitioner and letter dated 04.08.2020, Annexure P-8, treating the petitioner as general category candidate and rejecting the claim of the petitioner as SC category candidate on the basis on notification of 2012 may kindly be quashed and set-aside.

(iii) That the respondents may kindly be directed to consider the candidature of the petitioner for appointment to the post of LT contract basis on batch-wise basis pursuant to the counseling held on 18.06.2019 as SC category candidate and in the event the petitioner is found suitable for appointment, she be offered appointment to the post of LT contract basis on batch-wise basis pursuant to the counselling held on 18.06.2019 as SC category candidate."

2. The case of petitioner is that her parental house is in State of Punjab. She got married to Sh. Balwinder Pal, a resident of District Una, Himachal Pradesh in the year 2001 and is residing with her husband since then. Petitioner belongs to Scheduled Caste (for short "SC") category and her husband also belongs to the same category.

3. The name of the petitioner was sponsored by the Employment Exchange to the Department of Education, H.P. in response to requisition for the posts of Language Teacher (for short "LT") on batch-wise basis. Petitioner appeared for counselling as SC category candidate. The candidature of petitioner was finally rejected by respondent No.3 vide letter dated 4.8.2020 (Annexure P-8). The basis of such rejection was quoted to be the instructions (Annexure P-9) issued in the year 2012.

4. We have heard learned counsel for the parties and have gone through the records of the case.

5. Petitioner has been denied the benefit of SC category for the purposes of employment in the State of Himachal Pradesh on the sole ground that she was born in the State of Punjab and had acquired the status of SC by virtue of her parents belonging to the said category in the State of Punjab.

6. The issue is no more *res integra*. This Court in ***CWP No. 8043 of 2021***, titled ***Subeena Sabri*** vs. ***State of H.P. and others***, decided on 19.05.2022, formulated a specific question as under:

> *"The question that arises for determination is whether the petitioner by virtue of being married to a person belonging to OBC in Himachal Pradesh or by inclusion of the original caste of petitioner (Ansari) in the list of Other Backward Classes in the State of Himachal Pradesh is entitled for issuance of a certificate of eligibility for reservation of jobs for Other Backward Classes in the State of Himachal Pradesh?"*

7. The question so formulated was decided in the following terms:

"19. In our considered view, in none of the judgments noticed by the Coordinate Bench of this court while deciding Review Petition No. 47 of 2021, scope for any exception was left. It cannot be overlooked that in all the cases the purpose was to protect the salutary principle enshrined in Articles 341 & 342 of the Constitution of India. To achieve such purpose, Hon'ble Apex Court repeatedly has held that migration for whatsoever reason, from one State to another, cannot be a sufficient ground for claiming benefit of being SC/ST/OBC in the migratee state. The objective criteria for declaration of a particular Caste or Tribe as SC/ST/OBC in one State is the specific level of backwardness, social disparage and economic disadvantages prevalent in such state. Though, one Caste notified as Scheduled Caste/ tribe/ OBC in one State may also find place in the list of notified Scheduled Caste/ Tribe/OBC in the other, but the same has not been held to be sufficient for claiming the benefit in other State by a person after migration for the reason that the degree of disadvantages of various elements which constitute the data for specification may be entirely different. The migrations be it voluntary or involuntary have been taken care of in the judgments passed by the Hon'ble Supreme Court, as noticed above. Thus, in our considered view, mere grant of a certificate of bonafide resident to a person by the migratee State after her marriage in such State cannot be an exception. The view taken by a Coordinate Bench in Review Petition No. 47 of 2021, titled State of H.P. & others Vs Navin Kumari to that effect, in our understanding, is per incuriam.

20. In the instant case, the facts that petitioner is married in the State of Himachal Pradesh to a person belonging to OBC and even the Caste to which the petitioner belonged in the State of her origin has been declared as a OBC in the State of Himachal Pradesh, cannot be held sufficient to carve out an exception to the mandate of law, as declared by Hon'ble Supreme Court in Marri Chandra Shekhar Rao vs. Deen, Seth G.S. Medical College and others 1990 (3) SCC, 130, Action Committee on issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State

of Maharashtra and another vs. Union of India and others, 1994 (5) SCC, 244 and Subhash Chandra and another vs. Delhi Subordinate Services Selection Board and others 2009 (15) SCC, 458, Pankaj Kumar vs. State of Jharkhand & others, 2021 SCC (online) SC 616 and Ranjana Kumari Vs State of Uttaranchal 2019 (15) SCC 664.

21. *Question is answered accordingly.*

22. In light of above discussion, we find no merit in the instant petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of."

8. The facts of the instant case are fully covered by the aforesaid judgment in ***Subeena Sabri's*** case and hence, the petitioner is not entitled to the reliefs claimed. The findings recorded by this Court in ***Subeena Sabri's*** case (supra) will apply mutatis mutandis to the instant case.

9. The petition is accordingly disposed of, so also the pending miscellaneous application(s), if any.

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

BETWEEN:

PAWAN KUMAR SALARIA, S/O SH. PREM CHAND, R/O SHIV SHAKTI GAURA NIWAS, CEMETERY ROAD, SANJAULI, SHIMLA, H.P. PRESENTLY WORKING AS PRINCIPAL, GOVERNMENT DEGREE COLLEGE NALAGARH, HP. (UNDER TRANSFER) AGE ABOUT 57 YEARS.

……..PETITIONER

(BY MR. NAVEEN AWASTHI, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (EDUCATION), TO THE GOVT. OF H.P. SHIMLA.

2. DIRECTOR HIGHER EDUCATION, SHIMLA, 171001.

.....RESPONDENTS

(BY SHRI ASHWANI K. SHARMA, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION
No . 2417 of 2022
Decided on:30.06.2022

Constitution of India, 1950- Article 226- Transfer policy- Petitioner aggrieved against his transfer has sought quashing of transfer order being in violation of Comprehensive Guiding Principles, 2013- Petitioner physically disabled- Held- Petitioner at the verge of retirement and physically disabled as such at this stage his transfer cannot be said to be justified- Petition allowed. (Para 11, 12)

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

O R D E R

Petitioner is posted as Principal in Government Degree College Nalagarh, District Solan, H.P. since 13.07.2021. Petitioner has now been ordered to be transfered to Government Degree College Beatan, District Una, H.P., vide order dated 18.04.2022.

2. Aggrieved against his transfer to Government Degree College Beatan, District Una, H.P., petitioner has approached this Court seeking quashing of such order on the grounds, firstly, that the impugned transfer order is neither in public interest nor administrative exigency, secondly, it is

in-violation of Comprehensive Guiding Principles-2013 and thirdly, the impugned order has been issued on *malafide* considerations.

3. The case of the petitioner is that he is a physically disabled person having disability to the extent of 90%. He suffered from post Covid Lung Fibrosis with peripheral vascular disease, as a result of which he had to undergo amputation of right leg above knee and also amputation of left foot. In these circumstances, petitioner was transferred on his request from Government Degree College, Theog to Government Degree College, Nalagarh in July, 2021.

4. Further, the case of petitioner is that one of the faculty member of the College is holding personal grudge against him as the petitioner has reprimanded the said faculty member for administrative lapses. The said faculty member had manhandled the petitioner, as a result of which, First Information Report, was lodged. In retaliation, he has managed filing of complaints against the petitioner, which has resulted in impugned transfer order.

5. Respondents have contested the claim for the petitioner primarily on the ground that the complaints against the petitioner were received in the office of Hon'ble Chief Minister from various Gram Panchayats, Vyapar Mandals and Students Associations etc. Reason for transfer of the petitioner has been confirmed to the complaints received against petitioner. It has further been submitted that respondents can transfer its employee in administrative exigency and in public interest. Petitioner being Class-I Officer is not entitled for benefit to remain posted at one place for normal tenure of three years.

6. We have heard learned counsel for the petitioner as well as learned Additional Advocate General and also gone through the record.

7. Petitioner has placed on record documents evidencing his medical condition. Petitioner has suffered amputation of right leg above knee and left foot below knee.

8. Respondents have placed on record copies of complaints received against the petitioner. Perusal of contents of these complaints clearly reveal that the complaints are orchestrated. All the complaints are in almost same and similar tone and tenor. All the complaints are generated contemporaneously in 3rd week of February, 2022. The allegation of the petitioner that the complaints were generated at the instance of a faculty member of the College does not seem to be without substance. The FIR at the instance of the petitioner against the said faculty member is dated 9th February, 2022, whereas the memorandum issued to the said Officer is dated 08.02.2022.

9. The action of respondents in transferring the petitioner on the basis of above noted complaints without, verification of facts, cannot be said to be in public interest or for administrative exigency. Otherwise also, transfer cannot be a mode of penalty that too, without any inquiry. It is difficult to understand, as to how, the Gram Panchayats or Vyapar Mandals would be concerned with the affairs of Principal of College.

10. Clause 5.3 of the Transfer Policy of the State Government reads as under:-

> *"**5.3 <u>Concessions to handicapped employees:-</u>** As far as possible, Officers/officials with 60% and above physical disability should be given stations of their choice. In the circumstances where it is absolutely not possible, subject to vacancy, they should at least be given postings on road heads or convenient stations where bus service is available.*
>
> *It is possible that at the time of making postings the information on physical disability is not available because of which a person with physical disability is posted to any inconvenient stations. In order to rule out such eventualities and*

the resultant hardships to the people with physical disability, the entries about the physical disability should be made in service books, incumbency statements, seniority lists and any other documents relied upon by the department for making transfers and postings."

11. Petitioner was transferred from Government Degree College, Theog to Government Degree College, Nalagarh, on his request, keeping in view his adverse health conditions. Under the aforesaid clause of the policy, petitioner is entitled to remain posted at the station of his choice. According to the petitioner, Nalagarh station is convenient and suitable to him keeping in view his physical condition. Another fact that needs to be taken into consideration is that the petitioner is on the verge of retirement and is left with less than one year of service. The transfer of petitioner, at this stage of his service, cannot be said to be justified.

12. In view of above discussion, the action of respondents transferring the petitioner vide impugned transfer order dated 18.04.2022, Annexure P-7, is not *bonafide* exercise of administrative powers. The impugned transfer order is neither in public interest nor for administrative exigency, therefore, the same cannot be sustained. The impugned transfer order dated 18.04.2022, Annexure P-7, is quashed.

13. Accordingly, the instant petition is disposed of, so also the pending miscellaneous application(s), if any.

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

Between:-
GOVIND SINGH S/O SH. HARI RAM,
R/O VILLAGE BEHRAN, P.O.
BHATER, TEHSIL BHARWAIN,
DISTRICT UNA, H.P.

...PETITIONER

(BY SH. ONKAR JAIRATH, ADVOCATE)

AND

1. HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR, THROUGH ITS SECRETARY.

2. STATE OF HIMACHAL PRADESH, THROUGH ITS SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA- 171 002, H.P.

3. THE DIRECTOR OF ELEMENTARY EDUCATION, GOVERNMENT OF HIMACHAL PRADESH, LALPANI, SHIMLA – 171 001.

4. SH. SUKH DEV SINGH S/O NOT KNOWN TO THE PETITIONER, THROUGH RESPONDENT NO.1, HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR.

…. RESPONDENTS.

(SH. SANJEEV KUMAR MOTTA, ADVOCATE,

FOR R-1.

SH. P.K.BHATTI, ADDL. ADVOCATE GENERAL, WITH MR. KUNAL THAKUR, DY. ADVOCATE GENERAL, FOR R-2 AND R-3

SH. TARA SINGH CHAUHAN, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION
No. 1952 OF 2019
Reserved on: 24.06.2022
Decided on:01.07.2022

Constitution of India, 1950- Article 226- Appointment for the post of TGT (Arts)- Aggrieved against his non-selection for the post of TGT (Arts) the petitioner has challenged the selection process- Petitioner held all minimum qualifications prescribed for the post of TGT (Arts)- Held- Petitioner has not

submitted the non-employment certificate in accordance with the advertisement and also the call letter- Respondent No. 1 is directed to consider the certificate procured by the petitioner even after declaration of final result- There is no fault as far as selection of private respondent No.4 is concerned- Petition dismissed. (Para 20, 26)

Cases referred:

Bedanga Talukdar vs. Saifudaullah Khan and others (2011) 12 SCC 85;
Dolly Chhanda vs. Chairman, JEE and others (2005) 9 SCC 779;
Sandeep Kumar vs. State of Himachal Pradesh and others SLP(C) No.16834/2021;
State of Bihar and others vs. Madhu Kant Ranjan and another JT 2021 (12) SC 262;

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

O R D E R

Aggrieved against his non-selection for the post of TGT (Arts), petitioner has approached this Court for grant of following substantive reliefs:

(I) That a writ in the nature of mandamus of any other appropriate writ, order or directions, may kindly be issued directing the respondents to award 1 mark to the petitioner for unemployed family, for which he is otherwise legally entitled to, and the respondent No.1 may be further directed to redraw the merit list for SC (UR) Category and the petitioner may be declared as selected for the appointment to the post of TGT (Arts).

(II) That the writ in the nature of certiorari, or any other appropriate writ, order or directions may kindly be issued quashing the selection and appointment of respondent No.4 as TGT (Arts).

(III) That the respondents may kindly be directed to appoint the petitioner to the post of TGT (Arts) w.e.f. the date other applicants have been appointed."

2. Respondent No.1 issued advertisement No.34-2/2018 dated 19.12.2018 (for short, "Advertisement") for filling up 495 posts of TGT (Arts) besides other posts. 92 posts were reserved for SC(UR) category.

3. The advertisement prescribed essential qualifications for the post of TGT(Arts). The mode of selection was also prescribed. As per Part-I of mode of selection a written objective type screening test of two hours consisting of multiple choice questions having 85 marks was prescribed. Part-II of mode of selection provided for evaluation process involving 15 marks. The break-up of 15 marks was separately provided. For the purpose of the controversy involved in the case, it will be suffice to notice that 1 (one) mark out of 15 marks allocated for evaluation process was to be allotted on production of non-employment certificate to the effect that none of the family members of the applicant was in Govt./Semi-Govt. service. The certificate was required to be issued by the concerned SDO (C)/Tehsildar/Naib Tehsildar or concerned Panchayat Secretary/Sahayak and countersigned by concerned Gram Panchayat Pradhan/Up Pradhan.

4. Only those candidates were eligible to participate in evaluation process, who were short-listed after qualifying written objective screening test.

5. Petitioner held essential qualifications for the post of TGT(Arts). Petitioner submitted his Online Recruitment Application (ORA), in response to the advertisement, within stipulated time. Petitioner belonged to SC (UR) category. He qualified the written objective screening test and was called for evaluation on 19.07.2019 vide letter dated 01.07.2019 (Annexure P-7).

6. Petitioner appeared before the evaluation committee on given date i.e. 19.07.2019. In order to claim one mark for member of family of unemployed, petitioner submitted unemployed certificate dated 04.06.2019 (Annexure P-5) issued by the Naib Tehsildar, Bharwain, District Una. The certificate so produced by petitioner read as under:

> *"**UN-EMPLOYED CERTIFICATE***
>
> *As per report of Pardhan, G.P. BHATER/ Patwari Halqua, it is certified that GOVIND SINGH S/o Shri HARI RAM, resident of Village BEHRAN, Sub Tehsil Bharwain, Distt. Una (H.P.) is not employee in any Govt./its agencies, Public Sector undertaking bodies/boards/Corporation etc.*
>
> *Sd/-*
> *Naib Tehsildar,*
> *Bharwain, Distt. Una, H.P."*

7. Evaluation Committee did not accept the unemployed certificate (Annexure P-5) submitted by the petitioner on the ground that firstly it was not in the prescribed format and, secondly, it was not in accordance with the requirements of advertisement, which required the certificate to ensure that none of the family members of the petitioner was in the service of Government/Semi-Government organization.

8. The final result of selection process for the post of TGT(Arts) was declared on 02.08.2019 and petitioner remained unsuccessful. Petitioner again procured a non-employment certificate dated 13.8.2019 (Annexure P-10) in the requisite format and compliant with the requirements of advertisement. Respondent No.1 did not accept the said certificate at belated stage.

9. The precise grievance of the petitioner is that he in fact belonged to a family in which none of the member was holding service in Government or

Semi-Government Sector. He had duly applied to the competent authority for grant of unemployed certificate and it was not his fault that the certificate dated 04.06.2019 (Annexure P-5) was neither in the prescribed format nor contained the necessary information. Contention of the petitioner is that he cannot be penalized for the fault of others. It is further case of the petitioner that unemployed certificate was not part of the essential qualification required for the post of TGT(Arts). Such certificate was required only to claim 1 (one) mark in evaluation process. Petitioner had obtained the unemployed certificate (Annexure P-5) well in time, hence its non-acceptance by respondent No.1 during evaluation process was wrong, illegal and arbitrary. Non-employment certificate (Annexure P-10) dated 13.8.2019 proved that none of the members of petitioner's family including the petitioner was in Government/Semi-Government services. The last selected candidate in SC (UR) category had obtained 47.12 marks, whereas the petitioner was awarded 46.72 marks. Had petitioner been awarded 1 (one) mark, being a candidate from a family having no person employed in Government/ Semi-Government Sector, he would have scored 47.72 marks and would have qualified for selection.

10. In reply, respondent No.1 has submitted that the information regarding requirements of non-employment certificate was clearly available in the advertisement and also in the call letter for evaluation process issued to petitioner. It is submitted that the unemployed certificate dated 04.06.2019 (Annexure P-5) submitted by the petitioner at the time of evaluation process was rightly rejected as the same was not as per the prescription. Petitioner cannot feign ignorance. He was a candidate for the post of TGT (Arts). The requirement of non-employment certificate, its format, contents and issuing authority etc. were clearly spelled time and again. Petitioner himself remained negligent and remiss in his conduct and cannot be allowed any benefit at belated stage, when entire selection process is complete. It is further

submitted that the certificate (Annexure P-10) was evidently issued in favour of petitioner on 13.8.2019 i.e. after declaration of final result, which stood declared on 02.08.2019. In such circumstances, the certificate (Annexure P-10) could not be considered. In this manner, the rejection of petitioner has been justified.

11. Respondent No.4 has also filed separate reply and has contested the claim of petitioner almost on similar grounds as raised by respondent No.1.

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

13. There is no dispute regarding the fact that petitioner held all minimum necessary qualifications prescribed for the post of TGT (Arts). It is also not in dispute that petitioner had applied in time in response to the advertisement and had also uploaded all the documents required at the stage of submission of Online Recruitment Application (ORA).

14. The only dispute in the instant case is with respect to the submission of non-employment certificate. Whereas, petitioner maintains that he submitted the required certificate on 19.7.2019 at the time of evaluation, respondents No. 1 to 4 have contested the claim of petitioner by asserting that the certificate so submitted by petitioner at the time of evaluation did not fulfill the requirements of advertisement as well as call letter dated 01.07.2019 (Annexure P-7).

15. To be entitled for 1 (one) mark in the evaluation of 15 marks, the petitioner was to submit non-employment certificate to the effect that none of the family members was in Government/Semi-Government services. It was specifically provided in the opening part of advertisement that the downloaded

copy of the online application format alongwith necessary original certificates and self-attested photocopies must be brought at the time of documentation/evaluation for 15 marks. Clause 16 of the advertisement provided for a check-list for verification by candidates before submitting the online recruitment application or documents/certificates. Sub-clause (vii) of this checklist provided as under:

> *"All other certificates, if any required for determining eligibility and carrying evaluation as mentioned in mode of selection criteria (Part I & II) whichsoever applicable to the applicants."*

16. Respondent No.1 has made a specific mention of the fact in its reply that the format for non-employment certificate was available on the website of respondent No.1.

17. In the circumstances evaluated above, it cannot be said that there was any ambiguity or confusion regarding the nature and format of non-employment certificate to be submitted by the candidates, who intended to claim the benefit of 1 (one) mark on the basis of their claim under said category. Undisputably, the certificate termed as "Non-employment Certificate" dated 4.6.2019 (Annexure P-5) submitted by the petitioner at the time of evaluation, was neither in the prescribed format nor fulfilled the condition of certifying that none of the family members of the candidate was in the Government/Semi-Government services.

18. Petitioner had obtained the certificate (Annexure P-5) on 04.06.2019. The call letter was issued to him on 01.07.2019 requiring him to appear for evaluation on 19.7.2019. Clause 11 (iv) of the call letter againreiterated the requirement to submit non-employment certificate to the effect that none of the family members of the petitioner was in Government/Semi-Government. In such circumstances, petitioner was fully

aware as to the exact requirement of non-employment certificate to be furnished by him at the time of evaluation. The contents of certificate (Annexure P-5) on the face of it suggested that they lacked in material particulars and were not compliant with the requirements of advertisement as well as call letter dated 01.07.2019. Despite having sufficient time for rectifying the certificate, petitioner did not choose to avail such opportunity and rather presented the non-compliant certificate at the time of evaluation.

19. Not only that petitioner remained negligent and remiss till the date the evaluation process was conducted, he did not take any steps to rectify the mistake immediately thereafter. Once the certificate (Annexure P-5) submitted by petitioner was not accepted during evaluation process, the petitioner would have been prompt in making efforts to get the mistake rectified. The petitioner could not have waited for indefinite period. Evidently, the declaration of final result by respondent No.1 on 02.08.2019 made the petitioner wiser and thereafter he procured the certificate (Annexure P-10), which in the considered opinion of this Court, will not serve the cause of petitioner.

20. Thus, it is clear that petitioner had not submitted the non-employment certificate in accordance with the advertisement and also the call letter dated 01.07.2019 (Annexure P-7). It is not a case where the petitioner was helpless or had no opportunity to comply with the requirements of advertisement and call letter. In such circumstances, this Court in exercise of jurisdiction under Article 226 of the Constitution of India will be loath to direct respondent No.1 to consider the certificate (Annexure P-10), procured by the petitioner even after declaration of final result especially when there is nothing to show that respondent No.1 has power to relax the rules set by it for recruitment.

21. In ***Bedanga Talukdar* vs. *Saifudaullah Khan and others (2011) 12 SCC 85***, the Hon'ble Supreme Court has held as under:

> "29. *We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with* Article 14 *of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There cannot be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant Statutory Rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the Rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of quality contained in Articles 14 and 16 of the Constitution of India."*

22. In ***State of Bihar and others* vs. *Madhu Kant Ranjan and another JT 2021 (12) SC 262***, the Hon'ble Supreme Court has held as under:

> *"9. As per the settled proposition of law, a candidate/applicant has to comply with all the conditions/eligibility criteria as per the advertisement*

> *before the cut-off date mentioned therein unless extended by the recruiting authority. Also, only those documents, which are submitted alongwith the application form, which are required to be submitted as per the advertisement have to be considered. Therefore, when the respondent No.1 – original writ petitioner did not produce the photocopy of the NCC 'B' certificate alongwith the original application as per the advertisement and the same was submitted after a period of three years from the cut-off date and that too after the physical test, he was not entitled to the additional five marks of the NCC 'B' certificate. In these circumstances, the Division Bench of the High Court has erred in directing the appellants to appoint the respondent No.1 – original writ petitioner on the post of Constable considering the select list dated 08.09.2007 and allotting five additional marks of NCC 'B' certificate."*

23. Learned counsel for the petitioner has tried to distinguish his case by placing reliance upon the judgment passed by the Hon'ble Supreme Court in ***Dolly Chhanda* vs. *Chairman, JEE and others (2005) 9 SCC 779***, in which it was held in paras 7 and 9 as under:

> *"7. The general rule is that while applying for any course of study or a post, a person must possess the eligibility qualification on the last date fixed for such purpose either in the admission brochure or in application form, as the case may be, unless there is an express provision to the contrary. There can be no relaxation in this regard i.e. in the matter of holding the requisite eligibility qualification by the date fixed. This has to be established by producing the necessary certificates, degrees or marksheets. Similarly, in order to avail of the benefit of reservation or weightage etc. necessary certificates have to be produced. These are documents in the nature of proof of holding of particular qualification or percentage of marks secured or entitlement for benefit of reservation. Depending upon the facts of a case, there can be some relaxation in*

> *the matter of submission of proof and it will not be proper to apply any rigid principle as it pertains in the domain of procedure. Every infraction of the rule relating to submission of proof need not necessarily result in rejection of candidature.*
>
> *9. The appellant undoubtedly belonged to reserved MI category. She comes from a very humble background, her father was only a Naik in the armed forces. He may not have noticed the mistake which had been committed by the Zilla Sainik Board while issuing the first certificate dated 29.6.2003. But it does not mean that the appellant should be denied her due when she produced a correct certificate at the stage of second counselling. Those who secured rank lower than the appellant have already been admitted. The view taken by the authorities in denying admission to the appellant is wholly unjust and illegal."*

24. No doubt, the certificate of non-employment to be produced by the petitioner was in the nature of proof of holding entitlement to benefit of 1 (one) mark in evaluation process, but the petitioner, in the given facts of the instant case, cannot derive any benefit from the above noticed judgment for the reason that in the said case the petitioner therein had rectified the mistake at the stage of second counselling i.e. before closure of admission process. The petitioner, as noticed above, despite opportunities had failed to rectify the mistake till declaration of final result.

25. Reliance has also been placed on behalf of the petitioner on judgment passed by the Hon'ble Supreme Court in ***SLP(C) No.16834/2021***, titled ***Sandeep Kumar*** vs. ***State of Himachal Pradesh and others***, decided on 10.5.2022. This judgment again will not help the cause of petitioner as in that case, also the petitioner had produced the required certificate with promptitude on the date of evaluation after receiving the call letter.

26. In these circumstances, the relief sought by petitioner cannot be granted. Additionally, it can be seen that the private respondent No.4 has been appointed on the basis of his own merit. There is no fault as far as selection of private respondent No.4 is concerned. Vested rights have accrued in favour of private respondent, which cannot be taken away without there being exhibition of palpable illegality or perversity in the selection process.

27. In the light of above discussion, there is no merit in the instant petition and the same is accordingly dismissed, so also the pending miscellaneous application(s) if any.

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

Between:-

TARSEM KUMAR SON OF
SH. PURAN CHAND, VPO BHARMAR,
TEHSIL JAWALI, DISTRICT KANGRA, HP.

……PETITIONER.

(BY SH. ANUP RATTAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY HOME, TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. SMT. SHIKHA RANA (NAME OF HUSBAND NOT KNOWN TO PETITIONER) PRESENTLY WORKING AS ADA DC OFFICE KANGRA AT DHARAMSHALA, TEHSIL & DISTRICT KANGRA, HP.

3. ARUN KUMAR, MLA NAGROTA BAGWANA CONSTITUENCY, RESIDENT OF VPO NAGROTA BAGWAN, WARD NO. 6, TEH. NAGROTA BAGWAN, DISTT. KANGRA (HP).

.....RESPONDENTS.

(SH.ASHOK SHARMA, ADVOCATE GENERAL WITH SH.RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, 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 RESPONDENT- 1).

(SH. NARESH KAUL, ADVOCATE, FOR RESPONDENT-2).

(SH. TARUN K. SHARMA, ADVOCATE, FOR RESPONDENT-3).

CIVIL WRIT PETITION
No.1930 of 2022
Reserved on: 30.06.2022
Decided on: 06.07.2022

Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973**- Section 24- D.O. Notes for securing transfer- Public Prosecutors procured demi official notes from the local M.L.A. for securing their transfers- Held- The working of the Prosecutors has to be free from any executive or political interference- Since both the petitioner as also the private respondent are beneficiaries of the D.O. Notes, they are directed to be posted out of district Kangra- Petition dismissed. (Para 25 to 30)

Cases referred:

Ajay Kumar vs. State and another, 1986 Criminal Law Journal, 932;

Deepak Aggarwal vs. Keshav Kaushik and others (2013) 5 SCC 277;
Hitendra Vishnu Thakur vs. State of Maharashtra and others (1994) 4 SCC 602;
K.V. Shiva Reddy vs. State of Karnataka and others, 2005 Criminal Law Journal 3000;
Medichetty Ramakistiah and others vs. The State of Andhra Pradesh, AIR 1959 AP 659;
Phool Singh vs. The State of Rajasthan and others, 1993 Criminal Law Journal 3273;
Shiv Kumar vs. Hukam Chand and another, (1999) 7 SCC 467;
Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) (2010) 6 SCC 1;
State of U.P. and another vs. Johri Mal (2004) 4 SCC 714;
Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others (2004) 4 SCC 158;

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

How some of the Public Prosecutors have over a period of time shamelessly started hobnobbing with some of the politicians to procure and secure orders of transfer of their convenience is best illustrated in the instant case.

2. Both the petitioner as also the private respondent are Public Prosecutors and have at different times procured D.O. Notes from the local M.L.A. for securing their transfers.

3. According to the petitioner, respondent No.3, who is a local M.L.A., issued a Demi-Official (D.O.) Note No. 379104 on 15.03.2022 for transfer of the petitioner at the behest of respondent No.2.

4. On the other hand, the defence of respondent No.2 is that the petitioner vide notification dated 06.08.2018 had been transferred from

Nurpur to Dalhousie, but he managed to get his transfer cancelled through Demi-Official (D.O.) Note No. 66623 dated 20.08.2018 issued by the local M.L.A. It is further averred that the petitioner managed his transfer thereafter on 15.01.2020 through three Demi-Officials (D.O.s) Notes in the year 2019 that too in condonation of his short stay against Sh. Bhupinder Chand vide DO No. Secy/CM-17006/2017-VIP-A-145598, dated 10/07/2019, DO. No. Secy/CM-H0503/2017-DEP-A-189798, dated 10/12/2019, DO.No.Secy/CM/ 17010/2017-VIP-A-190708, Dated 13/12/2019, from ADA office Nurpur to ADA office Kangra under District Attorney, Kangra at Dharamshala. However a very important averment has been made in para-6 of the reply which reads as under:-

> **"6. That it is important to submit here that the proposal for transfer of petitioner from Nurpur to Kangra (ADA office, where his wife was already ADA) was given by the MLA Sh. Rakesh Pathania, in condonation of short stay against Sh. Bhupinder Chand, who himself was booked under FIR No.110/13 dated 26/04/2013 u/s 452, 147, 149, 353, 332, 506 IPC & 3 Prevention of Damage to Public Property Act in case titled as "State vs. Rakesh Pathania & others", pending adjudication before the Ld. Court of JMFC, Nurpur. The petitioner being incharge of the prosecution case at that time, procured the DO note from Sh. Rakesh Pathania, who himself was undergoing trial in the said court and managed his transfer at his choice of station with his Wife (Shveta Ji). The act of obtaining DO Note from the person who is facing prosecution, is certainly a misconduct on the part of public servant. So the petitioner has not come before this Hon'ble court with clean hands."**

5. The local M.L.A., who has been arrayed as respondent No.3, has also filed his reply and it shall be apt to reproduce paras-2 to 5 of the reply, which read as under:-

"2) That replying Respondent is elected public representative and is serving to the people of Nagrota Constituency. It is pertinent to submit here that the husband of Respondent No.2 is working in Dr. RPGMC Tanda as Cardiologist, which falls in Nagrota Bagwan constituency and being public representative of the said Constituency, the replying Respondent often requires help from the husband of respondent No.2 for the emergent treatment and consultation of his constituents. It is pertinent to mention here that Respondent No.2 and her Husband are not may constituents, as there is no political mileage in helping Respondent No.2 but only to serve the poor people of my constituency replying Respondent issued the DO note in favour of Respondent No.2 so that husband of Respondent No.2 can serve the patients in healthy atmosphere.

3) That in the Month of March when Replying Respondent visited Tanda Medical College to know the requirements of all departments and their needs as well as grievances. The replying Respondent came to know about the health and medical history of Respondent No.2 through her husband Dr. Naresh Rana who made a representation for redressal of grievances before the respondent No.3 and being elected member of the legislative assembly the replying respondent issued DO Note and same has been duly considered by the Hon'ble Chief Minister of Himachal Pradesh and transfer order has been passed for the redressal of grievances.

4) That it is further submitted that wife of the petitioner is working as ADA in ADA office Kangra since 2016 and replying Respondent is fully aware that she is having a child who is 2 years old and knowing the medical history of Respondent No.2 replying Respondent on humanitarian grounds and in the capacity of public representative recommended the D O Note for transfer. It is pertinent to submit here that distance between Kangra and Dharamshala is only 18 Km.

5) That it is pertinent to submit here that the petitioner approached the replying Respondent after receiving his transfer order Dt. 30/30/2022 and falsely misrepresented the

facts to replying Respondent that he has received the consent of Respondent No.2 for mutual adjustment and has convinced Respondent No.2 to stay in Dharamshala, in the office of Deputy Commissioner (Kangra at Dharamshala) for six months and after that both of them i.e. petitioner and his wife (Ms. Shaveta) will get themselves transferred to Palampur or some other District. The petitioner himself has called Respondent No.3 telephonically and has personally met Respondent alongwith some supporters of the constituency of respondent No.3 and requested for DO Note regarding cancellation of transfer order Dt. 30.03.2022 and on the request of petitioner replying Respondent issued D.O. Note No.Secy/CM-17015/2017-VIP-A-388062, Dated: 07-04-2022 (copy of which is annexed as Annexure R-3/1). It is further submitted that DO note for cancellation of transfer order dated 30-03-2022 has been issued at the request of petitioner who has fraudulently misrepresented the facts before Respondent No.3. Hence, the petition of the petitioner may kindly be dismissed in the interest of justice and equity."

6. The Public Prosecutors are appointed under Section 24 of the Code of Criminal Procedure which provides as under:-

"[1][24. Public Prosecutors.
(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.
(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.
(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:
Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be

a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.
(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.
(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub- section (4).
(6) Notwithstanding anything contained in sub- section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:
Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub- section (4).
[2][Explanation.-For the purposes of this sub-section-

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officer which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Pubic Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.]

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub- section (1) or sub- section (2) or sub- section (3) or sub- section (6), only if he has been in practice as an advocate for not less than seven years.

> (8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.
> [1][Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.]
> (9) For the purposes of sub- section (7) and sub- section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]"

7. A Public Prosecutor is one, who should necessarily conduct the case of the prosecution with a sense of impartiality and fairness.

8. In the words of Crompton J., in **R.V. Puddick (1865) 4 F and F 497 at page 499,** Public Prosecutors "should regard themselves rather as Minister of Justice assisting in its administration than as Advocates" which was adopted by the Court of Criminal Appeal in **R.V. Banks, 1916 2 KB 621.**

9. A learned Division Bench of the Andhra Pradesh High Court in ***Medichetty Ramakistiah and others*** *vs.* ***The State of Andhra Pradesh, AIR 1959 AP 659*** after relying upon the aforesaid observations proceeded further to observe as under:-

> "10……A prosecution, to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the licensed and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such courts should be astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public

> Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party."

10. The Delhi High Court in the case of ***Ajay Kumar*** *vs.* ***State and another, 1986 Criminal Law Journal, 932,*** dealing with the role of a Public Prosecutor held that the Public Prosecutor is a functionary of the State appointed to assist the court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure. It is no part of his obligation to secure conviction of an accused, in any event, or at all costs. Nor he is intended to play a partial role or become party to the persecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. His plain task is to represent the State's point of view on the basis of the material which could be legitimately brought before the Court at the trial. Thereafter, the Court went on to make very pertinent observations which read as under:-

> "15. What then is the position of a public prosecutor in the criminal court system and how far can his association with one or the other of the parties be capable of lending vitiating element to the trial. The public prosecutor is a functionary of the State appointed to assist the court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure. It is no part of his obligation to secure conviction of an accused, in any event, or at all costs. Nor is he intended to play a partial role or become party to the persecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. His plain task is to

represent the State's point of view on the basis of the material which could be legitimately brought before the Court at the trial. If all State actions must be just, fair and reasonable, he would be under no less duty as a functionary of the State to discharge his functions as a public prosecutor in an equally just, fair and reasonable manner irrespective of the outcome of the trial. In that sense, he is part of the judicature system, and an upright public prosecutor has no friends and foes in Court. He has no prejudices, pre-conceived notions, bias hostility or his own axe to grind. He represents public interest, but is not a partisan in the narrow sense of the term.

16. Is the position of a public prosecutor any different than of counsel, who appear for parties in a court of law. The answer is both in the affirmative and the negative. An advocate of the court is in theory an officer of the Court and whatever be the side he is engaged to represent he has his higher duty to the court in assisting the court in finding out the truth and in placing before the Court the point of view of his client honestly and fairly and to desist from making any misrepresentation or attempt to mislead the court. The advocate's duty to the court transcends the limited and narrow loyalty to the client, who engages him to protect his interest. Every advocate, therefore, has a dual capacity. He represents his client but that does not dilute his higher duty to the court. He is, however, partisan counsel in a sense not only because he is paid for the work by the client but also because an advocate, in actual practice, does not necessarily conform to the noble theory by which his conduct is sought to be disciplined. The duty of an ordinary advocate and a public prosecutor are, therefore, co-extensive to the extent that both have a common duty to the court and must, therefore, place their respective points of view before the Court in a fair and reasonable manner but the similarity ends there. A public prosecutor has no client or constituency apart from the State and State is not a party like any other party. He is not paid by an individual who may be aggrieved or by the accused who is on trial. He, therefore, does not have the disability of a dual personality, which is certainly true of an ordinary advocate, who

is torn, in the thick of his practice in Court, between the wider loyalty to public interest, to the court system, claim of straight and rigid adherence to truth and discipline on the one hand, and his narrow, as also monetary, association with the individual litigant or the institution, whom he represents on the other. An advocate-client relationship introduces a personal element from which the public prosecutor must be considered immune. He is above the personal loyalty. He does not have a dual capacity.

17. Is the position of a public prosecutor any different merely because he is not the ordinary functionary of the State. but has been supplanted either at the instance of an aggrieved party, or a fending faction, or even if appointed independently of the aggrieved party had prior association with the party, and has been amply rewarded by it, as in the present case ? Can such a public prosecutor be said to be as well insulated against pressure of an aggrieved party as an ordinary public prosecutor would be or is at least expected to be but,what is more important would his background not give the appearance of partiality or generate an apprehension of hostility in an Impartial observer of the scene, as indeed,in the accused, who is so vitally interested in the fairness of a trial? Would this feature of the public prosecutor be capable of vitiating the trial or create an atmosphere which may smack of likelihood of or reasonable probability of bias. In seeking answers to these questions, it is necessary to keep in mind the clear distinction between the "reality" of affair trial and the "appearance" that it is just, fair and reasonable. The concept of equality before the law and equal protection of the laws is in practice fairly diluted when it comes to the right of representation in a court of law.Money and influence do play more than their due roles, The decision of a cause in a court of law is essentially deter mined by the law, as indeed, the facts of the case. Nevertheless, where an over-burdened special public prosecutor is pitched against eminent, competent, and influential members of the bar with better training, specialised skills, able research and other faculties and aids,the fight cannot but be descried as unequal. What makes the position worse,is the declining moral standards of some of

the services.There is,therefore, a wide feeling among the public that the representation for the State is comparatively less effective and may also be easily tampered with through a variety of nefarious influences. If in that kind of an environment an influential or well-to-do aggrieved family feels impelled to engage a counsel of their own choice in whose competence and probity they have full faith and approach the State to engage such a counsel without any burden on the exchequer, it would be difficult to fault such an appointment even though one may not be happy that the State is unable to pay for proper legal services. The accused is no doubt vitally interested in the trial for it may result not only in his condemnation but even of deprivation of his freedom. The accused and the victim are not at par and a criminal trial is not a forum for personal vengeance. It is essentially a State action to punish crime. There is,therefore, no other party involved but with all the concern for a fair trial and humane and civilised conditions in which the accused is treated, both during the investigation in the course of trial, and after conviction., it is difficult to ignore the claim ofthe victims or of the aggrieved party to ensure that the crime is detected, properly investigated, and the accused is effectively tried, and suitably punished. A fair trial does not necessarily mean that it must be fair only to the accused. It must be fair to the victim also. It must be fair for all. A fair trial is a concept which is much higher than the claims or ends of parties to it. If the accused has a right to counsel of his choice why should not the victims of the crime be entitled to a say in the matter of representation of the State at the trial. The motive of the State and of the victim may be different but the object is common. Moreover a party's counsel who is engaged by the State at the cost of the aggrieved party is equally bound by the higher duty to the court as also to his discipline as an advocate, and is expected to rise to the occasion and discharge his duties as a just and fair public prosecutor unmindful of the source from which the funds are made available for payment to him. The material placed on record by the investigating agency places its own limitations on such a public prosecutor should be nevertheless carry a prejudice or a

> bias. Above all, there is institutional safeguard against any prejudice or bias or any vitiating elements flowing from such a public prosecutor or his association with a party or a faction in the judicial duty to shift the material and provide the necessary insulator cover against any irrelevant, improper influencing of the trial. While there is no doubt that the association of such public prosecutor may perhaps disturb or dislodge the appearance of a fair trial or create a reasonable apprehension in the mind of the accused that with a hostile and partisan counsel in the garb of special public prosecutor he would perhaps be denied justice or that trial would neither be just nor reasonable. But such fear must not be allowed to blur the judicial mind because of the institutional safeguard. It follows, therefore, that the appointment of party's counsel as a special public prosecutor does not by itself militate against the principle that State action must be just, fair and reasonable and would not, without anything more, either vitiate a trial or deprive the trial for that reason alone of the appearance of a fair trial."

11. Commenting upon the role of the Public Prosecutor, a learned Single Judge of the Rajasthan High Court in ***Phool Singh*** *vs.* ***The State of Rajasthan and others, 1993 Criminal Law Journal 3273*** observed that a Public Prosecutor is a public servant. The office of the Public Prosecutor involves duties of public nature and is of vital interest to the public. In criminal cases, the State is the prosecutor and not the complainant. The role of the Public Prosecutor in any criminal trial, whether at the instance of the State or of a private party, is to safeguard the interest of the complainant as well as the accused. It is apt to reproduce para-8 of the judgment which reads as under:-

> "8. A Public Prosecutor is a public servant. The office of Public Prosecutor involves duties of public nature and is of vital interest to the public. In criminal cases, the State is the prosecutor. The State through the Public Prosecutor is the party and not the complainant. The role of the Public Prosecutor in any criminal

> trial, whether at the instance of the State or of a private party, is to safeguard the interest of the complainant as well as the accused. The right to be heard includes a right to be represented by an able spokesman of one's confidence. This right belongs both to the accused and the complainant. It is not only the accused, who is in need of an assistance and protection of his rights, but also the complainant. In fact, it is to vindicate the rights and grievances of the complainant and through him, of the State, that the prosecution is launched whether by the State or by the private party. The object and purpose of criminal prosecution is to bring home the guilt of the accused and to ensure that he is adequately punished. The prosecutor has, therefore, to discharge his duties diligently, without fear or favour and without ill-will or mala fide. A prosecutor, who fails in and neglects his duties cannot import effective and substantial service to the administration of justice. In the discharge of his duties as a prosecutor, he is ordained by law, by professional ethics and by his role as an officer of the Court, to employ only such means as are fair and legitimate, and to desist from resorting to unjust and wrongful means. This so whether the prosecutor is private or appointed by the State and whether he is paid by the State or his appointment is made at the request of a private party as a Special Public Prosecutor and the State requires such private party to pay his remuneration. The duties of the prosecutor and the requirements of a fair trial do not vary from case to case. Moreover, there is always the Court to safeguard the interests of the accused and the complainant, to control the proceedings and to check the omissions and commissions of the prosecutor. It is needless to mention that the Court is not a moot spectator in a criminal trial, but an active participant therein. Therefore, by no stretch of imagination, it can be held that where Special Public Prosecutor is appointed whether paid by the State or the Private Party, the prosecution and the trial should be presumed to be biased, partial or unfair."

12. The Public Prosecutor is expected to be scrupulously fair and completely detached without evincing any anxiety while performing his duties. The expected attitude of the Public Prosecutor while conducting

prosecution must be couched in fairness not only to the Court and to the investigating agencies, but to the accused as well. The Prosecutor does not represent the investigating agency but represents the State.

13. In ***Hitendra Vishnu Thakur*** *vs.* ***State of Maharashtra and others (1994) 4 SCC 602,*** it was held as under:-

> "23.....A public prosecutor is an important officer of the State Government and is appointed by the State under *the Code* of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation....."

14. Commenting upon the expected attitude of the Public Prosecutor while conducting prosecution, the Hon'ble Supreme Court in a Bench comprising of Hon'ble three Judges in ***Shiv Kumar*** *vs.* ***Hukam Chand and another, (1999) 7 SCC 467***, held as under:-

> "13. From the scheme *of the Code* the legislative intention is manifestly clear that prosecution in a sessions court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a sessions court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused

is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

15. In ***Zahira Habibulla H. Sheikh and another*** *vs.* ***State of Gujarat and others (2004) 4 SCC 158***, the Hon'ble Supreme Court held as under:-

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. *Section 311* of the Code and *Section 165* of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the

> Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

16. The Hon'ble Supreme Court in ***State of U.P. and another*** *vs.* **Johri Mal (2004) 4 SCC 714** observed that "*only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the public prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy"* Thereafter, a very pertinent observation was made to the effect that "*no appointment of public prosecutor or district counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer*".

17. A learned Single Judge of the Karnataka High Court has elaborately considered the status and responsibilities of the Public Prosecutor in case ***K.V. Shiva Reddy*** *vs.* ***State of Karnataka and others, 2005 Criminal Law Journal 3000*** in paras 13, 15 and 17 which read as under:-

> "13. On the role of the Prosecutor it was held that, he is an officer of the Court expected to assist the Court in arriving at the truth in a given case. The Prosecutor no doubt, has to vigorously and conscientiously prosecute the case so as to serve the high

public interest of finding out the truth and in ensuring adequate punishment to the offender. At the same time, it is no part of his duty to secure by fair means or foul conviction in any case. He has to safeguard public interest in prosecuting the case; public interest also demands that the trial should be conducted in a fair manner, heedful of the rights granted to the accused under the laws of the country including *the Code*. The Prosecutor, while being fully aware of his duty to prosecute the case vigorously and conscientiously, must also be prepared to respect and protect the rights of the accused.

15. A Public Prosecutor has no client or constituency apart from the State and State is not a party like any other party. He is not paid by an individual who may be aggrieved or by the accused who is on trial. He, therefore, does not have the disability of a dual personality, which is certainly true of an ordinary Advocate, who is torn, in the thick of his practice in Court, between the wider loyalty to public interest, to the Court system, claim of straight and rigid adherence to truth and discipline on the one hand, and his narrow, as also monetary, association with the individual litigant or the institution, whom he represents on the other. An Advocate-client relationship introduces a personal element from which the Public Prosecutor must be considered immune. He is above the personal loyalty. He does not have a dual capacity.

17. Public Prosecutors were expected to act in a "scrupulously fair manner" and present the case "with detachment and without anxiety to secure a conviction" and that the Courts trying the case "must not permit the Public Prosecutor to surrender his functions completely in favour of a private Counsel". Public Prosecutor for the State was not such a mouth piece for his client the State, to say what it wants or its tool to do what the State directs. "He owes allegiance to higher cause". He must not consciously "misstate the facts", nor "knowingly conceal the truth". Despite his undoubted duty to his client, the State, "he must sometimes disregard his client's most specific instructions if they conflicted with the duty in the Court to be fair, independent and unbiased in his views".

18. It needs to be noticed that the learned Single Judge had formulated six points for consideration which are as under:-

> "(1) What is the status, responsibilities of a Public Prosecutor in a criminal trial?
>
> (2) How and under what circumstances a Special Public Prosecutor could be appointed?
>
> (3) How, the remuneration is to be paid to the Special Public Prosecutor?
>
> (4) Whether the accused has a right to challenge the order of appointment of a Special Public Prosecutor?
>
> (5) Whether the impugned order appointing the second respondent as the Special Public Prosecutor is liable to be quashed?
>
> (6) Whether this writ petition is liable to be dismissed on the ground of delay, laches, suppression of material facts, etc.?"

19. While answering points No. 1 to 3 as regards Public Prosecutor, it was observed as under:-

> "25. Point Nos. (1), (2) and (3):-
>
> STATUS
>
> The words "Public Prosecutor" has been defined under the Code. Section 2(u) of the Code states that "Public Prosecutor" means any person appointed under Section 24 and includes any person acting under the directions of Public Prosecutor. Therefore, the words "Public Prosecutor" includes Public Prosecutor, Additional Public Prosecutor, Special Public Prosecutor and' a Pleader instructed by a private person under Section 301(2) of the Code. The office of the Public Prosecutor is a public one. He is a public servant. Special status and position as well as great powers have been conferred on the office of Public Prosecutor. Under the Criminal Procedure Code, the Public Prosecutor has a special status and his is a statutory appointment. Under some of the provisions made in the Code, he receives special recognition. Sections 199(2), 225, 301(1), 301(2), 302, 308, 321, 377 and 386 are some of the provisions in the Code which confer a special position upon the Public Prosecutor. He is a part of the judicial system. He is an officer of the Court and must act independently

and in the interests of justice. The primacy given to the Public Prosecutor under the Scheme of the Code has a social purpose. The office of the Public Prosecutor involves duties of public nature and of vital interest to the public. In criminal cases the State is the Prosecutor. The State by Public Prosecutor is the party and not the complainant. The Prosecutor is bound by law and professional ethics and by his role as an officer of Court to employ only fair means. Public Prosecutor must remind himself constantly of his enviable position of trust and responsibility.

RESPONSIBILITIES:-

26. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts of the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court to the investigation agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence Counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the Court, if it comes to his knowledge.

27. It is an office of responsibility more important than many others because the holder is required to prosecute with detachment on the one hand and yet with vigour on the other. An upright Public Prosecutor has no friends and foes in Court. He has no prejudices, preconceived notions, bias, hostility or his own axe to grind. He represents public interest. He has no client or constituency apart from the State. He is above the personal loyalty. He does not have a dual capacity. He has to safeguard public interest in prosecuting the case. Public interest also demands that the trial should be conducted in a fair manner, heedful of the rights granted to the accused under the laws of the country including code. It is no part of his obligation to secure conviction of an accused in any event or at all costs. Nor is he intended to play a partisan role or become party to the

prosecution of the accused or lend support, directly or indirectly to a denial of justice or of fair trial to the accused."

20. In ***Sidhartha Vashisht alias Manu Sharma*** *vs.* ***State (NCT of Delhi) (2010) 6 SCC 1,*** the Hon'ble Supreme Court observed as under:-

"197. In the Indian Criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

198. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be a witness against himself and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to investigation of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the Courts do not normally have the right to interfere in the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot free while an innocent is not punished. Even in the might of the State the rights of an accused

> cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the Courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law.
>
> 199. It is not only the responsibility of the investigating agency but as well that of the Courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of bias mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society."

21. In ***Deepak Aggarwal*** *vs.* ***Keshav Kaushik and others (2013) 5 SCC 277***, the Hon'ble Supreme Court reiterated the observations made in ***Manu Sharma's case.***

22. The role of the Public Prosecutor came up before the Andhra Pradesh High Court in Writ Petition No. 21280 of 2019 in case titled ***Katari Praveen*** *vs.* ***State of Andhra Pradesh,*** decided on 18.01.2021, wherein the matter was considered and examined in detail and it was held that an ideal Public Prosecutor must consider himself/herself as an agent of justice in India. It shall be apt to reproduce para-21 of the judgment which reads as under:-

> "21. Sri N. Ranga Reddy, learned counsel for the third respondent contended that the third respondent is honest advocate who had previous experience on civil and criminal side while discharging his duties as Additional Public Prosecutor in the Court of Assistant Sessions Judge, Chittoor during the period 2012-2015 and now appointed as Additional Public Prosecutor to conduct cases registered under POCSO Act, discharging his functions as effectively as possible. Hence, he is

more competent than Sri S. Venkata Narayana, who is a Cadre Public Prosecutor. However, the petitioner or the accused have no choice to select their own men as Public Prosecutor(s) to conduct prosecution in the sessions case and denied the alleged pendency of contempt before this Court and complaint made by Sri B. Krishna Murthy before A.P. Bar Council and requested to dismiss the writ petition."

23. Thereafter, the Court proceeded to elaborate on the responsibilities and duties of the prosecution in para-29 of the judgment which reads as under:-

"29. The role of the Prosecutor is not to single-mindedly seek a conviction regardless of the evidence but his/her fundamental duty is to ensure delivery of justice. The Indian judiciary interpreted role, responsibilities and duties of prosecution as follows:

a) The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying departments of the State Governments with which she/he has been in contact. He must consider herself/himself as an agent of justice. The Courts have ruled that it is the duty of the Public Prosecutor to see that justice is vindicated and that he should not obtain an unrighteous conviction.

b) Public Prosecutor should not exhibit a seemly eagerness for, or grasping at a conviction" The purpose of a criminal trial being to determine the guilt or innocence of the accused person, the duty of a Public Prosecutor is not to represent any particular party, but the State. The prosecution of the accused persons has to be conducted with utmost fairness. In undertaking the prosecution, the State is not actuated by any motives of revenge but seeks only to protect the community. There should not therefore be "a seemly eagerness for, or grasping at a conviction.

c) A Public Prosecutor should not by statement aggravate the case against the accused, or keep back a witness because her/his evidence may weaken the case for prosecution. The only aim of a Public Prosecutor should be

to aid the court in discovering truth. A Public Prosecutor should avoid any proceedings likely to intimidate or unduly influence witnesses on either side.

d) A Public Prosecutor should place before the Court whatever evidence is in her/his possession .The duty of a public Prosecutor is not merely to secure the conviction of the accused at all costs but to place before the court whatever evidence is in the possession of the prosecution, whether it be in favour of or against the accused and to leave the court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged. It is as much the duty of the Prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

e) The duty of the Public Prosecutor is to represent the State and not the police. A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure, 1973. She/he is not a part of the investigating agency. She/he is an independent statutory authority. She/he is neither the post office of the investigating agency, nor its forwarding agency; but is charged with a statutory duty.

f) The purpose of a criminal trial is not to support at all cost a theory, but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the Public Prosecutor is to represent not the police, but the State and her/his duty should be discharged by her/him fairly and fearlessly and with a full sense of responsibility that attaches to her/his position.

g) Time and again, the Courts have held that prosecution should not mean persecution and the Prosecutor should be scrupulously fair to the accused and should not strive for conviction in all these cases. It further stated that the courts should be zealous to see that the prosecution of an offender should not be given to a private party. The Court also said that if there is no one to control the situation

when there was a possibility of things going wrong, it would amount to a legalised manner of causing vengeance.
h) A Public Prosecutor cannot appear on behalf of the accused .It is inconsistent with the ethics of legal profession and fair play in the administration of justice for the Public Prosecutor to appear on behalf of the accused.
i) No fair trial when the Prosecutor acts in a manner as if he was defending the accused, It is the Public Prosecutors duty to present the truth before the court. Fair trial means a trial before an impartial Judge, a fair Prosecutor and atmosphere of judicial calm. The Prosecutor who does not act fairly and acts more like a counsel for the defense is a liability to the fair judicial system.
j) If there is some issue that the defense could have raised, but has failed to do so, then that should be brought to the attention of the court by the Public Prosecutor The Supreme Court stated that the duty of the Public Prosecutor is to ensure that justice is done. It stated that if there is some issue that the defense could have raised, but has failed to do so, then that should be brought to the attention of the court by the Public Prosecutor. Hence, she/he functions as an officer of the court and not as the counsel of the State, with the intention of obtaining a conviction. The District Magistrate or the Superintendent of Police cannot order the Public Prosecutor to move for the withdrawal, although it may be open to the District Magistrate to bring to the notice of the Public Prosecutor materials and suggest to her/him to consider whether the prosecution should be withdrawn or not. But, the District Magistrate cannot command and can only recommend."

24. Further observations made by the Court in paras-30 to 39 are equally educative and informative which read as under:-

"30. To discharge the duties of Public Prosecutor as enumerated above, though elliptic, procedure is prescribed in Section 24 of the Cr.P.C which deals with appointment of public prosecutors in the High Courts and the district by the central government or

state government. Sub-section (3) says down that for every district, the state government shall appoint a public prosecutor and may also appoint one or more additional public prosecutors for the district. Sub-section (4) requires the district magistrate to prepare a panel of names of persons considered fit for such appointment, in consultation with the sessions judge. Sub-section (5) explains an embargo against appointment of any person as the public prosecutor or additional public prosecutor in the district by the state government unless his name appears in the panel prepared under sub-section (4). Sub-section (6) provides for such appointment wherein a state has a local cadre of prosecuting officers, but if no suitable person is available in such cadre, then the appointment has to be made from the panel prepared under subsection (4). Subsection (4) says that a person shall be eligible for such appointment only after he has been in practice as an advocate for not less than seven years.

31. In R. Rathinam vs. State AIR 2000 SCC 1851 the Supreme Court permitted a lawyer to file an application for cancellation of bail. This view was approved by the Apex Court in Puran vs. Rambilas (2001) 6 SCC 338. In R. Rathinam's case (supra) the Apex Court held that the frame of sub-Section 2 of Section 439 Cr.P.C. indicates that it is a power conferred on the court mentioned therein. It was held that there was nothing to indicate that the said power could be exercised only if the State or investigating agency or the Public Prosecutor moved an application. It was held that the power so vested in the High Court can be invoked by any aggrieved party he can addressed the court.

32. The Apex Court in Dawarika Prasad Agarwal vs. B.D. Agarwa (2003) 6 SCC 230 held that party can not made to suffer adversely either directly or indirectly by reason of an order passed by any court of law which is not binding on him. The very basic upon which a judicial process can be resorted to is reasonableness and fairness in a trial. The fair trial is fundamental right of every citizen including the victim of the case under Article 21 of our Constitution as held in Nirmal Singh Kahlon vs. State of Punjab (2009) 1 SCC 441.

33. On the careful scrutiny of the criminal procedure, I find that Legislature has not framed any section by which mechanism has been given that in what manner, the appeal and prosecution applications are to be conducted. However, the hallmark of criminal justice system is to conduct fair trial, which is a fundamental right guaranteed under the Constitution of India.

34. From the scheme of the Code, the legislative intention is manifestly clear that prosecution in a sessions court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a sessions court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

35. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a

combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter. (vide Shiv Kumar v. Hukam Chand (1999) 7 SCC 467.

36. The Full Bench of the Allahabad High Court in Queen Empress v. Durga 1894 ILR (All) 84 has pinpointed the role of a Public Prosecutor as follows:

> **"It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated: and, in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness box for cross examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favorable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness box, he is not bound, in our opinion, to call that witness or to tender him for cross examination."**

37. The Division Bench of the High Court of Andhra Pradesh in Medichetty Ramakistiah & Ors. vs. The State of Andhra Pradesh AIR 1959 (AP) 659 observed as follows:

> **"A prosecution, to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such courts should be astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed**

> **over completely to a professional gentleman instructed by a private party."**

38. Equally forceful is the observation of Bhimasankaram, J. for the Division Bench in Medichetty Ramakistiah (cited supra) which is worthy of quotation here:

> "Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate into a legalized means for wreaking private vengeance. The prosecution instead of being a fair and dispassionate presentation of the facts of the case for the determination of the Court, would be transformed into a battle between two parties in which one was trying to get better of the other, by whatever means available. It is true that in every case there is the overall control of the court in regard to the conduct of the case by either party. But it cannot extend to the point of ensuring that in all matters one party is fair to the other."

39. Keeping in view the role of Public Prosecutor to conduct fair prosecution, the Government may entrust conduct of prosecution in a particular case. Prosecution cannot be entrusted mechanically at the whim and caprice of any individual by the Government at the instance of any person who is interested over any conviction or acquittal of the accused."

25. The role of the Public Prosecutor has been highlighted by the Hon'ble Supreme Court in a recent judgment rendered by three Hon'ble Judges in ***Manoj and others*** *vs.* ***State of Madhya Pradesh, Criminal Appeal No. 248/2015***, decided on 20.05.2022, wherein it was observed as under:-

> "170. Before proceeding to consideration of the question of sentence, this court finds it necessary to briefly highlight the role of the public prosecutor and trial court in a criminal trial, so as to safeguard the rights of the accused. The concealment of DW-1's role in this case's investigation (her analyzing of call detail records of the deceased and in connection to Neha – which was not produced in trial; tip-off allegedly received regarding Neha's whereabouts and what she would be wearing; participating in Neha's arrest, and subsequent involvement on

23.06.2011 in recoveries of articles) points to concerning gaps in the manner of investigation carried out initially, or at the very least, an untruthful recollection and presentation of it, for the purposes of trial. As elaborated earlier, these facts prompted this court to draw adverse inferences against the prosecution's version of Neha's arrest. Other circumstances have been proved sufficiently to conclude their guilt and result in conviction. However, it is appropriate to also point out that concealment of DW-1's role and failure to include the call detail records, could have severely prejudiced the accused, had these other circumstances not been made out. Therefore, at this juncture, it is pertinent to note and reiterate the role of the public prosecutor, and trial court, in arriving at the truth by way of fair disclosure and scrutiny by inquiry, respectively.

171. A public prosecutor (appointed under Section 24 CrPC) occupies a statutory office of high regard. Rather than a part of the investigating agency, they are instead, an independent statutory authority(Hitendra Vishnu Thakur v. State Maharashtra, (1994) 4 SCC 602) who serve as officers to the court (Deepak Aggarwal v. Keshav Kaushik, (2013) 5 SCC 277). The role of the public prosecutor is intrinsically dedicated to conducting a fair trial, and not for a "thirst to reach the case in conviction". This court in Shiv Kumar v. Hukam Chand (1999) 7 SCC 467 further held that

> "….if an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused…".
>
> In Siddharth Vasisht @ Manu Sharma v. State of NCT Delhi 2010 6 SCC 1 (hereafter 'Manu Sharma') it was concluded that:
>
> > "187. Therefore, a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the

> Prosecutor to be lax in any of his duties as against the accused."

172. In Manu Sharma, the appellants in question had argued that the right to fair trial included a wide duty of disclosure on the public prosecutor, such that non-disclosure of any evidence – whether or not relied upon by the prosecution – must be made available to the defence. This court considered Section 207 and 208 CrPC, Rule 1677 of the Bar Council of India Rules (which is limited to evidence on which prosecutor proposes to rely on), and English law. The common law position culled out was that subject to exceptions like sensitive information and public interest immunity, the prosecution should disclose any material which might be exculpatory to the defense. Such a position, however, was not accepted by this court, in its totality. It was held that such obligations are on a different footing in India, given the fundamental canons of our criminal jurisprudence founded on Articles 20 and 21 of the Constitution, which require not just the investigating agency, but also courts in their own independent field, to ensure that investigation is fair and does not hamper the individual's freedom, except in accordance with law, i.e., ensure adherence to the rule of law. Relevant extracts that merit repetition:

> **"199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society.**
>
> ****
>
> 201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner.

> In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in Sasi Thomas v. State [(2006) 12 SCC 421 : (2007) 2 SCC (Cri) 72] , State (Inspector of Police) v. Surya Sankaram Karri [(2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225] and T.T. Antony v. State of Kerala [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048] .
>
> 202. In Nirmal Singh Kahlon v. State of Punjab [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law."

173. The scheme of the CrPC under Chapter XII (information to police and powers to investigate) is clear – the police have the power to investigate freely and fairly; in the course of which, it is mandatory to maintain a diary where the day-to-day proceedings are to be recorded with specific mention of time of events, places visited, departure and reporting back, statements recorded, etc. While the criminal court is empowered to summon these diaries under Section 172(2) for the purpose of inquiry or trial (and not as evidence), Section 173(3) makes it clear that the accused cannot claim any right to peruse them, unless the police themselves, rely on it (to refresh their memory) or if the court uses it for contradicting the testimony of the police officers.

174. In Manu Sharma, in the context of policy diaries, this court noted that "the purpose and the object seems to be quite clear that there should be fairness in investigation, transparency and a record should be maintained to ensure a proper investigation".

This object is rendered entirely meaningless if the police fail to maintain the police diary accurately. Failure to meticulously note down the steps taken during investigation, and the resulting lack of transparency, undermines the accused's right to fair investigation; it is up to the trial court that must take an active role in scrutinizing the record extensively, rather than accept the prosecution side willingly, so as to bare such hidden or concealed actions taken during the course of investigation. (Role of the courts in a criminal trial has been discussed in Zahira Habibulla H. Sheik vs. State of Gujarat, 2004 4 SCC 158.)

175. In the present case, the trial court ought to have inquired more deeply into the role of DW-1, given that by her own deposition she had admitted to analyzing call detail records and involvement in Neha's arrest – all of which had been suppressed by the prosecution side, for reasons best known to them. In this context, a reading of Section 91 and 243 CrPC as done in Manu Sharma, is important to refer to:

> **"217. ..Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the court has to pass a reasoned order."**

176. The court went on to elaborate on the due process protection afforded to the accused, and its effect on fair disclosure responsibilities of the public prosecutor, as follows:

> "218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in

trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as afore referred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the

expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would

> affect administration of criminal justice and the defence of the accused prejudicially.
> 222. The concept of disclosure and duties of the Prosecutor under the English system cannot, in our opinion, be made applicable to the Indian criminal jurisprudence stricto sensu at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any setback in the facts and circumstances of the case. The accused even did not raise this issue seriously before the trial court.
> (emphasis supplied)

177. In this manner, the public prosecutor, and then the trial court's scrutiny, both play an essential role in safeguarding the accused's right to fair investigation, when faced with the might of the state's police machinery.

178. This view was endorsed in a recent three judge decision of this court in Criminal trials guidelines regarding Inadequacies and Deficiencies, in re v. State of Andhra Pradesh,(2021) 10 SCC 598. This court has highlighted the inadequacy mentioned above, which would impede a fair trial, and inter alia, required the framing of rules by all states and High Courts, in this regard, compelling disclosure of a list containing mention of all materials seized and taken in, during investigation- to the accused. The relevant draft guideline, approved by this court, for adoption by all states is as follows:

> **"4. SUPPLY OF DOCUMENTS UNDER SECTIONS 173, 207 AND 208 CR.PC**
> **Every Accused shall be supplied with statements of witness recorded under Sections 161 and 164 Cr.PC**

and a list of documents, material objects and exhibits seized during investigation and relied upon by the Investigating Officer (I.O) in accordance with Sections 207 and 208, Cr. PC.

Explanation: The list of statements, documents, material objects and exhibits shall specify statements, documents, material objects and exhibits that are not relied upon by the Investigating Officer."

179. In view of the above discussion, this court holds that the prosecution, in the interests of fairness, should as a matter of rule, in all criminal trials, comply with the above rule, and furnish the list of statements, documents, material objects and exhibits which are not relied upon by the investigating officer. The presiding officers of courts in criminal trials shall ensure compliance with such rules."

26. Discussion on the subject would not be complete in case we do not refer to the order passed by the learned Division Bench of this Court (Coram: Hon'ble Mr. Justice Deepak Gupta and Hon'ble Mr. Justice Rajiv Sharma, as his Lordships then were), in CWP No.7656 of 2012, where the question arose whether the Public Prosecutors/District Attorneys should be kept posted at one place for an indefinite period and it was observed as under:-

"This case raises an important question as to whether the Public Prosecutors/District Attorneys should be kept posted at one place, for an indefinite period. The policy of transfer applies to the Public Prosecutors/District Attorneys also. There is no reason why they should not be posted out after three years.

In fact, this Court is, prima facie, of the opinion that keeping in view the nature of the job, performed by the Public Prosecutors/ District Attorneys, they should not be posted in their home districts or stations, where they have practiced as Lawyers. We are saying this because the people practicing as Lawyers develop relationships. When a person remains posted as Public

> Prosecutor/District Attorney at one station, for a sufficient long period, certain friendships are developed. At the same time, with certain people relations become strained.
>
> Therefore, there is a need that the Public Prosecutors/District Attorneys should also be posted out of their stations to fresh stations, so that the litigant public do not have the impression that if a particular Lawyer is engaged, the Public Prosecutor/District Attorney will help him or will oppose him more of strongly.
>
> The Secretary (Home), in consultation with the Secretary (Law), shall personally examine this matter and shall, by next date, frame a Policy and place it before this Court as to how the Public Prosecutors/District Attorneys are going to be transferred from one place to another. The Policy should not only be made transparent, but it should also be ensured, as this Court has observed in other cases, that all the Public Prosecutors/District Attorneys serve in tribal areas, hard stations, soft stations etc., in turn."

27. As observed by the Hon'ble Supreme Court in ***Hitendra Vishnu Thakur's case*** (supra) and other cases that a Public Prosecutor (appointed under Section 24 Cr.P.C.) occupies a statutory office of high regard. Rather than a part of the investigating agency, they are instead an independent statutory authority, who serve as Officers to the Court. The role of the Public Prosecutor is intrinsically dedicated to conduct a fair trial and, therefore, it does not behove well that these Attorneys be seen hobnobbing with the politicians or socializing with the public. The conduct and behaviour expected of them is nothing short of that expected of a Judicial Officer. The object and purpose especially of criminal prosecution where the role of the prosecutor assumes a greater importance is to bring home the guilt of the accused and to ensure that he is adequately punished. The Prosecutor has, therefore, to discharge his duties diligently without fear or favour and without ill-will or malice. A Prosecutor, who fails and neglects his duties

cannot import effective and substantial service to the administration of justice. It is in discharge of the duties as a Prosecutor, he is ordained by law, by professional ethics or by his role as an Officer of the Court, to employ only such means as are fair and legitimate, and to desist from resorting to unjust and wrongful means. But, unfortunately, in the instant case, both the petitioner as well as private respondent have been complacent in tarnishing the image of the prosecution.

28. The working of the Prosecutors has to be free from any executive or political interference. The concept of independence of Prosecutors being a wider concept indicates an independent functioning of every Prosecutor free of fear, interference and breaches. Therefore, the conduct of every Prosecutor should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, sans political or partisan influences. He should deal with his appointment as a public trust and should not allow other affairs or private interests to be interfered with his official duties, nor, he should administer the office for the purpose of advancing his personal ambitions or increasing his popularity. If he compromises with his office, its rippling effects would be both disastrous as well as deleterious.

29. It has specifically come on record that a criminal case is pending against one of the M.L.A.s, who issued a D.O. Note in favour of 2nd respondent in that very Court where 2nd respondent has been posted. We really wonder whether with these falling standards can the public repose any trust or confidence on the Prosecutor as being fair and impartial as against the standards as are expected of a Public Prosecutor. We leave it as that.

30. Reverting back to the facts, since both the petitioner as also the private respondent are beneficiaries of the D.O. Notes, they are directed to be posted out of district Kangra.

31. Since, the working of the Public Prosecutor is intrinsically connected with the Court and is not a part of the investigating agency and is rather an independent statutory authority, we direct that henceforth no Public Prosecutor, Assistant District Attorney and District Attorney shall be transferred on the basis of the D.O. Notes and their transfers shall be effected strictly in accordance with the Comprehensive Guidelines, 2013, for regulating the transfers of the employees, that too, only by the Administrative authority.

32. With the aforesaid observations, the instant petition is disposed of, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

33. Since, both the petitioner as well as private respondent have feigned ignorance regarding the working and ethics of the Department and the conduct as is expected of them and as their conduct otherwise is not befitting to that of a Public Prosecutor, we gather an impression that probably such Public Prosecutors, who are now being inducted in service, are not at all aware of the status they hold and the conduct and behaviour that is expected of them by virtue of their office alone.

34. Therefore, let all the Public Prosecutors inducted in service over the last 15 years, irrespective of their ranks as A.P.P. or P.P., undergo a refresher course designed, laying special emphasis on ethics, morality and conduct expected of a Public Prosecutor in the Himachal Pradesh Judicial Academy, Shimla. Such courses be designed by the Director, Himachal Pradesh Judicial Academy, within a period of four weeks and thereafter the Assistant Public Prosecutors/Public Prosecutors be provided training/ refresher courses on batchwise basis stretched over a period of two months.

35. Let a copy of this order be sent to the following:-

(i) The Additional Chief Secretary(Home), to the Government of Himachal Pradesh.

(ii) The Director, Himachal Pradesh Judicial Academy, Shimla, 16 Mile, Shimla-Mandi National Highway, District Shimla-171014.

(iii) The Director, Prosecution, H.P., Shimla.

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

Between:-

SOHAN LAL VERMA, S/O SH. RAM RATTAN VERMA,
R/O VILL & P.O. CHANOG, TEHSIL AND DISTT
SHIMLA, H.P.

....PETITIONER

(BY SH. AJAY KUMAR DHIMAN, ADVOCATE)

AND

1. STATE OF HP THROUGH ITS
PRINCIPAL SECRETARY (FOOD CIVIL
SUPPLIES & CONSUMER AFFAIRS) TO THE,
GOVT. OF H.P. SHIMLA-2.

2. DIRECTOR FOOD CIVIL SUPPLIES &
CONSUMER AFFAIRS AT KASUMPTI,
DISTT SHIMLA, H.P.

3. SMT. GEETA NEGI, W/O SH HR BHARDWAJ,
(WORKING AS SUPERINTENDENT GRADE-I)
THROUGH RESPONDENT NO.2, DIRECTOR
FOOD CIVIL SUPPLIES & CONSUMER AFFAIRS
AT KASUMPTI DISTT SHIMLA, H.P.

....RESPONDENTS

(SH. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL FOR R-1 AND 2.)

(SH. RUPINDER SINGH, ADVOCATE FOR R-3).

CIVIL WRIT PETITION
No. 3155 of 2019
Reserved on:2406.2022
Decided on: 01.07.2022

Constitution of India, 1950- Article 226- Promotion to the post of Superintendent Grade-I- Held- Petitioner could not claim right to be considered for promotion before expiry of the period of penalty- No fault can be found in the administrative action of official respondents in this regard- Petition dismissed. (Para 8, 9)

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

O R D E R

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

"*i) A writ in the nature of certiorari may be issued and thereby quash the impugned order of promotion of respondent No.3 Geeta Negi dated 24.1.2019 Annexure P-1.*

ii) A writ in the nature of mandamus may be issued and thereby directing the respondents No. 1 and 2 to consider the case of the petitioner for promotion to the post of Superintendent Grade I before respondent No.3.

iii) That respondent may kindly be directed to open the sealed cover of the petitioner for promotion to the post of Superintendent Grade II from due date i.e. 2.3.2015."

2. The grievance of the petitioner is two-fold. In the first instance, petitioner has claimed promotion to the post of Superintendent Grade-II w.e.f. 2.3.2015 and secondly, challenge has been laid to the promotion of respondent No.3 to the post of Superintendent Grade-I, ordered vide notification dated 24.1.2019 (Annexure P-3).

3. On the first count, the case of petitioner is that he had become eligible for promotion to the post of Superintendent Grade-II w.e.f. 2.3.2015. His juniors were promoted from time to time by keeping his case in sealed

cover. Petitioner was finally promoted to the post of Superintendent Grade-II on 7.4.2017, on the basis of recommendations of DPC held on 5.4.2017.

4. As regards the promotion to the post of Superintendent Grade-I, petitioner has submitted that he was senior to respondent No.3 in the seniority list of Superintendent Grade-II and hence the promotion of private respondent to the post of Superintendent Grade-I w.e.f. 24.1.2019 is bad in law. The action of official respondents in promoting respondent No.3 to the post of Superintendent Grade-I has also been assailed on the ground that the Government of Himachal Pradesh has taken a decision not to grant the benefit of 85th Constitutional Amendment in the State, therefore, the promotion of respondent No.3 by granting the benefit of Scheduled Tribe category is unsustainable.

5. Respondents have contested the claim of petitioner. The official respondents, by way of reply to the writ petition have submitted that the petitioner was facing departmental proceedings vide charge-sheet dated 18.7.2014. The charges against the petitioner were proved and a penalty of withholding two increments without cumulative effect was imposed against him vide order dated 13.8.2015. It was for this reason that the case of the petitioner was kept in sealed cover and his case for promotion to the post of Superintendent Grade-II could be considered only after the expiry of penalty period. Accordingly, petitioner was promoted to the post of Superintendent Grade-II w.e.f. 7.4.2017.

6. The promotion of respondent No.3 to the post of Superintendent Grade-I has been sought to be justified on the ground that the promotional post in the cadre of Superintendent Grade-I was available on reservation roster Point No.12 (13 point roster), reserved for Scheduled Tribe Category. Respondent No.3 was the only available candidate in seniority list of

Superintendent Grade-II, who belonged to Scheduled Tribe Category and accordingly she was rightly considered and promoted to the post of Superintendent Grade-I vide notification dated 24.1.2019.

7. I have heard learned counsel for petitioner, respondent No.3 and learned Additional Advocate General for the State.

8. Petitioner has not been able to controvert the factual position stated on behalf of official respondents. Nothing has been placed on record to show that the order vide which penalty was imposed upon the petitioner was either set aside, quashed or modified. That being so, petitioner could not claim right to be considered for promotion before expiry of the period of penalty. No fault can be found in the administrative action of official respondents in this regard.

9. The plea of petitioner challenging promotion of respondent No.3 to the post of Superintendent Grade-I appears to be clearly misconceived. The benefit in the matter of promotion in public employment is available to the employees belonging to categories of Scheduled Caste and Scheduled Tribe. 85th amendment to the Constitution of India only provides for consequential seniority along with benefit of promotion to the employees belonging to Scheduled Caste or Scheduled Tribe category. Respondent No.3 has been promoted to the post reserved for Scheduled Tribe Category. Petitioner cannot have any dispute with respondent No.3 on this count. Further, the grievance of petitioner is without any substance, as he cannot claim seniority above respondent No.3 till he is promoted to the post of Superintendent Grade-I.

10. In view of the above discussion, there is no merit in the writ petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

BETWEEN:

SUDHIR KUMAR, SON OF SH. HUSAN CHAND, RESIDENT OF VILLAGE GULLARAWALA, POST OFFICE KARUANA, TEHSIL BADDI, DISTRICT SOLAN, H.P. AGED ABOUT 28 YEARS.

.....PETITIONER

(BY MR. KAMALJEET SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SHRI P.K. BHATTI & SHRI BHARAT BHUSHAN ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION(MAIN)
NO.1381/2022
Reserved on: 01.07.2022
Decided on:05.07.2022

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 21- Bail- Recovery of Codine Phosphate - Held- Quantity of contraband recovered in the case is commercial quantity, hence, rigors of Section of 37 of NDPS Act are applicable- Bail petition dismissed. (Para 7, 11)

Cases referred:

Kerala and others Vs. Rajesh and others, (2020) 12 SCC 122;
Satpal Singh Vs. State of Punjab (2018) 13 Supreme Court Cases 813;

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

O R D E R

Petitioner has approached this Court for grant of bail under Section 439 Cr.P.C. in case FIR No.267/2021, dated 26.11.2021, under Section 21 of Narcotic Drugs & Psychotropic Substances, Act (for short 'ND&PS Act'), registered at Police Station Baddi, District Solan, H.P.

2. Petitioner is in custody since 29.04.2022.

3. On the intervening night of 25/26-11-2021, police officials of Police Station Baddi, District Solan, H.P., while on routine patrol duty, intercepted a Tempo bearing registration No. HP-93-3189 near Amit Engineering Company. Petitioner was driving the Tempo. On search of the Tempo 15 bottles filled with syrup and without any label were recovered. The case was registered and bottles were sent for chemical analysis. As per report of laboratory, the contents found in the bottles included Codine Phosphate. The total weight of syrup was found to be 1.837 Kgs., which as per ND&PS Act is commercial quantity.

4. On receipt of the report from the laboratory, petitioner was arrested on 28.04.2022 and remained in police custody till 02.05.2022, whereafter, he was remanded to judicial custody. Petitioner is in judicial custody till date.

5. Challan has been filed after completion of investigation and is pending before learned Special Judge, Nalagarh, District Solan, H.P.

6. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report as well as record of the case.

7. The quantity of contraband recovered in the case is commercial quantity, hence, rigors of Section 37 of ND&PS Act, are applicable.

8. In State of ***Kerala and others*** *Vs.* ***Rajesh and others, (2020) 12 Supreme Court Cases 122***, it has been held as under:

> *"19. The scheme of Section 37reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Cr.PC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.*
>
> *20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."*

9. Similarly, in ***Satpal Singh Vs. State of Punjab (2018) 13 Supreme Court Cases 813,*** the three Judges Bench of Hon'ble Supreme Court has held as under:

> *"3. Under Section 37of the NDPS Act, when a person is accused of an offence punishable under Section 19or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not*

> *guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court."*

10. Thus, in the teeth of Section 37 of ND&PS Act, accused can be released on bail in cases involving commercial quantity of contraband, if all three conditions are satisfied, viz. opportunity of opposing the bail is granted to the prosecutor, the Court records satisfaction to the effect that there are reasonable grounds for believing the accused not guilty of such offence and that he/she with certainty can be believed not to commit the same offence during the period of bail.

11. Coming to the facts of the case, petitioner was found in conscious possession of commercial quantity of contraband. There was none other in the Tempo driven by the petitioner. Thus, it is not a case where there is no *prima facie* material against the petitioner, therefore, this Court is not in a position to record satisfaction to the effect that there are reasonable grounds for believing the accused not guilty of offence under ND&PS Act involving commercial quantity.

12. Keeping in view the entirety of circumstances, petitioner is not entitled to be released on bail. Accordingly, the instant petition is dismissed.

13. Any observation made here-in-above shall not be taken as an expression of opinion on the merits of the case and the trial court shall decide the matter uninfluenced by any observation made here-in-above.

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

Between:-

ASHOK KUMAR SHARMA, S/O RAJINDER KUMAR SHARMA, AGED ABOUT 63 YEARS, R/O HOUSE NO. 7, ANAND VIHAR, PATIALA, PUNJAB, INDIA.

...PETITIONER NO. 1.

MANISHA SHARMA, W/O ASHOK KUMAR SHARMA, AGED ABOUT 62 YEARS, R/O HOUSE NO. 7, ANAND VIHAR, PATIALA, PUNJAB, INDIA.

...PETITIONER NO. 2.

(BY SHRI J. R. POSWAL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH.

2. PIYUSHA SHARMA, W/O VIVEK SHARMA, D/O SH. BRIJ MOHAN SHARMA, R/O NEAR PWD REST HOUSE, SOLAN SADAR, SOLAN, HIMACHAL PRADESH, INDIA.

PERMANENT ADDRESS: HOUSE NO. 7, ANAND VIHAR, PATIALA, PUNJAB, INDIA.

...RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR R-1.

MR. KARUN NEGI, ADVOCATE, FOR R-2.

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.235 of 2020
Decided on:16.08.2022

Code of Civil Procedure, 1908- Section 482- **Indian Penal Code, 1860**- Section 498-A read with section 34- Quashing of FIR- Held- FIR demonstrates that prima facie the same meets the requirements of Section 498-A of the Indian Penal Code- Whether or not these allegations are correct is a matter of investigation as also trial- Not fit case to quash the F.I.R.- Petition dismissed. (Para 7)

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

J U D G M E N T

By way of this petition filed under Section 482 of the Criminal Procedure Code, the petitioners have prayed for quashing of FIR No. 0060/2019, dated 25.11.2019, registered under Section 498-A read with Section 34 of the Indian Penal Code at Women Police Station Solan, District Solan, H.P., on the ground that the FIR does not disclose the commission of any offence under Section 498-A of the Indian Penal Code and as the FIR is devoid of any merit, therefore, the same warrants quashing.

2. Learned counsel for the petitioners has argued that filing of the FIR against the petitioners by the complainant, who happens to be the daughter-in-law of the petitioners, is nothing but an abuse of the process of law. He has argued that the petitioners never resided with the complainant after the initial acrimony between their son and the complainant and in these circumstances, the allegations which are levelled in the FIR are completely false and the same call for quashing of the FIR. Learned counsel also submitted that the complainant is presently employed as Assistant Professor in an Agricultural University, i.e., Desh Bhagat University at Patiala since August, 2016 and therefore also, filing of the present FIR at Solan also indicates that the same has been filed with an intent to harass the petitioners. Since December 2017, the petitioners have shifted to Dehradun, where

petitioner No. 1 was serving as a Principal and therefore, as they were not residing with the complainant, there was no question of any cruelty being meted out by them to the complainant. In support of his case, learned counsel has relied upon judgment dated 8th February, 2022, passed by the Hon'ble Supreme Court in Criminal Appeal No. 195 of 2022, arising out of S.L.P.(Crl.) No. 6545 of 2020, titled as Kahkashan Kausar @ Sonam & Ors. Vs. State of Bihar & Ors.

3. Learned Additional Advocate General has opposed the petition, inter alia, on the ground that after lodging of FIR, investigation was carried out in the matter and the same points out towards the culpability of the petitioners. He submitted that the investigation was carried out fairly, is evident from the fact that there were certain allegations levelled by the complainant against her brother-in-law, namely, Shalesh Sharma also, but as said allegations were not found correct in the course of investigation, accordingly, his name was deleted from the array of the accused. Learned Additional Advocate General has also pointed out that otherwise also a perusal of the FIR prima facie demonstrates that ingredients of Section 498-A of the Indian Penal Code are clearly made out and whether or not the petitioners are guilty of the offences alleged against them is a matter of trial and therefore also, the petition deserves to be dismissed. He has also argued that the judgment being relied upon by learned counsel for the petitioners is of no help in the peculiar facts of the present case.

4. Learned counsel for respondent No. 2 besides adopting the arguments made by the learned Additional Advocate General has also argued that it is incorrect that the FIR has been lodged on the basis of false allegations. He submitted that the complainant was subjected to continuous cruelty, as is evident from the averments made in the FIR also and it is in these circumstances that the FIR was lodged by the complainant. Learned counsel also argued that the complainant was not only subjected to mental

and physical cruelty, but demands of dowry were also raised from her by thepetitioners, as is evident from the contents of the FIR. Accordingly, he has prayed that the present petition being devoid of any merit be dismissed.

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

6. In a plethora of judgments, the Hon'ble Supreme Court has now made it apparent and evident that in exercise of its inherent powers so conferred under Section 482 of the Criminal Procedure Code, the High Court is not to thwart any investigation into the cognizable offences. Hon'ble Supreme Court has held that power of quashing should be exercised sparingly with circumspection, in the 'rarest of rare cases'. While examining an FIR/complaint, quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint. Criminal proceedings ought not to be scuttled at the initial stage and quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule. Hon'ble Supreme Court has also held that the first information report is not an encyclopedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the Court should not go into the merits of the allegations in the FIR and the police must be permitted to complete the investigation. Hon'ble Supreme Court has also held that when a prayer for quashing of FIR is made by the alleged accused, the Court when it exercises the power under Section 482 Cr. P.C., only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merit whether the allegations made out a cognizable offence or not and the Court has to permit the investigating agency/police to investigate the allegations in the FIR (See *M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others*, Criminal Appeal No. 330 of 2021).

7. Coming back to the facts of the present case, a perusal of the FIR demonstrates that prima facie the same meets the requirements of Section 498-A of the Indian Penal Code and instances of cruelty stand alleged against the petitioners therein by the complainant. Now, whether or not these allegations are correct is a matter of investigation as also trial. Every accused has the right to be presumed innocent till held guilty by the appropriate Court of law. This principle applies in the present case also and the petitioners herein have a right to be presumed innocent till proved otherwise. However, on the strength of the contentions of learned counsel for the petitioners, this Court is of the considered view that the FIR in issue cannot be quashed and set aside. This is for the reason that the contentions which have been raised by learned counsel for the petitioners seeking quashing of FIR touch the merits of the case and this Court is of the considered view that in the course of exercise of its inherent powers so conferred under Section 482 of the Criminal Procedure Code, this Court is not to substitute itself for the Trial Court and undertake the trial, that too, of the contents of FIR. As far as the judgment being relied upon by learned counsel for the petitioners is concerned, in the said case, Hon'ble Supreme Court after taking into consideration the law laid down by it with regard to Section 498-A of the India Penal Code and abuse thereof and thereafter reverting to the facts of the case in hand, was pleased to held that none of the appellants therein had been attributed any specific role in furtherance of the general allegations made against them and this simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations as were contained in the said complaint were to the effect that the accused were pressurizing the respondent-wife therein to purchase a car as dowry and threatened to forcibly terminate her pregnancy if the demands were not met. Unlike the fact situation of the case before the Hon'ble Supreme Court, herein in the FIR in issue, the role of the petitioners has been spelled

out by the complainant. FIR discloses commission of a cognizable offence. This Court again reiterates that it is not commenting upon the correctness of the allegations which has been made by the complainant, as the same is a matter of trial, but on the strength of what is narrated in the FIR, this Court does not find the present to be a fit case so as to quash the FIR in issue.

8. In view of the observations made hereinabove, as this Court finds no merit in the present petition, the same is dismissed. Interim orders, if any, stand vacated.

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

Between:-

1. MAHESH CHAND, S/O ROSHAN LAL, VILLAGE AND POST OFFICE PANOH, TEHSIL AND DISTRICT UNA, AT PRESENT PEON UNDER THE ESTABLISHMENT OF DC UNA.

2. DIWAN CHAND, S/O PRABHAT CHAND, RESIDENT OF VILLAGE DANGOD, P.O. RUKSAL, TEHSIL NANGAL, DISTRICT ROPAR PUNJAB, OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

3. RAM MURTI, S/O AMRIT LAL, VILLAGE AND POST OFFICE RAIPUR SAHODA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.
(ORDERED TO BE DELETED VIDE ORDER DATED 02.08.2021)

4. ASHOK KUMAR, S/O JOG RAJ, VILLAGE AND POST OFFICE CHATADA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

5. RAKESH KUMAR, S/O DHANI RAM, VILLAGE AND POST OFFICE JAKHERA, TEHSIL AND DISTRICT UNA, HP, OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

6. SWARAN SINGH, S/O HARNAM SINGH, VILLAGE AND POST OFFICE BASDEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

7. SUKHDEV SINGH, S/O KISHORI LAL, VILLAGE AND POST OFFICE BASDEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, HP.

8. JANG BAHADUR, S/O BALDEV SINGH, VILLAGE AND POST OFFICE BASDEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC, UNA, H.P.

9. RAMESH KUMAR, S/O BHAG SINGH, VILLAGE AND POST OFFICE BASDEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

10. KULDIP RAJ, S/O RAM NATH, VILLAGE AND POST OFFICE KHANPUR, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

11. KARNAIL SINGH, S/O KARTAR SINGH, VILLAGE AND POST OFFICE BASDEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

12. PRADEEP KUMAR, S/O DEVI DAYAL, RESIDENT OF GEETA COLONY MEHATPUR, TEHSIL MEHATPUR, DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

13. SATISH KUMAR, S/O GURDASS RAM, VILLAGE AND POST OFFICE CHADATGHAD, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

14. PAWAN KUMAR, S/O KULDEEP KUMAR, RESIDENT OF VILLAGE AND POST OFFICE KALSEDA, TEHSIL NANGAL, DISTRICT ROPAR, PUNJAB OCCUPATION PEON IN THE ESTABLISHMENT OF DC, UNA, H.P.

15. ASHOK KUMAR, S/O MULLA RAM, VILLAGE AND POST OFFICE MEHATPUR, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

16. ASHOK KUMAR, S/O GURDASS RAM, RESIDENT OF VILLAGE BANGARH, P.O. JAKEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

17. SATISH KUMAR, S/O SHER SINGH, VILLAGE BANGARH, PO JAKEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

18. ASHWANI KUMAR, S/O TARSEEM LAL, VILLAGE AND PO BASDEHRA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

19. RAM KISHAN, S/O HARI RAM, VILLAGE AND PO RAIPUR SAHODA, TEHSIL AND DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

20. RAJ KUMAR, S/O NANAK CHAND, VILLAGE AND PO JAKEHRA BASDEHRA, TEHSIL AND DISTRICT UNA, H.P. OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

21. SURINDER SINGH, S/O HOSHIAR SINGH, RESIDENT OF VILLAGE DADASIBA, PO SIUL, TEHSIL DEHRA, DISTRICT KANGRA, OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

22. SOHAN LAL, S/O PRITA RAM, RESIDENT OF VILLAGE AND POST OFFICE KUNGHAT, TEHSIL HAROLI, DISTRICT UNA, H.P., OCCUPATION PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

23. JANG BAHADUR, S/O PRITAM CHAND, RESIDENT OF VILLAGE AND POST OFFICE RAIPUR SAHODA, TEHSIL AND DISTRICT UNA, H.P., AT PRESENT PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

24. PAWAN KUMAR, S/O RAMESH CHAND, RESIDENT OF VILLAGE AND POST OFFICE MATOLI, TEHSIL AND DISTRICT UNA, H.P., AT PRESENT PEON IN THE ESTABLISHMENT OF DC UNA, H.P.

...PETITIONERS

(BY SHRI MOHIT THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ADDITIONAL CHIEF SECRETARY REVENUE GOVERNMENT OF HIMACHAL PRADESH.

2. DEPUTY COMMISSIONER, UNA, H.P.

3. SUB-DIVISIONAL OFFICER AMB/CONCERNED SUB DIVISION DISTRICT UNA, H.P.

4. HPGIC (HIMACHAL PRADESH GENERAL INDUSTRIES CORPORATION LIMITED) THROUGH ITS MANAGING DIRECTOR AT SHIMLA.

...RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, FOR R-1 TO R-3.

MS. SUNITA SHARMA, SENIOR ADVOCATE, WITH MR. DHANANJAY SHARMA, ADVOCATE, FOR R-4.

CIVIL ORIGINAL PETITION CONTEMPT (TRIBUNAL) No. 79 OF 2019

BETWEEN:-

MAHESH CHAND, S/O ROSHAN LAL, VILLAGE AND POST OFFICE PANOH, TEHSIL AND DISTRICT UNA, AT PRESENT RETIRED EMPLOYEE, ESTABLISHMENT OF DC UNA.

...PETITIONER

(BY SHRI MOHIT THAKUR, ADVOCATE)

AND

1. RAKESH KUMAR PRAJAPATI, PARENTAGE NOT KNOWN AT PRESENT DEPUTY COMMISSIONER UNA, DISTRICT UNA, H.P.

2. H.S. GULERIA, PARENTAGE NOT KNOWN, AT PRESENT MD HP GENERAL INDUSTRIES CORPORATION.

3. AVTAR SINGH RANA, PARENTAGE NOT KNOWN, GENERAL MANAGER CLBP MEHATPUR, DISTRICT UNA, H.P.

...RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, FOR R-1.

DR. LALIT KUMAR SHARMA, ADVOCATE, FOR R-2 AND R-3.

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.1200 of 2019 ALONGWITH CONNECTED MATTER
CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 1200 of 2019
Reserved on:05.04.2022
Decided on:06.07.2022

Constitution of India, 1950- Article 226- **EPF and CPF Schemes**- Pensionary benefits- Held- After the absorption of petitioner in the establishment of Deputy Commissioner, Una, that too in the year 2015, which absorption is prospective, cannot stake a claim to be governed by the CCS (Pension) Rules, 1972, simply on the ground that they were in job before 14.5.2003- It is reiterated that their being in job before 14.05.2003 for the purpose of being governed by the CCS (Pension) Rules, 1972 would have been of relevance only if they were governed by the CCS (Pension) Rules, 1972 in their parent Organization also, which admittedly, they were not- This renders the contention of the petitioners qua quashing of Annexure A-1 and also qua issuance of a mandamus to the respondents to treat the petitioners to be governed by the CCS (Pension) Rules, 1972 to be unacceptable in law. During the course of arguments, it could not be substantiated by the petitioners

before this Court that their service conditions have been altered to disadvantage by taking away their right to receive pension under the CCS (Pension) Rules, 1972, to which they were entitled to under their erstwhile employer- Petition dismissed. (Para 19)

These petitions coming on for pronouncement of judgment this day, the Court passed the following:-

J U D G M E N T

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 1200 of 2019

By way of this petition, the petitioners have, inter alia, prayed for the following reliefs:-

> *"(a) That the impugned order dated 24th April, 2017 (Annexure A-1) may kindly be set aside and quashed, wherein, it has been held that the applicants are entitled to be considered under the CPF Scheme instead of GPF Scheme after absorption the present department/establishment. That the respondents may be directed to determine the pensionary benefits of the applicants under only GPF scheme and the matching contribution may be made by the State only as per the provisions of GPF Scheme and not as per CPF Scheme.*
>
> *(b) That the entire services rendered by the applicants in the parent department HPGIC may be considered for the purposes of Pension, Increments and other Financial Benefits. The applicants may be allowed all consequential benefits on account of such consideration.*
>
> *(c) In the alternative if the Hon'ble Tribunal comes to the conclusion that being the absorbed employees under the State the applicants are entitled to be considered only under the CPF Scheme and not under the GPF Scheme in that case the absorption of the applicants in the present establishment of Deputy*

Commissioner, Una may be declared and held to be illegal as being without consent and further without seeking any mandatory option from the applicants and also of the parent department HPGIC."

2. Brief facts necessary for the adjudication of the present petition are that the petitioners were initially appointed as Class-IV employees in the Himachal Pradesh General Industries Corporation in between the years 1977 to 1987. They were serving in the said Corporation on regular basis in terms of the averments made in the petition. From the year 2009 to 2012, the petitioners were deployed on secondment basis in the establishment of Deputy Commissioner, Una under the Revenue Department without their consent. In the year 2015, again without their consent, they were permanently absorbed in the establishment of Deputy Commissioner, Una. Before their absorption in the Department, the consent of HPGIC was also not taken and for this reason, even after their absorption, the contributions continued to be made towards their EPF accounts by the HPGIC. The case of the petitioners is that they stood regularized as employees of HPGIC before the year 2003. While serving in HPGIC, their services were regulated under the provisions of Employees Provident Fund Scheme.The rate of contribution by the employer in the EPF was much higher than compared to CPF Scheme and even after being deployed on secondment basis in the Revenue Department, the petitioners were considered for pensionary entitlements and contributions under the EPF Scheme only. Thereafter, HPGIC suddenly stopped the contribution under the EPF Scheme. Vide letter dated 17th February, 2017, the petitioners were asked to join CPF Scheme.

3. Feeling aggrieved, petitioners filed an Original Application, i.e., Original Application No. 584 of 2017 before the erstwhile learned Administrative Tribunal. The Original Application was disposed of in terms of

order dated 06.03.2017, whereby, respondents were directed to consider the pending representation of the petitioners and pass appropriate orders thereupon. The direction issued by the Tribunal has resulted in the issuance of impugned Annexure A-1, reference whereof has already been given hereinabove.

4. Learned counsel for the petitioner has argued that the petitioners were initially employed in HPGIC, wherein, they were serving on regular basis before the year 2003. It was in the year 2009 when they were sent on secondment basis to the establishment of Deputy Commissioner, Una, whereafter, they were absorbed in the establishment, but without their consent. Learned Counsel further submitted that in view of the fact that the petitioners were serving on regular basis in their parent Organization before the year 2003 and as the service of the employees engaged before the year 2003 in the Revenue Department is pensionable, therefore, the petitioners are entitled for the grant of pension. He submitted that in this background, order dated 24.04.2017 (Annexure A-1), passed by the Deputy Commissioner, Una, District Una, H.P. is bad in law and is liable to be quashed and set aside.

5. The petition is opposed by the State, *inter alia*, on the ground that the absorption of the petitioners in the Revenue Department was not a routine absorption of an employee on foreign service, but the same was in terms of Office Memorandum dated 11th May, 2012, appended as Annexure R-V with the reply filed by respondents No. 1 to 3, which was the Policy regarding permanent absorption of surplus staff taken on secondment basis by the State Government. Learned Additional Advocate General by referring to the said Office Memorandum submitted that the act of the State of taking on secondment basis the petitioners in the Revenue Department and their subsequent absorption in the said Department was an act undertaken to save

the services of the petitioners from termination, as they were rendered surplus in their parent Organization.

6. Learned Additional Advocate General argued that erstwhile learned Himachal Pradesh State Administrative Tribunal while disposing of O.A. No. 584 of 2017, titled *Mahesh Chand & others Vs. State of H.P. & others* had directed the Deputy Commissioner, Una, respondent No. 2, to take a decision on the representation of the applicants therein, i.e., the present petitioners. The applicants were heard in person by the authority concerned, who thereafter held in terms of Communication dated 11.10.2012 (Annexure R-I) that the petitioners herein were permanent employees of Himachal Pradesh General Industries Corporation Limited and were not covered under the CCS (Pension) Rules, 1972. Permanent pension account number was to be allotted to them since they were merged in the establishment of Deputy Commissioner Una on the basis of their consent. The petitioners thus fell under the CPF Scheme and were not entitled for subscription under the GPF Scheme. It was further held by the authority that in terms of instructions dated 31.07.2012, issued by the Finance Department, Government of Himachal Pradesh, on completion of 20 years of regular service, one additional increment to all Class-IV employees was to be given, but the same was applicable to the State Government employees and the petitioners were not eligible for special increment after completion of 20 years service, since earlier they were employees of HPGIC. On these basis, learned Additional Advocate General submitted that the petition being devoid of any merit, is liable to be dismissed. He reiterated that the petitioners were absorbed in the establishment of Deputy Commissioner, Una with their consent and they willingly submitted their consents which were appended with the reply as Annexure-VIII and it was on the basis of these consents that they were absorbed in the establishment of Deputy Commissioner, Una. Learned Additional Advocate General also argued that as the service of the petitioners

was not pensionable with their erstwhile employer, therefore, they were not covered under the CCS (Pension) Rules, 1972 and, thus, they are entitled for the benefits of CPF Scheme but not the GPF Scheme.

7. Respondent No. 4 in its reply has stated that the petitioners were initially appointed by the Himachal Pradesh Minerals Industrial Development Corporation Limited (HPMIDC) in the years 1976, 1977, 1978 and 1979 in the Unit Country Liquor Bottling Plant. After the establishment of Himachal Pradesh General Industries Corporation Limited in the year 1988, the Country Liquor Bottling Plant was transferred to Himachal Pradesh General Industries Corporation Limited alongwith its employees. The petitioners were deployed on secondment basis with respondent No. 2 only after they fell in surplus pool of respondent No. 4 and after the issuance of State Government Notification dated 26.09.2000. The petitioners were deployed on secondment basis on different dates in the year 2011, whereafter, they were relieved of their duties from Country Liquor Bottling Plant, Mehatpur. It is also mentioned in the reply that consents of the petitioners were duly taken before their absorption with respondent No. 2. 8. The petitioners have placed on record by way of CMP-T No. 2009 of 2020 their orders of regularization as well as relieving orders from HPGIC. Letters of absorption with respondent No. 2 have also been appended and documents qua receipt of EPF from HPGIC have also been placed on record.

9. The main argument put forth by learned counsel for the petitioners is that as the petitioners after their appointment on secondment basis and absorption became permanent employees of the Government of Himachal Pradesh, wherein, the job was pensionable, therefore, they were entitled for grant of pension post their superannuation and Annexure A-1, dated 24.04.2017, in terms whereof said prayer of the petitioners was rejected, was liable to be quashed and set aside.

10. To substantiate his contentions, learned counsel for the petitioners has relied upon judgment dated 19th June, 2013, passed by the High Court of Jharkhand at Ranchi in *Bir Kaur Paswan and others Vs. State of Jharkhand and others,* W.P. (S) No. 939 of 2012 with I.A. No. 3766 of 2013, judgment of the Hon'ble Supreme Court in *The State of Jharkhand Vs. Bir Kaur Paswan and others*, Civil Appeal No. 13372 of 2015 and judgment of the High Court of Judicature at Patna in *Mukteshwar Prasad Singh and others Vs. The State of Bihar and others,* Letters Patent Appeal No. 716 of 2017 in Civil Writ Jurisdiction Case No. 7702 of 2010.

11. I have heard learned counsel for the parties and have also gone through the pleadings as well as the documents on record.

12. Few facts which are not in dispute are enumerated hereinbelow, as they are necessary for the adjudication of present petition. All the petitioners were initially appointed as Class-IV employees in the Himachal Pradesh General Industries Corporation in between 1977 to 1987. All the petitioners were regularized in Himachal Pradesh General Industries Corporation in the year 1987, as is evident from the orders of regularization which have been placed on record by the petitioners, which are available at Page No. 324 onwards of the paper-book. In terms of Communication dated 07.11.2009, issued by the ACS-cum-FC (Revenue) to the Government of Himachal Pradesh to Divisional Commissioners, Shimla, Mandi and Kangra at Dharamshala, on the subject 'Filling up of vacant posts of Peons (Class-IV Category) in the Revenue Department', which document is available at Page No. 343 of the paper-book as Annexure A-11 with CMP-T No. 2009 of 2020, approval was accorded by the Government to fill up 143 vacant posts of Peons (Class-IV Category) in the establishment of Deputy Commissioners from the surplus pool, *inter alia,* drawn from Agro Industries Corporation, HPMC, Khadi & V.I. Board, Housing & UD authority, GIC, SIDC and Financial Corporation. Thereafter, in terms of Office Order dated 11.03.2015 (Annexure A-32) with

CMP-T No. 2009 of 2020 at Page No. 369 of the paper-book, the petitioners who were deployed on secondment basis in the office of Deputy Commissioner, Una as surplus staff, were absorbed in the establishment against vacant posts of Clerks, Drivers and Peons etc. Before this, in between the years 2009 to 2012, the petitioners were deployed on secondment basis in the office of Deputy Commissioner, Una under the Revenue Department.

13. In a nut-shell, the prayer of the petitioners is that a direction be issued to the respondent-State to the effect that the job of the petitioners be considered to be pensionable, as they were already serving HPGIC on regular basis much prior to the year 2003, which is the cut off year as far as the State is concerned for the purpose of grant of pension to its employees. The petitioners are erstwhile employees of HPGIC. There is no dispute that the job of the employees of HPGIC including the petitioners was not pensionable. In between the years 2009 to 2012, the petitioners were deputed on secondment basis in the establishment of Deputy Commissioner, Una and they continued to serve as such there till they were permanently absorbed in the establishment of Deputy Commissioner, Una in the year 2015. Thus, till the time the services of the petitioners were absorbed in the establishment of Deputy Commissioner, Una, in terms of Office Order dated 11.03.2015, for all intents and purposes, they continued to be the employees of HPGIC.

14. At this stage, it is relevant to refer to the terms of Office Order dated 11.03.2015, in terms whereof, the petitioners were absorbed in the office of Deputy Commissioner, Una. A perusal of this Communication demonstrates that the employees whose names were referred therein were absorbed in the establishment against the posts referred against their name and the absorption was on temporary basis, and the employee was to remain on probation for a period of two years. This clearly demonstrates that the absorption was prospective.

15. This absorption was in terms of Office Memorandum dated 11th May, 2012, issued by the Finance (Regulations) Department, Government of Himachal Pradesh, on the subject 'policy regarding permanent absorption of surplus staff taken on secondment basis by the State Government'. This Policy/Office Memorandum is available at Pages No. 80 and 371 of the paper-book. A perusal of this Office Memorandum demonstrates that a decision was taken in terms thereof by the Stage Government to absorb the staff taken on secondment basis on the terms and conditions spelled out in the said Office Memorandum, which*inter alia*, included the following three conditions:-

> *"7. The pensionary benefits to the officials will be regulated as per the instructions of the State Government issued vide FD's letter No. Fin (Pen)A(3)-1/96, dated 15.05.2003 and as per provision of H.P. Civil Services Contributory Pension Rules 2006 notified by the Department of Finance (Pension) vide Notification No.:Fin(Pen)A(3)-1/96, dated 17.08.2006.*
>
> *8. In the case of those employees who were appointed on or before 14.05.2003 on regular basis and were governed by the CCS (Pension) Rules, 1972 in their parent organization then the above Condition No. 7 will not be applicable as they shall continue to be governed under aforesaid Rules for pensionary benefits.*
>
> *9. The employees will be required to accept these terms & conditions before the issuance of final orders of absorption."*

16. At this stage, it is also relevant to refer to the order in terms whereof, the petitioners were sent on secondment basis initially. Said document is at Page No. 343 of the paper-book and a perusal thereof demonstrates that those employees of the establishments like HPGIC were sent on secondment basis in the Revenue Department, who were in surplus pool. This clearly demonstrates that the purpose of sending them on secondment basis to the Revenue Department was to save their jobs. Now, as

far as the contention of learned counsel for the petitioners that no consent was taken from the petitioners when they were sent on secondment basis is concerned, all that this Court can observe is this that there is nothing on record from which it can be inferred that the petitioners were forced to go on secondment basis. Be that as it may, to counter the contention of the petitioners that they were absorbed without either seeking their options or obtaining their proper consents, respondents No. 1 to 3 alongwith their reply have placed on record as Annexure R-VII, the consents which were given by the petitioners for their permanent absorption, which belies the fact that no such consents were taken from them.

17. Still this Court will venture to adjudicate the issue raised by the petitioners before this Court as to whether the rejection of their claim of pension by the respondents is sustainable in law or not. From the facts as they have been enumerated hereinabove, it is apparent and evident that the petitioners were regular employees of the Himachal Pradesh General Industries Corporation Limited. Their jobs in HPGICL were not pensionable. For some reason, they were placed in the surplus pool of employees of HPGICL. In between the years 2009 to 2012, they were sent on secondment basis to Revenue Department, which placement on secondment basis was accepted by them without any protest. Their consents were taken before their permanent absorption in the establishment of Deputy Commissioner, Una and as the petitioners gave their consents for absorption, it was thereafter that services of the petitioners were absorbed as such.

18. Now, at this stage it is important to again refer to the terms and conditions of Office Memorandum dated 11th May, 2012, i.e., Policy regarding permanent absorption of surplus staff taken on secondment basis by the State Government. Clause-7 of the same provides that pensionary benefits to the officials will be regulated as per the instructions of the State Government issued by the FD's letter dated 15.05.2003 and as per provisions of H.P. Civil

Services Contributory Pension Rules, 2006 notified by the Department of Finance (Pension) vide Notification dated 17.08.2006. Clause-8 thereof provides that in the case of those employees who were appointed on or before 14.05.2003 on regular basis and if they were governed by the CCS (Pension) Rules, 1972 in their parent organization, then the above Condition No. 7 will not be applicable, as they shall continue to be governed under the aforesaid Rules for pensionary benefits.

19. As has been held by me hereinabove also, the petitioners were not governed by the CCS (Pension) Rules, 1972 before 14.05.2003 in their capacity as employees of HPGICL. That being the case, but natural, the pensionary benefits to the petitioners, post absorption, are to be governed in terms of Clause-8 of Office Memorandum dated 11th May, 2012. It is pertinent to mention that there is no challenge *per se* to this Office Memorandum with regard to its legal validity in the petition. In this background, this Court is of the considered view that as the job of the petitioners in their parent Department as on 14.05.2003 was not governed by the CCS (Pension) Rules, 1972, therefore, they after their absorption in the establishment of Deputy Commissioner, Una, that too, in the year 2015, which absorption is prospective, cannot stake a claim to be governed by the CCS (Pension) Rules, 1972, simply on the ground that they were in job before 14.5.2003. It is reiterated that their being in job before 14.05.2003 for the purpose of being governed by the CCS (Pension) Rules, 1972 would have been of relevance only if they were governed by the CCS (Pension) Rules, 1972 in their parent Organization also, which admittedly, they were not. This renders the contention of the petitioners qua quashing of Annexure A-1 and also qua issuance of a mandamus to the respondents to treat the petitioners to be governed by the CCS (Pension) Rules, 1972 to be unacceptable in law. During the course of arguments, it could not be substantiated by the petitioners before this Court that their service conditions have been altered to

disadvantage by taking away their right to receive pension under the CCS (Pension) Rules, 1972, to which they were entitled to under their erstwhile employer.

20. Now coming to the judgments referred by learned counsel for the petitioners of the Hon'ble High Court of Jharkhand at Ranchi. In all these cases, the job of the petitioners was pensionable in the erstwhile Department. It is evident from the perusal of the judgment by the High Court Jharkhand at Ranchi in *Bir Kaur Paswan & Ors. Vs. State of Jharkhan & Ors,* W.P. (S) No. 939 of 2012 with I.A. No. 3766 of 2013 that the very case of the petitioners therein was that they were employees of Government undertaking/Corporation and their services were pensionable from the date of joining their service, but by the impugned Resolution, the respondents were denying the said valuable right by bringing them under the New Pension Scheme, which was implemented recently. It is in this background that the Hon'ble High Court held the New Pension Scheme as well as denial of legitimate demand of the petitioners therein as wholly arbitrary, unjust and illegal. Hon'ble Supreme Court upheld these findings in *The State of Jharkhand Vs. Bir Kaur Paswan & Ors,* Civil Appeal No. 13372 of 2015. Similarly, in *Mukeshwar Prasad Singh and others Vs. The State of Bihar and others(supra)*, the Hon'ble Division Bench therein, taking into consideration the fact that the petitioners were similarly situated as the petitioners in *Bir Kaur Paswan's case (supra),* who after creation of the new State of Jharkhand, had been allocated to the State of Jharkhand, allowed the writ petitions in view of the adjudication in *Bir Kaur Paswan's case (supra).*This Court is of the considered view that the judgments relied upon by learned counsel for the petitioners are of no assistance to them, because therein the services of the petitioners were already pensionable in their erstwhile Departments and the prayer of the petitioners was that the service so rendered by them in their erstwhile Departments should be taken into consideration while determining

their pensionary benefits. In the present case, as has been discussed in detail hereinabove, admittedly, service of the petitioners in the erstwhile Organization, i.e., their parent Organization, was not pensionable. Therefore, the above judgments are of no help to them.

21. Accordingly, in view of the discussion made hereinabove, as this Court finds no merit in the present petition, the same is dismissed. Miscellaneous applications, if any, also stand disposed of.

CIVIL ORIGINAL PETITION CONTEMPT (TRIBUNAL) No. 79 OF 2019

22. In view of the adjudication of the main writ petition, these proceedings are ordered to be closed. Notices stand discharged.

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

Between:-

CHET RAM, S/O SH. LAL DASS, AGED ABOUT 44 YEARS, RESIDENT OF VILLAGE BHANVADI, POST OFFICE THACHI, TEHSIL BALICHOWKI, DISTRICT MANDI (HP), PRESENTLY LODGED IN JAIL, BILASPUR (HP).

...PETITIONER

(BY SHRI N.K. TOMAR, ADVOCATE, VICE MR. RAJINDER SINGH CHANDEL, ADVOCATE)

AND

STATE OF H.P. THROUGH SECRETARY (HOME).

...RESPONDENT

(M/S SUMESH RAJ & DINESH THAKUR, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL & MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL).

CRIMINAL MISC. PETITION (MAIN)
No.1429 of 2022
Decided on: 18.08.2022

Code of Civil Procedure, 1908- Section 439- **Narcotic Drugs and Psychotrpic Substances Act, 1985**- Sections 20 & 29- Charas weighing

3.850 Kg.- Held- There are reasonable grounds for believing that accused is guilty of such offence- Petition dismissed. (Para 6, 7 & 8)

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 439 of the Code of Criminal Procedure, the petitioner has prayed for his release in FIR No. 336/20, dated 07.11.2020, registered at Police Station Kullu, in terms whereof, the petitioner is being prosecuted for commission of an offence punishable under Sections 20 &29 of the Narcotic Drugs and Psychotropic Substances Act.

2. Mr. N.K. Tomar, learned counsel for the petitioner submits that the petitioner has been falsely implicated in the case and he has no connection whatsoever with the other accused in the case and, therefore, the petitioner deserves to be released on bail. He contends that the petitioner is an agriculturist by profession, who otherwise also is not involved in the commission of such kind of matters and he has been falsely implicated in the case at the behest of Police. He further states that the petitioner has no past criminal history and there is not even a remote possibility of the petitioner having committed the offence alleged against him and in these circumstances, if released on bail, he will comply with all such conditions as may be imposed by the Court.

3. The bail petition is opposed by the learned Additional Advocate General, who states that on the fateful day, i.e., 7th November, 2020, a huge hall of contraband, i.e., c*haras* weighing 3 Kg. 850 grams was recovered from a bag which was kept in the rack just above Seat Nos. 25 and 26 of a KTC Transport Bus bearing No. HP66-1742, which was on its way from Manikaranto Bhuntar. The bag was grey in colour and none in the bus

claimed the ownership thereof. The contraband was discovered in the course of a routine checking of the bus by the police officials. When the bag was opened in the presence of witnesses, the same was found containing besides other articles, as have been mentioned in the status report, five packets, inside which, the contraband was found. These when weighed, were found to be 3 Kg. 850 grams and on the basis of experience, it was discovered that the same was *charas*. After recovery of the contraband, investigation was carried by the Police and the same revealed that on 06.11.2020, in Room No. 101 of one Sharma Guest House at Manikaran, three persons, namely, Piare Singh, Chet Ram and Gita Nand had stayed together, who checked out of the Room on 07.11.2022 at 8:00 a.m. At the relevant time, the bag which was recovered from the bus was being carried by one of the said three persons, namely, Gita Nand. Incidentally, investigation further revealed that one of these three persons,Piare Singh, was one of the passengers of the bus, from which the contraband was recovered. Investigation also revealed that the bag was kept in the rack of the bus by Chet Ram and Gita Nand, who had paid an amount of Rs.5,000/- to Piare Singh to take care of the bag, from whom the same was to be collected by the other accused at Bhuntar, who had already left for Bhuntar prior in time before the bus was to reach there. It is in this backdrop and in the course of what was revealed in the investigation that the accused were arrested, which includes Chet Ram also. Accordingly, learned Additional Advocate General has argued that it is not as if the petitioner has been taken into custody on the basis of some confessional statement only, made by the co-accused, as the involvement of the petitioner stands clearly spelled out by the investigation which was carried in the matter, which includes the statements of employee of the Guest House and also one *Dhabha* owner, who had disclosed that all these three persons were together on the night before the fateful day when the *charas* was recovered from the bus. The bag in issue was also identified by these two persons, i.e., the employee of the Guest House

as well as the owner of the *Dhabha*. Learned Additional Advocate General thus submits that as the petition is devoid of any merit, the same be dismissed.

4. In rebuttal, Mr. Tomar has submitted that assuming what has been stated by the learned Additional Advocate General is correct, even then by no stretch of imagination, it can be said definitely that the bag allegedly identified by the employee of the Guest House as also the owner of the *Dhabha* was the same bag which was recovered from the bus in issue and the bag which was seen by these two persons in the possession of one of the accused was the same containing the contraband. Learned counsel submits that otherwise also, the petitioner deserves to be released on bail in view of the judgment of the Hon'ble Supreme Court in *Tofan Singh Vs. State of Tamil Nadu*, (2021) 4 Supreme Court Cases 1 as well *as Narcotics Control Bureau Vs. Mohit Aggarwal*, Criminal Appeal Nos. 1001-1002 of 2022 (Arising out of Petitions for Special Leave to Appeal (Crl.) No. 6128-29 of 2021), as the sole basis of the arrest of the petitioner appears to be some kind of a confessional statement made by the other accused.

5. I have heard learned counsel for the parties and also gone through the petition as well as the status report which has been filed by the State.

6. As the factual matrix already stands spelled out in the submissions of leaned Additional Advocate General, which have been recorded hereinabove, this Court will not repeat the same for the sake of brevity. It is not in dispute that from the bag in issue, 3 Kg. 850 grams *charas* has been recovered, which admittedly, is a commercial quantity. A perusal of the status report demonstrates that it was in the course of investigation which was carried by the Police after the recovery of contraband from the bag in issue that the same revealed the involvement of the accused, which includes the present petitioner also. It is apparent from the status report that the investigation revealed that on the night before the *charas* was recovered from

the bag in the bus concerned, the petitioner as well as other two accused had stayed together in the 'Sharma Guest House' at Manikaran, District Kullu, H.P. and they had checked out of the room next morning. It has also been found in the course of the investigation that incidentally though no one claimed the ownership of the bag when the bus was stopped by the Police and checking of the same was carried out, however, one of the three accused was travelling in the said bus. Now, all these things cannot be said to be a mere coincidence or a figment of imagination of prosecution, as the petitioner wants this Court to believe. Therefore, this is not a case, wherein, the petitioner has been taken into custody only on the basis of some confessional statement made by one of the accused, as argued on behalf of the petitioner. There is one more fact which requires mention at this stage and said fact is that whereas the contraband was recovered from a bag which was placed in a bus which was on its way from Manikaran to Bhuntar, both of which areas are in District Kullu, all the three accused happen to be the residentsof Post Office Thachi, Tehsil Balichowki, District Mandi, H.P. In other words, the presence of all these three persons at Manikaran in the same room in same Guest House on a day before the contraband was recovered from the bus again cannot be said to be a co-incidence. In terms of the provisions of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985, no person accused of an offence punishable inter alia for offences involving commercial quantity shall be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. In the facts of the present case at this stage, this court is not in a position to record its satisfaction that there are reasonable grounds for believing that the accused is not guilty of such offence.

7. Coming to the judgments relied upon by learned counsel for the petitioner, this Court is of the considered view that the judgment of the Hon'ble Supreme Court in *Tofan Singh's case (supra)* is of no assistance to the petitioner at this stage for the reason that involvance of the petitioner in the offence is not on the basis of sole confessional statement of a co-accused,as their is other material on record to corroborate the case against the accused.

8. As far as the judgment of the Hon'ble Supreme Court in *Narcotic Control Bureau's case (supra)* is concerned, this Court is of the considered view that a perusal of paras-14, 16 and 18 of the same demonstrate that it has been clearly laid down by the Hon'ble Supreme Court in this judgment that the expression "reasonable grounds" used in Clause (b) of Sub-section (1) of Section 37 would mean credible and plausible grounds for the Court to believe that the accused person is not guilty of the alleged offence and for arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Hon'ble Supreme Court by referring to its judgment in *Tofan Singh's case (supra)* has held that in *Tofan Singh's case*, a confessional statement recorded under Section 67 of the NDPS Act has been held to be inadmissible in the trial of an offence under the NDPS Act, but if *de hors* the confessional statement, other circumstantial evidence is brought on record by the prosecution, then the Court is justified in exercising its discretion not to release the accused on bail. This Court again reiterates that in view of what is contained in the status report, *prima facie*, satisfaction to the effect that the accused is not guilty of the offence alleged to have been committed by him, cannot be recorded by this Court in the present case and, therefore, as this Court finds no merit in the present petition, the same is dismissed.

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

BETWEEN:-

1. INTZAR, AGED ABOUT 35 YERAS,
S/O SH NIKKA
R/O VILLAGE NERON KOTRI, PO KAULANWALA BHOOD
TEHSIL NAHAN, DISTRICT SIRMAUR
HIMACHAL PRADESH.

2. BHEEM SINGH S/O SH LAIK RAM
R/O VILLAGE KHANDA, PO KAULAWALA BHOOD,
TEHSIL NAHAN, DISTRICT SIRMAUR,
HIMACHAL PRADESH.

3. RANJEET SINGH KANWAR
S/O SH LALIT KANWAR
R/O ISHWAR BHAWAN, H NO.988/5,
MOHALLA AMARPUR, DISTRICT SIRMAUR (HP).

4. BALBIR SINGH S/O SH PHOOL CHAND
R/O VILLAGE AND PO KAULAWALA BHOOD,
TEHSIL NAHAN, DISTRICT SIRMAUR (HP).

5. RAJESH KUMAR S/O SH MOHINDER SINGH
R/O VILLAGE AND PO KAULAWALA BHOOD,
TEHSIL NAHAN, DISTRICT SIRMAUR (HP).

6. TAPENDER SINGH S/O SH MADAN SINGH
R/O VILLAGE PANUALI, PO PARARA,
TEHSIL DADAHU, DISTRICT SIRMAUR (HP)

7. DINSEH KUMAR S/O SH JEEWAN SINGH
R/O VILLAGE JADOL, PO TAPROLI,
TEHSIL RAJGARH, DISTRICT SIRMAUR (HP)

8. RAMESH KUMAR S/O SH LEKH RAM
R/O 370/3 SHIMLA ROAD, NAHAN,
DISTRICT SIRMAUR (HP)

9. NADEEM KAUSAR S/O SH NAZIR HUSSAIN
R/O VILLAGE KIRATPUR, PO PURUWALA,
TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR (HP)

10. VIRENDER KUMAR S/O SH SANT RAM
R/O VPO NAGHETA, TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR (HP)

11. RAJEST KUMAR S/O SH GOPAL SINGH
R/O VILLAGE KATWARI BAGRATH,
PO KANSAR, TEHSIL DADAHU,
DISTRICT SIRMAUR (HP)

12. SUBHASH CHAUHAN S/O SH BASTI RAM
R/O VPO BHAWAT,
DISTRICT SIRMAUR
(HP)

13. RAKESH KUMAR S/O SH NAND RAM,
VPO GIRI NAGAR, TEHSIL POANTA SAHIB,
DISTRICT SIRMAUR (HP)

14. ROHIT SAINI S/O SH KAMAL KUMAR
R/O 78/11 BARA CHAWNK JAIN BAZAR NAHAN
DISTRICT SIRMAUR (HP)

15. VISHAL KUMAR S/O SH DINESH CHAND
R/O 677/11 BALMIKI BASTI NAHAN
PO NAHAN TEHSIL NAHAN
DISTRICT SIRMAUR (HP)

16. SUSHILA CHAUHAN
D/O SH CHARANJEET SINGH CHAUHAN
R/O VILLAGE MASHU PO JAMMA
TEHSIL KAMROO DISTRICT SIRMAUR (HP)

17. RAM KARAM S/O SH MATU RAM
R/O VILLAGE SUKETI PO MOGINAND
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

18. SANDEEP SHARMA S/O SH RANDHIR SHARMA
R/O VILLAGE NEHRLA PO SHAMBHUWALA
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

19. VIRENDER KUMAR S/O SH NAIN SINGH
R/O VILLAGE MINAL-BAG PO DUGANA

TEHSIL KAMROW DISTRICT SIRMAUR (HP)

20. KAILASH THAKUR S/O SH JAIPAL SINGH
R/O VILLAGE GAWANA PO BHAROG BANERI
TEHSIL PAONTA SAHIB
DISTRICT SIRMAUR (HP)

21. VINITA DEVI S/O SH LAYAK RAM
R/O VPO KHODRI MAJRI TEHSIL POANTA SAHIB
DISTRICT SIRMAUR (HP)

22. NEELAM DEVI S/O SH DAYA RAM
R/O VILLAGE KANLOG PO BANAH KI SER
TEHSIL PACHHAD DISTRICT SIRMAUR (HP)

23. NARENDER KUMAR S/O SH BALA RAM
R/O VILLAGE VETERINARY COLONY RAJGARH
PO & TEHSIL RAJGARH
DISTRICT SIRMAUR (HP)

24. NAZRA S/O SH SABIR ALI
R/O VILLAGE NAWADA,
PO SHIVPUR TEHSIL PAONTA SAHIB
DISTRICT SIRMAUR (HP)

25. INDU RANI S/O SH SUNDER LAL
R/O VILLAGE DOON PO JAMUN KI SER
TEHSIL PACHHAD DISTRICT SIRMAUR (HP)

26. SUNIL CHAUHAN S/O SH SHUPA RAM
R/O VPO BELLA,
TEHSIL SHILLAI DISTRICT SIRMAUR (HP)

27. KAMAL SINGH S/O SH NARANJAN SINGH
R/O VILLAGE & PO KOLAR
TEHSIL PAONTA SAHIB
DISTRICT SIRMAUR (HP)

28. TEK CHAND S/O SH VIJAY RAM
R/O VILLAGE GADDA BHUDDI
PO SHAMBHU WALA
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

29. ANWAR SINGH S/O SH SOHAN SINGH
R/O HOUSE NO 166/2 WARD NO 1
TEHSIL POANTA SAHIB DISTRICT SIRMAUR (HP)

30. KIRTI KUMAR TOMAR S/O SH MADAL LAL TOMAR
R/O VILLAGE DHAUN PO RAMA
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

31. MUDDASIR NAZAR S/O ISLAM
R/O VILLAGE NARWADA PO SHIVPUR
TEHSIL PAONTA SAHIB DISTRICT SIRMAUR (HP)

32. VIKRAM SINGH S/O SH BHAGAT RAM
R/O VILLAGE BHARAYAN PO KOTLA MOLAR
TEHSIL NAHAN DISTRICT SIRMAOUR (HP)

33. JAMEEL KHAN S/O SH NAZIR KHAN
R/O VILLAGE SAINWALA PO MAJRA
TEHSIL PAONTA SAHIB DISTRICT SIRMAUR (HP)

34. DINESH KUMAR S/O SH INDER SINGH
R/O VPO & TEHSIL NOHRADHAR
DISTRICT SIRMAUR (HP)

35. HARJEET SINGH S/O SH MANGAT SINGH
R/O HOUSE NO 86/13 MOHALLA GOBIND GARH
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

36. PRAVEEN KUMAR S/O SH JATI RAM
R/O VPO KOTRI BIAS
TEHSIL POANTA SAHIB
DISTRICT SIRMAUR (HP)

37. KABUL SINGH S/O SH HARI SINGH
R/O VPO KOTRI BIAS TEHSIL POANTA SAHIB
DISTRICT SIRMAUR (HP)

38. CHAMAN LAL S/O SH PREM CHAND
R/O VILLAGE BHARAPUR PO DHOULAKUAN
TEHSIL PAONTA SAHIB DISTRICT SIRMAUR (HP)

39. SUDHIR SHARMA S/O SH DURGA DUTT
R/O VILLAGE JHANGAN PO CHHOG

TEHSIL RAJGARH DISTRICT SIRMAUR (HP)

40. ARUNA TOMAR S/O SH VIPIN KAMAL
R/O VPO BOGDHAR TEHSIL NORADHAR
DISTRICT SIRMAUR (HP)

41. SANJOO S/O MOHAN LAL
R/O VILLAGE DHADUWALA PO BIKRAM BAG
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

42. PANKAJ TOMAR S/O SH SURESH KUMAR
R/O VPO SHAMBHU WALA
TEHSIL NAHAN DISTRICT SIRMAUR (HP)

43. BAHADUR SINGH S/O SH SURAT SINGH
R/O VPO LANA PALLAR TEHSIL SANGRAH
DISTRICT SIRMAUR (HP)

44. AJAY KUMAR S/O SH OM PRAKASH
R/O VILLAGE BAKAHAN PO BHAROG BANERI
TEHSIL POANTA SAHIB DISTRICT SIRMAUR (HP)

45. LALITA SHARMA S/O SH RAVI DUTT
R/O VILLAGE NADRI PO DEVAMANAL
TEHSIL NORADHAR DISTRICT SIRMAUR (HP)

46. SHYAM LAL S/O SH BHOOP SINGH
R/O VILLAGE LANI PO KOTI BOUCH
TEHSIL SHILLAI DISTRICT SIRMAUR (HP)

47. VIJAY KUMAR S/O SH JAI PAL
R/O VILLAGE MEHRUWALA PO BHAGANI
TEHSIL PAONTA SAHIB DISTRICT SIRMAUR (HP)

48. SANDEEP KUMAR S/O SH LUXMI SINGH
R/O VILLAGE LAWANA PO DEOTHI MAJHGEON
TEHSIL RAJGARH DISTRICT SIRMAUR (HP)

49. KAMLESH KUMARI S/O SH PANCH RAM
R/O VPO SHILLAI DISTRICT SIRMAUR (HP)

50. DAYA RAM S/O SH AMAR SINGH
R/O VILLAGE GULABGARH PO KOTRI BIAS

TEHSIL PAONTA SAHIB DISTRICT SIRMAUR (HP)

51. SATYA PRAKASH S/O SH BRAHM DUTT
R/O VILLAGE BAUNAL PO RAJANA
TEHSIL SANGRAH DISTRICT SIRMAUR (HP)

52. NIRMALA DEVI S/O SH GUMAN SINGH
R/O VILLAGE DHADAS PO KANDO BHATNOL
TEHSIL SHILLAI DISTRICT SIRMAUR (HP)

53. KANWAR SINGH S/O SH JAWALA RAM
R/O VILLAGE DHIRAINA, P.O. NAINDHAR
TEHSIL SHILLAI DISTRICT SIRMAUR (HP)

54. DEEP RAM SHARMA S/O SH RAMAND SHARMA
R/O VILLAGE BHARAINA PO BAKRAS
TEHSIL SHILLAI DISTRICT SIRMAUR (HP)

55. DINESH KUMAR S/O SH DURGA SINGH
R/O VPO TAPROLI TEHSIL RAJGARH
DISTRICT SIRMAUR (HP)

56. ASHA KAPOOR S/O SH BABU RAM
R/O H NO-3 FLAT NO 6, MOHALLA AMARPUR,
HOUSING BOARD COLONY
DISTRICT SIRMAUR (HP)

...PETITIONERS

(BY SHRI SANJEEV BHUSHAN,
SENIOR ADVOCATE WITH SHRI
JEEVAN KUMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS CHIEF SECRETARY,
GOVERNMENT OF HP, SHIMLA

2. THE DEPARTMENT OF FOREST
THROUGH ITS SECRETARY,

GOVT. OF HP

3. THE PRINCIPAL CHIEF CONSERVATOR OF FOREST,
GOVT. OF HP.

4. CONSERVATOR OF FOREST,
NAHAN,
DISTRICT SIRMAUR AT NAHAN
(HP)

5. KUSHAL CHAND S/O LATE BIRI SINGH
R/O VPO PALI,
TEHSIL PADHAR, DISTRICT MANDI,
HIMACHAL PRADESH
POSTED AS FOREST GUARD
UNDER MANDI FOREST DIVISION
MANDI, DISTRICT MANDI

6. LAL SINGH S/O LATE SHRI PRITHI SINGH,
R/O VPO PALI,
TEHSIL PADHAR, DISTRICT MANDI,
HIMACHAL PRADESH.
POSTED AS FOREST GUARD UNDER
NACHAN FOREST DIVISION, GOHAR,
DISTRICT MANDI.

7. MISAR DASS S/O MAHESHWAR
R/O TUNA, P.O. PALI P.O. SHALLA
TEHSIL CHACHIOT DISTRICT MANDI
HIMACHAL PRADESH.
POSTED AS FOREST GUARD UNDER
NACHAN FOREST DIVISION GOHAR
DISTRICT MANDI

8. GANGA RAM S/O LATE DUTT RAM
R/O VPO PALI,
TEHSIL PADHAR, DISTRICT MANDI,
POSTED AS FOREST GUARD UNDER
MANDI FOREST DIVISION, MANDI
DISTRICT MANDI.

9. ROOP RAM S/O BABU RAM
R/O VILLAGE LARECH PO MAAN TEHSIL ARKI,

DISTRICT SOLAN, HP:
PRESENTLY POSTED AS FOREST GUARD
IN THE OFFICE OF RANGE FOREST OFFICER KUTHAR,
DISTRICT SOLAN, H.P.

10. BHIM SINGH MEHTA S/0 SH. JIYA LAL MEHTA
R/O VILLAGE DABROT P.O. BHANERA,
TEHSIL KARSOG,
DISTRICT MANDI H.P.
PRESENTLY POSTED AS FOREST GUARD
IN THE OFFICE OF RANGE FOREST OFFICER
CHAURIDHAR,
DISTRICT MANDI, H.P

11. NARENDER KUMAR S/O DURGA DUTT
R/O VILLAGE SHINGALT P.O. MAAN
TEHSIL ARKI, DISTRICT SOLAN, H.P
PRESENTLY POSTED AS FOREST GUARD
IN THE OFFICE OF RANGE FOREST OFFICER KUTHAR,
DISTRICT SOLAN, H.P

12. NARAYAN DUST S/O DAYA RAM
R/O VILLAGE KAMLAHRA, P.O. KUFTU,
TEHSIL KANDAGHAT, DISTRICT SOLAN
PRESENTLY POSTED AS FAREST GUARD
IN THE OFFICE OF RANGE FOREST OFFICER SPATU,
DISTRICT SOLAN, HP

13. CHANDER PRAKASH S/O SH. KULDEEP SINGH
R/O HOUSE NO. 493, B-1, RATPUR COLONY,
P.O. PINJAUR, TEHSIL KALKA (HARYANA)
PRESENTLY POSTED AS FOREST GUARD
IN THE OFFICE OF RANGE FOREST OFFICER
PARWANOO, DISTRICT SOLAN.

14. RAM DUTT S/O SH. JIVANOO RAM
R/O VILLAGE MAHIYAN, P.O. BHOJNAGAR,
TEHSIL & DISTRICT SOLAN, HP
PRESENTLY POSTED AS FAREST GUARD
IN THE OFFICE OF RANGE FOREST OFFICER
PARWANOO, DISTRICT SOLAN, H.P

15. BACHHAN SINGH S/O SH. LACHHAN SINGH

R/O VILLAGE JASWANI, P.O. DADHOL,
TEHSIL GHUMARWIN,
DISTRICT BILASPUR, HP.
PRESENTLY POSTED AS FOREST GUARD
IN IDP PROJECT BILASPUR UNIT AT BARTHI
C-2, DISTRICT BILASPUR
H.P.

16. TEJ SINGH SON OF OM CHAND
R/O VILLAGE & P.O.TIKKAR
TEHSIL BALH, DISTRICT MANDI
POSTED AS FOREST GUARD
UNDER MANDI FOREST DIVISION MANDI
DISTT. MANDI

17. SUBHASH CHAND SON OF LATE PIAR SINGH
R/O VILLAGE AND P.O.AHJOO
TEHSIL JOGINDER NAGAR
DISTT. MANDI
POSTED AS FOREST GUARD
UNDER JOGINDERNAGAR FOREST DIVISION
JOGINDER NAGAR DISTT. MANDI

18. SUNDER SINGH SON OF DHANI RAM
R/O VILLAGE BHAWAT P.O.SADHIANI
TEHSIL BALH DISTT. MANDI
POSTED AS FOREST GUARD UNDER
MANDI FOREST DIVISION MANDI
DISTT.MANDI

19. DEV RAJ SON OF SH.SANT RAM
V&PO JALARI TEHSIL & DISTT. KANGRA
POSTED AS FOREST GRUARD IN G.H.N.P
SAMSHI DIVISION SAMSHI DISTT KULLU(HP)

20. PRADEEP KUMAR S/O SH.RAM CHAND
V&PO DADH TEHSIL PLAMPUR
DISTT.KANGRA
POSTED AS FOREST GUARD
DALHOUSIE FOREST DIVISION
DISTT.CHAMBA

21. SMT. REKHA DEVI D/O SH. CHATTAR SINGH

R/O VILLAGE KALU, PO KIRI,
TEHSIL AND DISTRICT CHAMBA, HP
PRESENTLY POSTED AS
FOREST GUARD IN FOREST DIVISION DALHOUSIE,
HIMACHAL PRADESH

22. SH. BHUVAN MOHAN PAL S/O SH. YASH PAL
R/O VILL BAROR PO NAREDI,
TEHSIL & DISTRICT CHAMBA, HP,
PRESENTLY POSTED AS FOREST GUARD
IN FOREST DIVISION CHAMBA, HP

23. SH. MANJIT KUMAR S/O SH. PURAN CHAND
R/O VILL BHANOUTA, PO CHANED,
TEHSIL AND DISTRICT CHAMBA, HP.
PRESENTLY POSTED AS FOREST GUARD IN
FOREST DIVISION CHAMBA, H.P.

...RESPONDENTS

(SHRI ASHOK SHARMA, ADVOCATE GENERAL
WITH MR. RAJU RAM RAHI, DEPUTY ADVOCATE
GENERAL FOR R- 1 TO R-4

SHRI NARENDER SHARMA ADVOCATE VICE
SHRI TEK CHAND SHARMA AND SHRI K.C.
SANKHYAN, ADVOCATES FOR R-5 TO R-8
AND R16 TO R20.

SHRI DIGVIJAY SINGH, ADVOCATE FOR
R-9 TO R-15.

SHRI NARENDER SHARMA, ADVOCATE
FOR R-21 TO R-23.

MS. ARCHANA DUTT, ADVOCATE FOR
R-24 TO R28.)

CWP No.3077 of 2020

Between

1. SANDEEP KUMAR
SON OF SHRI GIARU RAM

PRESENTLY WORKING AS FOREST GUARD
IN KOTI FOREST RANGE, SHIMLA FOREST
DIVISION,RESIDENT OF VILLAGE GHARYANA,
TEHSIL & POST OFFICE SUNNI,
DISTRICT SHIMLA H.P.

2. SATISH KUMAR SON OF SHRI JAGAT RAM
PRESENTLY WORKING AS FOREST GUARD
IN TARA DEVI FOREST RANGE,
SHIMLA FOREST DIVISION, H.P.
RESIDENT OF VILLAGE PAODHANA
POST OFFICE CHHAUSHA,
TEHSIL KANDAGHAT DISTRICT SOLAN.

3. SHRI YOGESH KUMAR
S/O SHRI RAMESHWAR DASS,
PRESENTLY WORKING AS FOREST GUARD
IN DHAMI, FOREST RANGE,
SHIMLA FOREST DIVISION, H.P
R/O VILLAGE GUMMA,
TEHSIL & DISTRICT SHIMLA.

..PETITIONERS

(BY SHRI DEVEN KHANNA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS CHIEF SECRETARY,
GOVERNMENT OF HP, SHIMLA.

2. THE DEPARTMENT OF FOREST
THROUGH ITS SECRETARY,
GOVERNMENT OF HIMACHAL PRADESH.

3. THE PRINCIPAL CHIEF CONSERVATOR OF FOREST,
GOVERNMENT OF HIMACHAL PRADESH,
TALLAND, SHIMLA 171001

4. THE CHIEF CONSERVATOR OF FOREST,
SHIMLA, DISTRICT SHIMLA,
HIMACHAL PRADESH.171002

.... RESPONDENTS.

(BY SHRI ASHOK SHARMA, ADVOCATE

GENERAL WITH SHRI RAJU RAM
RAHI, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITIONS
NO.2765 OF 2019 & 3077 OF 2020
Reserved on: 03.06.2022
Decided on:22.08.2022

Constitution of India, 1950- Article 226- Recasting the seniority of Forest Guards for their promotion to the posts of Deputy Ranger- Recruitment and Promotion Rules, 2003- Held- Employer has a right to determine transparent, fair and impartial criteria for selection to a post through appointment or by way of promotion amongst appointees of one and the same recruitment process inter-se seniority is determined on the basis of merit in selected list prepared in the said recruitment process- Seniority of one and the same recruitment process is to be determined on the basis of merit- Petition disposed of with direction to respondents. (Para 18 to 24)

Cases referred:

APSEB vs. R.Parthasarthi, (1998)9 SCC 425;

Bimalesh Tanwar vs. State of Haryana and others, AIR 2003 SC 2000;

Chairman Puri Gramya Bank and another vs. Ananda Chadra Das and others, (1994)6 SCC 301;

K.R. Mudgal and others vs. R.P. Singh and others (1986)4 SCC 531;

N. Subba Rao etc. vs. Union of India and others (1972)2 SCC 862;

Shiba Shankar Mohapatra vs. State of Orissa and others (2010)12 SCC 471;

Suresh Chandra Jha vs. State of Bihar and others, (2007)1 SCC 405;

T.Kannan and others vs. S.K. Nayyar and others (1991) 1 SCC 545;

Vimla Kumar Jain vs. Labour Court, Kanpur AIR 1988 SC 394;

These petitions coming on for pronouncement this day, the Court delivered the following:

J U D G M E N T

These petitions involving common questions of facts and laws, are being decided by this common judgment.

2 Petitioners, serving as Forest Guards in Forest Circle, Nahan, District Sirmaur and Forest Circle Shimla, District Shimla have approached this Court against impugned directions contained in communication dated 8th August, 2019 (Annexure P-12 in CWP No 2765 of 2019 and Annexure P-20 in

CWP No. 3077 of 2020) issued by Principal Chief Conservator of Forest (Pr.CCF) (HOFF), Himachal Pradesh to all Chief Conservator of Forest (CCFs)/Conservator of Forest (CFs) (T&WL) in Himachal Pradesh whereby direction has been issued for recasting the seniority of Forest Guards for their promotion to the posts of Deputy Ranger (State Cadre), as per the merit gained in Direct Recruitment/Limited Direct Recruitment process in order to prepare/draw State Level Panel of eligible Forest Guards after holding DPC at Circle level.

3 Plea of petitioners is that aforesaid instructions/directions have been issued on the basis of order dated 13.2.2019, passed by the Erstwhile H.P. State Administrative Tribunal in OA No. 584 of 2019 titled Kushal Chand vs. State of HP, which is not applicable to present petitioners being appointees of Direct Recruitment against 90% quota of Direct Recruitment provided in R&P Rules, whereas the said order was passed by the Erstwhile H.P. State Administrative Tribunal with respect to Forest Guards appointed from amongst Class-IV employees of Department against 10% quota of Limited Direct Recruitment. Further that appointment through Limited Direct Recruitment was undertaken by respondents-Department in the year 2003 by preparing State Level List after undertaking the Recruitment process at State level and therefore, their inter-se seniority was directed by the Erstwhile H.P. State Administrative Tribunal to be determined on the basis of State level seniority list prepared on the basis of inter-se merit amongst them, whereas, petitioners have been appointed by the Recruitment Committee constituted at Circle Level by preparing separate and distinct merit list at Circle Level by issuing appointment letter at Circle Level and, therefore, it has been contended that seniority list of Forest Guards, appointed at Circle Level against 90% quota for direct recruitment, cannot be made at State level on the basis of merit after amalgamation of the select list of different Circles and, it has to be maintained on the basis of length of service from the date of joining

as a Forest Guard because process of appointment, though was initiated by issuing advertisement and continued by conducting screening of candidates, assessing physical efficiency and evaluating written paper together but was completed by conducting personality test and declaring the result at circle level after preparation of separate merit list at each Circle level through different and distinct circle level Recruitment Committees.

4 It has also been contended on behalf of petitioners that as direct recruitment was made at circle level by different Recruitment Committees and, therefore, there is possibility of adopting different criteria, either liberal or strict, in awarding marks by each circle level Selection Committee, there is every possibility of awarding lesser or higher marks in such selection of Forest Guards depending upon conservative or liberal approach of concerned Committee and on amalgamation of different circle level merit list shall put topper of select list prepared by conservative committee at a considerable lower place in combined amalgamated select list and preparation of State level seniority list is not only contrary to adopted and accepted procedure for preparing seniority list of Forest Guards for promotion of Deputy Ranger but also an arbitrary act causing grave injustice to petitioners and other similarly situated persons.

5 Case of respondents, as pleaded, is that appointment and selection by way of promotion to the post of Deputy Ranger is to be made by preparing the State Level Panel of Forest Guards as cadre of Deputy Ranger is State Cadre and, therefore, State Panel of eligible Forest Guards is to be made on the basis of seniority subject to rejection of unfit as provided under R&P Rules and, therefore, amalgamation of different seniority lists of various Circles is to be amalgamated and, therefore, a conscious decision has been taken by employer by issuing instructions to prepare the seniority list as per merit gained in the Direct Recruitment/Limited Direct Recruitment in consonance with law of land as relevant R&P Rules in this regard are silent. It

has been contended that respondents authority is competent to issue instructions to supplement the R&P Rules in order to fill-up the gap, if any, in consonance with law of land and, therefore, it has been contended that there is nothing illegal in impugned instruction dated 8.8.2019 directing to recast the seniority as per merit gained in recruitment process. Though date of initiation of recruitment process in the year 2007 in various circles has not been disclosed either in writ petition or in reply however during arguments, it has been contended by respondents that process to fill-up 583 posts of Forest Guard in all Circles in the State was initiated vide Advertisement/communication dated 20.4.2007 simultaneously through different Selection Committees as post of Forest Guard is a circle cadre post.

6 It has been contended on behalf of respondents that selection process for Forest Guard at Circle level is governed by procedure provided in Himachal Pradesh Forest Department Forest Guard, Class-III (Non-Gazetted) (Executive Section) Recruitment and Promotion Rules, 2003 (in short 'the Rules) which remain the same in amended Rules 2014 also which provides constitution of circle level Recruitment Committee consisting of Conservator of Forest as Chairman and two District Forest Officers as Members in each Forest Circle. The said Committee on receiving applications on the basis of Advertisement, undertakes scrutiny of candidates with respect to age, educational qualification and physical standard as provided under Rule 7 of Rules is done and eligible candidates are required to undergo Physical Efficiency Test (PET), written examination and interview. Further that Physical Efficiency Test provides for maximum 25 marks and for awarding the marks, definite criteria has been provided in R&P Rules which is identical throughout the State for every Circle and therefore, there is no scope of discretion for evaluating the physical efficiency of a candidate. Further that, 60 marks have been provided for written test and written test is conducted on one and the same day in all Circles of State on the basis of one and the same question

paper in all Circles and question paper is set by the University of Horticulture and Forestry (UHF) and after receiving it from representative of UHF, not below the rank of Assistant Professor, the same is opened in examination centre in presence of all members of Recruitment Committee including Chairman of the Committee on the scheduled date of examination. After examination, answer sheets are sealed in an envelope duly signed by Chairman and Members of Committee and is handed over back to representative of HUF under proper receipt. The UHF evaluates the answer sheets and send the marks list under the sealed covers to the concerned CFs and after adding marks obtained in physical efficiency test and written test, a merit list is prepared category-wise in different Forest Circles for the purpose of calling the candidates for personality test in the ratio of 1:3 on the basis of number of posts available category-wise in the concerned Forest Circle. Personality test is of 15 marks. Out of 15 marks, five marks shall be awarded for participation in NCC, NSS, Sports and Cultural Activities according to definite criteria provided under R&P Rules leaving no scope of discretion to allot these marks on the basis of personal choice and only 10 marks have been provided for personality test on the basis of interview prescribing evaluation of personality, confidence and aptitude for the job. Therefore, it has been contended that in view of aforesaid criteria of Direct Recruitment provided in R&P Rules, there is no room for adopting different criteria for awarding marks for physical efficiency test, written test or participation in NCC, NSS, sports and other cultural activities etc. and only 10 marks are there, available with Recruitment Committee but therein also, criteria has been provided to test the candidate's knowledge regarding customs, culture and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in State viz-a-viz evaluating the candidates' personality, confidence and aptitude for the job and, thus, by and large, a uniform pattern is applicable for awarding the marks by different Recruitment

Committees in different Circles and, therefore, it has been canvassed that plea of petitioners that criteria for preparing the merit list of direct recruits in different Circles varies according to temperament and expectations of circle level Recruitment Committee is not sustainable.

7 Recruitment to the post of Forest Guards as well as Deputy Forest Rangers, initially, was governed by Himachal Pradesh Deputy Forest Rangers and Forest Guards Class III (Executive Section) Recruitment, Promotion and Certain Conditions of Service Rules, 1978. Rules 11(2) and 11(3) read as under:-

> ***"(2) The inter-se-seniority of the direct recruits will be in accordance with the merit prepared by the Selection Committee.***
> ***(3) In respect of all the Deputy Forest Rangers the seniority list will be prepared and maintained by the Head of Department and that of the Forest Guards of the Circle by the Conservator concerned."***

8 Annexure to these Rules provides that 60% posts of Deputy Forest Rangers shall be filled by way of promotion from amongst matriculate Forest Guards with five years service as Forest Guard and 40% by way of direct recruitment. Notes 'l' and 'r' to Annexure to R&P Rules dealing with recruitment/promotion to the post of Deputy Forest Rangers, are as under:-

> ***"(l) The Chief Conservator of Forests may constitute more than one D.P.C./Selection Committee in the State for the purpose of recruitment/promotion of Dy. Forest Rangers but he shall prepare a joint list of merit for the purpose of seniority before the orders of appointment are issued.***
> ***(r) promotion to the posts of Deputy Forest Rangers will be made by seniority subject to rejection of unfit."***

9 In the year 2003, separate Rules with respect to Forest Guards known as Himachal Pradesh Forest Department, Forest Guard, Class-III (Non-

Gazetted) (Executive Section) Recruitment and Promotion Rules, 2003 were framed, and by repeal and savings, as provided in Rule 2 thereof, Rules 1978 as well as Rules 1996 as amended from time to time with respect to Forest Guard were repealed. Therefore, after 2003, R&P Rules to the posts of Forest Guard and Deputy Ranger were separated. Thereafter, appointment and promotion with respect to post of Deputy Rangers is continuing to be governed by Rules of 1978 whereas appointment and promotion with respect to post of Forest Guard is governed by separate R&P Rules. Initially, it was governed by Himachal Pradesh Forest Department, Forest Guard, Class-III (Non-Gazetted) (Executive Section) Recruitment and Promotion Rules, 2003, which were further amended in 2007 and 2014.

10 Petitioners are appointees of process undertaken under Rules 2003 as amended in the year 2007. The procedure for recruitment of Forest Guards, by and large remained same in Rules 2014 as it was in the year 2007.

11 Referring Rule 17(v)(a) of Rules 2003 as amended vide Rules 2007 as well as Rule 17(8) of Rules 2014, which is identical provision in both Rules, it has been contended that seniority of Forest Guards is to be maintained at Forest Circle level as no inter-circle transfer of Forest Guard is permissible unless concerned official forgoes the seniority in the parent circle and on transfer, he shall be assigned seniority in new circle from the date of joining of circle and further that this Rule provides determination of seniority on the basis of date of joining.

12 It has been contended on behalf of respondents that though process in the year 2007, for filling up 583 posts of Forest Guard in all Circles, was initiated on 20.7.2004 and written test was conducted on one and same day, but process in various Forest Circles was completed by concerned Recruitment Committee on different dates resulting into issuance of appointment letter in different forest Circles on different dates and in Circles

i.e. Rampur, Shimla and Nahan appointment letters were issued in September 2007 whereas in remaining Forest Circles appointment letters were issued on later dates i.e. in November, 2007 and resultantly joining of appointees in Rampur, Shimla and Nahan took place earlier to appointees of other circles. Therefore, despite being appointees of one and same recruitment process, initiated simultaneously in all Forest Circles, because of delay in declaration of result and issuance of appointment letters, private respondents and others shall suffer for no fault on their part, in case seniority list is prepared on the basis of joining date.

13 Referring ***Chairman Puri Gramya Bank and another vs. Ananda Chadra Das and others,*** reported in***(1994)6 SCC 301; Bimalesh Tanwar vs. State of Haryana and others,*** reported in AIR ***2003 SC 2000;*** and ***Suresh Chandra Jha vs. State of Bihar and others,*** reported in ***(2007)1 SCC 405,*** it has been contended that seniority of appointees of one and the same process is to be governed by common merit list of the appointees on the basis of their gradation in merit list but not on the basis of issuance of appointment letters or date of joining or on the basis of length of service.

14 Learned counsel for petitioners has contended that seniority of petitioners has been notified in the year 2010 and has been again circulated, as it stood on 1.10.2015, in the year 2015 and thereafter on 27.12.2018, as it stood on 1.1.2018, and, therefore, respondents-authority has no right to unsettle or disturb the settled position of seniority of petitioners as held in ***K.R. Mudgal and others vs. R.P. Singh and others*** reported in ***(1986)4 SCC 531;*** and ***Shiba Shankar Mohapatra vs. State of Orissa and others*** reported in ***(2010)12 SCC 471.***

15 Referring ***Vimla Kumar Jain vs. Labour Court, Kanpur*** reported in ***AIR 1988 SC 394;*** and***T.Kannan and others vs. S.K. Nayyar and others*** reported in***(1991) 1 SCC 545***, it has been contended that in absence of any relevant Rules for seniority/promotion the length of service will

be taken into consideration and it would also satisfy the test of Article 16 of Constitution of India. By relying upon ***N. Subba Rao etc. vs. Union of India and others*** reported in ***(1972)2 SCC 862,*** it has been contended that seniority of employee on the basis of integration/merging of two or more cadres/services, is to be determined on the basis of length of service.

16 Putting reliance upon ***APSEB vs. R.Parthasarthi,*** reported in ***(1998)9 SCC 425,*** it has been contended that benefit of past service for purpose of seniority cannot be denied and therefore, service rendered by petitioners, prior to joining of other Forest Guards who have been appointed in other Circles after joining of the petitioners, cannot be ignored for determining their seniority.

17 As reiterated in ***Bimlesh Tanwar's case***, it is well settled that in absence of Rules governing seniority, an executive order may be issued to fill-up the gap and in absence of a Rule or executive instructions, the Court may have to evolve a fair and just principle which could be applied in facts and circumstances of case.

18 It is also settled that employer has a right to determine transparent, fair and impartial criteria for selection to a post through appointment or by way of promotion. It is also well settled that amongst appointees of one and the same recruitment process inter-se seniority is determined on the basis of merit in selected list prepared in the said recruitment process.

19 No doubt, provisions of Rules 1978 are not applicable to the Forest Guards for framing of separate R&P Rules for them. However, promotion to the post of Deputy Ranger shall be governed by provisions of Rules 1978 which, in Note 'l' and 'n' to Annexure to these Rules, 'quoted supra' provide that promotion to the post of Deputy Forest Range Officer will be made on the basis of seniority subject to rejection of unfit and for recruitment/promotion to State cadre post of Deputy Forest Rangers,

Authority has power to constitute more than one DPC/Selection Committees in the State but with rider that authority shall prepare a joint list of merit for the purpose of seniority before passing/issuing orders of appointment, meaning thereby that joint list of merit is to be prepared at State level by amalgamating seniority list of various Forest Circles for the purpose of determining seniority for promotion to the post of Forest Deputy Ranger.

20 Rules 2003, Rules 2007 and Rules 2014 do not provide any procedure or method for amalgamation of various seniority lists or preparing seniority list in a circle. In absence of specific provision, General Rule, as propounded and upheld by the Apex Court also, as evident from the pronouncements referred supra, seniority of direct recruits shall be determined in the order of merit in selection list subject to adjustment of candidates selected on applying the Rule of reservation and roster and as such, seniority of those, appointed under the same recruitment process, shall be assigned from their order of merit in the appointment order and not from the dates of their joining. Rule 17(v)(a) of Rules 2003 as amended by Rules 2007, and Rule 17(8) of Rules 2014 speak about maintaining seniority at Forest Circle level but it is not for the purpose of promotion to the post of Deputy Forest Ranger but it speaks about permissibility and impermissibility of transfer of a Forest Guard from one Forest Circle to another Forest Circle and providing a condition for transfer to forgo the seniority in the parent Circle. These provisions also do not say that seniority of Forest Guards who are appointee of the same selection process is to be determined on the basis of date of joining or length of service. Date of joining is basis for determining seniority only in case of joining another circle after inter-circle transfer after loosing seniority of service in previous circle. There is silence about the manner in which seniority shall be determined at the time of initial recruitment. There is also no specific provision for determining the seniority or amalgamating the seniority list of various Forest Circles for the purpose of

promotion to the post of Deputy Forest Ranger. Rules 1978 provide promotion to the post of Deputy Forest Ranger on the basis of seniority. Post of Deputy Forest Ranger is State cadre post and, therefore, seniority of Forest Guard is to be considered at the State level by amalgamating his seniority with the Forest Guards working in other Forest Circles. No specific procedure has been provided for that. Therefore, respondents' authority is competent to issue instructions and guidelines for that and, therefore, instructions dated 8.8.2019 are within the domain and power of respondents authority.

21 Next question requires to be considered is that whether the instructions provide impartial, fair and transparent criteria for causing/refixing the seniority of Forest Guards for the purpose of promotion to the post of Deputy Forest Ranger or not.

22 As discussed supra, seniority of appointees of one and the same recruitment process is to be determined on the basis of merit. In present case, recruitment process for 583 posts was initiated on one and the same date i.e. 20.4.2007 by providing identical criteria of Physical Efficiency Test, conducting a Written Examination at State level and making evaluation of written papers by one and the same Agency UHF on one and the same time. Thereafter, process of Personality Test was bifurcated by assigning it to various circle level Committees but with a prescribed criteria for awarding the marks. Therefore, all 583 appointees are to be considered appointees of one and the same selection process, particularly for the purpose of determining interse seniority amongst them for considering their candidature for promotion to the post of Deputy Forest Ranger, by amalgamating the merit list of each Forest Circle on the basis of order of merit by taking into consideration their marks in the selection process. All 583 candidates are appointees of one and the same selection process and conducting of interview and declaration of result was not in their hand and delay in interview or declaration of result has caused their joining later than the petitioners or some other serving in other

Forest Circles. Therefore, they should not be made to suffer on account of mis-management, lack of coordination or laxity on the part of Recruitment Committee for one reason or the other. There may be possibility of granting marks, out of 10 marks, kept for personality test liberally by one Committee or conservatively by another but at the same time, date of joining on the basis of offer of appointment made on different dates, but for appointment to the post advertised at one and same time undertaken to be filled with one and same selection process cannot be made basis for determining the seniority amongst appointees of the same process. It is also noticeable that for appointment to various posts Himachal Pradesh Public Service Commission as well as Staff Selection Commission Hamirpur also constitute different Boards for personal interview for selection to the post advertised through one and the same Advertisement, Agency and undertaken to be filled through one and the same process. Whenever there are large number of posts causing call of interviews to large number of candidates, merit in such recruitment process is prepared but after amalgamating the award list prepared by different Selection Committees particularly when Selection Committees have to award marks on fixed standard and criteria with limited or least choice to deviate it.

23 Therefore, I find that there is no illegality, irregularity or infirmity or perversity in the impugned instructions dated 8.8.2019 directing to recast the seniority as per merit gained in Direct Recruitment/Limited Direct Recruitment for the purpose of promotion of Forest Guards to the post of Deputy Forest Rangers.

24 Respondents authority can amalgamate the merit list of various Forest Circles only with respect to those candidates who are appointee of one and same recruitment process but not of those who have been appointed by undertaking different recruitment process either prior to or after a particular recruitment process.

25 Before parting, I consider it necessary to issue direction to respondents that in future as and when recruitment process is undertaken for filling up the posts of Forest Guard in various Forest Circles, at State level, then one and the same Advertisement must be issued to fill-up such posts by prescribing the common dates of completion of various levels i.e. Screening, Physical Efficiency Test, Written Examination, result of Written Examination, conducting Interview for Personality Test and declaration of Final Result in every Forest Circle and also for issuance of appointment letter(s) in all Forest Circles so as to avoid any controversy like present one in future.

Petitions stand dismissed accordingly including all pending miscellaneous application(s), if any in aforesaid terms. Interim order(s) stand vacated.

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

Between:

MEENAKSHI JAIN, WIFE OF SH. MAMAN CHAND JAIN, HOUSE NO.393, SECTOR 8, HUDA COLONY, AMBALA (HARYANA).

....PETITIONER

(BY MR. RAJNISH MANIKTALA SENIOR ADVOCATE WITH MR. NARESH VERMA, ADVOCATE)

AND

7. STATE OF HIMACHAL PRADESH THROUGH ITS CHIEF SECRETARY, H.P. SECRETARIAT, SHIMLA-171002 (H.P.)

8. DRUGS INSPECTOR, NAHAN, DISTRICT SIRMOUR, (H.P.)

....RESPONDENTS

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CR.P.C NO.433 of 2019
Decided on:01.08.2022

Code of Criminal Procedure, 1973- Section 482- **Drugs and Cosmetics Act, 1940**- Section 32- Quashing of complaint under Section 32 of Drugs and Cosmetics Act, 1940- Samples were found to be not of standard quality- Held- It is well settled that High Court while exercising power under Section 482 Cr.P.C. can proceed to quash and set-aside the complaint as well as summoning order, if it is satisfied that evidentiary material adduced on record would not reasonably connect the accused with the crime and if trial in such situation is allowed to continue, person arrayed as an accused would be unnecessarily put to arduous of the protracted trial on the basis of flippant and vague evidence- Reports signed by Government Analyst qua the samples drawn from the premises of the petitioner were not made available to her- There is sufficient ground for this Court to exercise its inherent jurisdiction under Section 482 Cr.P.C. for quashing of complaint and consequent criminal proceedings against the petitioner, to prevent abuse of process of law and to prevent unnecessary harassment to the petitioner against whom there is no evidence to connect them with the commission of offences as incorporated in the complaint- Petition allowed. (Para 17, 31, 36)

Cases referred:

Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460;
L. Krishna Reddy v. Stateby Station House Officer and Ors, (2014) 14 SCC 401;
Medicamen Biotech Limited and another vs. Rubina Bose, Drug Inspector; (2008)7 SCC 196;
Northern Mineral Limited vs. Union of India and another (2010) 7 SCC 726;
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

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioner for quashing of complaint No. 48/3 of 2016, titled as ***State of Himachal Pradesh*** versus ***Maman Chand Jain and others***, pending in the Court of learned Judicial Magistrate, 1st Class, Nahan, Sirmour, H.P.

23. Precisely, the facts of the case as emerge from the record are that petitioner's firm i.e. M/s Vardhman Pharma was granted licence to manufacture, for sale or distribution of drugs specified in Schedule C,C(I) (excluding those specified in Schedule X) vide orders dated 10.12.2004 and such licence was valid from 10.12.2004 to 9.12.2009, as is evident from copy of licence placed on record as Annexure P-1. Apart from above, M/s Vardhman Pharma was granted licence to manufacture and sale of drugs other than those specified in Schedule C & C(1) vide order dated 10.12.2014 and such, licence was also valid with effect from 10.12.2004 to 9.12.2009, as is evident from copy of licence placed on record as Annexure P-2.

24. A complaint under Section 32 of Drugs & Cosmetics Act, 1940 ***(for short 'Act')*** was filed by the respondents against the present petitioner and other, wherein it came to be alleged that on 28.09.2013, the premises of M/s Vardhman Pharma were raided by the Drugs Inspector alongwith other members of the raiding party and during inspection, it was found that drugs were being manufactured in the premises without licence, which expired on

9.12.2009. Apart from above, raiding team also drawn 19 samples of the drugs and one portion of sample was handed over to Sh. Rohit Kumar, an employee of the petitioner company and 19 samples of the drugs were handed over to Government Analyst for analysis on 01.10.2013, who vide report dated 26.11.2013 reported that 12 samples were found to be not of standard quality and 7 samples were found to be of standard quality.

25. Learned Judicial Magistrate, 1st class, Nahan, District Sirmour, H.P., having taken cognizance of aforesaid complaint issued process against the petitioner Smt. Meenakshi Jain, proprietor of the firm, as is evident from zimini orders placed on record as Annexure P-9(colly). Being aggrieved and dissatisfied with the issuance of process, petitioner has approached this Court in the instant proceedings, praying therein to set-aside the complaint as well as summons issued against her.

26. Challenge to the summoning process has been laid primarily on two grounds;(i) Since report of laboratory, which had tested the sample was not supplied to the petitioner, she was unable to file objections against the same, as a result of which, report given by Chemical Analyst shall be read against her; (ii) Since she was unable to dispute the report by requesting the testing of the samples by Central Drugs Labs in terms of Section 25 of the Act coupled with the fact that samples drawn at the time of raid now have expired, no chemical test can be conducted on the request, if any, made by the petitioner; and (iii) Averments contained in the complaint that petitioner had no licence to manufacture the drug is totally contrary to the record.

27. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that facts, as noticed hereinabove, are not in dispute, rather stand admitted in the reply filed by the respondents. The complaint, which is sought to be quashed in the instant proceedings, reveals that on 28.09.2013, Drug Inspector of Industrial area, Kala Amb, District Sirmour, H.P., raided the premises of M/s Vardhman

Pharma alongwith raiding team constituted by the State Drug Controller and found that in factory premises drugs were being manufactured without there being any valid licence issued in the name of proprietor of the firm concerned. Raiding team found that drug manufacturing licence stood expired on 9.12.2009 and firm had not applied for renewal of the licence even after almost three years of the expiry of valid licence and as such, firm was found to have contravened the provisions of Section 18(c) of the Act. A huge stock of the raw materials, packing materials bearing the name and address of the firm M/s Vardhman Pharma were found lying inside the premises. Though, Smt. Meenakshi Jain, proprietor of the concerned firm was not present in the factory premises during the raid, but she was requested to join the search and seizure procedure, however, she could not come present on account of her being out of station. Drug inspector then randomly took 9 drugs' samples of the finished product in form 17 dated 28.09.2013, after offering fair price of the same. The sample was numbered as NHN/13/53 to NHN/13/61. One portion of each of all the nine samples alongwith one copy each of Form-17 and Form 17-A were handed over to the representatives of the petitioner namely, Rohit Kumar and Sumit Kumar and the receipt was taken on Form 17 and Form 17-A. Besides above, Drug Inspector drew 10 more samples in Form-17, qua which, he issued receipt on Form-17A, dated 29.09.2013. One portion each of all the ten samples alongwith one copy of each of Form-17 and Form 17A were handed over to the representatives of the accused. All the 19 samples numbered from NHN/13/53 to NHN/13/71 were delivered by hand to Govt. Analyst, CTL Kandaghat on 19 separate Forms numbered as NHN/Drugs/13/180 to NHN/Drugs/13/198, dated 01/10/2013 in a sealed parcel. One copy each of all the 19 samples in Forms 18 was also supplied separately in a sealed envelope to the said Govt. Analyst and receipt dated 4.10.2013 in that regard was issued by the Government Analyst. In the aforesaid background, Drug Inspector after having found petitioner i.e.

proprietor contravened provisions contained in Section 18(a)(i), Section 17, Section 17B punishable under Section 27(c) and 27(d) of the Drugs and Cosmetics Act, 1940, Section 18(c) punishable under Section 27(b)(ii) of the Drugs and Cosmetics Act, 1940 and Section 18(b) punishable under section 27(d) of the Drugs and Cosmetics Act, 1940 filed complaint in the Court of learned Judicial Magistrate, 1st Class, Nahan, District Sirmour, H.P. on 29.02.2016.

28. Learned trial Court taking cognizance of averments/ allegations contained in the complaint issued process against the petitioner herein, but subsequently, on account of repeated absence from the trial, petitioner was declared as proclaimed offender. However, order declaring the petitioner as proclaimed offender was stayed by this Court vide order dated 30.07.2019 in the instant proceedings. Since vide order dated 30.07.2019, order dated 9.5.2019 passed learned Judicial Magistrate, 1st Class Nahan, declaring the petitioner to be proclaimed offender was stayed by this Court, no further progress has been made in the complaint by the court below.

29. Mr. Rajnish Maniktala, learned Senior Counsel representing the petitioner duly assisted by Mr. Naresh Verma, Advocate, vehemently argued that complaint sought to be quashed in the instant proceedings is not legally sustainable because allegations contained in the same are totally contrary to the factual position available on record. Learned counsel representing the petitioner while making this Court to peruse the various documents adduced on record, vehemently argued that at the time of inspection, petitioner had valid licence to manufacture the drugs and as such, there was no occasion for the Drug Inspector to submit complaint that factory owned and possessed by the petitioner was being run without there being any valid licence. Learned counsel representing the petitioner while inviting attention of this Court to peruse Section 25 of the Act contended that since copy of report submitted by chemical analyst never came to be furnished to the petitioner, she was unable

to file objections against the same, which right was otherwise available to her. Section 25(4), which provides that party not satisfied with the report of the chemical analyst, can make a request to send the sample to Central Government Lab. He further submitted that by the time complaint was filed by the complainant all the drugs seized at the time of raid had rendered expired and as such, could not be sent to Central Government Lab for testing on the request, if any, made by the petitioner under Section 25(4) of the Act. While inviting attention of this Court to peruse Annexures P-6 to P-8, learned counsel representing the petitioner argued that though initially sum of Rs.11400/ was deposited by the petitioner for grant of permission to manufacture additional products, but since such prayer of her was not accepted, she vide communication dated 6.8.2007, specifically wrote to the Controller-cum-Licensing Authority, Himachal Pradesh for renewal of drug licence No.MNB/04/89 and MB/04/90, specifically stating therein that sum of Rs.11400/- deposited on 21.02.2006 alongwith Rs. 3900/-, which she deposited vide challan No.22,6.8.2007, be construed to be deposited by her for renewal of her licence, as detailed hereinabove. Learned counsel representing the petitioner submitted that since no decision, if any, ever came to be taken on the aforesaid request made by the petitioner, licence, as detailed hereinabove, was deemed to have been renewed,as has been provided under Rule 72 and 77 of the Act.

30. Mr. Narender Guleria, learned Additional Advocate General while refuting aforesaid submissions made on behalf of the learned counsel representing the petitioner argued that there was no requirement, if any, for Drug Inspector to supply the copy of report submitted by Chemical Analyst, rather same was to be collected by the petitioner, who was aware of the factum with regard to sending of the samples to the lab. While fairly acknowledging that at the time of filing of the complaint, all the drugs seized from the premises of the factory owned by the petitioner had expired, learned Additional

Advocate General submitted that otherwise also there is/was no occasion and requirement, if any, to get drugs, as detailed hereinabove, retested in view of specific report submitted by Government Analyst. Learned Additional Advocate General further submitted that it is admitted case of the petitioner that sum of Rs. 11400/- was deposited by her on 21.02.2006 for grant of licence to manufacture additional items and such prayer of her was considered and allowed. He further submitted that additional amount of Rs.3900/- was deposited by the petitioner for grant of permission to manufacture 38 additional items and such prayer of her was also allowed. Though, learned Additional Advocate General was unable to produce any documents with regard to permission granted by the respondents to the petitioner for manufacturing of additional items, however, to substantiate his aforesaid claim, he placed heavy reliance upon Annexure R-1 and R-2 i.e noting given on the file by the competent authority with regard to permission granted to the petitioner for manufacturing additional items. Learned Additional Advocate General also invited attention of this Court to Annexure R-1 i.e. letter sent to the petitioner apprising therein factum with regard to expiry of licence No.MNB/04/89 & MB/04/90 dated 9.12.2009.

31. Before considering the rival submissions having been made by learned counsel representing the parties *vis-à-vis* prayer made in the instant petition, this Court at the first instance deems it necessary to discuss/elaborate scope and competence of this Court to quash the complaint as well as consequent proceedings, if any, pending in the competent court of law while exercising power under Section 482 Cr.P.C.

32. 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.

33. Subsequently, in case titled S**tate 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 prosecution.

34. 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."

35. 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.

36. Hon'ble Apex Court in case titled **Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460** held that framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Cr.PC unless the accused is discharged under Section 227 Cr.PC. The Hon'ble Apex Court has further held that under the Section 227and 228 Cr.PC, the Court is required to consider the 'record of the case' and the documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall proceed to frame the

charge. The Hon'ble Apex Court has further held that once the facts and ingredients of the Section concerned exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. Most importantly, the Hon'ble Apex Court in the aforesaid judgment has concluded that the satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. At this stage, this court deems it fit to reproduce the following paras of aforesaid judgment having been passed by the Hon'ble Apex Court as follows:-

> 27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :
>
> 27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.
>
> 27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic

ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full- fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.
27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.
27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.
27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.
27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.
27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist."

37. The Hon'ble Apex Court in judgment titled ***L. Krishna Reddy v. Stateby Station House Officer and Ors, (2014) 14 SCC 401***, has held that Court is neither substitute nor an adjunct of the prosecution, rather once a

case is presented to it by the prosecution its bounden duty is to sift through the material to ascertain whether prima-facie case has been established, which would justify and merit the prosecution of a person. The relevant paras are as follows:-

> **"10. Our attention has been drawn to Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia as well as K. Narayana Rao but we are unable to appreciate any manner in which they would persuade a court to continue the prosecution of the parents of the deceased. After considering Union of India v. Prafulla Kumar Samal, this Court has expounded the law in these words: (Stree Atyachar Virodhi Parishad case, SCC p. 721, para 14) "14. ... In fact, Section 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides that "the Judge shall discharge when he considers that r there is no sufficient ground for proceeding against the accused". The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The Court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor it is necessary to delve deep into various aspects. All that the Court has to consider is whether the evidenciary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into"**
>
> **11. The court is neither a substitute nor an adjunct of the prosecution. On the contrary, once a case is presented to it by the prosecution, its bounden duty is to sift through the material to ascertain whether a prima facie case has been established which would justify and merit the prosecution of a person. The interest of a person arraigned as an accused must also be kept in perspective lest, on the basis of flippant or vague or vindictive accusations, bereft of probative**

> **evidence, the ordeals of a trial have to be needlessly suffered and endured. We hasten to clarify that we think the statements of the complainant are those of an anguished father who has lost his daughter due to the greed and cruelty of his son-in-law. As we have already noted, the husband has taken his own life possibly in remorse and repentance. The death of a child even to avaricious parents is the worst conceivable punishment."**

38. Aforesaid exposition of law laid down by Hon'ble Apex Court from time to time, clearly reveal that High Court while exercising power under Section 482 Cr.P.C can proceed to quash and set-aside the complaint as well as summoning order, if it is satisfied that evidentiary material adduced on record would not reasonably connect the accused with the crime and if trial in such situation is allowed to continue, person arrayed as an accused would be unnecessarily put to arduous of the protracted trial on the basis of flippant and vague evidence.

39. Before ascertaining the correctness and genuineness of the rival submissions made on behalf of learned counsel for the parties vis-à-vis prayer made in the instant petition, it would be apt to take note of Section 18 of the Act, which reads as under:-

> "18. **Prohibition of manufacture and sale of certain drugs and cosmetics**.—From such (date) as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf—
>
> (a) [manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute—
>
> [(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;
>
> (ii) any cosmetic which is not of a standard quality or is misbranded, adulterated or spurious;]

(iii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof 3 [the true formula or list of active ingredients contained in it together with the quantities thereof];

(iv) any drug which by means of any statement design or device accompanying it or by any other means, purports or claims 7 [to prevent, cure or mitigate] any such disease or ailment, or to have any such other effect as may be prescribed;

(v) any cosmetic containing any ingredient which may render it unsafe or harmful for use under the directions indicated or recommended;

vi) any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder;

(b) [sell or stock or exhibit or offer for sale,] or distribute any drug 9 [or cosmetic] which has been imported or manufactured in contravention of any of the provisions of this Act or any rule made thereunder;

(c) [manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute any drug 9 [or cosmetic], except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter:

Provided that nothing in this section shall apply to the manufacture, subject to prescribed conditions, of small quantities of any drug for the purpose of examination, test or analysis:

Provided further that the [Central Government] may, after consultation with the Board, by notification in the Official Gazette, permit, subject to any conditions specified in the notification, the [manufacture for sale or for distribution, sale, stocking or exhibiting or

offering for sale] or distribution of any drug or class of drugs not being of standard quality."

40. Careful perusal of aforesaid provisions of law reveals that no person can manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale or distribute, any drug which is not of standard quality and misbranded and spurious. Section 18(c) specifically talks about the issuance of licence for manufacture of drugs. In exercise of the powers conferred under the Act, Drugs & Cosmetics Rules, 1945 have been framed, wherein Rule 69 provides that an application for grant of a licence to manufacture and sale of drugs other than those specified in Schedule C & C(I) is to be made to the Licensing Authority appointed by the State Government. Such application is submitted in the prescribed format as provided under the rules. Rules 69 is reproduced hereinbelow:-

> "**69. Application for licence to manufacture drugs other than those specified in Schedules C and C(1) to the Drugs and Cosmetics Rules**:(1)Application for grant or renewal of licence to manufacture for sale 3[or for distribution] of drugs, other than those specified in Schedules C and C(1) shall be made to the licensing authority appointed by the State Government for the purpose of this Part (hereinafter in this Part referred to as the licensing authority) and shall be made—
> (a) in the case of repacking of drugs excluding those specified in Schedule X for sale or distribution in Form 24B;
>
> (b) in the case of manufacture of drugs included in Schedule X in Form 24F;
> (c) in any other case, in Form 24.
> (2) 5[(a) Every application in Form 24B shall be made up to ten items for each category of drugs categorised in Schedule M and shall be accompanied by a licence fee of rupees five hundred

plus and an inspection fee of rupees two hundred for every inspection or for the purpose of renewal of the licence.

(b) Every application in Form 24F shall be made up to ten items for each category of drugs categorised in Schedule M and shall be accompanied by a licence fee of rupees six thousand and an inspection fee of rupees one thousand and five hundred for every subsequent inspection or for the purpose of renewal of licence.

(c) Every application in Form 24 shall be made upto ten items for each category of drugs categorised in Schedule M and Schedule MIII and shall be accompanied by a licence fee of rupees six thousand and an inspection fee of rupees one thousand and five hundred for every inspection or for the purpose of renewal of the licence.]

(3) If a person applies for the renewal of a licence after the expiry thereof but within six months of such expiry the fee payable for the renewal of such licence shall be:-

[(i) in the case of Form 24B a licence fee of rupees five hundred plus an additional fee at the rate of rupees two hundred and fifty per month or part thereof in addition to an inspection fee of rupees two hundred;

(ii) in the case of Form 24F a licence fee of rupees six thousand plus an additional fee at the rate of rupees one thousand per month or part thereof in addition to an inspection fee of rupees one thousand;

(iii) in the case of Form 24 a licence fee of rupees six thousand plus an additional fee at the rate of rupees one thousand per month or part thereof in addition to an inspection fee of rupees one thousand and five hundred.]

(4) A fee of 5[rupees one hundred shall be paid] for a duplicate copy of the licence issued under clause (a), clause (b) or clause (c) of sub-rule (1) if the original is defaced, damaged or lost.

2[(5) Applications for manufacture of more than ten items of each category of drugs as categorized under Schedule M and M-III or for manufacture of additional items of drugs by licensees in Form 24 or Form 24F shall be accompanied by an additional fee at the rate of rupees three hundred for each

additional item of drug. Applications in Form 24B for licence to manufacture for sale and distribution for repacking for more than 10 items of each category or for manufacture of additional item of drug shall be accompanied by additional fee of rupees one hundred for each additional item of drugs as cetegorized in Schedule M and M-III.

3[(6) Where an application under this rule is for the manufacture of drug formulations falling under the purview of new drug as defined in rule 122E, such application shall also be accompanied with approval, in writing, in favour of the applicant, from the licensing authority as defined in clause (b) of rule 21.

41. Rule 70 of the Act provides that the licence for manufacture of drugs shall be granted in Form 25 prescribed under the rules. Rules 70 of the Act is reproduced as under:-

"70. **Form of licence to repack or manufacture drugs other than those specified in Schedules C and C(1) (1)** .— Licences for repacking of drugs against application in Form 24B shall be granted in Form 25B, licences for manufacture of drugs included in Schedule X against application in Form 24F shall be granted in Form 25F and licences for manufacture of drugs against application in Form 24 shall be granted in Form 25."

42. Similarly, Rule 72 provides for duration of the licenc , which reads as under:-

"72. **Duration of licence**.—An original licence or a renewed licence in Form 25 2[Form 25B or Form 25F] unless sooner suspended or cancelled shall be 3[valid for a period of five years on and from the date on which] it is granted or renewed:

Provided that if the application for the renewal of a licence is made before its expiry, or if the application is made within six months of its expiry, after payment of

> additional fee, the licence shall continue to be in force until orders are passed on the application and the licence shall be deemed to have expired if the application for its renewal is not made within six months of its expiry.

43. Proviso to aforesaid provisions clearly provides that if an application for renewal of licence is made before its expiry, or if the application is made within six months of its expiry, after payment of additional fee, the licence shall continue to be in force until orders are passed on the application and the licence shall be deemed to have expired if the application for its renewal is not made within six months of its expiry. Rule 73 provides that the certificate of renewal shall be issued in a particular form i.e. Form 25 or form 25-F shall be issued in Form 26 for form 26-F respectively. For the purposes of licence to manufacture for sale and distribution of drugs specified in Schedule C & C(i), application form is to be submitted in accordance with Rule 75, which is para-materia to the Rules 69 to 72,which provides for application for licence to manufacture drugs other than those specified in Schedule C & C(1) to the Drugs and Cosmetics Rules.

44. In the case at hand, specific allegation against the petitioner as contained in the complaint is that drugs specified in Rule C & C(1) of the Drugs & Cosmetics Rules and drugs other than those specified in schedule C and C(1) were being manufactured without there being any valid licence. Case of the petitioner is that she had valid licence to manufacture both type of the drugs, as detailed hereinabove, and as such, no case much less under Section 18-1 and 18-C is made out against her. There is no dispute that petitioner had licence to manufacture the drugs, as detailed hereinabove, and same was valid till 9.12.2009. Though, claim of the petitioner is that she had applied for renewal of the aforesaid licence well within time, but it has been categorically stated by the respondents that no prayer ever came to be made

on behalf of the petitioner for renewal of the licence and as such, at the time of raid, drugs were found to be manufactured without there being any licence.

45. Petitioner with a view to substantiate her claim with regard to application made by her for renewal, specifically placed reliance upon the communication dated 6.8.2007 (Annexure P-5), perusal whereof reveals that as per discussion with State Drug Controller-cum-licensing Authority M/s Vardhman Pharma deposited sum of Rs. 3900/- vide challan No.22, dated 6.8.2007 in head of 0210-01-107-01 for renewal of drug manufacturing licence No.MNB/04/89 and MB/04/90. Though, aforesaid communication clearly reveals that such prayer was made in the year, 2007, whereas licence sought to be renewed was actually to expire in the month of December, 2009.

46. Learned counsel representing the petitioner argued that though initially sum of Rs.11400/- was deposited on 21.02.2006 with a request to grant permit to manufacture 14 additional items, but since such payer of her was not allowed, sum of Rs.3900/- as advised by the State Drugs Controller-cum-Licensing Authority was deposited over and above Rs.11400/- for renewal of manufacturing licence No. MNB/04/89 and MB/04/90, which was otherwise to expire in the month of December, 2009. Careful perusal of aforesaid

communication dated 6.8.2007, addressed to State Drugs Controller-cum-Licensing Authority (Annexure P-5) clearly reveals that M/s Vardhman Pharma while depositing Rs.3900/- vide challan No.22, dated 6.8.2007 categorically made request to grant renewal of license manufacturing licence No. MNB/04/ 89 and MB/04/90 valid upto 9.12.2009.

47. Though, perusal of communication dated 10.12.2009 (Annexure P-7), whereby prayer made on behalf of the petitioner for renewal of licence came to be allowed and licence of the petitioner was renewed from 10.12.2009 to 9.12.2014, as is evident from Annexure P-7 clearly reveals that licence was renewed but since respondents specifically claimed in their reply that no

licence was ever renewed and documents placed on record are forged, this Court passed following order on 28.06.2022:-

> ***"Respondents No. 1 and 2 in their reply have stated in ground 13 (d) that petitioner has fabricated the certificate and no such document was issued by the Drugs Licensing Authority. Besides above, it has been further stated that Annexures P-4, 5, 6 and 7 were also forged and fake. Learned Additional Advocate General is directed to file affidavit whether action, if any, ever came to be taken against the petitioner for her having filed forged/fabricated document, if any, within one week. List on 13.7.2022".***

48. Pursuant to aforesaid order dated 28.06.2022, respondents filed affidavit reiterating therein that aforesaid documents Annexures P- 5 to 7 placed on record are forged and in that regard FIR No. 70/2013 dated 29.9.2013 under Sections 18(c), 18-B, 18(a) (i) r/w Rule 17, 17-B, 36 AC, r/w sub section 3 of section 22, clause (c) of section 27 and Section 28-A of the Drugs and Cosmetics Act, 1940 and Section 420 of IPC was registered at police Station Kala Amb, but subsequently on the basis of the opinion rendered by ADA Nahan, entire file relating to the case was returned to the Department with the observations that no case muchless under Section 468, 420, 471 and 467 is made out and Department is advised to file complaint under appropriate provision of law in the competent court of law.

49. Interestingly, even alongwith aforesaid compliance affidavit, no cogent and reliable documents ever came to be placed on record by the respondent-Department to refute the claim of the petitioner that application for renewal of the license was filed well within time and same was renewed for a period of five years. In response to aforesaid compliance affidavit, petitioner filed affidavit enclosing therewith information received under Right to Information Act (Annexure A-1 available at page 263 of the paper book),

perusal whereof reveals that since no case was found muchless under Sections 467,468 and 471of IPC, case under Sections 18(c), 18-B, 18(a) (i) r/w Rule 17, 17-B, 36 AC, r/w sub section 3 of section 22, clause (c) of section 27 and Section 28-A of the Drugs and Cosmetics Act, 1940 and Section 482 was filed before Judicial Magistrate, 1st Class Nahan. At this stage, learned Senior counsel representing the petitioner argued that since during investigation conducted by the police no case muchless under Section 468, 420, 467, 471 of IPC was found against the petitioner, respondents are estopped from claiming that documents placed on record with regard to issuance of renewal of licence for a period of five years vide communication dated 10.12.2009 (Annexure P-5 to 7) are forged and fabricated.

50. Interestingly, in the case at hand, though respondents have not made specific mention, if any, with regard to non-availability of record with effect from 2004 to 2011 of issuance/renewal of licence on the application, if any, made by the petitioner and other similarly situate persons, but petitioner by way of rejoinder to the reply filed by the respondents has placed on record documents procured by her under Right to Information Act, perusal whereof clearly reveals that that no record with regard to certified copies of Form 27, form 24 and list of documents, issued/supplied by M/s Vardhman Pharma, certified copies of inspection report prepared by the department at the time of issuance of licence for DML MNB/04/89, DML MB/04/90 and certified copies of additional items 18, dated 17.12.2004, product permission as well as other documents, as detailed in application filed under Right to Information Act (Annexure P-12 available at page No.137 of the paper book) was available with the respondents. Since respondents did not have record with regard to renewal of licence for a period specified hereinabove, they cannot be permitted at this stage to claim that documents showing renewal of licence for a period of five years are forged, especially when such charge has been already dismissed by the police while returning the case file to the department for

filing the same in the appropriate court of law. Most importantly, ADA Nahan, while advising respondent department to file complaint in the appropriate court of law for the charges/allegations contained in the complaint, specifically stated in the opinion that no case muchless under sections 467,468 and 471of IPC, is made out and this court has reasons to presume and believe that opinion of District Attorney must be based upon the record available with the department. Since ADA Nahan was unable to find out record, if any, with regard to issuance of licence and application submitted by the parties, for a period specified hereinabove, he categorically opined that no case under Sections 467,468 and 471of IPC, is made out against the petitioner.

51. This Court after having carefully perused the Annexures P-5 to P-7 is fully convinced that petitioner had valid licence to manufacture the drugs w.e.f.10.12.2009 to 9.12.2014 and as such, allegations contained in the complaint sought to be quashed that petitioner was not having valid licence to manufacture the drugs and drugs were being manufactured without there being any licence, is not sustainable and deserves to be quashed and set-aside. Similarly careful perusal of Section 25 (3&4) reveals that any document purporting to be a report singed by a Government analyst shall be evidence of facts stated therein and as such evidence shall be conclusive unless the person from whom the sample was taken has within twenty-eight days of the receipt of a copy of the report, notified in writing to the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in contraversion of the report, meaning thereby after submission of report duly singed by Government Analyst, person from whom samples were drawn, has a remedy of laying challenge to the report either before inspector or the Court where proceedings are pending and in that situation, such samples are required to be sent to

Central Drugs Laboratory, as is provided under Section 25(4) of the Act. Section 25(4) of the Act is reproduced as under:-

> ***(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused: cause the sample of the drug [116] [or cosmetic] produced before the Magistrate under sub-section (4) of section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.***

52. Admittedly in the case at hand, reports signed by Government Analyst qua the samples drawn from the premises of the petitioner were not made available to her, enabling her to raise objections, if any, with regard to the same. It has been vehemently argued by the respondents that it was not the duty of the respondents to provide such report, rather same was to be collected by the person, from whose premises samples were drawn, meaning thereby, no such report was made available to the petitioner by respondent-Department. If Section 25, as taken note hereinabove, is read in its entirety, nowhere suggests that report submitted by Govt. Analyst is to be procured by the persons from whose premises samples were drawn, rather same is required to be made available to the person, from whose premises samples were drawn, enabling him/her to notify his/her intention to adduce evidence in contravention of the report.

53. At the cost of repetition, it is stated that in case opportunity, as provided under Section 25(3), is provided to the person concerned, he/she can always get the sample retested from Central Drugs Laboratory and then such

report shall be conclusive. In the case at hand, procedure as prescribed under Section 25(3) and 25(4) never came to be applied/followed, as a consequence of which, petitioner, from whose premises samples were drawn, was denied opportunity of raising objections, if any, with regard to correctness of the report submitted by the Government analyst, which otherwise in the event of non-filing of objections would be conclusive and shall be read against the person concerned. Had the Department provided copy of report submitted by Government analyst to the petitioner at first instance, she could raise objections with regard to correctness of the same and in that event, matter was to be referred to the Central Drugs Laboratory. Though, learned Additional Advocate General vehemently argued that aforesaid omission**,** if any, on the part of respondents can be rectified at this stage, but since it is not in dispute that at the time of filing of the complaint, all the drugs seized from the premises of the petitioner had expired, there is otherwise no occasion at this stage to draw samples as per Section 25(3) and send the same to Central Laboratory.

54. Since, the petitioner was deprived of her valuable right under Sections 25(3) and 25 (4) of the Act, initiation of proceedings under section18(c), 18-B, 18(a) (i) r/w Rule 17, 17-B, 36 AC, r/w sub section 3 of section 22, clause (c) of section 27 and Section 28-A of the Drugs and Cosmetics Act, 1940, are not sustainable. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in **Medicamen Biotech Limited and another** vs. **Rubina Bose, Drug Inspector;** (2008)7 Supreme Court Cases 196, wherein it has been held as under:-

> ***"19. In the affidavit filed to the petition by Dr. D. Rao, Deputy Drugs Controller, and in arguments before us, it has been repeatedly stressed that the delay in sending of the sample to the Central Drugs Laboratory had occurred as the appellant had***

> ***avoided service of summons on it till 9th May 2005. This is begging the question. We find that there is no explanation as to why the complaint itself had been filed about a month before the expiry of the shelf life of the drug and concededly the filing of the complaint had nothing to do with the appearance of the accused in response to the notices which were to be issued by the Court after the complaint had been filed. Likewise, we observe that the requests for retesting of the drug had been made by the appellant in August/September 2001 as would be clear from the facts already given above and there is absolutely no reason as to why the complaint could not have been filed earlier and the fourth sample sent for retesting well within time. We are, therefore, of the opinion that the facts of the case suggest that the appellants have been deprived of a valuable right under Section 25(3) and 25(4) of the Act which must necessitate the quashing of the proceedings against them."***

55. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in **Northern Mineral Limited** vs. **Union of India and another** (2010) 7 Supreme Court Cases 726, wherein it has been held as under:-

> ***"22. From the language and the underlying object behind Section 24(3) and (4) of the Act as also from the ratio of the decisions aforesaid of this Court, we are of the opinion that mere notifying intention to adduce evidence in controversion of the report of the Insecticide Analyst confers on the accused the right and clothes the court jurisdiction to send the sample for analysis by the Central Insecticides Laboratory and an accused is not required to demand in specific terms that sample be sent for analysis to Central Insecticides Laboratory. In our opinion the mere intention to adduce evidence in controversion of the report, implies demand to send the***

sample to Central Insecticides Laboratory for test and analysis.

23. Section 24(3) of the Act gives right to the accused to rebut the conclusive nature of the evidence of Insecticide Analyst by notifying its intention to adduce evidence in controversion of the report before the Insecticide Inspector or before Court where proceeding in respect of the samples is pending. Further the Court has been given power to send the sample for analysis and test by the Central Insecticides Laboratory of its own motion or at the request of the complainant or the accused.

24. No proceeding was pending before any Court, when the accused was served with Insecticide Analyst report, the intention was necessarily required to be conveyed to the Insecticide Inspector, which was so done by the appellant and in this background Insecticide Inspector was obliged to institute complaint forthwith and produce sample and request the court to send the sample for analysis and test to the Central Insecticides Laboratory. Appellant did whatever was possible for it. Its right has been defeated by not sending the sample for analysis and report to Central Insecticides Laboratory.

25. It may be mentioned herein that shelf life of the insecticides had expired even prior to the filing of the complaint. The position therefore which emerges is that by sheer inaction the shelf life of the sample of insecticides had expired and for that reason no step was possible to be taken for its test and analysis by Central Insecticides Laboratory. Valuable right of the appellant having been defeated, we are of the opinion that allowing this criminal prosecution against the appellant to continue shall be futile and abuse of the process of Court.

26. We are distressed to note the casual manner in which the whole exercise has been done. Insecticide Inspector had collected the sample on 10th September, 1993 and sent it to the Insecticide Analyst for analysis

and report. Insecticide Analyst submitted its report dated 13th October, 1993. Notice of the report was sent to the appellant on Ist November, 1993, in reply whereof by letter dated 17th November, 1993 it intimated its intention to adduce evidence in controversion of the report. The shelf-life of the pesticide had not expired by that time but expired in February 1994. However, permission to file complaint was given on 23rd February, 1994 and the complaint was actually filed on 16th March, 1994. Had the authority competent to grant consent, given consent and complaint lodged immediately after the receipt of intimation of the accused, sample could have very well sent for analysis and report, before the expiry of shelf-life.

27. It is interesting to note that Section 24(3) and (4) of the Act obliges the Insecticide Analyst and Central Insecticides Laboratory to make the test and analysis and report within thirty days. When 30 days is good enough for report, there does not seem any justification not to lodge complaint within 30 days from the receipt of the intimation from the accused and getting order for sending the sample for test and analysis to the Central Insecticides Laboratory. All who are entrusted with the implementation of the provisions of the Act, would be well advised to act with promptitude and adhere to the time-schedule, so that innocent persons are not prosecuted and real culprits not left out.

28. In the result, the appeal is allowed, the impugned judgments of the High Court as also that of the Chief Judicial Magistrate refusing to discharge the appellant are set aside and the appellant is discharged of its criminal liability".

56. In case of ***Medicamen Biotech case***(supra), it had been observed with respect to the provisions of Section 25(3) and 25(4) of the Act as follows:-

"A reading of the aforesaid provisions would reveal that they lay certain obligations as well as provide safeguards for a person from whom a drug has been seized for analysis

> ***or testing as Section 25(3) specifies that unless such a person controverts the correctness of the report submitted by the Government Analyst within 28 days in writing that he intends to adduce evidence to controvert the report of the Analyst, it would be deemed to be conclusive evidence of the quality of the drug whereas sub-section (4) of Section 25 obliges the Magistrate on the request of the complainant or the accused or on in his own motion to send the fourth sample which has been disputed for fresh testing to the Director of the Central Drugs Laboratory***."

57. In view of the detailed discussion made herein above and law taken into consideration, there is sufficient ground for this Court to exercise its inherent jurisdiction under Section 482 Cr.P.C, for quashing of complaint and consequent criminal proceedings against the petitioner, to prevent abuse of process of law and to prevent unnecessary harassment to the petitioner against whom there is no evidence to connect them with the commission of offences as incorporated in the complaint. Otherwise also, continuance of the criminal proceedings against the petitioner in the present case would be a sheer wastage of time of the learned trial Court and the same would amount to subjecting the petitioner to unnecessary and protracted ordeal of trial, which is bound to culminate in acquittal.

58. Consequently, in view of the above, present petition is allowed and complaint No.48/3 of 2016, tilted **State of Himachal Pradesh** versus **Maman Chand Jain & others**, pending in the Court of learned Judicial Magistrate, 1st Class, Nahan, District Sirmour, H.P. (Annexure P-8), is quashed and set-aside, as a consequence of which, orders dated 30.11.2016 and 9.05.2019 passed by learned Court below are also quashed and set-aside. Accordingly, present petition is disposed of, so also pending applications, if any.

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

Between:-

GUDDU ALIAS BANKU SON OF BUDHE RAM, R/O VILLAGE NANDAL, P.O. KATAULA, TEHSIL & DISTRICT MANDI, H.P., AGED 48 YEARS, (DATE OF ARREST 12.08.2016).

....APPELLANT

(BY DEEPAK KAUSHAL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 175 of 2019
Reserved on: 01.08.2022
Decided on:17.08.2022

Code of Criminal Procedure, 1973- Appeal- **Narcotic Drugs and Psychotropic Substances Act, 198**5- Section 20- Appellant assailed conviction- Charas 1.700 Kg.- Held- Exclusive possession of contraband with appellant proved- Presumption under Section 35 and 54 of the Act regarding culpability of the appellant- Conviction upheld- Appeal dismissed. (Para 14)

Cases referred:

Kallu Khan vs. State of Rajasthan 2021 online SC 1223;

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

J U D G M E N T

By way of instant appeal, appellant has assailed judgment of conviction and sentence order dated 20.6.2018, passed by the learned Special Judge-I, Una, District Una, H.P, in Sessions Case No. 54 of 2016, whereby

appellant has been convicted and sentenced under Sections 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act) and Section 181 of Motor Vehicles Act, as under:

Sr. No.	Sentence of imprisonment.	Fine	In Default of payment of fine.
1.	Rigorous imprisonment for a term of ten years under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985.	1,00,000/-	Rigorous imprisonment for one year
2.	Under Section 181 of MV Act	500/-	-

2. The prosecution case in a nut-shell was that during intervening night of 11th and 12th August, 2016, a *'Nakka'* was laid by police officials of Police Station, Chintpurni, District Una, H.P. at place Bharwain. SI/SHO, Bhup Singh (PW-9), ASI Amrik Singh (PW-11) and HHG, Shokeen Muhammad were on *'Nakka'* duty. These officials were also joined by SI Ankush Dogra (PW-8) and SI Hashim Ali (PW-10), officials of Special Investigation Unit (for short, 'SIU'), Una.

3. At about 4.25 AM a Car bearing registration No. HP-33D-5887 was stopped for checking. Appellant was on the wheel. He got perplexed on noticing the presence of police. Suspicion was entertained and a search of the car was conducted by PW-10 SI Hashim Ali. A backpack was found lying adjacent to the driver's seat. It was checked and another polythene bag was found inside containing charas weighing 1 kg 700 grams. The recovered substance was repacked in the same manner in polythene bag and the backpack and thereafter was sealed in a cloth parcel with 8 seals having impression 'M'. Relevant columns of 'NCB' forms were filled on spot by PW-10. The sealed parcel containing contraband, NCB forms, vehicle along with its documents and key were seized vide Seizure Memo Ext. PW-8/A. *'Rukka'* Ext. PW-10/B was prepared and sent to Police Station through PW-11, ASI Amrik

Singh. FIR Ext. PW-13/A was registered. The Investigating Officer prepared the spot map. Appellant was formally arrested vide Arrest Memo Ext. PW-10/F.

4. After completion of spot investigation, the case property alongwith NCB form, sample seal and the appellant were produced before SHO, Police Station, Chintpurni by PW-10 SI Hashim Ali. The parcel containing contraband was re-sealed with 5 seals of impression 'I'. Relevant columns of NCB form were filled. Seal impressions were embossed on NCB form. Facsimile of seal impression was separately preserved and the case property was handed over to PW-5, HC Ravi Kumar No. 61 for safe deposit in the *'Malkhana'* of the Police Station.

5. On 13.8.2016, special report under Section 57 of the Act was prepared by PW-10 and was sent to SDPO Amb through PW-2 LC Reena Kumari, which was received by SDPO Amb and handed over to PW-6 HC Ashwani Kumar No. 48 for records.

6. Investigation also revealed that Car bearing No HP-33D-5887 was owned by one Parmanand, who was also arrayed as an accused. On 15.8.2016, PW-4 HHC Gopal Singh No. 354 delivered the contraband at State Forensic Science Laboratory (SFSL) Junga for examination. The examination report prepared by SFSL Junga Ext. PW-10/H confirmed the sample to be the extract of cannabis and sample of Charas.

7. After completion of investigation, challan was filed. Prosecution examination total 14 witnesses. Appellant was examined under Section 313 Cr.P.C. No evidence in defence was offered by the appellant.

8. On conclusion of trial, appellant was convicted and sentenced, as noticed above, whereas the co-accused Parmanand was acquitted.

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

10. PW-8 SI Ankush Dogra, PW-9 SI Bhup Singh, PW-10 SI Hashim Ali, PW-11 SI Amrik Singh, were examined as spot witnesses. PW-1, Rakesh Kumar was examined as an independent witness but he did not support the case of the prosecution. PW-2, LC Reena Kumari and PW-6, HC Ashwani Kumar were examined to prove the dispatch and receipt of special report under Section 57 of the Act Ext. PW-6/A. PW-3 HHC Baljit Kaur was examined to prove recording of DDR No. 11, dated 11.8.2016 Ext. PW-3/A. PW-4, HHC Gopal Singh was examined to prove the transit and safe custody of the contraband from Police Station, Chintpurni to SFSL, Junga. PW-5 HC Ravi Kumar was the MHC of the Police Station, Chintpurni at the relevant time and was examined to prove the safe deposit and custody of the contraband and sample seals in the Malkhana. PW-7, Constable Rajesh Narayan and PW-13, ASI Shiv Parkash Sharma were examined to prove the recording of the FIR. PW-12, HHC Ranbir Singh was examined to prove the transit and safe custody of the contraband and SFSL report from SFSL, Junga to Police Station, Chintpurni.

11. The spot witnesses PW-8 to PW-11 while making depositions before learned trial Court had narrated the sequence of events that had taken place at the time and after the recovery of contraband from the car driven by the appellant. All these witnesses had been in unison while stating the relevant facts. PW-10 and PW-8 had stated that they were posted in SIU Una and on 11.8.2016 both of them had been on routine patrol duty for detection of crime under NDPS Act. When they reached Bharwain, they found that PW-9 SI Bhup Singh, PW-11 ASI Amrik Singh and HHG, Shokeen Mohammad of Police Station, Chintpurni had already laid a *'Nakka'*. They also joined the said police officials. At about 4.25 a.m. a car bearing registration No. HP-33D-5887 was stopped. The appellant was on the driving seat and there was no other person occupying the car. Appellant got perplexed at the site of police. PW-10 SI Hamish Ali entertained suspicion and checked the car. A backpack

was found lying adjacent to driver's seat. On opening, it was found to contain another polythene bag, which had 1kg 700 grams of charas. The charas was weighed with the help of weighing scale, brought from the nearby shop, owned by PW-1. The contraband was repacked in the same manner in polythene as well as backpack and thereafter was sealed in a cloth parcel with 8 seals having impression 'M'. PW-10 prepared seizure memo Ext. PW-8/A.'Rukka' Ext. PW-10/C was prepared and sent to Police station through PW-11, ASI Amrik Singh. After registration of FIR, spot map Ext. PW-10/C was prepared and the appellant was formally arrested vide arrest memo Ext. PW-10/D. These witnesses were cross-examined at length but nothing material could be elicited.

12. PW-11, SI Amrik Singh stated on oath that he along with PW-9 SI Bhup Singh, ASI, Hashim Ali and HHG Shokeen Mohammad were present at Bharwain main road and had laid a Nakka. PW-8, SI Ankush Dogra had also joined them at about 4.50 a.m. During nakabandi at about 4.20 a.m., car bearing Registration No. HP-33D-5887 was stopped. This witness gave the same version as given by PW-10 and PW-8. As per this witness, Rukka was taken by him to Police Station, Chintpurni and handed over to MHC at the Police Station. He thereafter returned to the spot and further investigations were conducted by the Investigating Officer, PW-10. From the cross-examination of this witnesses also nothing material could be extracted on behalf of the defence.

13. PW-9, SI Bhup Singh stated that he was posted as SHO, Police Station, Chintpurni. On 12.8.2016, PW-10, Hashim Ali had produced one sealed parcel containing 1 kg 700 grams of charas before him. The parcel was sealed with 8 seals of seal impression 'M'. NCB form in triplicate with sample seals were also produced before him. He re-sealed the parcel with 5 seals of seal impression 'I' and filled the relevant column of NCB forms Ext. PW-9/A. Seal impressions were taken on the NCB forms. Facsimile of seal impression

'I' was also preserved as Ext. PW-9/B. Re-sealing certificate Ext. PW-9/C was issued. The case property thereafter was deposited with the MHC along with NCB forms and sample seals. In cross-examination, PW-9 stated that as per entries Ext. PW-5/A in Malkhana Register, the case property was deposited by PW-10, SI Hashim Ali.

14. Thus, from above discussed evidence, recovery of 1 kg 700 grams of Charas is proved to have been made from the vehicle that was in complete control of the appellant at the time of such recovery. Once the exclusive possession of the contraband with appellant was proved, a presumption would arise under Sections 35 and 54 of the Act regarding culpability of the appellant. Such legal presumption has not been rebutted on behalf of the appellant.

15. Learned counsel for the appellant contended that the factum of PW-10 SI Hashim Ali and PW-8 SI Ankush Dogra leaving SIU Una on the night of 11.8.2016 vide DDR No. 11 Ext. PW-3/A was sufficient to infer that they had prior intimation about the Charas being transported by the appellant in Car No. HP-33D-5887. Our attention was drawn to the contents of DDR Ext. PW-3/A, according to which, PW-10 and PW-8 had left Una at about 10.00 PM on 11.8.2016 for detection of crime in Narcotics. On the strength of aforesaid document, noncompliance of Section 42 (2) of the Act was alleged.

16. The contention so raised on behalf of the appellant deserves rejection. The contents of DDR Ext. PW-3/A merely recorded the departure of PW-10 and PW-8 for routine patrolling in relation with detection of offences under NDPS Act. It is not suggested even remotely from the contents of Ext. PW-3/A that PW-10 and PW-8 had left Una on the basis of some prior information. The perusal of record further reveals that there is no other evidence to suggest the inference regarding availability of prior information with PW-10 and PW-8. The cross-examination of these witnesses also

nowhere revealed that any question or circumstance was put to them suggesting availability of prior information with them.

17. Learned counsel for the appellant further contended that there are major contradictions in the versions of PW-9 and PW-10. As per PW-9, SI Hashim Ali (PW-10) had deposited the case property with MHC, whereas PW-10, SI Hashim Ali has stated otherwise. According to him, the case property was handed over by him with PW-9, SHO Bhup Singh and not with MHC of the Police Station. A reference has also been made to the entry in the extract of Malkhana register Ext. PW-5/A, which shows the deposit of case property in the Malkhana by PW-10, SI Hashim Ali.

18. We have considered the argument raised on behalf of the appellant and are of the view that the discrepancies so pointed out singly cannot be held to be fatal to the prosecution case. The prosecution has been able to prove the recovery of contraband from the car driven by appellant. Even otherwise, the compliance of Section 55 of the Act is merely directory and any fault in such compliance is not by itself sufficient to doubt the prosecution story unless supported by some other material on record. No specific prejudice has been shown by the appellant from the above noted discrepancy.

19. Looking at the other evidence, it has also been proved that the contraband remained intact throughout and no material has been brought on record to suggest that it was tampered with at any stage. PW-5 proved its receipt and safe custody in Malkhana. PW-4 HHC Gopal Singh and PW-12, HHC Ranbir Singh proved the transit and safe custody of the contraband from Police Station to SFSL, Junga and back. Defence has not been able to extract anything from these witnesses so as to make their versions doubtful.

20. The report Ext. PW-10/H, issued by the SFSL, Junga proved that the substance recovered from the appellant was extract of cannabis and

sample of Charas. Thus, the commission of offence under Section 20 of the Act was duly proved against the appellant.

21. A benefit has been tried to be taken from the fact that PW-1 had turned hostile and had not supported the prosecution version. He only deposed that at about 12.00 in the night, he was present in his Tea Stall and police had taken his weighing scale. According to this witness, nothing more had happened in his presence. He was cross-examined by learned prosecutor but nothing favouring prosecution was stated by him. It is submitted on behalf of the appellant that from the statement of PW-1, the entire prosecution story was falsified. Learned trial Court has dealt with this contention by relying upon the judgment of this Court in Criminal Appeal No. 305 of 2014, titled Sohan Lal vs. State of H.P.We are in agreement with the findings recorded by learned trial Court that appellant could not avail anything apart from the fact of independent witness turning hostile. It is not uncommon in our system that the independent witness turns hostile for various obvious reasons. It cannot be always inferred from such conduct of independent witness that the prosecution case was false. In the cases under NDPS Act, the principle of reverse burden applies. Once the conscious possession of contraband with the accused is proved, it is for the accused to bring on record such facts, which may create doubt in the prosecution story.

22. Lastly, it has been argued on behalf of the appellant that even if it was not a case of prior information, the search of private car after sun set was against law. This contention of appellant is again liable to be rejected. It was the case of chance recovery. Nothing has been placed on record to show that PWs 8, 9 and 10 were not empowered or authorized officers. In ***2021 online SC 1223, Kallu Khan vs. State of Rajasthan***, it has been held by the Hon'ble Supreme Court, as under: -

> *"After hearing and on perusal of record and the evidence brought, it is apparent that on apprehending the accused, while making*

search of the motor cycle, 900 gm of smack was sized to which seizure and sample memos were prepared, as proved by the departmental witnesses. In the facts of the case at hand, where the search and seizure was made from the vehicle used, by way of chance recovery from public road, the provisions of Section 43 of the NDPS Act would apply. In this regard, the guidance may be taken from the judgments of this Court in **S. K. Raju (***supra) and* **S. K. Sakkar** *(supra). However, the recovery made by Pranveer Singh (PW6) cannot be doubted in the facts of this case."*

23. Perusal of the impugned judgment reveals that learned trial Court has arrived at reasonable and plausible conclusion on the basis of evidence on record. No fault can be found with the findings recorded by the learned trial Court. The commission of offence under Section 20 of the Act has duly been proved against the appellant. Resultantly, no case for interference with the judgment, passed by the learned trial Court is made out. The impugned judgment and sentence is thus affirmed. The appeal is accordingly dismissed. Record be sent back forthwith. Pending applications, if any, also stand disposed of.

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

Between:-

STATE OF HIMACHAL PRADESH

....PETITIONER

(BY SHRI HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

AND

GIAN CHAND SON OF SHRI MOHAN LAL, RESIDENT OF VILLAGE SAPHAL, PO CHORI, P.S. SUJANPUR, DISTRICT HAMIRPUR AT PRESENT SHOPKEEPER RUNG KHUD MAHADEV, TEHSIL AND DISTRICT HAMIRPUR H.P.

...RESPONDENT

(BY MS. SHEETAL VYAS, ADVOCATE)

CRIMINAL APPEAL

NO. 366 OF 2009
Decided on: 10.08.2022

Code of Criminal Procedure, 1973- Appeal- **Punjab Excise Act, 1914**- Section 61(1)(a)- Recovery of 145 bottles of whisky, Rum- Held- Only independent witness hostile- Glaring discrepancies and contradictions of statements of official witnesses- Evidence not trustworthy and credible- Appeal dismissed. (Para 11)

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

J U D G M E N T

State has preferred this appeal against acquittal of respondent in Criminal Case No. 22-1-08/ 48-III-08, arising out of FIR No. 254 of 2007, registered in Police Station Hamirpur under Section 61(1)(a) of Punjab Excise Act as application to State of Himachal Pradesh.

2 Prosecution case is that on 18.6.2007, police patrolling party headed by PW9 HC Surender Kumar received a credible information that respondent was selling liquor in his shop unauthorizedly and on raiding the said shop, huge quantity of liquor would be recovered. As there was apprehension of destroying/destruction of case property, therefore, for registration of FIR, a Ruka Ext.PW9/A was prepared and sent to Police Station Hamirpur, which led to registration of FIR Ext.PW6/B.

3 After associating Vidhi Chand PW11 as an independent witness in the search and seizure process, shop was raided in presence of accused and during search, total 145 bottles, of various Marks of Whisky, Rum, I.M.F.L., Lal Kila, Una No.1 and Punjab Orange, were recovered from shop of respondent. Respondent could not produce any permit in this regard, whereupon all bottles were seized vide memo Ext.PW9/B after keeping one bottle of each kind as sample and these bottles were sealed with seal

impression Ext.PW9/D. Impression of said seal was taken on separate piece of cloth.

4 Samples of liquor were deposited in the Malkhana and entered in Malkhana Register vide entry Ext.PW2/A and these samples on 8.7.2007, vide RC No. 93/07, Ext.PW2/B, were sent to Chemical Test Laboratory, Kandaghat through C. Sunil Kumar PW3 and after depositing the same in CTL Kandaghat, he handed over the receipt to MHC. As per result of Chemical Analysis Ext.PW9/G and Ext.PW9/H, received from CTL Kandaghat, samples were affirmed as country liquor with different percentage of proof alcohol in each.

5 In order to prove the case, prosecution has examined 12 witnesses. Thereafter, statement of respondent was recorded under Section 313 Cr.PC. No defence evidence was led by respondent.

6 PW11 Bidhi Chand, an independent witness, did not support the prosecution case by stating that no recovery of liquor took place in his presence and further that samples were neither taken in his presence nor sealed with seal 'H'. After declaring him as hostile witness, for resiling from earlier statement recorded under Section 161 Cr.PC, he was cross examined, but nothing material could be elucidated in favour of prosecution in his cross examination. PW4 HC Swaroop Kumar in his cross examination has admitted that large number of bottles, produced in Court as case property, were either empty or half filled which indicates that case property was not kept intact by prosecution. Benefit of tampering with case property is to be extended to respondent as in absence of production and proof of case property as sealed on the spot, it would be difficult to place reliance upon recovery thereof.

7 According to PW4 Swaroop Kumar, bottles were kept in gunny bag, whereas PW9 Surinder Kumar stated that case property was kept in

gunny bags as well as in boxes with description that two boxes were having 24 bottles and remaining bottles were kept in gunny bags. PW5 Dalel Singh stated that case property was kept in six gunny bags, whereas PW12 Shyam Lakhanpal stated that case property was kept in 3-4 gunny bags. All these witnesses are official witnesses, whose version with respect to case property is different to each other.

8 PW4 HC Swaroop Kumar stated that case property was recovered from a building having two storeys. In his cross examination, he denied that building was five storeyed having four shops with further clarification that those shops are owned by two shopkeepers. Whereas PW9 HC Surinder has stated that there is one storey above the shop and one storey below the shop meaning thereby that building was three storeyed, but thereafter, he again stated that said building might be having five storeys. He stated that there are two shops in the building. PW5 HC Dalel Singh stated that building was three storeyed and it was having 4-5 shops. PW12 C.Shyam Lakhanpal stated that building was single storeyed and there were 2-3 shops adjacent to each other and he further stated that he did not know that who were owners of shops adjacent to shop wherefrom liquor was recovered. All these witnesses have given different versions regarding the number of storeys and shop(s) wherefrom recovery of liquor was allegedly effected.

9 PW4 Swaroop Kumar stated that room wherefrom liquor was recovered was having wooden partition and there was a door and some Karyana was lying in the said building. PW5 Dalel Singh stated that there was no door in room and room was partitioned with brick wall. PW9 Surinder Kumar stated that shop was consisting of two rooms and it was partitioned with brick wall whereas PW12 Shyam Lakhanpal was unable to depose about material of partition of two rooms. On this count also, these witnesses have given version contrary to each other.

10 PW9 HC Surinder Kumar is Investigating Officer who seized and took possession of alleged bottles of liquor. He remained in possession of those bottles and in his deposition in Court, he nowhere stated that case property remained intact in his possession and it was not tampered in any manner. Omission to depose such fact may be a minor discrepancy but for production of case property, which was not intact as admitted by PW4 Swaroop Kumar in his cross examination, it becomes a material fact causing de-linking all samples of liquor sent to CTL Kandaghat with case property seized by police and in such eventuality, chemical analysis of samples by CTL Kandaghat has also become irrelevant for adjudication of case.

11 In present case, the only independent witness did not support the prosecution case. It is true that there can be conviction on the basis of deposition of official witnesses only irrespective of the fact that independent witness(es) did not support the prosecution case and declared hostile. However, in such eventuality, veracity of official witnesses is to be judged by evaluating the evidence minutely. In present case, for glaring discrepancies and contradictions of statements of official witnesses with respect to case property, description of building as well as details of room/shop wherefrom liquor was recovered and also other material on record doubting the credence of prosecution case, respondent cannot be convicted on the basis of statements of official witnesses including the Investigating Officer as their deposition in cross examination has shaken their credibility and therefore, it cannot be said that State has proved the case against the respondent beyond reasonable doubt by leading cogent, reliable, credible and trustworthy evidence on record.

In view of aforesaid discussion, appeal is dismissed being devoid of merit. Bail bonds furnished by respondent are discharged.

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

Between:-

JHALLO RAM, SON OF SH. TIKHNA, RESIDENT OF VILLAGE SHERU, P.O. TAPPAR, TEHSIL BAROLI, P.S. BANNI, DISTRICT KATHUNA, JAMMU AND KASHMIR, PRESENTLY LODGED IN DISTRICT JAIL CHAMBA AS CONVICT AGE 50 YEARS.

....APPELLANT

(BY SH. N. K. THAKUR, SR. ADVOCATE WITH MR. DIVYA RAJ SINGH, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 427 of 2019
Reserved on:28.7.2022
Decided on: 01.08.2022

Code of Criminal Procedure, 1973- Appeal- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20 and 52A- Conviction- Charas 5.30 Kg. – Held- No material on record to show that the samples drawn were representative samples- The appellant can only be held to be in possession of 20 grams or at the most 52 grams of Charas which as per Act is small quantity- Judgment and sentence modified. (Para 18, 19)

Cases referred:

Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa AIR 1993 SC 1456;

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

J U D G M E N T

By way of instant appeal, appellant has assailed judgment and sentence order dated 5.7.2019, passed by the learned Special Judge, Chamba Division Chamba, H.P. in Sessions Trial No. 77 of 2018, whereby appellant has been convicted under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act) and has been sentenced to undergo rigorous imprisonment for a period of twelve years and to pay fine of Rs. 1,20,000/-. In default of payment of fine, to further undergo simple imprisonment for a term of one year.

2. The prosecution case in brief is that on 25.8.2018, police party comprising of HC Gias Lal PW-4, HC Ramesh Kumar PW-1, HC Dinesh Kumar PW-8, Constable Hem Raj PW-2 and Constable Vinod Kumar PW-5 were on routine patrol duty near Koti Bridge within jurisdiction of Police Station, Sadar Chamba. Appellant was apprehended with a bag on his back. On noticing the police, appellant became perplexed. On suspicion, the bag carried by appellant was checked. 5 kg 30 grams of charas was recovered therefrom. The recovered charas was repacked in the same bag and thereafter placed in a cloth parcel, sealed with six seals of impression 'SB'. Relevant columns of NCB forms PW-4/C were filled. Seal impressions were taken on the NCB forms. Specimen seal impression Ext. PW-1/A was preserved. Recovery and seizure memo Ext. PW-1/B was prepared.

3. Rukka Ext. PW-2/A was sent to Police Station through Constable Hem Raj PW-2. FIR Ext. PW-9/K was accordingly registered. The further investigation was carried. The appellant was formally arrested and arrest memo Ext. PW-4/A was prepared.

4. On completion of spot investigation, the police party returned to the Police Station. The case property was produced before Inspector/SHO Prashant Singh Thakur PW-13, who re-sealed the parcel by affixing four seals of impression 'SC'. The relevant columns of NCB forms were filled. The case

property was deposited with MHC of the Police Station, who incorporated necessary entries in Malkhana Register.

5. On 26.8.2018, PW-14 HC Santosh Kumar moved an application Ext. PW-14/A before learned JMFC, Chamba for proceedings under Section 52A of the Act. Two samples of 26 grams each were drawn and were separately sealed in cloth parcel. Five seals each with impression 'JM' were affixed. The remaining bulk was separately sealed.

6. One of the samples drawn by learned JMFC Chamba was sent to SFSL, Junga on 28.8.2018 for chemical examination. The report Ext. 'PX' was received from SFSL, Junga according to which, the sample was confirmed to be the Charas. Special report under Section 57 Ext. PW-7/C was prepared on 27.8.2018 and sent to Additional Superintendent of Police, Chamba through Constable Surinder Kumar PW-12.

7. The case property was destroyed on 5.11.2018 by a committee, headed by Superintendent of Police, Chamba and certificate Ext. PW-9/C was issued in that behalf.

8. On completion of investigation, challan was prepared and presented before the Court. Appellant was tried in Sessions Trial No. 77 of 2018 and was convicted and sentenced, as noticed above.

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

10. The prosecution examined as many as 14 witnesses. PW-1 HC Ramesh Kumar, PW-2 Constable Hem Raj, PW-4 HC Gais Lal, PW-5 Constable Vinod Kumar, PW-8 HC Dinesh Kumar were examined as sport witnesses. PW-6 HHC Ajay Kumar was a witness to re-sealing effected by Inspector/SHO Prashant Singh vide memo Ext. PW-6/B. PW-7 HC Sanjeev Kumar proved receipt of special report Ext. PW-7/C by Additional Superintendent of Police, Chamba, as also the relevant entries in the extract of register Ext. PW-7/B. PW-9 proved the safe custody of the contraband in Police Station, Sadar

Chamba. PW-10 proved the photographs Ext. PW-10/A and Ext. PW-10/B, as also the preparation of CD Ext. PW-10/C. PW-11 photographer Sher Khan proved photographs Ext. PW-1/C to Ext. PW-1/E and PW-5/A. He has also proved photographs Ext. PW-11/A to Ext. PW-11/H. PW-14 HC Santosh Kumar was witness to the proceedings under Section 52A undertaken before learned JMFC, Chamba.

11. On conclusion of prosecution evidence, the appellant was examined under Section 313 Cr.P.C. No defence evidence was led by the appellant.

12. It has been contended on behalf of the appellant that the sample examined at SFSL Junga weighed only 24.40 grams and there was no evidence on record to prove that the sample so examined in the Laboratory was representative of the entire bulk, recovered from the appellant.

13. Recovery and seizure memo Ext. PW-1/B reveals that the substance recovered from the bag carried by appellant was in the shape of sticks. The order Ext. PW-14/E, passed by the learned JMFC, Chamba on 26.8.2018 also described the material as "black hard coloured substance in the shape of sticks which had been rolled up together". Photographs Ext. PW-11/E clearly reveals that the substance was in multiple masses in the shape of sticks/wicks. Photographs Ext. PW-11/E as per the statement of PW-14 HC Santosh Kumar was clicked in presence of JMFC, Chamba.

14. Thus, it is quite evident from the recovery and seizure memo Ext. PW-7/D, order Ext. PW-14/E passed by learned JMFC and also the photographs Ext. PW-11/E that the substance found from the possession of appellant was not a single mass which was in the shape of sticks and wicks. The nature of substance was hard. Thus, the evidence on record goes to show that the police had seized plurality of masses from possession of the appellant. The spot witnesses have also described the recovered substance in the shape of sticks.

15. Section 52A, sub-Section (2) of the Act reads as under:

> "(2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—
>
> (a) certifying the correctness of the inventory so prepared; or
>
> (b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or
>
> (c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn".

16. As per requirement of above noted provision of the Act, the Officer incharge of Police Station is required to prepare an inventory of the Narcotic Drugs Psychotropic Substance seized, containing details relating to description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars, as may be considered relevant, by the officer concerned and is further required to make an application to the Magistrate for the purposes specified in sub-section (2) of Section 52A of the Act, including permission to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

17. The statement of PW-14 reveals that two samples of 26 grams each were drawn by learned JMFC, Chamba. The witness has not stated

anything about the mode and manner in which the samples were drawn. Learned JMFC, Chamba has not been examined as witness. No other witness has stated on record regarding the mode and manner of drawl of sample. The order Ext. PW-14/E passed by learned JMFC, Chamba also mentions as under:-

> *"out of such cannabis two samples of 26 grams each taken out and placed on two separate pieces of white paper, which were then rolled up and placed inside two separate cloth parcels, which were then sewed up and sealed with five cut seals each of impression 'JM' Chamba".*

As per Section 52A(2) of the Act, the Officer Incharge of Police Station is required to seek permission of Magistrate to draw representative samples. The order passed by learned JMFC Ext. PW-14/E does not reveal that the proceedings had been conducted in accordance with law. The evidence shows that the samples were drawn by learned JMFC, Chamba himself.

18. There is no material on record to show or even suggest that the samples drawn were representative samples. When the substance included plurality of mass, it was incumbent upon the prosecution to prove that the samples were representative of entire seized substance. The representative samples could be said to be available only when the seized substance was made homogeneous.

19. There is nothing in the prosecution evidence that any specific procedure was adopted for drawing a representative sample. This creates doubt about the very legitimacy of the case of the prosecution. To have credence, the sample had to be the representative samples of entire 5 k.g. 30 grams of substance, failing which, it can be a case of recovery of only 26 grams of charas or at the most 52 grams of charas by including weight of second sample having entirely different legal consequences.

20. In **AIR 1993 SC 1456**, titled **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa**, it has been held as under:-

> "5. The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms.

> also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

21. We consider it appropriate to reproduce hereunder the observations and conclusions rendered by different Division Benches of this Court while dealing with identical or akin proposition from time to time.

22. In ***Khek Ram*** Vs ***NCB*** Criminal Appeal No. 450 of 2016 decided on 29.12.2017, paras 78 to 80 read as under:

> "78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.
>
> 79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in

absence of there being chemical examination of whole quantity, can be held to be charas.

80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon'ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145, wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

23. In ***State*** Vs ***Naresh Kumar*** Criminal Appeal No. 782 of 2008 decided on 28.6.2019, paras 23 to 25 read as under:

"23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.

24. In ***State of HP*** Vs ***Sultan Singh and Others*** Criminal Appeal No. 324 of 2008, decided on 22.4.2016 para 16 reads as under:

"16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

25. In ***State of Himachal Pradesh*** Vs ***Sohan Singh*** Criminal Appeal No. 259 of 2009 decided, on 23.12.2015 para 16 reads as under:

"16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-

> examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL."

26. Thus, from the entirety of evidence available on record, we are convinced that the sample of 26 grams examined by SFSL, Junga was not representative of entire bulk of substance and hence, the appellant cannot be held to have been found in conscious possession of 5 k.g. 30 grams of charas. The appellant can only be held to be in possession of 26 grams or at the most 52 grams of charas by including the weight of other sample, which as per Act is small quantity.

27. Accordingly, appellant is held guilty of offence under Section 20 of the Act for having been found in conscious possession of only small quantity of charas and is sentenced to undergo rigorous imprisonment for one year. The impugned judgment and sentence order passed by the learned trial Court is accordingly modified.

28. The appellant was arrested on 25.8.2018. He remained in judicial custody till the conclusion of trial and thereafter is undergoing sentence. Since the appellant has already undergone much more sentence than could be inflicted upon him, the appellant is ordered to be released immediately, if not required in any other case. The Registry is directed to prepare the release warrant forthwith.

29. In view of the provisions of Section 437 of Code of Criminal Procedure, 1973, appellant is directed to furnish his personal bond in the sum of Rs. 25,000/- with one surety in the like amount before the learned Registrar (Judiial) of this Court, which shall be effective for a period of six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of leave, the appellant, on receipt of notice thereof, shall appear before the Supreme Court.

30. The appeal is accordingly disposed of. Records be sent back. Pending applications, if any, also stand disposed of.

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

Between:-

PARKASH CHAND SON OF SHRI GANGA RAM,
RESIDENT OF VILLAGE BALH, PO & TEHSIL
GHUMARWIN, DISTRICT BILASPUR, H.P.

....PETITIONER

(SH. ANUJ GUPTA, ADVOCATE)

AND

SMT. KANTA DEVI WIFE OF SHRI PARKASH
CHAND, RESIDENT OF VILLAGE BEHRA,
PO LEHRI-SARAIL, TEHSIL GHUMARWIN,
DISTRICT BILASPUR, H.P.

....RESPONDENT

(SH. B.C. NEGI, SR. ADVOCATE WITH SH. NITIN THAKUR, ADVOCATE)

CRIMINAL REVISION PETITION
NO. 4171 OF 2013
Reserved on:22.8.2022
Decided on:25.8.2022

Code of Criminal Procedure, 1973- Section 397- **Protection of Women from Domestic Violence Act, 2005**- Petitioner has assailed the order of Ld. Additional Sessions Judge, who has affirmed the order of Ld. Judicial Magistrate First Class- Held- No illegality committed by both the Courts below while awarding and affirming the payment of maintenance- Protection order and residence orders passed in favour of wife cannot be faulted- Compensation to tune of Rs.10,000/- is not unreasonable- No illegality or impropriety in the impugned judgment- Petition dismissed. (Para 14, 15)

Cases referred:

Rajnesh vs. Neha and another, 2021 (2) SCC 324;

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

O R D E R

By way of instant petition, petitioner has assailed the judgment dated 29.8.2013, passed by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), whereby the order dated 31.10.2022, passed by the learned Judicial Magistrate, 1st Class, Court No.2, Ghumarwin, District Bilaspur in case No. 23/3/2011 has been affirmed.

2. Petitioner and respondent hereinafter shall be referred as the husband and wife respectively for clarity.

3. Wife filed an application under The Protection of Women from Domestic Violence Act, 2005 (for short the Act) inter-alia praying for protection order, residence order, maintenance order and compensation in her favour. Wife alleged domestic violence at the hands of husband. It was alleged that wife was insulted by husband for not bringing the dowry and also bearing the child. She was humiliated. The husband was also accused of not providing any maintenance to the wife after forcing her to live out of shared house-hold.

4. Husband contested the claim of wife on the grounds that the provisions of the Act would not apply in the facts and circumstances of the case. As per husband, he married to wife on 26.12.1980, whereafter the wife

left his house within a period of one month. It was alleged that the wife did not join the company of husband voluntarily. Wife was alleged to have left the matrimonial house of her own accord. The wife was also stated to have been awarded maintenance at the rate of Rs. 500/- per month under Section 125 Cr.P.C.

5. I have heard Mr. Anuj Gupta, Advocate, for the petitioner and Mr. B. C. Negi, learned Senior Advocate for the respondent and have also gone through the record carefully.

6. Learned counsel for the petitioner contended that since the parties have been resided separately since 1981, complaint under the Act filed in the year 2011 would not be maintainable. According to learned counsel for the petitioner, the provisions of the Act could be invoked only if wife was living in a domestic relationship with the husband. Challenge has also been made to the impugned judgment on the ground that the wife has already been granted maintenance under Section 125 Cr.P.C. and, therefore, the husband cannot be burdened further by directing him to pay additional maintenance at the rate of 3000/- per month.

7. Domestic relationship has been defined under Section 2 (f) of the Act as under:-

> *"domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family".*

The requirement of the Act, thus, is that to constitute domestic relationship between two persons it is sufficient if such persons have lived or have had any point of time lived together in a shared household when they are related by marriage.

8. As per Section 2 (a) of the Act, aggrieved person means any woman who is or has been in a domestic relationship with respondent and

who alleged to have been subjected to any act of domestic violence by the respondent.

9. Admittedly, the wife was married to the husband in the year 1980. It has also not been denied that the wife and husband shared household as husband and wife. Both the courts below have concurrently held that the wife resided with husband initially from 1980 to 1983 and then from 1987 to 1988. There is also a concurrent finding of fact that the husband is keeping another woman as his wife and has four children from such relationship. The findings to this effect are based on admissions made by the husband. Further, it has also been found on facts by the learned courts below that the wife had reasonable cause to live separately as she cannot be supposed to live with the husband, who has long standing relationship with another woman and has four children from such relationship.

10. The domestic violence as defined under the Act has many facets. It includes any act, omission or commission or conduct of the respondent which injure or endanger to health and safety whether mental or physical of the aggrieved person. It also includes any injury or harm whether physical or mental to the aggrieved person. The very fact that husband has a long standing relationship with another woman and has four children therefrom is sufficient to infer harm or injury to the mental health and well being of the wife.

11. The second explanation appended to Section 3 of the Act states that for the purpose of determining whether any act of omission, commission or conduct of the respondent constitutes domestic violence under this section the overall facts and circumstances of the case shall be taken into consideration.

12. As is evident from the grounds raised in the instant petition, no serious challenge has been made to the finding of facts arrived at by the learned courts below. That being so, the contention on behalf of the petitioner

as to maintainability of the petition under the Act needs to be out rightly rejected. It has been established that the wife and husband had shared household and were in domestic relationship. The wife thus is the aggrieved person and can definitely maintain the application under the Act alleging domestic violence at the hands of respondent.

13. It is not a case where the factum of receipt of maintenance by wife from husband under Section 125 Cr.P.C. was suppressed. Husband had disclosed this fact in his reply and was not rebutted by the wife. There is no bar under the Act to claim maintenance. Even if the aggrieved person already gets amount earlier under Section 125 Cr.p.C. Section 20 (1) (d) of the Act reads as under:-

> "*the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the code of Criminal Procedure, 1973 or any other law for the time being in force"*

From the reading of the aforesaid provisions of the Act, it is clear that the maintenance under the Act can be awarded in addition to an order of maintenance under Section 125 Cr.P.C. In such situation, it is trite that grant of maintenance and its quantum under another act/law has to be considered while grant of maintenance under the Act. Reference can be made to a judgment passed by Hon'ble Supreme Court in the matter of ***Rajnesh vs. Neha and another, 2021 (2) SCC 324*** as under:-

> *"60. It is well settled that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the D.V. Act and Section 125 of the Cr.P.C., or under H.M.A. It would, however, be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. If maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of*

> *maintenance in the subsequent proceeding, the civil court/family court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant."*

14. As noticed above, there is no challenge to the findings of fact recorded by both the courts below. Considering the income of husband, learned trial Court found it expedient to award a sum of Rs. 3000/-, as maintenance to the wife in addition to the maintenance of Rs. 500/- already being received by her under Section 125 Cr.P.C. The finding as to the financial capacity of husband to pay the maintenance, as awarded vide impugned orders, has also not been assailed. Thus, no illegality has been committed by both the courts below while awarding and affirming the payment of maintenance at the rate of Rs. 3000/- per month to the wife. In addition, the protection orders passed in favour of the wife and the order directing the husband to provide reasonable accommodation to the wife also cannot be faulted by taking overall analytic assessment of the facts available on record. Further, the allowance of compensation to the tune of Rs. 10,000/- in favour of wife also cannot be said to be unreasonable.

15. The findings of facts recorded by both the courts below are otherwise borne from the material on record. Nothing has been suggested or shown to this Court, so as to infer any perversity in such findings. From the material on record, no illegality or impropriety has been found as far as impugned judgment is concerned.

16. In view of the above discussion, there is no merit in the instant petition and the same is accordingly dismissed. The impugned judgment is affirmed. No order as to costs. The records be sent back forthwith. Pending applications, if any, also stand disposed of.

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

Between:-

HEM KUMAR SHARMA, AGED 47 YEARS, SON OF LATE SH. HARI BALLABH, RESIDENT OF VILLAGE DHAROT, POST OFFICE DHAROT, TEHSIL AND DISTRICT SOLAN, H.P.

...PETITIONER

(BY SH. ANIRUDH SHARMA, ADVOCATE.)

AND

STATE OF H.P.

...RESPONDENT

(BY SH. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL.)

CRIMINAL MISC. PETITION (MAIN)
No. 1279 OF 2022
Decided on: 01.08.2022

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Indian Penal Code, 1860- Sections 354-A, 376(3), 376(2)F- Protection of Children from Sexual Offences, Act, 2012- Sections 6 and 10- Held- it is not a case where ex-facie no case is made out against the petitioner- Investigation is in progress- Taking into consideration nature and gravity of offence and stage of investigation no case for grant of anticipatory bail is made out- Petition dismissed. (Para 24, 25)

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;
Dr. Jaseer Aboobackr Vs. State of Keralab 2019 1 ILR (Ker) 362;
Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others, (2017) 16 SCC 775;
Freed and other connected matters v. State 2020(4) Shim. LC 1614;

Gurbaksh Singh Sibbia & others v. State of Punjab, (1980) 2 SCC 565;
Mangal Singh Negi v. Central Bureau of Investigation 2021(2) Shim. LC 860 : 2021(2) Him L.R. (HC) 917;
Noor Aga Vs. State of Punjab, 2008 (16) SCC 417;
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) 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;

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

O R D E R

Petitioner has approached this Court, invoking provisions of Section 438 Cr.P.C., seeking anticipatory bail in case FIR No. 98 of 2022, dated 10.6.2022, registered in Police Station Dharampur, District Solan, H.P. under Sections 354-A, 354, 376(3), 376(2)F of the Indian Penal Code (for short 'IPC') and Sections 6 and 10 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act').

2. Status Report stands filed. Record was also made available.

3. Petitioner has also placed a certificate on record, whereby he has been given State Level Teachers Award-2020 for doing extra-ordinary work for characteristic, physical and cultural development of students. A Pen Drive has also been placed on record, allegedly having conversation of someone on behalf of complainant with relative of the petitioner making offer for amicable settlement.

4. Prosecution case is that on 10.6.2022 an e-mail bearing rapat No. 15 in Daily Diary dated 10.6.2022 was received in the Police Station,

Dharampur from Police Chowki Subathu, informing that one Devinder Kumar had submitted a complaint about teasing the school girls by DPE, posted in Government Girls School, Subathu, during training of Yoga, stating therein that complainant was a wholesale businessman and his daughter, studying in 9th Class, on 9.6.2022, after returning from the School, told her mother that since so many days, their DPE sir, in the School used to tease her and other 9 girls students during Yoga learning. The complainant's wife disclosed it to him. Thereafter complainant alongwith parents of other girls met Principal of School in his office, who assured Departmental inquiry on the issue. All girls were stated to be under stress and fear due to inappropriate conduct of DPE as he, with ulterior motive and ill-intention, had been touching body parts of girls while instructing Yoga.

5. On the basis of aforesaid complaint and inquiry, FIR under Section 354-A of IPC and Section 8 of POCSO Act was registered. Thereafter statements of victims were recorded under Section 161 Cr.P.C. and they were medically examined in CHC Dharampur. From the statements of victims it transpired that petitioner, on the pretext of improving the postures and stretching, used to touch their private parts and insert his figure in private part and petitioner used to wear a torn lower without wearing underwear, exposing his private part to girls. Torn lower has been recovered from the Almirah kept in sports room of the school.

6. During investigation written complaints submitted by victim girls to Sexual Harassment Committee and a communication sent by one victim girl to her elder sister, were taken into possession and statements of victim girls were also recorded under Section 164 Cr.P.C. before the Magistrate. As per certificates of victims, all victims are of less than 16 years of age. On the basis of statements of victims, Sections 354, 376(3), 376(F) of IPC and Sections 6 and 10 of POCSO Act, attracted in the case, were also incorporated and Section 8 of POCSO Act was omitted.

7. In the communication sent by one victim to her elder sister, victim wrote that 'didi sir was too mean as he put his hand on her lower private part and thereafter asked that she was feeling good by saying that when it would be in heat, then she would enjoy it and for that reason she was resisting direction of her mother to attend Yoga classes.'

8. In the complaints submitted to the Principal, it has been stated by victims that they used to attend Yoga classes on call of petitioner and during classes of Yoga, sir used to touch their private parts. Petitioner used to lay down the girls on the table on the pretext of improving flexibility of body by stretching and used to touch their body inappropriately, and touch of body parts of petitioner without undergarments was very embarrassing for them and he used to ensure touching of his stomach with the girls and because of this sometimes they missed the Yoga class but next day petitioner used to compel girls to attend Yoga class. At the time of stretching, petitioner used to ask about part where girls were feeling pain and irrespective of location of pain pointed out by the girls, he used to touch their private part and to say that he was not able to identify or catch their nerve and for that he had to open their trouser, and on the pretext of helping back bending, petitioner used to touch his private part with body of girls by asking the girls for more back bending. He used to massage private parts of girls on the pretext of increasing flexibility without pain. He used to sit in front of girls stretching his legs in such a manner that his private part would visible to the girls. Whenever, it was brought in his notice he asked them to look forward and whenever girls used to close their eyes, petitioner forced them to open their eyes at that time by insisting to do Yog Aasan with open eyes.

9. In their statements recorded before the Magistrate, victims have re-iterated the allegations in same fashion.

10. Learned counsel for the petitioner has submitted that in the medical examination of the victims, there is nothing to implicate the petitioner

under Section 376 IPC or under Section 6 of POCSO Act. There is no threat not to disclose the incident. There is no penetration or any physical harm to any victim. The communication claimed to be written by one of the victim to her sister is not authentic document, as it bears no date, no identity of scribe or recipient has been mentioned thereon. Further that the statements indicate that girls have been tutored to depose against the petitioner to implicate him in a false case as there are more than 50 students in the class, but allegations have been leveled only by ten students. Other students have not been associated to verify the facts and it has been further submitted that petitioner is teaching Yoga class since 1999 and his students have performed well at State level and National level, details of such ten students have been given in para 4 of the application. He has further stated that his work has been appreciated by SMC Kawarag and petitioner was awarded with State Award on 5.9.2020 by Hon'ble Education Minister of Himachal Pradesh for physical, cultural and characteristic development of students for his dedication towards personality development of students; one student Promila has referred the petitioner as Farishta in her written communication; petitioner has participated as coach (Yoga) in 60th National School Yoga Championship/Tournament at Ahmednagar, Gujarat; and he was head of delegation in 59th National Yoga Championship (girls) under-19. Further that since 1999 till date, no such allegations have ever been leveled by anybody at any point of time and this case has been concocted against the petitioner to create pressure upon him as immediately after complaints of students, one person claiming him speaking from Human Rights Commission called one Naval Kishore Sharma, a relative of petitioner, to settle the issue.

11. Learned Additional Advocate General has submitted that the parents of victim girls reported the matter to the Principal and thereafter to the Police and they have taken a risk of exposing their girls in the Courts, who are of adolescent age, but these parents or students have no enmity with the

petitioner and they are not going to be benefited in any manner and that all 50 students were not attending Yoga class and further that it is not improbable that every person would not like to complaint or expose his girl child by raising such issue publicly and, therefore, complaint made by ten students out of more students attending the class is not a ground for rejecting the version of victims, who not only narrated the incident to their parents and gave in writing to Principal, but also re-iterated the same complaint before the Magistrate at the time of recording their statements under Section 164 Cr.P.C. Further that parents of girls have not only made complaints to Principal and Police, but also allowed victims to be medically examined which reflects the intensity of mental suffering being faced by victims as well as their parents compelling them to complain the matter irrespective of odd situations faced by victims. It has further been stated that matter is under investigation and there is unrest in society, and further that past history of achieving certificates and good performance by the students at State level and National level, does not provide immunity to the petitioner for committing any offence or to exploit adolescent girls physically or otherwise and/or entitle him for anticipatory bail in present case rather his claim for anticipatory bail is to be assessed on the basis of material of present case. Thus it has been submitted that petitioner is not entitled for anticipatory bail.

12. Learned counsel for the petitioner has placed reliance upon judgment dated 12.4.2022 passed by Delhi High Court in *Bail Application No. 163 of 2022*, titled *Surya Prakash Pal Vs. State of NCT of Delhi*, wherein it has been observed that presumption against accused under Section 29 of POCSO Act is attracted only after framing of charge. Learned counsel for the petitioner has also referred pronouncement of the Supreme Court in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat & another*** reported in ***2016 (1) Criminal Court Cases 264 (SC),*** wherein it has been observed that for grant of anticipatory bail, accused is not to make out a special case and

presumption of innocence of an accused until he is found guilty and sanctity of individual liberty is to be considered for that and limitations mentioned in Section 437 Cr.P.C. are not to be read in Section 438 Cr.P.C.

13. Reliance has also been placed on behalf of petitioner on pronouncement of Kerala High Court in ***Dr. Jaseer Aboobackr Vs. State of Keralab,*** reported in ***2019 1 ILR (Ker) 362***, wherein referring pronouncement of the Supreme Court in ***Noor Aga Vs. State of Punjab, 2008 (16) SCC 417***, it has been observed that an accused is certainly entitled to show to the Court, if he apprehends arrest, that case of the complainant was motivated and if it can be so shown there is no reason that the Court is not able to protect liberty of such a person, as there cannot be any mandate under the law for arrest of an innocent.

14. Referring the judgment dated 1.1.2020 of co-ordinate Bench of this Court in *Cr.MP (M) No. 2477 of 2019*, titled *Netar Singh Vs. State of Himachal Pradesh,* it has been contended that gravity of offence alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the Court while exercising its discretion and object of bail is to secure attendance of the accused in the trial and proper test to be applied for granting or refusing bail is as to whether it is probable that the person will appear to take his trial or not because normal rule is bail but not jail.

15. Law of bail deals with two complicating interests, i.e. societal interest to cure hazards of crime and to avoid repeating of the same and on the other hand principle of criminal jurisprudence referring presumption of innocence of accused till he is found guilty and his individual liberty. 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.

16. 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.*
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> *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.**"***

… *…* *…* *…*

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."

17. In **Pokar Ram v. State of Rajasthan and others, (1985) 2 SCC 597,** the Supreme Court, referring Constitution Bench in ***Gurbaksh Singh Sibbia Vs. State of Punjab (1980) 2 SCC 565***, 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 Court would exercise its discretion, one way or the other, are substantially different from each other. .....

18. 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:*
>
> > *'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.)"**

... ...

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. ……"

19. 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."

20. Learned Additional Advocate General submits that there is nothing on record to indicate that victims or their family members or anybody else behind them was having any enmity with the petitioner for having motivated complaints against him and also victims are stating similar facts in one voice, but in different manner and enlargement of petitioner on anticipatory bail in present case would have serious adverse impact on societal interest and for that reason alone, bail application filed by petitioner deserves to be dismissed.

21. Learned Additional Advocate General has referred Section 30 of POCSO Act to substantiate his plea that presumption of culpable mental state of accused is to be presumed in existence by the Court in a case under POCSO Act.

22. Learned counsel for the petitioner has responded that such presumption shall be applied in a case before the Special Court during trial, but not before the High Court dealing with an application for anticipatory bail.

23. Learned Additional Advocate General has submitted that for commission of offence under Section 376 Cr.P.C. or Section 6 of POCSO Act penetration causing any injury, evident in medical report, is not necessary ingredient, but otherwise also in the given set of evidence, a person can be liable to be punished under Section 376 IPC or Section 6 of POCSO Act and for attracting Section 6 of POCSO Act touching vagina or making the child to touch penis is sufficient and, therefore, case has rightly been registered under Sections 6 and 10 of POCSO Act read with Section 376 IPC.

24. From the material placed before me and submissions made by learned counsel for the parties, I am of the considered opinion that it is not a case where ex-facie no case is made out at all against the petitioner. For material placed before the Court, it cannot be said to be totally false on the face of it. Therefore, in present case accusation cannot be said to have been made with object to injuring or humiliating the petitioner by having him so arrested without any cause. Investigation in present case is going on.

25. Without commenting upon the merits of the rival contentions, but taking into consideration nature and gravity of offence, 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.

26. Hence, in view of the above discussion, the bail petition is dismissed and disposed of.

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

Between:-

OM PRAKASH
SON OF SH. MAHENDER,
RESIDENT OF DARUAPUR, POST OFFICE
FALASI, TEHSIL AONLA, DISTRICT BAREILY,
UTTAR PRADESH THROUGH HIS WIFE
SAROJ DEVI, RESIDENT OF VILLAGE
POST OFFICE PHULASI, TEHSIL AONLA,
DISTRICT BAREILY, UTTAR PRADESH

....PETITIONER

(BY MS. KANTA THAKUR ADVOCATE)

AND

STATE OF HIMACHAL PRADESH
THROUGH SECRETARY HOME,
GOVT. OF HIMACHAL PRADESH.

..RESPONDENT

(MR. P.K. BHATTI, ADDL. A.G WITH MR. KUNAL THAKUR, DY. A.G.)

CRIMINAL MISC. PETITION (MAIN)
No. 1581 of 2022
Reserved on: 29.7.2022
Decided on: 02.08.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 392, 201 read with Section 34- Trial is pending- Held- Petitioner does not have past criminal history- No likelihood of his absconding- Petition allowed. (Para 11 to 13)

Cases referred:

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

Petitioner is in custody since 11.04.2020 in case registered vide FIR No. 22 of 2020, dated 19.03.2020 under Sections 302, 392, 201 read with Section 34 of the Indian Penal Code in Police Station, Parwanoo, District Solan, H.P. The challan was filed after completion of investigation on 10.07.2020. The trial is still pending.

2. The prosecution case, in nut-shell, is that on 18.03.2020 a dead body was recovered by the police near railway track, Sector-5, Parwanoo, District Solan, H.P. The case was registered and on investigation, complicity of petitioner along-with two others namely Sandeep and Tinku @ Boriya was

found. The challan has been filed on the allegations that all three above named persons, way laid the deceased (Hari Ram) with intent to commit robbery and in the process committed murder. It is alleged that Sandeep and Tinku @ Boriya caught hold of deceased in order to rob him, but Sandeep was over-powered by the deceased and in such process Sandeep inflicted blows on the person of deceased with knife which proved fatal. The allegations against the petitioner are that he was standing nearby the spot of offence and in fact Sandeep and Tinku @ Boriya had acted at his instance.

3. Petitioner has prayed for grant of bail on the grounds that he has been falsely implicated. He is the sole bread earner of the family and the financial condition of the family has worsened with each passing day, affecting future of his children. Material witnesses have already been examined. It has been contended on behalf of the petitioner that despite filing of challan on 10.07.2020, the trial has not yet concluded. Violation of fundamental right of speedy trial has also been alleged.

4. I have heard learned counsel for the petitioner and learned Additional Advocate General for the respondent-State and have also gone through the record carefully.

5. Seriousness and gravity of offence are the factors which have bearing on the fate of the prayer for grant of bail. Merely because the offence involved is of serious nature and attracts the severe punishment, cannot be the only ground to deny the right of bail. It has to be weighed and balanced with other factors such as the allegations against the bail petitioner and also the available evidence to prove such allegations.

6. Though this Court while deciding the bail application is not required to minutely scan the evidence collected by the police during investigation, still the material on record can be glanced only for the purposes of prima-facie assessment regarding the seriousness and gravity of allegations against the bail petitioner.

7. The case of the prosecution is based on circumstantial evidence. Admittedly, there is no eye witness to the crime. As per allegations against the petitioner, the other co-accused had acted at his instance. Actual participation in the crime has not been attributed to the petitioner. The allegation against him is that he was standing near the place of occurrence. The allegations are subject to proof.

8. Petitioner is in custody since 11.04.2020. Only about 10 witnesses have been examined till date. The trial is likely to take some time before conclusion. The contention of petitioner that all material witnesses have been examined has not been rebutted on behalf of the respondent. Petitioner cannot be incarcerated for indefinite period during trial. The right of speedy trial has been recognized to be a fundamental right under Article 21 of the Constitution of India.

9. In ***Umarmila @ Mamumia*** vs. ***State of Gujarat, (2017) 2 SCC 731***, the Hon'ble Apex Court has held as under:-

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

10. Recently, three Judges Bench of Hon'ble Apex Court in ***Union of India*** vs. ***K.A. Najeeb, (2021) 3 SCC 713*** has held as under:-

> *"15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee*

> *(Representing Undertrial Prisoners) v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."*

11. Petitioner does not have any past criminal history. It is not the case of the respondent that in case of release of petitioner on bail, there is any likelihood of his absconding from the course of justice. It has also not been alleged against the petitioner that his release on bail shall affect the trial adversely or the petitioner will be in a position to tamper with the prosecution evidence.

12. Taking into consideration the peculiar circumstances of the case, this Court is of the view that no fruitful purpose shall be served by prolonging pre-trial incarceration of the petitioner especially when nothing has been stated regarding early disposal of the trial.

13. Striking the balance between the right of petitioner as also the public interest and keeping in view the fact that petitioner is already in custody for more than two years and three months, the prayer of the petitioner is allowed. Petitioner is ordered to be released on bail in case FIR No. 22 of 2020, dated 19.03.2020 under Sections 302, 392, 201 read with Section 34 of the Indian Penal Code in Police Station, Parwanoo, District Solan, H.P., subject to his furnishing personal bond in the sum of Rs.1,00,000/- with two sureties in the like amount to the satisfaction of learned trial Court. This order, however, shall be subject to the following conditions:-

i) *That the petitioner shall attend the trial Court on each and every date of hearing.*

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

iii) That the petitioner shall not in any manner tamper with the prosecution evidence.

iv) That the petitioner shall not leave India without permission of the Court.

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

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

Between:

1. SAVITRI SARANG (AGED ABOUT 64 YEARS) WIDOW OF D.R DAMAN DEV SINGH RESIDENT OF HOUSE NO. 1038, SECTOR 27-B, CHANDIGARH.

2. KAMAL SARANG (AGED ABOUT 30 YEARS) DAUGHTER OF DR. DAMAN DEV SINGH WIFE OF MANDEP SINGH, RESIDENT OF FLAT NO. 304/305, NAGARJUNA DREAMLAND KOMPALLY, MORNING GLORY, KOMPALLE, K.V. RANGAREDDY, KOMPALLY, TELANGANA.

....PETITIONERS

(BY MR. RANJIT SINGH GHUMAN, MR. SUDHANSHU JASWAL AND MR. CHANDHARN HARWAL, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH

2. BINDIA SHARMA WIFE OF VIKRAM SARANG RESIDENT OF SET NO.5, SAROJ MANSION, CHOTA SHIMLA, SHIMLA EAST, SHIMLA, HIMACHAL PRADESH.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR. NARENDER GULERIA, ADDITIONAL ADVOCATES GENERAL WITH SUNNY DHATWALIA, DEPUTY ADVOCATE GENERAL, FOR THE STATE)

(BY MR. RAKESH MANTA, ADVOCATE, FOR RESPONDENT NO.2.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 597 of 2019
Reserved on: 19.07.2022
Decided on:01.08.2022

Code of Criminal Procedure, 1973- Section 482- Bail- **Indian Penal Code, 1860**- Sections 498-A, 34- Quashing of F.I.R.- Held- Sufficient grounds for quashing of F.I.R. to prevent abuse of process of law and to prevent unnecessary harassment to the petitioners against whom there is no evidence to connect them with the commission of offences as incorporated in the FIR- Petition allowed. (Para 22)

Cases referred:

Asmathunnisa v. State of A.P. (2011) 11 SCC 259;
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;
Shakson Belthissor v. State of Kerala and Anr, 2009 (14) SCC 466;
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;
Varala Bharath Kumar and Anr v. State of Telangana and Anr, 2017 AIR (SC) 4434;
Wasim v. State (NCT of Delhi) (2019) 7 SCC 435;

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

O R D E R

By way of instant petition filed under Section 482 Cr.PC, prayer has been made by the petitioners for quashing of FIR No. 0091, dated 8.8.2019, registered at PS Shimla East, District Shimla, under Section 498-A read with Section 34 of IPC, as well as consequent proceedings, if any, pending before the competent court of law.

2. For having bird's eye view, certain facts, which may be relevant for the adjudication of the case at hand are that marriage inter-se respondent No.2-complainant (*hereinafter referred to as the "complainant"*) and Vikram Sarang, who is son of petitioner No.1 and brother of petitioner No.2, was solemnized somewhere in April, 2009 and since then, allegedly, petitioners started harassing the complainant on one pretext or the other and as such, differences cropped inter-se petitioners and the complainant. On 8.8.2019, approximately after 10½ years of marriage, complainant lodged FIR sought to be quashed in the instant proceedings against the petitioners, alleging therein that both the petitioners immediately after the marriage started creating misunderstanding *inter-se* her and her husband Vikram Sarang. She also alleged that both the petitioners besides picking up quarrel with her on small issues also instigate her husband for taking divorce from her. She also alleged that whenever her husband was not at home, both the petitioners gave her beatings. She alleged that on 3.11.2018, her eight months pregnancy was aborted on account of constant mental harassment and torture meted at the hands of the petitioners. She alleged that on 26.5.2017, the petitioners came to her house and gave beatings. She alleged that since grandfather of her husband bequeathed his entire property in her as well as her husband's name i.e. Vikram Sarang, both the petitioners create ruckus everyday in the house. She alleged that after six months of her marriage, petitioner No.1 pushed her as well as her husband out of the house and they were compelled to live in separate accommodation. She alleged that on 4.12.2018, petitioners hurled

abuses at her in a marriage function at Chandigarh. She alleged that now water has gone above her head and there is constant threat to her and her husband's life from the petitioners. She also alleged that on 18.11.2013, her mother in law made an attempt to get her husband killed. She alleged that both the petitioners are of criminal nature and FIR already stands registered against her mother in law. At last, complainant prayed that case under Section 498-A IPC as well as Domestic Violence Act be registered against the petitioners.

3. Police on the basis of aforesaid complaint made by the complainant lodged FIR as detailed herein above against the petitioners under Section 498-A and Section 34 of IPC. After completion of investigation, police presented challan in the competent court of law. However, before same could be taken to its logical end, petitioners have approached this Court in the instant proceedings for quashing of FIR as well as consequent proceedings pending in the competent court of law.

4. Aforesaid prayer made in the instant petition has been seriously opposed by the respondents on the ground that there is overwhelming evidence available on record suggestive of the fact that petitioners had been constantly harassing the complainant on account of property and repeatedly, she was given beatings by them.

5. Mr. Sudhir Bhatnagar, learned Additional Advocate General and Mr. Rakesh Manta, Advocate, appearing for respective respondents, while making this Court peruse FIR sought to be quashed in the instant proceedings argued that same clearly discloses offence punishable under Section 498A and 34 of IPC and as such, prayer made by the petitioners for quashing of FIR deserves outright rejection. Above named counsel further argued that FIR clearly reveals that from day one, petitioners not only hurled abuses at respondent No.2, but they also indulged in character assassination. Learned

counsel further argued that complainant as well as husband were also given beatings and as such, they have been rightly booked under Section 498-A.

6. To the contrary, Mr. Ranjit Singh Ghuman, Advocate, appearing on behalf of the petitioners while making this Court peruse contents of the FIR vis-à-vis provisions contained under Section 498-A IPC contended that since there is no allegation of cruelty, if any, meted to the complainant on account of bringing less dowry or demand of dowry, no case much less under Section 498-A IPC is made out against the petitioners and as such, FIR deserves to be quashed and set-aside. He argued that otherwise also, there is an inordinate delay of more than 10 years in lodging the FIR, which fact itself suggests that FIR sought to be quashed has been purposely lodged with a view to harass the petitioners with whom, respondent No.2/complainant has estranged relationship on account of property dispute. While making this Court peruse the documents annexed with the petition, learned counsel representing the petitioners further argued that since criminal complaints came to be lodged against respondent No.2 and her husband on account of maltreatment meted to the petitioners, respondent No.2 in retaliation has made unfounded allegation in the FIR sought to be quashed in the instant proceedings. He further argued that entire dispute as of today inter-se petitioners and complainant is on account of property left behind by late father in law of petitioner No.1, but with a view to bring petitioner No.1 under pressure, complainant in connivance with her husband concocted false story of her being maltreated and harassed by the petitioners and lodged the FIR sought to be quashed. Lastly, learned counsel for the petitioners argued that petitioner No.2 is married since year, 2012, and since then, she is living happy married life in a place far away from Chandigarh, but yet complainant with a view to gain sympathy of this court has leveled false allegations against her as well as her mother, who is a widow.

7. I have heard the learned counsel for the parties and perused the record.

8. Before ascertaining the genuineness and correctness of the submissions and counter submissions having been made by the learned counsel for the parties vis-à-vis prayer made in the instant petition, this Court deems it necessary to discuss/elaborate the scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC.

9. Hon'ble Apex Court in judgment titled ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335*** has laid down several principles, which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. Before pronouncement of aforesaid judgment rendered by the Hon'ble Apex Court, a three-Judge Bench of Hon'ble Court in ***State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699***, held that the High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. Relevant para is being reproduced herein below:-

> "7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding

> in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the 5661 inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

10. Subsequently, Hon'ble Apex Court in **Bhajan Lal (**supra), has elaborately considered the scope and ambit of Section 482 Cr.P.C. Subsequently, Hon'ble Apex Court in **Vineet Kumar and Ors. v. State of U.P. and Anr.**, while considering the scope of interference under Sections 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 Cr.PC, as enumerated in **Bhajan Lal** (supra), i.e. where a criminal proceeding is manifestly attended with malafides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings.

11. Hon'ble Apex Court in **Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293**, while drawing strength from its earlier judgment titled as

Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330, has reiterated that High Court has inherent power under Section 482 Cr.PC., 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 charge, but such power must always be used with caution, care and circumspection. While invoking 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 and the material adduced on record itself overrules the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. 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 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 **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)
>
> 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."

12. Hon'ble Apex Court in **Asmathunnisa v. State of A.P. (2011) 11 SCC 259**, has held as under:

"12. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent

power under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified 9 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.

13. The law has been crystallized more than half a century ago in the case of R.P. Kapur v. State of Punjab AIR 1960 SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:

> (i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;
>
> (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

14.In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :

> "(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does

> not disclose the essential ingredients of an offence which is alleged against the accused;
> (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no 10 prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
> (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
> (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".
>
> 15. This court in State of Karnataka v. L. Muniswamy & Others (1977) 2 SCC 699, observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice requires that the proceedings ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the Legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

13. Hon'ble Apex Court in **Asmathunnisa** (supra) has categorically held that where discretion exercised by the Magistrate in issuing process is

capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like, High Court would be justified in exercise of its powers under S. 482 CrPC.

14. From the bare perusal of aforesaid exposition of law, it is quite apparent that exercising its inherent power under Section 482 Cr.PC., High Court can proceed to quash the proceedings, if it comes to the conclusion that allowing the proceedings to continue would be an abuse of process of the law.

15. Now being guided by the aforesaid law laid down by the Hon'ble Apex Court from time to time, this court would make an endeavour to find out "whether FIR sought to be quashed discloses offence, if any, punishable under Section 498-A and 34 IPC or not and evidentiary material collected on record by the prosecution is sufficient to connect the accused named in the FIR with the alleged commission of offence or not?"

16. It is quite apparent from the pleadings adduced on record by the respective parties as well as FIR sought to be quashed that marriage of complainant with Vikram Sarang, who is son of petitioner No.1 and brother of petitioner No.2, was solemnized in April, 2009. Though initially, respondent No.2 and her husband Vikram Sarang lived at her matrimonial house alongwith grandfather of the husband of the complainant and his family including petitioner No.1, but since year, 2012, when she was allegedly thrown out of her matrimonial house by petitioner No.1, she alongwith her husband had been living in a separate accommodation at Sector-48 Chandigarh. Though complainant in the FIR sought to be quashed has claimed that from day one of her marriage, she was harassed mentally and physically by the petitioners but no material ever came to be led on record suggestive of the fact that prior to lodging of the FIR at hand, criminal complaint, if any, was ever lodged by the complainant against the petitioners

with the police or in any competent court of law, rather record reveals that relationship inter-se petitioner No.1 and her father in law, late Col. Piara Singh Sarang was not cordial and at one point of time, late Col. Piara Singh Sarang had reported the matter to Deputy Commissioner UT Chandigarh, under Senior Citizen Act, 2007 (Annexure R-2) annexed with the reply filed by the complainant. In the aforesaid proceedings, Deputy Commissioner UT Chandigarh, directed petitioner No.1 to vacate the house of the late late Col. Piara Singh Sarang. Apart from above, documents placed on record by the petitioners herein reveal that husband of the complainant approached the Punjab and Haryana High Court by way of CWP No. 20594 of 2018, claiming therein that though he is entitled to the ownership of House No.1038, Sector 27-B, Chandigarh on the basis of will executed by his grandfather, but his other family members/relatives are issuing advertisement to sell the property. Punjab and Haryana High Court vide order dated 18.8.2018 (Annexure P-5) disposed of the writ petition observing in the order that effective recourse for resolving such like property dispute is to approach the Civil Court including by way of an injunction suit. Similarly, order dated 22.11.2018 (Annexure P-6), passed by the Assistant Controller (F&A) Estate Office UT Chandigarh reveals that husband of the complainant namely Vikram Sarang alongwith other family members Neeam Sarang and Promila Rani were requested to get the matter regarding transfer of ownership rights in respect of house No. 1038, Sector 27-B, Chandigarh, adjudicated from the competent court of law as per order dated 18.8.2018, passed by the Punjab and Haryana High Court. Similarly, perusal of complaint dated 12.2.2019 (Annexure P-7), lodged at the behest of the petitioners to the Incharge Women Police Station Sector 17 Chandigarh reveals that petitioner No.1, citing threat and danger to her life lodged complaint against the complainant. In the aforesaid complainant, petitioner No.1 alleged that she is being unnecessarily harassed and mentally tortured by the complainant/respondent No.2. She also alleged that

respondent/complainant repeatedly tried to defame her by sending letters by using highly vulgar, derogatory and un-parliamentary language to her, relatives and friends. Apart from above, respondent No.2 lodged one complaint with HP State Commission for Women, HIimrus Bhawan, Himland, Shimla, against the petitioners in the year, 2019 (Annexure P-8). Perusal of order dated 24.1.2019, passed by the Punjab and Haryana High Court in CWP No. 1931 of 2019 further reveals that husband of the complainant namely Vikram Sarang approached the Punjab and Haryana High Court, seeking therein direction to Chandigarh Administration to transfer the ownership of the house in question. In the aforesaid order, Punjab and Haryana High Court observed as under:

> "Contends that petitioner Vikram Dev Singh Sarang has a registered Will in his favour and as per the policy of the Chandigarh Administration they cannot stall the transfer of ownership if any objection is filed, even though the said transfer would be subject to outcome of the settlement in the event of the matter being taken to the court of competent jurisdiction."

17. If the allegations contained in the FIR are read in its entirety, no offence, if any, punishable under Section 498-A and 34 IPC can be said to have been committed by the petitioners, rather contents of FIR as well as other material available on record clearly reveal that entire dispute inter-se complainant and petitioners is on account of property left behind by the late Lt. Col. Piara Singh Sarang i.e. father in law of petitioner No.1 and grandfather of petitioner No.2 and husband of the complainant. Moreover as has been taken note herein above, as per own case of the complainant, she had been living separately with her husband in a separate accommodation at Sector 48 Chandigarh since year 2012, whereas petitioner No.1 continues to reside at house No. 1038 Sector 27-B, Chandigarh, which is otherwise bone of contention between petitioner No.1 and complainant. Though by way of will,

late Col. Piara Singh Sarang has bequeathed the aforesaid house alongwith other property in the name of the complainant and her husband, but yet petitioner has not vacated the house, rather allegedly an attempt was made by her to sell the property. Though apart from the aforesaid allegations of mental torture and harassment, complainant has alleged that she was hurled abuses and extended threats in a marriage function at Chandigarh on 4.12.2018, but if it is so, it is not understood why she failed to lodge complainant at the first instance, rather she waited for more than one year to lodge the FIR, which is subject matter of the instant case. Interestingly, in the case at hand, complainant has claimed that on 18.11.2013, her mother in law made an attempt to get her husband eliminated, but no report, if any, ever came to be lodged with the police qua the aforesaid alleged incident. As observed herein above, no case, much less under Section 498-A is made out against the petitioners. By now it is well settled that "cruelty" as defined under Section 498-A, is to be read in the context of "cruelty" meted out, if any, to the victim on account of bringing less dowry/demand of dowry. There is no allegation, if any, with regard to demand of dowry, rather entire dispute is with regard to property left behind by late Col. Piara Singh Sarang and as such, case under Section 498-A, is not sustainable against the petitioners. Similarly, after an inordinate delay of 10 years of the alleged incident of threat, beatings and mental torture meted to respondent No.2/complainant at the hands of the petitioners, it may not be possible for the prosecution to prove allegations contained in the FIR against the accused that too in the absence of any medical evidence.

18. At this state, it would be apt to take note of Section 498A of IPC.

> "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

> *Explanation.*—For the purposes of this section, "cruelty means"—
> (a) anywilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

For the purpose of Section 498-A, "cruelty" has been specifically defined under the aforesaid provision of law. Though Mr. Rakesh Manta, learned counsel for the complainant vehemently argued that case of the complainant strictly falls within the definition of "cruelty" as defined under the explanation (a) and (b) of Section 498-A, but having taken note of the allegations contained in the FIR as well as other material available on record, this court finds it difficult to agree with the aforesaid submission of Mr. Manta. There is no material suggestive of the willful conduct, if any, of the petitioners to drive the complainant to commit suicide or to cause grave injury or danger to life, limb or health. Similarly, there is no allegation that at any point of time, demand, if any, ever came to be made by the petitioners of dowry or maltreatment on account of bringing less dowry. At this stage, Mr. Manta, argued that since complainant is being deprived of property, to which she is legally entitled on account of will made in her favour by late Col. Piara Singh Sarang, her case would fall under clause (b) of Section 498A, however, this Court is not inclined to accept the aforesaid submission made by the petitioners for the reason that as per explanation (b) of Section 498A, harassment of woman must be with a view to coerce her or any person related to her to meet any unlawful demand

for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. In the instant case, there is no whisper in the FIR that the petitioners ever coerced or maltreated the complainant on account of bringing less dowry or made any demand of dowry. Similarly, there is no allegation that petitioners at any point of time, compelled the complainant to part away with the property, if any, she possessed or coerced her to handover some property to which she is legally entitled, rather dispute inter-se complainant and petitioners is on account of property left behind by late Lt. Col. Piara Singh Sarang, who allegedly by way of will has bequeathed the entire property in favour of the complainant and her husband. Since there is a will in favour of the complainant qua the house No. 1038 at Sector 27-B, appropriate remedy for her to get the petitioners evicted from that house is not the criminal proceedings, rather by way of civil suit as was pointed by the Punjab and Haryana High Court in its order dated 18.8.2018, passed in CWP No. 20594 of 2018.

19. Reliance is placed on judgment rendered by the Hon'ble Apex Court in ***Shakson Belthissor v. State of Kerala and Anr, 2009 (14) SCC 466***, wherein it has been held that since there is no allegation of harassment on account of dowry, no offence of cruelty either under Explanation (a) or Explanation (b) of Section 498A IPC is made out. Relevant paras of the aforesaid judgment reads as under:

> "26. It was fairly agreed at bar that the aforesaid FIR was filed by Respondent No. 2 with the intention of making out a prima facie case of offence under Section 498A of the Indian Penal Code. The charge sheet, which was filed by the police was under Section 498A of the Indian Penal Code. As to whether or not in the FIR filed and in the charge sheet a case of Section 498A IPC is made out or not is an issue, which is required to be answered in this appeal.

27.Section 498A of the IPC reads as follows:
"498A. Husband or relative of husband of a woman subjecting her to cruelty.

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
Explanation-For the purpose of this section, "cruelty" means-
(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) of the woman; or
(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her meet such demand".

In the light of the aforesaid language used in the Section, the provision would be applicable only to such a case where the husband or the relative of the husband of a woman subjects the said woman to cruelty. When the ingredients of the aforesaid Section are present in a particular case, in that event the person concerned against whom the offence is alleged would be tried in accordance with law in a trial instituted against him and if found guilty the accused would be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

28.The said section contains an explanation, which defines "cruelty" as understood under Section 498A IPC. In order to understand the meaning of the expression `cruelty' as envisaged under Section 498A, there must be such a conduct on the part of the husband or

> relatives of the husband of woman which is of such a nature as to cause the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman.
>
> 29. When we examine the facts of the present case particularly the FIR and the charge sheet we find that there is no such allegation either in the FIR or in the charge sheet making out a prima facie case as narrated under explanation
>
> (a). There is no allegation that there is any such conduct on the part of the appellant which could be said to be amounting to cruelty of such a nature as is likely to cause the Respondent No. 2 to commit suicide or to cause any injury to her life. The ingredient to constitute an offence under explanation (a) of Section 498A IPC are not at all mentioned either in FIR or in charge sheet and in absence thereof, no case is made out. Therefore, explanation (a) as found in Section 498A IPC is clearly not attracted in the present case.
>
> 30. We, therefore, now proceed to examine as to whether the case would fall under explanation (b) of Section 498A of IPC constituting cruelty of the nature as mentioned in explanation (b). In order to constitute cruelty under the said provision there has to be harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or a case is to be made out to the effect that there is a failure by her or any person related to her to meet such demand. When the allegation made in the FIR and charge sheet is examined in the present case in the light of the aforesaid provision, we find that no prima facie case even under the aforesaid provision is made out to attract a case of cruelty."

20. It would also be apt to take note of judgment of Hon'ble Apex Court in ***Wasim v. State (NCT of Delhi) (2019) 7 SCC 435***, wherein it has been held as under:

"10. The conviction of the Appellant by the Trial Court under Section 498-A was not for demand of dowry. The conviction under Section 498-A was on account of mental cruelty by the Appellant in having an extra marital relation and the threats held out by him to the deceased that he would leave her and marry Poonam. 10. The High Court acquitted the Appellant under Section 306 IPC by reaching a conclusion on the basis of evidence that the charge of abetment of suicide on part of the Appellant was not proved. Without any discussion of the evidence pertaining to demand of dowry and without dealing with the findings recorded by the Trial Court regarding the demand of dowry, the High Court held that the offence under Section 498-A was made out.

11. Cruelty is dealt with in the Explanation to Section 498-A as follows:

498-A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, "cruelty" means—

> (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

> 12. Conviction under Section 498-A IPC is for subjecting a woman to cruelty. Cruelty is explained as any willful conduct which is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health. Harassment of a woman by unlawful demand of dowry also partakes the character of 'Cruelty'. It is clear from a plain reading of Section 498-A that conviction for an offence under Section 498-A IPC can be for willful conduct which is likely to drive a woman to commit suicide OR for dowry demand. Having held that there is no evidence of dowry demand, the Trial Court convicted the Appellant under Section 498-A IPC for his willful conduct which drove the deceased to commit suicide. The Appellant was also convicted under Section 306 IPC as the Trial Court found him to have abetted the suicide by the deceased.
>
> 14. The High Court ought not to have convicted the Appellant under Section 498-A for demand of dowry without a detailed discussion of the evidence on record, especially when the Trial Court found that there is no material on record to show that there was any demand of dowry. The High Court did not refer to such findings of the Trial Court and record reasons for its disapproval."

21. Reliance is also placed on judgment passed by the Hon'ble Apex Court in ***Varala Bharath Kumar and Anr v. State of Telangana and Anr, 2017 AIR (SC) 4434,*** wherein it has been held as under:

> "7. It is by now well settled that the extraordinary power under Article 226 or inherent power under Section 482 of the Code of Criminal Procedure can be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice. Where allegations made in the First Information Report/the complaint or the outcome of investigation as found in the Charge Sheet, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out the case against the accused; where the allegations do not disclose the ingredients of the

offence alleged; where the uncontroverted allegations made in the First Information Report or complaint and the material collected in support of the same do not disclose the commission of offence alleged and make out a case against the accused; 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, the power under Article 226 of the Constitution of India or under Section 482 of Code of Criminal Procedure may be exercised.

While exercising power under Section 482 or under Article 226 in such matters, the court does not function as a Court of Appeal or Revision. Inherent jurisdiction under Section 482 of the Code though wide has to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 itself. It is to be exercised ex debito justitiae to do real and substantial justice, for the administration of which alone courts exist. The court must be careful and see that its decision in exercise of its power is based on sound principles. The inherent powers should not be exercised to stifle a legitimate prosecution. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extra ordinary jurisdiction of quashing the proceedings at any stage.

8. We are conscious of the fact that, Section 498A was added to the Code with a view to punish the husband or any of his relatives, who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. Keeping the afore-mentioned object in mind, we have dealt with the matter. We do not find any allegation of subjecting the complainant to cruelty within the meaning of Section 498A of IPC. The records at hand could not disclose any willful conduct which is of such a nature as is likely to drive the complainant to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the complainant. So also, there is nothing on record to show that there was a

> demand of dowry by the appellants or any of their relatives, either prior to the marriage, during the marriage or after the marriage. The record also does not disclose anywhere that the husband of the complainant acted, with a view to coerce her or any person related to her to meet any unlawful demand of any property or valuable security.

22. In view of the detailed discussion made herein above and law taken into consideration, there is sufficient ground for this Court to exercise its inherent jurisdiction under Section 482 Cr.P.C, for quashing of FIR and consequent criminal proceedings against the petitioners, to prevent abuse of process of law and to prevent unnecessary harassment to the petitioners against whom there is no evidence to connect them with the commission of offences as incorporated in the FIR. Otherwise also, continuance of the criminal proceedings against the petitioners in the present case would be a sheer wastage of time of the learned trial Court and the same would amount to subjecting the petitioners to unnecessary and protracted ordeal of trial, which is bound to culminate in acquittal.

23. 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. 0091, dated 8.8.2019, registered at PS Shimla East, District Shimla, under Section 498-A read with Section 34 of IPC, as well as consequent proceedings, if any, pending in the competent court of law are quashed and set-aside. Petitioners are acquitted of the charges framed against them in the aforesaid FIR. Accordingly, present petition is disposed of, so also pending applications, if any.

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

Between:-

RANJEET KUMAR SON OF SHRI BALESHWAR PRASAD, RESIDENT OF HOUSE No. 35, VILLAGE TELYAMAI, POST OFFICE OPPEY, BLOCK

ENKANAGAR-SAREY, DISTRICT NALANDA, BIHAR (AGED ABOUT 38 YEARS). (PRESENTLY IN JAIL).

....PETITIONER.

(BY MR. SUNEEL AWASTHI, ADVOCATE).

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HOME TO THE GOVERNMENT OF HIMACHAL PRADESH SHIMLA.
2. SUPERINTENDENT OF POLICE SHIMLA, D.C. COMPLEX MALL ROAD SHIMLA-1.
3. CRIME INVESTIGATION DEPARTMENT, POLICE STATION BHARARI, SHIMLA THROUGH STATION HOUSE OFFICER.

....RESPONDENTS.

(BY MR. VINOD THAKUR, ADDITIONALA DVOCATE GENERAL WITH MR. RAJAT CHAUHAN, LAW OFFICER)

CRIMINAL WRIT PETITION
No. 8 OF 2022
Reserved on: 10.08.2022
Decided on: 17.08.2022

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Indian Penal Code, 1860- Sections 419, 420, 201 and 120-B- Release of petitioner arrested in arbitrarily and malafide manner with observance to the due procedure of law- Held- Arrest of petitioner in 2nd FIR has been made after satisfaction as to the necessity of such arrest- Presumption is attached to a judicial order passed by the Court having jurisdiction- Prima facie complicity of petitioner was found- Petition dismissed. (Para 22, 23, 24)

Cases referred:

Anju Chaudhary vs. State of Utter Pradesh & Another, (2013)6 SCC 384;

Arnab Ranjan Goswami vs. Union of India & Ors, reported in (2021)2 SCC 427;

Babubhai v. State of Gujarat, (2010) 12 SCC 254;

Kari Choudhary vs. Mst. Sita Devi and others, (2002) 1 SCC 714;

Lalita Kumari vs. Government of Utter Pradesh and others, (2014)2 SCC 1;

Nirmal Singh Kahlon vs. State of Punjab & Others, (2009) 1 SCC 441;

Ram Lal Narang vs. State (Delhi Administration), (1979)2 SCC 322;

Satyender Kumar Antil vs. CBI, 2022, SCC Online SC 825;

Surender Kaushik and others vs. State of Uttar Pradesh & Others, (2013) 5 SCC 148;
T. T. Antony vs. State of Kerala and others, (2001)6 SCC, 181;
Upkar Singh vs. Ved Prakash & Others, (2004) 13 SCC 292;

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

J U D G M E N T

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

> *"i. That the action of the respondent authorities arresting the petitioner in FIR No.5 of 2022 registered at Police Station Bharari, Shimla under sections 419, 420, 201 and 120-B of Indian Penal Code may kindly be quashed and set aside and be declared illegal and unlawful.*
>
> *ii. That the FIR No.5 of 2022 registered at Police Station Bharari, Shimla under sections 419, 420, 201 and 120-B of Indian Penal Code may kindly be quashed and set aside qua the present petitioner or in alternate the FIR's registered at various police station regarding the leak question paper in Police Constable Recruitment Exam Paper may kindly be clubbed in the interest of justice and fair play.*
>
> *iii. That the contempt notice may kindly be issued to the respondent authorities as the action of the respondent department arresting the petitioner is in violation of the Judgment Passed by the Hon'ble Supreme Court in Arnesh Judgment (2014)8SCC 273.*
>
> *iv. That the respondent may kindly be directed to release the petitioner in FIR No.5 of 2022 registered at Police Station Bharari, Shimla under sections 420, 120 B, 201 and 120-B of Indian Penal Code as his arrest in unlawful."*

2. The ground on which above noted reliefs have been claimed by the petitioner can be summarised as under:-

a. Arrest of petitioner in the same case in which he was bailed out earlier is abuse of power and against the constitutional safeguards available to the petitioner. The arrest of petitioner is just to circumvent the bail order passed by the learned Additional Sessions Judge-III, Kangra at Dharamshala.

b. The arrest of petitioner in FIR No.5 of 2022 registered at Police Station Bharari, Shimla is against the dictum of law in Arnesh Kumar vs. State of Bihar and another reported in (2014)8 SCC 273 and Arnab Ranjan Goswami vs. Union of India & Ors, reported in (2021)2 SCC 427.

c. The arrest of petitioner is in violation of Section 41-A of the Code of Criminal Procedure (for short "the Code").

d. The manner of arrest in the case of petitioner is gross abuse of power. He was arrested in arbitrarily and malafide manner without observance to the due procedure of law.

3. Brief facts necessary for adjudication of petition are that a case was registered at Police Station Gagal, District Kangra, H.P., on 05.05.2022 vide FIR No. 41 of 2022, under Sections 420 and 120-B of the IPC (for short, "1st FIR") alleging *interalia* that the question paper meant for written examination scheduled to be conducted during recruitment process for the posts of Constables and Drivers in Police Department of the State of Himachal Pradesh had been leaked a day or two before the date of examination i.e. 27.3.2022. Many persons were suspected to be involved in the criminal conspiracy and commission of offence. During investigation of 1st FIR some arrests were made. The complicity of petitioner was also found and he was also arrested on 09.06.2022. Petitioner remained in custody in above said case till 31.07.2022. He was released on bail on 01.08.2022.

4. During the course of investigation of 1st FIR certain facts were stated to have been discovered during the interrogation of the accused persons revealing intra district ramification of the scam. The Superintendent of Police,

Kangra had apprehended the possibility of jurisdictional issues of trial courts and since CID Police Station Bharari exercised jurisdiction all over the State, it was requested to register the case keeping in view possible legal implications. Accordingly, on 07.05.2022 another FIR bearing No. 5 of 2022, under Sections 420 and 120-B of the IPC was registered at Police Station CID , Bharari, District Shimla (for short, "2nd FIR"). After his release on bail in 1st FIR petitioner was arrested in 2nd FIR on 02.08.2022. Presently the petitioner is in judicial custody in 2nd FIR.

5. In the back drop of aforesaid facts, the petitioner has approached this Court alleging violation of his constitutional and statutory rights in the manner as aforesaid. Having regard to the importance of preservation of constitutional guarantees available to the citizens of India, this court vide order dated 08.08.2022 required the respondent to file reply/instructions on or before 10.08.2022. Respondent submitted a status report on 10.8.2022. Petitioner also placed on record an application along with certain additional documents, *viz*. copies of 1st and 2nd FIRs, copy of order dated 19.07.2022 passed by learned Judicial Magistrate 1st Class, Nahan and a copy of order dated 05.08.2022 passed by learned Single Judge of this Court in Cr.MP(M) No. 1679 of 2022.

6. We have heard the learned counsel appearing for the parties and have also gone through the records.

7. The status report submitted on behalf of the respondents discloses that during the investigation of 2nd FIR a person named Ritik Thakur resident of Verma Niwas P.O. Malyana, Tehsil and District Shimla was also found to have applied for the post of constables and drivers in Police department. On 26.03.2022 Ritik Thakur and his mother Gita Thakur had visited Chandigarh on the asking of one Mahesh Thakur (Uncle of Ritik Thakur) and had found said Mahesh Thakur in the company of another person named Sunil. They had visited a flat at Panchkulla. After some time a

whatsapp message was delivered on the mobile phone of Sunil having some solved questions with answers. Sunil had provided his mobile to Ritik Thakur in a separate room with instructions to go through the questions and answers as those would be appearing in the written examination the next day. Ritik Thakur had gone through those questions and answers for about 40-45 minutes and returned the phone to Sunil. All monetary transactions were being handled by Mahesh Thakur. He came back and appeared in the examination on 27.03.2022. He had found all those questions in the question paper, which he had prepared at Panchkulla, the previous night. Police made necessary arrests. It was found that above named Sunil had already been arrested in 1st FIR and was in custody. His custody was got transferred in 2nd FIR on 23.07.2022. He was remanded to police custody till 28.07.2022. During interrogation of Sunil Kumar, it was disclosed that petitioner was the kingpin who had managed the entire affair at Chandigarh and provided him with solved question paper on whatsapp. In such circumstances, the arrest of petitioner was found necessary in 2nd FIR and was accordingly arrested on 2.08.2022. As per status report, the petitioner had been remanded to judicial custody till 20.08.2022 by learned Judicial Magistrate First Class, Court No.VII, Shimla. Thus, police had found involvement of the petitioner in providing the question paper to Ritik Thakur through Sunil Kumar against consideration.

8. The contention of petitioner is that 2nd FIR is bad in law in as much as it is nothing but continuation of 1st FIR. The subject matter in both the FIRs is identical and overlapping, therefore, the arrest of petitioner in 2nd FIR is also illegal. It has also been submitted that the petitioner has already remained in custody for more than 50 days in 1st FIR on the same very allegations on which the police has again arrested him in 2nd FIR. In support of his contention, petitioner has placed reliance on a judgment passed by the

Hon'ble Supreme Court in a case titled as ***T. T. Antony vs. State of Kerala and others, (2001)6 SCC, 181*** in which he has been held that:-

> *"27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the Court. There cannot be any controversy that sub-section (8) of Section 173 Cr.P.C. empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narangs' case (supra) it was, however, observed that it would be appropriate to conduct further investigation with the permission of the Court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) Cr.P.C. It would clearly be beyond the purview of Sections 154 and 156 Cr.P.C. nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr.P.C. or under Article 226/227 of the Constitution."*

9. Learned counsel for the petitioner has also relied upon paragraph No.11 of the judgment passed by the Hon'ble Supreme Court in ***Kari Choudhary vs. Mst. Sita Devi and others, (2002) 1 SCC 714***, which reads as under:-

> "*11. Learned counsel adopted an alternative contention that once the proceeding initiated under FIR No. 135 ended in a final report the police had no authority to register a second FIR and number it as FIR 208. Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted by the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the court reading the new discovery made by the police during investigation the persons not named in FIR No. 135 are the real culprits. The quash the said proceeding merely on the ground that final report had been laid in FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it."*

10. Further, stress has also been laid upon a judgment passed in ***Upkar Singh vs. Ved Prakash & Others, (2004) 13 SCC 292***, especially on paragraphs No. 15 to 18 thereof, which read as under:-

> *"15. The registration of the said crime came to be challenged before the High Court by way of a writ petition and learned Single Judge of the High Court directed the case to be re-investigated by CBI. But in a writ appeal the Division Bench of the High Court quashed the FIR in Crime No. 268 of 1997 as against the Additional Superintendent of Police but it directed a fresh investigation by the State police headed by one of the three Senior Officers named in the judgment in stead of fresh investigation by CBI as directed by the learned Single Judge. It is the above directions of the Division Bench that came to be challenged by way of different appeals before this Hon'ble Court in the case of T.T. Antony (supra) and connected cases. In this factual*

background this Hon'ble Court, as stated above, came to the conclusion that a subsequent FIR on the same set of facts is not in conformity with the scheme of the Code for the reasons stated therein.

16. Having carefully gone through the above judgment, we do not think that this Court in the said cases of T.T. Antony vs. State of Kerala & Ors . has precluded an aggrieved person from filing a counter case as in the present case. This is clear from the observations made by this Court in the above said case of T.T. Antony vs. State of Kerala & Ors. in paragraph 27 of the judgment wherein while discussing the scope of Sections 154, 156 and 173 (2) Cr.PC, this is what the Court observed :-

"In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offences alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173 (2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr. PC or under Articles 226/227 of the Constitution"

(Emphasis supplied.)

17. It is clear from the words emphasized hereinabove in the above quotation, this Court in the case of T.T. Antony vs. State of Kerala & Ors. has not excluded the registration of a complaint in the nature of a counter case from the purview of the Code. In our opinion, this Court in that case only held any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard would have already started and further complaint against the same accused will amount an improvement on the facts mentioned in the original

complaint, hence will be prohibited under Section 162 of the Code. This prohibition noticed by this Court, in our opinion, does not apply to counter complaint by the accused in the 1st complaint or on his behalf alleging a different version of the said incident.

18. This Court in Kari Choudhary vs. Mst. Sita Devi & Ors. 2002 (1) SCC 714 discussing this aspect of law held :-

"Learned counsel adopted an alternative contention that once the proceedings initiated under FIR no. 135 ended in a final report the police had no authority to register a second FIR and number it as FIR No. 208. Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the court regarding the new discovery made by the police during investigation that persons not named in FIR No. 135 are the real culprits. To quash the said proceedings merely on the ground that final report had been laid in FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offence alleged have been committed and, if so, who have committed it".

(Emphasis supplied.)

11. We have thoughtfully considered above referred judgments in order to appreciate the contention raised on behalf of petitioner. The dictum articulated in above noticed judgments is that second FIR for the same offence having similarity of facts is not permissible, however, a cross FIR of the same incident was an exception. Such legal proposition cannot be disputed. In

Surender Kaushik and others vs. State of Uttar Pradesh & Others, ***(2013) 5 SCC 148,*** the legal position has been summarised as under:

> *"24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in Upkar Singh (supra), the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible."*

12. The issue, however, is whether it can be laid as an absolute rule that second FIR arising out of a set of facts is always impermissible? Hon'ble Supreme Court in ***Anju Chaudhary vs. State of Utter Pradesh & Another, (2013)6 SCC 384*** has dealt with such proposition in following terms:-

> *"15. It has to be examined on the merits of each case whether a subsequently registered FIR is a second FIR about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not. It will not be appropriate for the Court to lay down one straightjacket formula uniformly applicable to all cases. This will always be a mixed question of law and facts depending upon the merits of a given case."*

Hon'ble Supreme Court in the aforesaid case emphasised the application of test of “sameness” to find out whether both FIRs related to the same incident and to the same occurrence, were in regard to incidents which were two or more parts of the same transaction or related completely to two distinct occurrences. In para-25 of ***Anju Chaudhary's case (supra)***, the Hon'ble Supreme Court has held as under:-

> *“25. The First Information Report is a very important document, besides that it sets the machinery of criminal law in motion. It is a very material document on which the entire case of the prosecution is built. Upon registration of FIR, beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Section 173 of the Code. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the investigating officer would be statements covered under Section 162 of the Code. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of ‘sameness’ to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible, This is the view expressed by this Court in the case of Babu Babubhai v. State of Gujarat and Ors. [(2010) 12 SCC 254]. This judgment clearly spells out the distinction between two FIRs relating to the same*

incident and two FIRs relating to different incident or occurrences of the same incident etc."

13. In ***Nirmal Singh Kahlon vs. State of Punjab & Others, (2009) 1 SCC 441,*** Hon'ble Supreme Court dealt with the fact situation which is somewhat akin to the facts involved in the present case. There were allegations of a scam in recruitments of Panchayat Sahayaks in the department of Rural Development Government of Punjab. FIR was registered by State Vigilance Bureau and was investigated by the same agency. On the direction of the High Court, CBI was asked to investigate the allegations and CBI registered another FIR. The question was raised as to permissibility of legality of second FIR. A question was formulated by Hon'ble Supreme Court as under:-

"31.Whether the first information lodged by the Vigilance Department of the State and the one lodged by CBI related to the same cause of action is the question?"

14. While answering the aforesaid question, it was observed as under:-

"52. It may be true that in both the FIRs Kahlon was named. He was considered to be the prime accused. But, it is one thing to say that he acted in his individual capacity and it is another thing to say that he conspired with a large number of persons to facilitate commission of crime by him as a result whereof all of them had made unlawful gains."

15. The Hon'ble Apex Court while holding the second FIR maintainable in the facts of the aforesaid case held as under:-

"67. The second FIR, in our opinion, would be maintainable not only because there were different versions but when new discovery is made on factual foundations. Discoveries may be made by the police authorities at a subsequent stage. Discovery about a larger conspiracy can also surface in another proceeding, as for example, in a case of this nature. If the police authorities did not make a fair investigation

and left out conspiracy aspect of the matter from the purview of its investigation, in our opinion, as and when the same surfaced, it was open to the State and/ or the High Court to direct investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged."

16. In the context of subject under consideration we find it apt to refer to the following observations made by the Hon'ble Supreme Court in ***Ram Lal Narang vs. State (Delhi Administration), (1979)2 SCC 322***:-

"11. It is obvious that neither at the time when the First Information Report pertaining to the Ambala case was registered nor at the time when the charge-sheet was filed in the Ambala Court, were the Narang brothers known to be in the picture. The investigating agency was not also aware of what Malik and Mehra had done with the pillars after they had obtained possession of the pillars from the Court and substituted and returned fake pillars to the Court. The First Information Report and the charge-sheet were concerned primarily with the offences of conspiracy to cheat and to misappropriate committed by Malik and Mehra. At that stage, the investigating agency was not aware of any conspiracy to send the pillars out of the country. It was not known that the Narang brothers were also parties to the conspiracy to obtain possession of the pillars from the Court. It was much later that the pillars surfaced in London and were discovered to be in the constructive possession of Narang brothers. Even then, the precise connection between Malik and Mehra on the one side and Narang brothers on the other was not known. All that was known was that the pillars which were stolen property within the definition of the expression in Section 410 Indian Penal Code were found to be in the possession of Narang brothers in London. On the discovery of the genuine pillars in the possession of Narang brothers, without anything further to connect

Narang brothers with Malik and Mehra, the police had no option but to register a case under Section 411 Indian Penal Code against Narang brothers. That was what was done. No fault could, therefore, be found with the police for registering a First Information Report against the Narang brothers for the offence of conspiracy to commit an offence under Section 411 Indian Penal Code. In the course of the investigation into this offence, it transpired that the Narang brothers were also parties to the original conspiracy to obtain possession of the pillars from the Court by cheating. Facts came to light which indicated that the conspiracy, which was the subject matter of the case pending in the Ambala Court was but part of a larger conspiracy. The fresh facts which came to light resulted in the filing of the second charge-sheet. The several facts and circumstances mentioned by us earlier and a comparison of the two First Information Reports and the two charge-sheets show that the conspiracy which was the subject matter of the second case could not be said to be identical with the conspiracy which was the subject matter of the first case. The conspirators were different. Malik and Mehra alone were stated to be the conspirators in the first case, while the three Narang brothers were alleged to be the principal conspirators in the second case. The objects of the two conspiracies were different. The alleged object of the first conspiracy was to obtain possession of the pillars from the Court by cheating and to misappropriate them. The alleged object of the second conspiracy was the disposal of the stolen property by exporting the pillars to London. The offences alleged in the first case was Section 120-B read with Section 420 and Section 406 Indian Penal Code, while the offences alleged in the second case were Section 120-B read with Section 411 Indian Penal Code and Section 25 of the Antiquities and Art Treasures Act, 1972. It is true that the Antiquities and Art Treasures Act had not yet come into force on the

date when the First Information Report was registered. It is also true that Omi Narang and Manu Narang were not extradited for the offence under the Antiquities and Art Treasures Act and, therefore, they could not be tried for that offence in India. But the question whether any of the accused may be tried for a contravention of the Antiquities and Art Treasures Act or under the corresponding provision of the earlier Act is really irrelevant in deciding whether the two conspiracies are one and the same. The trite argument that a Court takes cognizance of offences and not offenders was also advanced. This argument is again of no relevance in determining the question whether the two conspiracies which were taken cognizance of by the Ambala and the Delhi Courts were the same in substance. The question is not whether the nature and character of the conspiracy has changed by the mere inclusion of a few more conspirators as accused or by the addition of one more among the objects of the conspiracy. The question is whether the two conspiracies are in substance and truth the same. Where the conspiracy discovered later is found to cover a much larger canvas with broader ramifications, it cannot be equated with the earlier conspiracy which covered a smaller field of narrower dimensions. We are clear, in the present case, that the conspiracies which are the subject matter of the two cases cannot be said to be identical though the conspiracy which is the subject matter of the first case may, perhaps, be said to have turned out to be part of the conspiracy which is the subject matter of the second case. As we mentioned earlier, when investigation commenced in First Information Report No. R.C. 4 of 1976, apart from the circumstance that the property involved was the same; the link between the conspiracy to cheat and to misappropriate and the conspiracy to dispose of the stolen property was not known."

17. It is clear from the aforesaid exposition that it is on the basis of fact situation of each case that the determination as to the question of maintainability of second FIR has to be made. Section 154 of the Code of Criminal Procedure (for short, the Code") mandates registration of FIR in every case where commission of cognizable offence is made out from the information made available to the police. Meaning thereby that police is under a mandate to register as many FIRs as may arise from information made available to it disclosing commission of cognizable offences. The only requirement is that it should be separate and distinct offence. In ***Anju Chaudhary's*** case (supra) the theory of "sameness" was propounded as per said hypothesis the distinctive features being whether both FIRs relate to same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case, contrary is proved, where version of second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible. Reference has been made to the judgment passed by the Hon'ble Supreme Court in ***Babubhai v. State of Gujarat, (2010) 12 SCC 254***. The said judgment clearly spelt out the distinction between two FIRs relating to the same incident and two FIRs relating to different incident or occurrences of the same incident.

18. Reverting to the facts of the case, a scam has been detected in respect of the recruitment of Constables and Drivers in police department of the State of H.P. The question paper for said examination was leaked and was made available to many candidates, who had applied for said posts. Involvement of various channels has been discovered. The criminal conspiracy to commit such offence may form a single or more transactions but it does not necessarily mean that it may have ended in commission of only a single offence. The cheating and fraud committed at separate places in

respect of separate persons will constitute separate offences. In this case also it is not the case of the petitioner that in 1st FIR the allegation against him was only of providing solved question paper to Ritik Thakur through Sunil Kumar. Had it been so, definitely second FIR would not be permissible but since in 1st FIR the allegations are different, 2nd FIR with above noticed allegations cannot be said to be impermissible especially when the magnitude of scam is likely to have different facets and consequences.

19. Another contention raised on behalf of the petitioner is that the dictum of Arnesh Kumar vs State of Bihar and another reported in (2014)8 SCC 273 and Arnab Ranjan Goswami vs. Union of India & Ors, reported in (2021)2 SCC 427, has not been followed by respondents to the prejudice of the constitutional rights of the petitioner. Before dealing with the aforesaid submission at the touchstone of referred judgments, it is necessary to take notice of relevant provisions of the Code. Section 154 of the Code, reads as under:-

> ***"154. Information in cognizable cases.***
> *(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*
> *(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.*
> *(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied*

that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

Section 41 of the Code reads as under:-

41. When police may arrest without warrant.

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) against whom a 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 for a term which may be less than seven years or which

may extend to seven years whether with or without fine, if the following conditions are

satisfied, namely :-

(i) the police officer has reason to believe on the basis of such complaint, information or

suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary -

(a) to prevent such person from committing any further offence, or

(b) for proper investigation of the offence, or

(c) to prevent such person from causing the evidence of the offence to disappear or

tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement ,threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured , and the police officer shall record while making such arrest, his reasons in writing ;

(ba) 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 that seven years whether with or without fine 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;

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and

for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub- section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate"

Section 41-A of the Code reads as under:-

*"**41-A. Notice of appearance before police officer**-(1) The police officer may ,is all cases*

where the arrest of a person is not required under the provisions of sub-section (1) of section 41,issue a notice directing the person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence to appear before him or at such other place as may be specified in the notice .

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice , he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be

recorded ,the police officers is of the opinion that he ought to be arrested .
(4) Where such person,at any time ,fails to comply with the terms of the notice, it shall be
lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

20. As noticed earlier also it is mandatory for the police to register an FIR if it receives an information disclosing commission of cognizable offence. There is no option with the police to adopt any other course. In ***Lalita Kumari vs. Government of Utter Pradesh and others, (2014)2 SCC 1***, the Hon'ble Supreme Court has laid down as under:-

"120. In view of the aforesaid discussion, we hold:
120.1. Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

21. Section 41 of the Code authorises a Police Officer to arrest any person without an order from a Magistrate and without a warrant provided the conditions laid down in clauses (a) to (e) of sub-section (1) thereof are complied with. There is nothing in this provision that prohibits or bars the arrest of a

person without issuing him notice. In Arnesh Kumar versus State of Bihar, it has been mandated that the police officer making arrest under Section 41 of the Code shall record the reasons necessitating the arrest. Arnesh Kumar's judgment (supra) has recently been approved in ***Satyender Kumar Antil vs. CBI, 2022, SCC Online SC 825*** and it has been held as under:-

> **21.** Section 41 under Chapter V of the Code deals with the arrest of persons. Even for a cognizable offense, an arrest is not mandatory as can be seen from the mandate of this provision. If the officer is satisfied that a person has committed a cognizable offense, punishable with imprisonment for a term which may be less than seven years, or which may extend to the said period, with or without fine, an arrest could only follow when he is satisfied that there is a reason to believe or suspect, that the said person has committed an offense, and there is a necessity for an arrest. Such necessity is drawn to prevent the committing of any further offense, for a proper investigation, and to prevent him/her from either disappearing or tampering with the evidence. He/she can also be arrested to prevent such person from making any inducement, threat, or promise to any person according to the facts, so as to dissuade him from disclosing said facts either to the court or to the police officer. One more ground on which an arrest may be necessary is when his/her presence is required after arrest for production before the Court and the same cannot be assured.
>
> **22.** This provision mandates the police officer to record his reasons in writing while making the arrest. Thus, a police officer is duty-bound to record the reasons for arrest in writing. Similarly, the police officer shall record reasons when he/she chooses not to arrest. There is no requirement of the aforesaid procedure when the offense alleged is more than seven years, among other reasons.
>
> **23.** The consequence of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offense. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this

provision. Any non-compliance would entitle the accused to a grant of bail.

24. Section 41A deals with the procedure for appearance before the police officer who is required to issue a notice to the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence, and arrest is not required under Section 41(1). Section 41B deals with the procedure of arrest along with mandatory duty on the part of the officer.

25. On the scope and objective of Section 41 and 41A, it is obvious that they are facets of Article 21 of the Constitution. We need not elaborate any further, in light of the judgment of this Court in *Arnesh Kumar* v. *State of Bihar*, (2014) 8 SCC 273:

> "7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.
>
> 7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (*a*) to (*e*) of clause (1) of Section 41 CrPC.

8. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57 CrPC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey:

8.1. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 CrPC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner.

8.2. Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate

in turn is to be satisfied that the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.

8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused.

8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

9. …The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 CrPC has to be complied and

shall be subject to the same scrutiny by the Magistrate as aforesaid.

10. We are of the opinion that if the provisions of Section 41 CrPC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 CrPC for effecting arrest be discouraged and discontinued.

11. Our endeavor in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(*b*)(*ii*);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine."

26. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.

22. We have noticed from the contents of status report filed on behalf of the respondents that the arrest of petitioner in 2nd FIR is stated to have been made after satisfaction as to the necessity of such arrest. It is not

disputed that after his arrest, petitioner was produced before the learned Judicial Magistrate 1st Class, who remanded the petitioner to judicial custody till 20.08.2022. The presumption is attached to a judicial order passed by the Court having jurisdiction. As per *Arnesh Kumar's case (supra)*, the Police was under direction to provide material to learned Magistrate justifying the remand and the learned Magistrate could have remanded the petitioner only after satisfying himself as to the compliance of the mandate of law. There is no challenge in the present petition to the order passed by learned Judicial Magistrate 1st Class, Court No. VII, Shimla, who remanded the petitioner to judicial custody. Viewed from another angle also petitioner has alleged the violation of his constitutional rights and also directives issued in the case of *Arnesh Kumar* (supra), without providing any factual foundation for such allegations. There is not even a whisper as to how the mandate of Section 41 was not followed by the police.

23. As regards violation of Section 41-A of the Code alleged by the petitioner, it is suffice to say that in the facts of the case in hand Section 41-A of the Code was not applicable. It was not a case where the police did not require immediate custody of the petitioner. Requirement of notice under Section 41-A of the Code is imperative when the police does not require immediate arrest of the accused.

24. It is evident from second prayer of the petitioner that the petitioner has sought quashing of 2nd FIR qua him only. Meaning thereby, he has not challenged the permissibility or legality of 2nd FIR as such. Except as above, no separate ground has been raised by the petitioner to warrant making of such prayer. We have already held that the second FIR was permissible in the facts of instant case. Prima facie complicity of petitioner was found. There was credible information with the police that the petitioner had supplied solved question paper to accused Ritik Thakur through another accused Sunil Kumar. In such circumstances, the arrest of petitioner cannot

be said to be unwarranted. The reliance by petitioner on ***Arnab Ranjan Goswami vs. Union of India & Ors, reported in (2021)2 SCC 427*** is also misplaced. In the said case, Hon'ble Supreme Court was dealing with the question of release of appellant therein as interim measure in petition filed before the Bombay High Court for quashing the FIR in the said case. In the present case, there is no challenge to FIR as such. The judgment noticed hereinabove will otherwise not serve the cause of the petitioner as prima facie complicity of petitioner has been found to exist. The FIR cannot be quashed in parts. To say that there is no material showing the involvement of a person is another thing than to seek quashing of FIR against that particular person. The sole platform on which petitioner appears to be standing in his challenge to the validity of second FIR is its impermissibility. Such contention has already been rejected by us.

25. From the above analysis, we find no merit in this petition and the same is dismissed. All pending miscellaneous application(s) shall also stand disposed of.

26. Before parting, we feel it appropriate to observe that irrespective of the decision of this petition, petitioner has independent right to claim his release on bail and in case petitioner avails such remedy, the case of the petitioner shall be decided by the court concerned on its own merit and the observations made by us hereinabove shall in no manner affect such adjudication process.

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

Between

BAKSHISH SINGH SONS OF SH TARA SINGH
(DEAD) THROUGH LRS

1(A) SH SHAMSHER SINGH,

1(B) JAGIR SINGH

1(C) HARMAIL SINGH

I(D) BALDEV SINGH

1(E) TAPENDER SINGH

PLAINTIFFS NO.1(A) TO 1(E),
ALL SONS OF LATE SHRI BAKSHISH SINGH,
R/O VILLAGE HARIPUR TOHANA,
P.O. SHIV PUR, TEHSIL PAONTA SAHIB,
DISTT SIRMOUR,
HIMACHAL PRADESH 173025.

1(F) RESHAM KAUR
(D/O. LATE SH BAKSHISH SINGH)
W/O SH PURAN SINGH
R/O VILLAGE PUJAMPUR, DISTT KARNAL,
HARYANA 132001

1(G) BALBIR KAUR (D/O LATE SH BAKSHISH SINGH)
W/O SH JASWINDER SINGH
R/O VILLAGE AND P.O. VIKAS NAGAR,
DISTRICT DEHRA DUN,
UTTRAKHAND. PIN 248001

1(H) SURJEET KAUR,
W/O LATE SH BAKSHISH SINGH,
R/O VILLAGE HARIPUR TOHANA,
P.O. SHIV PUR, TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR,
HIMACHAL PRADESH 173025.

2. BALBIR SINGH S/O
LATE SH JASMER SINGH S/O
LATE SH TARA SINGH
R/O VILLAGE GENDIKHATA, P.O. GENDIKHATA KHAS
TEHSIL AND DISTRICT HARIDWAR,
UTTRAKHAND.

3. HARJEET KAUR
W/O LATE SH UDHAM SINGH
S/O LATE SH JASMER SINGH
S/O LATE SH TARA SINGH.

R/O. VILL GENDIKHATA P.O. GENDIKHATA KHAS. TEHSIL AND DISTT HARIDWAR UTTRAKHAND.

4. HARVINDER SINGH
S/O LATE SH UDHAM SINGH
S/O LATE SH JASMER SINGH
S/O LATE SH TARA SINGH

5. MOHINDER SINGH
S/O SH PREM SINGH, S/O LATE SH TARA SINGH

6. KARAM SINGH
S/O SH PREM SINGH
S/O LATE SH TARA SINGH

PLAINTIFFS NO.2 TO 6
R/O. VILL GENDIKHATA
P.O. GENDIKHATA KHAS
TEHSIL AND DISTT HARIDWAR
UTTRAKHAND.

7. GURVINDER SINGH
W/O LATE SH VIR VIKRAM JIT SINGH
S/O SH PREM SINGH S/O LATE SH TARA SINGH
R/O. VILL. HARIPUR TOHANA,
P.O. SHIVPUR, TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR
HIMACHAL PRADESH 173025.

.....PLAINTIFFS

(BY SHRI AJAY KUMAR DHIMAN, ADVOCATE, FOR

PLAINTIFFS NO.1(A) TO 1(H) & 2 TO 7)

AND

1. AJAY VIR SINGH
S/O SH SUKH DEV SINGH GILL
S/O SH PYARA SINGH
R/O. GILL AVENUE, SHIMLA ROAD NAHAN,
DISTRUCT SIRMOUR
HIMACHAL PRADESH.

2. RANVEER SINGH
S/O LATE SMT PARAMJEET KAUR
(W/O DALIP SINGH)
D/O SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O WARD NO 3 BADRIPUR,
TEHSIL PAONTA SAHIB
DISTRICT SIRMOUR
HIMACHAL PRADESH.

3. JASPAL SINGH
S/O LATE SMT PARAMJEET KAUR
(W/O. DALIP SINGH)
D/O SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O WARD NO 3 BADRIPUR,
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH

4. HARPAL SINGH
S/O LATE SMT PARAMJEET KAUR
(W/O DALIP SINGH)
D/O SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O WARD NO 3 BADRIPUR
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR

HIMACHAL PRADESH.

5. GURMEET KAUR
(W/O SH MOHAN SINGH)
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILLAGE TARUWALA
P.O. AND TEHSIL PAONTA SAHIB
DISTRICT SIRMOUR
HIMACHAL PRADESH.

6. AMARJEET KAUR
(W/O SH SANGAT SINGH)
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O WARD NO 3 BADRIPUR
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

7. MANJEET KAUR @ BIMLA DEVI
(W/O SH JOGINDER SINGH)
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILLAGE AKALGARH
CHAWANIWALA P.O. SHIVPUR,
TEHSIL PAONTA SAHIB DISTRICT SIRMOUR
HIMACHAL PRADESH

8. BALWANT KAUR
(W/O SH CHANAN SINGH)
D/O LATE SMT JAGIR KAUR
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O. VILLAGE & P.O. SHIVPUR
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

9. RAJINDER KAUR
(W/O PARAMJEET SINGH)
D/O LATE SMT JAGIR KAUR
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILLAGE BHUNGARNI P.O. SHIVPUR
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

10. SARANJEET KAUR
(W/O SH TEJINDER SINGH)
D/O LATE SMT JAGIR KAUR
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILLAGE TARUWALA, WARD NO 4,
P.O. AND TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR
HIMACHAL PRADESH.

11. NARENDER SINGH
(S/O SH DARSHAN SINGH)
S/O LATE SMT JAGIR KAUR
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILLAGE TARUWALA,
P.O. AND TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

12. AMANPREET SINGH
(S/O. SH CHARANJEET SINGH)
S/O SATVINDER KAUR
D/O LATE SMT JAGIR KAUR
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILL AND P.O. SHIVPUR,
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

13. GURPREET KAUR
(D/O SH CHARANJEET SINGH)
D/O SATVINDER KAUR
D/O LATE SMT JAGIR KAUR
D/O LATE SMT RATTAN KAUR
D/O LATE SH BASANT SINGH
R/O VILLAGE AND P.O. SHIVPUR,
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

14. MOHAN SINGH
(S/O SH MAHENDER SINGH)
D/O LATE SMT PRITTAM KAUR
D/O LATE SH BASANT SINGH
R/O VILL. SURAJPUR, P.O. BATA MANDI
TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR
HIMACHAL PRADESH.

15. DHANVEER SINGH
S/O SH AMAR SINGH
R/O VILLAGE BHUNGARNI,
TEHSIL PAONTA SAHIB, DISTT SIRMOUR
HIMACHAL PRADESH.

16 RANJANA RAINA
W/O SH VEERENDER SWARUP
S/O SH SAROOP CHAND
R/O BADRIPUR, TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR
HIMACHAL PRADESH.

17. NETTER SINGH CHAUHAN
S/O SH DHARAM SINGH
S/O SH MANI RAM
R/O VILL SHUBKHERA,
TEHSIL & P.O. PAONTA SAHIB,

DISTT SIRMOUR
HIMACHAL PRADESH.

18. VIPUL SHARMA
S/O SMT SUNAINA KIRAN
D/O SH ISHWAR CHAND
R/O VILLAGE DEVI NAGAR,
TEHSIL PAONTA SAHIB DISTRICT SIRMOUR
HIMACHAL PRADESH.

... DEFENDANTS

19. JASVEER KAUR
W/O LATE SH VIR VIKRAM JIT SINGH
S/O SH PREM SINGH
S/O LATE SH TARA SINGH
R/O VILLAGE HARIPUR TOHANA,
P.O. SHIVPUR, TEHSIL PAONTA SAHIB,
DISTT SIRMOUR
HIMACHAL PRADESH. PIN 173025

20. GURMEET KAUR
W/O LATE SH VIR VIKRAM JIT SINGH
S/O SH PREM SINGH
S/O LATE SH TARA SINGH
R/O VILLAGE HARIPUR TOHANA,
P.O. SHIVPUR, TEHSIL PAONTA SAHIB,
DISTT SIRMOUR
HIMACHAL PRADESH. PIN 173025

21. GURDEV SINGH
S/O LATE SH JASMER SINGH
S/O LATE SH TARA SINGH
R/O VILL GENDIKHATA P.O. GENDIKHATA KHAS
TEHSIL AND DISTT HARIDWAR
UTTRAKHAND.

...PERFORMA DEFENDANTS

BY SHRI BHUPINDER GUPTA, SENIOR ADVOCATE

WITH SHRI JANESH GUPTA, ADVOCATE, FOR R-1
SHRI KARAN SINGH KANWAR, ADVOCATE FOR R-7 & 14
SHRI DESH RAJ THAKUR, ADVOCATE, FOR R-15 TO 18
SHRI ASHOK K. TYAGI, ADVOCATE, FOR R-19 & 20
SHRI RAJNEESH K. LALL, ADVOCATE, FOR R-21
RESPONDENTS NO.2 TO 6, 8 & 9 TO 11 EX.PARTE

CIVIL SUIT
NO.42 OF 2020
Decided on: 01.08.2022

Code of Civil Procedure, 1908- Order 7 Rule 11- Rejection of plaint- Application for rejection of plaint on the grounds of limitation, cause of action and that there is no right to sue for the relief claimed- Suit for declaration, permanent prohibitory and mandatory injunction- Held- Suit simpliciter for declaration that plaintiffs and proforma-defendants are owners of the property is not maintainable as plaintiffs have not sought relief of possession of the property- Barred by limitation- Suit not maintainable- Appeal allowed and consequently plaint is rejected. (Para 28 to 35)

Cases referred:

Ajhar Hussain v. Rajiv Gandhi, 1986 (Supp) SCC 315;
Bhau Ram v. Janak Singh & others, AIR 2012 SC 3023;
C. Natrajan v. Ashim Bai and another, (2007) 14 SCC 183;
Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) & others, (2020) 7 SCC 366;
Khatri Hotesl Private Ltd & another v. Union of India & another, (2011) 9 SCC 126;
Kuldeep Singh Pathania v. Bikram Singh Jaryal, (2017) 5 SCC 345;
Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and another, (2004) 9 SCC 512;
Raghwendra Sharan Singh v. Ram Prasanna Singh (2020) 16 SCC 601;
Rajender Bajoria v. Hemant Kumar Jalan, AIR 2021 SC 4594;
Srihari Hanumandas Totala v. Hemant Vithal Kamat & others, (2021) 9 SCC 99;
Swamy Atmanana & others v. Sri Ramakrishna Tapovanam and others, (2005) 10 SCC 51;
T. Arivandandam v. T.V. Satyapal & another, (1977) 4 SCC 467;

This appeal coming on for pronouncement this day, the Court delivered the following:

J U D G M E N T

In this Civil Suit, defendants No.15 to 18 have filed an application **OMP No.239 of 2021**, under Order VII Rule 11 of the Code of Civil Procedure (for short 'CPC'), for rejection of plaint under Rules 11(b) & 11(d) of Order VII CPC, on the grounds that there is no right to sue for the relief claimed in the suit, suit is barred by Law of Limitation, and, cause of action and relief claimed is not recognized by law of land and, thus, suit is manifestly vexatious and meritless and abuse of process of law.

15. In response, plaintiffs have claimed that the application is an abuse of process of law and is not maintainable, as the defendants No.15 to 18 have not come to the Court with clean hands and the application is bad on account of lack of better particulars, material information and it suffers from legal error. It has been claimed on behalf of the plaintiffs that for the pleadings in the plaint and documents filed therewith, suit filed by the plaintiffs is maintainable and no ground, as claimed by defendants No.15 to 18, is made out for rejection of plaint.

16. Learned counsel for defendants No.15 to 18 have placed reliance on **T. Arivandandam v. T.V. Satyapal & another, (1977) 4 SCC 467; Ajhar Hussain v. Rajiv Gandhi, 1986 (Supp) SCC 315; Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and another, (2004) 9 SCC 512; Swamy Atmanana & others v. Sri Ramakrishna Tapovanam and others, (2005) 10 SCC 51; Khatri Hotesl Private Limited & another v. Union of India and another, (2011) 9 SCC 126; Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives & others, (2020) 7 SCC 366; Raghwendra Sharan Singh v. Ram Prasanna Singh (Dead) by Legal Representatives, (2020) 16 SCC 601;** and **Rajender Bajoria v. Hemant Kumar Jalan, 2021 SCC Online 764 : AIR 2021 SC 4594.**

17. Learned counsel for the plaintiffs has placed reliance upon **C. Natrajan v. Ashim Bai and another, (2007) 14 SCC 183; Bhau Ram v. Janak Singh & others, AIR 2012 SC 3023; Kuldeep Singh Pathania v.**

Bikram Singh Jaryal, (2017) 5 SCC 345; and **Srihari Hanumandas Totala v. Hemant Vithal Kamat and others, (2021) 9 SCC 99.**

18. I have heard learned counsel for the parties and has gone through the record as well as case law cited by them.

19. In principle, there is no quarrel with respect to ratio of law related to Order VII Rule 11 CPC and cause of action, and the pronouncements of the Supreme Court relied upon by both sides.

20. Basic principle is that for adjudicating an application under Order VII Rule 11 CPC, no other material except plaint and documents filed therewith are to be considered.

21. Plaintiffs, alongwith proforma-defendants No.19 to 21, are successors-in-interest of Ram Singh. Defendants No.7 to 14 are successors-in-interest of Basant Singh, whereas defendant No.1 is purchaser of suit land from Rattan Kaur and Pritam Kaur, both daughters of Basant Singh, and defendants No.15 to 18 are subsequent purchasers of parts of suit land from defendant No.1.

22. As per plaintiffs' case, Basant Singh created a simple mortgage, without possession, on the suit land in favour of Ram Singh, for borrowing `800/-, with undertaking to pay the same within three years alongwith interest and also to pay penal compounding interest for default in making re-payment of the loan and not to alienate or dispose of the mortgaged property till then. Mortgage Deed was registered with Sub Registrar on 26.6.1931, but before recording of the same in the Revenue Record, Ram Singh expired and, thus, mutation of mortgage was attested in favour of Tara Singh son of Ram Singh. Plaintiffs and proforma-defendants No.19 to 21 are successors-in-interest of Tara Singh.

23. After death of Basant Singh and subsequent death of his wife, estate of Basant Singh was inherited by his two daughters Rattan Kaur and Pritam Kaur in equal shares.

24. Rattan Kaur sold her share to defendant No.1 on 18.2.1999 and Pritam Kaur sold her share to defendant No.1 on 26.6.2000. Mutation No.1240 dated 7.8.2018 was attested by Revenue Authority deleting/omitting the names of plaintiffs and other persons, who, being successors-in-interest of Tara Singh, were recorded as mortgagees.

25. Defendant No.1 sold parts of the land, purchased from Rattan Kaur and Pritam Kaur, to Netar Singh, Vipul Sharma, Ranjana Raina and Dhanvir, vide Sale Deeds dated 21.1.2019, 21.1.2019, 19.3.2019 and 20.5.2019, respectively. These purchasers are defendants No.15 to 18.

26. Suit has been filed, seeking declaration that Mutation No.1240 of 2018 dated 7.8.2018; Sale Deeds No.171/1999 dated 21.1.2019, 175 dated 26.6.2019, 191/2019 dated 21.1.2019, 192/2019 dated 21.1.2019, 675/2019 dated 19.3.2019 and 1152/2019 dated 25.5.2019 are null and void and that plaintiffs and proforma-defendants No.19 to 21 are owners of the suit land; for permanent prohibitory and mandatory injunction against the defendants restraining them from interfering, raising illegal construction, creating any charge or changing the nature of or alienating the suit land in any manner and if defendants have raised illegal construction over the same then for direction to demolish the illegal construction raised by them.

27. In Para-6 of the plaint, plaintiffs have stated that it was agreed by mortgagor Basant Singh to pay mortgage amount within three years and to redeem the land, failing which he had agreed to pay 75 paise (12 Annas) upto three years from the date of execution of the Mortgage Deed and failing which `2.00 per month with monthly compounding interest till realization of total amount. It has also been claimed that in terms of the mortgage, a sum of `10,15,86,956/- is recoverable from defendants No.2 to 14 being successors-in-interest of deceased Basant Singh, however, no prayer for such recovery has been made in the prayer clause nor Court Fee for claiming such recovery has been affixed.

28. In Para-9 of the plaint, it has been stated that Basant Singh or is legal representatives have failed to redeem the mortgaged property within the period of thirty years which expired in the year 1961 and, therefore, their right to redeem the said property ceased to exist from 1961, losing right, title or interest of any kind over the suit land and, therefore, on the principle of foreclosure mortgagee Ram Singh and upon his death his legal representatives became owner of the suit land and, thus, alienation of the property by Rattan Kaur and Pritam Kaur is illegal and wrong and transferees from both of them have no right, title or interest of any kind in the suit land.

29. In Para-17 of the plaint, it has been stated that cause of action arose in favour of the plaintiffs earlier when Rattan Kaur and Pritam Kaur executed Sale Deeds in favour of defendant No.1 and defendant No.1 got the mutation attested in his favour, and on dates when defendant No.1 executed Sale Deeds in favour of defendants No.15 to 18 and, lastly, on 3.1.2020, when plaintiff No.1 visited the suit land and was surprised to see that agents of defendants had started raising construction over the suit land. Further that, cause of action is still subsisting as the amount of mortgage has not been paid by the defendants till date and, thus, it has been claimed that suit is not barred by limitation.

30. Indisputably, mortgage created in present case is "simple mortgage" which is defined in Section 58(b) of Transfer of Property Act, 1882 (hereinafter referred to as 'TPA'), which reads as under:

> "58(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

31. The aforesaid provision of TPA does not entitle a mortgagee to acquire right of ownership in the mortgaged property, rather it provides, as has also been done in Registered Mortgage Deed, mortgagor binds himself personally to pay the mortgage-money and agrees, expressly or impliedly, that in the event of his failing to pay, according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and proceeds of the sale to be applied in payment of mortgage-money.

32. In present case, mortgagor had agreed to pay the borrowed money within three years. Therefore, right to recovery the borrowed amount accrued after three years, i.e. in the year 1934 (26.6.1934).

33. Article 62 of the Limitation Act, 1963 provides that a suit to enforce payment of money secured by mortgage can be filed within 12 years, when the money sued for becomes due. Therefore, limitation to file a suit for recovery of amount due in present case, in terms of Section 58(a) of TPA, expired on 26.6.1946, but during that period no suit was filed by the mortgagee or his successors-in-interest for recovery of the mortgage-money or recovery thereof by selling the mortgaged-property.

34. In the plaint, right to ownership has been claimed on the basis of principle of foreclosure. There is no any such principle in law of the land creating right of mortgagee to acquire ownership in the mortgaged property automatically, declaring him owner.

35. Rights and liabilities of mortgagee have been provided in Chapter-IV of TPA and Sections 67 and 68 are relevant for adjudication of present lis and claim of parties, which read as under:

> **"67. Right to foreclosure or sale** :- In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the

mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed-

(a) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgagees rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure: or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, served their interests under the mortgage.

67A. Mortgagee when bound to bring one suit on several mortgages :- A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of

which he has a right to obtain the same kind of decree under section 67 , and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

68. Right to sue for mortgage-money :- (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely-

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

> (2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfers the mortgaged property.**"**

36. Section 67 provides that nothing in this Section shall be deemed to authorize any mortgagee, other than a mortgage by conditional sale or a mortgage under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or usufructuary mortgage as such or a mortgagee by conditional sale as such to institute a suit for sale. Therefore, in a case of simple mortgage, right to foreclosure is not available. Thus, claim of the plaintiffs, on the basis of principle of foreclosure, is misconceived being not available under law.

37. Section 67 also provides a right to obtain a decree from the Court to sell the property after mortgage-money had become due to the mortgagee, any time before passing of decree of redemption of mortgage property or payment or deposit of mortgage-money.

38. It is apt to record here that present suit is not a suit by mortgagee for a decree to sell the property for recovery of mortgage-money. Even otherwise, such suit after 26.6.1946 would have been time barred, in view of limitation prescribed in Article 62 of the Limitation Act.

39. Section 68(1)(a) gives right to sue for mortgage-money where the mortgagor binds himself to pay the same, as is the case in present suit, for undertaking given by the borrower to repay the same within three years from the date of creation of simple mortgage, plaintiff(s) may have such right. However, proviso to Section 68(1) provides that in such case a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money. As, in present case, now mortgaged property has been

sold to Defendants No.1 and 15 to 18. They shall not be sued for repayment of the mortgage-money. It is also apt to record that suit has not been filed for recovery of mortgaged-money under Section 68 of the TPA. In any case, such suit would have also been barred by limitation as provided under Article 62 of the Limitation Act.

40. One prayer in the suit is for declaration that plaintiffs and proforma-defendants are owners of the suit land. Admittedly, plaintiffs and proforma-defendants are not in possession. Section 34 of Specific Relief Act, 1963, provides as under:

> **"34. Discretion of court as to declaration of status or right.**- Any person entitled to any legal character; or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> ***Explanation:*** A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.**"**

41. In present case, suit simpliciter for declaration that plaintiffs and proforma-defendants are owners of the property is not maintainable as plaintiffs have not sought relief of possession of the property without which, in view of aforesaid provision of Section 34 of Specific Relief Act, no declaration of ownership shall be made by the Court. Otherwise also, there is no provision in the Act to acquire ownership in the mortgaged property subject matter of simple mortgage.

42. Plaintiffs have sought declaration to declare the Sale Deeds and mutations executed and attested during the period from 18.2.1999 to 25.5.2019. Suit has been filed on 13.1.2020. A per plaint, cause of action firstly arose to the plaintiffs at the time of execution of Sale Deeds by Rattan Kaur and Pritam Kaur, which were executed on 18.2.1999 and 26.6.2000.

43. Schedule in Part-III of Limitation Act, 1963 provides limitation with respect to suits related to declaration. Article 58 of the Limitation Act provides three years limitation to obtain any other declaration from the date when right to sue first accrues. The word "first" has been used between the words "sue" and "accrues", meaning thereby that where suit is based on multiple cause of actions, period of limitation shall begin from the date when the right to sue first accrues. In present case, as stated in Para-17 of the plaint, first cause of action accrues in favour of the plaintiffs and proforma-defendants with respect to transfer of the mortgaged property by legal representatives of mortgagee on 18.2.1999 and 26.6.2000. Therefore, limitation to seek declaration against the Sale Deeds was upto 18.2.2002 and 26.6.2003, when Rattan Kaur and Pritam Kaur sold their share to defendant No.1. Thereafter, defendant No.1 sold parts of the property to defendants No.15 to 18. As challenge to Sale Deeds executed by Rattan Kaur and Pritam Kaur is barred by limitation, therefore, subsequent Sale Deeds by defendant No.1 shall not revive the right of the plaintiffs to assail the Sale Deeds executed by Rattan Kaur and Pritam Kaur and in absence of challenge to those Sale Deeds for setting aside of those Sale Deeds, declaration to the effect that subsequent Sale Deeds are null and void is not maintainable as unless or until Sale Deeds executed by Rattan Kaur and Pritam Kaur are declared null and void there shall be no reason to declare the subsequent Sale Deeds null and void. Therefore, suit with respect to this prayer is also liable to be dismissed being beyond the period of limitation from the date when the right to seek declaration with respect to selling of the mortgaged property accrued

in favour of the plaintiffs. Not only for this but also provision contained in proviso to Section 68(1) of TPA, which provides that the transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money, the suit is not maintainable against defendant No.1 and defendants No.15 to 18 and, thus, declaration prayed with respect to them is also barred by law.

44. Though plaintiffs have attempted to make an illusory cause of action, but from the record it is apparent that they have failed to disclose legal, valid and enforceable cause of action in their favour and against the defendants. The plaint is liable to be rejected on this count also.

45. Plaint with respect to declaration sought by the plaintiffs is not maintainable. Therefore, relief of permanent prohibitory and mandatory injunction is also not maintainable, particularly when plaintiffs are neither in possession nor owners of the property or entitled to be declared as owner of the property.

46. Plaint is also lacking mandatory statement with respect to valuation of suit. Though in Para-6 of the plaint, it has been claimed that plaintiffs are entitled for recovery of `10,15,86,956/-, but no such prayer has been made for such recovery and in absence of that suit simpliciter for declaration and injunction should have been filed in the Court of first resort and, therefore, plaint was liable to be returned under Order VII Rule 10 CPC. However, for the findings returned hereinabove that suit is barred by law, no order is ordered to be passed on this count.

47. Prayer has been made for declaring the Sale Deeds null and void, but without affixing requisite Court Fee for such declaration as payable on the basis of valuation of property in Sale Deeds. Plaintiffs may have been directed to affix appropriate Court Fee. But as the suit has otherwise been found barred by law, therefore, direction for affixing appropriate Court Fee is neither necessary nor being passed.

48. In view of above discussion, the suit is barred by law and it is not disclosing valid cause of action entitling the plaintiffs to file and maintain the suit. Hence, OMP No.239 of 2021 is allowed and consequently the plaint is rejected.

The suit stands disposed of, in the aforesaid terms, so also pending applications if any.

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

Between:-

1. BOBY MEHTA
S/O LATE SH. DHARMENDER KUMAR,
R/O VILLAGE JUBRIDHAR (BADHYA)
P.O. DHALI TEHSIL & DISTRICT SHIMLA,
H.P.-171012, AGED ABOUT 23 YEARS.

2. VIKRAM SINGH,
S/O SH. BALJEET
R/O VILLAGE & P.O. BUDAIN,
TEHSIL UCHANA, DISTRICT JIND,
HARYANA-126115,
AGED ABOUT 22 YEARS.

3. SURJEET
S/O SH. ROHTASH
R/O VILLAGE HARIGARH,
P.O. RAMNAGAR, TEHSIL SEFIDON,
DISTRICT JIND HARYANA-126112,
AGED ABOUT 23 YEARS.

.....PETITIONERS

(BY SH. ABHISHEK DULTA, ADVOCATE)

AND

1. UNION OF INDIA
THROUGH SECRETARY DEFENCE MINISTRY,
OF DEFENCE GOVT. OF INDIA,
SENA BHAWAN, SOUTH BLOCK,
NEW DELHI.

2. HEADQUARTERS WESTERN COMMAND
THROUGH GENERAL OFFICER
COMMANDING (GOC),
CHANDIMANDIR, HARYANA.

3. HEAD QUARTER PH & HP (I) SUB AREA,
THROUGH ITS GENERAL OFFICER
COMMANDING (GOC), AMBALA CANTT.
HARYANA.

4. STATION COMMANDER, STATION HEADQUARTERS
SHIMLA, HIMACHAL PRADESH.

5. ADMINISTRATIVE COMMANDER,
STATION HEADQUARTERS SHIMLA,
HIMACHAL PRADESH.

.....RESPONDENTS

(SH. BALRAM SHARMA, ASSISTANT SOLICITOR
GENERAL OF INDIA)

CIVIL WRIT PETITION
No. 1438 of 2022
Decided on: 23.08.2022

Constitution of India, 1950- Article 226- Respondents cancelled the entire selection process when only appointment letters in favour of selected persons left to be issued- Held- The appointments due to the petitioners against the posts of Firemen cannot be denied to them on the ground that subsequent to their selection, rules/policy of recruitment had undergone change- In the facts

of the case, the new policy/rules can be applied only prospectively and not retrospectively to the recruitment process already conducted under different set of rules/policy- Petition allowed. [Para 3(i), 3(ii)(b)]

Cases referred:

Asha Kaul Vs State of Jammu and Kashmir (1993) 2 SCC 573;

Dinesh Kumar Kashyap and others Vs. South East Central Railway & Others (2019) 2 SCC 798;

Shankarsan Dash Vs Union of India (1991) 3 SCC 47;

This petition coming on for admission this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

The only thing left in the selection process was issuance of appointment letters in favour of the selected persons i.e. the three petitioners herein. At that stage, the respondents cancelled the entire selection process, giving cause of action to the petitioners to invoke the extraordinary jurisdiction of this Court.

2. After hearing learned counsel on both the sides and on going through the pleadings of parties, the **admitted factual position** that emerges is :-

2(i). On 12.07.2021, Station Headquarters Shimla (respondent No.4) ordered the Board of Officers to publish advertisement for recruitment of 3 Firemen against NACs in national and local newspapers. The recruitment notice was accordingly published on 21.07.2021 in 'The Times of India' & 'Himachal Jagran'. Applications were invited in this notice from eligible male candidates for the three posts of Firemen. Two out of these three posts were meant for General category candidates and one was reserved for candidates belonging to Scheduled Castes category. The eligibility criteria was also laid down in the advertisement.

2(ii). The petitioners applied for the post in question under the advertisement. The Board of Officers of the respondents assembled on 12.08.2021. Total 57 applications were accepted, inclusive of 32 applications of candidates belonging to General category and 25 applications belonging to Scheduled Castes category. The proceedings held by Board of Officers were found to be in order, accepted & duly countersigned by respondent No.4-Station Commander Shimla on 14.08.2021.

2(iii) Admit cards were issued to the eligible candidates by the respondents. The petitioners were also issued admit cards on 16.08.2021. They were directed to report for undertaking physical and written test on 29.08.2021 at 304(Independent) Supply Platoon ASC at Jutogh Cantt (Shimla).

2(iv) The Board of Officers of respondents assembled at Jutogh on 29.08.2021 and conducted the selection proceedings. 49 out of 57 applicants reported. 27 candidates did not clear the physical test. 22 candidates, who cleared the physical test including the petitioners were asked to take the written test. The petitioners amongst others appeared in the written test. The Board of Officers prepared the merit-list of 22 candidates. This merit-list was found to be in order. It was accepted and duly countersigned by respondent No.4 on 09.09.2021. Based on this merit-list, the petitioners emerged meritorious candidates for the three advertised posts of Firemen and were eventually selected. Respondent No.4 also kept four candidates in reserve based on the merit-list.

2(v) Letters were issued to the petitioners on 09.09.2021 informing them of their provisional selection for the posts of Firemen. The selection was termed as provisional as the petitioners' medical tests and other formalities including verification of their documents etc. were yet to be carried out. The petitioners were directed to report on 20.09.2021 to Station Headquarters at Shimla for purpose of their medical examination and also for checking of their

documents. The petitioners complied with this direction. Their documents were verified by the respondents at Station Headquarters Shimla. Petitioners also underwent medical examination. Police verification with respect to their antecedents was also carried out. Complete board proceedings and verified documents of the petitioners were forwarded by respondent No.4 to respondent No.3 (Headquarter PH & HP(I) Sub Area) for issuance of actual appointment letters in favour of the petitioners.

2(vi) Appointment orders were not issued to the petitioners. After waiting for about three months, petitioner No.2 on 08.01.2022 wrote a letter to respondent No.5- The Administrative Commandant, Station Headquarters, Shimla requesting for indicating the time-line for their joining the posts. At that stage, the officials at Station Headquarters Shimla responded on 27.01.2022 (Annexure P-5 Colly) by saying that the competent authority has directed that recruitment for Civilian Defence Employee will be carried out centrally for all units under Western Command under the aegis of HQ PH & HP (I) Sub Area vide letter No.318/1/Gen/GS (SD) dated 02 Oct 2021.

2(vii) Citing the aforesaid reason, the recruitment process undertaken by respondent No.4 and selection of petitioners therein was directed to be treated as cancelled. Aggrieved against the cancellation of recruitment process and also against the cancellation of their selection under this recruitment process, the petitioners have preferred the instant writ petition praying for following reliefs:-

> *"i) That the writ in the nature of Certiorari may kindly be issued directing the Respondents to quash the impugned order dated 27th January 2022 (Annexure P-5 (Colly)).*
>
> *2. That the writ in the nature of Mandamus may kindly be issued and respondents may be directed to issue appointment letters to the petitioners for the post of Firemen."*

3. It will be apt to reproduce the relevant contents of the impugned communication dated 27.01.2022:-

> ***"PROVISIONAL SELECTION FOR THE POST OF FIREMEN***
>
> *1. It is intimated that competent authority has directed that recruitment for Civilian Defence Employee will be carried out centrally for all units under Western Command under the aegis of HQ PH & HP (I) Sub Area vide letter No.318/1/Gen/GS (SD) dated 02 Oct 2021.*
>
> *2. In view of above, it is intimated that recruitment process carried out by this Headquarters for 03 X Firemen Civilian Defence Employee against Non Availability Certificate based on which provisional selection was forwarded to you vide this Headquarters letter No. 1023/3/GS (SD) dated 09 Sep 2021 is hereby* ***CANCELLED.***
>
> *3. You may consider to apply for the same through recruitment process being undertaken centrally.*
>
> *4. This is for your information please.*
>
> *(Ravi Bisht)*
> *Lieutenant Colonel*
> *Officiating Station Staff Officer*
> *For station Commander"*

In terms of above communication, on 02.10.2021, the competent authority had directed that the recruitment for Civilian Defence Employee would be carried out centrally for all units under Western Command under the aegis of HQ PH & HP (I) Sub Area. According to the respondents, the recruitment process in question was not carried out centrally under the aegis of HQ PH & HP (I) Sub Area (respondent No.3). The recruitment process in question was conducted by respondent No.4 i.e. Station Commander, Station

Headquarters, Shimla H.P. For this reason, the recruitment process carried out by respondent No.4 was cancelled, which automatically meant cancellation of the selection of the petitioners in the said recruitment process.

3(i) The decision of the respondents statedly taken on 2.10.2021 to carry out centralized recruitment process for all units under the Western Command under the aegis of respondent No.3 will have no effect on the recruitment process, that was initiated prior to 2.10.2021. The recruitment process involved herein was not only initiated prior to 2.10.2021 but for all practical purposes, it was concluded before 2.10.2021. The provisional selection letters were issued to the petitioners on 09.09.2021. By 20.09.2021, the remaining formalities i.e. the medical tests, verification of the petitioners' documents and the police verification of their antecedents/character had also been completed. What was left, was only issuance of actual appointment letters.

3(i)(a) In (1993) 2 SCC 573 (***Asha Kaul Vs State of Jammu and Kashmir***), select list of 20 candidates was prepared and recommended by the Public Service Commission. The State Government approved the list to the extent of first thirteen candidates. The question before the Hon'ble Apex Court was whether the State Government could approve the select list in part. The Government *inter alia* defended its action under Rule 39 of the J&K Civil Services (Judicial) Recruitment Rules, 1967, which provided that 'the list of selected candidates after it is approved shall be published by the Government Gazette and a copy thereof shall be sent to the court along with the waiting list, if any, furnished by the Commission for record in their office'. Hon'ble Supreme Court held that Rule 39 does not confer an absolute power upon the Government to disapprove or cancel the select list sent by the Public Service Commission. The Government can refuse to approve the select list only after holding due inquiry. If, the Government is satisfied that the selection has been vitiated either on account of violation of a fundamental

procedural requirement or by consideration of corruption, favoritism or nepotism, in such a case, the Government is bound to record the reasons for its action and produce the same before a Court, if and when summoned to do so. It was also held that the Government cannot pick and choose candidates out of the list.

3(i)(b) In (1991) 3 SCC 47 (***Shankarsan Dash Vs Union of India***), the Hon'ble Apex Court held that it is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted.

3(i)(c) Similarly in (1995) Supp 2 SCC 230 (***R.S. Mittal Vs Union of India***), it was observed that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment . But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel.

3(i)(d) *In (2019) 2 SCC 798* **(Dinesh Kumar Kashyap and others Vs. South East Central Railway & Others***), it was held that "arbitrariness is an anathema to the rule of law. When an employer invites applications for filling up a large number of posts, a large number of unemployed youth apply for the same. They spend time in filling the form and pay the application fees. Thereafter, they spend time to prepare for the examination. They spend time and money to travel to the place where written test is held. If they qualify the written test, they have to again travel to appear for the interview and medical examination, etc. Those who are successful and declared to be passed have a reasonable expectation that they will be appointed. No doubt, as pointed out above, this is not a vested right. However, the State must give some justifiable, non-arbitrary reason for not filling up the post. When the employer is the State it is bound to act according to Article 14 of the Constitution. It cannot without any rhyme or reason decide not to fill up the post. It must give some plausible reason for not filling up the posts. The courts would normally not question the justification but the justification must be reasonable and should not be an arbitrary, capricious or whimsical exercise of discretion vested in the State."*

In view of the law settled down by the Hon'ble Apex Court, in the facts of the case, the appointments due to the petitioners against the posts of Firemen cannot be denied to them on the ground that subsequent to their selection, rules/policy of recruitment had undergone change. In the facts of the case, the new policy/rules can be applied only prospectively and not retrospectively to the recruitment process already conducted under different set of rules/policy.

3(ii) Another reason given in the reply by the respondents is that the Headquarters PH & HP (I) sub area (respondent No.3) had not issued appointment letters to the selected candidates (petitioners) since the recruitment was not carried out as per existing policy. It has further been submitted in the reply that the respondents were required to follow the

procedure mentioned in centralized recruitment of Defence Civilian Employees at Command level dated 13.10.2017. That this letter was forwarded by the Headquarters Western Command directly to respondent No.4 on 13.10.2017 but not to respondent No.3.

3(ii)(a) Reading of letters dated 13.10.2017, 19.03.2021 & 30.03.2021 does not make it clear as to whether the detailed mentioned therein were proposals simplicitor or the same had attained form of some final policy. Nonetheless the fact remains that respondent No.4 had undertaken a painstaking exercise for recruitment to the three posts of Firemen in question under recruitment notice dated 21.7.2021.

Total 57 candidates including the petitioners had applied for the posts in question. The petitioners emerged meritorious for the three advertised posts. They were provisionally selected on 09.09.2021 pending their medical tests and completion of other requisite formalities. The essential documents of the petitioners were verified by respondent No.4 on 20.09.2021, besides conducting their police verification and medical examinations. Insofar as the petitioners are concerned, the selection process was complete in all respects on 20.09.2021. Only the appointment letters remained to be issued to them. The appointment letters cannot be denied to them on account of a subsequent policy of the respondents issued on 2.10.2021 for holding centralized recruitment for Defence Civilian Employee. Such Policy can have prospective effect and will not affect the selection process already undertaken by respondent No.4 under a particular set of rules/instructions etc.

3(ii)(b) Instant is not a case where there are any allegations of illegalities or irregularities in the conduct of selection process. It is nobody's case that the recruitment process was carried out in an arbitrary or discriminatory manner. In fact, the documents on record show that the procedure for centralized recruitment, for all practical purposes more or less matches with the procedure followed by respondent No.4 for the recruitment

process in question, which culminated in selection of the petitioners. It is also well settled that rules of the game, the criteria for selection cannot be altered in the middle or after the process of selection has commenced.

4. In view of above discussion, we find merit in the contentions of the petitioners. This writ petition is accordingly allowed. The impugned decision of the respondents contained in letter dated 27.01.2022 (Annexure P-5 colly) for cancelling the recruitment process as well as selection of the petitioners is quashed. Respondents are directed to take the selection process in question to its logical conclusion by issuing appointment letters to the petitioners for the posts of Firemen advertised vide recruitment notice dated 21.07.2021 (Annexure P-1), within a period of four weeks from today. Pending miscellaneous applications, if any, shall also stand disposed of.

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

Between:-

SANJAY KUMAR S/O SH. GANGU RAM,
VILLAGE SAMTYARI, P.O. KANDHAR,
TEHSIL ARKI, DISTRICT SOLAN, HIMACHAL
PRADESH-173205 THROUGH GPA.

……PETITIONER.

(BY SH. VIVEK SINGH ATTRI, ADVOCATE)

AND

1. STATE OF H.P. PRINCIPAL SECRETARY
(TRANSPORT) GOVERNMENT OF
HIMACHAL PRADESH, SECRETARIAT,
CHOTTA SHIMLA, SHIMLA, H.P.

2. DIRECTOR OF TRANSPORT DEPARTMENT,
REGIONAL TRANSPORT OFFICE AT
SHIMLA (HP).

3. SUB DIVISIONAL MAGISTRATE,
REGISTERED AND LICENSE AUTHORITY,
SHIMLA, URBAN.

4. HINDUJA LEYLAND FINANCE LTD.,
THROUGH ITS AUTHORIZED
REPRESENTATIVE REGISTERED
OFFICE: 1, SARDAR PATEL ROAD,
GUINDY, CHENNAI (600032).

5. HINDUJA LEYLAND FINANCE LTD.,
OFFICE AT HOUSE NO.3, 1ST FLOOR,
NH-21, NEAR COLLEGE CHOWK,
TEHSIL SADAR, DISTT.-BILAPSUR
(HP).

6. TEJINDER SINGH BIRDI, S/O
BACHITTAR SINGH, 10, FACTORY
AREA, KARTAR PARK COLONY, PATIALA,
STATE OF PUNJAB.

7. REGIONAL TRANSPORT AUTHORITY,
PATIALA MALL ROAD, YADWINDER
COLONY, PATIALA, PUNJAB.

.....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL
WITH SH. VINOD THAKUR, ADDITIONAL
ADVOCATE GENERAL, SH. BHUPINDER THAKUR,
SH. YUDHBIR SINGH THAKUR, DEPUTY
ADVOCATE GENERALS AND SH. RAJAT CHAUHAN,
LAW OFFICER, FOR RESPONDENTS-1 TO 3/STATE)

CIVIL WRIT PETITION
No.2047 of 2018
Decided on: 01.08.2022

Constitution of India, 1950- Article 226- Setting aside the auction of truck and further fresh auction as per guidelines- Held- Respondent 4 and 5 is a private entity against whom alone the reliefs have been claimed do not fall within the meaning of State under Article 12 of the Constitution and they are not financially, functionally and administratively dominated by or under the control of the Government- Petition dismissed. (Para 2,3, 6, 7)

Cases referred:

Rajbir Surajbhan Singh vs. Chairman, Institute of Banking Personnel Selection, Mumbai (2019) 14 SCC 189;

Ramakrishna Mission and another vs. Kago Kunya and others AIR 2019 SC 5570;

This petition coming on for admission before 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 substantive reliefs:-

> 1. allow the present writ petition and the auction of truck bearing No.HP 03 D 6262 may be set aside;
>
> 2. direct the respondents to further make a fresh auction as per the guidelines and by giving the petitioner an opportunity to participate in the auction process;
>
> 3. direct respondents to call the records pertaining to loan, auction, transfer of registration of truck bearing No. HP 03D 6262."

2. It would be noticed that the auction of the truck has been conducted by respondent Nos. 4 and 5 i.e. Hinduja Leyland Finance Ltd. which is a private entity and not a creature of statute nor discharging statutory duties and, therefore, the writ petition is not maintainable.

3. Respondent Nos.4 and 5 against whom alone the reliefs have been claimed do not fall within the meaning of State under Article 12 of the Constitution and they are not financially, functionally and administratively dominated by or under the control of the Government. These respondents are not even discharging public duties or public functions.

4. The question regarding maintainability of the petition is otherwise no longer *res integra* and reference in this regard can be made to a fairly recent judgment of the Hon'ble Supreme Court in ***Ramakrishna Mission and another*** *vs.* ***Kago Kunya and others AIR 2019 SC 5570***, wherein it was observed as under:-

> "20. The Governing Body of the Mission is constituted by members of the Board of Trustees of Ramakrishna Math and is vested with the power and authority to manage the organization. The properties and funds of the Mission and its management vest in the Governing Body. Any person can become a member of the Mission if elected by the Governing Body. Members on roll form the quorum of the annual general meetings. The Managing Committee comprises of members appointed by the Governing Body for managing the affairs of the Mission. Under the Memorandum of Association and Rules and Regulations of the Mission, there is no governmental control in the functioning, administration and day to day management of the Mission. The conditions of service of the employees of the hospital are governed by service rules which are framed by the Mission without the intervention of any governmental body.
>
> 21. In coming to the conclusion that the appellants fell within the description of an authority under Article 226, the High Court placed a considerable degree of reliance on the judgment of a two judge Bench of this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani AIR 1989 SC 1607. Andi Mukta (supra) was a case where a public trust was running a college which was affiliated to Gujarat University, a body governed by State legislation. The teachers of the University and all its affiliated

colleges were governed, insofar as their pay scales were concerned, by the recommendations of the University Grants Commission. A dispute over pay scales raised by the association representing the teachers of the University had been the subject matter of an award of the Chancellor, which was accepted by the government as well as by the University. The management of the college, in question, decided to close it down without prior approval. A writ petition was instituted before the High Court for the enforcement of the right of the teachers to receive their salaries and terminal benefits in accordance with the governing provisions. In that context, this Court dealt with the issue as to whether the management of the college was amenable to the writ jurisdiction. A number of circumstances weighed in the ultimate decision of this Court, including the following:

(i) The trust was managing an affiliated college;

(ii) The college was in receipt of government aid;

(iii) The aid of the government played a major role in the control, management and work of the educational institution;

(iv) Aided institutions, in a similar manner as government institutions, discharge a public function of imparting education to students;

(v) All aided institutions are governed by the rules and regulations of the affiliating University;

(vi) Their activities are closely supervised by the University; and

(vii) Employment in such institutions is hence, not devoid of a public character and is governed by the decisions taken by the University which are binding on the management.

22. It was in the above circumstances that this Court came to the conclusion that the service conditions of the academic staff do not partake of a private character, but are governed by a right-duty relationship between the staff and the management. A breach of the duty, it was held, would be amenable to the remedy of a writ of mandamus. While the Court recognized that "the fast

expanding maze of bodies affecting rights of people cannot be put into watertight compartments", it laid down two exceptions where the remedy of mandamus would not be available:

> **"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus..."**

23. Following the decision in Andi Mukta (supra), this Court has had the occasion to re-visit the underlying principles in successive decisions. This has led to the evolution of principles to determine what constitutes a 'public duty' and 'public function' and whether the writ of mandamus would be available to an individual who seeks to enforce her right.

24. In VST Industries Ltd v. VST Industries Workers' Union (2001) 1 SCC 298, a two judge Bench of this Court held that a mere violation of the conditions of service will not provide a valid basis for the exercise of the writ jurisdiction under Article 226, in a situation where the activity does not have the features of a public duty. This Court noted:

> **"7. In de Smith, Woolf and Jowell's Judicial Review of Administrative Action, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law e.g. the activities by private bodies may be governed by the standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to act in the public interest... After detailed discussion, the learned authors have summarised the position with the following propositions:**
>
> **(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a 'public' or a 'private' body.**
>
> **(2) The principles of judicial review prima facie govern the activities of bodies performing public functions.**

> **"(3) ...In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:**
>
> (a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and
>
> (b) where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."
>
> (Emphasis supplied)

25. In G Bassi Reddy v. International Crops Research Institute (2003) 4 SCC 225, a two judge Bench of this Court dealt with whether the International Crop Research Institute for the Semi-Arid Tropics ("ICRISAT") which is a non-profit research and training centre, is amenable to the writ jurisdiction under Article 226. The dispute concerned the termination of employees of ICRISAT. The Court held that only functions which are similar or closely related to those that are performed by the State in its sovereign capacity qualify as 'public functions' or a 'public duty':

> **"28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty...ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training**

> **programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities."**
>
> **Applying the above test, this Court upheld the decision of the High Court that the writ petition against ICRISAT was not maintainable.**

26. A similar view was taken in Ramesh Ahluwalia v. State of Punjab (2012) 12 SCC 331, where a two judge Bench of this Court held that a private body can be held to be amenable to the jurisdiction of the High Court under Article 226 when it performs public functions which are normally expected to be performed by the State or its authorities.

27. In Federal Bank Ltd. v. Sagar Thomas (2003) 10 SCC 733, this Court analysed the earlier judgements of this Court and provided a classification of entities against whom a writ petition may be maintainable:

> **"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function." (emphasis supplied)**

28. In Binny Ltd. v. V Sadasivan (2005) 6 SCC 657, a two judge Bench of this Court noted the distinction between public and private functions. It held thus:

> **"11...It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."**

The Bench elucidated on the scope of mandamus:

> **"29. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action...There cannot be any general definition of public authority or public action. The facts of each case decide the point."**
>
> **(emphasis supplied)**

29. More recently in K K Saksena v. International Commission on Irrigation and Drainage (2015) 4 SCC 670, another two judge Bench of this Court held that a writ would not lie to enforce purely private law rights. Consequently, even if a body is performing a public duty and is amenable to the exercise of writ jurisdiction, all its decisions would not be subject to judicial review. The Court held thus:

> **"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "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 a 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. The reason is obvious. A 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."**
>
> **Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.**

30. Having analysed the circumstances which were relied upon by the State of Arunachal Pradesh, we are of the view that in running the hospital, Ramakrishna Mission does not discharge a public function. Undoubtedly, the hospital is in receipt of some element of grant. The grants which are received by the hospital cover only a part of the expenditure. The terms of the grant do not indicate any form of governmental control in the management or day to day functioning of the hospital. The nature of the work which is rendered by Ramakrishna Mission, in general, including in relation to its activities concerning the hospital in question is purely voluntary.

31. Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The hospital has no

monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an 'authority' within the meaning of Article 226. State governments provide concessional terms to a variety of organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present case, the absence of state control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority.

32. It has been submitted before us that the hospital is subject to regulation by the Clinical Establishments (Registration and Regulation) Act 2010. Does the regulation of hospitals and nursing homes by law render the hospital a statutory body? Private individuals and organizations are subject to diverse obligations under the law. The law is a ubiquitous phenomenon. From the registration of birth to the reporting of death, law imposes obligations on diverse aspects of individual lives. From incorporation to dissolution, business has to act in compliance with law. But that does not make every entity or activity an authority under Article 226. Regulation by a statute does not constitute the hospital as a body which is constituted under the statute. Individuals and organisations are subject to statutory requirements in a whole host of activities today. That by itself cannot be conclusive of whether such an individual or organisation discharges a public function. In Federal Bank (AIR 2003 SC 4325, Para 32) (supra), while deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, the court held thus:

> **"33. ...in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only**

> **where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank..." (emphasis supplied)**

5. To similar effect is the another judgment rendered by the Hon'ble Supreme Court in ***Rajbir Surajbhan Singh*** *vs.* ***Chairman, Institute of Banking Personnel Selection, Mumbai (2019) 14 SCC 189***, wherein it was observed as under:-

> "15. It is true that the Governor of the Reserve Bank of India and the Chairmen of certain Public Sector Banks along with the Joint Secretary, Banking Division, Ministry of Finance are members of the governing body of the Respondent-Institute. There is no dispute that the Respondent is not constituted under a statute. It is also not disputed that the Respondent does not receive any funds from the Government. The Respondent is not controlled by the Government. The letter dated 20.09.2010 produced by the Appellant along with the rejoinder affidavit does not show deep and pervasive control by the Government of India. The question of whether the Council of Scientific and Industrial Research fell under 'other authorities' within the meaning of Article 12 was referred to a 7 Judge Bench of this Court. [See: Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Others (2002) 5 SCC 111.

16. Resolving the dispute, the 7 Judge Bench in Pradeep Kumar Biswas (supra) held that the question as to whether a corporation/society would fall within the meaning of Article 12 should be decided after examining whether the body is financially, functionally and administratively dominated by or under the control of the Government. This Court observed that such control should be particular to the body in question and must be pervasive. A control which is merely regulatory under the statute or otherwise would not make the body 'State' under Article 12. As there is no control by the Government over the Respondent in the manner mentioned above, we have no doubt in our mind that the Respondent cannot be said to be falling within the expression 'State' under Article 12 of the Constitution of India.

17. The question that remains to be answered is whether the Writ Petition is maintainable against the Respondent on the ground that it discharges public duty. This Court in Andi Mukta Sadguru S. M. V. S. S. J. M.S.T. and Ors. v. V.R. Rudani and Ors.(1989) 2 SCC 691 held (SCC p. 700, para 20)

> "The term 'authority' used in Article 226 of the Constitution of India, must receive a liberal meaning unlike the term "other authorities" in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue Writs for enforcement of fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or the authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied."

18. This Court in the said judgment also referred to what Professor S.A. de Smith stated in 'Judicial Review of

Administrative Action', which is as follows: (V.R. Rudani case, SCC p. 701, para 22)

> **"22.....To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract."**

19. In Regina v. Panel on Take-Overs and Mergers, Ex parte Datafin PLC and Another 1987 QB 815, Lloyd L. J. speaking for the Court of Appeal held that if the duty is a public duty, then the body in question is subject to public law. The distinction must lie in the nature of the duty imposed, whether expressly or by implication. He referred to an earlier judgment in Reg. v. Criminal Injuries Compensation Board, Ex. Parte Lain(1967) 2 QB 864 where Diplock L.J. held that in addition to looking at the source of power for the purpose of deciding the question pertaining to public law, nature of power is an important facet to decide whether a dispute pertains to public law or private law.

20. There is no manner of doubt that a Writ Petition under Article 226 is maintainable even against a private body provided it discharges public functions. While deciding the question as to whether ICRISAT is amenable to the writ jurisdiction under Article 226, this Court held that it is not easy to define what a public function or public duty is. It can reasonably be said that such functions as are similar to or closely related to those performable by the State in its sovereign capacity, are public functions. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture, purely on a voluntary basis which according to this Court, is not a public duty (G.Bassi Reddy v. International Crops Research Institute (2003) 4 SCC 225). A private company carrying on banking business as a scheduled commercial bank cannot be termed as an institution or a company carrying on any statutory or public duty (Federal Bank Ltd. v. Sagar Thomas (2003) 10 SCC 733).

21. In K.K. Saksena v. International Commission on Irrigation &Drainage (2015) 4 SCC 670, this Court observed that the Respondent therein would not be amenable to Writ jurisdiction under Article 226 of the Constitution of India, as the activities

were voluntarily undertaken by the Respondents and there was no obligation to discharge certain activities which were statutory or of public character. Reference was made to the Federal Bank case wherein it was held that the Writ Petition was not maintainable under Article 226 of the Constitution of India in spite of the regulatory regime of the Banking Regulation Act and the other statutes being in operation.

22. The relevant questions, according to this Court in K. K. Saksena (supra), to be answered for the purpose of deciding whether a Writ Petition is maintainable under Article 226 are:

a) Whether a private body which is a non-governmental organization partakes the nature of public duty or State action?

b) Whether there is any public element in the discharge of its functions?

c) Whether there is any positive obligation of a public nature in the discharge of its functions?

d) Whether the activities undertaken by the body are voluntary, which many a non-governmental organization perform?

23. The Respondent Institute has been set up for the purpose of conducting recruitment for appointment to various posts in Public Sector Banks and other financial institutions. Applying the tests mentioned above, we are of the opinion that the High Court is right in holding that the Writ Petition is not maintainable against the Respondent. Conducting recruitment tests for appointment in banking and other financial institutions, is not a public duty. The Respondent is not a creature of a statute and there are no statutory duties or obligations imposed on the Respondent.

24. This Court in Federal Bank Ltd. v. Sagar Thomas (2003) 10 SCC 733 held that a Writ Petition under Article 226 of the Constitution is not maintainable against a scheduled bank on the ground that the business of banking does not fall within the expression “public duty”. As the activity of the Respondent of conducting the selection process for appointment to the banks is voluntary in nature, it cannot be said that there is any public function discharged by the Respondent. There is no positive

obligation, either statutory or otherwise on the Respondent to conduct the recruitment tests. For the reasons above, we are of the considered opinion that the Respondent is not amenable to the Writ Jurisdiction under Article 32 or Article 226 of the Constitution of India."

6. From the aforesaid exposition of law, it is absolutely clear that no doubt a writ petition would be maintainable even against a private party, provided it discharges public functions or statutory duties which are conspicuously absent as regards private respondent Nos. 4 and 5 herein.

7. Accordingly, we have no difficulty in concluding that respondent Nos. 4 and 5 being private parties not discharging any public functions or statutory duties are not amenable to the writ jurisdiction. Accordingly, the writ petition is dismissed, so also the pending application, if any.

8. However, before parting, it needs to be observed that this Court has not expressed any opinion on the merits of petitioner's claim and, therefore, if the petitioner is still aggrieved, it will be open to him to take recourse to such remedy as permissible in law.

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

Between:-

SOM DUTT SHARMA
S/O SH. PURNA NAND SHARMA,
R/O VILLAGE BHANET-HALDWARI,
P.O. BHAROG-BANERI,
TEHSIL DADAHU-173022,
DISTRICT SIRMOUR, H.P.

.....PETITIONER

(BY SH. DILIP SHARMA, SENIOR ADVOCATE,
WITH SH. MANISH SHARMA, ADVOCATE)

AND

3. STATE OF HIMACHAL PRADESH,
THROUGH CHIEF SECRETARY
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-171002.

2. ADDITIONAL CHIEF SECRETARY
(EXCISE & TAXATION) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171 002.

3. SH. JAGDISH CHANDER SHARMA,
PRESENTLY HOLDING THE POST OF
ADDITIONAL CHIEF SECRETARY
(EXCISE & TAXATION) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA – 171 002.

...RESPONDENTS

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL, WITH SH. R.N. SHARMA, ADVOCATE, FOR RESPONDENTS NO. 1 AND 2)

(RESPONDENT NO. 3 DELETED VIDE ORDER DATED 20.04.2022)

CIVIL WRIT PETITION
No. 2610 OF 2021
Reserved on: 26.07.2022
Decided on: 02.08.2022

Constitution of India, 1950- Article 226- **Central Civil Services (Classification, Control and Appeal) Rules, 1965**- Rule 14- Petition sought direction to Competent Authority to open the recommendations of DPC kept in sealed cover qua the assessment of the petitioner working as Excise and Taxation Officer for promotion to the post of Deputy Commissioner of State Taxes and Excise- Fresh inquiry without reviewing the earlier order- Held- Valuable rights of the petitioner have been affected- Non-compliance of the principles of natural justice- Once the petitioner was exonerated there was no legal impediment in opening the sealed cover- Petition allowed. (Para 24, 28, 29)

Cases referred:

Delhi Jal Board vs. Mahinder Singh (2000) 7 SCC 210;

State of Madhya Pradesh and another vs. Syed Naseem Zahir and others 1993 Supp.(2) SCC, 225;

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

ORDER

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

> *"(a) That the respondent no.3 may be restrained from dealing with the service matters of the petitioner.*
>
> *(b) That the competent authority may be directed to open the recommendations of DPC held on 28.2.2019 (Annexure P-18) kept in sealed cover qua the assessment of the petitioner for promotion to the post of Assistant Excise and Taxation Commissioner (now re-designated as Deputy Commissioner of State Taxes and Excise) including promotion from the date persons junior to the petitioner were promoted vide notification dated 28.2.2019, (Annexure P-18/A), with all consequential benefits."*

2. Petitioner is working as Excise and Taxation Officer in the Department of State Taxes and Excise, Government of Himachal Pradesh. Petitioner, in the capacity of Assessing Officer, had passed an Assessment Order dated 18.3.2010 (Annexure P-3) (for short "AO") in the matter of M/s Budget Signs, Plot No.76, EPIP, Phase-II, Thane, Baddi, District Solan for assessment years 2005-06, 2006-07, 2007-08 and 2008-09.

3. The then Excise and Taxation Commissioner, Himachal Pradesh set aside the 'AO' *vide* order dated 15.3.2011 (Annexure P-5) by exercising his *suo moto* revisional powers and remanded the matter back to the Assistant Excise and Taxation Commissioner, Baddi, District Solan (for short 'AETC'). In compliance, the AETC, Baddi passed fresh order dated 10.01.2012. The Revisional order (Annexure P-5) passed by the Excise and Taxation Commissioner was assailed by the assessee M/s Budget Signs before the Himachal Pradesh Tax Tribunal. The appeal of the assessee was decided vide

order dated 29.8.2013 (Annexure P-9) and the order dated 10.01.2012 passed by AETC, Baddi was set-aside. The matter was remanded with direction to constitute a committee of members of Tax Research Unit. Thereafter, more than twelve years have elapsed but the merits of 'AO' are still unresolved.

4. The 'AO' also gave rise to initiation of disciplinary proceedings against petitioner. Charge Memo dated 27.2.2012 (Annexure P-8) was served upon the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short 'Rules'). Inquiry was conducted and the Inquiry Officer submitted his report dated 03.01.2015 whereby none of the charges were held substantially proved. The Appointing-cum-Disciplinary Authority accepted the inquiry report vide order dated 06.02.2015 (Annexure P-11) and the petitioner was exonerated.

5. On 05.01.2019, almost after four years, another Charge Memo (Annexure P-17) was served upon petitioner relating back to the alleged misconduct arising from the 'AO'. Petitioner submitted his reply and a representation seeking dropping of charges against him on the basis of his exoneration from same charges.

6. In the meantime, petitioner had acquired eligibility for being promoted to the post of AETC. On 28.2.2019 the Departmental Promotion Committee (DPC) held meeting for considering the promotion of Excise and Taxation Officers to the post of AETC (Class-I Gazetted). Total five (5) officers were promoted, out of which three (3) were junior to the petitioner. The last promoted official was promoted on officiating basis against the vacancy kept reserved for the petitioner. The matter relating to promotion of petitioner was kept in sealed cover on the basis of charge memo dated 5.1.2019.

7. Petitioner was served with yet another charge-sheet dated 30.03.2019 (Annexure P-19) again based on charges arising out the 'AO'. Petitioner again submitted his representations for dropping of charges.

8. The competent authority dropped the charge memo dated 05.01.2019 (Annexure P-17) vide order dated 04.01.2020 (Annexure P-20) and charge memo dated 30.03.2019 (Annexure P-19) vide order dated 27.5.2020 (Annexure P-23).

9. Petitioner submitted his representations dated 06.01.2020 (Annexure P-21) and 30.5.2020 (Annexure P-24) with a prayer to open sealed cover in the matter of his promotion. On 03.06.2020, the Excise and Taxation Commissioner, Himachal Pradesh forwarded integrity certificate of petitioner and recommended opening of sealed cover vide letter Annexure P-25.

10. Instead of promoting the petitioner, he was served with yet another charge-sheet dated 16.3.2021 (Annexure P-28) again relating to the alleged misconduct arising out of 'AO'.

11. We have heard Sh. Dilip Sharma, learned Senior Advocate assisted by Sh. Manish Sharma, Advocate, learned counsel for the petitioner and Sh. Ashok Sharma, Advocate General assisted by Sh. R.N. Sharma, Advocate, for respondents No. 1 and 2 and have gone through the records of the case carefully.

12. Initially, the petitioner had impleaded the officer by name, who had remained as Excise and Taxation Commissioner and Principal Secretary, Excise and Taxation, Himachal Pradesh and against whom the petitioner had alleged personal vendetta. However, on 20.04.2022 the name of said respondent was deleted from the array of the parties on the asking of learned counsel for the petitioner. We have also been informed that the originally impleaded respondent No.3 has retired after filing of this petition. Relief (a) prayed in the petition has thus become redundant.

13. This Court on 24.4.2021 had passed the first order as under:

"**CWP No.2016/2021 & CMP No.5025/2021**

Notice. The learned Additional Advocate General waives service of notice on behalf of respondents No.1 and 2. Notice on

behalf of respondent No. 3, on steps being taken within one week, returnable within three weeks thereafter. Reply by filed within four weeks. List on ***28.5.2021****.*

In the meanwhile, the respondents concerned shall appoint a fresh disciplinary authority in place of, respondent No.3, and the disciplinary authority, shall work only respect to the nowat articles of charges framed against the applicant, and, for enabling by the inquiry officer concerned, make appropriate orders thereon.

The Chief Secretary, Government of Himachal Pradesh is also directed to make a forthwith decision upon the representation made by the applicant against the article of charges now drawn against the applicant. It is certified that till the representation made against the article of charges now drawn against the applicant is decided by the latter, co-respondent No.3 shall not deal in any manner with the afore. It is further directed that a copy of the decision made by the Chief Secretary, upon, the representation of the applicant shall be produced before this Court on the next date of hearing."

14. In compliance to aforesaid order the Chief Secretary decided the representation of petitioner but refrained from taking any final decision quoting pendency of multifarious proceedings. Thus, the inquiry in pursuance to charge memo dated 16.03.2021 (Annexure P-28) is continuing against the petitioner. The charge memo dated 16.03.2021 or the proceedings initiated in pursuance thereto are not in question before us in this petition.

15. Shri Dilip Sharma, learned Senior Advocate has confined his submissions to the extent only that after dropping of charges against petitioner by the competent authority vide orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23), the proceedings of the DPC held on 28.02.2019 (Annexure P-18) and kept in sealed cover are liable to be opened. It has been contended that the inquiry now being faced by the petitioner in pursuance to charge memo dated 16.03.2021 (Annexure P-28) is a fresh inquiry for all intents and purposes. It has further been submitted that neither the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23)

have been reviewed nor set-aside in any proceedings. As per petitioner, he came to know for the first time from charge memo dated 16.03.2021 (Annexure P-28) that the aforesaid orders had been reviewed, however, on an enquiry, no order of Review was found to exist. It has been categorically submitted on behalf of the petitioner that he had never been associated in any proceedings for review of aforesaid orders, if any. Our attention was drawn to the relevant extract of Charge Memo dated 16.3.2021 which reads as under:

> *"Whereas the orders withdrawing the charge sheets dated 5.01.2019 and 30.03.2019 against Shri Som Dutt Sharma, Assistant Commissioner of State Taxes and Excise, conveyed vide Memorandum No. EXN-B(14)-1/2020, dated 01.04.2020 and 27.05.2020* ***have been reviewed by the competent authority*** *and accordingly, it has been directed to expeditiously inquire into the charges as made out at Annexure-I……"*

16. In response, learned Advocate General has drawn our attention to para 58 (B) and (C) of reply, wherein a specific mention about review of aforesaid orders by the competent authority has been made. Perusal of the contents of reply submitted on behalf of the respondents reveals that the respondents have placed entire emphasis on the alleged misconduct of petitioner arising from order dated 18.03.2010 (Annexure P-3).

17. In view of the confinement of submissions by the petitioner and also in the nature of relief prayed in the petition the issue precisely required to be adjudicated by us is whether the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) were ever reviewed, so as to nullify their effect? The merits of the allegations of misconduct against petitioner are not required to be gone into by us. In any case, the inquiry in pursuance to charge memo dated 16.03.2021 is stated to be pending against petitioner and it will have its own course, permissible under law.

18. The respondents had not placed any tangible material on record to substantiate their plea regarding review of orders dated 04.01.2020

(Annexure P-20) and 27.05.2020 (Annexure P-23) by the competent authority. During the course of hearing, a compendium has been placed on record which according to respondents are the note-sheets and proceedings evidencing review of aforesaid orders.

19. The power of review is provided under Rule 29-A of the Rules, which reads as under:

> "**29-A Review**:
>
> *The President may, at any time, either on his own motion or otherwise review any order passed under these rules, when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case, has come, or has been brought, to his notice:*
>
> *Provided that no order imposing or enhancing any penalty shall be made by the President unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed or where it is proposed to impose any of the major penalties specified in rule 11 or to enhance the minor penalty imposed by the order sought to be reviewed to any of the major penalties and if an enquiry under rule 14 has not already been held in the case, no such penalty shall be imposed except after inquiring in the manner laid down in rule 14, subject to the provisions of rule 19, and except after consultation with the Commission where such consultation is necessary and the Government servant has been given an opportunity of representing against the advice of the Commission."*

20. We have carefully gone through the compendium of documents placed on record on behalf of the respondents during hearing of the case but have not found the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) having been reviewed in exercise of powers under Rule 29-A

ibid. The compendium includes the official note-sheets dealing with the situation after the dropping of charges against petitioner vide orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23). It starts with the opinion of Addl.LR-cum-Addl. Secy. (Law) to the Government of Himachal Pradesh dated 11.01.2021. The matter appears to have been dealt with thereafter by the Addl. Chief Secy.(E&T) to the Govt. of Himachal Pradesh recommending serving of fresh charge sheet against the petitioner. The Addl. Chief Secy.(E&T) to the Govt. of Himachal Pradesh, was the same person whom petitioner had initially impleaded as respondent No.3 in this petition. This fact has been admitted by the respondents in their reply also.

21. On 12.03.2021 vide N/125, it was noted as under:

> *"Action with respect to the order/memo dated 27.5.2020 for dropping the charges needs to be taken first before issuing the charge sheet as discussed N-89 ante, please put up a note."*

Evidently the legal implications for initiating fresh inquiry without reviewing the earlier orders had been visualised.

22. Thereafter, the matter was again dealt with at various levels. On 15.03.2021 vide N/141, a proposal was made to review and rescind the orders dated 04.01.2020 and 27.05.2020 and also to issue a fresh charge sheet. It was on such proposal that a note at N/142 was placed as under:

> *"As discussed, to ensure the delivery of this charge sheet we may send this to the Joint Commissioner, State Taxes & Excise, NZ, Palampur for service and furnishing it evidence/receipt, the DFA is submitted for signature please."*

23. The documents noticed above cannot be said to be an order of review under Rule 29-A of the Rules. There is no order on record which satisfies the requirements of Rule 29-A of the Rules. The fact that a fresh charge sheet had been framed itself suggests that the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) had not been reviewed. In

case the said orders had been reviewed, the action, if any, would have been taken on earlier charge memos dated 05.01.2019 (Annexure P-17) and 30.03.2019 (Annexure P-19).

24. Even otherwise, there is nothing on record to suggest the existence of any new material or evidence which could not be produced or was not available at the time of passing of the orders under review and which had the effect of changing the nature of the case, having come or brought to the notice of the competent authority named in Rule 29-A of the Rules. The power of Review, as aforesaid, cannot be recognized to be available as one-sided administrative exercise. Since it tends to affect the valuable rights having accrued in favour of the person, such exercise cannot be said to be available without complying with the principles of natural justice. It is not in dispute that petitioner had no notice of any order amounting to Review of orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23).

25. As a consequence of above, we have no hesitation to hold that the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) were never reviewed and, therefore, their efficacy cannot be said to have faded. The exoneration of the petitioner from charges supplied to him vide charge memo dated 05.01.2019 (Annexure P-17) would mean that no such charge existed against the petitioner. The consideration of petitioner for promotion by the DPC dated 28.02.2019 (Annexure P-18) was kept in sealed cover only due to pendency of chargesheet dated 05.01.2019 (Annexure P-17). It is more than settled that once the petitioner was exonerated, there was no legal impediment in opening the sealed cover.

26. In ***Delhi Jal Board vs. Mahinder Singh (2000) 7 SCC 210***, the question before the Hon'ble Supreme Court was with respect to the binding precedents of the judgments in (1999) 5 SCC 762, Bank of India vs. Degala Suryanarayana and (1998) 4 SCC 154, State of A.P. vs. N. Radhakishan, whereby it was held that once the first disciplinary inquiry resulted in favour

of writ petitioner, the benefit of the findings of DPC should be given to the writ petitioner notwithstanding the pendency of second inquiry. In above noted judgments it was held that if a person's case had been considered for promotion by the DPC and because of pendency of certain charges, the findings of DPC were kept in sealed cover, he was entitled to the benefit of the findings of the selection, if the disciplinary inquiry ended in his favour notwithstanding the fact that by that date, some other inquiry might have been pending against him. A submission was made before the Hon'ble Supreme Court that the aforesaid two judgments required consideration. Negating such contention and upholding the dictum of aforesaid judgments, it was held as under:

> *"**5**. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the Disciplinary Enquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any Disciplinary Enquiry. The sealed cover procedure was envisaged under the rules to give benefit oi any assessment made by the Departmental Promotion Committee in favour of such an officer. if he had been found fit for promotion and it he was later exonerated in the disciplinary inquiry which was pending at the time when the DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee*

in his favour in the anterior selection. There is. therefore, no question of referring the matter to a larger Bench.

6. *In the SLP, we have not thought it fit to send matter back to the Division Bench which had dismissed the appeal as time barred and on the ground that the Advocate was not present. In our view, this is not a fit case to remand the matter to the High Court because the only argument addressed by the learned Additional Solicitor General before us is that the earlier judgments of this Court cited above and relied upon by the learned Single Judge require reconsideration and that question cannot obviously be raised before the Division Bench of the High Court. We have, therefore, considered the correctness of the judgment of the learned Single Judge on merits."*

27. Learned Advocate General has contended before us that even the pendency of subsequent inquiry is the deterrent for petitioner to pray for opening of sealed cover. In support of such submission, reliance has been placed on the judgment passed by the Hon'ble Supreme Court in ***State of Madhya Pradesh and another vs. Syed Naseem Zahir and others 1993 Supp.(2) Supreme Court Cases, 225.*** In that case, the facts were entirely different and on the basis of such difference, the judgments so relied cannot be applied in the instant case. Though the charge memo in that case was issued after DPC proceedings but the referred judgment was passed at a stage when the charges were already found proved against the person after inquiry. The matter was pending before the Appointing-cum-Disciplinary Authority. It was in the backdrop of such facts that the Hon'ble Supreme Court held as under:

*"**7**. It is no doubt correct that in view of Union of India vs. K.V. Jankiraman (1991) 4 SCC 109, the DPC was not justified in keeping the recommendation pertaining to Syed in a "sealed cover", but it is difficult to ignore glaring facts in a given case and act mechanically. Even in Jankiraman's case while dealing with*

Civil Appeal Nos. 51-55 of 1990 this Court observed as under: (SCC p.126, para 39)

> *"In view of the aforesaid peculiar facts of the present case, the DPC which met in July, 1986 was justified in resorting to the sealed cover procedure, notwithstanding the fact that the charge sheet in the departmental proceedings was issued in August/December, 1987. The Tribunal was, therefore, not justified in mechanically applying the decision of the Full Bench to the facts of the present case and also in directing all benefits to be given to the employees including payment of arrears of salary".*

Keeping in view the facts of this case we are to the view that the "sealed cover" containing recommendations of the DPC in respect of respondent Syed be not opened till the departmental proceedings against him are concluded. As mentioned above the enquiry report has already been received by Syed and it is matter of days before the disciplinary proceedings would come to an end. In case he is completely exonerated, the "sealed cover" shall be opened and if the recommendation is in his favour, he shall be notionally promoted with effect from the date when a person junior to him was promoted to the post of Chief Engineer. In that event, he shall be entitled to all consequential benefits including back wages. In case, respondent Syed Naseem Zahir is punished in the proceedings, then action would be taken in accordance with the guidelines as laid down by this Court in Jankiraman's case."

28. On the basis of above analysis, we have no hesitation to hold that the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) exonerating the petitioner were intact meaning thereby the petitioner stood exonerated from charges issued to him vide charge memos dated 05.01.2019 (Annexure P-17) and 30.03.2019 (Annexure P-19). That being so, there is no legal impediment in opening the sealed cover in respect of the findings of the DPC relating to petitioner.

29. Accordingly, the petition is allowed. The respondents are directed to open the recommendations of the DPC held on 28.02.2019 (Annexure P-18) kept in sealed cover in respect of assessment of the petitioner for promotion to the post of Assistant Excise and Taxation Commissioner (now re-designated as Deputy Commissioner of State Taxes and Excise) and in case the findings are in his favour to promote him from the date when persons junior to the petitioner were promoted vide notification dated 28.02.2019 (Annexure P-18/A), with all consequential benefits.

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

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

Between:-

1. MS. REETA DEVI, AGED 40 YEARS, D/O SH. MOHAN LAL, W/O SH. KUNDAN, RESIDENT OF VILLAGE LELLU, POST OFFICE SAINJ, TEHSIL THEOG, DISTRICT SHIMLA (H.P.).

2. MS. INDIRA DEVI, AGED 52 YEARS, D/O LATE SH. KIRPA RAM, W/O SH. DILA, RESIDENT OF VILLAGE LELLU, POST OFFICE SAINJ, TEHSIL THEOG, DISTRICT SHIMLA (HP).

.....PETITIONERS

(SH. B.C. NEGI, SR. ADVOCATE WITH
MR. Y.P. SOOD, ADVOCTE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (PANCHAYATI RAJ) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. THE DIRECTOR, PANCHAYATI RAJ DEPARTMENT, GOVERNMENT OF HIMACHAL PRADESH, KASUMPTI, SHIMLA-171009.

3. THE STATE ELECTION COMMISSION, HIMACHAL PRADESH, SHIMLA-171002 THROUGH ITS SECRETARY.

4. THE DEPUTY COMMISSIONER, SHIMLA DISTRICT, SHIMLA 171001.

5. THE HIMACHAL PRADESH STATE COMMISSION FOR BACKWARD CLASSESES, KASUMPTI, SECRETARY. SHIMLA-171009, THROUGH ITS SECRETARY.

6. RAJINDER SHARMA, S/O SHRI LAIK RAM SHARMA, RESIDENT OF VILLAGE TIKKARI, POST OFFICE JAIS, TEHSIL THEOG, DISTRICT SHIMLA (H.P.).

.....RESPONDENTS

(SH. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL, FOR R-1, 2 & 4.)

(SH. AJEET SINGH SAKLANI, ADVOCATE, FOR R-3)

(MS. TANU SHARMA, ADVOCATE, FOR R-5)

(SH. R. K. BAWA, SR. ADVOCATE WITH SH. AJAY KUMAR SHARMA, ADVOCATE, FOR R-6).

CIVIL WRIT PETITION
No. 3490 of 2022
Reserved on: 28.07.2022
Decided on: 04.08.2022

Himachal Pradesh Panchayati Raj (Election) Rules 1994- Rule 28 (8)- **Constitution of India, 1950**- Article 243D (6)- Reservation in Panchayati Raj elections- Held- Notification dated 30.4.2022, issued by respondent No.4 cannot be sustained for the reasons firstly that it has been issued in a mechanical manner, without due application of mind and secondly that the same is in violation of instructions dated 24.9.2020 issued by the Secretary Panchayati Raj, Government of Himachal Pradesh and lastly violates the right of proportionate representation available to persons belonging to backward classes under Section 125(3) of the Act and Article 342D(6) of the

Constitution- Notification and consequent initiation of election process are quashed and set aside. (Para 25, 26)

Cases referred:

Election Commission of India vs. Ashok Kumar and others 2000 (8) SCC 216;
State of Goa vs. Fauziya Imtiaz Sheikh & another, 2021 (8) SCC 401;

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

O R D E R

1. Facts necessary for adjudication of the petition are as under: -

(i) H.P. State Election Commission declared election programme for conduct of general elections to Panchayati Raj Institutions of Himachal Pradesh vide notification dated 21.12.2020. Prior to that, reservation roster for the offices of Presidents of the Gram Panchayats (for short, 'GP')in District Shimla had been issued by respondent No.4 on 14.12.2020. For Development Block Theog, offices of Presidents of three Panchayats namely Dhamandri, Baldhar and Sainj were declared reserved for Backward Classes. At the time of such declaration there were 212 persons from backward classes in GP Sainj as per data available with respondent No.5 and notified by Department of Social Justice and Empowerment (for short, 'SJ&E') vide notification dated 4.11.2010.

(ii) The dispute herein relates to the reservation to the office of President, Gram Panchayat Sainj.

(iii) In the first instance respondent No.6 herein assailed reservation of Gram Panchayat Sainj for aforesaid purpose before this court by way of CWP No. 6352 of 2020 on the ground that there was not even a single person belonging to backward class in entire Panchayat. During the pendency of the said petition, a corrigendum dated 12.11.2021 was issued by Department SJ &E *inter-alia* notifying the population of persons belonging to backward classes in GP Sainj as Nil. Resultantly, respondent

No.4 vide notification dated 30.4.2022, de-reserved the office of the President GP Sainj. This development led to the culmination of proceedings in CWP No. 6352 of 2020, as infructuous vide order dated 4.5.2022.

(iv) Before the final disposal of CWP No. 6352 of 2020, petitioner therein had moved an application for impleadment of Smt. Indira Devi, Smt. Manju Kumari and Smt. Rita Devi as party respondents on the premise that they would be necessary and proper parties, as they had filed their nominations to contest the office of President, GP Sainj as candidates belonging to backward classes.

(v) The instant petition, now has been filed by two of the three above mentioned proposed respondents in CWP No. 6352 of 2020, namely Smt. Rita Devi and Smt. Indira Devi. Their grievance is against de-reservation of office of President GP Sainj. Petitioners claim themselves to be the members of backward classes. Certificates issued by Tehsildar, Theog certifying the petitioners to be the members of backward classes have been placed on record.

(vi) Petitioners herein contend that notification dated 30.4.2022, issued by respondent No.4, declaring office of GP Sainj available to general category is in violation of instructions dated 24.9.2020, issued by Secretary Panchayati Raj. As per these instructions, for the purposes of reservation roster the Development Block is taken as one unit. No reservation to the office of President of GP is available for backward classes in those development blocks which have less than 5% of their total population belonging to such classes. Where the population of backward classes in a development block is 5% or more of its total population, reservation for backward classes for the office of Presidents GP becomes available in same proportion to total number of seats of Presidents GP in the entire block as is the ratio of population of backward classes to the total population in entire block. The reservation for backward classes cannot be more than 15%. According to petitioners the de-reservation of GP Sainj for above said purpose shall leave only two seats of the

office of Presidents GP reserved for backward classes as against required three as per above mentioned instructions.

(vii) Respondents No.1, 2 and 4 have submitted their joint reply. These official respondents have also relied upon the instructions dated 24.9.2020, issued by Secretary, Panchayati Raj in respect of reservation to the posts of Presidents of Gram Panchayats and other office bearers of Panchayat Samiti and Zila Parishad. It is submitted that the data published by respondent No.5 is made the basis for determination of seats for reservation to the candidates belonging to backward classes. It has also been stated that as per second proviso to Rule 28 (8) of Himachal Pradesh Panchayati Raj (Election) Rules 1994, (for short, 'the Rules'), reservation for a particular category cannot be rotated for a constituency where the population of such category is less than 5% of the total population of that constituency. Reliance has also been placed on notification dated 17.11.2000, Annexure R-III, according to which, a constituency shall be reserved for backward classes only if the population of backward classes is greater than 5% of the total population in that particular constituency. In case of the constituencies having less than 5% population already reserved for backward classes by the Deputy Commissioner or by the State Government, these constituencies will be de-reserved immediately and such constituencies which have remained un-reserved having more than 5% population of backward classes will be considered for reservation by taking up the constituency with higher percentage of backward classes population first. The act of de-reservation of Gram Panchayat, Sainj has further been justified on the ground that the seat of President Gram Panchayat, Sainj was de-reserved on the basis of contents of reply filed by respondent No.5 in CWP No. 6352 of 2020, as per which, there was no person belonging to backward classes in Gram Panchayat, Sainj.

(viii) Respondent No.5 has made a prayer for treating its reply filed in CWP No. 6352 of 2020 as reply to the present petition. A copy of such reply is on record of this petition as Annexure P-8.

(ix) Respondent No.6 has filed a separate reply. It has been averred that after a detailed survey, respondent No.5 has found that

there is 'Nil' population of backward classes in Gram Panchayat, Sainj. The claim of petitioners to be persons belonging to backward classes has also been challenged by alleging that they belong to the caste 'Brahmin' with sub caste 'Bhardwaj' which was not declared as backward class in the State of Himachal Pradesh. Respondent No.6 in support of his contention has placed reliance on various documents viz Shajra Nasab, Copies of Pariwar Register and Goshwara etc. Relevant Rule of 28(8) of the Rules as also corrigendum dated 12.11.2021, issued by Additional Chief Secretary, Social Justice & Empowerment, declaring Nil population of backward classes in Gram Panchayat, Sainj has also been relied.

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

3. To determine the controversy, it will be relevant to recall applicable Constitutional and statutory provisions. Article 243D (6)of the Constitution reads as under

> "**243 D (6)**: Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens".

4. Thus, Constitution saves power in the State Legislatures to make provisions for reservation of seats in any Panchayat or offices of Chairmans in Panchayats at any level in favour of citizens of backward classes. Deriving powers from aforesaid Constitutional provision, Section 125 (3) of Himachal Pradesh Panchayati Raj Act, 1994 (for short, 'the Act') has been incorporated as under:

> "**Section 125 (3):** The State Government may, by general or special order, reserve such number of offices of chairpersons for persons belonging to Backward Classes in Panchayats at every level, not exceeding the proportion to the total number of offices to be filled by direct election in the Panchayat as the population of the persons belonging to Backward Classes in the State bears to the total population of the State and may further reserve [one-

half] of the total seats reserved under this sub-section for women belonging to Backward Classes."

5. The above is the only statutory provision dealing with the subject of reservation for backward classes in Panchayati Raj Institutions in the State. Noticeably, the State Government has framed H.P. Panchayati Raj (Election) Rules, 1994 (for short, 'Rules') but these deal only with reservations available to categories of Scheduled Castes, Scheduled tribes and Women. The category of backward classes has been left out from the Rules. In such situation general or special orders passed by Government in pursuance to power so reserved in it by section 125(3) *ibid* have to be considered.

6. In the backdrop as noticed above, reference in the first instance can be made to the instructions dated 24.9.2020, issued by Secretary, Panchayati Raj, whereby for the purposes of reservation roster the development block is taken as one unit. No reservation to the office of President of GP is available for backward classes in those development blocks which have less than 5% of their total population belonging to such classes. Where the population of backward classes in a development block is 5% or more of its total population seats for such classes for the office of Presidents GP shall be reserved in same proportion to total number of seats of Presidents GP in the entire block as is the ratio of population of backward classes to the total population in entire block. The reservation for backward classes cannot be more than 15%.

7. Another notification that needs attention was issued by the Commissioner-cum-Secretary, Panchayati Raj, Government of Himachal Pradesh on dated 17.11.2000 in respect of the reservation for the candidates from backward classes for election to the offices of members of Panchayat Samiti and Chairman of Gram Panchayats in a particular Block, which reads as under:

> "*A constituency shall be reserved for backward classes only if the population of backward classes is greater than 5% of the total*

population in that particular constituency. In case, constituencies with less than 5% population have already been reserved for backward classes by the Deputy Commissioners or by the State Government, these constituencies will be de-reserved immediately and such constituencies that are remaining un-reserved but having more than 5% population of backward classes will be considered for reservation by picking up the constituencies with highest percentage of backward classes population first."

8. Thus, the State Government in exercise of powers under Section 125 (3) of the Act has made provisions for reservation of seats for President Gram Panchayat for persons belonging to Backward Classes in aforesaid manner.

9. Keeping in view the aforesaid provisions, the contention of the petitioners that minimum three seats are required to be reserved for the offices of Presidents for persons belonging to Backward Classes in Development Block, Theog is not without substance. It is not denied that the population of Backward Classes in entire Development Block, Theog is more than 5% of the total population of block. There are 59 Gram Panchayats in Development Block, Theog. By applying the prescribed ratio, three seats are required to be reserved for Backward Classes.

10. Respondent No.4 had issued the reservation roster dated 14.12.2000, which rightly identify three Panchayats reserved for Backward Classes in development block Theog for the purpose of election to the offices of Presidents including the Gram Panchayat, Sainj. At the relevant time, as per data prepared by respondent No.5, Gram Panchayat, Sainj had population of 212, belonging to Backward Classes.

11. A peculiar situation has arisen only on account of intervening circumstances, which have taken place after the declaration of General Elections to the Panchayati Raj Institutions by State Election Commission on 21.12.2020. Respondent No.6 laid challenge to the reservation of Gram

Panchayat Sainj on the ground that the said Panchayat had not even a single member of Backward Classes and filed CWP No. 6352 of 2020. Respondent No.5 collected fresh data and on the basis of that Additional Chief Secretary, Social Justice & Empowerment issued notification dated 12.11.2021, declaring Nil population of Backward Classes in GP Sainj. Respondent No.4 de-reserved the GP Sainj vide notification dated 30.4.2022, which reads as under: -

"Office of Deputy Commissioner, Shimla
District Shimla, Himachal Pradesh.
No.PCH-SML(Reservation/202034748-34755 Dt.30 April,2022
NOTIFICATION

As per Notification No.PCH-SML (Panchayat Reservation) 2020-1926, dated 14.12.2020 the post of President in Gram Panchayat Sainj was reserved for Other Backward Class for the elections held during the year 2020-21. But now the question of reservation of this post is under consideration of the Hon'ble High Court of Himachal Pradesh.

Now in compliance to the order official letter No.193/2020-32581, dated 28.4.2022 and in compliance to the Deputy Advocate General Himachal Pradesh Office letter No.CWP No.6322/2020, dated 23.4.2022, the above post has to be de reserved.

Therefore, I, Aditya Negi, Deputy Commissioner, Shimla do hereby declare the post of President Gram Panchayat, Sainj as unreserved for the information of General Public.

Sr. No.	*Name of Development Block*	*Name of Gram Panchayat*	*The category for which reserved*	*Present status of reservation*
1.	*Theog*	*Sainj*	*OBC*	*General*

(Aditya Negi) I.A.S.
Deputy Commissioner, Shimla
District Shimla (H.P.)"

12. Respondent No.4 issued the order of de-reservation dated 30.4.2022 on the basis of correspondence dated 28.4.2022 from Director Panchayati Raj to respondent No.4, which referred to the contents of reply of respondent No.5 filed in CWP No. 6352 of 2020, wherein the Backward Classes population in Gram Panchayat, Sainj was mentioned as 'Nil'. Respondent number 4 also appears to have been swayed by irrelevant consideration of pendency of CWP No. 6532 of 2020. The reply of respondent No.5 in CWP 6532/2020 evidently was based on corrigendum dated 12.11.2021 which declared the population of backward classes in GP Sainj as 'Nil'. A survey conducted by respondent No.5 was stated to be the basis for such declaration. Thus, the contents of notification dated 30.4.2022 nowhere reflected independent application of mind by respondent No.4. The fact remains that as per prescription made by the State Government, there could not be less than three seats of President, Gram Panchayats, reserved for Backward Classes in Development Block Theog.

13. Section 125(3) of the Act *ibid* clearly refers to ratio between population of the block and that of the State for ascertaining the number of seats to be reserved to the offices of Presidents of GP. On the same principle are the instructions dated 24.9.2020 and on application of above said mandate 3 seats for offices of Presidents GP in development block Theog were rightly declared vide reservation roster dated 14.12.2020.

14. The question thus arises as to whether the data allegedly collected by H.P. Commission for Backward Classes with respect to population of backward classes after the completion of election process for all other GPs in the State except GP Sainj, could be looked into or made relevant. The clear answer is in negative for the reason that the population for the purposes of Act relates back to the previous Census and hence any data collected thereafter cannot be considered. Section 2(29) of the Act defines 'population' as under:

> *"population" means the population as ascertained at the last preceding census of which the relevant figures have been published"*

15. Admittedly, an anomalous situation arises in case such subsequent data is taken into consideration. The de-reservation of Gram Panchayat, Sainj amounts to violation of the instructions, whereby three seats of President Gram Panchayat are required to be reserved in favour of persons belonging to Backward Classes in development block Theog. By allocating the seat of President of Gram Panchayat, Sainj to general category, only two seats remain reserved for category of Backward Classes. In case, the seat of President of Gram Panchayat, Sainj is kept reserved for Backward Classes, the notification dated 17.11.2000 is violated, whereby to qualify for reservation the constituency must not have less than 5% population of backward classes.

'Constituency' has been defined in the Rules as:

> *"(b) —Constituency‖ means a territorial constituency of a Gram Sabha, Panchayat Samiti or Zila Parishad, as the case may, for the representation of which a member is to be elected or has been elected and in relation to Pradhan or Up-Pradhan of a Gram Panchayat, shall mean the whole of Gram Sabha area"*

16. The authenticity of data collected by respondent No.5 also comes in question, when the petitioners claim themselves to be belonging to Backward Classes as per certificates issued to them by the competent authority. As per these certificates, the petitioners have been certified to be the persons belonging to Backward Classes on the basis of the fact that their respective fathers belonged to 'Bhat' or 'Bhatta' class, which is declared as a Backward Class vide notification dated 9.9.2011, issued by the Department of Social Justice & Empowerment, Government of Himachal Pradesh. A copy of this notification has been placed on record as Annexure R-6/3A, wherein at

Sr. No. 8 “Bhat or Bhatta (whether with or without the appendage Brahman)” have been declared as Other Backward Classes.

17. In such situation, in our considered opinion, the option to keep office of GP Sainj reserved for backward classes as per reservation roster dated 14.12.2020 has to sustain for the following reasons:

(a) As per section 2(29) of the Act “population” means the population as ascertained at the last preceding census of which the relevant figures have been published. Thus, the population as per last census has to be taken into account for the purposes of the Act. The data which has been collected or made available after completion of election process in all other constituencies is neither permissible nor desirable.

(b) Viewed from another angle, there is some doubt regarding the data available with H.P. Commission for Backward Classes. Admittedly, petitioners are electors of GP Sainj. They have produced certificates issued by Tehsildar Theog certifying them to be the persons belonging to backward classes. Official respondents have not said anything about such certificates. Similarly the H.P. Commission for Backward Classes has also not filed a specific counter thereto. It has been submitted on behalf of respondent No.6 that the certificates produced by petitioners will be challenged. The fact remains that petitioners are in possession of backward class certificates in their favour issued by the competent authority.

(c) The salutary and cherished purpose of providing reservation to backward classes in the matter of representation in Panchayati Raj institutions shall be well served by maintaining the prescribed ratio of backward class population *vis-à-vis* total population in the entire block. Any other interpretation or option shall be nugatory to the provisions of section 125(3) of the Act.

(d) More than two years have already elapsed since the completion of election process of general elections to the Panchayati Raj institutions in the entire state. Further

delay will not be in the interest of the GP Sainj and its residents as they stand to lose their active participation in the process of Governance.

(e) The notification dated 30.4.2022 cannot withstand the judicial scrutiny and is unsustainable for want of independent application of mind by respondent No.4. In case the said respondent is allowed to engage in the process of re-determination it will again open opportunities for further objections and litigations and in such situation the election to the office of President GP Sainj will remain in limbo for indefinite period and possibly till the expiry of entire permissible tenure.

18. Respondents have also taken an exception to maintainability of the petition under Article 226 of the Constitution. It is alleged that any intervention by this Court will amount to halting the election process, which has been held to be not permissible by Hon'ble Supreme Court in ***2000 (8) SCC 216, Election Commission of India vs. Ashok Kumar and others***. Reliance has also been placed on the judgment passed in ***State of Goa vs. Fauziya Imtiaz Sheikh & another, 2021 (8) SCC 401***.

19. Before dealing with such contention it will be apposite to notice the mandate of Article 243(O) of the Constitution which reads as under:-

> ***"243-O. Bar to interference by courts in electoral matters.-*** *Notwithstanding anything in this Constitution-*
>
> *(a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court;*
>
> *(b) No election to any Panchayat shall be called in question except by an election petition presented to such authority*

and in such manner as is provided for by or under any law made by the Legislature of a State."

20. The nature of the controversy raised in present petition is not covered by any of the situations provided under Article 243-O. Under said Article embargo is with respect to the proceedings in which validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies, made or purported to be made under Article 243-K, has been challenged. Further, the prohibition prescribed by Article 243-O (b) relates to proceedings, which are substitute to election petition permissible under law.

21. As regards the applicability of judgment in *2000 (8) SCC 216*, with due deference to the ratio laid therein, we are of the considered opinion that the same will not help the cause of respondents. The prohibition is only with respect to interruption, obstruction to and protraction of election process, whereas there is no embargo on the power of judicial review against the action of Election Commission. Para-32 of the aforesaid judgment can be gainfully reproduced as under:-

> *"For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-*
>
> *1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.*
>
> *2) Any decision sought and rendered will not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the*

election proceedings cannot be described as questioning the election.

3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the courts indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

22. Thus, as per the above referred judgment anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election. It rather permitted such judicial intervention that

subserves the progress of the election and facilitates the completion thereof.

23. As regards the judgment in *2021 (8) SCC 401*, the same was passed in the context of the provisions relating to election of the Municipal Bodies. Their Lordships were dealing with the provisions of Article 243-Z (g) (b), which started with a *non-obstante* clause, whereas the provisions of Article 243-O, as noticed above, do not create any such absolute bar.

24. We have been informed that during pendency of this petition Respondent 3 has initiated the election process for election to the office of President GP Sainj by treating the said office available for general category on the basis of notification dated 30.4.2022 issued by Respondent No.4.

25. In view of above analysis, the notification dated 30.4.2022, issued by respondent No.4 cannot be sustained for the reasons firstly that it has been issued in a mechanical manner, without due application of mind and secondly that the same is in violation of instructions dated 24.9.2020 issued by the Secretary Panchayati Raj, Government of Himachal Pradesh and lastly violates the right of proportionate representation available to persons belonging to backward classes under Section 125(3) of the Act and Article 342D(6) of the Constitution.

26. Resultantly, notification dated 30.4.2022, issued by respondent No.4 (Annexure P-11) and consequent initiation of election process by Respondent-3 to the office of President Gram Panchayat Sainj, Theog Block, District Shimla are quashed and set aside. Respondents 1 to 4 are directed to initiate the elections to office of President Gram Panchayat Sainj in Development Block Theog of District Shimla (HP) on the basis of reservation roster dated 14.12.2020 Annexure P-3 at the earliest and not later than two weeks from the date of this judgment.

27. The writ petition is disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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

BETWEEN:

1. RACHHPAL SINGH DADHWAL, AGED 69 YEARS, SON OF SHRI SANSAR SINGH DADHWAL, RESIDENT OF VILLAGE AND POST OFFICE GONDPUR BANERA LOWER, TEHSIL AMB, DISTRICT UNA, HIMACHAL PRADESH.

.....PETITIONER

(BY MR. VIJAY CHAUDHARY, ADVOCATE)

AND

1 STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-02.

2. DIRECTOR HIGHER EDUCATION.
HIMACHAL PRADESH, SHIMLA-01.

.....RESPONDENTS

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

CIVIL WRIT PETITION
No. 6247 of 2021
Reserved on: 27.07.2022
Decided on: 02.08.2022

Constitution of India, 1950- Article 226- Petitioner appointed Lecturer Physical Education in DAV College, Daulatpur Chowk, District Una- Later on services of petitioner were taken over as Lecturer (School Cadre) instead of

Lecturer (College Cadre)- Petitioner approached H.P. State Administrative Tribunal but no relief was given- During service petitioner acquired Master's Degree- Held- It was too late for respondent to allege that petitioner did not have the requisite qualification even at the time of initial appointment in the College and on acquisition of Master's Decree, the petitioner had acquired the requisite qualification- Ld. Tribunal erred in holding that petitioner was not having requisite qualification for the post of Lecturer (College cadre) as prevalent at the time of taking over of the College- Petition allowed. (Para 11 to 14)

This petition coming on for pronouncement of judgmentthis day, ***Hon'ble Mr. Justice Satyen Vaidya,*** *passed the following* :-

O R D E R

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

(i) That impugned order dated 10.01.2019 passed by Erstwhile Himachal Pradesh Administrative Tribunal in T.A. No. 93 of 2015 (Annexure P-4) may kindly be quashed and set aside.

(ii) That the T.A. No. 93 of 2015, titled Rachpal Singh Dadhwal Vs. Principal Secretary (Education) may kindly be allowed and notification dated 04.01.2007(Annexure P-9 of TA No. 93 of 2015) may kindly be quashed and set aside, to the effect that the services of the petitioner may be ordered to be taken over as Lecturer Physical Education (College Cadre) from due date i.e. 04.01.2007, along with all consequential benefits.

(iii) That the respondents may kindly be directed to protect the last drawn salary of the petitioner which he was taking in privately managed colleges DAV College, Daulatpur Chowk, District Una, Himachal Pradesh on the post of Lecturer Physical Education (College Cadre) while taking over his services as Lecturer Physical Education by the Government w.e.f 04.01.2007.

2. Brief facts of the case are that petitioner was appointed Lecturer Physical Education (D.P.E) in D.A.V. College, Daulatpur Chowk, District Una, H.P. on 05.01.1979. At that time, petitioner held a Diploma in Physical Education from Nagpur University. In the year 1984, petitioner acquired M.A. Degree in History. Himachal Pradesh University approved the appointment of petitioner as Lecturer in Physical Education in D.A.V. College, Daulatpur Chowk, District Una, H.P. w.e.f. 03.10.1979, vide executive council decision dated 03.08.1991.

3. In the year 2007, respondent No.1 took over the management and also the services of teaching&non-teaching Staff of D.A.V. College, Daulatpur Chowk. The services of the petitioner were taken over as Lecturer (School Cadre) instead of Lecturer (College Cadre), vide notification dated 04.01.2007, on the premise that petitioner did not have the requisite qualification for the post of Lecturer Physical Education (College), at the time of taking over of theCollege.

4. Petitioner immediately approached the Erstwhile Himachal Pradesh Administrative Tribunal by preferring original application which subsequently came to be registered as T.A. No. 93/2015*, inter alia* praying for quashing of notification dated 04.01.2007 qua the petitioner and directions to the respondents to take over the services of the petitioner as Lecturer (College Cadre) with all consequential benefits. The protection of the last drawn salary as Lecturer (College Cadre) was also sought.

5. The claim of the petitioner was contested by the respondents on the ground that essential qualification for the post of College Lecturer was M.A. with 55% marks in a particular faculty with NET/SET qualification. The learned Tribunal dismissed the T.A. No. 93/2015, vide order dated 10.01.2019 by holding that the petitioner at the time of take over of the College by State

Government did not possess requisite qualification i.e. 55% marks in Masters Degree coupled with qualification of NET/SET.

6. This lead the petitioner to assail the order dated 10.01.2019, passed by erstwhile Himachal Pradesh Administrative Tribunal, by way of instant petition.

7. The main plank of challenge is that petitioner could not be put to disadvantageous position without any fault on his part. According to the petitioner, he held the requisite qualification as applicable at the time of his initial entry as D.P.E. in DAV College, Daulatpur Chowk in the year 1979. The subsequent change in R & P Ruleswould not be applicable in the case of petitioner, that too, when the college was taken over by the decision of the State Government at a juncture when petitioner was left with almost 3/½ years of service. The petitioner superannuated on 31.05.2010.

8. Respondents have contested the stand of the petitioner, on the grounds that the notification dated 04.01.2007, was strictly in accordance with law and the petitioner was not eligible for the post of Lecturer Physical Education(College Cadre) at the time of taking over the college as per prevalent R & P Rules.The prevalent R&P Rules required the incumbent to have 55% marks in Masters Degree with NET/SET as essential qualification.Further objection raised to the claim of the petitioner is that he was not eligible for the post of Lecturer(College Cadre)even at the time of his initial appointment in the college on 03.10.1979 as he possessed only Bachelor Degree with Diploma in Physical Education. The R&P Rules in vogue at that time required minimum essential qualification of Masters Degree with2ndClass in the concerned subject.

9. We have heard learned counsel for the petitioner as well as learned Additional Advocate General for the respondent-State and gone through the record.

10. Petitioner joined D.A.V. College, Daulatpur Chowk, District Una, H.P. in the year 1979 as Lecturer Physical Education (D.P.E.). The Recruitment &Promotion Rules in respect of Himachal Pradesh, Education Department, Class-III (College Cadre) Services notified on 08.11.1973, were in vogue. The minimum qualification for D.P.E., Degree Colleges and College of Education, were as under:-

DPE (Degree Colleges and College of Education)	-	Class-III (Non-Gaz.)	Rs. 300-600	N.A.	Between 18 years and 35 years	*Essential*: M.A. 2nd Class Degree in Physical Education (50% marks) OR M.P.E.(2ndClass 50% marks) degree (2 years course) OR M.A. degree in any subject with a 2nd class Diploma/Degree in Physical Education of a recognized University/Institution equivalent.

11. At the time of joining the College, petitioner had Bachelor Degree for Diploma in Physical Education. However, he improved his qualification by acquiring Masters Degree in History from Himcahal Pradesh University in 1984. Considering his subsequent acquisition of Masters Degree, the Himachal Pradesh University approved the appointment of petitioner in D.A.V. College, Daulapur Chowk, District Una, H.P. w.e.f 03.10.1979 in pursuance to executivecouncil decision dated 03.08.1991 in that behalf. D.A.V. College, Daulatpur Chowk was a Government aided College receiving 95% grant. Petitioner was allowed to continue as Lecturer Physical Education in said college till 2007. Evidently, the basis for continuation of petitioner in such capacity was the approval of his appointment by Himachal Pradesh University w.e.f 03.10.1979. Petitioner was also allowed benefit of senior scale

from time to time. In any case, petitioner had acquired Masters Degree in 1984. His appointment at the most could be recognized from the date of such acquisition. Whether initial appointment of petitioner is considered from 03.10.1979 or in 1984 i.e. the date of acquisition for the Masters Degree, would not have any effect on the determination of issue involved in the petition. Thus, it was too late for respondents to allege that the petitioner did not have the requisite qualification even at the time of his initial appointment in the College. On acquisition of Masters Degree, the petitioner had acquired the requisite qualification. It has been contended on behalf of the respondents that the recruitment and promotion rules prevalent at the time of initial appointment of petitioner also required Masters Degree with 2nd Class, whereas the degree acquired by the petitioner was in 3rd Class. Such contention also needs to be rejected for the reason that the relevant provisions of prevalent R &P Rules appears to be wrongly comprehended by the respondents. The requirement was M.A. Degree in any subject with a 2nd Class Diploma/Degree in Physical Education. The respondents required this Court to understand the said requirement as M.A. Degree with 2nd Class and Diploma/Degree in Physical Education, which in our considered view, is not the correct interpretation of the relevant clause. The words "with a" bifurcates the two parts of the provision i.e. M.A. Degree in any subject and 2nd Class Diploma/Degree in Physical Education. There cannot be any other interpretation as the words "2nd Class" and "Diploma/Degree in Physical Education" are in continuation. Thus, the words "2nd Class" are to be read with Diploma/Degree in Physical Education. The petitioner therefore, held the requisite qualification as per prevalent R & P Rules at the time of initial appointment especially in view of his acquiring Masters Degree in 1984 and the approval of his appointment by the executive council of the University in the year 1991 ex-post-facto.

12. The act of taking over of the D.A.V. College, Daulatpur Chowk by the State Government alongwith services of its staff was a decision taken in the year 2006-07. Petitioner had already rendered service of about 27 years by that time. Evenafter the amendment of R & P Rules prescribing minimum marks in Masters Degree with NET/SET qualification, petitioner was never asked to improve his qualification in terms of amended R& P Rules and thus was allowed to continue with his original qualification as Lecturer(College Cadre) till the College was taken over. It was the unilateral administrative decision of the State Government to take over the College, in which petitioner obviously could not have any say. There was no complaint that due to lack of qualification, petitioner had failed to discharge his duties. In such circumstances, the lack of qualifications with petitioner in terms of amended R & P Rules could not be used to his detriment. Admittedly, petitioner superannuated on 31.05.2010, meaning thereby that at the time of taking over the College by the Government, he was left with about 3/½ years of service.

13. LearnedTribunal has thus clearly erred in holding that the petitioner was not having the requisite qualification for the post of Lecturer(College Cadre) as prevalent at the time of taking over of the College. In the given fact situation, it was sufficient that petitioner was holding the essential qualification at the time of his initial appointment as approved by Himachal Pradesh University. That being so, lack of essential qualifications in terms of amended R & P Rules could not be used as a tool to deny the petitioner benefit of continuation of his service as Lecturer(College Cadre). It was the qualification at the time of initial appointment that was relevant and not the qualification as required under the amended R& P Rules at the time of taking over of the College.

14. In view of above discussion, the petition is allowed. Order dated 10.01.2019, passed by erstwhile Himachal Pradesh Administrative Tribunal,

in T.A. No. 93/2015(Annexure P-4), is quashed and set-aside. Respondents are directed to treat the petitioner as Lecturer Physical Education (College Cadre) from the date of taking over of D.A.V. College, Daulatpur Chowk, District Una, H.P. by the State Government till 31.05.2010, on which date petitioner superannuated and to grant him all consequential benefits within eight weeks from the date of production of this judgment before respondent No.2.

15. Accordingly, the instant petition is disposed of, so also the pending application(s), if any.

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

Between:-

SH. TIRATH BAHADUR
SON OF SH. SUKH BAHADUR,
RESIDENT OF HIGH COURT PARKING COMPLEX,
SHIMLA, P.O. AND TEHSIL SHIMLA,
DISTRICT SHIMLA, H.P. PRESENTLY
SERVING AS A BELDAR IN
HPPWD DIVISION NO. 3, SHIMLA, H.P.

...PETITIONER

(BY SH. A.K. GUPTA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH THE PRINCIPAL SECRETARY (PUBLIC WORKS) WITH HEADQUARTERS AT SHIMLA, H.P.

2. ENGINEER-IN-CHIEF, HPPWD, WITH HEADQUARTERS AT NIRMAN BHAWAN, SHIMLA-171002.

3. THE EXECUTIVE ENGINEER, HPPWD DIVISION NO.3, SHIMLA, H.P.

... RESPONDENTS.

(SH.ARVIND SHARMA,
ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION
No. 7369 OF 2021
Reserved on: 22.08.2022
Decided on: 24.08.2022

Constitution of India, 1950- Article 226- Work charge status after completion of eight years service- Held- Relief claimed by the petitioner in the instant proceedings has been already extended to similar situated Nepalee employees and petitioner being similar situated person is also entitled for similar benefit- Petition allowed. (Para 5, 6)

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

O R D E R

Petitioner namely, Sh. Tirath Bahadur, who is a Nepali citizen, was engaged as a daily wage beldar with effect from 1999 and since then he had been working continuously with 240 days in each calendar year in the aforesaid capacity till his regularization in the year, 2017, Annexure P-1. Since the petitioner was not granted work charge status after his having completed eight years' service, he has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for following relief:

> *"i. That the respondents may be ordered to grant work charge status to the petitioner from the date he completed 8 years' service with all benefits incidental thereof."*

2. Learned counsel for the petitioner while making this Court to peruse the judgment rendered by Principal Division Bench of this Court in bunch of petitions i.e. ***Civil Writ Petition No. 5702 of 2011*** titled ***Dal Bahadur*** versus ***State of Himachal Pradesh*** alongwith other connected matters, contended that his case is squarely covered with the aforesaid judgment. He also invited attention of this Court to judgment passed by learned Single Judge of this Court in ***CWP No. 5799 of 2014*** titled as ***Budh***

Bahadur versus ***The State of H.P. and others***, wherein similar relief, as has been prayed in the instant petition, has been granted to the petitioner in that case.

3. Aforesaid prayer made on behalf of the petitioner has been resisted on behalf of the respondent-department by learned Additional Advocate General on the ground that judgment rendered by Division Bench of this Court in ***Dal Bahadur*** versus ***State of Himachal Pradesh***alongwith other connected matters and judgment dated 27.04.2012 passed in ***Shiv Kumari*** versus ***State of Himachal Pradesh***alongwith other connected matters, have not attained finality because department has laid challenge to the same by way of SLP in the Hon'ble Supreme Court.

4. However, careful perusal of material made available to this Court clearly reveals that SLP having been filed by the respondent-State against the judgment rendered by Division Bench of this Court in ***Dal Bahadur*** case (supra) stands dismissed. Having taken note of dismissal of SLP filed by the respondent-State in ***Dal Bahadur*** case, learned Single Judge while allowing the writ petition bearing ***CWP No.5799 of 2014*** titled as ***Budh Bahadur*** versus ***the State of HP and others***, directed the respondent-State to confer work charge status upon the petitioner on his having completed eight years of uninterrupted service and thereafter regularize the service of the petitioner in accordance with law upon availability of vacancies.

5. Learned Additional Advocate General was unable to dispute that larger issue as to whether petitioner, who is not Indian citizen, is entitled to invoke writ jurisdiction of Court of India stands duly adjudicated by the Hon'ble Apex Court. Learned Additional Advocate General was also unable to dispute that relief claimed by the petitioner in the instant proceedings have been already extended to similar situate Nepalee employees.

6. Division Bench of this Court while passing judgment dated 9.11.2011 in ***Dal Bahadur*** case (supra) specifically took note of judgment

rendered by this Court in case tilted as ***Man Singh*** versus ***State of Himachal Pradesh, CWP No.1594 of 2008***, decided on 27.7.2009, wherein it specifically took note of resolution passed by Central Government on 1.3.1977, the office memorandum dated 10.5.1978 and letter dated 16.7.2009 addressed by the Secretary (Agriculture) to the Government of Himachal Pradesh to the Director of Agriculture, whereby it was laid down that as far as Nepalese citizens are concerned, only eligibility certificates are required. As per aforesaid judgment, if Nepalese citizens are able to furnish eligibility certificates they are also required to be granted benefit in terms of policy framed by Government of Himachal Pradesh from time to time with regard to conferment of work charge status and thereafter regularization. Since aforesaid judgment rendered by Principal Division Bench has already attained finality, the petitioner in the case at hand being similar situate person is also entitled for similar benefit.

7. Consequently, in view of the above, the present petition is allowed and the respondents are directed to confer work charge status upon the petitioner from the date he completed eight years' service with all benefits incidental thereto. Since the petitioner has approached this Court in the instant proceedings in the year 2021, he is held entitled to consequential benefits from the date three years prior to filing of the petition.

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

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

Between :-

NARINDER SINGH CHAUHAN, AGED 59 YEARS, SON OF LATE SHRI JAI RAM CHAUHAN, RESIDENT OF HOUSE No. A-98, NEAR MBD HOUSE, SECTOR-I, NEW SHIMLA, SHIMLA-171009 (H.P.)

...PETITIONER

(BY MR. ADARSH K. VASHISTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS CHIEF SECRETARY THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171 002

2. ADDITIONAL CHIEF SECRETARY (FINANCE) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171 002.

3. PRINCIPAL SECRETARY (AGRICULTURE) TO THE GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, SHIMLA-171 002.

4. THE DIRECTOR (AGRICULTURE), HIMACHAL PRADESH, SHIMLA-171005.

...RESPONDENTS

(MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 954 of 2021
Reserved on:05.08.2022
Decided on: 17.08.2022

Constitution of India, 1950- Article 226- The financial benefits were granted to petitioner w.e.f. 23.08.2016 when he was regularly promoted, however, petitioner sought that these benefits ought to have been given w.e.f. 30.06.2014- Held- The petitioner worked as Assistant Director (Legal) with effect from 30.06.2014- It cannot be said that he worked as a Law Officer on the post which did not exist after 30.06.2014- Hence, financial benefit for the period from 30.06.2014 to 23.08.2016 cannot be denied to the petitioner merely because of the fact that the Recruitment & Promotion Rules for the post of Assistant Director (Legal) were framed only on 19.07.2016 and benefit of regular promotion against the post of Assistant Director (Legal) was granted to the petitioner only from 23.06.2016- Petition allowed. [Para 4(d)]

Cases referred:
Bharat Sanchar Nigam Limited vs. R. Santhakumari Velusamy and Others (2011) 9 SCC 510;
Punjab State Power Corporation Limited and another Vs. Bal Krishan Sharma and others, (2022) 1 SCC 322;

This petition coming on for admission this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua****, passed the following :*

O R D E R

The financial benefits, pay scale etc. attached to the post of Assistant Director (Legal) in the of Directorate of Agriculture were granted in favour of the petitioner w.e.f. 23.08.2016 when he was regularly promoted to this post. Prayer of the petitioner is that these benefits ought to have been released to him w.e.f. 30.06.2014. The respondents have turned down petitioner's request. Hence, the instant petition.

2. There is no dispute on facts :-

(i) Petitioner was appointed as a Clerk in the pay scale of Rs. 950-1800 (pre-revised) in the department of Agriculture where he joined as such on 20.08.1992.

(ii) The petitioner was promoted as a Legal Assistant (Class-III) on 08.10.1997 in the pay scale of Rs. 6400-10640 (pre-revised).

(iii) On 24.06.2004, petitioner was promoted to the post of Law Officer (Class-II Gazetted), but he remained in the pay scale of Rs. 6400-10640 which he had enjoyed as a Law Officer. On 23.10.2010, petitioner was given benefit of an increment under Fundamental Rule 22.

(iv) In the department of Irrigation and Public Health, the post of Law Officer in the pay scale of Rs. 6400-10640 (Gazetted Class-II) was upgraded to the post of Deputy Director (Legal) (Class-I

Gazetted) in the pay scale of Rs. 10025-15100 vide Notification dated 04.04.2006.

On the above analogy, the petitioner also represented for upgradation of the post of Law Officer held by him in the Directorate of Agriculture to that of Deputy Direct (Legal) in the pay scale of Rs. 10025-15100. The said representation was recommended by the Director of Agriculture on 23.08.2006. While recommending petitioner's representation, it was mentioned that the duties and responsibilities of the petitioner as Law Officer had increased manifolds, but no financial benefit of any kind was made available to him under the existing rules/instructions ; That the petitioner was promoted from the post of Legal Assistant to that of Law Officer, but his scale remained the same ; There was no time scale for the post of Law Officer which had put the officer (petitioner) to disadvantage.

Iv) On 30.06.2014, a Notification was issued upgrading the post of Law Officer in the Directorate of Agriculture to that of Assistant Director (Legal) in the pay band of Rs. 15,600-39,100 + 5400 as grade pay with immediate effect. The existing post of Law Officer was abolished vide same Notification. Being relevant, this Notification is being reproduced hereinafter :-

"Notification

The Governor, Himachal Pradesh is pleased to order the upgradation of the post of Law Officer to that of Assistant Director (Legal) in the Directorate of Agriculture, H.P. Shimla-171005, in the pay band of Rs. 15600-39100 + Rs. 5400 Grade Pay with immediate effect by abolishing the post of Law Officer."

After the issuance of Notification dated 30.06.2014, the petitioner continued to work as Assistant Director (Legal). However, the emoluments attached to the said post were not released in his favour. The respondents vide Notification dated 19.07.2016, framed R&P Rules for the post of Assistant Director (Legal) (Class-I Gazetted). Under these rules, the cadre of Assistant Director (Legal) consisted of single post. In terms of column No. 10 of R&P Rules, the post was to be filled up 100% by promotion. Column No. 11 of the rules provided that post was to be filled up by promotion from amongst the Law Officers possessing 10 years of regular service or regular combined with continuous adhoc service, if any, in the grade failing which on secondment basis from amongst the incumbents working on the similar posts and having identical pay scale from other departments of Government of Himachal Pradesh. The petitioner was regularly promoted on 23.08.2016 to the post of Assistant Director (Legal) (Class-I Gazetted) in the pay band of Rs. 15600-39000+5400 Grade pay. The emoluments attached to the post of Assistant Director (Legal) were paid to the petitioner subsequent to his regular promotion w.e.f. 23.08.2016.

3. The petitioner's prayer for release of emoluments attached to the post of Assistant Director (Legal) for the period 30.06.2014 to 22.08.2016 has been turned down by the respondents on the ground that the R&P Rules for the post of Assistant Director (Legal) were not in existence prior to 19.07.2016. Petitioner was promoted as Assistant Director (Legal) only on 23.08.2016, therefore, emoluments for the said post cannot be paid to him for the period 30.06.2014 to 22.08.2016.

4. The stand of the respondents in rejecting the case of the petitioner for grant of financial emoluments attached to the post of Assistant Director (Legal) for the period 30.06.2014 to 22.08.2016 cannot be accepted for the following reasons :-

(a) Firstly, the post of Law Officer held by the petitioner w.e.f,. 24.06.2004 onwards was abolished with immediate effect vide Notification dated 30.06.2014. The petitioner, therefore, cannot be assumed to be holder of the post of Law Officer after 30.06.2014. The post of Law Officer stood abolished w.e.f. 30.06.2014.

(b) The post of Law Officer was upgraded to that of Assistant Director (Legal) w.e.f. 30.06.2014. None else, but the petitioner was holding the post of Assistant Director (Legal) w.e.f. 30.06.2014 till he was regularly promoted on this post vide Notification dated 23.08.2016.

(c) The records produced by the respondents have also been seen. There is no dispute that the petitioner continued to discharge the duties of Assistant Director (Legal) from 30.06.2014 onwards till he was regularly promoted on the said post on 23.08.2016.

(d) The instant was a case where the solitary post of Law Officer held by the petitioner in the Directorate of Agriculture was upgraded to that of Assistant Director (Legal). The apex Court in **Bharat Sanchar Nigam Limited** versus **R. Santhakumari Velusamy and Others (2011) 9 SCC 510** elaborated the distinction between upgradation and promotion. It was held that upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibility, but merely gets a higher pay scale. When there is an advancement to higher pay scale without change of post, it may be referred to as up-gradation or promotion to a higher pay-scale. Where the advancement to a higher pay-scale is available to everyone who satisfies the eligibility conditions without undergoing any process of selection, it will be upgradation. But, if the advancement to a higher pay scale without

change of post is as a result of some process which has elements of selection, then it will be a promotion to higher pay scale. In other words, upgradation by application of process of selection as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense i.e. advancement to a higher payscale. The relevant para from the judgment is as under :-

"29. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both - that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale

without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply the rules of reservation. But where the upgradation involves selection process and is therefore a promotion, the rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

The above principles were reiterated in **(2022) 1 SCC 322, Punjab State Power Corporation Limited and another** Vs. **Bal Krishan Sharma and others**

In the instant case, the respondents had abolished with immediate effect the post of Law Officer which the petitioner was holding vide Notification dated 30.06.2014. The petitioner, therefore, for all intents and purposes, on and w.e.f. 30.06.2014 was working on the post of Assistant Director (Legal) in the Directorate of Agriculture. The duties and responsibilities of the petitioner remained the same, but he was to get higher pay scale attached to the upgraded post. The stand of the respondents that the petitioner was rendering his services as Law Officer from 30.06.2014 to 23.08.2016 cannot be countenanced in the facts of the case. As observed earlier, even the record produced by the respondents reflects that w.e.f. 30.06.2014, the petitioner was discharging the duties as Assistant Director (Legal) and not as Law Officer, which post stood abolished on 30.06.2014. The R&P Rules framed by the respondents for the post of Assistant Director (Legal) vide Notification dated 19.07.2016 prescribe that the solitary post of Assistant Director (Legal) is to be filled in 100% by promotion from amongst Law Officers possessing 10 years of regular service or regular combined with continuous

adhoc service. The petitioner who was promoted as Law Officer on 24.06.2004 satisfied this eligibility criteria laid down in the R&P Rules as on 23.06.2014.

The post of Law Officer was abolished on 30.06.2014 and was upgraded to the post of Assistant Director (Legal) in the pay band of Rs. 15,600-39100+5400 Grade Pay with immediate effect. Thus, the petitioner worked as Assistant Director (Legal) with effect from 30.06.2014. It cannot be said that he worked as a Law Officer on the post which did not exist after 30.06.2014. Hence, financial benefit for the period from 30.06.2014 to 23.08.2016 cannot be denied to the petitioner merely because of the fact that the Recruitment & Promotion Rules for the post of Assistant Director (Legal) were framed only on 19.07.2016 and benefit of regular promotion against the post of Assistant Director (Legal) was granted to the petitioner only from 23.06.2016.

For all the aforesaid reasons, there is merit in the contention of the petitioner. Accordingly, this writ petition is allowed. The respondents are directed to release the emoluments attached to the post of Assistant Director (Legal) to the petitioner w.e.f. 30.06.2014 to 23.08.2016. This exercise be completed within a period of 8 weeks from today. The writ petition stands disposed of, so also the pending applications, if any.

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

Between:-

DURGI DEVI
W/O LATE BHOLA RAM,
R/O VILLAGE AND P.O. BANI MAJHERWIN,
TEHSIL GHUMARWIN,
DISTRICT BILASPUR, H.P.

.....PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE WITH MR. RAJESH KUMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (HOME)
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2.

2. DIRECTOR- GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA-2.

3. ACCOUNTANT GENERAL,
HIMACHAL PRADESH, SHIMLA-3.

.....RESPONDENTS

(MR. NARENDER SINGH THAKUR, DEPUTY ADVOCATE GENERAL WITH MR. RAM LAL THAKUR, ASSISTANT ADVOCATE, GENERAL, FOR R-1 AND R-2.
MR. LOKINDER PAL THAKUR, SENIOR PENAL COUNSEL FOR R-3)

CIVIL WRIT PETITION
No.1657 of 2016
Reserved on: 29.07.2022
Decided on: 05.08.2022

Constitution of India, 1950- Article 50- **CCS (Pension) Rules, 1972**- Rule 54- Petitioner claimed that being second wife of deceased Bhola Ram she is entitled for family pension after the death of his first wife, who was recipient of the family pension- Held- The marriage of the petitioner solemnized with the deceased during subsistence of his first marriage, lawfully solemnized with Smt. Ramku Devi and as such, petitioner as second wife of deceased Bhola Ram, cannot be held entitled for family pension- Petition dismissed. [Para 4(i)(c)]

Cases referred:

Raj Kumari and others Vs Krishna and others 2015(14) SCC 511;

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

O R D E R

Petitioner's claim is that she is second wife of deceased Bhola Ram, so she is entitled to family pension, more so, after the death of his first wife, who was recipient of the family pension.

2. The facts as submitted by learned Senior Counsel for the petitioner are that:-

2(i) The petitioner got married to Bhola Ram in the year 1964. The marriage was solemnized as per customs and rituals prevailing in the area. Six children were born from this wedlock. Petitioner was not aware at the time of her marriage that Bhola Ram was already married and had a wife. She became aware of this fact much later.

2(ii) Bhola Ram superannuated in the year 1983. He died on 17.01.2002. Bhola Ram had nominated the petitioner in the official record for the purpose of family pension. However, claim for family pension was put forth by his first wife-Smt. Ramku Devi. The respondents conducted inquiry in the matter and came to the conclusion that Smt. Ramku Devi was the first and legally wedded wife of late Bhola Ram. On this basis, family pension was sanctioned and paid to Smt. Ramku Devi.

2(iii) The petitioner challenged the decision of the respondents in declining her the family pension by filing Civil Writ Petition No. 7571 of 2010 in this Court. The writ petition was dismissed on 27.07.2011.

2(iv) The petitioner's present claim is that Bhola Ram's first wife Smt. Ramku Devi has also died on 01.08.2015, hence, no other claimant qua family pension survives, but for the petitioner and her children. On such basis, she has now stacked her claim on family pension w.e.f. August 2015.

3. The arguments of learned Senior Counsel for the petitioner are that the petitioner was lawfully married to Bhola Ram. She gave birth tohis children. So, she is entitled for family pension after Bhola Ram's first wife passed away. Inviting attention to Rule 54 of CCS Pension Rules, learned Senior Counsel asserted that law envisages a situation where pension is payable to more than one wife. Learned Senior Counsel also placed reliance upon judgment of Madras High Court, dated 23.01.2020, titled ***C.Sarojini Devi Vs. The Director of Local Fund Audits and others, WP No.34592 of 2019,*** wherein, the decision of the official respondents in rejecting the proposal for family pension to the petitioner (therein) on the sole ground that when the petitioner married the deceased government servant, the marriage between the government servant and his first wife was subsisting, was held to be incorrect. The second wife was held entitled to the family pension.

The argument of learned Deputy Advocate General was that the petitioner had already invoked extraordinary jurisdiction of this Court for the same relief as claimed herein. Having lost in her earlier Civil Writ Petition No.7571 of 2010, it is not open for the petitioner to agitate the same issue once again. The prayer was made for dismissing the writ petition.

4. Observations:

4(i). Rule Position.

4(i)(a). Rule 54 of CCS Pension Rules, 1972 pertains to family pension. Sub Rule (7) thereof talks about the situation where family pension is payable to more than one widow of the deceased. Rule 54(7) is extracted hereinafter:

> *"(7) (a) (i) Where the family pension is payable to more widows than one, the family pension shall be paid to the widows in equalshares.*
>
> *(ii) On the death of a widow, her share of the family pension shall become payable to her eligible child:*

Provided that if the widow is not survived by any child, her share of the family pension shall not lapse but shall be payable to the other widows in equal shares, or if there is only one such other widow, in full, to her.

(b) Where the deceased Government servant or pensioner is survivedby a widow but has left behind eligible child or children fromanother wife who is not alive, the eligible child or children shallbe entitled to the share of family pension which the mother wouldhave received if she had been alive at the time of the death ofthe Government servant or pensioner.

Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares shall not lapse, but shall be payable to the other widow or widowsand/or to the other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child.

(c) Where the deceased Government servant or pensioner is survived by a widow but has left behind eligible child or children from a divorced wife or wives, the eligible child or children shall be entitled to the share of family pension which the mother would have received at the time of the death of the Government servant or pensioner had she not been so divorced.

Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares, shall not lapse, but shall be payable to the other widow or widows and/or to the other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child.

(d) where the family pension is payable to twin children, it shall bepaid to such children in equal shares:

Provided that when one such child ceases to be eligible, his/her share shall revert to the other child and when both of them cease to be eligible

the family pension shall be payable to the next eligible single child / twin children."

Second wife (widow) can be granted family pension, in those cases, where more than one marriage is permissible under the applicable personal laws of the deceased employee and not otherwise. This position has also been clarified by the Government of India decision No.(13) Below Rule 54 of CCS Pension Rules, which provides that second wife will not be entitled for family pension as legally wedded wife. The extract of the decision is as under:-

"(13) ***When second wife not entitled to the family pension.*** *-The Department of Pension and Pensioners' Welfare have since clarified that the second wife will not be entitled to family pension as a legally wedded wife. A copy of their clarification is enclosed for information.*

COPY OF D.O., LETTER NO. 1/39/86-P. & P.W., DATED 16-2-1987, RECEIVED FROM SHRI HAZARA SINGH, DEPUTY SECRETARY, DEPARTMENT OF PENSION AND P.W., NEW DELHI.

An extract of the relevant advice given by the Ministry of Law in the matter is enclosed. You may like to take necessary action in the matter accordingly.

EXTRACT

It is specifically a question arising under the Hindu Marriage Act, 1955. Under Rule 54 (7) of the CCS (Pension) Rules, 1972, in case a deceased Government servant leaves behind more than one widow or a widow and eligible offspring from another widow, they are entitled to family pension in respect of that deceased Government servant. Section 11 of the Act provides that any marriage solemnized after the commencement of the Act shall be null and void and can be annulled against the other party by a decree of nullity if the same contravenes any of the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Act. Section 5 (1) stipulates that the marriage cannot be legally solemnized when either party has a spouse living at the time of such marriage. Therefore, any second marriage by a Hindu male after

the commencement of 1955 Act during the lifetime of his first wife will be a nullity and have no legal effect. Such marriage cannot be valid on the ground of any custom. In fact, a custom opposed to an expressed provision of law is of no legal effect. So under these circumstances, the second wife will not be entitled to the family pension as a legally wedded wife."

4(1)(b). In ***2015(14) SCC 511, titled Raj Kumari and others Vs Krishna and others***, claim of pension was made by Krishna-the second wife of the deceased-Atam Parkash. The High Court decided in favour of the second wife. The Apex Court set aside the judgment delivered by the High Court and held as under:-

"14. Normally, pension is given to the legally wedded wife of a deceased employee. By no stretch of imagination one can say that the Plaintiff, Smt. Krishna was the legally wedded wife of late Shri Atam Parkash, especially when he had a wife, who was alive when he married to another woman in Arya Samaj temple, as submitted by the learned Counsel appearing for the Appellants. We are, therefore, of the view that the High Court should not have modified the findings arrived and the decree passed by the trail court in relation to the pensionary benefits. The pensionary benefits shall be given by the employer of late Shri Atam Parkash to the present Appellants in accordance with the rules and Regulations governing service conditions of late Shri Atam Prakash."

A Division Bench of Bombay High Court while deciding Writ Petition No. 2949 of 2019 vide judgment dated 16.02.2022, held that petitioner (thereinthe second wife) would not be entitled to family pension under the pension Rules notwithstanding the death of first wife as petitioner's marriage to the deceased itself was void under the provisions of Hindu Marriage Act.

The judgment of Madras High Court cited by the learned Senior Counsel is distinguishable on facts. In the said case, the marriage

between the deceased government servant and his first wife had dissolved in the year 2003.

4(1)(c). Against the backdrop of above legal position, facts of the instant case may be examined. It is the admitted case of the petitioner that her marriage was solemnized with the deceased during subsistence of his first marriage, lawfully solemnized with Smt. Ramku Devi. The petitioner as second wife of the deceased Bhola Ram, cannot be held entitled to family pension. Bhola Ram had died on 17.01.2002. He was survived even at that time by his lawfully married first wife Smt. Ramku Devi, who died on 01.08.2015. Smt. Ramku Devi had receivedthe family pension till her death on 01.08.2015.

In view of these facts considered in light of the applicable legal position, the petitioner being the second wife of deceased Bhola Ram, cannot be held entitled to family pension after the demise of his first wife Smt. Ramku Devi.

4(ii). There is one more reason for dismissing the present writ petition. The petitioner had earlier filed CWP No.7571 of 2010, seeking quashing of the decision of the official respondents to grant family pension to Smt. Ramku Devi, first wife of deceased Bhola Ram. While dismissing the writ petition on 27.07.2011, the Court had held that the deceased had solemnized second marriage with the petitioner during subsistence of his first marriage with Smt. Ramku Devi, which is void, therefore, there could not be a valid nomination in favour of the petitioner by the deceased for the payment of family pension. The Court also held that even otherwise the nominee is only a trustee of the rightful claimant and no relief cannot be granted to him. The judgment goes as under:-

> *"By means of present writ petition the petitioner seeks the quashment of Annexure P-8 whereby respondent No.4 the first wife of deceased Bhola Ram was granted family pension after his death.*

2. *Said Shri Bhola Ram had retired from the Army service and got reemployment in Police Department. The petitioner was entered in the service record by the deceased as his wife alongwith children born from the said wedlock. On attaining the age of superannuation, he was retired from the service on 30.6.1983. His pension was sanctioned by respondent No.5. He died on 17.1.2002 and the family pension was sanctioned in favour of the petitioner as per entry contained in the service-book. Later respondent No.4 sent a complaint to the Secretary (Home) to the Government of Himachal Pradesh claiming herself to be the first and legally wedded wife of deceased Bhola Ram. An enquiry was initiated, which was conducted by the Superintendent of Police, Bilaspur. It revealed that respondent No.4 Ramku Devi alias Ram Kaur was the legally wedded wife of deceased Bhola Ram, but there was no issue out of the said wedlock. Consequently, Bhola Ram solemnized second marriage with the petitioner. It also revealed during the enquiry that the petitioner had also requested the army authorities to release family pension of said Shri Bhola Ram to her being the second wife, but they rejected her claim and recommended full family pension to respondent No.4, who was already recorded as the wife of the deceased.*

3. *From the record, it stands established that the petitioner herein was kept as a wife by the deceased during the subsistence of the first marriage with respondent No.4, which is void. Therefore, there could not be a valid nomination in her favour by the deceased for the payment of pension. Even otherwise also, the nominee is the trustee of the rightful claimant and no relief can be granted to her. In view of the aforesaid circumstances, the prayer sought cannot be allowed. As such, the petition is dismissed."*

The petitioner has accepted the above verdict dismissing her writ petition for claim of family pension. In the instant writ petition, the petitioner has essentially prayed for the same relief as was claimed by her in her earlier writ petition. The only difference being that she has now restricted her claim from August 2015 i.e. when Smt. Ramku Devi, the first wife of

deceased Bhola Ram, died. The relief claimed by the petitioner cannot be granted to her on the principle of *res-judicata.*

For the aforesaid reasons, I find no merit in the claim of pension set forth by the petitioner-the second wife of the deceased employee.

5. Having turned down the pension claim of the second wife of the deceased employee, there is yet another facet which remains to be examined that is entitlement of children born from other marriages to the pension of their father.

5(i) As per Section 11 of the Hindu Marriage Act, any marriage shall be null and void, if the party has a spouse living at the time of marriage. According to Section 16 of the Act, children of such null and void marriage shall be legitimate.

5(ii) Government of India vide O.M. No. 1/16/96-P & PW(E) dated 02.02.1996 had clarified that pensionary benefits will be granted to the children of a deceased government servant from void orvoidable marriages as per their turn in accordance with Rule 54(8) of Pension Rules, 1972. It was also clarified that such children will have no claim whatsoever to receive family pension as long as legally wedded wife is the recipient of the same.

5(iii) In supersession of O.M. dated 02.02.1996, another O.M. was issued on 27.11.2012 to the effect that share of children from illegally wedded wife in the family pension shall be payable to them in the manner given under Rule 54(7) (c) of CCS (Pension) Rules, 1972 alongwith the legally wedded wife. It was also decided that in past cases, no recovery from previous beneficiary should be made.

5(iv) Thus the sum total about entitlement of children of null and void marriages to pension of their deceased father is that:-

(a) If deceased employee is survived by more thanone widow and children from these wedlocks, family pension will be shared

equally by first wife being legally wedded wife alongwith children from the other wedlocks.

The eligibility of each child for pension has to be considered in terms of Rule 54(8)(iii) of CCS (Pension) Rules, 1972.

(b) In terms of Rule 54(7)(b) and (c) of CCS (Pension) Rules, 1972:-

(i) On the death of legally wedded wife, who is not survived by any child eligible to receive pension, share of family pension to her stream would not lapse, but would be payable to eligible children from other wedlock (the other stream) in full i.e. 100%.

(ii) If children from the other wedlock become ineligible to receive pension, their share of the family pension would not lapse but would be payable to the legally wedded wife and her children as the case may be in full i.e. 100%.

(iii) In case deceased employee is survived by a widow and children from first wife however second marriage was solemnized after the death of first wife or after getting divorce from first wife, family pension will be shared equally by second widow being legally wedded wife alongwith children from first wedlock.

The writ petition filed by the second wife, claiming family pension, is accordingly dismissed with the above observations. All pending application(s), if any, also stand disposed of.

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

Between

1. OM PARKASH
   S/O SHRI HANS RAJ
   R/O OF VILLAGE KANGER KOTLI,

POST OFFICE ROPARI,
TEHSIL SARKAGHAT, DISTRICT MANDI,
HIMACHAL PRADESH.

2. SHRI AMAR SINGH
S/O SHRI LEKH RAM,
R/O VILLAGE THARU, POST OFFICE GOPALPUR,
TEHSIL SARKAGHAT, DISTRICT MANDI,
HIMACHAL PRADESH

AT PRESENT WORKING AS FIELD KANOONGO LANGNA,
TEHSIL DHARAMPUR, DISTRICT MANDI,
HIMACHAL PRADESH.

3. OM CHAND
S/O SHRI HIMMAT RAM,
R/O VPO CHOUNI THANA
TEHSIL SARKAGHAT, DISTRICT MANDI,
HIMACHAL PRADESH

AT PRESENT FIELD KANOONGO, BALDWARA,
TEHSIL SARKAGHAT, DISTRICT MANDI,
HIMACHAL PRADESH

.....PETITIONERS

(BY SH. SURINDER SAKLANI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (REVENUE)
TO THE GOVERNMENT OF HIMACHAL PRADESH
SHIMLA-2

2. DIVISIONAL COMMISSIONER,
MANDI DIVISION,
HIMACHAL PRADESH.

3. DEPUTY COMMISSIONER-CUM-COLLECTOR,
MANDI, DISTRICT MANDI,
HIMACHAL PRADESH

4. SHRI SHYAM LAL,
NAIB TEHSILDAR SADAR,
DISTRICT MANDI,
HIMACHAL PRADESH.

5. HEM SINGH, NAIB TEHSILDAR,
LAO, HP PWD MANDI,
DISTRICT MANDI,
HIMACHAL PRADESH.

6. TULSI RAM,
FIELD KANOONGO SAINJ,
TEHSIL CHACHYOT, DISTRICT MANDI,
HIMACHAL PRADESH.

7. GOPAL SINGH,
NAIB TEHSILDAR,
TEHSIL SARKAGHAT, DISTRICT MANDI,
HIMACHAL PRADESH

....RESPONDENTS

BY

MS DIVYA SOOD, DEPUTY ADVOCATE GENERAL,
FOR RESPONDENTS NO.1 TO 3.

MR. NIMISH GUPTA, ADVOCATE, FOR
RESPONDENTS NO.4, 5 & 7.

NONE FOR RESPONDENT NO.6 (EX-PARTE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO.771 OF 2019

Decided on: 10.08.2022

Constitution of India, 1950- Article 226- Redrawing the seniority list of Kanungo of District Mandi- Assigning seniority to petitioners by counting their service since their initial appointment- Representation rejected- Principles of No Work No Pay- Held- Petitioners have not been promoted to the next higher posts(s), for no fault on their part, but on account of wrong seniority assigned to them, they were kept away by authorities for no fault on their part, therefore, it is not a case where petitioners remained away from the work for their own reasons despite offer to them for performing the work but he was refrained on account of act of the employer- Principles of No Work No Pay not applicable- Petitioners are held entitled for consequential benefits including promotion on the basis of revised seniority list. (Para 20, 21)

Cases referred:

Union of India vs. K.V Janki Raman n (1991) 4 SCC 109;

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

O R D E R

Petitioners have approached this Court, seeking direction to redraw the Seniority List of Kanungos in District Mandi, by assigning seniority to petitioners by counting their service since their initial appointment, i.e. w.e.f. 31.1.1987, instead of counting their service, for the purpose of seniority, from completion of Settlement/ Revenue Training and passing of Departmental Examination.

2. Petitioners were appointed as Kanungos in the Revenue Department in District Mandi, Himachal Pradesh, on the basis of recommendations of Sub Regional Employment (Ex-servicemen Cell), Shimla and the H.P. Public Service Commission, vide Office Order dated 31.1.1987 (Annexure P-1). In final Seniority List, as existed on 31.12.1988, petitioners' seniority was decided on the basis of their date of appointment, i.e. 31.1.1987. They completed their Settlement Training, Revenue Training and passed Departmental Examination of Kanungo in the year 1991. Lateron, they were

placed in the Seniority List of Kanungos of District Mandi, on the basis of date of completion of training and passing of Departmental Examination, w.e.f. 8.10.1991.

3. In the final Seniority List of Kanungos of District Mandi, as it stood on 30.6.2000, to assign seniority to petitioners, date of appointment of petitioners was reflected as 8.10.1991. Petitioners submitted representation, dated 10.6.2005, for assigning them seniority from the date of appointment, i.e. 31.1.1987, as, on the basis of Rules related to assigning seniority of the candidates selected through H.P. Public Service Commission, seniority of such candidates is assigned from the date of appointment.

4. During intervening period, identical issue was raised by some Kanungos appointed in District Shimla, by filing OA No.572 of 1989 before Erstwhile H.P. State Administrative Tribunal, seeking direction to assign them seniority from the date of appointment, instead of completion of training/passing the Departmental Examination. The said OA was dismissed by the Erstwhile H.P. State Administrative, Tribunal vide order dated 29.9.1999.

5. The aforesaid order dated 29.9.1999 was assailed by aggrieved person by filing CWP No.238 of 2000, titled as Devinder Singh Kalta versus State of Himachal Pradesh. A Division Bench of this Court, vide order dated 15.12.2006, allowed the said petition and Office Order assigning seniority on the basis of date of completion of training/passing of Examination and order dated 29.9.1999, passed by erstwhile H.P. State Administrative Tribunal in OA No.572 of 1989, were quashed and set aside, with further direction to redraw the seniority of Kanungos, as per Rule 12 of the Himachal Pradesh Kanungo's Service Rules, 1951 (hereinafter referred to as 'Rules 1951'), on the basis of date of initial appointment. The said order was never assailed, rather was implemented by the Revenue Department.

6. On 20.2.2007, petitioner Om Prakash submitted a reminder to Deputy Commissioner Mandi, alongwith copy of Judgment dated 15.12.2006, passed by the Division Bench of High Court, with prayer to determine seniority from date of initial appointment, i.e. 31.1.1987.

7. Aforesaid representation was rejected by the Deputy Commissioner Mandi by passing a non-speaking order, dated 19.2.2007 (Annexure P-5). Before that, the Deputy Commissioner Mandi issued Tentative Seniority List of Kanungos, as it stood on 31.12.2006 (Annexure P-6), which was circulated on 15.2.2007, wherein petitioners were reflected to have been appointed on 8.10.1991.

8. Being aggrieved, petitioners, alongwith another person Ved Prakash, filed Original Application (OA) No.752 of 2007 before the Erstwhile H.P. State Administrative Tribunal. The said OA, on abolition of Erstwhile H.P. State Administrative Tribunal, was transferred to this High Court and was numbered as CWP(T) No.2148 of 2008. Vide order dated 31.8.2009, passed in this petition (CWP(T) No.2148 of 2008), rejection of representation dated 10.6.2005, vide order dated 19.2.2007 (Annexure P-5), was quashed and set aside and the Deputy Commissioner, Mandi was directed to decide the representation of the petitioners afresh by self-contained order, within a period of four weeks from that date.

9. In sequel to order dated 31.8.2009, passed in CWP(T) No.2148 of 2008, the Deputy Commissioner, Mandi, decided the representation of petitioners vide order dated 14.12.2009/6.1.2010, rejecting the claim of petitioners, by referring Rule 12 of Rules 1951 providing for determination of seniority of Kanungos on the basis of date of their substantive appointment and instructions issued by the Financial Commissioner-cum-Secretary (Revenue) to the Government of Himachal Pradesh, vide No.Rev.A(B)7-4/2005, dated 20.2.2006 as well as Para 6(ii) of Letter No.Rev-A(B)7-4/2005, dated 21.6.2006. Para 6(ii) of the instructions reads as follows:

> "Seniority of a person shall be determined from the date of substantive appointment, which means that seniority can not be reckoned prior to appointment in service i.e. service rendered during training period and also prior to passing the examination shall not be reckoned for seniority."

10. Feeling aggrieved by the aforesaid rejection of representation, petitioners have approached this Court.

11. In response to the petition, order passed by the Deputy Commissioner, Mandi, has been justified, by stating that the Seniority List, as it stood on 30.6.2000, was issued in the light of order passed by the erstwhile H.P. State Administrative Tribunal in OA No.409 of 1988 and further that this High Court, vide order dated 1.4.2003, passed in CWP No.869 of 2002, titled as State of Himachal Pradesh v. Sunder Dass, directed to follow the Seniority List dated 4.8.2002 and subsequent Seniority List has been issued accordingly and order dated 14.12.2009/6.1.2010, deciding the representation dated 10.6.2005 has been passed, keeping in view the aforesaid facts. Further that, judgment dated 15.12.2006, passed by this High Court in CWP No.238 of 2000, pertained to a Kanungo of District Shimla, whereas petitioners have been appointed in District Mandi and by referring to instructions and communications, mentioned in order of rejection of representation, it has been stated that assigning of seniority to the petitioners from 8.10.1991 is legal, valid and justified.

12. Rule 12 of Rules 1951, reads as under:

> "12. The seniority of the members of the service shall be determined by the date of their substantive appointment provided that if two or more members are appointed substantively on the same date, their seniority shall be determined according to the orders in which their names are entered by the Director of Land Records in the list of Kanungo candidates maintained in his office."

13. In OA No.572 of 1989 as well as in CWP No.238 of 2000, it was stand of the respondents-State that Seniority List of direct Kanungo candidates was drawn in accordance with relevant Rules, assigning seniority after completion of training/qualifying the Kanungo examination and obtaining Efficiency Certificate from the Director of Land Records from such date and, thus, assigning the seniority on the basis of merit, after satisfactory performance of duties and training/passing of examination from the date of passing of the examination was justified claiming that interse seniority was not to be determined on the basis of initial appointment. Stand of the State, approved by the erstwhile H.P. State Administrative Tribunal by dismissing OA NO.572 of 1989, was quashed and set aside by the Division Bench of this High Court in CWP No.238 of 2000.

14. Considering the submissions of the parties on the aforesaid issue, the Division Bench of this Court, vide judgment dated 15.12.2006, passed in CWP No.238 of 2000, has observed and held as under:

> "We have given our thoughtful considerations to the rival contentions of the parties. We are absolutely clear in our mind that there could not be two rules for fixing the seniority inter-se the candidates. By now it is well established that when ever there is a conflict between the Statutory Rules and the Executive Instructions, Statutory rules are to be preferred and given precedence. However, where the rules aforesaid are silent, it can be supplemented by issuing adequate Executive instructions which, of course, should not be contradictory or in conflict and opposed to the statutory rules or the rules of natural justice. In the instant case, admittedly, the petitioner and the private respondents are direct recruits and are similarly situated. A perusal of the rules, Annexure-P1 clearly demonstrates that the Kanungos are governed by the aforesaid rules and therefore, selection of the petitioner and private respondents being direct recruits, has been made in accordance with Rule 6 (c) (ii) of the said Rules. The method of appointment clearly provides that such appointment shall be made by selection from amongst the accepted kanungo candidates other than 'patwaris' who are in possession of a 'certificate of efficiency', from the Director of Land

Records. Whereas, the office order dated January 23, 1984 regarding the appointment of the petitioner, inter alia, contained the following conditions:

> "8. The inter seniority of the candidate shall be fixed on the basis of their merits and satisfactory performance of their duties training.
>
> 9. On successful completion of training and qualifying departmental examination he shall be eligible for appointment as Kanungo anywhere in any government department/ semi government organization./public undertakings subject to the availability of posts in the pay scale of 48-880 and may be posted in any part of Himachal Pradesh.
>
> Provided that no candidate will be appointed as Kanungo unless he is in possession of efficiency certificate issued by the director of land records, H.P. Shimla."

Taking a cue from the above conditions, the respondents have laid stress that the petitioner was bound by these conditions as having been accepted and that the final seniority list was required to be prepared on the basis of merit and as per the above conditions. But in our considered opinion, these conditions are opposed to rule 12 which provides the method of seniority. Rule 12 of the Rules aforesaid, can be extracted as under:

> "12. The seniority of the members of the service shall be determined by the <u>date of their substantive appointment provided that if two or more members are appointed substantively on the same date, their seniority shall be determined according to the orders in which their names are entered by the Director of Land Records in the list of Kanungo candidates maintained in his office</u>".
>
> (emphasis supplied)

As already said, there cannot be different criteria for determining the seniority in the same cadre, one as per the rules and another by applying the Executive instructions. If there is any such contradictory or contrary provision existing, that is essentially required to be ignored and the statutory rules shall have the prevalence. Therefore, we are not in agreement with the

> arguments advanced by the learned counsel for the respondents that conditions No. 8 and 9 would govern the seniority in the instant case more specifically when the statutory rules clearly occupies the field. The only mode to fix the seniority inter-se the petitioner and private respondents is Rule 12 ibid. Thus, keeping in view the related rules, in our opinion, the seniority of the Kanungo candidates shall be determined by the same date when the petitioner and private respondents were appointed substantively as per the orders in which their names as Kanungo candidates are entered by the Director Land Records in the list of Kanungo candidates maintained in his office. The acceptance of office order dated January 13, 1984, which lays down the conditions No. 8 and 9 above, by the petitioner will not stop him to claim seniority as per rules as applicable at that time.
>
> Keeping in view the above discussion and reasons, we hereby quash and set aside the office order Annexure-PA dated September 3, 1988 and the order dated September 29, 1999 passed by the learned H.P. Administrative Tribunal in O.A. No. 572 of 1989, Annexure-PH, and direct the respondents No.1 and 2 to redraw the seniority of the petitioner and the private respondents as per Rule 12 above. The petition is accordingly allowed."

15. As observed in judgment passed in CWP No.238 of 2000, in Shimla District, some Kanungos were assigned seniority from initial date of appointment, whereas others were assigned seniority from completion of training/passing of examination. Considering all these facts, the Division Bench quashed and set aside the Office Order dated 3.9.1988, assigning the seniority on the basis of completion of training/passing of examination and directed respondents No.1 and 2, i.e. State of Himachal Pradesh through Secretary (Revenue) and the Deputy Commissioner Shimla to redraw the seniority. The said judgment is equally applicable and binding in case of Kanungos of District Mandi.

16. Any instruction issued by State of Himachal Pradesh, contrary to the verdict Court, is not sustainable and is liable to be ignored and quashed. Therefore, in present case also, instruction referred to by respondents-State

for rejecting the claim of petitioners or any other such instruction(s) contrary to verdict of the Division Bench in CWP No.238 of 2000, referred supra, is/are liable to be quashed and, as such, are deemed to have been quashed and set aside.

17. Employer of all Kanungos in the State, in various Districts, is Government of Himachal Pradesh, through Administrative Department, i.e. Revenue Department and State of Himachal Pradesh was respondent in all cases referred supra, including CWP No.238 of 2000. Petitioners though have been appointed Kaungos in District Mandi, but in the Revenue Department of Himachal Pradesh, like the Kanungos appointed in District Shimla. Kanungos of both the Districts are governed by one and the same Rules, i.e. Rules 1951. No separate instruction has been issued by the Revenue Department with respect to conditions of service of Kanungos serving in different Districts of the State of Himachal Pradesh.

18. The present case is squarely covered by the aforesaid judgment of the Division Bench, passed in CWP No.238 of 2000, which directs the respondents, to assign seniority to the Kanungos from their initial date of appointment. The rejection order has been passed by the Deputy Commissioner Mandi after aforesaid verdict of Division Bench of this Court but contrary to the directions passed by the Court, despite the fact that Secretary (Revenue) to the Government of Himachal Pradesh was representing the State in both cases, i.e. CWP No.238 of 2000 and CWP(T) No.2148 of 2008, as well as also in present case and despite that stand has been taken by the respondents that judgment passed in CWP No.238 of 2000 was in a case filed by a Kanungo of District Shimla. Such plea is not sustainable being completely misconceived. All Kanungos in the State of Himachal Pradesh are to be governed by Rules 1951, referred supra, and these Rules are to be

interpreted and implemented in uniform manner throughout the State of Himachal Pradesh.

19. Accordingly, Order dated 14.12.2009/ 6.1.2010, passed by the Deputy Commissioner Mandi, rejecting representation dated 10.6.2005, is quashed and set aside, with direction to respondents No.1 and 2 to redraw the Seniority List, in reference, of the Kanungos of District Mandi alongwith others, as per Rule 12 of Rule 1951, by assigning seniority to the Kanungos from the date of initial appointment, but definitely subject to completion of training and passing of examination.

20. Since the petitioners have not been promoted to the next higher posts(s), for no fault on their part, but on account of wrong seniority assigned to them, they were kept away by authorities for no fault on their part, therefore, it is not a case where petitioners remained away from the work for their own reasons despite offer to them for performing the work but he was refrained on account of act of the employer. Therefore, as also, held by the Supreme Court in **Union of India vs. K.V Janki Raman** case, reported in **(1991) 4 SCC 109**, principle of 'No Work no Pay' is not applicable. Therefore, petitioners are also held entitled for consequential financial/ monetary benefits from due date on account of their promotion(s), if any.

21. Accordingly, petitioners shall also be entitled for all consequential benefits, including monetary benefits as well as other benefits, including promotion, accruing to them on the basis of revised/ redrawn Seniority List from the respective dates from which their immediate juniors have been conferred such benefits.

22. Respondents No.1 and 2 are directed to extend all consequential benefits to petitioners within two months, latest by 15.10.2022.

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

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

Between:-

NITIN KUMAR, S/O SHRI JAGDISH RAJ RATTAN, R/O VILLAGE GANGOT POST OFFICE BGHARWAIN, TEHSIL AMB, DISTRICT UNA, H.P.

....PETITIONER

(SH. ANKUSH DASS SOOD, SR. ADVOCATE WITH MR. NARESH KAUL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (SC, OBC & MINORITY) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. DIRECTOR SC, OBC & MINORITY, KASUMPTI, SHIMLA-9.

....RESPONDENTS

(SH. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.1077 of 2019
Reserved on:17.08.2022
Decided on: 22.08.2022

Constitution of India, 1950- Article 226- **Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995**- Section 32- Held- There is a clear mandate of law to every appropriate government to appoint in every establishment such percentage of vacancies

not less than 3% for persons or class of persons with disability of which 1% each is mandatorily required to be reserved for persons suffering from hearing impairment, blindness and locomotor disability or cerebral palsy- Petitioner was entitled to be appointed on regular basis from very inception- Petition allowed. (Para 10, 13 to 15).

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

O R D E R

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

> *"b) That respondents be directed to treat the appointment of the petitioner as appointment on regular establish from the date of his appointment i.e. with effect from November, 2006.*
>
> *c) That the respondents be directed to release all consequential benefits to the petitioner in view of his regularization with effect from November, 2006 i.e. increments, regular pay scale and all other benefits which are available to regular employees etc."*

2. Brief facts necessary for adjudication of the instant petition are that petitioner was appointed on the post of Peon in the office of Child Development Project Officer, Una, District Una, H.P. vide order dated 6.11.2006, on contract basis. Petitioner is a specially abled person, having 90% permanent disability on account of hearing impairment. The appointment of petitioner was made against the post, reserved for persons with disability. The precise grievance of the petitioner is that his appointment on contract basis was improper. As per petitioner, at the time of his appointment, there was no provision in the then existing Recruitment &

Promotion Rules for the post of Peon in the Department of Social & Women Welfare, where under the appointment could be made on contract basis. The said rules provided only for the regular appointments.

3. In response, the stand taken by the respondents is that the appointment of petitioner was made in pursuance to approval of the Government, conveyed vide letter dated 28.4.2006 (Annexure R-1). Further the case of respondents is that the Recruitment & Promotion Rules for the post of Peons were amended vide notification dated 19.4.2007 and the mode of appointment was prescribed as contract basis. It has also been maintained by the respondents that though the appointment of petitioner was prior to the issuance of notification dated 19.4.2007, yet the amended Recruitment & Promotion Rules would apply to the case of petitioner, as amendment of such rules was already in process since 2004. Even in the approval letter, issued by the State Government on 28.4.2006, there were directions to carry out amendments in Recruitment & Promotion Rules, if needed.

4. I have heard Mr. Ankush Dass Sood, learned Senior Advocate for the petitioner and Mr. Bharat Bhushan, learned Additional Advocate General for the respondents and have also gone through the records carefully.

5. The Recruitment & Promotion Rules for the post of Peons, issued by Social and Women Welfare Department, Government of Himachal Pradesh were notified on 20.5.1998 (for short, '1998 Rules'). As per these rules, there were 124 sanctioned posts of Peons. The prescribed mode of recruitment was 100% by transfer, failing which, by direct recruitment. These rules came to be amended vide notification dated 19.4.2007 (for short, '2007 Rules'). Clause 10 of 1998 rules was also amended, whereby the mode of recruitment was prescribed as 100% by transfer, failing which, by direct recruitment or on contract basis.

6. It is not in dispute that the petitioner was appointed on the post of Peon vide order dated 6.11.2006. At the time of appointment of the

petitioner, the 1998 Rules were in force. Since, these rules did not prescribe contract appointment as one of the modes of recruitment, appointment of petitioner made on contract basis cannot be upheld Petitioner had a right to be appointed strictly in accordance with 1998 Rules, which prescribed recruitment on regular basis only. All 124 posts of Peons were regular sanctioned posts. Merely, because the Government had issued communication dated 28.4.2006, conveying its approval for filling up of four vacant posts of Peons, reserved for physically handicapped persons on contract basis, 1998 Rules were not obliterated. 1998 Rules were framed under Article 309 of the Constitution of India and it is more than settled that the statutory rules cannot be superseded by administrative instructions.

7. Further, the 2007 Rules could not be applied retrospectively. The stand of the respondents that since the amended Recruitment & Promotion Rules were under process since 2004, it would apply to the case of the petitioner, deserves outright rejection.

8. Another question is whether appointment of persons with disabilities, on contract basis, can be said to be in consonance with the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, '1995 Act')? In my considered view the answer has to be in negative.

9. The 1995 Act has been enacted with most laudable object to provide equal opportunities to the persons with disabilities. Section 32 of the Act provides for identification of posts, which can be reserved for persons with disabilities whereas, Section 33 provide for reservation of such posts, which reads as under:-

> *"33. **Reservation of posts**.—Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from—*

(i) blindness or low vision;
(ii) hearing impairment;
(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

10. Thus, there is a clear mandate of law to every appropriate government to appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each is mandatorily required to be reserved for persons suffering from hearing impairment, blindness and locomotor disability or cerebral palsy.

11. The Hon'ble Supreme Court of India in Union of India vs. National Federation of the Blinds & others, 2013 (10) SCC 772 interpreted the purpose of 1995 Act as under:-

"24) Although, the Disability Rights Movement in India commenced way back in 1977, of which Respondent No. 1 herein was an active participant, it acquired the requisite sanction only at the launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002, which gave a definite boost to the movement. The main need that emerged from the meet was for a comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995 viz., the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which empowers persons with disabilities and ensures protection of their rights. The Act, in addition to its other prospects, also seeks for better employment opportunities to persons with disabilities by way of reservation of posts and establishment of a Special Employment Exchange for them. For the same, Section 32 of the Act stipulates for identification of posts which can be reserved for persons with disabilities. Section 33 provides for reservation of posts and Section 36 thereof

provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. The difference of opinion between the appellants and the respondents arises on the point of interpretation of these sections.

25) It is the stand of the Union of India that the Act provides for only 3% reservation in the vacancies in the posts identified for the disabled persons and not on the total cadre strength of the establishment whereas Mr. S.K. Rungta, learned senior counsel (R-1) appearing in person submitted that accepting the interpretation proposed by the Union of India will flout the policy of reservation encompassed under Section 33 of the Act. He further submitted that the High Court has rightly held that the reservation of 3% for differently abled persons in conformity with the Act should have to be computed on the basis of the total strength of a cadre and not just on the basis of the vacancies available in the posts that are identified for differently abled persons, thereby declaring certain clauses of the OM dated 29.12.2005 as unacceptable and contrary to the mandate of Section 33 of the Act."

12. The Hon'ble Apex Court in para-52 of above noted judgment further mandated as under:-

"Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) in consistent with the decision rendered by this Court."

13. Thus, keeping in view the object of 1995 Act there is no hesitation to hold that the purpose of reservation of posts under Section 33 of

1995 Act will not be fulfilled by making temporary, *ad-hoc* or contract appointments. Such an interpretation will make the very purpose of 1995 Act otiose. The reservation mandated under Section 33 of the Act will necessarily mean to provide employment, which has permanency attached to it and that can only be by way of regular appointment.

14. Reverting to the facts of the instant case, admittedly, petitioner is suffering from 90% hearing impairment and also was appointed against the backlog vacancies for persons with disability. Thus, petitioner is entitled for all protection as envisaged under 1995 Act. View from any perspective the petitioner was entitled to be appointed on regular basis from very inception.

15. In view of the above discussions, the petition is allowed. Respondents are directed to treat the appointment of the petitioner on regular basis from the date of his initial appointment i.e. 6.11.2006. The respondents are further directed to release all consequential benefits to the petitioner within eight weeks from the date of production of copy of this judgment by the petitioner before respondent No.2.

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

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

Between

BIPAN CHAND SON OF SHRI
KRISHAN CHAND RESIDENT
OF VILLAGE AND POST OFFICE
SALIANA, TEHSIL PALAMPUR,
DISTRICT KANGRA HP

.....PETITIONER

(BY SH. SANJEEV BHUSHAN,
SR. ADVOCATE WITH SHRI
RAKESH CHAUHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (IRRIGATION &
PUBLIC HEATH) TO THE GOVERNMENT
OF HIMACHAL PRADESH, SHIMLA-2

2. ENGINEER-IN-CHIEF, IRRIGATION AND
PUBLIC HEALTH, HIMACHAL PRADESH,
SHIMLA-1

....RESPONDENTS

(BY RAJU RAM RAHI, DEPUTY
ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.5846 OF 2019
Decided on: 30.08.2022

Constitution of India, 1950- Articles 226 and 14- FRSR-Note 18 – Fixation of pay- Representation of petitioner to step up his pay equal to the pay fixed for Junior Officer has been rejected- Stepping up of pay of senior on promotion drawing less pay than his junior- Held- No rationality or reasonableness in the decision of respondents rejecting the claim of petitioner for fixing his pay at par to his junior rather the rejection smacks arbitrariness which is anti-thesis of Article 14 of the Constitution of India- Petitioner is entitled for fixing his pay at par with his junior with all consequential benefits including pensionary benefits- Petition disposed of. (Para 14, 17)

Cases referred:

Gurcharan Singh Grewal and another vs. Punjab State Electricity Board and others (2009)3 SCC 94;

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

O R D E R

Petitioner has approached this Court for quashing communication dated 5th March, 2013 (Annexure A2) whereby his

representation, to step up his pay equal to the pay fixed for Junior Officer namely Engineer Arun Prashar, has been rejected. Further prayer in petition is to direct the respondents to grant benefit of stepping up of pay enhancing his pay as on 1.1.2006 from 49490 to 49740 with subsequent consequential pay fixation till his superannuation and other benefits including pensionery benefits, if any, on account thereof and to pay arrears of benefits w.e.f. 1.1.2006 by fixing pay of applicant at par with his junior along with interest at the rate of 9% per annum.

20. In the pleadings of parties, there were some discrepancies in the dates of appointment, promotion, etc. with respect to petitioner as well as Arun Prashar and, therefore, department was directed to impart instructions. In response thereto, learned Deputy Advocate General has placed instructions dated 10.5.2022 on record.

21. Perusal of pleadings as well as instructions imparted during the course of hearing indicates that petitioner's case is that he was appointed as Junior Engineer on regular basis with respondent-department on 18.7.1978 and was promoted as Assistant Engineer on regular basis on 25.6.1985 and was further promoted to the post of Executive Engineer on 28.1.1999 and was promoted as Superintending Engineer on 6.6.2011 and on promotion as Superintending Engineer his pay on 6.6.2011 was fixed on Rs.61010 in pay scale of 37400-67000+8700 GP and superannuated as Superintending Engineer on 30.4.2015, whereas one Arun Prashar was appointed as Junior Engineer in the year 1980 about two years later than petitioner and who was promoted as Assistant Engineer on 22.5.1986 about one year later than petitioner and was promoted as Executive Engineer on 9.4.2007 about and later than petitioner and superannuated on 31.7.2014 as Executive Engineer and as such Arun Prashar remained junior to the petitioner since initial appointment.

22. In revision of pay scale w.e.f. 1.1.986, pay of petitioner as Assistant Engineer was fixed as Rs.2200/- w.e.f. 1.1.1986 in pay scale of Rs.2200-4000 with next date of increment on 01.01.1987 whereas pay of junior (Arun Prashar) was fixed Rs.2200 but w.e.f. 22.05.1986 (the date of promotion as Assistant Engineer) in the pay scale of Rs.2200-4000 with next date of increment 01.5.1987.

23. In revision of pay scale w.e.f. 1.1.1996, pay of the petitioner as Assistant Engineer was fixed as Rs.12000 w.e.f. 1.1.1996 in pay scale of Rs.12000-15500 with date of next increment on 1.1.1997. Pay of his junior (Arun Prashar) was also fixed 12000 w.e.f. 1.1.1996, in the pay scale of 12000-15500 with next date of increment on 1.1.1997.

24. On 01.06.2003 pay of petitioner was Rs.15,900 whereas pay of junior Arun Prashar, as on 1.1.2004, was Rs.15500/- and since 1.6.2005 till 1.06.2006 pay of petitioner remained Rs.16800/- whereas pay of Arun Prashar till 1.1.2006 remained Rs.15900/-. Pay of the petitioner and Arun Prashar as on 31.12.2005 was 16800/- and 15900/- respectively. Therefore, till revision of pay scale w.e.f. 1.1.2006 petitioner was senior to Arun Prashar as Assistant Engineer and Executive Engineer and pay of petitioner was also higher.

25. On revision of pay scale w.e.f. 1.1.2006 pay of the petitioner was fixed as Rs.49490/- whereas pay of his junior Arun Prashar was fixed as Rs.49740/-.

26. Petitioner came to know about fixation of higher pay of his junior in the year 2010 and, therefore, he made representation for applying principle of stepping up for fixing his pay at par with his junior Arun Prashar.

27. The representation of petitioner was rejected by Engineer-in-Chief IPH Shimla vide dated 5th March, 2013 (Annexure A-2) on the ground that such anomaly had arisen due to option exercised by the Junior Officer to

fix his pay in the revised pay scale before granting annual increment in the revised Pay Band and Grade Pay effective from 1.1.2006, whereas there was no such opportunity available to the petitioner being his date of increment as 01.06.2006 and further that junior was promoted to the higher post of Executive Engineer on 9.4.2007 after getting higher pay scale of Rs.14,300-18500 under 4-tier Pay scale on completion of 14 years as Assistant Engineer whereas petitioner got his higher pay scale of Rs.14300-18150 after his promotion and thus pay of junior was already higher as Assistant Engineer and anomaly had arisen due to exercise of option by Junior in revised pay scale w.e.f. 1.1.2006 and not by application of RF-22(1)(a)(i).

28. In response to petition, one more additional ground has been taken that though petitioner was appointed as Junior Engineer in the year 1978 and Arun Prashar was appointed in the year 1980 but thereafter petitioner was appointed as Assistant Engineer afresh on his selection through Himachal Pradesh Public Service Commission during the year 1985 whereas Arun Prashar continued working as Junior Engineer in the Department and was promoted later on during 1986 as Assistant Engineer and, therefore, method of recruitment of both Officers was different and thus stepping up, as prayed, was not admissible.

29. Petitioner was senior as Junior Engineer to Arun Prashar. Even if it is considered that after appointment through Himachal Pradesh Public Service Commission, he is to be considered a fresh appointee as Assistant Engineer and, thus, not having any claim as a promotee then also he was appointed as Assistant Engineer on 26.6.1985 whereas petitioner was promoted to the same cadre i.e. as Assistant Engineer on 28.5.1986 i.e. about one year after the petitioner and, therefore, Arun Prashar remained junior to petitioner in the cadre of Assistant Engineer also and, thereafter, petitioner was promoted as Executive Engineer on 28.1.1999 whereas Arun Prashar was promoted as Executive Engineer on 9.4.2007. Till then Arun Prashar was

getting less pay than the petitioner. Therefore, even if seniority of petitioner with respect to Arun Prashar, on the basis of posting as Junior Engineer is ignored, then also petitioner remained senior in the cadre of Assistant Engineer to Arun Prashar and till 31.12.2005 petitioner was getting higher pay with basic pay 16800/- whereas Arun Prashar was drawing at the rate of Rs.15900/- per month. Thereafter, as explained by respondents, on account of exercising of option in the revised pay scale Arun Prashar was granted higher pay at the rate of Rs.49740/- per month in comparison to pay of petitioner of Rs.49490/- per month w.e.f. 1.1.2006.

30. Government of India's orders published in Swamy's Compilation of FRSR 20th Edition 2010 contained in Note-18 regarding removal of anomaly by stepping up of pay of senior on promotion drawing less pay than his junior are relevant for the purpose of adjudication of present petition, which reads as under:-

> "(18) **Removal of anomaly by stepping up of pay of Senior on promotion drawing less pay than his junior.----** (a) *As a result of application of FR 22-C. [Now FR 22 (1) (a) (1)].* In order to remove the anomaly of a Government servant promoted or appointed to a higher post on or after 1-4-1961 drawing a lower rate of pay in that post than another Government servant junior to him in the lower grade and promoted or appointed subsequently to another identical post, it has been decided that in such cases the pay of the senior officer in the higher post should be stepped up to a figure equal to the pay as fixed for the junior officer in that higher post. The stepping up should be done with effect from the date of promotion or appointment of the junior officer and will be subject to the following conditions, namely:-
>
> (a) Both the junior and senior officers should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;

(b) The scales of pay of the lower and higher posts in which they are entitled to draw pay should be identical;

(c) The anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments, the above provisions will not be invoked to step up the pay of the senior officer.

The orders refixing the pay of the senior officers in accordance with the above provisions shall be issued under FR 27. The next increment of the senior officer will be drawn on completion of the requisite qualifying service with effect from the date of refixation of pay.

[GI, M.F, OM. No. F. 2 (78)-E, III (A)/66, dated the 4th February, 1966]

(b) *As a result of FR 22 (1) (a) (1) application in the revised scales of CCS (RP) Rules, 2008*.----In cases, where a Government servant promoted to a higher post before the 1st day of January, 2006, draws less pay in the revised pay structure than his junior who is promoted to the higher post on or after the 1st day of January, 2006, the pay in the pay band of the senior Government servant should be stepped up to an amount equal to the pay in the pay band as fixed for his junior in that higher post. The stepping up should be done with effect from the date of promotion of the junior Government servant subject to the fulfilment of the following conditions, namely:-

(a) both the junior and the senior Government servants should belong to the same cadre and the posts in which

they have been promoted should be identical in the same cadre.

(b) the pre-revised scale of pay and the revised grade pay of the lower and higher posts in which they are entitled to draw pay, should be identical.

(c) the senior Government servants at the time of promotion have been drawing equal or more pay than the junior.

(d) the anomaly should be directly as a result of the application of the provisions of Fundamental Rule 22 or any other rule or order regulating pay fixation on such promotion in the revised pay structure. If even in the lower post, the junior officer was drawing more pay in the pre-revised scale than the senior by virtue of any advance increments granted to him, provisions of this Note need not be invoked to step up the pay of the senior officer.

Subject to the provisions of Rule 5, if the pay as fixed in the officiating post under sub-rule (1) is lower than the pay fixed in the substantive post, the former shall be fixed at the same stage as the substantive pay.

[Note 10 below Rule 7 of CCS (RP) Rules, 2008]"

31. In present case, petitioner was promoted to higher post prior to 1.1.2006 whereas Arun Prashar was promoted after 1.1.2006 and both Arun Prashar as well as petitioner belonged to same cadre i.e. Assistant Engineer and they have been promoted to identical posts in the same cadre i.e. Executive Engineer. The pre-revised scales of pay and revised pay grade, of lower and higher posts in which they were entitled to draw pay, were identical and petitioner, at the time of promotion i.e. on 28.1.1999, was drawing basic pay fixed at the rate of Rs.13500/- in comparison to basic pay of Arun Prashar at the rate of Rs.13125 i.e. petitioner was drawing more pay than his junior

and anomaly in the pay of petitioner and junior is directly as a result of provisions of orders regulating pay fixation in the revised pay structure and petitioner was not granted any advance increment for fixation of more pay of Junior Officers in the pre-revised scale and, therefore, instructions contained in Clause (b) of above referred Note are completely applicable in the present case which directs that in such situation, stepping up should be done w.e.f. date of promotion of Government servant.

32. In the aforesaid facts and circumstances, I do not find any rationality or reasonableness in the decision of respondents rejecting the claim of petitioner for fixing his pay at par to his junior rather the rejection smacks arbitrariness which is anti-thesis of Article 14 of the Constitution of India.

33. Learned counsel for the petitioner has also referred pronouncement of the Apex Court in ***Gurcharan Singh Grewal and another vs. Punjab State Electricity Board and others*** reported in ***(2009)3 SCC 94,*** wherein it has been observed that it is well settled principle of law that senior cannot be paid lesser salary than his junior and in such circumstances, even if there was difference in incremental benefits in the scale given to Government servants such anomaly should not have been allowed to continue and ought to have been rectified to fix the pay in parity with the junior officers.

34. Plea of respondents that petitioner and Arun Prashar were belonging to different cadres before promotion is not sustainable because even if it is considered that petitioner joined as Assistant Engineer as direct appointee then also Arun Prashar on his promotion joined the same cadre as junior to him and anomaly in the pay arose when petitioner and Arun Prashar had already been promoted to the same next cadre of Executive Engineer, as revision of pay scale took place after promotion of both but w.e.f. 1.1.2006.

35. In view of Government instructions, referred supra, and considering the facts of present case, narrated hereinabove, and discussion hereinbefore, I am of considered opinion that petitioner is entitled for fixing his

pay at par with his junior from the date of promotion of his junior w.e.f. 9.4.2007 with all consequential benefits including pensionary benefits and, therefore, respondent department is directed to take all necessary steps accordingly and to extend benefits to petitioner as expeditiously as possible latest by ***30th October, 2022***, failing which respondent department shall also be liable to pay interest at the rate of 5% per annum and interest component shall be recovered by Government from the Officer Incharge responsible for delay in complying the aforesaid direction.

Petition stands disposed of in above terms, so also pending application, if any.

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

Between:-

ASHA RAM, S/O SH. KANHIYA LAL, R/O VILLAGE RIHAL, POST OFFICE DHUNDAN, TEHSIL ARKI DISTRICT SOLAN, H.P. PRESENTLY WORKING AS SUPERVISOR IN MUNICIPAL CORPORATION SHIMLA, H.P.

....PETITIONER.

(BY MR. JAI RAM SHARMA, ADVOCATE)

AND

MUNICIAL CORPORATION SHIMLA HP, THROUGH ITS COMMISSIONER.

....RESPONDENT.

(BY MR. NARESH GUPTA, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 6243 OF 2020
Reserved on: 10.08.2022

Decided on: 17.08.2022

Constitution of India, 1950- Article 226 – Services of the petitioner were regularized as mate whereas his services were liable to be regularized as supervisor as he always performed the duty of supervisor- Held- No tangible material placed on record to prove that petitioner worked as supervisor- However, petitioner becomes entitled for regularization w.e.f. 1.1.2006- Petition partly allowed. (Para 10, 12, 14)

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

O R D E R

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

> *"(a) That the impugned order dated 17.07.2018 at Annexure A-1 may kindly be quashed and set aside and further respondent may kindly be directed to regularise the services of applicant as supervisor with all consequential benefits w.e.f. due date, in the interest of justice.*
> *(b) that the applicant may kindly be held entitled for regularisation after completion of 8 years of daily waged services i.e. 25.10.2003, with all consequential benefits, in the interest of justice."*

2. The case as set-up by petitioner is that though he was appointed as mate on daily wage basis by Respondent No.1 w.e.f. 26.10.1995, but he always performed the duties of supervisor. The services of petitioner were regularised as mate w.e.f. 20.4.2007, whereas his services were liable to be regularised as supervisor w.e.f. 25.10.2003. Respondent had designated petitioner as supervisor in the year 2016.

3. Petitioner preferred OA 6564 of 2017 before the SAT with the prayer to regularise his services after 8 years of daily wage service. The

application filed by petitioner was decided by the SAT vide order dated 27.12.2017 in following terms:

> ***"The original application is disposed of in terms of the aforementioned judgment in CWP No. 2415/2012, with a direction to the respondent corporation, through its Commissioner, that subject to the verification of records and on findings the applicants to be similarly situate as above, benefit of the said judgment, if the same has attained finality and implemented, shall also be extended to them along with consequential benefits, if any, as per law, within three months from the date of production of certified copy of this order along with copy of the aforesaid judgment, before the said authority by the applicants."***

4. In compliance to aforesaid order, the Commissioner, Municipal Corporation, Shimla passed the impugned order dated 17.07.2018, Annexure A-1. by taking into consideration the following facts:

> *"That the applicant Sh. Asha Ram, s/o Sh. Kanhaiya Lal was initially engaged as a daily waged Mazdoor w.e.f. October, 1995 and he worked as Mazdoor w.e.f. October, 1995 to December, 1997. Thereafter the applicant has worked as Mate on daily wage basis w.e.f. January, 1998. Accordingly, the services of the applicant were initially regularized as Mazdoor vide order dated 19.04.2007 after completion of 8 years of services with 240 days in each year on lower pay scale post as per Govt. Instructions for regularization of services of Daily Wagers issued vide letters dated 08.07.1999 and 09.06.2006."*

5. Petitioner has now assailed impugned order Annexure A-1 on the grounds that rejection of his claim was arbitrary and the finding regarding his service as daily wage Mazdoor from October 2005 to December 2007 was

incorrect. Since the petitioner has performed the job of supervisor right from the beginning of his engagement, his services were required to be regularised in said grade on completion of eight years i.e. in 2005. The impugned order has also been described as discriminatory.

6. In response, the respondent maintained that petitioner worked as Mazdoor w.e.f. October, 1995 to December, 1997. Thereafter the petitioner worked as Mate on daily wage basis w.e.f. January, 1998. Accordingly, the services of the petitioner were initially regularized as Mazdoor vide order dated 19.04.2007 after completion of 8 years of services with 240 days in each year on lower pay scale post as per Govt. Instructions for regularization of services of Daily Wagers issued vide letters dated 08.07.1999 and 09.06.2006. The services of petitioner were regularised as mate vide order dated 5.4.2012 retrospectively w.e.f. 20.4.2007. It has specifically been denied that petitioner worked as supervisor.

7. I have heard learned counsel for parties and have also gone through the documents available on file.

8. In the first instance the petitioner had approached the SAT by filing OA 6564 of 2017 and had remained satisfied with the order dated 27.12.2017, therefore, now the petitioner cannot be allowed to claim any relief which may be beyond the scope of aforesaid order passed by SAT. As per said order respondent was under direction to afford benefits of judgment in CWP 2415 of 2015 (***Mathu Ram Vs Municipal Corporation***) to the petitioner in case petitioner was found similarly placed. In CWP 2415 of 2012, right of regularisation of daily waged worker after completion of eight years' continuous service was upheld on the basis of judgment passed by a Division Bench of this Court in CWP 2735 of 2010 tilted Rakesh Kumar Vs State of H.P. and others.

9. As per the respondent-corporation, petitioner was engaged as daily waged Mazdoor w.e.f. October, 1995 and he worked in the same capacity

till December, 1997. Petitioner worked as Mate on daily wage basis w.e.f. January, 1998 and his services were regularized as Mazdoor on completion of 8 years w.e.f. 19.4.2007. The respondent has contended that since the petitioner had completed 8 years' daily wage service as Mate on 31.03.2007, therefore, his services were rightly regularized as Mate w.e.f. 19.04.2007, as per the policy of the Government. Reference has also been made to Government instructions dated 8.7.1999 and 9.6.2006. As per said instructions services of daily wagers, who had worked for less than 8 years on higher wages or a higher pay scale post, was to be considered for regularisation by combining the service both in lower scale post and higher scale post and was liable to be regularised on lower scale post as the incumbent would not have completed requisite 8 years daily wage service on higher scale post.

10. Petitioner has not made any endeavour to rebut the fact situation as provided by respondent. Save and except for the bald assertion made in the petition, petitioner has not placed on record any tangible material to prove his claim of having worked as supervisor or the mate, as the case may be, from the date of initial engagement. Even after specific findings recorded to this effect in the impugned order Annexure A-1, petitioner has failed to seriously contest such findings. It is also the case of respondent that vide order 5.4.2012 petitioner was regularised as mate from retrospective date i.e. 20.4.2007. This order has also not been assailed by the petitioner. Thus, there is no escape from concluding that petitioner worked as daily wage Mazdoor from October, 1995 till December 1997 and thereafter worked as Mate from January 1998 onwards. Further, nothing has been said on behalf of petitioner regarding applicability or interpretation of instructions dated 8.7.1999 and 9.6.2006 relied upon by the respondent.

11. In above view of matter, the only issue that needs adjudication is whether the impugned order Annexure A-1 was compliant with the judgment

passed in CWP 2415 of 2012 (Mathu Ram Vs Municipal Corporation, Shimla) in terms of directions issued by SAT vide its order dated 27.12.2017?

12. Petitioner had worked as Mate on daily wage since January, 1998 as already concluded above. That being so, petitioner would have completed 8 years continuous daily wage service on 31.12.2005 and thus would have become entitled for regularization w.e.f. 01.01.2006. However, vide impugned order the regularisation of petitioner w.e.f. 19.04.2007 has been justified, which cannot be held to be compliant with the judgment passed by this Court in CWP No. 2415 of 2012, titled Mathu Ram vs. M.C. Shimla and others.

13. Lastly Petitioner placed reliance on the judgment passed by a Division Bench of this Court on 12.08.2021 in ***CWPOA No. 4952 of 2020,*** titled as ***Amolak Ram & others vs. Municipal Corporation, Shimla & another*** in support of his claim for regularisation as Supervisor. The contention so raised on behalf of the petitioner deserves to be rejected simply on the ground that the petitioner cannot be allowed to claim relief beyond the scope of directions passed by H.P. State Administrative Tribunal in O.A. No. 6564 of 2017, as earlier held above. In *Amolak Ram* the petitioners therein were conferred the status of supervisors and the only dispute was in respect of date of such conferment, whereas in the instant case conferment of status of supervisor on petitioner, during relevant period, has neither been admitted by the respondent not otherwise proved by the petitioner.

14. In view of the above discussion, the petition is partly allowed and the order dated 17.07.2018, Annexure A-1 is held to have incorrectly upheld 20.4.2007 as the date of regularisation of petitioner on the post of mate. The impugned order Annexure A-I is quashed and set aside to the extent as held above. Accordingly, respondent is directed to regularized the petitioner immediately from the date he completed of 8 years' daily wage service as mate commencing from January, 1998, in terms of the observations made

hereinabove, with all consequential benefits. Needful be positively done within four weeks from the date of production of copy of this order before respondent. The petition is accordingly disposed of, so also, the pending applications, if any.

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

Between:-

SH. PRITAM SINGH SON OF SH. KHAJAN SINGH, RESIDENT OF VILLAGE LODEWALA,
P.O. HARIPUR KHOL, TEHSIL PAONTA SAHIB
DISTRICT SIRMAUR, H.P.
EX. FOREST WORKER, FOREST DIVISION
NAHAN, DISTRICT SIRMAUR, H.P.

...PETITIONER

(BY SH. A.K.GUPTA, ADVOCATE).

AND

1. THE STATE OF HIMACHAL PRADESH,
   THROUGH PRINCIPAL SECRETARY (FORESTS),
   WITH HEADQUARTERS AT SHIMLA-2, H.P.

2. THE PRINCIPAL CHIEF CONSERVATOR OF FORESTS
   WITH HEADQUARTERS AT SHIMLA, H.P.

3. THE CONSERVATOR OF FOREST,
   FOREST CIRCLE NAHAN, DISTT. SIRMAUR, H.P.

4. THE DIVISIONAL FOREST OFFICER,
   FOREST DIVISION NAHAN,
   DISTRICT SIRMAUR, H.P.

....RESPONDENTS

(BY SH. ARVIND SHARMA,

ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 6576 of 2019
Reserved on: 22.08.2022
Decided on: 24.08.2022

Constitution of India, 1950- Article 226 – Work charge status on completion of 8 years of continuous service on daily wage basis- Petitioner appointed as Beldar on daily wage basis on 1.1.1995 and his services were regularized w.e.f. 14.09.2007- Held- Action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory, hence cannot be sustained- Petition allowed. (Para 9, 11)

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

O R D E R

By way of instant petition, the petitioner has prayed for following substantive relief:

> *a) That Annexure P-1 may be quashed and set-aside and the respondents may be ordered to grant work charge status to the applicant from the date he completed 8 years of service as per the law laid down in Rakesh Kumar's case, with all the consequential benefits incidental thereof.*

2. The case as set-up by the petitioner is that he was appointed as "beldar" in the Forest Department of Government of Himachal Pradesh w.e.f. 01.01.1995 on daily wage basis. His services were regularized w.e.f. 14.09.2007. The grievance of the petitioner is that he was entitled for work charge status on completion of 8 years' continuous service on daily wage basis in terms of the judgment rendered by a Division Bench of this Court in ***CWP No. 2735 of 2010***, titled ***Rakesh Kumar*** vs. ***State of H.P. and others.*** Having remained unsuccessful in getting his grievance redressed from the respondents, petitioner approached this Court by way of CWP No. 7456 of

2013. A Division Bench of this Court disposed of the Civil Writ Petition No. 7456 of 2017 in following terms:

> *"We do not pronounce on the merits of the case of the petitioner or that of the State which opposes the present petition but direct that the second respondent shall consider/determine as to whether the facts in this case are similar or identical to those in Rakesh Kumar's case supra. The determination shall be by reasoned and speaking order after granting the petitioner an opportunity of being heard and placing on record such other and further material on which he seeks to rely. If on determination, the facts in this case are found to be identical to those in Rakesh Kumar's case, the petitioner shall be granted the same relief. Such determination shall be done within eight weeks from today. Petition stands disposed of."*

3. In compliance to aforesaid order passed in CWP No. 7456 of 2013, the petitioner submitted a representation to respondent No.2 and the representation of the petitioner was rejected by respondent No.2 vide office order dated 17.12.2015, Annexure P-1. Hence, the petitioner is before this Court by way of instant petition.

4. The contention of petitioner is that he has been wrongly denied the benefit of judgment passed by a Division Bench of this Court in CWP No. 2735 of 2010, titled Rakesh Kumar vs. State of H.P. and others, on the ground that the Forest Department did not have work charge establishment. As per petitioner, such findings are not tenable in view of the judgment passed by a Division Bench of this Court in State of H.P. and others vs. Ashwani Kumar, CWP No. 3111 of 2016 and also the judgment dated 23.05.2022 passed by the Division Bench of this Court in LPA No. 160 of 2021. Petitioner has also relied upon documents Annexure P-2 and Annexure P-1/A to contend that the stand

of the respondents stating unavailability of work charge establishment in Forest Department is incorrect.

5. Respondents have contested the claim of the petitioner. Rejection order dated 17.12.2015, Annexure P-1, has been justified on the ground that there was no work charge establishment in the Respondent-Department. As per respondents, the services of the petitioner were rightly regularized w.e.f. 14.09.2007. It has further been contended on behalf of the respondents that benefits under Annexure P-2 weregiven to the persons, who were initially engaged in the year 1984. Since the petitioner was engaged during the year 1995, he was not entitled for grant of work charge status.

6. I have heard learned counsel for the parties and have also gone through the documents available on the file.

7. Admitted facts of the case are that the petitioner was appointed as Beldar on daily wage basis in the Respondent-Department w.e.f. 01.01.1995 and his services were regularized w.e.f. 14.09.2007.

8. The respondents were under direction vide judgment passed in CWP No. 7456 of 2013 to examine the case of the petitioner in the light of the judgment passed in CWP No. 2735 of 2010, titled Rakesh Kumar vs. State of H.P. and Others. The impugned consideration order, Annexure P-1 reveals that the case of the petitioner was held to be distinct from Rakesh Kumar (supra) on the ground that there was no work charge establishment in the Respondent-Department.

9. Judging the ground of rejection against the contention raised on behalf of the petitioner, this Court is of considered view that the impugned rejection order, Annexure P-1, cannot be sustained in view of the judgment passed by a Division Bench of this Court in CWP No. 3111 of 2016, titled State of H.P. & Others vs. Ashwani Kumar, in which it has been held as under:

> *"6. Having carefully perused material available on record, especially judgment rendered by this Court in*

Ravi Kumar v. State of H.P. and Ors., as referred herein above, which has been further upheld by the Hon'ble Apex Court in Special Leave to Appeal (C) No. 33570/2010 titled State of HP and Ors. v. Pritam Singh and connected matters, this Court has no hesitation to conclude that there is no error in the finding recorded by the learned Tribunal that work charge establishment is not a pre-requisite for conferment of work charge status. The Division Bench of this Court while rendering its decision in CWP No. 2735 of 2010, titled Rakesh Kumar decided on 28.7.2010, has held that regularization has no concern with the conferment of work charge status after lapse of time, rather Court in aforesaid judgment has categorically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV worker (Beldars) and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged category and as such, there is an obligation cast upon the department to consider the case of daily waged workman for conferment of daily work charge status, being on a work charged establishment on completion of required number of years in terms of the policy. In the aforesaid judgment, it has been specifically held that benefits which accrued on workers as per policy are required to be conferred by the department."

10. Recently in ***State of Himachal Pradesh vs. Smt. Reema Devi, LPA No. 161 of 2021,*** decided on 23.05.2022, a Division Bench of this Court following Ashwani Kumar's case (supra) held as under in the case where also the respondent department was involved: -

"11. Now adverting to the facts of the instant case, the grant of work charge status to late Shri Het Ram has been denied on the ground that Himachal Pradesh

> *Forests Department had no work charge establishment. In Ashwani Kumar's case (supra) also right of the petitioner therein for grant of work charge status was considered when the HPPWD had ceased to be a work charge establishment.*
>
> *12. This Court while delivering judgment in Ashwani Kumar's case (supra) had, thus, decided the principle that work charge establishment was not a pre-requisite for conferment of work charge status and thus, would not confine only to the petitioner in the said case. In view of this, the contention raised on behalf of the appellants that the judgment in Ashwani Kumar's case (supra) was a judgement in personam, cannot be sustained."*

11. Thus, the action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory, hence cannot be sustained.

12. In view of the above discussion, the petition is allowed and the impugned office order dated 17.12.2015, Annexure P-1, is quashed and set-aside. The respondents are directed to regularize the services of the petitioner from the date when he completed 8 years' continuous service on daily wage basis. Needless to say that the consequential benefits shall also follow, subject however, to the condition that petitioner shall be entitled for consequential financial benefits, if any, only for a period of three years immediately preceding the date of filing of petition.

13. The petition is accordingly disposed of, so also the pending application(s), if any.

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

Between:

1.DURGA DASS, ELECTRICIAN, IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

2.PURSHOTAM, WORK INSPECTOR, IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

3.RAJINDER, WORK INSPECTOR, IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

4.PARKASH CHAND, FITTER, IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

5.MANOJ KUMAR, PUMP OPERATOR,IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

6.ROSHAN LAL, S/O SH. HARI SINGH, PUMP OPERATOR, IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

7.AMAR NATH, PUMP OPERATOR, IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

8.KASHMIR SINGH, PUMP OPERATOR,IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

9.ISHWAR DASS, PUMP OPERATOR,IPH SUB-DIVISION BALDWARA, DISTRICT MANDI, H.P.

10.DINA NATH, PUMP OPERATOR, IPH SUB-
DIVISION BALDWARA, DISTRICT MANDI, H.P.

.....PETITIONERS

(BY MR. ASHOK KUMAR, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (I&PH) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2.ENGINEER-IN-CHIEF, I&PH DEPARTMENT, US CLUB, SHIMLA 171001.

3.SUPERINTENDING ENGINEER, I&PH CIRCLE, HAMIRPUR, DISTRICT HAMIRPUR, H.P.

4.EXECUTIVE ENGINEER, I&PH SARKAGHAT, DISTT. MANDI, H.P.

5.ASSISTANT ENGINEER, I&PH SUB DIVISION BALDWARA, DISTRICT MANDI, H.P.

…….RESPONDENTS

(BY MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERAL WITH MR. SHREYAK SHARDA, SR. ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 6602 of 2019
Reserved on: 17.08.2022
Decided on: 22.08.2022

Constitution of India, 1950- Article 226 – Withdrawal of Assured Career Progression Scheme and recovery of excess payment- Held- Excess payment, if any, made to the petitioners by the employer was not the result of any misrepresentation or fraud on the part of the petitioners, the recovery made from the petitioners is harsh and arbitrary- Petition allowed with the direction not to effect recoveries of any amount from petitioners. (Para 8, 10)

Cases referred:

Thomas Daniel Vs. State of Kerala & Others, 2022 AIR (SC) 2153;

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

ORDER

Heard.

2. Petitioners approached the erstwhile Himachal Pradesh State Administrative Tribunal by filing O.A. No. 208 of 2016, praying for following substantive relief:-

> *"1.That this original application may kindly be allowed and impugned show cause notices of recovery issued by the respondent department contained in Annexure A-1 may kindly be quashed and set aside."*

After abolition of H.P. State Administrative Tribunal, Original Application of the petitioners came to be transferred to this Court and was registered as CWPOA No. 6602 of 2019.

3. Brief facts necessary for adjudication of the petition are that at the time of filing of the Original Application, petitioners were working in the department of Irrigation and Public Health, Government of H.P. on different Class-III posts like Pump Operator, Work Inspector, Electrician and Fitter etc. Petitioners were allowed the benefit of Assured Career Progression Scheme. However, subsequent to grant of benefit of A.C.P.S., respondent No. 3 issued show cause notices dated 07.11.2015 to the petitioners seeking their reply(ies) as to why the grant of benefit of A.C.P.S. to them, be not withdrawn, their respective salaries re-fixed and excess payment be not recovered from them in equal installments. Petitionerssubmitted their reply(ies), however, apprehending the recovery to be effected from them on the basis of show cause notices dated 07.11.2015, petitioners approached the State Administrative Tribunal by way of Original Application No. 208 of 2016, as noticed above.

4. Respondents have contested the claim of the petitioners on the ground that they were not entitled for the benefit of A.C.P.S. and respondents

were not estopped or precluded from effecting the recoveries of wrongfully disbursed amount to the petitioners. It has been submitted that pay fixation order in itself does not carry any right, as such fixation order is always carrying a note that fixation is subject to approval of Audit/Head Office.

5. It is not in dispute that petitioners were serving the respondents-Department as Class-III employees at the time of issuance of show cause notices dated 07.11.2015 to them. It is also not the case of the respondents that the excess amount was received by the petitioners by misrepresentation of facts or fraud.

6. A Division Bench of this Court vide judgment dated 24.03.2022 in a bunch of matters with **CWPOA No. 3145 of 2019, titled as S.S. Chaudhary** Vs. **State of H.P & others,** as a lead case has held as under:-

> "34. It was after taking into consideration the entire law on the subject, the Hon'ble Supreme Court in Rafiq Masih (2) laid down guidelines relating to recovery in para-18 of its judgment (supra). Thus, in such circumstances, it cannot be said that Rafiq Masih (ii) does not lay down correct law.
>
> 35. In view of the aforesaid discussion, as held by Hon'ble Supreme Court in ***Rafiq Masih's case*** (supra), it is not possible to postulate all situations of hardship, where payments have mistakenly been made by the employer, yet in the following situations, recovery by the employer would be impermissible in law:-
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

(vi) Recovery on the basis of undertaking from the employees essentially has to be confined to Class I/Group-A and Class-II/Group-B, but even then, the Court may be required to see whether the recovery would be iniquitous, harsh or arbitrary to such an extent, as would far over weigh the equitable balance of the employer's right to recover.

(vii) Recovery from the employees belonging to Class-III and Class-IV even on the basis of undertaking is impermissible.

(viii) The aforesaid categories of cases are by way of illustration and it may not be possible to lay down any precise, clearly defined, sufficiently channelised and inflexible guidelines or rigid formula and to give any exhaustive list of myriad kinds of cases. Therefore, each of such cases would be required to be decided on its own merit.

36. Thus, it would be clear that no inflexible rules regarding the recovery can be culled out and each case will have to be decided on its own merit keeping in view the broad guidelines as mentioned above."

7. Keeping in view the aforesaid exposition, petitioners fall in situations (i) & (v). Thus, instant case is covered by aforesaid judgment and the recoveries sought to be effected by respondents from the petitioners, cannot be sustained.

8. Since, the excess payment, if any, made to the petitioners by the employer was not the result of any misrepresentation or fraud on the part of the petitioners, the recovery made from the petitionersis harsh and arbitrary. Petitioners were Class-III employees and theirmonthly emoluments definitely meant a lot to them and this factor would far out way the equitable balance of the employer's right to recover.

9. At this stage, it would be apt to refer to a recent judgment rendered by Hon'ble Supreme Court in ***Thomas Daniel*** *Vs.* ***State of Kerala &***

Others, 2022 AIR (SC) 2153, decided on 02.05.2022, wherein it has been held as under:-

> "(9) This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess.
>
> (10) In Sahib Ram v. State of Haryana and Others1 this Court restrained recovery of payment which was given under the upgraded pay scale on account of wrong construction of relevant order by the authority concerned, without any misrepresentation on part of the employees. It was held thus:
>
> > "5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation, the appellant had been paid his salary on the revised scale. However, it is not on account of any 1 1995 Supp (1) SCC 18 misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault.

Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs."

(11) In Col. B.J. Akkara (Retd.) v. Government of India and Others2 this Court considered an identical question as under:

"27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 76 1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and V. Gangaram v. Regional Jt. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]):

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular 2 (2006) 11 SCC 709 interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his

family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to inservice employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of the circular dated 761999 till the issue of the clarificatory circular dated 11- 92001. Insofar as any excess payment made after the circular dated 1192001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier made."

(12) In Syed Abdul Qadir and Others v. State of Bihar and Others3 excess payment was sought to be recovered which was made to the appellantsteachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were

not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. The court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order. It was held thus:

> "59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

(13) In State of Punjab and Others v. Rafiq Masih (White Washer) and Others4 wherein this court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. This Court considered situations of hardship

caused to an employee, if recovery is directed to reimburse the employer and 4 (2015) 4 SCC 334 disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:

> "8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.
>
> xxx xxx xxx
>
> 18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law: (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
>
> (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery. (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

> (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."
>
> (14) Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondents is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General.
>
> (15) Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified."

10. In view of above discussion, the petition is allowed. Recovery of amounts sought to be effected by respondents from the petitioners in pursuance to show cause notices dated 07.11.2015, Annexure A-1, are held unsustainable in law. Accordingly, respondents are directed not to effect recoveries of any amount from petitioners as contemplated under show cause notices dated 07.11.2015,Annexure A-1.

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

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

Between:

SH. AMIT SHARMA, S/O SH. BEAS DEV SHARMA, R/O MOHALLA DHALPUR, PO KULLU, TEHSIL AND DISTRICT KULLU, H.P., PRESENTLY WORKING AS PHARMACIST AT PHC SACH, TEHSIL PANGI, DISTRICT CHAMBA, HIMACHAL PRADESH.

.....PETITIONER

(BY MR. ONKAR JAIRATH, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH, THROUGH ITS ADDITIONAL CHIEF SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2.THE DIRECTOR, HEALTH SERVICES, KASUMPTI, SHIMLA, HIMACHAL PRADESH.

3.THE CHIEF MEDICAL OFFICER, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.

4.THE RESIDENT COMMISSIONER, PANGI, AT KILLAR, DISTRICT CHAMBA, HIMACHAL PRADESH.

…….RESPONDENTS

(BY P.K. BHATTI AND MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS WITH MR. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 7403 of 2019
Reserved on: 29.07.2022
Decided on: 05.08.2022

Constitution of India, 1950- Article 226 – Regularization of service on completion of six years of contract employment in terms of regularization policy- Petitioner appointed as Pharmacist on contract basis regularized after 10 years- Petition allowed with the direction to respondent to take into consideration the contractual service rendered by the petitioner. (Para 8)

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

ORDER

Heard.

2. Brief facts necessary for adjudication of the petition are that on 19.09.2005, petitioner was appointed as Pharmacist on contract basis. His services were regularized w.e.f. 06.08.2015, whereas the claim of the petitioner is that he should have been regularized w.e.f. 01.04.2012 on completion of six years of contract employment in terms of Regularization Policy dated 31.08.2012.

3. In response, the case of the respondents is that the petitioner was initially appointed against available vacancy on contract basis for a period of 89 days, on fixed monthly remuneration. His contract continued to be extended from time to time for a period of 89 days. This arrangement continued till March,2008 and thereafter the contract of the petitioner was renewed on yearly basis. Thus, according to the respondents, the contract period of the petitioner till March, 2008, could not be considered for the purposes of regularization. The regularization of petitioner w.e.f. 06.08.2015, has been justified on aforesaid grounds.

4. The issue that arises for consideration is whether the contractual service rendered by the petitioner w.e.f. 19.09.2005 till March, 2008, was liable to be considered by the respondents towards regularization of his services?

5. An identical issue was subject matter of CWPOA No. 7370 of 2019, decided by Co-ordinate Bench of this Court, vide judgment dated 17.06.2022. The facts in the said case were *pari materia* the same, with facts of present case. Petitioner in both the cases had the same employer and their date of appointment was the same i.e. 19.09.2005. Their contracts were renewed only for 89 days till March, 2008 and their services were regularized w.e.f. 06.08.2015 by a single Office Order.

6. The Coordinate Bench of this Court while deciding CWPOA No. 7370 of 2019, has held as under:-.

> *"There is no difference between the contractual appointment of the petitioner after March, 2008 and prior to March, 2008. The terms & conditions of the contractual service of the petitioner for both the periods have remained the same. The petitioner has not undergone any fresh selection process after March, 2008. His post also did not undergo any change. He was appointed on an available vacancy in regular establishment pursuant to a selection process. Therefore, just because the contractual appointment of the petitioner prior to March, 2008 was initially for 89 days, which period was renewed from time to time thereafter, will not mean that the said contractual service is liable to be ignored for the purpose of regularization of his services. The break admitted by the respondents to have been given in the contractual service of the petitioner after 89 days before renewing his contract for further period of 89 days, has to be deemed to be a fictional/notional break in the facts and circumstances of the case. The respondents have themselves taken into consideration the contractual services rendered by the petitioner on year to year basis after March, 2008. There is no stipulation in the policy dated 31.08.2012 framed by the respondents-State for regularization of such contractual service, which is rendered by an employee only on year to year basis. In the facts of the case, the contractual services rendered by the petitioner w.e.f. 19.09.2005 to March, 2008 cannot be ignored by the respondents for the purpose of regularization of his services.*
>
> *Reliance placed by the learned Senior Additional Advocate General upon the judgment of the Hon'ble Apex Court in R.J. Pathan's case, supra, is misplaced. The facts of that case were entirely different. In the said case, the writ petitioners were initially appointed for a period of 11 months on a fixed salary in a particular project. The project came to an end. The unit, where the writ petitioners were appointed, was required to be closed, being a temporary unit. Instead of putting an end to the services of the writ petitioners, the State Government thought it fit to transfer and place the writ petitioners with the Indian Red Cross*

Society. Pursuant to the interim orders passed by the High Court, the writ petitioners continued to serve on contract basis. In the letters patent appeal filed by them, the High Court directed the State Government to consider their cases for absorption/regularization sympathetically and if required by creating supernumerary posts. In the civil appeal filed by the State, the Hon'ble Apex Court held that no such direction could be issued by the High Court for absorption/regularization of the employees appointed in a temporary unit, which was created for a particular project and that too by creating supernumerary posts. The facts of the instant case, as noticed earlier, are entirely different as noticed earlier, are entirely different."

7. Nothing has been brought on record on behalf of the respondents to persuade this Court to take a different view, therefore, the case of the petitioner in the instant case is fully covered by the judgment passed in CWPOA No. 7370 of 2019 and reasoning provided therein shall apply *mutatis mutandis* to the facts of the present case.

8. For the aforesaid reasons, the present petition is allowed. Respondents are directed to take into consideration the contractual services rendered by the petitioner with the respondents w.e.f. 19.09.2005 till March, 2008, for the purpose of regularization of his services and to regularize him from the due date in terms of policy dated 31.08.2012, with all consequential benefits.

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

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

Between:

SH. KAILASH CHAND, S/O SH. BISHAMBER NATH, R/O VILLAGE THANDAL, PO PURTHI, TEHSIL PANDI, DISTRICT CHAMBA, HP, PRESENTLY WORKING AS PHARMACIST AT PHC PURTHI, TEHSIL PANGI, DISTRICT CHAMBA, HIMACHAL PRADESH.

……..PETITIONER

(BY MR. ONKAR JAIRATH, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH, THROUGH ITS ADDITIONAL CHIEF SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2.THE DIRECTOR, HEALTH SERVICES, KASUMPTI, SHIMLA, HIMACHAL PRADESH.

3.THE CHIEF MEDICAL OFFICER, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.

4.THE RESIDENT COMMISSIONER, PANGI, AT KILLAR, DISTRICT CHAMBA, HIMACHAL PRADESH.

…….RESPONDENTS

(BY P.K. BHATTI AND MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS WITH MR. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 7401 of 2019
Reserved on: 29.07.2022
Decided on: 05.08.2022

Constitution of India, 1950- Article 226- Regularization policy- Petitioner a pharmacist on contract basis regularized after 10 years, whereas he claimed to have been regularized on completion of eight years of contract employment in terms of regularization policy dated 31.08.2012- Held- Respondents are directed to take into consideration the contractual service rendered by the petitioner for the purpose of regularization of his service- Petition allowed. (Para 8)

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

ORDER

Heard.

2. Brief facts necessary for adjudication of the petition are that on 10.06.2005, petitioner was appointed as Pharmacist on contract basis. His services were regularized w.e.f. 06.08.2015, whereas the claim of the petitioner is that he should have been regularized w.e.f. 01.04.2012 on completion of eight years of contract employment in terms of Regularization Policy dated 31.08.2012.

3. In response, the case of the respondents is that the petitioner was initially appointed against available vacancy on contract basis for a period of 89 days, on fixed monthly remuneration. His contract continued to be extended from time to time for a period of 89 days. This arrangement continued till March,2008 and thereafter the contract of the petitioner was renewed on yearly basis. Thus, according to the respondents, the contract period of the petitioner till March, 2008, could not be considered for the purposes of regularization. The regularization of petitioner w.e.f. 06.08.2015, has been justified on aforesaid grounds.

4. The issue that arises for consideration is whether the contractual service rendered by the petitioner w.e.f. 10.06.2005 till March, 2008, was liable to be considered by the respondents towards regularization of his services?

5. An identical issue was subject matter of CWPOA No. 7370 of 2019, decided by Co-ordinate Bench of this Court, vide judgment dated 17.06.2022. The facts in the said case were *pari materia* the same, with facts of present case, save and except,the date of initial appointment in both the cases differed. In CWPOA No. 7370 of 2019, petitioner therein was appointed on 19.09.2005, whereas petitioner in the instant case was appointed on 10.06.2005. Petitioner in both the cases had the same employer. Their contracts were

renewed only for 89 days till March, 2008 and their services were regularized w.e.f. 06.08.2015 by a single Office Order.

6. The Coordinate Bench of this Court while deciding CWPOA No. 7370 of 2019, has held as under:-.

> *"There is no difference between the contractual appointment of the petitioner after March, 2008 and prior to March, 2008. The terms & conditions of the contractual service of the petitioner for both the periods have remained the same. The petitioner has not undergone any fresh selection process after March, 2008. His post also did not undergo any change. He was appointed on an available vacancy in regular establishment pursuant to a selection process. Therefore, just because the contractual appointment of the petitioner prior to March, 2008 was initially for 89 days, which period was renewed from time to time thereafter, will not mean that the said contractual service is liable to be ignored for the purpose of regularization of his services. The break admitted by the respondents to have been given in the contractual service of the petitioner after 89 days before renewing his contract for further period of 89 days, has to be deemed to be a fictional/notional break in the facts and circumstances of the case. The respondents have themselves taken into consideration the contractual services rendered by the petitioner on year to year basis after March, 2008. There is no stipulation in the policy dated 31.08.2012 framed by the respondents-State for regularization of such contractual service, which is rendered by an employee only on year to year basis. In the facts of the case, the contractual services rendered by the petitioner w.e.f. 19.09.2005 to March, 2008 cannot be ignored by the respondents for the purpose of regularization of his services.*
>
> *Reliance placed by the learned Senior Additional Advocate General upon the judgment of the Hon'ble Apex Court in R.J. Pathan's case, supra, is misplaced. The facts of that case were entirely different. In the said case, the writ petitioners were initially appointed for a period of 11 months on a fixed salary in a particular project. The project came to an*

> *end. The unit, where the writ petitioners were appointed, was required to be closed, being a temporary unit. Instead of putting an end to the services of the writ petitioners, the State Government thought it fit to transfer and place the writ petitioners with the Indian Red Cross Society. Pursuant to the interim orders passed by the High Court, the writ petitioners continued to serve on contract basis. In the letters patent appeal filed by them, the High Court directed the State Government to consider their cases for absorption/regularization sympathetically and if required by creating supernumerary posts. In the civil appeal filed by the State, the Hon'ble Apex Court held that no such direction could be issued by the High Court for absorption/regularization of the employees appointed in a temporary unit, which was created for a particular project and that too by creating supernumerary posts. The facts of the instant case, as noticed earlier, are entirely different as noticed earlier, are entirely different.*"

7. Nothing has been brought on record on behalf of the respondents to persuade this Court to take a different view, therefore, the case of the petitioner in the instant case is fully covered by the judgment passed in CWPOA No. 7370 of 2019 and reasoning provided therein shall apply *mutatis mutandis* to the facts of the present case.

8. For the aforesaid reasons, the present petition is allowed. Respondents are directed to take into consideration the contractual services rendered by the petitioner with the respondents w.e.f. 10.06.2005 till March, 2008, for the purpose of regularization of his services and to regularize him from the due date in terms of policy dated 31.08.2012, with all consequential benefits.

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

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

Between:-

DR. RAVI KUMAR VAID, SON OF SH, SHYAM LAL,
RESIDENT OF WARD NO.2.,SWADESH SHYAM SADAN,
PROFESSOR COLONY, MEHATPUR, UNA,DISTRICT UNA, H.P.

.....APPLICANT

(BY SH. AJAY SHARMA, SR. ADVOCATE
WITH SMT. KAVITA KAJAL, ADVOCATE)

AND

1. STATE OF H.P.
THROUGH SECRETARY EDUCATION TO THE
GOVT. OF H.P., SHIMLA-2.

2. DIRECTOR,
OF HIGHER EDUCATION,
GOVT. OF H.P. SHIMLA- 171001.

3. DEPUTY DIRECTOR,
HIGHER EDUCATION, UNA,
DISTRICT UNA, H.P.

4. PRINCIPAL, GOVERNMENT SENIOR
SECONDARY SCHOOL, NANGAL
KHURD, TEHSIL HAROLI, UNA,
DISTRICT UNA, H.P.

.....RESPONDENTS

(BY SH. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION(ORIGINAL APPLICATION)
No. 4077 OF 2020

Decided on: 05.08.2022

Constitution of India, 1950- Article 226- Assured Career Progression Scheme- Benefit of Assured Career Progression Scheme made available to petitioner from 2012 was withdrawn in the year 2017 and recovery of excess amount was ordered- Petitioner enjoyed the benefits of Assured Career Progression Scheme (4-9-14) granted to him in the year 2012 onwards and superannuated in January 2017- Held- Recovery of the excess payment would be iniquitous and harsh upon the petitioner who stood superannuated- Overpayment shall not be recovered- Pension of petitioner be worked out on the basis of his eligibility and entitlement as per law- Petition disposed of with directions. [Para 4, 5(c), 5]

Cases referred:

State of Orissa and another Vs. Mamata Mohanty (2011) 3 SCC 436;

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

O R D E R

Benefit of Assured Career Progression Scheme 9.8.2012 made available to the petitioner from the year 2012 vide order dated 30.7.2014 was withdrawn on 6.10.2017 and recovery of excess payment was ordered. The order dated 6.10.2017 has been impugned herein.

2. Case of the petitioner is that he was promoted as Principal on 19.04.2008. On completion of four years of service, his case fell due for grant of benefit under the Assured Career Progression Scheme (In short ACPS) w.e.f. 19.04.2012. Due to fault at the level of the respondents-department, ACP was not granted to the petitioner immediately on completion of four years of service. The same, however, was allowed to him and several others vide office order dated 30.07.2014. The pay of the petitioner and the other officers mentioned in this office order was fixed on notional basis up-to 08.08.2012 and on actual basis w.e.f. 09.08.2012. On 6.10.2017, respondents issued an office order (Annexure A/2) withdrawing the ACP benefit earlier allowed to the

petitioner & also ordered to recover the excess payment made to him. In the aforesaid circumstances, the petitioner has preferred the present petition, seeking quashing of the order dated 6.10.2017 (Annexure A-2).

3. Contentions

3.1. The arguments advanced by learned Senior Counsel for the petitioner are that the impugned order was issued in violation of principles of natural justice. Benefit of ACPS was allowed not only to the petitioner, but several other officials, whose names figured in the impugned order. The benefit could not have been withdrawn only from the petitioner in an arbitrary manner. It was also contended that the impugned order was passed statedly on the strength of circular dated 7.7.2014, which came into force with immediate effect i.e. on 07.07.2014. Hence, the benefit of ACPS, which stood conferred upon the petitioner in terms of office order dated 30.07.2014 granting ACP on notional basis up-to 08.8.2012 and on actual basis w.e.f. 09.08.2012 could not have been withdrawn on the strength of the circular/instructions dated 07.07.2014. Reliance in this regard was also placed upon instructions dated 09.09.2014, which clarified that instructions dated 7.7.2014 were made applicable with immediate effect with the objective that all the cases pending on that day or arising after that have to be examined in light of instructions *ibid*.

The respondents short-stand in the reply is that the ACPS introduced under notification dated 09.08.2012 was explained by the Government of Himachal Pradesh Finance (Pay Revision) Department letter dated 7.7.2014 and 9.9.2014, whereby it was held out that an employee, who has already received three enhancement/financial up-gradations i.e. grant of progression under the new or old ACPS or promotion or any other financial enhancement except the annual increment or the general pay revision based on the pay commission in fourteen years or more of his entire service, will not be entitled for placement in next higher grade in the ACPS introduced on

9.8.2012. In compliance to the interlocutory orders passed in the matter, the respondents have further submitted that the following benefits had already been extended to the petitioner prior to issuance of office order dated 30.07.2014:-

> *"(I) 1st ACP benefit after 8 years of regular service paid on 21.04.1997. (1st benefit).*
>
> *(II) 1st proficiency step up after 16 years of regular service on 21.4.2002 (2nd benefit).*
>
> *(II) On promotion as Principal dated 19.4.2008. (3rd benefit).*

The case of the respondents is that the petitioner had already been granted three financial up-gradations in all. Thus, he was not entitled to the 4th financial up-gradation on completion of four years of service as Principal. The financial benefit granted to the petitioner vide office order dated 30.07.2014 was contrary to the ACPS dated 09.08.2012. Hence, it was correctly withdrawn vide impugned order passed on 6.10.2017.

4. Observations

On hearing learned counsel for the parties and after considering the case file, my observations are as under:-

4.1. An Assured Career Progression Scheme was introduced by the respondents on 15.12.1998 w.e.f. 01.01.1996. Subsequent to revision of pay-scale w.e.f. 01.01.2006, the operation of this scheme was stopped after 26.08.2009. A new Assured Career Progression Scheme was introduced on 09.08.2012, wherein an existing employee including employee having less than 4 years service was given the option either to continue in the existing ACP scheme after service of 8, 16, 24 & 32 years of service or to opt for 4,9, & 14 years ACP Scheme 2012.

4.2. As per para-4 (a) of 09.08.2012 ACP scheme, an employee was entitled to a maximum of three placements in the next higher grade pays in

the hierarchy of grade pays with benefit of one increment each at every placement. Para 3(a) of the ACP scheme dated 9.8.2012 envisaged that a Government employee after rendering service of 4, 9 and 14 years in a post or posts without any financial enhancement in the same cadre/post, who is not promoted to a higher level on account of non availability of a vacancy or non existence of a promotional avenue in the cadre, shall be granted the grade pay, which is next higher in the hierarchy of grade pays.

4.3. It is not in dispute in the instant case that the petitioner got first ACP benefit after 8 years of regular service on 21.04.1997. He got second financial benefit on 21.04.2002, when he was given first proficiency step up after putting in 16 years of regular service. The petitioner got third benefit on his promotion as Principal on 19.04.2008. Thus, the petitioner having already received three enhancements/financial up-gradations/promotion was not entitled for the 4th financial benefit, that was granted to him under office order dated 30.07.2014. Though ACP scheme dated 9.8.2012 was clarified to this an extent by the Government of H.P. Finance (Pay Revision) Department on 07.07.2014 (Annexure A-3), however, provisions to this effect were already there in the ACP Scheme dated 09.08.2012 itself. For convenience, relevant portions from the circular issued by the respondents on 07.07.2014 clarifying ACP scheme dated 09.08.2012 are reproduced as under:-

> *"3. Similarly, Para 3(a) of this Department's letter No.Fin(PR)B(7)-59/2010 dated 9th August 2012 vide which new ACP Scheme has been introduced on optional basis envisage that a government employee after rendering a service of 4,9 and 14 years in a post or posts without any financial enhancement in the same cadre/post, who is not promoted to a higher level on account of non availability of a vacancy or non existence of a promotional avenue in the cadre, shall be granted the grade pay, which is next higher in the hierarchy of grade pays given in the schedule annexed to Revised Pay Rules 2009 upto the maximum*

grade pay of Rs.8900 and on placement in the next higher grade pay in the hierarchy of grade pays after a service of 4,9 and 14 years, the pay of an employee shall be fixed at the next higher stage in the pay band. As per Para 4 (a) of this scheme an employee shall be entitled to a maximum of three placements in the next higher grade pays in the hierarchy of grade pays with benefit of one increment each at every placement under this scheme. Para 4 (f) provides that other existing conditions governing the grant of ACPS shall continue to be applicable.

5. Moreover, the overriding objective of an assured career progression scheme is to ensure at least three financial up gradations/enhancements/promotions to a regular employee in his entire service career. Therefore, in partial modification of earlier orders on ACP schemes it is directed, that, once an employee has already got three enhancements/financial up-gradations i.e. grant of progression under the new or old ACPS, or promotion or any other financial enhancement except the annual increment or the general pay revision based on the pay commission in fourteen years or more of his/her entire service, thereafter, he will not be entitled for placement in next higher grade pay in the ACPS scheme introduced vide FD's instructions dated 9th August, 2012. However it is clarified that after availing three enhancements/up-gradation/promotion, an employee will be eligible to take the benefit of normal promotions available in his service career."

Since the petitioner was wrongly given benefit of ACP Scheme 2012 under order dated 30.07.2014 as he had already received three financial up-gradations by that date, the benefit of ACP scheme allowed to him w.e.f. the year 2012 was correctly withdrawn vide office order dated 6.10.2017.

4.4. Insofar as argument of discrimination viz-a-viz the other officials, who were granted the benefits of ACP scheme (4-9-14) in the order dated 30.07.2014 is concerned, suffice to observe that:-

4.4(a) The officials to whom the benefit of ACPS dated 09.08.2012 have been granted allegedly at par with the petitioner are not parties to the present lis.

4.4(b) The respondents in their counter affidavit filed to the supplementary affidavit of the petitioner indicating names of certain officials to whom the similar benefit of ACPS have been allowed, have submitted as under:-

> *" That in reply to these paras it is submitted that the benefit of ACPs granted to the petitioner was not in order therefore, the same was withdrawn on 6.10.2017. The benefit of ACPs of Sr. No.8 and other six (deponent) were also reviewed and withdrawn. Rest of the cases will also be reviewed in view of finance department notification dated 9.9.2014 and 3.11.2016."*

4.4(c) It is well established that no benefit can be given to the petitioner on the basis of negative parity. A wrong order passed in favour of some does not confer any legal right on the petitioner to claim the same relief. In this regard, it would be apt to refer to judgment rendered by Hon'ble Apex Court in **(2011) 3 SCC 436** titled ***State of Orissa and another Vs. Mamata Mohanty.*** Relevant part of the judgment reads as under:-

> *"56. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Administration & Anr v. Jagjit Singh Yogesh Kumar v. Government of NCT Delhi, Anand Buttons Ltd. v. State of Haryana, K.K. Bhalla v. State of M.P. Krishan*

Bhatt v. State of Jammu & Kashmir, Upendra Narayan Singh and Union of India & Anr. v. Kartick Chandra Mondal)

57. This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in Hotel Balaji v. State of A.P., observed as under: (SCC p.551, para 12)

"12.... 2. To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter at p.18:

"a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors'".

In ***R. Muthukumar & Ors. Vs. The Chairman and Managing Director Tangedco & Ors***. (Civil Appeal No.1144/2022) decided on 7.2.2022, the principle of negative equality was reiterated in following manner:-

"24. A principle, axiomatic in this country's constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or be relied upon as a principle of parity or equality. In Basawaraj & Anr. v. Special Land Acquisition Officer, this court ruled that:

"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other

> *similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated."*
>
> *Other decisions have enunciated or applied this principle (Ref: Chandigarh Admn. v. Jagjit Singh (1995) 1 SCC 745; Anand Buttons Ltd. v State of Haryana (2005) 9 SCC 164, K.K. Bhalla v. State of M.P. (2006) 3 SCC 581; Fuljit Kaur v. State of Punjab, (2010) 11 SCC 455, and Chaman Lal v. State of Punjab (2014) 15 SCC 715. Recently, in The State of Odisha v. Anup Kumar Senapati (2019) SCC Online SC 1207 this court observed as follows:*
>
> *"If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision."*

4.5. Having observed that the benefit of ACP scheme (4-9-14) was wrongly given to the petitioner under office order dated 30.07.2014, the next question emerges whether the respondents could have ordered recovery of over payment from the petitioner in terms of impugned Annexure A-2 dated 6.10.2017. In respect of recovery of excess payment from the employees, it would be apt to refer to judgment rendered by Hon'ble Division Bench of this Court in CWPOA No.3145/2019 titled ***S.S. Chaudhary Vs. State of H.P. & ors.***, wherein after considering various precedents following was held:-

> *"35. In view of the aforesaid discussion, as held by Hon'ble Supreme Court in Rafiq Masih's case (supra), it is not possible to postulate all situations of hardship, where payments have mistakenly been made by the employer, yet*

in the following situations, recovery by the employer would be impermissible in law:-

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

(vi) Recovery on the basis of undertaking from the employees essentially has to be confined to ClassI/Group-A and Class-II/Group-B, but even then, the Court may be required to see whether the recovery would be iniquitous, harsh or arbitrary to such an extent, as would far overweigh the equitable balance of the employer's right to recover.

(vii) Recovery from the employees belonging to Class-III and Class-IV even on the basis of undertaking is impermissible.

(viii) The aforesaid categories of cases are by way of illustration and it may not be possible to lay down any precise, clearly defined, sufficiently channelised and inflexible gudielines or rigid formula and to give any exhaustive list of myriad kinds of cases. Therefore, each of such cases would be required to be decided on its own merit.

38. Thus, it would be clear that no inflexible rules regarding the recovery can be culled out and each case will

have to be decided on its own merit keeping in view the broad guidelines as mentioned above."

In light of above legal position following observations become germane:-

4.5(a) It is not the case of the respondents that the petitioner had misled or concealed any relevant fact from the respondents. The benefit of ACP (4-9-14) was granted by the respondents on their own to the petitioner in terms of office order issued on 30.07.2014.

4.5(b) The petitioner enjoyed the benefit of ACP scheme (4-9-14) granted to him from the year 2012 onwards vide office order dated 30.07.2014. Petitioner is stated to have superannuated in January 2017.

More than 9 months after petitioner's retirement, the respondents issued office order dated 6.10.2017 (impugned herein) withdrawing the ACP benefit from the petitioner and ordered recovery of over-payment made to him.

From the pleadings of the parties, it comes out that the petitioner had received benefit of ACP scheme till June 2018.

4.5(c) It would be evident that the case of the petitioner falls under para 35(iii) and (v) of the judgment rendered in S.S. Chaudhary's case (supra) as the excess amount was paid to the petitioner w.e.f the year 2012 onwards and the order of recovery of over payment was issued only on 6.10.2017. The over payment was made to the petitioner in excess of 5 years. Even otherwise recovery of the excess payment in factual scenario of the case would be iniquitous and harsh upon the petitioner, who stood superannuated from service about nine months prior to the issuance of impugned order.

5. Conclusions:

In view of above discussions, this writ petition is disposed of with following observations:-

(a) There is no illegality in office order dated 6.10.2017 withdrawing the benefit of APS scheme (4-9-14) wrongly given to the petitioner under order dated 30.7.2014 (Annexure A-1).

(b) In view of the settled legal position, coupled with the factual scenario of the case, the over payment made to the petitioner under order dated 30.07.2014 (Annexure A-1) shall not be recovered from him.

(c) The pension to the petitioner shall be worked out on the basis of his eligibility and entitlement in accordance with law.

(d) Any retiral benefits of the petitioner withheld by the respondents shall be released to him after making out the adjustment, if any.

With these observations, the instant petition is disposed of, so also the pending miscellaneous applications, if any.

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

Between:

SHANTI DEVI WIFE OF SHRI SHYAM LAL, RESIDENT OF MC QUARTER NEAR SENIOR SECONDARY SCHOOL CHHOTA SHIMLA, SHIMLA-171002, HP.

....PETITIONER

(BY MR. DEVENDER K. THAKUR,
ADVOCATE)

AND

1. HIMACHAL URBAN DEVELOPMENT AUTHORITY THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, NIGAM VIHAR, SHIMLA-171002.

2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HIMUDA) TO THE GOVERNMENT OF HIMACHAL PRADESH AT SHIMLA.

….RESPONDENTS

(BY MR. SUNNY DATWALIA
ASSISTANT ADVOCATE GENERAL)

2. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 5976 of 2019

Between:

KAUSHALYA DEVI, WIFE OF SHRI JAI SINGH, RESIDENT OF BLOCK C-33, ROOM NO.2, VIKAS NAGAR, SHIMLA-171009.

….PETITIONER

(BY MR. DEVENDER K. THAKUR,
ADVOCATE)

AND

1. HIMACHAL URBAN DEVELOPMENT AUTHORITY THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, NIGAM VIHAR, SHIMLA-171002.

2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HIMUDA) TO THE GOVERNMENT OF HIMACHAL PRADESH AT SHIMLA.

….RESPONDENTS

(BY MR. SUNNY DATWALIA
ASSISTANT ADVOCATE GENERAL)

3. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 6518 of 2019

Between:

JAI SINGH SON OF SHRI IRKA SINGH, AGED ABOUT YEARS, OCCUPATION GOVERNMENT EMPLOYEE, RESIDENT OF BLOCK C-33, ROOM NO. 2, VIKAS NAGAR, SHIMLA-171009, HP.

….PETITIONER

(BY MR. DEVENDER K. THAKUR,
ADVOCATE)

AND

1. HIMACHAL URBAN DEVELOPMENT AUTHORITY THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, NIGAM VIHAR, SHIMLA-171002.

2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HIMUDA) TO THE GOVERNMENT OF HIMACHAL PRADESH AT SHIMLA.

....RESPONDENTS

(BY MR. SUNNY DATWALIA
ASSISTANT ADVOCATE GENERAL)

4. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 6520 of 2019

Between:

SHYAM LAL SON OF SHRI NARVIR, RESIDENT OF MC QUARTER NEAR SENIOR SECONDARY SCHOOL CHHOTA SHIMLA, SHIMLA-171002.

....PETITIONER

(BY MR. DEVENDER K. THAKUR,
ADVOCATE)

AND

1. HIMACHAL URBAN DEVELOPMENT AUTHORITY THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, NIGAM VIHAR, SHIMLA-171002.

2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HIMUDA) TO THE GOVERNMENT OF HIMACHAL PRADESH AT SHIMLA.

….RESPONDENTS

(BY MR. SUNNY DATWALIA
ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 5986 of 2019
Decided on: 26.07.2022

Constitution of India, 1950- Article 226 – Work charge status after completion of 10 years of service- Held- As per well settled law petitions are allowed with the direction to respondents to confer work charge status to the petitioners on completion of eight years of service and thereafter their services be regularized in terms of policy framed by the Government. (Para 11)

Cases referred:

Mool Raj Upadhaya v. State of HP and Ors. 1994 Supl. (2) SCC 316;

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

O R D E R

Since in all these petitions, common question of facts and law are involved and same and similar relief has been claimed, all the matters are taken up together for hearing and disposal vide common order.

2. For the sake of clarity and brevity, facts of CWPOA No. 5986 of 2019, *Shanti Devi v. HP Urban Development Authority* are being noticed herein below.

3. Petitioner Shanti Devi was engaged as daily wage Beldar in the respondent-department in the year, 1990 and since then, she was continuously working with the respondent-department with minimum 240 days in each calendar year. Since case of the petitioner was not considered by the department for grant of work charge status after completion of ten years in view of the law laid down by the Hon'ble Apex Court in ***Mool Raj Upadhaya v.***

State of HP and Ors. 1994 Supl. (2) SCC 316, she filed an Original Application before the erstwhile HP State Administrative Tribunal, which subsequently on account of its abolition, came to be transferred to this Court for adjudication and was re-registered as CWP-T No. 15618/2008.

4. Learned Single Judge of this Court disposed of the aforesaid petition, directing the respondents to consider the case of the petitioner in light of law laid down by this Court in CWP-T No. 10220 of 2008, titled Phool Maya v. State of HP as well as CWP No. 1594 of 2008, titled Man Singh v. State of H.P.

5. Being aggrieved and dissatisfied with aforesaid judgment passed by the learned Single Judge, respondents preferred LPA No. 216 of 2011, which came to be disposed of by the Division Bench of this Court vide judgment dated 22.3.2011, directing the respondents to consider case of the petitioner in light of the decision rendered by this Court in CWP No. 1594 of 2008, ***Man Singh v. State of HP*** (a/w connected matters), within three months from the date of production of copy of the judgment, however, while passing the aforesaid order, Division Bench of this Court also recorded the statement of the learned counsel for the petitioner that in case department regularizes the petitioner w.e.f. 1.1.2007, the petitioner will not claim any benefit prior to 1.1.2007. Since despite there being aforesaid direction issued by the Division Bench of this Court, case of the petitioner was not considered in light of ***Man Singh's*** case supra, she approached this Court in the instant proceedings, praying therein for following main relief:-

> *"i) That the respondent may kindly be directed to grant the work charge status/regularization to the applicant w.e.f. 01.01.2000 as per the judgment passed by the Hon'ble High Court in Man Singh v/s State of H.P., with all consequential benefits.*

6. Pursuant to notice issued in the instant proceedings, respondents have filed their reply, wherein facts as have been noticed herein above, have not been disputed. Though it has been claimed that in terms of judgment dated 22.3.2011 passed by Division Bench of this Court in LPA No.216 of 2010, case of the petitioner has been considered in light of the judgment passed by this Court in ***Man Singh's*** case supra and she has been given appointment as work charge beldar vide office order dated 18.8.2010 w.e.f. 16.7.2007 with all consequential benefits as per the policy of the government prevalent at that relevant time, but no order with regard to conferment of work charge status, if any, upon the petitioner has been placed on record.

7. Mr. Devender K. Thakur, Advocate, appearing on behalf of the petitioner(s) states that till date, neither petitioner(s) has been given work charge status after having completed her 8 years service nor their services have been regularized in terms of policy of regularization framed by the government from time to time.

8. Mr. Amit Singh Chandel, Advocate, appearing on behalf of the respondents while reiterating that judgment dated 22.3.2011, passed in LPA No. 216 of 2011, titled *Chief Executive Officer-cum Secretary, HP Housing and UDA v. Shanti Devi and Ors,* has been duly complied with, contended that work charge status stands conferred upon the petitioner w.e.f. 16.7.2007, but he was unable to produce on record copy, if any, issued by the department concerned in the aforesaid record.

9. While placing on record communications dated 17.2.2016 and 6.3.2018 issued under the signatures of Executive Director HIMUDA Shimla and under Secretary (Housing) to the Government of Himachal Pradesh, Mr. Chandel, contended that though case for conferment of work charge status of the petitioner as well as regularization in terms of judgment passed in ***Man Singh's*** case was recommended to the Government, but same was refused on

the pretext that all the works in HIMUDA, are being done by the contractor and as such, there is no justification for having the Additional Class-IV posts and cadre of work charged employees be declared as dying cadre, without converting them into regular establishment. Aforesaid communication dated 17.2.2016 reveals that matter with regard to conversion of remaining 38 different work charged employees into the regular establishment were taken up with the government. It also appears from the aforesaid communication that initially in HIMUDA, there were 301 work charge incumbents, who were borne on the analogy of HPPWD in respect of work charged incumbents. On the analogy of HPPWD, cases with regard to conversion of work charged staff of HIMUDA into regular establishment were taken up with the Government of Himachal Pradesh and accordingly, approval was conveyed by the Government of Himachal Pradesh for conversion of 208 posts of various categories of work charged incumbents into regular employees vide office order dated 10.3.2010. Only 38 remaining incumbents appointed/regularized on work charged basis in HIMUDA continued to work on work charge basis and as such, vide aforesaid communication, request was made for conversion of 38 work charge incumbents into regular work establishment. It appears that since aforesaid 38 employees were Nepali nationals, their cases were not considered on account of pendency of the issue with regard to entitlement of Nepali Nationals to have employment under Government of India, in this court and thereafter, before the Hon'ble Apex Court. However, now it is not in dispute that issue as to whether person, who is not Indian citizen is entitled to claim employment stands duly adjudicated in case titled ***Dal Bahadur v. State of HP alongwith connected matters***, by the Principal Division Bench of this Court vide judgment dated 9.11.2011 in CWP No. 5799 of 2014, which has been further upheld by the Hon'ble Apex Court in SLP having been filed by the State of Himachal Pradesh. Division Bench of this court vide aforesaid judgment dated 9.11.2011, specifically took note of the judgment rendered by

this Court in ***Man Singh's*** case in CWP No. 1594 of 2008, decided on 27.7.2009, wherein it specifically took note of the resolution passed by the Central Government on 1.3.1977, office memorandum dated 10.5.1978 and letter dated 16.7.2009, addressed by the Secretary (Agriculture) to the Government of Himachal Pradesh to the Director of Agriculture, whereby it was laid down that as far as Nepalese citizens are concerned, only eligibility certificates are required. As per aforesaid direction, if Nepali citizens are able to furnish eligibility certificates they are also required to be granted benefit in terms of policy framed by the Government of Himachal Pradesh from time to time with regard to conferment of the work charge status and thereafter regularization. Since aforesaid judgment rendered by the Principal Division Bench of this Court has already attained finality, petitioner(s) being similarly situate is/are also entitled for similar benefits in terms of judgment passed by the learned Single Judge in ***Man Singh's*** case supra.

10. Mr. Amit Singh Chandel, learned counsel while inviting attention of this court to order dated 22.3.2011, passed by the Division Bench of this Court in LPA No. 216 of 2011 contended that petitioners herein cannot claim any benefit prior to 1.1.2007 on account of statement given by their counsel at the time of passing of judgment dated 22.3.2011. He also argued that cadre of work charge employee has been declared as dying cadre and as such, relief with regard to claim of the petitioner(s) for conferment of work charge status cannot be granted, but aforesaid pleas made by Mr. Chandel, deserves outright rejection being devoid of any merits. Division Bench of this Court vide judgment dated **10.5.2018**, in **CWP No. 3111 of 2016**, titled ***State of HP and Ors v. Ashwani Kumar***, has already held that cessation of work charge status is to do nothing with the conferment of work charge status and thereafter regularization. It is not in dispute that aforesaid judgment rendered by the Division Bench of this Court in ***Ashwani Kumar*** has attained finality

because SLP having been field by the respondent-State against the aforesaid judgment has been dismissed. Relevant paras whereof read as under:

> 6. Having carefully perused material available on record, especially judgment rendered by this Court in Ravi Kumar v. State of H.P. and Ors, as referred herein above, which has been further upheld by the Hon'ble Apex Court in Special Leave to appeal (C) No. 33570//2010 titled State of HP and Ors. v. Pritam Singh and connected matters, this Court has no hesitation to conclude that there is no error in the finding recorded by the learned Tribunal that work charge establishment is not a pre-requisite for conferment of work charge status. The Division Bench of this Court while rendering its decision in CWP No. 2735 of 2010, titled Rakesh Kumar decided on 28.7.2010, has held that regularization has no concern with the conferment of work charge status after lapse of time, rather Court in aforesaid judgment has categorically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV worker (Beldars) and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged category and as such, there is an obligation cast upon the department to consider the case of daily waged workman for conferment of daily work charge status, being on a work charged establishment on completion of required number of years in terms of the policy. In the aforesaid judgment, it has been specifically held that benefits which accrued on workers as per policy are required to be conferred by the department.
>
> 7. Subsequent to aforesaid decision, this Court while disposing of CWP No. 2398 of 2016 titled HPSEB and Anr. V. Nanak Chand and Ors, (alongwith connected matters), upheld the decision rendered by the learned Tribunal, whereby the respondent-electricity board was

directed to consider the case of the applicant for conferment of work charge status on completion of ten years of service with all benefits incidental thereto. It may be noticed that decision rendered by the learned Tribunal in OA No. 3207 of 2015 in Narotam Singh v. HPSEB Ltd. and Ors, dated 14.12.2015, which subsequently came to be assailed in CWP No. 3301/2016, was squarely based upon decision rendered by the Hon'ble Apex Court in Bhagwati Prasad v. Delhi State Mineral Development Corporation (1990) 1 SCC 361, as well as judgment rendered by this Court in CWP No. 9970 of 2012 titled Laxmi Devi v. State of H.P. and ors., decided on 26.11.2012.

8.Mr. A.K. Gupta, learned counsel representing the respondent has also brought factum to our notice with regard to the implementation of similar directions as issued in the present case by the various departments pursuant to the directions issued by the learned Tribunal as well as this Court in the case of other similarly situate persons. Mr. Gupta also invited attention of this Court to the judgments having been passed by this Court in CWP No.2735 of 2010, dated 28.7.2010, titled as Rakesh Kumar v. State of H.P. and others; 13.5.2013, passed in CWP No.1906 of 2013-A, titled as Hira Singh v. HPSEB Ltd. & anr.; 14.8.2014, passed in CWP No.2551 of 2014, titled as H.P. State Electricity Board and another v. Bhag Singh and others; 10.9.2014, passed in CWP No.179 of 2014, titled as Beg Dass and others v. HPSEB Ltd and anr.; and 20.11.2014, passed in LPA No.621 of 2011, titled as H.P. State Electricity Board Limited and others v. Jagmohan Singh, perusal whereof clearly suggests that benefit as prayed for in the instant petition stands duly accorded to other similarly situate persons.

9. Consequently, in view of the aforesaid discussion as well as law relied upon, we see no reason to interfere with the well reasoned judgment passed by the learned

Tribunal and as such, present petition fails and dismissed accordingly."

11. Consequently, in view of the above, all these petitions are allowed and respondents are directed to confer work charge status to the petitioners from the due date i.e. from the date petitioners completed eight years service with 240 days in each calendar year and thereafter, their services be regularized in terms of policy framed by the government from time to time. Since learned counsel for the petitioners have already made statement before the Division Bench of this Court at the time of passing of the judgment dated 22.5.2011 that in case petitioner are regularized w.e.f. 1.1.2007, they will not claim any benefit prior to 1.1.2007, petitioners are held entitled to consequential benefits on account of their being conferred work charge status and regularization w.e.f. 1.1.2007. In the aforesaid terms, present petitions are disposed of alongwith pending applications, if any.

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

Between:-

VIPIN KUMAR S/O SH. TELU RAM HOUSE NO. 22, CHHOTA SHIMLA-2, H.P.

....PETITIONER.

(BY MR. NARESH VERMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY FOREST GOVT. OF H.P.

2. PR. CHIEF CONSERVATOR OF FOREST (HOFF) HIMACHAL PRADESH, TALLAND, SHIMLA-1.

....RESPONDENTS.

(BY MR. ARVIND SHARMA, ADDTIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 6991 of 2019
Reserved on: 18.08.2022
Decided on: 23.08.2022

Constitution of India, 1950- Article 226 – Regularization of services on completion of 8 years of daily waged services- Petitioner appointed as Driver in Forest Department in the year 1996 on daily wage basis and his services were regularized in the year 2007- Held- Act of the respondent is arbitrary and discriminatory- Petition allowed with the direction to respondents to regularize the services of the petitioner from the date when he completed 8 years continuous service on daily wage basis. (Para 13, 14)

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

O R D E R

By way of instant petition, the petitioner has prayed for following substantive relief:-

> *"(i) That the orders dated: 09.02.2016 annexure A-2, may kindly be quashed and set aside and the respondent may kindly be directed to regularise the services of the applicant after 8 year of daily waged services i.e. 1.1.2004 as per the judgment delivered in CWP(T) No. 12217 of 2008, titled as Ashok Kumar Vs State of H.P."*

2. The case as set-up by petitioner is that he was appointed to the post of driver in Forest Department of Government of Himachal Pradesh in the year 1996, on daily wage basis. His services were regularised w.e.f. 25.09.2007. The grievance of the petitioner is that he was entitled for regularization on completion of 8 years' continuous service on daily wage basis in terms of the judgment rendered by a Division Bench of this Court in CWP

No. 2735 of 2010, Rakesh Kumar vs. State of H.P. & others. Having remained unsuccessful in getting his grievance redressed from the respondents, petitioner approached this Court by way of CWP No. 159 of 2011. A Division Bench of this Court vide Order dated 9th March, 2011, disposed of the Civil Writ Petition No. 159 of 2011 in following terms:-

> *"2. The petitioners claim work charge status on completion of eight years of continuous service as daily waged Driver/Chowkidar. According to the petitioners, the issue is covered in their favour by the judgment of this Court rendered in CWP No. 2735 of 2010, Rakesh Kumar versus State of H.P. & Others. It is for the respondents to examine the matter. Therefore, this writ petition is disposed of directing the respondents concerned to examine the matter in the light of the judgment referred to above and take appropriate action thereon within a period of four months from the date of production of copy of this judgment along with a copy of the writ petition and the copy of the judgment referred to above."*

3. In compliance to aforesaid order dated 09.03.2011 passed in CWP No. 159 of 2011, the petitioner submitted a representation to respondent No.2 and the representation of the petitioner was rejected by respondent No.2 vide office order dated 9.2.2016, Annexure A-2. Hence, the petitioner is before this court by way of instant petition.

4. The contention of petitioner is that he has been wrongly denied the benefit of judgment passed by a Division Bench of this Court in CWP No.2735 of 2010, Rakesh Kumar vs. State of H.P. & Others, on the ground that the Forest Department did not have work charge establishment. As per petitioner, such findings is not tenable in view of the judgment passed by a Division of this Court in State of H. P. & Ors. vs. Ashwani Kumar, CWP No. 3111 of 2016 and also the judgment dated 23.05.2022 passed by the Division Bench of this Court in LPA No. 160 of 2021. It has also been submitted on behalf of the petitioner that the person junior to the petitioner

has been granted the benefit of regularization on the post of driver w.e.f. 24.02.2006, whereas the petitioner was regularized w.e.f. 25.09.2007. Petitioner has, thus, sought parity with the case of Ashok Kumar, who was conferred aforesaid benefit vide office order dated 8.07.2013, Annexure A-3a, issued by respondent No.2. Further, the petitioner has also placed reliance upon information received under RTI Act from Divisional Forest Officer, Wildlife Division, Kullu, annexed as Annexure P-1. As per such information, the details of persons, who were granted work charge status in the years 1998, 2006 and 2007 has been provided. Petitioner has also placed reliance on the documents received under RTI Act according to which large number of vacancies existed during the years 2004-2005, 2005-2006, 2006-2007 in the cadre of driver.

5. Respondents have contested the claim of petitioner. Rejection order dated 09.02.2016, Annexure A-2, has been justified on the ground that there was no work charge establishment in the respondent department. As per respondents, the services of petitioner were rightly regularized w.e.f. 25.09.2007 as he did not fulfill the requirement of educational qualification and it was only after the sanction accorded by the Government on 09.08.2007 that the services of petitioner could be regularized. Further, it has been submitted on behalf of the respondents that the petitioner cannot derive any benefit from the case of Ashok Kumar as it was under challenge in a writ petition before this Court.

6. I have heard learned counsel for parties and have also gone through the documents available on file.

7. Admitted facts of the case are that the petitioner was appointed on the post of driver in the respondent department in the year 1996 on daily wage basis and his services were regularized w.e.f. 25.09.2007.

8. The respondents were under direction, vide judgment dated 09.03.2011 passed in CWP no. 159 of 2011, to examine the case of the

petitioner in the light of the judgment passed in CWP No. 2735 of 2010, Rakesh Kumar vs. State of H.P. & Ors. The impugned consideration order, Annexure A-2 reveals that the case of the petitioner was held to be distinct from Rakesh Kumar (Supra) on the ground that there was no work charge establishment in respondent department.

9. Judging the ground of rejection against the contention raised on behalf of the petitioner, this Court is of considered view that the impugned rejection order, Annexure A-2, cannot be sustained in view of the judgment passed by a Division Bench of this Court in ***CWP No. 3111 of 2016, titled as State of H.P. & Others vs. Ashwani Kumar***, in which it has been held as under:-

> *"6. Having carefully perused material available on record, especially judgment rendered by this Court in Ravi Kumar v. State of H.P. & Ors., as referred herein above, which has been further upheld by the Hon'ble Apex Court in Special Leave to Appeal (C) No. 33570/2010, titled State of HP & Ors. v. Pritam Singh and connected matters, this Court has no hesitation to conclude that there is no error in the finding recorded by the learned Tribunal that work charge establishment is not a pre-requisite for conferment of work charge status. The Division Bench of this Court while rendered its decision in CWP No. 2735 of 2010, titled Rakesh Kumar decided on 28.07.2010, has held that regularization has no concern with the conferment of work charge status after lapse of time, rather Court in aforesaid judgment has categorically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV worker (Beldars) and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged category and as such, there is an obligation cast upon the department to consider the case of daily waged workman for*

> *conferment of daily work charge status, being on a work charged establishment on completion of required number of years in terms of the policy. In the aforesaid judgment, it has been specifically held that benefits which accrued on workers as per policy are required to be conferred by the department.".*

10. Recently in ***State of Himachal Pradesh vs. Smt. Reema Devi, LPA No. 160 of 2021***, decided on 23.05.2022, a Division Bench of this Court following Ashwani Kumar's case (supra) held as under in the case where also the respondent department was involved:-

> *"11. Now adverting to the facts of the instant case, the grant of work charge status to late Shri Het Ram has been denied on the ground that Himachal Pradesh Forests Department had no work charge establishment. In Ashwani Kumar's case (supra) also right of the petitioner therein for grant of work charge status was considered when the HPPWD had ceased to be a work charge establishment.*
>
> *12. This Court while delivering judgment in Ashwani Kumar's case (supra) had, thus, decided the principle that work charge establishment was not a pre-requisite for conferment of work charge status and thus, would not confine only to the petitioner in the said case. In view of this, the contention raised on behalf of the appellants that the judgment in Ashwani Kumar's case (supra) was a judgement in personam, cannot be sustained."*

11. Petitioner has placed on record office order dated 08.07.2013 issued by respondent No.2, whereby benefit of regularization after 8 years was granted in favour of Ashok Kumar, driver of the same department. Respondents have not disputed the fact that Ashok Kumar was junior to petitioner. The respondents cannot give separate and distinct treatment to its employees who otherwise are similarly situated. Though, the respondents

have stated in their reply that the case of Ashok Kumar was under challenge in some Civil Writ Petition filed before this Court but no material has been placed on record to substantiate such contention. On the other hand, it is evident from the record that the office order dated 08.07.2003 issued in the case of Ashok Kumar was itself result of directions issued by this Court on 23.11.2011 in CWP (T) No. 12217 of 2008.

12. According to another contention of respondents, petitioner was not having requisite educational qualification and as such relaxation was sought from the government. Necessary sanction was accorded by the government on 09.08.2007, therefore, the regularization of the services of the petitioner w.e.f. 25.09.2007 was justified. The contention so raised on behalf of the respondents also deserves to be rejected for the reasons that once the government had relaxed condition of educational qualification prescribed in the R&P Rules, there was no impediment for granting the benefit of regularization to the petitioner from the due date. Perusal of the sanction accorded by the government on 09.08.2007, Annexure R-1, nowhere reveals that there was specific direction to not to confer the due benefits on the persons, in respect of whom sanction was accorded, from the due dates.

13. Thus, the action of respondents in denying the claim of the petitioner for regularization after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory, hence cannot be sustained.

14. In view of the above discussion, the petition is allowed and the impugned office order dated 09.02.2016, Annexure A-2 is quashed and set aside. Respondents are directed to regularise the services of the petitioner from the date when he completed 8 years continuous service on daily wage basis. Needless to say that the consequential benefits shall also follow subject, however, to the condition that petitioner shall be entitled for consequential financial benefits, if any, only for a period of three years

immediately preceding the date of filing of petition. The petition is accordingly disposed of, so also, the pending applications, if any.

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

Between:-

1. SH. SUMAN DAWAR, AGED ABOUT 48 YEARS,
2. SHRI VARUN DAWAR
   BOTH SONS OF LATE SH. VARESH DAWAR, C/O 5, NORTH BROOKE TERRACE, THE MALL, SHIMLA, H.P.

……. PETITIONERS/TENANTS

(BY MR. ANUJ GUPTA, ADVOCATE)

AND

SH. SURINDER SINGH KHERA S/O LATE SH. BACHHITER SINGH, R/O 5, THE MALL, SHIMLA.

……..RESPONDENT/LANDLORD

(M/S RAJEEV SAXENA AND RAHUL MAHAJAN, ADVOCATES)

CIVIL REVISION
NO. 156 OF 2019
Reserved on:27.06.2022
Decided on:28.07.2022

H.P. Urban Rent Control Act, 1987- Section 14(3)(c)- Revision- Eviction- Bonafide requirement for rebuilding and reconstruction- Held- Approval of plan of reconstruction by the statutory authority is not a condition precedent for ordering the eviction of a tenant on the ground referred to in Section 14(3)(c) of Rent Act- Eviction order rightly passed- Revision dismissed. (Para 12, 16)

Cases referred:

Hari Dass Sharma Vs. Vikas Sood and others (2013) 5 SCC 243;

Jagat Pal Dhawan Vs. Kahan Singh (dead) by LRs and others, (2003)1 SCC 191;

Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel, latest HLJ 2015 (HP)1096;

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

J U D G E M E N T

By way of this revision petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act (hereinafter to be referred as 'the Rent Act'), the petitioners/tenants (hereinafter to be referred as the 'tenants') have challenged both the order passed by leaned Rent Controller (1), Shimla, in Rent Petition No. 4-2 of 2007, titled as Surender Singh Khera Vs. Sh. Varesh Dawar, dated 17.02.2014, in terms whereof, the eviction petition filed under Section 14 of the Rent Act by the respondent/ landlord (hereinafter to be referred as the 'landlord'), has been allowed and the tenants have been ordered to be evicted on the ground of *bonafide* requirement of the landlord for the purpose of rebuilding and reconstruction of the demised premises, which reconstruction as per learned Rent Controller cannot be carried out without vacating the demised premises as reconstruction has to be done after demolition of the building and also against the judgment passed by learned Appellate Authority in Rent Appeal No. 31-S/14 of 2015/14, titled as Sh. Suman Dawar and another Vs. Sh. Surinder Singh Khera and another, dated 09.09.2019, in terms whereof, the appeal preferred by the tenants against the order of eviction stands dismissed.

2. Brief facts necessary for the adjudication of the present petition are that the landlord filed an eviction petition qua the demised premises known as '5 North Brooke Terrace, The Mall Shimla', against the tenants on the ground that the demised premises was old and its condition was not good. The landlord required the same for rebuilding and reconstruction, which is not possible without the building being vacated. According to the landlord, the

proposed construction was not only to increase the value of the property as it was situated in the heart of the city but the same would also have had enhanced the income of the landlord.

3. The petition was resisted by the tenants on the ground that the demised premises was not in a dilapidated condition and was in a perfectly habitable condition. According to the tenants, there was no *bonafide* requirement of the landlord for the purpose of reconstruction and rebuilding. The landlord was already running a shop which is below the demised premises, which belied the claim of the landlord that the condition of the building was not good. The tenants also challenged the status of the petitioner therein as landlord of the demised premises, as according to them, the alleged purchase was in violation of the H.P. Tenancy and Land Reforms Act, 1972. It was also alleged by the tenants that the eviction petition lack material particulars and construction was not permissible in the area where the demised premises was situated.

4. The stand of the tenants was denied by way of rejoinder by the landlord who reiterated his stand and claimed that rebuilding and reconstruction was permissible on old lines in the area where the demised premises was situated.

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

> "1. Whether the premises in question under the occupation and tenancy of respondent are *bonafide* required by the petitioner for the purpose of re-building and reconstruction and that such re-building and reconstruction cannot be carried out without the rented premises being vacated by the respondent? OPA.
> 2 Whether the present application is not maintainable? OPR
> 3 Whether there is no relationship of landlord and tenant between the applicant and respondent? OPR

4 Whether the applicant is stopped from filing the present application from his own acts, deeds and commissioners and acquiescence? OPR

5 Relief.

6. In terms of order dated 17.02.2014, the issues so framed were decided by learned Rent Controller as under:-

Issue No. 1 : Yes.
Issue No. 2: No.
Issue No. 3: No.
Issue No. 4: No.
Relief : The petition is allowed as per operative pat of the order."

7. While allowing the petition, learned Rent Controller held that though the tenants had disputed relationship of landlord and tenant in the reply but when one of the tenants entered into the witness box as RW-5, he clearly admitted that the eviction petitioner was the landlord. Learned Rent Controller further held that in order to prove that demised premises were in a dilapidated condition and required reconstruction, the landlord had examined AW-4 Sh. Rajiv Verma, an Engineer by profession, who had inspected the premises in question. By relying upon the evidence of this witness, learned Rent Controller held that the evidence of this witness qua dilapidated condition of the building, which remained consistent on record and replies given by said witness in his cross examination also demolished the arguments of the respondent that this witness had not actually inspected the premises in question, rather prepared his report at the instance of the landlord. Learned Rent Controller held that in addition, the tenants have examined RW-2 Surender Singh, Druaghtsman of M.C. Shimla and in his cross examination, this witness had proved two documents, i.e. Ext. P-X and P-Y, which were the inspection reports of the building conducted by the officers of the M.C. Shimla and the reports supported the contention of the eviction petitioner that the

building in question was in a dilapidated condition. Learned Rent Controller also held that landlord had demonstrated before the Court his financial capacity to undertake demolition and reconstruction of the demised premises and as far as the issue of the tenants that permission sought for reconstruction of the building by the landlord stood rejected by the Municipal Corporation, Shimla, is concerned, said order was appealable and the landlord had the option to get the order of rejection corrected by way of an appeal or the landlord may apply to the authority with the prayer to reconsider but it was not incumbent upon the landlord to prove that he had obtained necessary sanction for the purpose of reconstruction from the competent authority for proving his bonafide for eviction of the tenants on the ground of reconstruction and rebuilding. Learned Rent Controller relied upon the judgment of Hon'ble Supreme Court in Civil Misc. Appeal No. 47-S/14 of 2003, decided on 08.07.2013, titled as R.S. Puran Mull Trust Vs. M/s Dyal Sons, in support of its findings.

8. In appeal, these findings were upheld by learned Appellate Authority. It was reiterated by the learned Appellate Authority that the landlord had financial resources to carry out reconstruction, as was clear from statement of accounts Ext. CW-1/F & Ex. AW-1/G and this proved the *bonafide* of the landlord and further sanction of the plan was not the requirement of law for getting the eviction order. With regard to the issue raised by the tenants that there was common wall of the demised premises with adjoining building and therefore, the eviction order could not be passed, learned Appellate Court held that the same was for the landlord to settle with neighbours as to how he will get the common wall constructed but this was not a condition precedent for ordering the eviction. In this regard, learned Appellate Authority relied upon the judgment of the Hon'ble Supreme Court in *Jagat Pal Dhawan Vs. Kahan Singh (dead) by L.Rs. & others*, (2003) 1 SCC 191.

9. Feeling aggrieved, the tenants have filed the present revision petition.

10. Mr. Anuj Gupta, learned Counsel for the petitioners/ tenants has challenged the order of eviction as well as judgment passed by the learned Appellate Authority mainly on the ground that in the absence of there being a valid sanction for reconstruction granted by Municipal Corporation in favour of the landlord, the order of eviction passed by learned Rent Controller, as upheld by learned Appellate Authority, was not sustainable. He argued that the plans for reconstruction as submitted by the landlord were rejected by the Municipal Corporation as far back as in the year 2013 and till date neither any appeal stood preferred by the landlord against the rejection of the proposed plans not he had resubmitted any plan for reconstruction. Learned Counsel also relied upon the provisions of Sections 242 and 244 of the Municipal Corporation Act, 1994 and argued that in view of said statutory provisions also, the order and judgment under challenge were not sustainable. Learned Counsel also argued that the tenants were willing to give undertaking that they would vacate the demised premises immediately on expiry of two months as from the date of valid sanction being accorded in favour of the landlord by the statutory authority. No other point was argued assailing the order of eviction and the judgment passed by learned Appellate Court on behalf of the petitioners.

11. On the other hand, Mr. Rajiv Saxena, learned Counsel for the respondent-landlord vehemently argued that there is no merit in the present petition for the reason that the contention of the tenants that the order and judgment under challenge are not sustainable for lack of valid reconstruction sanction is without any legal basis, as it is settled law that for the purpose of passing an eviction order, it is not a condition precedent that the landlord should have a valid sanction in his hand. Learned Counsel further submitted that otherwise also as the only argument raised by the petitioners herein is

with regard to there not being any valid sanction in favour of the landlord, this means that the decision passed by the learned Courts below with regard to the property being in dilapidated condition which required reconstruction and which reconstruction was not possible without the vacation of the demised premises stood admitted by the tenants. Leaned Counsel further submitted that the prayer of the petitioners/tenants that they be permitted to continue to occupy the premises with the condition that they would vacate the same immediately on expiry of two months as from the date sanction is accorded in favour of the landlord by the competent authority, is not acceptable to the landlord for the reason that the use and occupation charges which were being paid by the tenants are extremely on the lower side and no offer has come forth from the petitioners/tenants that they are willing to pay use and occupation charges on the basis of rates as have been fixed by this Court in order passed with regard to properties which are less advantageously situated as the present demised premises is. Accordingly, a prayer has been made for dismissal of the present petition.

12. I have heard learned Counsel for the parties and carefully gone through the pleadings as well as documents appended therewith, including the order and judgment under challenge.

13. As primarily, two issues have been raised by learned Counsel for the petitioners in the present revision petition, i.e., (a) the impugned order and judgment being bad for want of valid sanction in favour of the landlord for reconstruction of the demised premises by the statutory authority; and (b) the contention that the petitioners/tenants be permitted to occupy the demised premises till the grant of valid sanction in favour of the landlord by the statutory authority. I will deal with these issues separately.

14. Coming to the only challenge which has been made before this Court with regard to non-sustainability of the order of eviction as well as the judgment passed by the Appellate Authority of there not being a valid sanction

by the Municipal Corporation, Shimla, in favour of the landlord, this Court will first refer to the relevant statutory provisions as also the case law relied upon in this regard by the parties. Section 14 of the Rent Act *inter alia* provides that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession in the case of a residential and non-residential building, if it becomes unsafe and unfit for human habitation or is required *bonafide* by him for carrying out repairs which cannot be carried out without the building or rented land being vacated or the building or rented land is required *bonafide* by him for the purpose of building or re-building or making thereto any substantial additions or alterations and that such building or re-building or addition or alteration cannot be carried out without the building or rented land being vacated.

15. Section 14(3)(c) of the Himachal Pradesh Urban Rent Control Act, 1987, reads as under:-

> *"14(3)(c). In the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or it has become unsafe or unfit for human habitation or is required bona fide by him for carrying out repairs which cannot be carried out without the building or rented land being vacated or that the building or rented land is required bona fide by him for the purpose of building or re-building or making thereto any substantial additions or alternations and that such building or re-building or addition or alternations cannot be carried out without the building or rented land being vacated."*

16. On the issue as to whether the premises in question under the occupation and tenancy of the tenants was *bonafide* required by the landlord for the purpose of rebuilding and reconstruction and the same could not be carried out without the rented premises being vacated by the tenants, as of now, there are concurrent findings in favour of the landlord and against the tenants returned by the learned Rent Controller, as upheld by the learned

Appellate Authority. It is reiterated that during the course of arguments, these findings have not been agitated by the learned Counsel. The ground of challenge as was argued before this Court was absence of a valid sanction qua reconstruction of the demised premises. It is pertinent to mention at this stage itself that as far as the scheme of the H.P. Urban Rent Control Act in general and Section 14 thereof in particular is concerned, there is no condition precedent contained in the statutory provisions that an eviction petition on the ground referred to hereinabove is not maintainable in the absence of there being a valid sanction of reconstruction in favour of the landlord or that an order of eviction cannot be passed in the absence of any such approval/sanction.

17. In the State of Himachal Pradesh, there is in force 'the Himachal Pradesh Municipal Corporation Act, 1994'. It has been enacted to consolidate, amend and replace the laws relating to the establishment of Municipal Corporations for certain Municipal areas in the State of Himachal Pradesh. Chapter 14 of the said act deals with regulations. This Chapter contains sections 241 to 260 of the Act. Section 242 of the M.C. Act prohibits erection of building without sanction by providing that no person shall erect or commence to erect any building or execute any of the works specified in Section 244, except with the previous sanction of the Commissioner. Section 244 of the same deals with applications for additions to, or repairs of building and provides that the same cannot be done without the sanction of the Commissioner. Thus, in view of the said provisions of the Municipal Corporation Act, it is a fact that the reconstruction of the demised premises cannot be carried out without the permission of the Commissioner.

18. Hon'ble Supreme Court of India in ***Jagat Pal Dhawan Vs. Kahan Singh (dead) by LRs and others***, (2003)1 SCC 191, while interpreting Section 14(3)(c) of the H.P. Urban Rent Control Act, 1987, held that said Section provides *inter alia* that a land lord may apply to the

Controller for an order directing the tenant to put the landlord in possession of the tenancy premises in case of any building or rented land being required *bonafide* by him for the purpose of building or rebuilding which cannot be carried out without the building or rented land being vacated. The provision does not have as an essential ingredient thereof and as a relevant factor the age and condition of the building. The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the Local Authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However, still suffice it to observe, depending on the facts and circumstances of the given case, the Court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the *bonafides* of the landlord. Hon'ble Supreme Court also held that if a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction, obviously his requirement would remain a mere wish and would not be *bonafide*.

19. In ***Hari Dass Sharma Vs. Vikas Sood and others*** (2013) 5 SCC 243, Hon'ble Supreme Court has again held while interpreting Section 14 of the H.P. Urban Rent Control Act that once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved, was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto. The relevant paragraphs of this judgment of the Hon'ble Supreme Court are quoted herein below:-

"17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J., writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.

18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been

disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

20. Hon'ble Coordinate Bench of this Court in ***Sh. Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel***, latest HLJ 2015 (HP)1096, while upholding the order of eviction of the tenant passed by the learned Court's below disposed of the revision petition in the following terms:-

"40. The tenant by way of instant revision has questioned the order dated 24.3.2014 passed by the learned Rent Controller (V), Shimla whereby pursuant to the execution proceedings having been carried out by the landlord, the tenant was granted three months' time to vacate the premises, however with the right of re-entry. Now, that the revision petition preferred by the tenant itself has been dismissed and the order passed by the appellate authority, has been upheld, this revision is disposed of with the clarification that the eviction order shall not be put to execution unless the petitioner/landlord/ appellant produces before the Executing Court the building plan duly sanctioned/approved by a competent authority and it shall be open to the tenant to apply for re-entry into the building in accordance with the proviso to Clause (c) of Section 14 (3) of the Act introduced by the Amendment Act. Pending application(s) if any, stands disposed of. The parties are left to bear their own costs."

21. Similarly, another Hon'ble Coordinate Bench of this Court in ***Sanjeev Sood (Bhagra) Vs. Raj Kumar Sood and ors***., Civil Revision No. 100 of 2014, decided on 31.10.2017, while upholding the order and judgment of eviction disposed of the revision petition in the following terms:-

> *"14. Therefore, the own evidence of the petitioner-landlady discussed hereinabove, is suggestive of that respondent No. 1 never sub-letted the demised premises to his son respondent No. 2 and rather firm M/s New Gift Shoppe of Hindu Undivided Family of which respondent No. 1 is also a member, is still running its business there. Not only this, but such business in the shop is being run under the supervision and control of respondent No. 1. Both Courts below, therefore, have rightly appreciated the evidence available on record. The eviction petition filed by the petitioner-landlady, a such, has rightly been dismissed by both Courts below. The impugned judgment, as such, cannot be said to be legally and factually unsustainable and the same is accordingly affirmed."*

22. In the backdrop of the statutory provisions of Section 14 of the Rent Act as well as the judgments of the Hon'ble Supreme Court referred to hereinabove, the contention of learned Counsel for the petitioners that the order of eviction as passed by learned Rent Controller and as upheld by learned Appellate Authority are not sustainable for want of valid sanction in favour of the landlord, cannot be accepted in law. In terms of the judgment of Hon'ble Supreme Court of India in *Jagat Pal Dhawan Vs. Kahan Singh and others (supra)*, this Court has no hesitation in holding that the approval of the plan of reconstruction by the statutory authority is not a condition precedent for ordering the eviction of a tenant on the ground referred to in Section 14(3)(c) of the Rent Act. In other words, simply because the landlord herein has not been granted the approval for the purpose of reconstruction of the building, i.e. the demised premises, the same does not render the order of eviction as passed by learned Rent Controller, and as upheld by learned Appellate Authority, as bad in law. This cannot be used as a tool by the tenants to defeat the order of eviction. Though, there is no dispute that the reconstruction of the demised premises cannot be carried out until and unless the landlord does has a sanction in terms of Section 244 of the Municipal

Corporation Act, 1994, however, non-availability of the sanction plan does not render the order of eviction to be un-executable.

23. It is relevant to mention at this stage itself that it is not as if the landlord never applied for the reconstruction sanction. Further, learned Counsel appearing for the respondent has made a statement in the Court of law that awaiting the outcome of the present proceedings, the landlord intends to do the needful immediately thereafter. As far as financial credibility of the landlord to undertake the process of reconstruction of the demised premises is concerned, the same has been found to be in favour of the landlord by both the learned Courts below. Accordingly, the plea of the tenants that the order and judgment under challenge are not sustainable for want of a valid sanction for reconstruction of the demised premises is rejected.

24. Now this Court will refer to the plea taken by learned Counsel for the petitioner that the petitioners/tenants be permitted to continue to occupy the demised premises till two months as from the date a valid sanction is granted in favour of the landlord by the statutory authority. In the present case, the demised premises is situated on the Mall Road, Shimla, which comprises of a big hall and a latrine for which rent of Rs. 1500/- per annum was being paid by the tenants to the landlord, inclusive of all taxes. As has been held by this Court hereinabove in the light of the judgments of the Hon'ble Supreme Court, referred to hereinabove, a valid sanction is not a pre-condition for eviction of a tenant from the demised premises nor an order of eviction, can be made subservient to the grant of a valid sanction by the statutory authority. The judgment passed by the Hon'ble Coordinate Bench in *Sh. Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel* (supra) was assailed before the Hon'ble Supreme Court and in terms of order dated 03.12.2019, passed in Civil Appeal No. 7925/2019, titled as *Ashok Kumar Goel Vs. Lin Kuei Tsann (D) Thr. LRs.*, the matter stood disposed of by the Hon'ble Supreme Court in the following terms:-

> *"The order of eviction passed against the tenant/respondent stands confirmed. The landlord/appellant is permitted to renovate his building to strengthen it, if he so chooses. He shall reinduct the respondent/tenant in basement and ground floor within 1 ½ years from the date of tenant vacating the premises for the purpose of getting the building renovated as per proviso to Clause (c) of Section 14(3) of the Himachal Pradesh Urban Rent Control Act, 1987. The tenant/respondent would hand over the possession of his portion to the landlord within two months from today. The appeal stands disposed of accordingly."*

25. As far as other judgments of the Hon'ble Coordinate Bench in case titled as Sanjeev Sood (Bhagra) Vs. Raj Kumar Sood and others (supra), is concerned, with due respect this Court states that the order of the Court that the tenant therein shall be evicted from the demised premises only upon production of necessary approvals granted by the statutory authority, is concerned, the same cannot be construed to be an order in rem which can be said to cover all similar cases, more so, in view of the judgments of the Hon'ble Supreme Court quoted hereinabove. Now incidentally during the course of hearing of the present petition, though, the learned Counsel for the petitioners has stated that the tenants be permitted to occupy the demised premises till the grant of valid sanction in favour of the landlord with the undertaking that they would vacate the premises in question within two month post the grant of valid sanction on payment of use and occupation charges as presently were being paid by them, but no proposal came forth from the petitioners that they were willing to pay use and occupation charges as per the market rate or the rate recently fixed by Hon'ble Coordinate Bench(s) in this regard. In this case, the use and occupation charges as are being paid by the tenants to the landlord are Rs. 20000/- per month. A Coordinate Bench of this Court in CMP No. 7925 of 2021, filed in Civil Revision No. 163 of 2019, has determined the use and occupation charges of

the demised premises therein at Rs. 500/- per square foot. This Court in terms of order dated 03.12.2021, passed in CMP No. 13786 of 2020 filed in Civil Revision No. 76 of 2020, titled as M/s Wardhan Corporation and others Vs. M/s Bhanu Mal and others, has fixed the use and occupation charges to be Rs. 1,25,000/- per month which demised premises are in close proximity of the demised premises, subject matter of the present petition. In this view of the matter, this Court is of the considered view that in the peculiar facts of this case, the petitioners cannot be permitted to continue to occupy the demised premises till the grant of valid sanction in favour of the landlord as use and occupation charges, which are being presently paid, did not commensurate with the use and occupation charges which the demised premises demand.

26. Accordingly, in view of above observations, this revision petition is dismissed. Pending miscellaneous application(s), if any, also stands disposed of accordingly. Interim order(s), if any, stand vacated.

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

Between:-

1. HEMANT PURI, SON OF SH. HARI RAM PURI, RESIDENT OF RAY LODGE, MOHALI MUGLA, HARDASPURA, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.
2. HARI RAM PURI, SON OF SH. NIHAL DASS PURI, RESIDENT OF RAY LODGE, MOHALI MUGLA, HARDASPURA, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.
3. SMT. SWAROOP PURI, WIFE OF SH. HARI RAM PURI, RESIDENT OF RAY LODGE, MOHALI MUGLA, HARDASPURA, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.

…….PETITIONERS

(BY MR. KARAN SINGH KANWAR, ADVOCATE)

AND

SMT. SHALINI BASSI, WIFE OF SH. HEMANT PURI, DAUGHTER OF SH. H.D. BASSI, RESIDENT OF MUGLA HARDASPURA, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH. PRESENTLY RESIDENT OF HOUSE NO.77, HOUSING BOARD COLONY, PHASE-1, SAPROON, TEHSIL AND DISTRICT SOLAN, HIMACHAL PRADESH.

.....RESPONDENT

(BY MR. NIMISH GUPTA, ADVOCATE)

CRIMINAL REVISION
No. 115 OF 2020
Decided on: 16.08.2022

Code of Criminal Procedure, 1973- Section 397- **Protection of Women from Domestic Violence Act, 2005**- Section 12- Enhancement of compensation- Held- No reasoning assigned in the order passed in appeal as to why the learned Appellate Court assessed that amount of compensation was liable to be enhanced from Rs. 20,000/- to Rs. 2.00 Lac- Petition allowed with the direction to Ld. Appellate Court to decide afresh by assigning reasons. (Para 4 to 7)

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

O R D E R

By way of this revision petition, the petitioners assail the judgment passed by the Court of learned Additional Sessions Judge-1, Solan, in Criminal Appeal No. 28-S/10 of 2018, dated 06.06.2018, in terms whereof, learned Appellate Court while allowing the appeal filed by the present respondent, modified the order passed in an application filed under Section 12 of the Protection of Women from Domestic Violence Act, 2005, by the present respondent by enhancing of the amount of compensation from Rs. 20,000/- to Rs. 2.00 Lac.

2. I have heard learned Counsel for the parties and also gone through the order passed by learned Judicial Magistrate 1st Class in Criminal

Appeal No. 11/3 of 2012 as also the judgment passed in appeal by learned Appellate Court, which is the subject matter of this revision petition.

3. Brief facts necessary for the adjudication of the present petition are that in an application filed under Section 12 of the Protection of Women from Domestic Violence Act by the respondent herein against the present petitioners, learned Trial Court granted the following reliefs in favour of the complainant therein:-

(i) The applicant is held entitled for protection order and the respondents are hereby prohibited from causing physical abuse to the applicant and to stop all forms of communication with applicant. Further respondents are directed to no to approach applicant at her workplace or at her residential accommodation.

(ii) The applicant shall have continued access to her personal effects lying in matrimonial house and the respondent Hemant is restrained from dispossessing or in any other manner disturbing the possession of applicant from the residential/ shared house if applicant chose to reside there.

(iii) The applicant is also entitled for Rs. 20,000/- as compensation from the respondents jointly on account of mental and emotional suffering.

4. Feeling aggrieved, the complainant preferred an appeal *inter alia* on the ground that the amount of Rs. 20,000/- which was granted as compensation was on the lower side and while assessing the said amount, the learned Court *inter alia* erred in not taking into consideration the fact that household expenses were not borne by the present petitioners and complainant had to leave the matrimonial house and thereafter had to live in a hotel for a night and she also had to go to Solan alongwith her parents. Further, the parents of her husband were not dependent upon the husband as they were having sufficient source of income being Class-1 pensioners, as

also property in their names at Chamba, Solan and Mumbai. No expenses for treatment on account of the injuries received were paid nor any expenses for travelling and defending the case were paid by the husband to the complainant and the complainant was also entitled travelling expenses and those incurred on defending herself in the cases.

5. The appeal has been allowed by the learned Appellate Court by enhancing the amount of compensation from Rs. 20,000/- to Rs.2.00 Lac. A perusal of the impugned order demonstrates that there is no reasoning given in the order as to how the learned Appellate Court assessed that the amount of compensation was liable to be enhanced from Rs. 20,000/- to Rs. 2.00 Lac. Though, in para-15 of the judgment, learned Appellate Court has made observations that the amount of compensation granted by the learned Appellate Court did not commensurate with the status of the parties and same cannot be treated as due compensation for the loss, sufferings and injuries sustained by the aggrieved person and the agony faced by the complainant, therefore, cannot be quantified, however, thereafter while assessing the amount by enhancing the same from Rs.20,000/- to Rs. 2.00/- Lac, no reasoning is given, explaining as to why, according to learned Appellate Court, Rs. 2.00 Lac is the reasonable amount for compensation.

6. The Court stands informed that whereas the husband is an Executive Engineer, wife, i.e. the complainant, is a Dental Doctor and a government employee and her salary is more than that of the husband. The Court has also been informed that the children presently are residing with their father who is looking after them. This Court is of the considered view that due to lack of reasoning assigned in the order passed in appeal as to why, as per the learned Appellate court, the reasonable amount of compensation, to which the complainant was entitled to was Rs. 2.00 Lac, said judgment cannot be sustained in the eyes of law. This is for the reason

that the findings which have been arrived at by the learned Appellate Court do not have the backing of the reasoning. In other words, no Court has unfettered power to arrive at some figure qua award of compensation which does not has the backing of any reasoning mentioned in the judicial pronouncement. This Court is not making any observation that the amount of compensation which has been awarded by the learned Appellate Court is on the higher side etc. All that this Court is observing is this that there has to be some reasoning as to how the complainant is entitled for this much amount. In the absence of final adjudication supported by some reasoning, the same is not sustainable in the eyes of law.

7. Accordingly, this petition succeeds. Judgment dated 14.11.2019, passed by learned Additional Sessions Judge-1, Solan, is set aside and the matter is remanded back to the learned Additional Sessions Judge-1, Solan, with the direction to hear the appeal afresh and decide the same on merit by assigning reasoning for adjudication. It is made clear that judgment under challenge has been set aside by this Court for lack of reasoning and while hearing the appeal afresh, learned Appellate Court should not be under any impression that this court has given any observation that the amount which has been assessed by it was on the higher side or otherwise. In other words, learned Appellate Court can award such amount of compensation as it deems fit, if it finds merit in the appeal but then whatever amount is assessed by the Appellate Court, the same should be substantiated by some reasoning.

The petition stands disposed of in above terms. Parties through their respective Counsel are directed to appear before the Court of learned Additional Sessions Judge-1, Solan, on 05.09.2022. Pending miscellaneous application(s), if any, also stands disposed of accordingly. Interim order stands vacated.

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

Between:-

1. SHRI GIAN CHAND SON OF SHRI SADA RAM,
2. SHRI SHANKAR DASS SON OF SHRI SADA RAM,
3. SHRI ROSHAN LAL SON OF SHRI SADA RAM,
   ALL RESIDENTS OF VILLAGE RAMPUR, TEHSIL AND DISTRICT UNA, H.P.

.....APPELLANTS

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

AND

1. SHRI RAM PAL SON OF SHRI WATTNA,
2. SHRI RAJ SON OF SHRI WATTNA,
3. SHRI OMI SON OF SHRI WATTNA,
4. SHRI RAM LAL SON OF SHRI WATTNA,
   ALL RESIDENTS OF VILLAGE RAMPUR, TEHSIL AND DISTRICT UNA, H.P.

.....RESPONDENTS

{MR. R.K. GAUTAM, SENIOR ADVOCATE WITH MR.
JAI RAM SHARMA, ADVOCATE)

REGULAR SECOND APPEAL
No. 558 OF 2009
Decided on: 26.08.2022

A. **Code of Civil Procedure, 1908**- Section 100- Suit for declaration challenging the revenue entries in favour of defendant was dismissed- First Appeal also dismissed- Plaintiff failed to demonstrate to be in exclusive possession of suit land along with proforma defendants as owners- Held- Concurrent findings of both the courts below do not require any interference.

B. **Code of Civil Procedure, 1908**- Order 41 Rule 27- Additional evidence- Provisions of Order 41 Rule 27 of Code of Civil Procedure cannot be permitted to be used as a tool by either of the parties to fill up the lacunae- Appeal dismissed. (Para 11) Title: Gian Chand & others vs. Ram Pal & others Page-916

This appeal coming on for HEARING this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G E M E N T

By way of this appeal, the appellants challenge the judgment and decree dated 02.11.2007, passed by the Court of learned Civil Judge (Junior Division), Court No. 2, Una, H.P. in Civil Suit No. 127/1998, titled as Gian Chand Vs. Ram Pal and others, in terms whereof a civil suit for declaration filed by the present appellants was dismissed by the learned Trial Court as also the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Una, District Una, H.P. in Civil Appeal No. 6/2008, dated 27.08.2009, titled as Gian Chand vs. Ram Pal and others, in terms whereof the appeal preferred by the appellants against the judgment and decree passed by learned Trial Court was dismissed.

2. This appeal was admitted by this Court on substantial questions of law No. 1, 2 and 3 given in the paper book, which are quoted as herein below:-

> *"1. Whether there can be any tenancy over the land which is not fit for cultivation and to sustain the plea of tenancy the consent of the owner or payment of rent are minimum requirement to be proved by the tenant?*
> *2. Whether the impugned judgments are vitiated on account of non-permitting the appellants/plaintiffs to place on record the affidavit executed by Shri Wattna, the predecessor-in-interest of the defendants affirming the fact that neither he nor his predecessor-in-interest cultivated the suit land?*
> *3. Whether the document which is necessary for enabling Court to pronounce the judgment for advancing substantial cause and the Courts are obliged to permit the production of such document as additional evidence and non-production of such document has caused a great prejudice to the cause of the appellants?"*

3. Brief facts necessary for the adjudication of this appeal are that one of the appellants, namely, Sh. Gian Chand filed a suit for declaration against the respondents herein in which other appellants were impleaded as proforma defendants for declaration that the plaintiff and proforma defendants No. 5 and 6 were owners in possession of land measuring 3 kanal 10 Marlas, bearing Khewat No. 502 min, Khatauni No. 626, Khasra No. 1776, as entered in jamabandi for the year 1984-86, situated in village Rampur, Tehsil and District Una, H.P. (hereinafter to be referred as the 'suit land'). According to the plaintiff, entries in the name of predecessor-in-interest of the defendants were absolutely wrong, incorrect and against factual position on the spot. The consequential relief of permanent injunction for restraining the defendants from taking forcible possession of the suit land or part thereof was also prayed for. According to the plaintiff, he and proforma defendants were in possession of the suit land as owners and neither the defendants nor their predecessor in interest had any right, title or interest over the same. The predecessor-in-interest of the defendants, namely, Bhagwana had died 35 years back and after his death, Wattna son of Tulsi, had succeeded him as legal heir. Wattna executed an affidavit in which he stated that neither he nor Bhagwana, ever cultivated the suit land as tenant and entries in the name of Bhagwana are absolutely wrong and incorrect. Wattna died in the year 1994 and contesting defendants were his legal heirs. As per the plaintiff, the defendants on the basis of wrong revenue record were trying to take forcible possession of the suit land without any right to do so, despite repeated calls of the plaintiffs to desist from do doing so, they refused the request of the plaintiffs in this regard, which led to filing of the civil suit.

4. The suit was contested by the contesting defendants *inter alia* on the ground that neither the plaintiff nor the proforma defendants were owners in possession of the suit land. According to the defendants, Bhagwana, i.e. their predecessor-in-interest was coming in possession of the suit land as

tenant on payment of rent for the last 50 years under the owners. After his death, father of the defendants, i.e. Wattna, succeeded the estate of Bhagwana and continued to cultivate the suit land as tenant on payment of rent, and thereafter became owners of the suit land by virtue of H.P. Tenancy and Land Reforms Act on the appointed day. As per the defendants, they succeeded the estate of their late father as owners in possession. According to them, there was no question of Wattna executing any affidavit as alleged by the plaintiff and the same was a result of fraud and perpetrated by the plaintiff in connivance with the interested persons. It was also the case of the defendants that the plaintiff had filed a correction application against Bhagwana, which was dismissed on 17.02.1998. On these bases, the defendants resisted the suit.

5. On the basis of pleadings of the parties, learned Trial Court framed the following Issues:-

1. *Whether the plaintiff and proforma defendants No. 5 and 6 are owners in possession of the suit land as prayed? OPP*
2. *Whether the plaintiff is entitled for the relief of declaration as prayed? OPP*
3. *Whether the plaintiff is entitled for the relief of permanent injunction as prayed? OPP*
4. *Whether the suit is not maintainable? OPD*
5. *Whether the plaintiff has no locus-standi? OPD*
6. *Whether this Court has jurisdiction? OPD*
7. *Whether the suit is within limitation? OPD*
8. *Whether the plaintiff is stopped to file the present suit due to his own acts and conduct? OPD*
9. *Relief.*

6. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

Issue No. 1: *No.*
Issue No. 2: *No.*

Issue No. 3:		*No.*
Issue No. 4:		*Yes*
Issue No. 5:		*Yes*
Issue No. 6:		*Yes*
Issue No. 7:		*Yes*
Issue No. 8:		*Yes*
Relief	*:*	*The suit of the plaintiff stands dismissed as per the operative part of the judgment.*

7. The suit was dismissed by learned Trial Court by returning the findings that a perusal of the revenue record clearly demonstrated that land was in possession of the predecessor-in-interest of the defendants alongwith others. Learned Trial Court held that the plaintiff claimed that revenue entries qua the record of rights were wrong, however, the plaintiff did not bring any document on record to substantiate his claim. It held that in the absence of cogent and reliable evidence to demonstrate that the plaintiff was in possession of the suit land, it could not held so. Learned Trial Court also held that as there was nothing on record to ascertain the claim of the plaintiff that he was owner in possession of the suit land alongwith proforma defendants, therefore, it could not be so held in favour of the plaintiff. Learned Trial Court further held that as the plaintiff has failed to prove that defendants had no right over the suit land, therefore, decree of permanent injunction could not be granted against the defendants and further, evidence on record clearly demonstrated that the defendants alongwith plaintiff and proforma defendants were in possession of the suit land. Learned Trial Court also returned categorical findings that the record of rights also demonstrated that possession of the suit land was that of the plaintiff, defendants and proforma defendants and not exclusively that of the plaintiff. On these bases, learned Trial Court dismissed the suit.

8. Learned Appellate Court upheld these findings by holding out that the contention of the plaintiff was that he and proforma defendants were owners in possession of the suit land and defendants have nothing to do with the same, however, Ext. P-1 and D-1 to D-3 demonstrated that defendants/their predecessor-in-interest were in possession of the suit land on payment of rent to the owners. Learned Appellate Court held that as these entries were challenged by the plaintiff, therefore, onus was upon the plaintiff to prove that the same were wrong which the plaintiff failed to do. Learned Appellate Court also held that oral evidence on record seemed to be evenly balanced, and therefore, the Court had to revert back to the documentary evidence or revenue entries which were against the plaintiff. With regard to the affidavit executed by Wattna, learned Appellate Court held that affidavit mark B was never filed by plaintiff on record at the time of filing the suit or at the time of settlement of issues and it was only after the evidence of the parties was over that he filed an application before the learned Trial Court to produce said affidavit in the Court by way of rebuttal evidence but the same was disallowed by the learned trial Court. While dismissing the application filed under Order 41, Rule 27 of the Code of Civil Procedure, learned Appellate Court held that sufficient explanation was not put forth by the plaintiff as to why this document was not filed earlier, when he was basing his claim on this very document. It held that the plaintiff could not be allowed to lead such evidence particularly when it was in the knowledge of the plaintiff from the very beginning. It also held that in case the application was allowed, the same will amount to re-opening the case causing prejudice to the opposite party, which cannot be allowed. Learned Appellate Court also held that otherwise also the affidavit was executed in the year 1991 by Sh. Wattna who died somewhere in the year 1994 but no effort was made by the plaintiff to get the revenue entries changed on the basis of this affidavit. Learned Appellate further Court held that said affidavit was not executed in the presence of any

person who could identify the executants, which rendered the execution of the affidavit to be doubtful. On these bases, learned Appellate Court dismissed the appeal.

9. Feeling aggrieved, the appellants preferred this regular second appeal which, as already mentioned hereinabove, was admitted on the substantial questions of law quoted hereinabove.

10. I have heard learned Senior Counsel appearing for the appellants as well as respondents and gone through the judgments passed by both the learned Courts below as well as record of the case.

11. A perusal of the judgments passed by both the learned Courts below demonstrate that there are concurrent findings of fact which have been returned by both the learned Court below to the effect that whereas the plaintiff failed to demonstrate that he alongwith proforma defendants was in exclusive possession of the suit land as its owner, the defendants have demonstrated that they alongwith plaintiff and proforma defendants were in possession of the suit land. Learned Courts have also returned concurrent findings to the effect that revenue record clearly demonstrates that predecessor-in-interest of the defendants were tenants upon the suit land who were confirmed proprietary rights. Now as far as the issue as to whether there can be any tenancy over the land which is not fit for cultivation is concerned, this Court is of the considered view that a careful perusal of the plaint demonstrate that no such stand was taken by the plaintiff in the plaint. Therein, the case of the plaintiff was simply that he alongwith proforma defendants was exclusive owner in possession of the suit land and defendant, who were strangers qua the suit land were interfering in the same. With regard to the question as to whether the Court is obliged to permit the production of such document as additional evidence which is necessary for enabling the Court to pronounce the judgment is concerned, it is well settled law that the provision of Order 41, Rule 27 of the Code of Civil Procedure

cannot be permitted to be used as a tool by either of the parties to fill up the lacunae. Additional evidence can be permitted by the Appellate Court only if the Court is satisfied that despite due diligence, the party concerned was not able to earlier produce the evidence before the Court. In the present case, the document, which was intended to be produced by way of additional evidence, was an affidavit purportedly executed by predecessor-in-interest of the defendants as far back as in the year 1991, which as per the averments made in the plaint was in the knowledge of the plaintiff even at the time when the suit was filed. There is no cogent explanation available in the entire record as to why this document was not produced at the very first available instance by the plaintiff before the Court if the same was so important for the adjudication of the *lis*, as has been observed by learned Appellate Court while dismissing application under Order 41, Rule 27 of the Code of Civil Procedure. This Court reiterates that whether or not an application filed under Order 41, Rule 27 of the Code of Civil Procedure is to be allowed has to be tested not only from the perspective of due diligence exercised by the applicant but also from the perspective as to whether any prejudice would be caused to either party in case such an indulgence is shown in favour of the applicant who has otherwise failed to exercise due diligence. Now in the present case, by no stretch of imagination, it can be said that had the application been allowed, prejudice would not have been caused to the defendants, more so, in the teeth of the fact that the plaintiff failed to produce the said document on record despite the same being available with him even when the suit was filed. Further it cannot be said that the judgments passed by learned Courts below are vitiated on account of appellants not being allowed to place on record affidavit executed by Shri Wattna. This is for the reason that it is not for the Court to produce relevant evidence which is in favour of the parties before it. Onus is upon the parties to produce whatever evidence is with them to prove their cases as per their pleadings. If a party fails to exercise due diligence, and

in such circumstances, if the prayer of a party to place on record a document is not accepted by the Court, then it cannot be said that the judgments passed by both the learned Courts below are vitiated on that count. Substantial questions of law are answered accordingly.

In view of discussion held hereinabove, this appeal is dismissed being devoid of merit. Pending miscellaneous application(s), if any, also stand disposed of accordingly. No order as to costs.

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

Between:-

1. THE PRINCIPAL SECRETARY (PWD)
   TO THE GOVT. OF H.P., SHIMLA.

2. DISTRICT COLLECTOR, MANDI,
   DISTRICT MANDI, H.P.

3. COLLECTOR LAND ACQUISITION,
   MANDI, DISTRICT MANDI, H.P.

…APPELLANTS

(BY SH. R. P. SINGH, DEPUTY ADVOCATE GENERAL
FOR THE APPELLANTS)

AND

1. SH. JAI GOPAL S/O SH. NEEL KANTHA
2. SHRI TEK CHAND S/O SH. JIWA NAND
3. SHRI NARESH KUMAR THROUGH HIS LRS
   A) VIJAY SHARMA W/O SH. NARESH KUMAR
   B) DIMPLE SHARMA D/O SH. NARESH KUMAR
   C) ISHA SHARMA D/O SH. NARESH KUMAR
   D) NEERAJ SHARMA S/O SH. NARESH KUMAR
4. SMT. KAMLA SHARMA W/O SH. NAGENDER PAL SHARMA
5. SH. ANIL SHARMA S/O SH. NAGENDER PAL SHARMA.
6. MISS ARTI SHARMA D/O SH. NAGENDER PAL SHARMA.
7. SH. LEELA DHAR S/O SH. PITAMBER

8. PREM CHAND S/O SH. PITAMBER
   ALL RESIDENTS OF VILLAGE KANGOO,
   TEHSIL SUNDER NAGAR, DISTT. MANDI, H.P.
9. OM KANT S/O SH. MURLI LAL,
   RESIDENT OF VILLAGE & P.O. JAI DEVI,
   TEHSIL SUNDER NAGAR, DISTT. MANDI, H.P.

....RESPONDENTS

(MS. ANUBHUTI SHARMA, ADVOCATE,
FOR THE RESPONDENTS)

REGULAR FIRST APPEAL
NO. 307 OF 2012
RESERVED ON:25.08.2022
DECIDED ON: 29.08.2022

Land Acquisition Act, 1894- Section 18- Award of Ld. Presiding Officer, Fast Track Court, Mandi, in Reference No. 166 of 2003 whereby compensation amount was enhanced at the rate of Rs.30000/- per biswa has been assailed by the appellants- Held- Total development has taken place in village Kangu and surrounding areas after 1989, therefore, the market value assessed at Rs.30000/- per biswa can be taken to be just and fair market value. (Para 10)

Cases referred:

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

General Manager, Oil and Natural Gas Corporation Limited vs. Rameshbhai Jivanbhai Patel and another (2008) 14 SCC 745;

Kaushalya Devi Bogra and others etc. vs. Land Acquisition Officer Aurangabad and another, AIR 1984 SC 892;

Lakhimpur vs Bhuban Chandra Dutta, AIR 1971 SC 2015;

Madishetti Bala Ramul (dead) by LRs vs. Land Acquisition Officer (2007) 9 SCC 650;

State of H.P. and another vs. Sanjeev Kumar and another Latest HLJ 2010 (HP) 172;

Viluben Jhalejar Contractor (dead) by LRs vs. State of Gujarat (2005) 4 SCC 789;

This appeal coming on for pronouncement of judgment this day, the Court delivered the following:

J U D G M E N T

By way of instant appeal, Award dated 13.05.2011 passed by learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. in Reference Case No. 166 of 2003, whereby the compensation amount was enhanced at the rate of Rs.30,000/- per biswa, has been assailed by the appellant.

2. In 1962-63, 14 biswas 6 biswansi of land comprised in Khata/Khatauni No. 113/120 min Khasra No. 306, in mauza Kangu, Tehsil Sunder Nagar, District Mandi, H.P. owned by the respondents (hereinafter referred to as claimants) was utilized by the State for the construction of Kangu-Dhar Link Road. Neither the land of the respondents was acquired nor any compensation was paid to them. However, the State Government decided to acquire the land of the claimants at much later stage and accordingly proceedings under the Land Acquisition Act, 1894 (for short 'Act') were initiated. Notice under section 4 of the Act (for short, 'section 4 notification') was issued on 20.12.1995 and was published in '*Rajpatra'* on 10.02.1996. Notice under Section 6 of the Act was issued on 12.04.1997. The Acquisition Collector (LAC) passed the Award on 19.9.1997. The market value of of the acquired land was assessed at Rs.26,536/-. The LAC had relied upon two transactions recorded *vide* mutation Nos. 340 and 353 dated 25.5.1995 and 05.02.1996 for arriving at the market value of the acquired land. Accordingly, a total amount of Rs.1,56,945/- was assessed as payable to the claimants. The break-up of which is as under:

1. Value of land	Rs.26,536.00
2. 30%G.A. charges.	Rs. 7,961.00
3. 12% Addl. compensation U/s 23(1-A) w.e.f.5.2.96 to 30.9.97	Rs. 5,261.00
4. Interest U/s 34 w.e.f. 1.4.63 to 30.9.97	Rs.1,17,187.00

Total **Rs.1,56,945.00**

3. On application of claimants under Section 18 of the Act, the LAC referred the matter to learned District Judge, Mandi, who further assigned the same to the Presiding Officer, Fast Track Court, Mandi for disposal in accordance with law. The Reference Court passed the impugned Award whereby the market value of the acquired land was assessed at Rs.30,000/- per biswa and the respondents were held entitled to market value of Rs.30,000/- per biswa for the acquired land with 12% additional compensation under Section 23 (1-A) of the Act from the date of publication of the Section 4 notification till the date of Award passed by the LAC, 30% solatium under Section 23 (2) of the Act and interest at the rate of 9% per annum for one year from the date of notification and thereafter @ 15% per annum till realization on the enhanced compensation amount.

4. Appellants have assailed the impugned Award on the grounds that the assessment of the market value at Rs. 30,000/- per biswa is without any legal evidence. The Reference Court had made a single sale transaction as basis for arriving at the market value of the acquired land whereby only two Biswas of land was sold for Rs.61,000/-. It is further submitted that the allowance of compensation at Rs.30,000/- per biswa without making any deductions in accordance with law is unsustainable.

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

6. It is more than settled that the Reference Court does not sit in appeal over the Award passed by the LAC. The Reference Court has to independently adjudge the fair and just market value of the acquired land on the basis of material placed before it.

7. The claimants had examined as many as nine witnesses in order to prove the market value of the acquired land. Needless to say, that the market value relevant at the time of issuance of section 4 notification was to be taken into consideration. The claimants examined witness Mani Ram as PW-4, who proved the sale deed Ex.PW-4/A whereby the land measuring one biswa three biswansi was sold for Rs.13,000/- in the year 1989. Another sale deed Ext. PW-5/A was proved by the claimants through PW-5 Brij Lal whereby little more than two Biswas of land was sold for Rs.61,000/- on 04.01.1996. PW-7 Anil Sharma, proved sale transaction dated 17.11.1997 whereby two biswa twelve biswansi of land was sold for Rs.1,04,000/- at Village Kangu. PW-9 Kishan proved sale deed Ext.PW-9/A whereby five Biswas nineteen biswansi of land was sold for Rs.4,30,000/- on 16.9.2003 at Village Salappar. In addition, two more sale transactions recorded vide Ext.P-10 and Ext. P-11 were placed on record. Vide Ext.P-10, two Biswas of land was sold for Rs.93,000/- in Mohal Sudwahan, Tehsil Sundernagar on 11.11.2003 and vide Ext.P-11, two biswas 09 biswansi of land was sold for Rs.55,000/- on 02.09.1999 in Mohal Kangu. On the other hand, on behalf of the appellants sale deed Ext. RW-3/A was proved whereby five bighas of land was sold for a sum of Rs.1,00,000/- in Mohal Kangu on 19.01.1995.

8. Out of the above-mentioned transactions proved by the parties before the Reference Court, Ext. PW-5/A and Ext. PW-4/A pertained to the period prior to publication of section 4 notification. All remaining sale transactions were subsequent thereto.

9. In ***General Manager, Oil and Natural Gas Corporation Limited vs. Rameshbhai Jivanbhai Patel and another (2008) 14 SCC 745***, it has been held that the assessment of market value should be avoided on the exemplar sale transactions which have taken place after the issuance of notification. Para-16 of the judgment reads as under:

"16. Much more unsafe is the recent trend to determine the market value of acquired lands with reference to future sale transactions or acquisitions. To illustrate, if the market value of a land acquired in 1992 has to be determined and if there are no sale transactions/acquisitions of 1991 or 1992 (prior to the date of preliminary notification), the statistics relating to sales/acquisitions in future, say of the years 1994-95 or 1995-96 are taken as the base price and the market value in 1992 is worked back by making deductions at the rate of 10% to 15% per annum. How far is this safe? One of the fundamental principles of valuation is that the transactions subsequent to the acquisition should be ignored for determining the market value of acquired lands, as the very acquisition and the consequential development would accelerate the overall development of the surrounding areas resulting in a sudden or steep spurt in the prices. Let us illustrate. Let us assume there was no development activity in a particular area. The appreciation in market price in such area would be slow and minimal. But if some lands in that area are acquired for a residential/commercial/industrial layout, there will be all round development and improvement in the infrastructure/ amenities/facilities in the next one or two years, as a result of which the surrounding lands will become more valuable. Even if there is no actual improvement in infrastructure, the potential and possibility of improvement on account of the proposed residential/commercial/ industrial layout will result in a higher rate of escalation in prices. As a result, if the annual increase in market value was around 10% per annum before the acquisition, the annual increase of market value of lands in the areas neighbouring the acquired land, will become much more, say 20% to 30%, or even more on account of the development/proposed development. Therefore, if the percentage to be added with reference to previous acquisitions/sale transactions is 10% per annum, the

> *percentage to be deducted to arrive at a market value with reference to future acquisitions/sale transactions should not be 10% per annum, but much more. The percentage of standard increase becomes unreliable. Courts should therefore avoid determination of market value with reference to subsequent/future transactions. Even if it becomes inevitable, there should be greater caution in applying the prices fetched for transactions in future. Be that as it may."*

Thus, the only sale transactions which could be considered by the learned Reference Court were Ext. PW-4/A and Ext. PW-5/A.

10. Learned Reference Court placed reliance upon the sale transaction Ext. PW-5/A coupled with another sale transaction whereby the land was sold for Rs.40,000/- per biswa in Village Kangu in the year 1997. Thereafter, considering the value of Rs.40,000/- per biswa to be applicable market price, learned Reference Court made deduction of 25% and thereby arrived at the figure of Rs.30,000/- per biswa as market price. The method adopted by learned Reference Court cannot be approved for the reason that the price of Rs.40,000/- per biswa was taken on the basis of sale deed which was subsequent to the issuance of section 4 notification. Thus, at the best the market price of Rs.30,000/- per biswa on the basis of sale deed Ext. PW-5/A could be taken to be just and fair value of the acquired land. Similarly, according to sale deed Ext. PW-4/A, one biswa of land in the same village was sold for a sum of Rs.13,000/- in the year 1989 by making addition of increase of value by 7.5% from 1990 to 1996, the value will be somewhere around Rs.20,000/- per biswa. However, it is on record that a lot of development has taken place in Village Kangu and surrounding areas after 1989, therefore, the market value assessed at Rs.30,000/- per biswa can be taken to be just and fair market value.

11. A co-ordinate Bench of this Court in ***State of H.P. and another vs. Sanjeev Kumar and another Latest HLJ 2010 (HP) 172*** has observed as under:

> *"6. To substantiate his submission that 30% to 40% deduction should have been made keeping in view the fact that the sale deed Ext.PW-3/A was only for one biswa of land, the learned Assistant Advocate General had placed reliance upon the decision in The Collector of* ***Lakhimpur versus Bhuban Chandra Dutta, AIR 1971 Supreme Court 2015****. In considering the provisions of Section 23 of the Act, it was observed by their Lordships that in determining the compensation, the value fetched for small plot also cannot be applied to lands covering a very large extent. It was held that the large area of land cannot possibly fetch a price at the same rate at which small plots are sold.*
>
> *7. The reliance was also placed upon the decision in* ***Kaushalya Devi Bogra and others etc. versus Land Acquisition Officer Aurangabad and another, AIR 1984 Supreme Court 892.*** *The observations made in para 13 are relevant and are being reproduced below:*
>
> > *"When large tracts are acquired, the transactions in respect of small properties do not offer a proper guideline. Therefore, the valuation in transactions in regard to smaller property is not taken as a real basis for determining the compensation for larger tracts of property. For determining the market value of a large property on the basis of a sale transaction for smaller property a deduction should be given."*
>
> *In the above case, in para 13 of the judgment, their Lordships had referred to an earlier decision of the Supreme Court in which deduction of 25% was, indicated, while in other cases mentioned therein, it was observed that the deduction should be to the extent of 1/3rd. It is,*

therefore, clear that in case the court comes to the conclusion that the sale deed of small piece of land is to be relied upon, a deduction of about 30% should be made."

12. In ***Viluben Jhalejar Contractor (dead) by LRs vs. State of Gujarat (2005) 4 SCC 789***, the deduction on account of development charges has also been prescribed as under:

"21. Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price.

13. Since the sale transaction vide Ext. PW-5/A pertained to only two Biswas of land, whereas the land acquired was more than fourteen Biswas, after deducting 1/3rd of such value, the respondents would be entitled to compensation at the rate of Rs.20,000/- per biswa for acquired land and shall also be entitled to all consequential benefits under the Act including statutory interest and solatium etc.

14. It is an admitted fact in this case that the land measuring 14 bighas 6 biswansi of the claimants was utilized by the State Government for construction of road in the year 1962-63. To this effect, admission has been made by the respondents in their reply submitted before the learned Reference Court. In order to balance the competing interest of the parties, the respondents cannot be put in disadvantageous position for remaining deprived of their land for a period of about 34 years.

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

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

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

notification having regard to the provisions contained in the Land Acquisition (Amendment) Act, 1984. Whereas the High Court may be correct in interpreting the question of law in view of the decision of this Court, but the same would not mean that Appellants would not get anything for being remaining out of possession from 1979 to 1991.

20. In the peculiar facts and circumstances of the case, although the proper course for us would have to remand the matter back to the Collector to determine the amount of compensation to which the Appellants would be entitled for being remained out of possession since 1979, we are of the opinion that the interest of justice would be met if this appeal is disposed of with a direction that additional interest @ 15% per annum on the amount awarded in terms of award dated 02.01.1999 for the period 16.03.1979 till 22.12.1991, should be granted, which, in our opinion, would meet the ends of justice."

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

"1. The short issue arising for consideration in this appeal is whether the appellants are entitled to interest for the period from the date of dispossession to the date of Notification under Section 4(1) of the Land Acquisition Act, 1894 (For short 'the Act'). That issue is no more res integra. In R.L. Jain Vs. DDA (2004) 4 SCC 79 at para 18, this Court has taken the view that the land owner is not entitled to interest under the Act. However, it has been clarified that the land owner will be entitled to get rent or

damages for use and occupation for the period the Government retained possession of the property.

2. Noticing the above position, this Court in Madishetti Bala Ramul Vs. Land Acquisition Officer (2007) 9 SCC 650, took the view that it may not be proper to remand the matter to the Collector to determine the amount of compensation to which the appellants therein would be entitled for the period during which they remained out of possession and hence, in the interest of justice, this Court directed that additional interest at the rate of 15% per annum on the amount awarded by the Land Acquisition Collector, shall be paid for the period between the date of dispossession and the date of Notification under Section 4(1) of the Act.

3. The said view was followed by this Court in Tahera Khatoon Vs. Land Acquisition Officer (2014) 13 SCC 613.

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

17. A co-ordinate Bench of this Court in case titled ***The Land Acquisition Collector*** vs. ***Surjit Singh and others***, ***RFA No. 463 of 2012***, decided on 11.07.2018 applied the same principle and awarded 15% additional interest from the date of dispossession till the date of issuance of notification under Section 4 of the Act.

18. In view of the law expounded in the aforesaid judgment, the claimants are also held entitled to additional interest by way of damages @ 15% per annum on the amount of Rs.20,000/- per biswa from 01.01.1963 till 10.02.1996 the date of section 4 notification. The amount, as above, shall be calculated and deposited before the Reference Court within a period of three months from today.

19. The appeal is accordingly disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s) if any, also stands disposed of.

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

Between:-
SH. SUBHASH CHAND S/O SH. BHAGAT RAM,
RESIDENT OF VILLAGE BARMANA,
P.O. BARMANA, TEHSIL SADAR,
DISTRICT BILASPUR, H.P.

...APPELLANT

(BY SH. G.D. VERMA, SENIOR ADVOCATE,
WITH SH. B.C. VERMA, ADVOCATE)

AND

1. LAND ACQUISITION COLLECTOR,
   KOLDAM, DISTRICT BILASPUR,
   AT BILASPUR, H.P.
2. DISTRICT COLLECTOR,
   BILASPUR DISTRICT AT BILASPUR, H.P.
3. N.T.P.C. KOLDAM, BILASPUR
   THROUGH ITS AUTHORISED OFFICER.

.... RESPONDENTS

(SH. BHARAT BHUSHAN, ADDITIONAL

ADVOCATE GENERAL, FOR R-1 & R-2.
SH. JAGDISH THAKUR, ADVOCATE, FOR R-3.)

REGULAR FIRST APPEAL
NO. 352 OF 2014
Reserved on:17.08.2022
Decided on: 22.08.2022

Land Acquisition Act, 1894- Section 18- Award of Ld. Additional District Judge, in land reference petition whereby the reference petition filed under Section 18 of the Land Acquisition Act was dismissed-

A. Just and fair compensation- Held- The Courts are not restricted to awarding only that amount as has been claimed by the land owners in their application- There is no cap on maximum rate of compensation. (Para 7)

B. Ld. Reference Court has failed to exercise the jurisdiction vested in it under law- It was incumbent upon to determine the just and fair market value of first and second floors- Matter remanded back to reference Court to decide afresh. (Para 9, 10)

Cases referred:

Associated Cement Companies Ltd. Vs. JaganNath and others 1998 (2) Shim. L.C. 92;

Ashok Kumar and another vs. State of Haryana (2016) 4 SCC 544;

This appeal coming on for pronouncement of judgment this day, the Court deliveredthe following:

J U D G M E N T

By way of instant appeal, appellant assails award dated 27.06.2014 passed by learned Additional District Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur) in Land Reference Petition No.47-4 of 2007 whereby the reference petition filed under Section 18 of the Land Acquisition Act (for short 'Act') was dismissed.

2. Brief facts necessary for adjudication of the appeal are that respondent No.1 acquired land, structures and trees for construction of Koldam Hydro Project of respondent No.3. Land bearingKhasra No.317/266/130 alongwith structure owned and possessed by the appellant, was also acquired. Respondent No.1 awarded a sum of Rs.5,99,094/- only in

favour of the appellant as market value of the ground floor of the house of the appellant. The claim of the appellant for compensation to the first and second floor of the building constructed on Khasra No. 317/266/130 was rejected on the ground that said floors were constructed after issuance of notification under Section 4 of the Act. The basis for such rejection was said to be the videography of the house of appellant recorded on 7/8.11.2000 when only the ground floor existed.

3. Aggrieved against inadequacy of amount awarded by respondent No.1, the appellant preferred application under Section 18 of the Act for making reference to the appropriate Court. The reference was accordingly made by respondent No.1 and the matter came to be decided by learned Additional District Judge, Ghumarwin, District Bilaspur vide impugned award.

4. The appellant has assailed the impugned award on the ground that the same was non-speaking and no reasons have been assigned for dismissing the reference petition. As per appellant, on one hand, the Reference Court had held that first and second floor of the building of the appellant were in existence prior to issuance of notification under Section 4 of the Act, on the other, the reference petition was dismissed without awarding any compensation for the said floors.

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

6. The perusal of impugned award reveals that the learned Reference Court had found the evidence led by the appellant, as to existence of first and second floor of the building prior to issuance of notification under Section 4 of the Act, as reliable and cogent. Whereas, the contrary stand taken by the respondents was disbelieved. Further, the record of videography of the building of the appellant conducted on 7/8.11.2000 produced before the learned Reference Court by way of compact disc Ext.RW3/A was held to be not proved in accordance with law.Thus, the learned Reference Court did not

accept that the structure of the appellant was having only one storey at the time of issuance of notification under Section 4 of the Act. Still, the reference petition was dismissed merely on the ground that the appellant had failed to prove the market value of the acquired property. The statement of appellant's witness Sh. Rattan Lal Sharma (PW-1) and the site plan Ext.PW-1/A with estimate Ext.PW-1/B prepared by the said witness were disbelieved for want of placement of detail measurement on record in support of the abstract prepared by the said witness.

7. It is more than settled that the Reference Court holds an independent inquiry so as to arrive at just compensation payable to the person seeking enhancement before it. The Reference Court does not sit as a Court of appeal over the award passed by the Land Acquisition Collector. In ***Ashok Kumar and another vs. State of Haryana (2016) 4 SCC 544***, it has been held by the Hon'ble Supreme Court that it is the duty of the Court to award just and fair compensation taking into consideration the true market value and other relevant factors, irrespective of the claim made by the land owner and there is no cap on maximum rate of compensation that can be awarded by the Court and the Courts are not restricted to awarding only that amount as has been claimed by the land owners/applicants in their application before it.

8. A Division Bench of this Court in ***Associated Cement Companies Ltd. Vs. JaganNath and others 1998 (2) Shim. L.C. 92***, has held as under:

> *"**10**. So far the observations of the Land Acquisition Collector as referred to in Para 30 of the impugned award of the District Judge in respect of comparison of the lands in villages Barmana, Nalag, Bhater, Baloh, Dawan, Koti, Jamthal and Panjgain are concerned, these cannot be taken into account for holding that the acquired land is comparable to the lands of awards Ex. P-12 and P-7 in view of the law laid down by the Supreme Court inChimanlalHargovinddas vs. Special Land Acquisition*

Officer, Poona and another (supra). In this judgment it has been categorically held that a reference under Section 18 of the Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Collector in his award unless the same material is produced and proved before the Court. Further, the award of the Land Acquisition Collector is not to be treated as judgment of the trial Court open to challenge before the Court hearing the reference. It is merely an offer made by the Land Acquisition Collector and the material utilized by him for making his valuation cannot be utilized by the Court unless produced and proved before it. It is not the function of the Court to sit in appeal against the award, approve or disapprove its reasoningor correct itserror oraffirm, modify or reverse the conclusion reached by the Land Acquisition Collector, as if it were an appellate Court. The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it."

9. Keeping in view the aforesaid exposition of law, it can be said with certainty that learned Reference Court has failed to exercise the jurisdiction vested in it under law. Once the learned Reference Court had arrived at the conclusion that the structure owned by the appellant had three floors before the issuance of notification under Section 4 of the Act, it was incumbent upon such count to determine the just and fair market value of first and second floors of said structure. Merely because the learned Reference Court had found the evidence of appellant deficient in proving the market value of the structure in question, the reference petition could not have been dismissed. Admittedly, some amount had been awarded in favour of the appellant for the ground floor by the Land Acquisition Collector and the

quantification so arrived must have some basis for it. Learned Reference Court in any event could not have ignored such basis.

10. In view of above discussion, the appeal is allowed. Award dated 27.06.2014 passed by learned Additional District Judge, Ghumarwin, District Bilaspur in Land Reference Petition No. 47-4 of 2007 is set-aside and the case is remanded to the learned Additional District Judge, Ghumarwin, District Bilaspur to decide the reference petition afresh after affording opportunity of hearing to the parties. Since the reference petition pertains to the year 2007, learned Additional District Judge, Ghumarwin, District Bilaspur is directed to decide the reference petition within a period of six months from the date of appearance of the parties before such Court. The parties are directed to appear before the Court of learned Additional District Judge, Ghumarwin, District Bilaspur, H.P. on **01.09.2022.**

11. The appeal stands 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. JAI KRISHAN AGED 69 YEARS, SON OF SHRI SURJU RAM RESIDENT OF VILLAGE KANDAGHAT, DISTRICT SOLAN HIMACHAL PRADESH.

2. PYARE LAL AGED 68 YEARS, SON OF SHRI BIR SINGH, RESIDENT OF NALAGARH, TEHSIL NALAGARH, DISTRICT SOLAN HIMACHAL PRADESH.

3. RAM CHAND AGED 66 YEARS SON OF SHRI RIKHI RAM, RESIDENT OF VILLAGE RAURI, TEHSIL NALAGARH, DISTRICT SOLAN HIMACHAL PRADESH.

4. AJEET SINGH AGED 59 YEARS, SON OF SHRI BALAK RAM, RESIDENT OF VILLAGE DAL CHHAMB, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH

5. MANJINDER SINGH AGED 64 YEARS, SON OF SHRI PREM SINGH, RESIDENT OF VILLAGE, POST OFFICE AND TEHSIL KANDAGHAT, DISTRICT SOLAN HIMACHAL PRADESH.

6. YOG RAJ AGED 65 YEARS SON OF SHRI RADHA KISHAN, RESIDENT OF NIKKUWAL, TEHSIL NALAGARH, DISTRICT SOLAN HIMACHAL PRADESH.

7. MADAN LAL AGED 52 YEARS SON OF SHRI LACHMAN DASS, RESIDENT OF VILLAGE SAURI, TEHSIL NALAGARH, DISTRICT SOLAN HIMACHAL PRADESH

....PETITIONERS

(BY SHRI SURINDER SAKLANI, ADVOCATE)

AND

1. JOGINDERA CENTRAL COOPERATIVE BANK LIMITED, RAJGARH ROAD, SOLAN DISTRICT SOLAN, HIMACHAL PRADESH THROUGH ITS MANAGING DIRECTOR

2.REGISTRAR, COOPERATIVE SOCIETIES HIMACHAL PRADESH, SHIMLA-9

...RESPONDENTS

3. BARFOO RAM SON OF SHRI PARMA NAND, RESIDENT OF VILLAGE GYANA TEHSIL ARKI, DISTRICT SOLAN HIMACHAL PRADESH
...PROFORMA RESPONDENT

(BY SHRI ASHOK SHARMA, SENIOR ADVOCATE WITH
SHRI NARESH K. SHARMA, ADVOCATE FOR R-1

BY SHRI HEMANT VAID, ADDITIONAL ADVOCATE
GENERAL FOR R-2

(NO NOTICE ISSUED TO R-3)

REVIEW PETITION
NO. 287 OF 2022
Decided on:24.08.2022

Code of Civil Procedure, 1908- Section 114 and Order 47 Rule 1- Review of judgment- Held- A subsequent decision of the Supreme Court or a larger Bench of the same court taking a contrary view on the point covered by the judgment does not amount to a mistake or error apparent on the face of the record- Petition dismissed. (Para 6, 7)

Cases referred:

The Nalagarh Dehati Cooperative Transport Society Ltd. vs. Beli Ram etc. AIR 1981 HP 1;

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

O R D E R

This review petition has been preferred by petitioner seeking review of judgment dated 10.8.2022 passed by this Court in CWPOA No. 5828 of 2019 whereby writ petition preferred by petitioners has been dismissed being not maintainable on the basis of pronouncement of Division Bench in LPA Nos 182 and 183 of 2008 adjudicated on the same subject matter.

2 No notice is required to be issued to respondent No.3, whose interest is the same as of the petitioners, and thus his presence is not necessary for adjudication of matter.

3 Review petition has been filed on the ground that now in view of order dated 12th August, 2022 passed by the Supreme Court in Special Leave to Appeal (Civil) No. 4518 of 2016 titled The Kangra Central Cooperative Bank vs. State of Himachal Pradesh, writ preferred by petitioners would be maintainable.

4 Judgment in CWPOA No. 5828 of 2019 was passed by this Court on 10th August 2022, whereas order of the Supreme Court, being relied upon for reviewing the judgment, has been pronounced on 12th August, 2022.

5. Explanation to Rule 1 of Order 47 of Civil Procedure Code reads as under:-

> *"Explanation-The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."*

6 As referred by Mr.Ashok Sharma, Senior Advocate, Full Bench of this High Court in case ***The Nalagarh Dehati Cooperative Transport Society Ltd. vs. Beli Ram etc.*** reported in ***AIR 1981 HP 1*** has observed as under:-

> *"14. However, the explanation added by Act 104 of 1976 to Rule 1 of Order XL VII has laid the controversy to rest. It came into effect on 1st February, 1977. It has given a statutory recognition to the view that reversal of the decision on a question of law by subsequent decision by a superior Court shall not be a ground for review of such judgment. It makes no distinction between the subsequent decision given by the Supreme Court or any other superior Court. In our opinion, therefore, a subsequent decision of the Supreme Court or a larger Bench of the same court taking a contrary view on the point covered by the judgment does not amount to a mistake or error apparent on the face of the record."*

7 In view of aforesaid settled position and facts of the case, I do not find any merit in the review petition as the impugned judgment has been passed on the basis of material on file and law prevailing on that day and there is no error apparent on the face of record.

8 Before parting, it would be apt to record that I have not gone through ratio of law laid down by the Supreme Court in judgment dated 12th August, 2022 passed in Special Leave Petition (Civil) No. 4518 of 2016 as well as impact thereof on present matter as it is not necessary for adjudication of present review petition.

Review petition is dismissed in aforesaid terms, including all pending miscellaneous application(s), if any.

Dasti copy.

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

BETWEEN:-

SHRI NIKKU RAM SON OF SHRI SAMUNDU, R/O VILLAGE SAI BRAHMANA PARAGA RATTANPUR, TEHSIL SADAR, DISTRICT BILASPUR (H.P.)

....APPELLANT/PLAINTIFF

(BY MR. AJAY KUMAR, SENIOR ADVOCATE WITH MR. ROHIT ADVOCATE.)

AND

1. SHRI BUDHI RAM (SINCE DECEASED) THROUGH LEGAL REPRESENTATIVES:-

   1(A)SMT. AJUDHIYA DEVI (WIFE)
   1(B) SHRI PARKASH CHAND (SON)
   1(C) SHRI KISHORI LAL (SON)
   1(D)SMT. SARSWATI DEVI (DAUGHTER).

   ALL R/O VILLAGE DHABETA NEAR SWARGHAT, TEHSIL SRI NAINA DEVI JI, DISTRICT BILASPUR, H.P.

2. SHRI BHURI LAL SON OF SHRI SAMUNDU C/O SHRI NAROTAM DUTT, THROUGH LEGAL HEIRS:-

   2(A) SMT. DEVAKI SHARMA, WIFE OF LATE SH. BHURI LAL,
   2(B) SH. DHEERAJ SHARMA S/O LATE SH. BHURI LAL,
   2(C) SH. HARISH DEEP SHARMA SON OF LATE SH. BHURI LAL
   2(D) SMT. KRTITI SHARMA D/O LATE SH. BHURI LAL,

ALL RESIDENT OF VILLAGE ANJHI, P.O. KASUMPATI, TEH AND DISTT. SHIMLA, H.P.

3. SHRI MUNSHI RAM SO OF SHRI SAMUNDU, R/O VILLAGE SAI BRAHMNA PARAGA RATTANPUR, TEHSIL SADAR, DISTRICT BILASPUR, (H.P.).

4. SMT. DEO DEVI WIFE OF LATE SHRI SAMUNDU R/O VILLAGE SAI BRAHMNA PARAGA RATTANPUR, TEHSIL SADAR, DISTRICT BILASPUR, (H.P.).

….RESPONDENTS/DEFENDANTS.

(BY MR. BHUPENDER GUPTA, SENIOR ADVOCATE
WITH MR. JANESH GUPTA, ADVOCATE)

REGULAR SECOND APPEAL
NO.566 of 2011
Reserved on: 25.08.2022
Decided on: 29.08.2022

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- **Indian Succession Act, 1925**- Section 63- **Indian Evidence Act, 1872**- Section 68- Suit for declaration- Will- Suit dismissed so as the first appeal- Will dated 3.4.1999 alleged to have been procured by fraud and misrepresentation- Held- Due execution of Will not proved in accordance with law- Contrary findings recorded by both the Courts below thus needs interference being palpably wrong- Appeal allowed and findings of both the Courts below are set aside- Suit of the plaintiff is decreed. (Para 19, 20, 24)

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

J U D G M E N T

The appellant assails judgment and decree dated 28.09.2011 passed by learned District Judge, Bilaspur in Civil Appeal No. 22 of 2009, whereby the judgment and decree dated 30.04.2009 passed by learned Civil

Judge (Senior Division), Bilaspur, in Civil Suit No. 106-1 of 2002, dismissing the suit of the plaintiff was affirmed.

2. The parties herein shall be referred by the same status as they held before the learned trial Court. The appellant herein is the plaintiff and respondents No.1 and 2 are the defendants and respondents No.3 and 4 are the proforma defendants.

3. Plaintiff filed a suit seeking declaration to the effect that plaintiff and proforma defendants were owner in possession of the suit land on the basis of Will dated 16.03.1999 executed by late Shri Samundu with further declaration to declare the Will dated 03.04.1999 of Shri Samundu as null and void on the ground that Shri Samundu did not execute the said Will with free mind or without pressure. A decree of permanent prohibitory injunction was also sought against the defendants from causing any interference in the suit land and the house situated thereon. In the alternative a decree of possession, in case of dispossession of the plaintiff during the pendency of the suit was also prayed for.

4. As per plaintiff, late Shri Samundu was father of plaintiff, defendants No.1 to 3 and husband of proforma defendant No.4. Defendant No.2 was stated to be son of late Shri Samundu from his second wife Smt. Devo i.e. proforma defendant No.4. Plaintiff, defendants No.1 and 3 were stated to be the sons of late Shri Samundu from his first wife namely Smt. Durgi. Plaintiff claimed that late Sh. Samundu had executed a Will dated 16.03.1999 bequeathing his properties in favour of plaintiff and proforma defendants. The Will was also claimed to be registered with Sub Registrar, Bilaspur, on the same day i.e. on 16.03.1999. The plaintiff also averred that the original Will executed by late Shri Samundu on 16.03.1999 was destroyed by defendant No.1 by putting the same on fire. Plaintiff could retrieve some burnt pieces of the document.

5. According to the plaintiff, the defendants got mutation No.256 attested after death of Shri Samundu on 25.01.2001 on the basis of another Will dated 03.04.1999 allegedly executed by late Sh. Samundu. The Will dated 03.04.1999 was alleged to be result of fraud, mis-representation and undue influence. Plaintiff pleaded the date of knowledge about executed of Will dated 03.04.1999 to be after attestation of mutation No.256.

6. Written statement was filed on behalf of the defendants. Preliminary objections as to maintainability, lack of cause of action, estoppel etc., were raised. On merits, it was specifically pleaded that Will dated 16.03.1999 had been revoked by late Shri Samundu by executing his last Will dated 03.04.1999. It was also alleged that the Will dated 16.03.1999 was result of fraud, mis-representation and undue influence. On the basis of subsequent Will of late Shri Samundu, dated 03.04.1999, the defendants claimed themselves to be owner in possession of the suit land. As per defendants, late Shri Samundu had thrown the original Will dated 16.03.1999 into fire, when he was made to understand by his grandson Shri Prakash Chand that his two sons had been disinherited under the Will dated 16.03.1999. The allegations of Will dated 16.03.1999 being burnt by defendant No.1 were denied.

7. On the basis of pleadings of the parties, following issues were framed: -

1. Whether deceased Samundu executed a valid and legal "Will" dated 16.03.1999 in favour of the plaintiff and proforma defendants, as alleged? OPP

2. Whether the plaintiff and proforma defendants are owners in possession of the suit land, as alleged? OPP.

3. Whether the "Will" dated 03.04.1999 executed by Samundu in favour of the parties to the suit is valid and legal "Will"? OPD

4. Whether the suit is not maintainable? ...OPD

5. Whether the plaintiff has no cause of action, as alleged? OPD.

6. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.

7. Relief.

8. Both the learned Court below held both the Wills dated 16.03.1999 propounded by the plaintiff and 03.04.1999 propounded by the defendants as validly executed Wills, however, the suit of the plaintiff was dismissed on the ground that Will dated 03.04.1999 being later in time impliedly revoke the earlier Will dated 16.03.1999.

9. The instant appeal was admitted on 19.04.2012 on the following substantial questions of law: -

1. Whether the findings of the Courts below are a result of complete misreading of pleadings, evidence and the law as applicable to the facts of the case and particularly documents Ex.PW2/A, Ex.DW2/A and Ex. PX and statements of DW3, DW4, DW5 and DW6 and as such palpably erroneous and illegal and if so to what effect?
2. Whether in the face of the oral and documentary evidence produced in the case the Courts below were justified in holding Ex.DW2/A as a legal and valid Will of late Shri Samundu by discarding the earlier Will PW2/A?

10. I have heard Mr. Ajay Kumar, Senior Advocate for the plaintiff and Mr. Bhupender Gupta, Senior Advocate for the defendants and have also gone through the entire records carefully.

11. Shri Ajay Kumar, learned Senior Advocate, representing the plaintiff has contended that both the learned Courts below have wrongly, illegally held the Will dated 03.04.1999 (Ex.DW5/A) to have been proved in accordance with law. He has contended that the original document i.e. Will dated 03.04.1999 was not produced on record and in absence thereof the will Ex.DW5/A cannot be said to have been proved.

12. On the other hand, Shri Bhupender Gupta, learned Senior Advocate, representing the defendants submitted that Will Ex.DW5/A was duly proved on record. DW-2 Buleshwar Dutt produced the record of registration of the Will dated 03.04.1999 on the basis of which a photo copy of the said document was proved on record as Ex.DW5/A. He further contended that it was the Will dated 16.03.1999 propounded by the plaintiff that was not proved in accordance with law. Admittedly, the original of Will dated 16.03.1999 was alleged to have been destroyed. In the absence of the original, Will Ex.PW2/A dated 16.03.1999 being merely a copy could not be held to be proved in accordance with law.

13. Learned First Appellate Court and the learned Trial Court, both have returned the concurrent findings of fact that plaintiff has been able to prove valid execution of Will Ex.PW2/A and defendant No.1 has also been able to prove execution of Will Ex.DW5/A in accordance with law. Further, Will Ex.DW5/A being later in time has been held to have impliedly revoked the earlier Will, Ex.PW2/A, therefore, the mutation No. 256 recorded on the basis of second Will of late Shri Samundu, Ex.DW5/A has been upheld.

14. Though the findings returned by both the courts on Issue No.3 are concurrent, but on detailed examination of material on record such findings need interference and cannot be sustained for reasons detailed hereafter. Such findings are clearly perverse as these do not confirm to the applicable provisions of law.

15. As per the case of the defendants, criminal proceedings were initiated on the complaint of one Budhi Ram s/o Sihnu Ram, whose name was mentioned as identifier of the testator in Will Ex.DW5/A. The allegation was that the signatures of identifier on said Will were forged. The original Will was stated to be taken into possession by the police during the investigation of the case. Challan was presented in the Court and the original Will was also stated to be made part of the report under Section 173 of the Code of Criminal Procedure. Defendants produced Shri Buteshwar Dutt, Criminal Ahlmad, court of Judicial Magistrate 1st Class, Bilaspur, who had brought the summoned record i.e. case file No. 7/1 of 2004, titled as Budhi Ram versus State. He deposed that the original Will of Samundu Ram was annexed in the file. As per this witness Ex.PW2/A was the certified copy of the Will of Samundu Ram and was correct according to the original. In this manner, a copy of Will dated 03.04.1999 of Samundu Ram was placed on record and initially exhibited as Ex.PW2/A, later on converted to Ex.DW5/A. Perusal of document Ex.DW5/A reveals that a certified copy of the document was obtained from the file of case No. 7/1 of 2004, titled as Budhi Ram vs. State of Himachal Pradesh, pending before the learned Judicial Magistrate 1st Class, Bilaspur.

16. Record further reveals that original Will dated 03.04.1999 was never produced on record. The will dated 03.04.1999 was stated to be a registered document for which witnesses DW-3 Uma Gupta and DW-4 Pratap Singh were examined. DW-3 was the registration clerk in the office of Sub Registrar Bilaspur. She produced the summoned record i.e. a copy of Will of Samundu Ram pasted in the Register No. 76, Book No.3, Volume No.106, page 47, dated 03.04.1999. After the deposition, DW-3 had taken back the aforesaid record brought by her. No effort was made to get the original record, containing pasted copy of the Will dated 03.04.1999, retained in the Court.

Even a certified copy of Will produced by DW-2 Buteshwar Dutt was not compared with the original produced by DW-3.

17. DW-4 was the Sub Registrar, who had registered Will dated 03.04.1999 at Village Chehari. This witness verified the copy of Will Ex.PW2/A to be true copy of original Will found in the record produced by DW-3. Noticeably, DW-3 and DW-4 were examined on the same day i.e. on 28.12.2004.

18. The original Will was in the records of case file No. 7/1 of 2004 of the court of Judicial Magistrate 1st Class, Bilaspur, but no effort was made to place the original record of the Will on the file before the learned trial Court. The second copy of the Will pasted in the relevant register of Sub Registrar, Bilaspur, was also not retained in the Court. Resultantly, the entire reliance was placed on a copy of Will exhibited as Ex.DW5/A. Admittedly, the defendants had not sought any permission of the Court to prove the Will dated 03.04.1999 by leading secondary evidence. That being so, the question arises as to whether in absence of original of Will dated 03.04.1999, the courts below were justified in holding the execution of Will dated 03.04.1999, in accordance with law? The rules of evidence contained in the Indian Evidence Act, 1872, (for short "Act") provide for the mode and manner for proving a fact. As per Section 61 of the Act, the contents of documents may be proved either by primary or by secondary evidence. Primary evidence, as per Section 62 of the Act means the document itself produced for the inspection of the Court and secondary evidence as per Section 63 of the Act means and includes (1) certified copies given under the provisions of Section 76 of the Act; (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies; (3) copies made from or compared with the original; (4) counterparts of documents as against the parties who did not execute them; (5) oral accounts of the contents of a document given by some person who has himself seen it. Section 64 of

the Act mandates that the documents must be proved by primary evidence except in the cases mentioned thereafter. Section 65 of the Act provides for conditions in which secondary evidence can be allowed to be lead by the Courts. In the facts of the instant case neither any case was made out by the defendants for leading secondary evidence nor any permission was sought in that behalf from the Court. In such circumstances, the document i.e. Will dated 03.04.1999 cannot be said to be proved as the primary evidence (original Will) was not produced on record.

19. Plaintiff had specifically alleged the Will dated 03.04.1999 to have been procured by fraud, mis-representation and force etc. Meaning thereby that the due execution of Will by late Shri Samundu Ram was not admitted. Voluntary execution of a Will without any fraud, mis-representation and coercion is *sine qua non* for proving the due execution of a Will. Section 68 of the Indian evidence Act reads as under:-

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

The Will is required to be attested by two witnesses. As per Section 63 of the Indian Succession Act, 1925, a specific mode for execution of Will has been provided therein. Thus, for proving the execution of Will at least one of the attesting witnesses, if alive, is required to be produced for proving the

execution of Will. In this case, defendants have examined DW-5 as attesting witness of Will dated 03.04.1999. Incidentally, at the time of examination of DW-4 as witness before the learned trial Court, the original document i.e. Will dated 03.04.1999 was not shown to him as the same was not available at the time of his examination. In the absence of original document, the requirement of Section 68 of the Act cannot be said to be fulfilled as the attesting witness could depose about the execution of the document placed before him, only when the defendants had placed on record the original thereof. When the defendants had failed to prove the Will dated 03.04.1999 by not producing the original document in the record, its due execution cannot be said to have been proved by merely producing an attesting witness and confronting him with only a copy of the document that too without seeking permission to lead secondary evidence. The provisions of Section 68 of the Act are mandatory, so much so that even in the cases of a registered Will no exception is carved out as is available with respect to other documents required to be attested by law.

20. Thus, I have no hesitation to hold that neither the Will date d03.04.1999 propounded by defendant No.1 was proved to exist nor its due execution was proved in accordance with law. Contrary findings recorded by both the learned Courts below thus needs interference being palpably wrong. Undoubtedly, such findings have been recorded by ignoring the provisions of law which renders such findings perverse.

21. Coming to the Will propounded by plaintiff, Ex.PW2/A, admittedly the original thereof was not available. Plaintiff specifically pleaded that the original Will was destroyed in fire by defendant No.1, whereas defendant No.1 submitted that the original Will was thrown in fire by late Shri Samundu himself. Be that as it may, the fact remains that the original Will dated 16.03.1999 was not available. Plaintiff moved an application dated 17.11.2003 seeking leave of the Court to prove the Will dated 16.03.1999 by

leading secondary evidence. Learned trial Court allowed the application of plaintiff with a prayer to lead secondary evidence on 17.11.2003 itself as defendants had pleaded no objection to the grant of prayer made in the aforesaid application. The plaintiff was allowed to lead secondary evidence.

22. Plaintiff examined PW-2 Uma Gupta, Registration Clerk from the office of Sub Registrar, Bilaspur. She produced the summoned record i.e. the pasted copy of Will dated 16.03.1999, pasted in Book No.3 Volume 80. This document was stated to have been registered at serial No.63. A photo copy of the Will was exhibited as Ex.PW2/A and was verified to be correct copy of the original. This witness was not cross-examined on behalf of the defendants. PW-2 had appeared as witness before the learned trial Court on 25.05.2004. Plaintiff examined PW-4 Brij Lal and PW-5 Daya Ram as attesting witnesses of the Will. PW-4 and PW-5 were also examined on 25.05.2004 and they deposed as to the execution of the Will by Samundu Ram on the basis of pasted copy of Will dated 16.03.1999 produced in the Court by PW-2. The pasted copy of the Will in the records of Registrar is also the primary evidence as per explanation (1) to Section 62 of the Indian Evidence Act which provides that where a document is executed in several parts each part is primary evidence of the document. For registration purposes two copies of Will are prepared. Both copies are signed in original by the testator as well as by the attesting witnesses. In any case, plaintiff was allowed to lead secondary evidence and he had proved the document in accordance with law. Its due execution was also proved by PW-4 and PW-5 being its attesting witnesses. Both the learned Courts below have concurrent held the Will Ex.PW2/A to have been duly proved and in view of the above discussion no interference is required in such findings.

23. Both the substantial questions of law are answered accordingly.

24. In view of the aforesaid analysis the appeal is allowed. Judgment and decree dated 28.09.2011 passed by learned District Judge, Bilaspur in

Civil Appeal No. 22 of 2009, whereby the judgment and decree dated 30.04.2009 passed by learned Civil Judge (Senior Division), Bilaspur, in Civil Suit No. 106-1 of 2002, dismissing the suit of the plaintiff was affirmed, is set aside. Issue No.1 is held proved, whereas issue No.3 is held not proved. The findings returned on all other issues do not require interference. Accordingly, the suit of the plaintiff is decreed. The Will dated 16.03.1999 Ex.PW2/A, executed by late Shri Samundu Ram is held to be legal and valid Will and the plaintiff and proforma defendants are held to be owner in possession of the suit land on the basis of aforesaid Will of late Shri Samundu Ram. The defendants are restrained from causing any interference in the ownership and possession of the plaintiff and proforma defendants qua the suit land. Decree sheet be prepared accordingly. Pending applications, if any, shall also stand disposed of.

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

Between:

SHRI ROSHAN LAL SON OF SHRI KHAJAN SINGH, HOUSE NO. 254, WARD NO.4 (OPPOSITE VETERINARY HOSPITAL), VILLAGE SALAH, PO SUNDER NAGAR-1, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.-175018.

.....PLAINTIFF-APPELLANT

(BY MR. BHUPINDER GUPTA, SR. ADVOCATE
WITH MS. RINKI KASHMIRI, ADVOCATE)

AND

1.SHRI JAGAT SINGH SON OF SHRI KRISHAN SINGH.
2. SMT. BRINDA WIFE]
3.SHRI PANKAJ, SON]
4. SHRI ATUL, SON]OF SHRI JAGAT SINGH

ALL RESIDENTS OF VILLAGE SALAH, PO SUNDER NAGAR-I, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P-175018.

……DEFENDANTS/RESPONDENTS

5.SHRI KULDEEP SINGH (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES.

(A) SHRI SURESH SEN(SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES;

(I) SHRI CHIRAG SEN, SON]
(II) SHRI MUNISH SEN, SON]
(III) SMT. SARITA SEN, WIFE] OF LATE SHRI SURESH SEN

ALL RESIDENTS OF VILLAGE SALAH PO SUNDERNAGAR-I, TEHSIL SUNDERNAGAR DISTRICT MANDI, H.P.-175018.

(B) SHRI KAMAL KISHORE, SON]
(C) SHRI LALIT SEN, SON]
(D) SMT. CHAMPA DEVI, WIDOW] OF SHRI KULDEEP SINGH.

ALL RESIDENTS OF VILLAGE SALAH, PO SUNDER NAGAR-I, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.-175018.

6.SHRI AMARDEEP SINGH, SON OF SHRI JAI SINGH, RESIDENT OF VILLAGE SALAH, PO SUNDER NAGAR-1, TEHSIL SUNDER NAGAR, DISTRICT MANDI, H.P. 175018.

7.SMT. RAM DEI (SINCE DECEASED) NAME ORDERED TO BE DELETED VIDE ORDER DATED 10.09.2012 PASSED BY THE HON'BLE COURT.

8. SHRI RAM LAL, SON]
9. SHRI JAGDISH CHAND, SON]
10. SHRI MAYA SINGH, SON]
11. SHRI BALAK RAM, SON]
12. SHRI BHOOP SINGH, SON]

13. SHRI AMAR SINGH, SON]
14. SMT. KAMLI DEVI, DAUGHTER]
15. SMT. NIRMALA DEVI, DAUGHTER] OF SHRI HUKAM CHAND.

ALL RESIDENT OF VILLAGE JADYALA (HARIPUR), PO SUNDER NAGAR-I TEHSIL SUNDERNAGAR, DISTRICT MANDI H.P.174401.

16. SHRI AMAR SINGH, SON]
17. SHRI PIAR SINGH, SON] OF SHRI KHAJAN SINGH

BOTH RESIDENTS OF VILLAGE SALAH, PO SUNDERNAGAR-I TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.175018.

18. SMT. RUKMANI(SINCE DECEASED0 NAME ORDERED TO BE DELETED VIDE ORDER DATED 10.09.2012 PASSED BY THE HON'BLE COURT.

19. SMT. DURGI DEVI, WIFE OF SHRI SALIG RAM, RESIDENT OF VILLAGE SALNOO, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

20. SMT. KAMLA DEVI, WIDOW OF SHRI BISHAN SINGH, CHANDEL, RESIDENT OF VILLAGE AND PO GHAMANI VIA KANDRAUR, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

.....PROFORMA DEFENDANTS-PROFORMA RESPONDENTS

(BY MR. SANJEEV KUTHIALA, SR. ADVOCATE
WITH MS. ANAIDA KUTHIALA, ADVOCATE, FOR
R-1 TO 4/CROSS-OBJECTORS)

CROSS OBJECTIONS No. 259 of 2009

Between

1.SHRI JAGAT SINGH SON OF SHRI KRISHAN SINGH.

2.SMT. BRINDA WIFE]
3.SHRI PANKAJ, SON]
4.SHRI ATUL, SON]OF SHRI JAGAT SINGH
5.SH. KULDEEP SINGH, S/O LATE SH. JAI SINGH.

(A) SURESH SEN, SO LATE SH. KULDEEP SINGH (SINCE DECEASED THROUGH HIS LR'S)
(I)SMT. SARITA, WIDOW OF LATE SH. SURESH SAIN.
(II) SH. MUNISH, S/O LATE SH. SURESH SAIN.
(III) SH. CHIRAG, S/O LATE SH. SURESH SAIN.
(IV) SMT. CHAMPA DEVI, MOTHER OF LATE SH. SURESH SAIN.

ALL RESIDENTS OF VILLAGE SALAH, PO SUNDER NAGAR-I, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.-175018.

(b) KAMAL KISHORE, S/O LATE SH. KULDEEP SINGH.
(C) LALIT SEN, S/O LATE SH. KULDEEP SINGH
(D) SMT. CHAMPA DEVI, WIDOW OF LATE SH. KULDEEP SINGH.

6.SHRI AMARDEEP SINGH, S/O LATE SH. JAI SINGH

7.SMT. RAM DEI, WIDOW OF LATE SH. JAI SINGH.

ALL R/O VILLAGE SALAH, POST OFFICE SUNDERNAGAR-I TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.
....CROSS OBJECTORS/RESPONDENTS/APPLICANTS

8. SHRI RAM LAL, SON]
9. SHRI JAGDISH CHAND, SON]
10. SHRI MAYA SINGH, SON]
11. SHRI BALAK RAM, SON]
12. SHRI BHOOP SINGH, SON]
13. SHRI AMAR SINGH, SON]
14. SMT. KAMLI DEVI, DAUGHTER]
15. SMT. NIRMALA DEVI, DAUGHTER] OF SHRI HUKAM CHAND.

ALL RESIDENTS OF VILLAGE JADYALA (HARIPUR), PO SUNDER NAGAR-I TEHSIL SUNDERNAGAR, DISTRICT MANDI H.P.

16. SHRI AMAR SINGH, SON]
17. SHRI PIAR SINGH, SON] OF LATE SHRI KHAJAN SINGH

18. SMT. RUKMANI, WIDOW OF LATE SH. KHAJAN SINGH

(RESPONDENTS 16 TO 18, R/O VILLAGE SALAH, POST OFFICE SUNDERNAGAR-I, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.

19. SMT. DURGI DEVI, WIFE OF SHRI SALIG RAM, RESIDENT OF VILLAGE SALNOO, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.

20. SMT. KAMLA DEVI, WIDOW OF SHRI BISHAN SINGH, CHANDEL, RESIDENT OF VILLAGE AND PO GHAMANI VIA KANDRAUR, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

.....PROFORMA RESPONDENTS/DEFENDANTS

(BY MR. SANJEEV KUTHIALA, SENIOR ADVOCATE, WITH MS. ANAIDA KUTHIALA, ADVOCATE, FOR R-1 TO 4/CROSS OBJECTORS)

AND

SHRI ROSHAN LAL SON OF SHRI KHAJAN SINGH, HOUSE NO. 254, WARD NO.4 (OPPOSITE VETERINARY HOSPITAL), VILLAGE SALAH, PO SUNDER NAGAR-1, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.-175018.

.....NON-CROSS OBJECTOR/APPELLANT/NON-APPLICANT

(BY MR. BHUPINDER GUPTA, SR. ADVOCATE
WITH MS. RINKI KASHMIRI, ADVOCATE)

REGULAR SECOND APPEAL

No. 657 of 2008 a/w CROSS OBJECTIONS
No. 259 of 2009
Reserved on:22.08.2022
Decided on: 26.08.2022

A. Code of Civil Procedure, 1908- Section 100- **Limitation Act, 1963**- Article 65- Suit for possession- Plea of defendant qua adverse possession accepted and the suit was dismissed- Ld. First Appellate Court affirmed the dismissal of the suit however declined plea of adverse possession and accepted the plea of irrevocable license- Held- To hold the possession of defendants to be adverse the material was clearly missing- Ld. Trial Court thus erred in deciding issue No. 6 in favour of defendants- Mere continuity of possession without exercising the rights of ownership, that too, in denial of the title of true owner, would not mature as adverse possession. (Para 24)

B. License- Defendants have throughout insisted on the plea of adverse possession, the alternative plea of irrevocable license being self destructive could not survive- Appeal allowed and cross-objections dismissed. (Para 28, 32)

Cases referred:

Karnataka Board of Wakf Vs. Government of India and others(2004) 10 SCC 779;

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

J U D G M E N T

Appellant assails the judgment and decree dated 30.09.2008, passed by learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P., in Civil Appeal No. 11 of 2007, whereby the appeal of the appellant has been dismissedbyaffirming the judgment and decree dated 12.10.2007, passed by learned Civil Judge(Sr. Division), Sundernagar, District Mandi, H.P., in Civil Suit No. 51 of 1997.

2. Parties hereafter shall be referred to by the same status as they held before learned Trial Court. Appellant herein was the plaintiff and respondents herein were the defendants before the learned Trial Court.

3. Plaintifffiled a suit for possession of land measuring 56 sq. meters as entered in jamabandi for the year 1990-1991 of Muhal Pungh/26/7, Tehsil Sundernagar, District Mandi, H.P and described as Khewat No. 43,Min Khatauni No.102, Khasra No. 1635(here-in-after to be referred as the 'suit land') by way of demolition of boundary wall illegally constructed by the defendants thereon in May, 1991. Plaintiff claimed the ownership of suit land alongwith proforma defendants No. 16 to 20. It was averred in the plaint that possession of the suit land was with plaintiff and proforma defendants No. 16 to 20 till the month of April,1991. In May 1991, defendants taking benefit of the absence of plaintiff and his brothers from the suit land, raised a wall enclosing the suit land from its front as well as southern side. As per plaintiff, a request was made to defendants to remove the wall and not to interfere in the possession of plaintiff and proforma defendants No. 16 to 20 and also to restore the suit land in its original position but remained unsuccessful. Plaintiff could notinstitute the suit till 1997 as he was posted at far off stations out of his home district.

4. It was also averred in the plaint that though proformadefendants No. 5 to 7 have also been shown to be co-owners in the suit land alongwith plaintiff and proforma defendants No. 16 to 20, but in partition proceedings the suit land has been allotted in favour of the plaintiff and proforma defendants No. 16 to 20 exclusively.

5. Land comprised in Khasra No. 1636 was allotted to one of the co-owners Charan Dass and others, who further sold the said land to late Sh. Hukam Chand, father of proforma defendants No. 8 to 15. Sh.Hukam Chand constructed a shop on Khasra No. 1636 and subsequently sold the said shop alongwith land comprised in Khasra No. 1636 in favour of the predecessor-in-interest of defendants No. 1 and 2 including defendant No. 2 himself. Defendant No. 1 purchased the share of Khasra No. 1636 in the shape of shop from Sh. Kahan Singh etc. on 23.02.1989 being 1/3rd share

measuring 48 sq. meters. As per plaintiff, proforma defendants No. 5 to 7 never raised any objection against the sale of this Khasra number by the predecessor-in-interest of plaintiff and proforma defendants No. 16 to 20 in favour of Charan Dass and they never exerted their right on the suit land. Proforma defendants No. 8 to 15 have been arrayed as proforma defendantssince the name of their father is recorded in revenue records as one of the person in possession of the suit land. This entry is stated to be wrong neither the proforma defendants No. 8 to 15 nor their predecessor-in-interest ever remained in possession of the suit land.

6. Defendants No. 1 to 7 contested the suit of the plaintiff. In the joint written statement filed on behalf of the said defendants preliminary objections with respect to limitation, locus-standi of plaintiff to file the suit and estoppel were raised. On merits, the averments made in the plaint were denied in generality. However, a specific plea was raised, wherebycontinuance, open, hostile and exclusive possession of the suit land was claimed by the defendants since the date of its purchase i.e. 06.09.1974. It was alleged that the aforesaid possession of defendants has continued for more than twelve years and as such they have perfected the title over the suit land by way of adverse possession. Defendants also claimed to have constructed their septic tank over the suit land besides having laid underground sewerage and water pipe lines. The only passage available to Khasra No. 1636 was also claimed through the suit land. It was further claimed by the defendants that they had used the suit land as their courtyard(Sehan) and for that purpose had constructed a cement floor thereon. In alternative, the plea of irrevocable license was also raised by the defendants. The allegation of plaintiff with respect to construction of wall in the year 1991 was specifically denied. It was alleged that the wall was constructed much prior to the year 1991 and such fact was within the knowledge of the plaintiff.

7. In their written statement, the defendants also raised a plea that proforma defendants No. 5 to 7 were recorded co-owners of the suit land alongwith plaintiff and proforma defendants No. 16 to 20, however, the exclusive possession was claimed by defendants No. 1 to 4. They maintain the plea of accusation of title over the suit land by adverse possession as against the plaintiff, proforma defendants No. 5 to 7 and 16 to 20. It was submitted in the written statement that previously the suit land and the land comprised in Khasra No. 1636 was in possession of S/Sh. Roshan Lal, Charan Dass, S/o Sh. Sri Ram from 1959 to April 1967. On 07.04.1967, Sh. Hukam Chand, S/o Sh. Jawahar, came into possession of the suit land together with land comprised in Khasra No. 1636, who had constructed a house on Khasra No. 1636 and used Khasra No. 1635 as Sehan till 1974 where after the suit land was in possession of the defendants.

8. In replication filed on behalf of the plaintiff averments made in the plaint were reiterated and the contents of the written statement were denied.

9. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

1. *Whether plaintiff and proforma defendants are possessing the suit land as owners as alleged?*

   .....OPP

2. *Whether defendants have raised wall over the suit land in illegal manner as alleged?*

   .....OPP

3. *Whether suit is not within limitation?*

   .....OPD

4. *Whether plaintiff has no locus-standi to file the present suit?*

   .....OPD

5. *Whether plaintiff is estopped by his acts and conduct to file the present suit?*

…….OPD

6. *Whether defendants have become owner of the suit land by way of adverse possession as alleged?*

……..OPD

7. *Whether in the alternate, defendants are irrevocable licencee over the suit land as alleged?*

……..OPD

8. *Relief.*

10. Issue nos. 1,2,4,5 and 7 were decided in negative and issue nos. 3 and 6 were decided in affirmative. Defendants were held to have perfected their title over the suit land by way of adverse possession. The suit of the plaintiff was held to be beyond limitation. Accordingly, the suit was dismissed.

11. In first appeal, learned Lower Appellate Court reversed the findings on issue no.6. It was held that defendants had failed to prove the perfection of title over the suit land by way of adverse possession. Findings on issue no. 7 were also reversed and it was held that the plaintiff had impliedly created an irrevocable license in favour of the defendants and in view of such findings, the dismissal of suit was maintained.

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

13. Mr. Bhupinder Gupta, learnedSenior Advocate, representing the plaintiff, raised the contentions that once learned Lower Appellate Court had reversed the findings on issue no.6, the suit of the plaintiff for decree of possession should have been decreed as the title of the plaintiff was not in dispute. He further submitted that defendants had miserably failed to plead and prove necessary ingredients for proving perfection of title by way of

adverse possession. Further, challenge has been laid to the findings recorded by the learned Lower Appellate Court on issue no.7 being without any material on record.

14. On the other hand, defendants have filed their cross-objections and have also challenged the findings recorded by learned Lower Appellate Court on issue no.6. Mr. Sanjeev Kuthiala, learned Senior Advocate, representing defendants has contended that defendants had proved accusation of title on suit land by way of adverse possession and has thus, supported the findings recorded by the learned Trial Court on issue no.6. He has further contended that in alternative plea of the defendants with respect to irrevocable license was also duly proved. On these submissions, he prayed for dismissal of the appeal.

15. The appeal was admitted on the following substantial questions of law:-

1. *When the Trial Court held defendants to have become owners of the suit land by adverse possession, which findings have been set aside by the Lower Appellate Court specifically, have not Lower Appellate Court acted in erroneous and perverse manner to non suit the plaintiff on the ground that no tatima of the disputed property is filed for the reliefs claimed, by ignoring that suit was for recovery of possession of a whole number having specified area?*
2. *Whether both the Courts below have committed grave illegality and irregularity in recording erroneous and perverse findings that suit of the plaintiff was barred by limitation? Are not such findings the result of misunderstanding and misapplying correct provisions of Limitation Act.?*
3. *When the Trial Court did not hold the status of defendants to be that of a licencee, which plea was taken in the alternative invoking provisions of Section 60 of Easement Act, has not the Lower Appellate Court acted in a highly erroneous and perverse manner to hold that possession of defendants over the suit land is that of a license without recording findings as to the*

alleged creation of license and termination thereof? Has not Lower Appellate Court committed grave error of law and jurisdiction in recording such findings when there was no proper pleadings and evidence available on the record? Have not both the Courts below acted beyond their jurisdiction to disentitled the plaintiff for recovery of possession when the status of defendants was proved to be that of a trespasser and proper provision of law applicable was Section 65 of Limitation Act?

16. The cross-objections of defendants were also admitted on substantial questions of law No. 1 and 2, which reads as under:-.

1. *Whether the learned First Appellate Court has misread and mis-appreciated the pleadings of the parties as also the evidence on record, both oral and documentary, and has erred in modifying the findings qua issues No. 6 and 7 and whether such modification of the findings are sustainable in law?*
2. *Whether on the ingredients of adverse possession having been pleaded and proved by way of cogent evidence and pleadings and the right of adverse possession having flowered into ownership and the same having been answered in favour of the Cross Objectors by the learned Trial Court, the modification of such findings are sustainable in law?*

17. Article 65 of the Limitation Act prescribes a period of twelve years as limitation for filing suit for possession of immovable property or any interest therein based on title from the time when the possession of the defendant becomes adverse to the plaintiff. Thus, in a suit for possession on the basis of title, defendants seeking dismissal of suit on the plea of adverse possession has the burden of proving such plea. Issue No.6 was accordingly framed and the onus was rightly placed on the defendants.

18. The question is as to what is meant by adverse possession.

19. In ***Karnataka Board of Wakf*** *Vs.* ***Government of India and others(2004) 10 SCC 779,*** the necessary ingredients for proof of adverse possession have been articulated as under:-

> *"10. Now we will turn to the aspect of adverse possession in the context of the present case. Appellants averred that the plea of the respondent based on title of the suit property and the plea of adverse possession are mutually exclusive. Thus finding of the High Court that the title of Government of India over the suit property by way of adverse possession is assailed.*
>
> *11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : S M Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa v. State of Karnataka (1997) 7 SCC 567). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to*

clearly plead and establish all facts necessary to establish his adverse possession.

12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: S M Karim v. Bibi Sakinal AIR 1964 SC 1254). In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

> *"As regards the first plea, it is inconsistent with the second plea.Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."*

20. It is also settled that necessary ingredients of adverse possession are required to be specifically pleaded and necessary factual foundation in support thereof is to be made out. Equally important is the necessity to prove all necessary ingredients of adverse possession. It is incumbent upon the defendants to plead and prove the date on which the possession became adverse and then the same continued uninterruptedly for twelve years. Since by plea of adverse possession, rightful title of someone is sought to be taken away, a heavy burden lies upon the defendants to prove

the plea of adverse possession. In case of failure to prove the adverse possession, any other form of possession howsoever, long, cannot be held sufficient to nonsuit the plaintiff in his prayer for possession of the suit land on the basis of title.

21. Examining the case of the defendants in the backdrop of aforesaid legal position, I have no hesitation to say that defendants have failed in their quest to nonsuit the plaintiff on the plea of adverse possession. In the written statement, the defendants have only stated that since 06.09.1974, they are coming in continuance, open, hostile and exclusive possession of the suit land. There is no plea that the defendants had taken possession of the suit land by clearly asserting hostile title in denial of the title of the true owner. The basic requirement that defendant must claim the title in himself by denying the title of true owner is completely missing in the case. The continuity, exclusiveness and openness of the adverse possession will then follow in order to prove the perfection of title in the defendants by adverse possession.Otherwise, the continuity, exclusiveness and openness of possession with defendants without proof of adversity, as noticed above is of no use.

22. Learned Trial Court while deciding issue No. 6 in favour of the defendants has based in its findings on the oral evidence led by the parties. Admissions made by plaintiff while appearing as his own witness(PW-1) to the effect that the path of the house of defendants passed through Khasra No. 1635, defendants had constructed a septic tank over the path of Khasra No. 1635 and had further laid underground water pipes. Statement of PW-3 to the extent that suit land was used as Sehan (Courtyard) by defendant No. 2 since the time when defendant No. 2 constructed the house. He had further stated that defendant No. 2 had purchased the house on Khasra No. 1636 on 06.09.1974 from Sh. Hukam Chand and courtyard on Khasra No. 1635 was in possession of Hukam Chand even before its sale to defendant No. 2. The

depositions of PW Nos. 4 and 5 were also considered, who also stated that the possession of defendants on the suit land was existing since 1974 and that defendants had constructed their septic bank and had also laid underground water pipes therefrom. To similar effect, statement of PW Nos. 6 and 7 were also relied upon by learned Trial Court. On the basis of such evidence learned Trial Court held that defendants were in possession of suit land since 06.09.1974.

23. Learned Trial Court further relied upon the statements of defendants witnesses in order to reiterate its findings as to possession of defendants on the suit land since 06.09.1974. It was on the basis of the oral evidence led by the parties that learned Trial Court also inferred the existence of hostile actual, open, uninterrupted, notorious, exclusive and continuance possession of defendants over the suit land on that premise. It was held that defendants had perfected their title over the suit land by way of adverse possession.

24. No doubt, the findings of learned Trial Court holding defendants to be in possession of suit land since 1974 are in sync with the statements ofthe witnesses. However, to hold such possession to be adversed, the material was clearly missing. The learned Trial Court had thus erred in deciding issue no. 6 in favour of the defendants. It was not proved as to on which date defendants had started exercising the right of ownership on the suit land in denial of title of the suit land. None of the witnesses have stated that the defendants claimed themselves to be the owner of the suit land and used the same by denying the title of the plaintiff. That being *sine-qua-non*, for establishing adverse possession, defendants could not be held to have perfected the title over the suit land by way of adverse possession. Mere continuity of possession without exercising the rights of ownership, that too, in denial of the title of true owner, would not mature as adverse possession.

25. The findings of learned Trial Court on issue no. 6 also cannot be sustained for the reason that the possession of defendants or their predecessor-in-interest in the revenue records was recorded as permissive. Exhibit PW1/D Missal Haqiat, Ext. PW1/C jamabadi for the year 1979-80 and Ext. PW1/B jamabandi for the year 1985-86 recorded the possession of Hukam Chand, the predecessor-in-interest of defendants as *"Villalagan Vavdah Rajamandie"* that is the possession with permission to the owner. The same was the possession in jamabandi for the year 1991, Ext. PW1/A. The presumption is attached to the revenue records. Defendants had not assailed the entry so recorded. In absence of such challenge, the probative value of revenue entries cannot be ignored.

26. Thus, the findings on issue No. 6 returned by learned Trial Court, were not sustainable. Learned Lower Appellate Court has thus, rightly held that the necessary ingredients for proving the plea of adverse possession had not been proved by the defendants.

27. In their cross-objections, the defendants have assailed the findings after learned Lower Appellate Court on the issue of adverse possession. At the time of hearing of this appeal, again the adverse possession of defendants over the suit land has been claimed and argued to have been proved on record. Adverse possession can be claimed only against the true owner. The insistence of defendants on their plea of adverse possession itself suggest that the ownership of plaintiff is not denied. Ground-B of cross-objections clearly lays down that the defendants have challenged the findings of learned Lower Appellate Court regarding existence of irrevocable license in favour of the defendants.

28. The appeal as well as suit of the plaintiff has been dismissed by learned Lower Appellate Court on the ground that from facts established on record grant of irrevocable license was proved in favour of the defendants. In my considered view, such finding is clearly erroneous over the reasons that

there was no factual foundation made out by the defendants, so as to succeed in the plea of irrevocable license. As noticed above, by way of cross-objections even the defendants have assailed such findings before this Court. The findings as to existence of irrevocable license are also under challenge in appeal filed by the plaintiff except for a bald averment in the written statement that the defendants were irrevocable licensee over the suit land, there is nothing on record to suggest that such plea was seriously pressed by the defendants at any stage. Neither the defendants while appearing as DWsnor any of their witnesses have uttered even a single word regarding grant of license or irrevocability thereof. The license becomes irrevocable on proving of the conditions laid down in Clause A and B of Section 60 of the Indian Easement Act, 1882, however, *sine-qua-non* is creation of license. It has never been the case of defendants that license was created in their favour by the plaintiff. License has been defined in Section 52 of the Act ibid as under:-

> "*52.* ***"License'*** *defined- Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called as license.*"

When the defendants have throughout insisted on the plea of adverse possession, the alternate plea of irrevocable license being self destructive could not survive as the license is also creation of permissiveness by the grantor of a right to do, or continue to do, in or upon the immovable property, something which, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property. Learned Lower Appellate Court in the aforesaid circumstances, could not have carved out the case for defendants on its own.

29. Once the defendants had failed to prove the perfection of title over the suit land by way of adverse possession, the legal consequence would be the success of the suit of plaintiff for prayer of possession.

30. Noticeably, the defendants though denied the averments made in the plaint to the effect that defendants had raised the wall on the suit land in the year 1991, but no specific plea was set-up as to when the wall was raised. Even the evidence led by the defendants was silent on this aspect. That being so, the plaintiff could not be disbelieved regarding date of construction of wall by defendants. The suit could not be held to be beyond limitation by learned Lower Appellate Court for the reasons firstly that there is no limitation for seeking the relief of possession of immovable property on the basis of title.The permissive possession may be howsoever long title holder as a right to seek possession at any time unless the same has become adverse to his title and twelve years have elapsed. Another reason is that even if by construction of wall defendants had exerted title in themselves, the same cannot be said to have matured in ownership as the suit was filed before the requisite period of twelve years that commenced from 1991.

31. The substantial questions of law framed in the appeal as well as in the cross-objections are accordingly decided.

32. This appeal succeeds. Cross-objections are dismissed.Judgment and decree dated 30.09.2008, passed by learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P., in Civil Appeal No. 11 of 2007,arising out of judgment and decree dated 12.10.2007, passed by learned Civil Judge(Sr. Division), Sundernagar, District Mandi, H.P., in Civil Suit No. 51 of 1997, is set-aside. The suit of the plaintiff is decreed and decree of possession of suit land comprised in Khewat No. 43, Min Khatauni No.102, Khasra No. 1635 is passed in favour of the plaintiff and against the defendants with further directions to the defendants to demolish the wall raised by them on the suit land, if so desired, within a period of two weeks, from the date of this decree,

failing which plaintiff shall be entitled to the possession of the suit land with all annexures made to it including the wall raised by the defendants.

33. The appeal is accordingly disposed of, so also the pending miscellaneous application(s), if any.

Decree sheet be prepared accordingly.

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

Between:-

1. MANOHAR LAL S/O SH. NARAYAN DASS
2. LEELADHAR S/O SH. NARAYAN DASS

BOTH R/O VILLAGE SAMOUL,
P.O. BALAG, TESHIL SUNDERNAGAR,
DISTRICT MANDI, H.P.

.....APPELLANTS

(BY MR. VINAY MEHTA, ADVOCATE)

AND

KAUSHLYA D/O SMT. HIMTI DEVI
R/O VILLAGE SAMOUN,
P.O. BALAG, TEHSIL SUNDERNAGAR,
DISTRICT MANDI, H.P.

.....RESPONDENT

(BY MR. AJAY CHANDEL, ADVOCATE)

REGULAR SECOND APPEAL
No.75 of 2021
Decided on: 10.08.2022

Code of Civil Procedure, 1908- Section 100-Will- **Indian Succession Act, 1925**- Section 63- **Indian Evidence Act, 1872**- Section 68- Both the Ld. Courts below held that execution of the Will set up by the plaintiff was shrouded with suspicious circumstances- Held- Regarding the execution of the

Will in question there are too many material discrepancies- Due execution of the Will not proved- Plaintiffs failed to dispel the suspicious circumstances- The findings of facts rendered by Ld. Courts below do not suffer from any infirmity- Appeal dismissed. (Para 5)

Cases referred:

Kavita Kanwar Vs. Pamela Mehta & others (2021)11 SCC 209;
Shiva Kumar Vs. Sharanabassapa (2021) 11 SCC 277;

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

J U D G M E N T

Leeladhar andManohar Lal, minors at the relevant time,instituted a Civil Suit on 01.11.2007, through their father Narayan Singh (Narayan Dass), claiming property of their paternal uncle Het Ram on the basis of a Will dated 23.11.2005, allegedly executed by him (Het Ram) in their favour. Mutation No.75,concerning the suit property, was entered and attested on 15.03.2007 in favour of Het Ram's widow–Himti Devi (original defendant No.2) and his daughter Kaushlya Devi (original defendant No.1). Defendant No.2 died during the pendency of the proceedings before the learned trial Court, hence, her name was struck off from the array of parties.

Both the learned Courts below have concurrently held that execution of the Will set up by the plaintiffs was shrouded with suspicious circumstances. The execution of the Willdid not appealto the conscious of the learned Courts in view of the suspicious circumstances explained in their judgments. Hence, the plaintiffs' civil suit was dismissed by both the learned Courts below. Aggrieved, the plaintiffs have come up by means of present Regular Second Appeal against the impugned judgments and decrees passed by the learned trial Court on 22.08.2017 and by the learned First Appellate Court on 17.12.2019.

2. With the consent of learned counsel for the parties, the appeal was taken up for disposal at the admission stage itself. The points emphasized by learned counsel for the appellants were that learned Courts below erred in law and fact in holding that the Will dated 23.11.2005 executed by Het Ram in favour of his nephews (appellants/plaintiffs) was shrouded with suspicion and doubts, more so, when it was a case of registered Will. Both the learned Courts did not appreciate the evidence, moreparticularlythe statement made by Het Ram in a proceeding under Section 125 Cr.P.C. where he had denied his relation with the defendants. Learned counsel prayedfor allowing the appeal and for setting aside the impugned judgments and decrees. Learned counsel for the respondent/defendant defended the judgments and decrees in question and argued that neither the execution of Will by the testator in sound disposing state of mind was proved by the plaintiffs nor the suspicious circumstances surrounding the Will were cogently dispelled by them.

3. After hearing learned counsel for the parties and going through the record of the case with their assistance, I am not inclined to interfere with the wellreasoned judgments and decrees passed by the learned Courts below on facts as well as on law. I am in agreement with the findings returned by both the learned Courts below that the execution of Will set up by the plaintiffs for claiming the property of Het Ram does not appeal to the conscious and that the alleged Will was shrouded with many suspicious and mysterious circumstances.

4. Regarding execution and proof of the Will, Hon'ble Apex Court after tracing various judicial precedents in ***(2021)11 SCC 209, (Kavita Kanwar Vs. Pamela Mehta & others)*** reiterated that Will is the testamentary document that comes into operation after the death of the testator. Section 59 of the Succession Act provides that every person of sound mind, not being a minor, may dispose of his property by Will. A Will or any portion thereof; the making of which has been caused by fraud or coercion or

by such importunity that has taken away the free agency of the testator is declared to be void under Section 61 of the Succession Act. Section 62 of the Act enables the maker of the Will to make or alter the same at any time when he is competent to dispose of his property by Will.

It was also observed that Section 63 of Succession Act provides for execution of the unprivileged Wills as under:-

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

The Will ought to be attested by two or more attesting witnesses. The document propounded as Will cannot be used in evidence unless one attesting witness is examined for purpose of proving its execution in accordance with following Section 68 of the Evidence Act:-

> ***"Proof of Execution of document required by law to be attested.*** *-If a document is required by law to be attested, it*

shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Relevant principles settled by consistent decisions, summarized in ***(2021) 11 SCC 277 (Shiva Kumar Vs. Sharanabassapa*** were noticed as under in Kavita Kanwar's case:-

"24.8. We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying the same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in Civil Appeal No. 6076 of 2009: Shivakumar & Ors. v. Sharanabasppa & Ors., decided on 24.04.2020, this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a Will as follows: (SCC pp 309 -10, para12)

"12……. 12.1. Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.2. The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available

for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.

12.4. The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

12.5. If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be 'real, germane and valid' and not merely the 'fantasy of the doubting mind.'

12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the

circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance/s. While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?

12.9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will."

5. Coming to the facts of the case, the plaintiffsin order to prove the execution of the Will (Ex.P-1) produced its scribe Balak Ram as PW-3, one attesting witness Chint Ram asPW-4and Sub-Registrar Gariba Ram as PW-5. Plaintiff No.2 Leeladhar appeared in the witness-box as PW-2.

Regarding execution of the Will in question, there are too many material discrepancies to ignore in the evidence led by the plaintiffs.

5(a) Presence of Tehsildar

PW-3 Balak Ram, the scribe, deposed that Tehsildar was not present on the spot when Will was written by him. That the Tehsildar had not come in his presence. The attesting witness Chint Ram (PW-4) testified that Tehsildar was present at the time of writing of the Will by Balak Ram (PW-3).

Gariba Ram the Tehsildar, who appeared in the witness box as PW-5, stated that the Will was prepared in his presence after he reached the spot. Plaintiff No.2 Leeladhar, who appeared as PW-2 deposed that the Will in question was written by Tehsildar Gariba Ram (PW-5) in his presence.

There is no escape from conclusion that all the witnesses of the plaintiffs have deposed differently in respect of the presence of Tehsildar on the spot at the time of execution of the alleged Will dated23.11.2005 and regarding the execution of the Will.

5(b) Age of the Testator

Gariba Ram (PW-5) and Balak Ram (PW-3) have described the age of the testator as 70 years in their statements, whereas, in the Will, Ex.P-1, the scribe Balak Ram (PW-3), mentioned the testator to be 95 years old.

The testator (Het Ram) was not known personally either to Gariba Ram (PW-5) or to scribe Balak Ram (PW-3). In the alleged Will, the testator has been shown to have been identified by one Bhagirath. The identifier has not been produced in the witness-box. The identity of this identifier is also not very clear. Beneficiaries of the Will were minors, whereas the Tehsildar-the Sub-Registrar stated that they were around 30-32 years of age.

5(c) Time of writing the Will

Scribe Balak Ram (PW-3) stated that he was summoned by the deceased in the hotel at Nihri. He started writing the Will at 1:00 pm and finishedit by 2:00 pm. He further stated that Tehsildar did not reach the spot during his presence and that he might have arrived at around 3:00 pm. The attesting witness Chint Ram (PW-4) said that Will was written by 11:00 am and Tehsildar had arrived at 1:00 pm. All the witnesses have deposed

differently regarding the time of writing the Will and about the presence of the Tehsildar.

5(d) Place of execution

The case of the plaintiffs was that the Will had been executed at a hotel belonging to one Hans Raj in village Nihri. The testator was sick and could not walk. He was brought on shoulders by some persons from his village Samoul to the hotel of Hans Raj at Village Nihri after covering a long distance on foot between the two villages.

It has come on record that Tehsil office was at about 100 meters from the hotel in question. In case, the testator had been brought by carrying him on shoulders as put forth by the plaintiffs, then why he was not straight away taken to the Tehsil office for execution and registration of the Will, is an important question. The plaintiffs have tried to circumvent answering this question by stating that Tehsildar was not present in the office, therefore, they had to stay put in the hotel of Hans Raj at village Nihri for two days for execution of the Will on 23.11.2005. In sharp contrast to this stand, the statement of Tehsildar Gariba Ram (PW-5) is that he was present in his office on 20th, 21st and 22nd November, 2005.

The Will in question Ex.P-1, is alleged to have been executed in the hotel of Hans Raj on 23.11.2005, whereas, the computerized receipt of its entry Ex.PW-5/A, bears thumb mark of testator Het Ram. The said receipt was admittedly prepared at the office of Sub Registrar. Testator admittedly did not go to the office of the Tehsildar yet his thumb impression appears in the receipt prepared at the office. There is no photograph of testator Het Ram on this receipt. The execution of the Will comes under cloud. Further, as per Gariba Ram (PW-5), the Will was entered on the computer the same day it was executed, whereas perusal of Ex.PW-5/B, reflects that the Will was presented only on 08.12.2005.

5(e) Reasons for Execution of the Will

The plaintiffs have not explained the reasons for execution of the alleged Will by Het Ram in their favour. The case put forth by the plaintiffs is that Het Ram was their Uncle. Himti Devi (defendant No.2) was his wife. The relationship between the two was strained for the past about 40 years, for the reason, that defendant No.2 was residing with Het Ram's brother Paras Ram. Defendant No.1, Kaushalya Devi was daughter of Paras Ram & Himti Devi and not of Het Ram. Defendant No.1 was wrongly recorded as daughter of Het Ram in the family register. The plaintiffs set out that Het Ram was being looked after by them and he, out of love and affection and in a sound disposing state of mind had executed the Will dated 23.11.2005 in their favour.

Narayan Singh, the natural guardian and father of the minor plaintiffs through whom the suit was filed did not step into the witness-box. Minor plaintiff No.2 appeared as PW-2. He was allowed to depose after the learned trial Court was satisfied about his comprehension power. He categorically deposed that the Will, Ex.P-1, was prepared by Paras Ram in plaintiffs' favour. This assertion is contrary to the case set up by the plaintiffs about the alleged Will having been executed by Het Ram. The statement of PW-2 unearths plaintiffs' shallow claim about the Will. PW-2 has further stated that Het Ram was being looked after right till his death by his wife Himti Devi and daughter Kaushalya Devi. He has expressed his ignorance that the property of Het Ram was in possession of his wife Himti Devi and daughter Kaushalya Devi. Thus, the pivotal witness Leeladhar, the plaintiff himself, admitted that Het Ram was being looked after by his wife and daughter and it is for this reason that the witness pleaded his ignorance to the suggestion concerning property of Het Ram being in possession of Himti Devi and Kaudhalya Devi. Het Ram, thus, had no reasons to disinherit the defendants.

An application moved by the plaintiffs under Order 7 Rule 14 of the Code of Civil Procedure to place on record an earlier Will allegedly

executed by the testator on 05.08.1996 was turned down by the learned trial Court on the ground of document being irrelevant to the case. Alongwith their first appeal, the plaintiffs moved application under Order41 Rule 27 of CPC to produce the earlier Will dated 05.08.21996. Prayer was rightly not allowed by the learned First Appellate Court. The fact regarding existence of the earlier registered will dated 05.08.1996 was already established through Het Ram's statement recorded in proceedings under Section 125 Cr.P.C.which was part of record. No relief even otherwise had been claimed in the Civil Suit on the basis of Will dated 05.08.1996. The suit was instituted on the basis of alleged Will dated 23.11.2005. The plaint did not contain any pleading concerning the Will dated 05.08.1996

The plaintiffs have also brought on record the statements of Het Ram and Himti Devi recorded in the proceedings under Section 125 of Code of Criminal Procedure as well as the judgment passed by the competent Court in the said proceedings alongwith certain other ancillary documents exhibited as PW-6/A to Ex.PW-6/E. These proceedings (No.139 /1997) were initiated in the year 1997 and culminated on 09.09.1999. The documents, Ex.PW-6/A to Ex.PW-6/E, do show that there was a litigation between Himti Devi and Het Ram. Het Ram believed that the daughter born to his wife was born out of her association with his brother Paras Ram. He had executed a Will dated 05.08.1996 in favour of the plaintiffs regarding the suit property. Even assuming these facts to be correct, the next questioncrops up: -when Het Ram had already executed a Will on 08.05.1996 in favour of the plaintiffs regarding the suit property, there was no occasion for him to execute the second Will on23.11.2005 to the same effect. It was for the plaintiffs to explain the circumstances under which the two Wills at different intervals, in favour of the same beneficiaries and with respect to the same subject matter, had to be executed by the testator. This question was to be answered either by the beneficiaries of the Will or by their father. The father of the beneficiaries did

not step into the witness-box. Out of the two minor beneficiaries i.e. the plaintiffs, one appeared in the witness box as PW-2. He stated nothing about this aspect, but did depose that Het Ram was being looked after by the defendant Kaushalya Devi and her mother Himti Devi. He did not deny that suit property was intheir possession. From documents on record, in such circumstances, an inference can be safely drawn that the relations between Het Ram and the defendants perhaps were strained till 1999, but improved thereafter. The plaintiffs were under apprehension that Het Ram would leave his property in favour of the defendants by revoking his first Will dated 05.08.1996. For this reason, theythought of getting executed from him a second Will. The old and infirm testator had statedly been carried on shoulders for the execution of the alleged Will from his village to another village. He was made to stay in a hotel there for two days on the pretext of non-availability of Tehsildar, whereas the Tehsildar was actually available in the Tehsil office. In such a case, undue exertion of coercion and pressure on Het Ram cannot be ruled out. Plaintiff No.2 admitted that testator was being looked after by his wife & daughter who were also in possession of the suit property.

The Will set up by the plaintiffs was not established to have been duly executed by the testator. The document propounded as Will was surrounded with too many material suspicious circumstances, which the plaintiffs were not able to dispel. The cumulative effect of these factors does not satisfy the conscience of the Court that the Will in question represented the last wish of the testator. Both the learned Courts below have justly dismissed the suit filed by the appellants after correctly examining the pleadings and the evidence led by the parties. The findings of facts recorded by the learned Courts below do not suffer from any infirmity. No question of law,much less substantial question of law, arises for adjudication in the present appeal.

For the aforesaid reasons, there is no merit in the present appeal. The same isaccordingly dismissed alongwith pending miscellaneous application(s), if any.