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the rigor of aforesaid provision of Order 7 Rule 14 CPC does not apply to the document which are produced for cross- examination of plaintiff's witnesses or handed over to such witness to refresh his memory. The impugned order while rejecting the application under Order 7 Rule 14 CPC does not deal with any of above situations. The trial Court was to adjudicate on the question whether plaintiff was entitled for grant of leave to produce documents detailed in application. The trial Court appears to have swayed by the factors unconnected & irrelevant to decision of application under Order 7 Rule 14 CPC. No reason what so ever has been assigned by trial Court for not allowing the production of documents as prayed by plaintiff.
The impugned order to that extent deserves to be set aside. The documents sought to be produced by the plaintiff allegedly had come into existence only on 05.08.2012. It is trite that mere production of documents does not amount to proof of its existence or contents. Each & every document has to be proved in accordance with procedure prescribed under law. There is no reason that plaintiff should not have been allowed to produce on record documents annexed with application under Order 7 Rule 14 CPC.
Section 45A of the Evidence Act deals with a situation where expert opinion is required to be formed by the Court on any matter relating to any information transmitting or stated in any computer source or in any other electronic/digital form & further speaks about such opinion, if obtained to be a relevant fact. The Impugned order is deficient meeting with the legal requirement for adjudication of the prayer made by the plaintiff- the application of plaintiff under Section 45A of the Evidence Act was misconceived at the stage of filing. In facts of case, no case was made out to seek an expert opinion as there was no requirement of such opinion at a stage when the information alleged to be stored in digital form was not even proved by way of evidence in the case. The petition is partly allowed. The application u/o 7 rule 14 CPC is allowed & application u/s 45A Evidence Act is dismissed.
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Code of Civil Procedure, 1908 - Section 100- Regular Second Appeal-- Civil suit preferred by Predecessor-in-interest of appellants no. 1-4 and proforma respondents No. 6-10 dismissed by Ld. Civil Judge (Junior Division) – Appellants No. 1-4 preferred first appeal wherein respondents No. 6-10 were arrayed as proforma respondents No. 6-10 which appeal was dismissed by Ld. Additional District Judge – Challenged in present Second Appeal – Held, that Respondent No. 6 was one of the plaintiffs who attended the proceedings before First Appellate Court through his counsel, who expired during pendency of the said appeal – Judgment & decree passed by the first Appellate Court quashed and set aside – Case remanded to first Appellate Court with a direction to allow the appellants to take consequential steps on the death of respondent No. 6 and thereafter to decide the question of substitution of his legal representatives.Title: Chughi Devi & others vs. Nika Ram & others Page-166

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Petition allowed – Order dated 13-06-2019 quashed and set aside – order dated 07-05-2019 also quashed and set aside and the matter is remanded back to the Ld. Executing Court with a direction that issues be framed in terms of order dated 29-03-2017 and then objections be decided.Title: Sukh Ram vs. Smt. Surtu Devi Page-313

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Code of Civil Procedure, 1908- Order 39 Rule 1 & 2 - The petition assailing the order dated 5.3.2021 passed by Ld. DJ (Forest) whereby order dated 20.12.2019 passed by Ld. Civil Judge in an application under order 39 Rule 1 & 2 CPC has been affirmed- Held, petitioner/plaintiff has sought relief of permanent prohibitory injunction to restrain the defendant No.1 from putting decree in execution for possession of suit property & in the prayer in application under order 39 rule 1 & 2 introduction by seeking as injunction. The tenure of the plaint filed by plaintiff does not prime facie level as to on what harsh the plaintiff is seeking better title to the suit property. As per plaintiff suit property is still joint between the parties, if that we so the plaintiff can not be held to have a prime facie case to obstruct a lawful decree of possession passed against him by a court of competent jurisdiction - The petition dismissed.Title: Banwari Lal vs. Balak Ram and others Page- 752

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agreement Rs. 1500000/- had been received by defendant and balance amount of consideration was to be paid at the time of execution of sale deed fixed for 15.7.2018. Defendant also received Rs. 2500000/- as part of sale of consideration. The defendant threatened to transfer the property to third party for escalation of price of property & defendant had not denied execution of agreement - sale deed was to be executed after partition and last date was fixed for 15.7.2018, land was partitioned in the year 2015-16 and defendant approached plaintiff for execution of sale deed being in dire need of money but plaintiff refused and in 2018, plaintiff again was not ready and conveyed no objection for selling land to third person - Defendant admits receipt of earnest money but denied further payment- Held, as per plaintiff, plaintiff remained present in office of Registrar with sale consideration on 16.7.2018 for execution of sale deed but they surreptitiously remained silent for 2 years which cast doubt about their claim that they were ready with sale consideration for execution of sale deed in 2018 - No reason has been assigned for remaining silent for 2 years- during these two years, defendants, had changed their position by selling land, further agreement to sell was executed in year 2013 and thereafter title of land after partition was clear in year 2015-16 and last date for execution of sale deed was 15.7.2018 - Thereafter plaintiff waited for 2 years for filing suit for specific performance which tilts balance of convenience in favour of defendant by creating doubt about claim of plaintiff undoubted there is price escalation in the value of land, though plaintiffs have claimed that they are having sufficient means for making payment of balance amount of consideration but no documentary proof thereof or any other material has been placed on record to substantiate the plea - plaintiffs were not entitled for interim stay. Title: Kamini Ahluwalia & another vs. Devi Saran Page-713

Code of Civil Procedure, 1908- Order 9 Rule 7 - It is settled that a party who has been proceeded ex-parte has a right to join proceedings at later stage anytime if the said party does not press for restoring of the proceedings to its original position when such party was proceeded exparte- in case of prayer to restore the stage of date of proceeding exparte such party has to establish sufficient cause with satisfactory explanation for absence and exercise of due diligence and caution on its part in pursuing the cause- joining at later stage at any point does not revive the right of such party which stands extinguished for absence without good cause.Title: Sameer Singh vs. Dinesh Bindal and

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Code of Civil Procedure, 1908 –Section 100 - Regular Second Appeal – Suit for possession of the suit property on the basis of ownership filed by the plaintiff decreed by the Trial Court – Judgment and decree of the trial court affirmed by the Ld. Appellate Court – Challenged by way of present RSA – Held, that the status of defendant can be termed to be of gratuitous licensee over the suit property being relative of the plaintiff – No right & interest acquired over the suit property by the defendant – Plea of the defendant that he was inducted as a tenant not established – Concurrent findings of trial court and first Appellate Court based on correct appreciation of evidence and are not perverse – Appeal dismissed.Title: Ms. Anjana Kumari vs. Sh. Jhina Ram Page-218

Code of Civil Procedure, 1908- Section 115 read with Order 9 Rule 8 - The Civil Revision against the order passed by Motor Accident Claims Tribunal where by Civil Misc application preferred by petitioner under section 5 of limitations Act for condonation for delay in filing application under order 9 Rule 8 CPC read with section 115 CPC for restoration of MACP Chetan vs. Jagroop has been dismissed- Held- finding returned by the MACT that there is nothing on record that application for receiving copies of Zimni orders was filed on 19/12/2014 is perverse as is evident from stamp of copying agency affixed on back of order sheet that copy was applied on 19.12.2014 and proposed date of delivery of copy was not given as in stamp of copying against column it is mentioned as NA therefore plea of petitioner to this effect is substantiated by stamp of the copying agency. In order dated 25.4.2014, it is not clearly mentioned that where the case shall be taken on next date of hearing. Therefore by extending benefit of doubt in favour of the petitioner, balance of interest lies in his favour particularly keeping in view that claim petition has been filed under the beneficial provisions of legislation and therefore no benefit to the petitioner in getting his petition dismissed in default. Delay in filing the petition stands satisfactory explained by giving plausible satisfactory explanation, the finding of MACT are contrary to record and not sustainable. Order of MACT is set aside and to decide the application under order 9 rule 4 & 8 CPC in light of observations.Title: Sh. Chetan vs. Jagroop Singh and others Page - 651

Code of Civil Procedure, 1908- Order 39 Rules 1 & 2- Interim injunction-

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Code of Criminal Procedure, 1973 – Section 197 - Petitions against summoning order dated 3.11.2017 passed by trial court in private complaint - Held - Petitioners allegedly having committed offence while discharging official duty. Mrs. Anjum Ara and petitioners being Govt officials are on same footings - The findings of Co-ordinate bench with respect to same incident which have not been assailed squarely covers present case, so Judicial Magistrate could not have taken cognizance against the petitioners except with previous sanction u/s 197 Cr. P.C. - petitions allowed and criminal proceedings instituted against petitioners vide private complaint are quashed. Title: Sh. Hans Raj and others vs. Sh. Prem Singh Tangania and others. Page – 895

Code of Criminal Procedure, 1973 - Section 374 – Appeal against judgment of conviction and order of sentence dated 02-03-2019 passed by Ld. Special Judge, Una under Ss. 447 and 34 IPC and Section 3 (1)(g) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Held, that no evidence to show that complainant was dispossessed by accused from land in question – No plausible explanation for the delay in filing FIR – Once possession of land in question not delivered to the complainant after culmination of partition proceedings, no question of his dispossession – Judgment/order of conviction passed by Learned Court below not legally sustainable – Appeal allowed – Impugned judgment of conviction set aside.
Title: Mohinder Singh and another vs. State of Himachal Pradesh Page- 57

Code of Criminal Procedure, 1973 - Section 378 – Appellant is aggrieved by the order of National Lok Adalat, whereby due to absence of the complainant,

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Code of Criminal Procedure, 1973 – Section 397 – Criminal revision against order passed by Ld. Additional Sessions Judge, Nalagarh dated 12-02-2021 vide which prayer for stay of conviction in case titled State of H.P. ---Vs.--- Mahesh Kumar & ors. was rejected – Held, that order granting stay of conviction is not the rule but an exception to be resorted in rarest of rare case, depending upon facts – Petitioner being MLA, will be disqualified on account of conviction in terms of Section 8(3) Representation of People Act 1951 and the present case falls under "exceptional" case which calls for stay of conviction recorded by learned trial court as it would lead to serious consequences – Petition allowed – Conviction recorded by trial court against petitioner stayed till final adjudication of the appeal.Title: Pradeep Chaudhary vs. State of Himachal Pradesh Page-30

Code of Criminal Procedure, 1973 – Section 397 – Release of vehicle impounded under Section 18, 25, 28, 29 & 60 of Narcotic Drugs & Psychotropic Substances Act, 1985 – Scope – Held – In Sunderbhai Ambalal Desai vs. State of Gujrat, AIR 2003 S.C. 638, Hon'ble Apex Court and in case titled Ashok Kumar vs. State of H.P., 2008 (2) Shimla L.C. 452, Hon'ble High Court of H.P. has held that the procedure under Section 451 Cr. P.C. should be followed by recording evidence and disposal – No useful purpose will be served by keeping seized vehicle at Police station for long period, so, Magistrate shall pass/ immediately appropriate orders by taking personal bonds & guarantee as well as security for return of vehicle, if required at any point of time – Ld. Special Judge, Nalagarh, District Solan rightly released the vehicle. – Petition disposed of accordingly. [Paras 15 & 17] Title: Narcotics Control Bureau vs. Sangeeta Bhardwaj Page-468

Code of Criminal Procedure, 1973 – Section 397 - The petition challenging

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Code of Criminal Procedure, 1973 – Sections 397 and 401 - Criminal Revision petition u/s 397/401 Cr.P.C. against Judgment passed by Ld. Sessions Judge in Criminal Appeal modifying the order passed by Ld. Judicial Magistrate whereby application u/s 12 of Protection of Women from Domestic Violence Act filed by respondent / wife was partly allowed - Held - under Domestic Violence Act, maintenance can only be granted if person seeking maintenance is able to prove that victim was subjected to "Domestic Violence" defined in section 3 of the Act - respondent / wife has specifically admitted that for last 30-40 years, she along with her son is residing separately from petitioner/husband - Mere pleadings with regard to 2nd marriage of the petitioner without proof as same was not produced in accordance with law is / was not sufficient to prove factum with regard to cruelty rather to have maintenance under D. V. Act - It is incumbent upon the respondent/wife to specifically prove that she was compelled to leave her matrimonial house on account on 2nd marriage of petitioner-husband- Evidence led on record by

respondent/wife itself suggests that dispute inter se her and petitioner is purely on account of property and such dispute does not fall within the definition of "Domestic Violence" as defined under the Act - Maintenance under Domestic Violence can be granted on three counts i.e. physical abuse, mental abuse and economic abuse - Hence Petition is allowed the Judgments / order passed by Ld. courts below set aside.Title: Manohar Singh vs. Smt. Dropti Devi Page-823

Code of Criminal Procedure, 1973 – Section 438 - The petition under section 438 Cr. P.C. in case FIR- 23/2021 under section 420, 467, 468, and 471 IPC with the allegations that petitioners Jitender, Sanjeev approached bank for grant of home loan of Rs. 15,00000/- for purchase of property - Bank agreed to grant home loan in order to secure loan, they mortgaged their property and deposited sale deed - When bank official visited the property, it was found that the borrowers had sold all flats confirmed by Bank's Advocate that said sale deed was not found registered with Registrar. They also approached bank for grant home loan to the tune of Rs. 20,00,000/- for completing semi furnished house by depositing mortgaged deed which was found forged - Petitioner Sanjay in Connivance with petitioner Jitender, Sanjeev approached Bank for Rs. 20,00,000/- for purchase for entire RCC floor on depositing sale and mortgage deed but property in the deeds are not in names of borrower. Petitioner Pankaj in connivance with Petitioner Jitender and Sanjeev approached bank for loan of Rs. 20,00,000/- for purchase of semi furnished flat on deposit of sale deed, but same was not found neither sale deed belonging to petitioner Pankaj nor the mortgage deed was in existence - The petitioners in order to cheat the bank of its public money prepared false documents - Held - Considering the facts and parameters necessary to be considered for adjudication of anticipatory bail under section 438 Cr.P.C , in view of evidence, it is not a fit case for continuation of bail under section 438 Cr.P.C- Petition dismissed. Title: Jitender Kumar and others vs. State of H.P. Page – 663

Code of Criminal Procedure, 1973 – Section 438 - The petition under section 438 Cr.P.C for Anticipatory bail in case FIR No. 25 of 2021 under section 6 POCSO Act, Section 363, 376 (2) IPC, with allegations that father of victim made a complaint that his daughter (victim) a student of Shastri College on 31.3.2021 at 11:30 am left the home with permission to bring personal articles but did not return back, suspecting that someone had kidnapped his

daughter- prayer for action- on 14.7.2021. victim was recovered from the house of co-accused Sagar in Saharanpur -victim alleged in her statement under section 164 Cr.P.C. that petitioner Karan who had come in contact with her on face book, had been blackmailing her and threatening her family- Karan also violated her person, had also photographed, video graphed her obscene and vulgar picture/video forcibly - Held - material placed before the court is sufficient to infer that accusation does not seem to have been made in present case with the object to injuring or humiliating the petitioner having him arrested. The affidavits being claimed by petitioner of victim and her mother exonerating the petitioner are matter of consideration by the I.O. or the trial court but not at the stage when investigation is pending - Investigation is in initial stage- investigative agency for non-cooperation of petitioner has not been able to access to the face book which is necessary for completion of investigation- Considering the factors and parameters necessary to be considered for adjudication of anticipatory bail under section 438 Cr.P.C. - this is not fit case for continuation of bail under section 438 Cr.P.C. - The petition dismissed.Title: Karan Kumar vs. State of H.P. Page – 680

Code of Criminal Procedure, 1973 - Section 439 – FIR No. 32 of 2021 dated 15-05-2021 registered at P.S. Arki under Section 18 (c) of Narcotics Drugs and Psychotropic Substances Act 1985 – Petitioner (accused) arrested on the same day – Prayer made for enlargement on bail – Held, that ownership and possession of land from where 1190 plants of opium poppy were allegedly found not ascertained to be of the accused (Petitioner) – Liberty of the petitioner cannot be curtailed on the basis of unverified piece of evidence – Petition allowed – Petitioner ordered to be released on bail subject to conditions. Title: Hem Chand vs. State of Himachal Pradesh Page-237

Code of Criminal Procedure, 1973 – Section 439 – Narcotic Drugs & Psychotropic Substances Act, 1985 – Sections 20 & 29 – Bail - Recovery of charas - The accused namely Diwan Chand got perplexed after seeing the police and after throwing the bag in the grass - He tried to flee – The accused was apprehended and during his interrogation he told that he purchased the contraband from Chuni Lal – Chuni Lal was also arrested and he disclosed the police that he arranged the contraband from the petitioner – Held – the contraband has not been received from the conscious possession of the petitioner and the main accused has no where mentioned the name of bail petitioner – bail petitioner has been implicated in the case on the basis of

statement of co-accused, that too without there being any concrete evidence - Bail granted. (Paras 6 & 8) Title: Chhabile Ram vs. State of Himachal Pradesh Page-581

Code of Criminal Procedure, 1973 - Section 439 – Petitioner has sought his release on bail in FIR No. 50 of 2021 P.S. Jogindernagar District Mandi under Section 20 ND&PS Act for being in possession of 1 Kg 20 gram charas – Held, that though weight or contraband in report of SFSL, Junga after deducting weight of carry bag or parcel cloth is 0.990 kg but in report under Section 173 CrPC, it is mentioned as 1 kg 20 grms – Court at this stage has not to scan evidence collected by the investigating agency minutely – Fact whether commercial or intermediate quantity was found from the person of petitioner can only be decided after recording of evidence by competent court – Petitioner is an accused in another case under Section 20 ND&PS Act and has been apprehended with larger quantity of contraband within almost one year – Rigors of Section 37 ND&PS Act also prohibits release of petitioner on bail – Petition dismissed.Title: Vidya Sagar vs. State of H.P. Page-389

Code of Criminal Procedure, 1973 - Section 439 – Petitioner has sought release on bail in case FIR No. 34 of 2020 dated 01-02-2020, P. S. Sadar, Hamirpur under Sections 454, 380 read with Section 34 of IPC – Held, Challan presented against the petitioner and investigation qua him is complete – Nothing on record to suggest that petitioner is accessory in any manner, in non – apprehension of other co-accused by the police – Fact that petitioner is an accused in other case FIR No. 06/2020 u/s 454, 380 read with Section 34 IPC not a sole factor to keep him in custody for prolonged duration as the guilt is yet to be proved in cases against him – No apprehension of accused fleeing from the course of justice – Bail Petition allowed – Petitioner ordered to be released on bail subject to conditions. Title: Sandeep Kumar alias Sonu vs. State of Himachal Pradesh Page-394

Code of Criminal Procedure, 1973 – Section 439 - Protection of Children from Sexual Offences Act, Section 4 – FIR No. 88 of 2020 dt. 21-11-2020 P.S. Pachhad registered u/s 376 IPC, Sec – 4 POCSO Act against Petitioner – Petitioner arrested on 22-11-2020 and is in judicial lock up – Prayer made for enlargement on bail – Held, that petitioner and victim are teenagers and on completing 18 years of age in March 2020, petitioner considered to be major – Considering principles and factors relevant to be considered at the time of

deciding bail application with reference to facts and circumstances, petition allowed and Petitioner ordered to be released on bail subject to conditions. Title: Om Singh vs. State of Himachal Pradesh Page-232

Code of Criminal Procedure, 1973 – Sections 397 & 401 – Petitioner convicted by Ld. Appellate Court, although acquitted by Ld. Trial Court - Application filed by petitioner for conversion of criminal revision into Criminal appeal under section 374 Cr. P.C. - Held – the revision petition has been filed with the period of limitation so criminal revision can be converted into criminal revision – Petition allowed. [Para 5] Title: Rakesh Kalyan vs. State of Himachal Pradesh Page - 466

Constitution of India, 1950 – Article – 226 – Petitioner having rendered service in Indian Air Force, re-employed as Assistant District Attorney in 2001 against the post reserved for ex-serviceman category – Petitioner opted to count his previous military service for the purpose of retirement benefits on superannuation – Later, petitioner prayed for permission for withdrawal of option exercised by him under Rule 19 of CCS (Pension) Rules 1972 alleging that same is not accepted – Government conveyed the decision that once Petitioner has already exercised the option under Rule 19, the same can not be withdrawn – Challenge thereof – Held, that Petitioner failed to deposit entire amount received by him on account of military pension – Instead of depositing the remaining amount as required by the Government, Petitioner prayed for withdrawal of consent – No provision to withdraw option once exercised under Rule 19 – No plausible explanation rendered on record qua long delay in approaching the court – Petition dismissed being devoid of merits. (Paras 24,25,30) Title: Ravinder Kumar Barwal vs. State of Himachal Pradesh and others Page-129

Constitution of India, 1950 – Articles 14 and 226 – The petitioner is aggrieved by the act of the respondents whereby he has not been given the scale of the tailor since date of appointment with further revised pay scale from time to time alongwith interest as he discharged his duties as tailor – Held – In the communications from the year 1989 to 2009 by the respondent department, the petitioner has been shown to be tailor, which fact reveals that petitioner was appointed as peon but he infact worked as a tailor – The person having been allowed to serve on a higher post is entitled to get salary of such post – Petition allowed and the respondents are directed to grant the

pay scale of tailor since date of his appointment with revisions & consequential benefits. [Paras 7, 8 & 16] Title: Gheem Chand vs. State of Himachal Pradesh Page-545

Constitution of India, 1950 – Articles 14, 16 and 226 read with The persons with Disabilities (Equal opportunities, Protection of Rights and full participation) Act, 1995 – The petitioner was aggrieved by the impugned order dated 04.07.2015 denying the seniority to the petitioner from the date of his initial appointment – Held – Employee who has suffered disability during service cannot be deprived of the benefits which would otherwise accrue to him merely on account of disability – The respondents have not disputed the applicability of the Section 47 of the person with disabilities (Equal opportunities, Protection of Rights and full participation) Act, 1995 on the petitioner, however service benefits are not provided to him – Petition allowed. [Paras 11 & 12] Title: Surjeet Singh vs. State of Himachal Pradesh **(D.B.).** Page-523

Constitution of India, 1950 – Article 226 – Department of Education, Government of H.P. framed terms and conditions for the appointment of Professor, Associate Professor, Assistant Professor, Tutor Senior Residents and Junior Residents (on contractual basis) in 4 newly opened Government Medical Colleges in the year 2016 – Due to inadequate qualified medical faculty, respondents recruited the contractual faculty for Medical Colleges as per regulations – Petitioners appointed as tutor in different specialties for six months against posts advertised for Pt. Jawahar Lal Nehru Government Medical College, Chamba and Dr. Radhakrishnan Government Medical College, Hamirpur – The service of petitioners not regularized despite of regularization policy – The condition of repeat tenure came to be completely modified vide notification dated 22-06-2019 of Resident Doctor Policy defeating purpose of regularization policy – Challenge thereof – Held, that in the year 2015, i.e. prior to opening of newly opened medical colleges, posts of Tutor, Senior Residents etc were created in various departments – Notification dated 26-05-2016 issued by Department of Medical Education and Research shows creation of 80 posts in various departments in newly opened medical colleges – As such, prayer for regularization by the petitioners cannot be rejected on the ground that there is no substantive post – Petitioners possessing requisite qualification as prescribed by MCI and Resident Doctor Policy, cannot be denied the benefit of regularization – Resident Doctor Policy

for the year 2019 nowhere debars a candidate from seeking regularization against the post of Tutors, Senior Residents and Junior Residents after completion of their contract – Barring stipulation in R & P Rules against their staking claim for regularization flawed, arbitrary – Petition allowed – Respondents directed to regularize the service of the petitioners against the posts of Senior Resident / Tutor in their respective specialties. Title: Aakash Srivastava vs. State of HP and Ors. **(D.B.)** Page-249

Constitution of India, 1950 - Article 226 – Departmental proceedings initiated against the petitioner on the basis of inquiry report submitted by respondent no. 4 – Petitioner accordingly charge-sheeted on 17-01-2005 on the charges of non-maintenance of record including other charges and supplementary charges – Petitioner placed under suspension on 1-3-2005 – Finally, Inquiry officer submitted his inquiry report on 11-04-2011, copy of which was sent to the Petitioner on 21-05-2011 who was required to submit reply within 10 days but did not submit his reply – Order of dismissal of petitioner from government service issued on 20-06-2011 – Petitioner preferred CWP No. 4980 of 2011 which was decided on 29-07-2011 and respondents were directed to consider the matter afresh taking note of representation of the petitioner - The inquiry conducted afresh but inquiry report dated 11-04-2011 stand as such – Punishment order dated 23-11-2013 issued against the petitioner – Appeal preferred by the petitioner dismissed – Being aggrieved, Petitioner preferred the instant petition – Held, that scope of judicial review in matter of inquiry is very limited – Financial irregularity of Rs. 32,70,953/- has been detected - Inquiry report reveals that petitioner had withdrawn cash from the bank but no entries to this effect made in cash book – Appellate Authority rightly appreciated the facts – Petition dismissed.Title: Het Ram vs. State of Himachal Pradesh and others Page-401

Constitution of India, 1950 – Article 226 – Husband of petitioner allegedly suffered accident while driving scooty and died later on – Application seeking Ex-gratia filed by the petitioner came to be rejected by SDO (Civil) Bhoranj on the ground that her husband died on account of cardiac arrest and not road accident – Challenge thereof – Held, that factum of husband of the petitioner falling from scooty immediately before death is not disputed – Death of husband of the petitioner cannot be said to be natural rather, same can be said to have been caused on account of accident – Petition allowed – Respondents directed to make the payment of Ex-gratia to the petitioner on

account of death of her husband.Title: Smt. Sarita Devi vs. State of Himachal Pradesh and others Page-159

Constitution of India, 1950 - Article 226 - Online applications from eligible candidates for 215 posts of Lecturer (School-new) Commerce invited by respondent on 10-12-2019 – Petitioner applied under the Economically Weaker Section (EWS) category but his candidature rejected on the ground that he had not submitted requisite EWS certificate in support of his eligibility – Challenged by way of instant petition – Held, that Petitioner had not submitted requisite EWS certificate though had applied under EWS category – Non-submission of requisite certificates by a candidate in accordance with requirement of Advertisement is sufficient ground to reject his candidature – Petition disposed of with a direction to consider selection of Petitioner in case he finds merit amongst general category candidates. Title: Dile Ram vs. State of H.P and others **(D.B.)** Page-398

Constitution of India, 1950 - Article 226 – Petitioner and respondent no. 6 originally belonging to District Bilaspur were enrolled in Employment Exchange Office, Ghumarwin –- Respondent no. 6 appointed as language teacher vide order dated 09-02-2016 in District Solan, through Staff Selection Commission against post reserved for ward of Freedom fighter – Not knowing about said appointment, Employment Exchange Officer, Ghumarwin on 15-09-2016, had sponsored name of respondent no. 6 as well as petitioner, for batch wise appointment to the post of Language teacher reserved for ward of freedom fighter – Interview conducted – Petitioner approached the erstwhile H.P. State Administrative Tribunal and process for appointment to the post of Language Teacher, batch wise, against quota reserved for ward of freedom fighter ordered to be kept in abeyance – Challenge thereof – Held, that as per "H.P. State Litigation Policy and its adoption, instead of settling the cases or redressing grievances at their own level, or rectifying mistake, Departments are contesting cases for years together – Direction issued to Chief Secretary to take necessary steps in consonance with policy to issue reminders to avoid unnecessary litigation - Services of respondent no. 6 regularized, who is not averse against consideration of the candidature of the petitioner for the post in question excluding respondent no. 6 – Petition allowed accordingly and respondent Department directed to consider the candidature of the petitioner to the post of Language Teacher, batch wise basis, in District Bilaspur, reserved for ward of freedom fighter excluding candidature of respondent no.

6.Title: Ms. Ankita Bhardwaj vs. State of Himachal Pradesh & others Page-336

Constitution of India, 1950 - Article 226 – Petitioner applied for the post of Senior Laboratory Technician advertised by Respondent No. 3 – Petitioner placed at Sr. No. 1 in the waiting list under OBC (Wards of Ex-Serviceman) – Grievance of the petitioner remain that respondents No. 5 & 6 secured more marks than candidates of General category (Wards of Ex-serviceman) who ought to be placed at Sr. No. 1 & 2 in merit list under general category and petitioner ought to be selected against category OBC (Wards of Ex-Serviceman) – Held, that the candidates, who are entitled to the benefit of special category reservation, can compete and be selected against the posts meant for general category on the basis of their merit – Respondent-State to consider candidature of respondents no. 5 & 6 against the posts meant for general category – Petitioner at Sr. No. 3 in the OBC (Wards of Es-Servicemen) category has consequently right to be selected against one of the posts reserved for OBC (Wards of Es-Servicemen Category) – Selection made by respondent no. 3 vide Annexure P-4 set aside – Respondent No. 3 directed to redraw the selection list of all the categories qua selection in question – Petition allowed. (Paras 16, 17, 23) Title: Kikar Singh vs. State of HP and others **(D.B.)** Page-99

Constitution of India, 1950 – Article 226 – Petitioner appointed as Work Inspector on daily wage basis in the Department of PWD, Himachal Pradesh – Regularization of services made from retrospective date pursuant to the directions of Division Bench in CWP in similarly situated cases – Petitioner not granted promotion immediately after completion of three years service in the feeder category of diploma holder work inspector – Being aggrieved, O.A. No. 2992 of 2017 filed before Erstwhile H.P. State Administrative Tribunal which came to be transferred after abolition of tribunal – Held, that Petitioner was regularized w.e.f. 01-01-2001 who became eligible to be promoted against the post of Junior Engineer (Civil) on 01-01-2004 – 85 posts of Junior Engineer were available in the State of H.P. and claim of respondents that there were no posts of Junior Engineer (Civil) available in the year 2004 contrary to record – Petition allowed – Respondents directed to promote the petitioner as Junior Engineer from amongst the category of Work Inspector/ Diploma Holder in Civil Engineering from the date of his having completed three years service in the feeder category with all consequential benefits.Title: Rangila Ram vs. State

of Himachal Pradesh and Ors. Page-202

Constitution of India, 1950 – Article 226 - Petitioner being posted as Assistant Professor (Special Education) at composite Regional Centre (CRC) Sundernagar for skill Development, Rehabilitation & Empowerment of Persons with disabilities regularly discharging duties of Officer-in-charge-However, vide office letter dated 03-05-2021, respondent no. 3 has been ordered to take over the charge of officer-in-charge, CRC Sundernagar – Challenge thereof – Held, No dispute regarding policy decision dated 09-02-2021 which forms basis to issue impugned office order – Petitioner being one of the Assistant Professor was given opportunity to work as officer-in-charge, CRC Sundernagar and he can't claim any right to remain in such post for an indefinite period – As per Rotation policy issued by Central Vigilance Commission dated 11-09-2013, senior most Assistant Professor is to be given charge of the office of officer-in-charge, CRC but petitioner having served for more than 18 years, cannot be permitted to stake claim alleging that above rotation policy came into operation w.e.f. 09-02-2021 which is not having prospective effect - Petition dismissed.Title: Manjeet Singh Saini vs. Union of India and others **(D.B.)** Page-148

Constitution of India, 1950 - Article 226 – Petitioner engaged as a Driver on daily wage basis in Hamirpur Division of Forest Department – Petitioner has put in 240 days work in each calendar year till filing of Original Application (O.A.) in erstwhile H.P. Administrative Tribunal which stands transferred after its abolition – Earlier, competent authority was directed vide order passed in O.A. No. 4909 of 2017 filed by petitioner for considering his claim of regularization as a driver but the same was rejected – Being aggrieved, instant petition filed – Held, that as per regularization policy framed by the government dated 22-04-2016, daily wage worker was to be regularized on completion of 7 years of service as on 31-02-2016, provided he had put in 240 days in each calendar year – Petitioner having fulfilled the criteria entitled to be considered for regularization as on 31-03-2016 – Post of driver available in the department on 31-12-2015 – Petition allowed and respondents directed to regularize the services of the petitioner as Driver w.e.f. 01-04-2016 with all consequential benefits including seniority. Title: Suresh Kumar vs. State of H.P. and others Page-411

Constitution of India, 1950 - Article 226 – Petitioner running a business of

selling tea, eatables etc. from a stall/rehri in ward no. 6 Hamirpur on payment of Rs. 200/- to M.C. Hamirpur – Stall/rehri vacated by Petitioner in lieu of understanding that one shop was to be allotted to the petitioner on payment of construction cost of Rs. 85,000/-. Petitioner deposited the said amount but no shop allotted to him and money was also returned – Challenged in the instant petition – Held, that petitioner was not eligible for allotment of the shop and no indefeasible right has accrued upon him for allotment of the shop – Petition disposed of accordingly but with an observation that in the event of some shops being still vacant with respondent no. 2, one of the shops be offered to the petitioner subject to acceptance of offer by the petitioner and execution of agreement in this regard. Title: Sh. Tilak Raj vs. Municipal Council, Hamirpur and another Page-318

Constitution of India, 1950 - Article 226 – Petitioner serving as a Class – IV employee with the respondent – department retired at the age of 58 years filed CWP No. 1693 of 2010 with a grievance that, as he was serving in Forest Department of Government of Himachal Pradesh as class - IV employee, he should be superannuated at the age of 60 years – Petitioner was permitted to continue upto the age of 60 years in previous CWP – Present petition filed claiming differential amount of leave encashment – Held, that there is nothing on record to demonstrate that after filing of the petition of the petitioner that he should retire at the age of 60 years, any demand of interest on the amount of leave encashment was raised by the State from the petitioner – Leave encashment earlier paid to the petitioner was so paid taking into consideration that he was to superannuate at the age of 58 years and now only balance of two additional years has to be paid to the petitioner – Petition allowed – Differential amount of leave encashment ordered to be paid to the petitioner by respondent-department within a period of three months.Title: Sh. Sant Ram vs. State of Himachal Pradesh and others Page-332

Constitution of India, 1950 – Article 226 - Petitioner, a fair price shop holder in Khandla Panchyat and Respondent No.3 allotted another fair price shop to respondent No.6 in same Panchyat- Petitioner objected to above allotment being in violation of 2014 guidelines as neither the population nor distance criteria was adhered- Petitioner assailed allotment before respondent No.2 by preferring appeal, approached respondent no.1 under clause 17(1) (c) H.P specified articles (Regulation of distribution) Order, but were dismissed - Respondent No.1 dismissed the appeal on ground of limitation - Petitioner

approached Hon'ble High Court in CWP and judgment of respondent No 1 was set aside after condoning the delay in filing appeal and the matter was remanded back- respondent No.1 again dismissed the appeal and petitioner again approached the Hon'ble High Court- Held- The order passed by respondent No.1 being bereft of any reasoning and nonspeaking on material issues is not sustainable - The order reflects complete non-application of mind by 2nd appellate Authority to the facts of case, violation of 2014 guidelines which appellate authority could have easily ascertain - The order is set aside with direction to decide the appeal afresh by passing reasoned order. Title: Hem Singh vs. State of Himachal Pradesh **(D.B.)** Page - 644

Constitution of India, 1950 – Article 226 – Petitioners' request for premature retirement on medical grounds was turned down by the respondents on 03-01-2018 for not completing qualifying service of 20 years and, subsequently on 27-03-2019 nearing completion of 20 years of service due to paucity of staff – Show cause notice issued by the respondents to the petitioner for unauthorized absence of duty w.e.f. 18-11-2019 – Challenge thereof – Held, that any government servant with satisfactory service record may retire from service on completion of 20 years of regular service, after 3 months' notice is accepted by the appropriate authority as per rules – the contention of deemed premature retirement of the petitioner can not be accepted in view of the provisions of applicable rules – Petition dismissed. Title: Dr. Sanjay Chadha vs. State of Himachal Pradesh and others Page-179

Constitution of India, 1950 - Article 226 – Prayer made for issuance of the writ, in the nature of habeas corpus, for immediate release of detenu, Ms. Rajwinder Kaur and to appoint warrant officer to enable the release of detenu – Allegations that respondent no. 4-6 threatened to kill their daughter Ms. Rajwinder Kaur, rather allow her marriage with the petitioner and want to solemnize her marriage forcibly with other boy against her wish – Held, that, Ms. Rajwinder Kaur did not echo the same feeling towards the petitioner as contended by the petitioner and she did not complain of any compulsion employed against her not to marry a person of her choice – Even, in inquiry into the allegations of petition do not verify its contents – No fundamental right of Ms. Rajwinder Kaur violated – Petition dismissed. Title: Sham Kumar vs. State of H.P and others **(D.B.)** Page-172

Constitution of India, 1950 – Article 226 – Process initiated by the

respondent – department to fill up six posts of drivers – 3 posts were for general category, 2 posts were reserved for S.C. and one post for ST category – Petitioner belongs to SC category whose grievance remains that appointment given to selected candidates by the respondent-department bad in law, he being meritorious than two general category candidates – Challenged by way of instant petition – Held, that act of respondent-department of not offering appointment to candidates belonging to SC category against posts meant for general category on the basis of their merit being higher than candidates belonging to general category bad in law – Denial of appointment for the post of driver to the petitioner against post reserved for SC category also bad in law – Petition disposed of with a direction to the respondents to offer appointment to the petitioner against post reserved for SC category as from the date other incumbents stood appointed against said posts alongwith consequential benefits including that of seniority.Title: Sh. Mohan Lal vs. State of Himachal Pradesh and others Page-326

Constitution of India, 1950 - Article 226 – Respondent no. 4 having found eligible was selected for the post of language Primary Assistant Teacher (PAT), SDO Sadar, District Bilaspur who joined as such on 04-04-2006 – Petitioner challenged the selection by way of O.A. No. 3136/2007 in erstwhile H.P. State Administrative Tribunal and on being transferred, a coordinate Bench quashed and set aside appointment of respondent no. 4 and directed respondents to fill up the post as per earlier selection made in the interview in the year 2006 and merit list so drawn – Being aggrieved, LPA No. 64 of 2013 filed by respondent no. 4 allowed and Division Bench remanded the case back to Ld. Single Judge for hearing – Held, that only two categories, i.e. candidate having 10+2 examination or with higher academic examination duly recognized by University and H.P. Government could have been considered for the post in question – Respondent no. 4 had passed “Prak Shastri” which is not equivalent to 10+2 as per record – Marks awarded to respondent no. 4 for possessing “Prak Shastri Certificate” in merit list so drawn required to be excluded being not equivalent to 10+2 and total marks of respondent no. 4 comes to 35 whereas Petitioner was awarded 55 marks – Petitioner being higher in merit deserve to be appointed against the post in question – Petition allowed – Selection of respondent no. 4 quashed & set aside – Respondents directed to offer appointment to the petitioner as PAT from the date of interview. Title: Chet Ram vs. State of HP and Ors. Page-195

Constitution of India, 1950 – Article 226 – Service matter **–** Regularization **-** The Petitioner initially engaged as Clerk on contract basis on 31-03-2001. The contract of petitioner came to be renewed periodically- the Petitioner had become eligible for regularization in terms of policy of State Govt. dated 29-08-2009 but his case was not considered for regularization - the proceeding under Article 226 Constitution of India for writ of mandamus for direction to regularize the petitioner as per policy of government on completion of six year service on contract basis w.e.f 31-03-2001 - The claim of petitioner for regularization from due date has been rejected by respondents on the ground that petitioner was initially engaged on 31-03-2001 without essential qualifications now the petitioner has acquired essential qualification-he has been appointed clerk on 23-06-12 and pursuant to his fresh appointment he has joined services without registering any protest- Held it is settled law that educational qualification is to be seen at the time of engagement of workman & not at the time of regularization- the experience gained by the petitioner while working as a clerk is a substitute for the qualification - In view of above present petition is allowed - Respondents are directed to regularize the service of the petitioner as clerk in terms of policy of Govt. framed on 29-08-2009 with all consequential benefits. Title: Rajesh Thakur vs. State of Himachal Pradesh & others Page-816

Constitution of India, 1950 – Article 226 – Service matter **–** The Petition for quashing letter dated 18-09-2010 and 20-09-2012, for directions to review D.P.C. proceedings and to assign the appropriate / correct place to petitioner in merit list keeping in view entries made in his ACR, to promote him earlier in point of time before all respondents No: 4 to 9 after comparing the entries made in their ACR & to redraw annexure P-3 & to grant all the consequential benefits. Held- the claim of the petitioner along with other eligible candidates came to be considered by D.P.C. in its meeting on 30-09-2008 for promotion to post of Dy.S.P - DPC recommended the name of petitioner along with other 18 Inspectors of police to H.P. Police service in the year 2008 but his name was placed at serial No. 14 in view of his overall assessment - The careful perusal of ACR shows that the Reporting officer had graded the petitioner Good & Very Good in majority of columns then there was no occasion, if any, for reviewing officer to grade the officer as 'outstanding' and as such DPC being otherwise competent to upgrade / downgrade the ACRs on the basis of overall record rightly downgraded the entries of the petitioner from "Outstanding" to very good - As per clause 19.8.5 of Hand book on personal

matters Reporting / reviewing officer shall exercise great restraint while making an entry of an officer as 'outstanding' - However, if such entry is to be made, details of specific performances & achievements justifying the entry should be recorded in the ACR of officer - The bare reading of ACRs shows that Reviewing officer though have accepted the overall grading given by the reporting officer but in remarks column, without applying his or her mind has proceeded to grade the officer as an outstanding officer. Entries made in ACRs, if read in entirety nowhere commensurate with final grading given by reviewing officer - As per Hand book on personnel matters (Chapter 16), the DPC is well within its right to upgrade / downgrade the ACR of person to be considered for promotion and it is not mechanically bound to follow the grading given by Reporting /reviewing officer clause 16.25 of chapter 16 of Hand book on personnel matters does not make it incumbent upon DPC to assign reasons before upgrading / downgrading of ACRs of a person to be considered for promotion to higher post - Scope of judicial review is very limited as for as gradation of ACRs by DPC is concerned. - Thus there is no illegality and infirmity in order dated 20-09-2012 passed by respondent No. 1 & is upheld - The Petition dismissed. Title: Brijesh Sood vs. State of Himachal Pradesh and others Page-830

Constitution of India, 1950 – Article 226 – Service matter **–** The petition for quashing rejection of candidature of petitioner & directing selection committee to inter-view the petitioner - Respondent No. 2 issued recruitment notice inviting applications on online format for post of constable - The petitioner applied under OBC category with sub category IRDP & uploaded copy of OBC certificate among other documents along with application form as required - after qualifying written test & physical test was called for suitability cum personality test along with all documents in original uploaded while submitting online application - BPL certificate produced before the authorities as demanded, but the authorities refused to admit the certificate provided by him to be valid certificate & issued rejection slip rejecting his candidature on the ground that he could not produce the valid IRDP certificate for the relevant period - Held - the Document uploaded by petitioner at the time of submission of online application was Identity card for poor under signature of secretary Nagar Panchayat & bore the date 16-06-2017 but pertained to year 2004-05 as per reply of respondents 3 & 5 - Requirement of Recruitment notice was that the certificate of category under which candidate was to apply should be valid on the date of submission of online application - The Petitioner produced

another BPL certificate dated 31-10-2019 before the authorities at the time of appearance for suitability cum personality test and the BPL certificate dt. 31-10-2019 relied upon by petitioner was valid for six months – Held - The onus lies on the petitioner to show that the BPL/IRDP certificate downloaded by him at the time of submission of online application was valid on said date - The document downloaded was not a BPL certificate, it was issued on 16-06-2017 on the basis of survey conducted in 2004/05 it shows age of petitioner as 14 year, which cannot be petitioner's age in 2017 - petitioner was not in possession of a valid BPL/IRDP certificate on the date of submission of his online application - Non-submission of requisite certificate by a candidate in accordance with the requirement of advertisement / recruitment notice is sufficient ground to reject the candidature - Petition dismissed. Title: Sandeep Kumar vs. State of Himachal Pradesh **(D.B.)** Page – 870

Constitution of India, 1950 – Article 226 - The petition challenging order passed in departmental inquiry imposing penalty- Held, the courts will not act as an appellate court and reassess the evidence led in domestic inquiry nor interfere on the ground that another view is possible on the material on the record. If enquiry has been fairly and properly held and the findings are on evidence- the question of adequacy of the evidence or the reliable nature of evidence will not be ground for interfering with the findings in departmental inquires, however, courts can interfere with findings in disciplinary matter If principles of natural justice or statutory regulation have been violated or if order is found to be arbitrary capricious malafide or based on extraneous consideration.

Held- Preliminary inquiry is to do nothing with the inquiry conducted after issuance of charge sheet- very purpose of conducting preliminary enquiry is to find out whether disciplinary inquiry is had to be initiated or not- however once full fledged disciplinary inquiry is conducted, preliminary enquiry would lose its relevance -

Entire inquiry report furnished by enquiry officer in the departmental proceedings is based on preliminary inquiry report given by the inquiry officer responsible to conduct preliminary inquiry wherein he merely had suggested involvement of delinquent official in alleged crime however involvement of delinquent official against the alleged crime was to be proved in accordance with law in full fledged disciplinary proceedings- as such inquiry report is totally contrary to the evidence led on record and cannot be sustained-petition allowed. Title: Sanjeev Kumar & others vs. State of H.P. & others. Page

– 989

Constitution of India, 1950 – Article 226 - The petition for direction to allow benefit of counting of service rendered by petitioner as Lecture (school cadre) till his joining as Assistant Professor College cadre and protection of pay last drawn by him as Lectures (school cadre) on joining new post of Assistant Professor (college cadre) and for all service benefits- petitioner appointed as lecture in school cadre- Petitioner applied and participated in selection process conducted by HP Public Service Commission- declared successful for post of Assistant Prof. (College Cadre) Petitioner was offered appointment requiring him to join in government college Seraj within 7 days of notification. Petitioner after declaration of result made a representation to the Secretary Education for protection of his salary which remained undecided- in meantime offer of appointment was made to him petitioner instead of accepting appointment approached H P Administrative Tribunal along with prayer for interim relief and tribunal passed the order to the effect that competent authority may consider to extend the time for joining by the applicant and further to consider prayer for pay protection within a reasonable time frame after affording opportunity of being heard. The order was though extended till 31.3. 2016. Thereafter no order came to be passed on the interim application. Ld. Tribunal had not issued any positive command directing the respondents to extend the time for joining- on 23.2.2016- Addl. Chief Secretary vide notification has withdrawn the offer of appointment to petitioner on account of his failure to join within stipulated time –Held- Once the petitioner did not accept the offer of appointment made to him, he lost whatever cause of action he had, to agitate his claim by way of present petition. The relief of protection of pay and entitlement to post service benefits have lost relevance with the decision of petitioner not to accept the offer of appointment - The challenge to the withdrawal of offer of appointment laid by petitioner is also without any merit - Petitioner consciously had opted to participate in the selection process for post of Assistant Prof. (College Cadre) after having gone through the terms of advertisement inviting applications - No promise was held out in the advertisement to persons already in employment as regard any benefit being available to him in lieu of their past employment in order to claim benefit of F. R 22 (1) (a) (1) petitioner was required to at least to accept the appointment and to claim benefit of Rule 26 of CCS (Pension Rules, he had to tender resignation as minimum requirement. had he accepted the offer of appointment, he may have continued to have cause of action. The respondents

could not have waited for the petitioner in perpetuity. More over Ld Tribunal had not considered it to be proper case to grant interim relief to petitioner - The plea of petitioner of non consideration of his representation cannot be ground to set aside the notification whereby respondents had withdrawn the offer of appointment. Petitioner could not have put precondition for his appointment to employer - The respondents were under no obligation to have decided the representation of petitioner before withdrawal of offer of appointment - Petition dismissed. Title: Sushil Kumar vs. State of Himachal Pradesh **(D.B.)** Page –638

Constitution of India, 1950 – Article 226 - The petition for directions to respondent, Secretary H.P. Staff Selection Commission to consider certificate Annexure P-5 in evaluation process and award one mark to petitioner and thereafter redraw the merit list accordingly. The perusal of document alongwith Bio data and form filled by the petitioner while applying for part demonstrate that indeed annexure P-5 was not made available by the petitioner to respondent No.3 - The sheet dealing with evaluation part of 15 marks which contains the signature of the petitioner also at Sr. No.x refers to framing of atleast of six month duration related to the post applied for from a recognized university institution against which under the Head submitted/ not submitted - there is a cross meaning thereby the same was not submitted and therefore no marks were allotted to the petitioner for the same – Held - In view of record submitted by commission, training certificate was not submitted by petitioner to commission for which no fault can be attributed to the commission for not granting one mark to the petitioner**.** The petition dismissed. Title: Sh. Rakesh Kumar vs. State of Himachal Pradesh & others Page-768

Constitution of India, 1950 – Article 226 - The petition of writ of certiorari for quashing letter asking the petitioner to produce bonafide Himachali certificate and writ of mandamus directing the respondents to give appointment letter to petitioner - Held - R & P Rules and advertisement inviting application from the eligible candidates for post PGT (IP) nowhere suggests that only candidates having bonafide Himachali Certificate are eligible for appointment to the post of PGT (IP)- No doubt as per desirable qualification candidate aspiring to be selected as PGT must have knowledge of customs, manner and dialects of HP but there is nothing that only bonafide Himachali can participate for selection for PGT- neither in advertisement,

candidates aspiring to apply were made aware of condition with regard to bonafide Himachali certificate - Held - no citizen on ground of religion, race caste, sex, descent and place of birth or residence can be declared ineligible or discriminated against state employment - Once respondent No.3 specialised agency found petitioner eligible and selected him in the interview- appointing authority has no right to reject his candidature that too on ground of residence - The action of respondent impressing upon petitioner to produce bonafide Himachali certificate cannot be sustained - Petition allowed. Title: Ranbir Singh vs. State of H.P. Page – 1010

Constitution of India, 1950 – Article 226 – The petitioner having all the qualifications for the post of Medical Laboratory Technician Grade-II applied for the post within/ stipulated period which was advertised – Petitioner required registration certificate which was applied for by her – She submitted all requisite certificates with provisional registration certificate, however her candidature was rejected on the ground that she did not possess provisional certificate prior to 10.03.2021 – Held – Respondent No. 2 had registered petitioner provisionally on 21.01.2017, but the provisional registration certificate on the necessary format was not issued, for which petitioner cannot be faulted – The petitioner had made substantial compliance with the requirements of advertisement , so the rejection of the candidature of the petitioner by respondent No. 1 illegal, arbitrary, irrational & violative of Articles 14 & 16 of Constitution of India – Petition allowed. [Paras 18, 20 & 21] Title: Ankita vs. Himachal Pradesh Staff Selection Commission and another **(D.B.)** Page-496

Constitution of India, 1950 – Article 226 - The petitioner was senior operator in respondent Co-after issuing chargesheet, holding inquiry and concluding disciplinary proceedings his services were terminated by respondent - The reference sent by appropriate govt to Labour court whether punishment of termination of petitioner service was communicate with the charges leveled against him was answered against petitioner, so the petitioner filed writ petition after three years challenging the award - Held- it is settled legal position that while exercising power of judicial review, the court will not act as an appellate court for reappriciating the evidence led in the departmental inquiry. Inquiry report also shows that inquiry was conducted in accordance with law, the principal of natural justice was followed - The sexual harassment of a woman at workplace has been held to be a violation of

fundamental right to gender equality and right to life liberty - Petitioner having been held guilty of outraging the modesty of a female co-worker and physically assaulting a male co-worker had made himself liable for stringent punishment. Petitioner was guilty of gross misconduct - Punishment of termination of service in the proved facts of case can not be said to be unduly harsh or disproportionate to the charges proved against him - The writ petition is dismissed. Title: Narender Kumar vs. The Vice President (Works), M/s Himachal Exicom Communications Ltd **(D.B.)** Page-744

Constitution of India, 1950 - Article 226 – Vide advertisement notice dated 13-10-2020, posts of Trained Graduate Teachers (TGT) were proposed to be filled from eligible candidates of disabled persons category – On 21-10-2020, notification published in Rajpatra vide which 4% posts were reserved for disabled persons in Elementary Education Department and upper limit of 60% disability was prescribed for deaf and hard of hearing candidates – Petitioner called for counseling but not selected on the ground that he had 70% disability of hearing impairment and hence ineligible – Being aggrieved, Petitioner has challenged the rejection – Held, that no material to show that on what basis upper limit of 60% of disability for deaf and hard of hearing persons was prescribed for the post of TGT (Arts) which is arbitrary, irrational hence illegal – Petition allowed – Notification dated 19-09-2020 published on 21-10-2020 in Rajpatra, Himachal Pradesh quashed to the extent it prescribes upper limit of disability at 60% for deaf and hard of hearing candidates for the post of TGT (Arts) – Respondents no. 1-3 directed to offer appointment to the post of TGT (Arts) to the petitioner forthwith by placing him according to his merit along with payment of arrears of salary and permissible dues. Title: Geeta Ram vs. State of Himachal and others **(D.B.)** Page-242

Constitution of India, 1950 – Article 226 –Petitioner engaged on daily wage basis in the year 1989 and since then regularly working without any interruption in department of agriculture and despite her having completed 8 years of service as daily wager, she was not granted work charge status so her services were not regularized in terms of policy of government - The petition for direction to respondents to consider her case in light of judgment Man Singh vs state of H.P - Held since petitioner had rendered 240 days service in a calendar year as daily wager uninterruptedly w.e.f 1999 till 2007 she ought to have been granted work charge status w.e.f 1.1.2007 and her services should have been also regularized w.e.f. that date. Since now respondents

have regularized the service of petitioner w.e.f. 2018 meaning thereby that petitioner must have handed over eligibility certificate to department and if it is so ,she is entitled to such benefit w.e.f the date when she completed 8 years daily wage service with 240 days in each calendar year - The petition is allowed. Title: Smt. Phool Mati vs. State of Himachal Pradesh Page –878

Constitution of India, 1950 – Article 226 - Petitioner Institute established in the year 2011 – Affiliated with National Council of Vocational Training (NCVT) for Electrician Trade – Recommendation Committee of Respondent No. 3 refused to recommend the affiliation of additional 4th base unit in Electrician Trade for petitioner Institute – Petitioner preferred CWP No. 6128 of 2020 and Respondent No. 3 was directed to re-consider the case of the petitioner in accordance with applicable norms of affiliation – Recommendation Committee vide office memorandum order dated 03-02-2021 in reconsideration, rejected the prayer of Petitioner Institute for additional 4th base unit – Aggrieved and dissatisfied, filed present petition – Held, that in view of clarification issued by Directorate General of Training (DGT) to all State Directors of Training vide communication dated 22-01-2020, case of Petitioner Institute is to be decided without reference to the requirement of re-affiliation – 2018 Norms of affiliation require compliance of latest NCVT norms not intended to addresses the minimum number of trades which one Institute may have but it indicates towards standards and infrastructure of institute – Reliance of DGT upon the requirement of minimum four trades in order for an existing institution to apply for additional units/trades is unsustainable – Petition allowed and office memorandum dated 03-02-2021 quashed and set aside – Respondents directed to consider the case of petitioner for additional units in terms of report of Subcommittee without insisting upon the condition of having minimum four trades.Title: Takshila Private Industrial Training Institute vs. State of HP and Ors.**(D.B.)** Page- 1

Constitution of India, 1950 – Article 226 read with order 2 Rule 2 of Civil Procedure Code, 1908 – The petitioner felt aggrieved by the order dated 06.08.2019 whereby he was directed by the respondent No. 4 not to report for his duty as Lab. Assistant in ECHS Poly clinic, Solan - Held – Avoiding the multiplicity of legal proceedings should be the aim of all courts, so, litigant shall not be allowed to split up his claim and file writ in piece meal fashion – The provision of order 2 Rule 2 C.P.C. are applicable in this case - The petitioner was appointed purely against temporary post and it is liable to be

abolished at any time – The services of the temporary employee can be terminated without notice whenever there is no vacancy against which it was retained – The respondents have replied that they have already abolished the vacancy of Lab. Assistant against which petitioner was working – Petition dismissed. [Paras 13, 20 & 23] Title: Vinod Kumar vs. Union of India and others **(D.B.)** Page-505

Constitution of India, 1950 – Article 226 read with Sections 35-A and 94 (2), of Himachal Pradesh Cooperative Society Act, 1968 – Petitioner was aggrieved by the order passed by Additional Registrar Cooperative Society, Solan, whereby Additional Registrar while disposing of Revision Petition directed Deputy Registrar, Cooperative Societies / Assistant Registrar, Cooperative Societies, Solan that they may consider names of respondents No. 4 & 5 for nomination as members of the managing committee if vacancy is caused in committee alleging that the revision petition filed by the respondents No. 4 & 5 had become infructuous – Held – Registrar / Competent Authority has been conferred with power to constitute a committee and such power includes power to alter, modify and reconstitute the committee, which includes power to remove any member of the committee – the authority found to be competent to consider the names of all persons , who are eligible to be nominated as members of the committee – the direction issued by Additional Registrar, Cooperative Societies with respect to respondents No. 4 & 5 set aside – Respondents allowed reconstitute the committee for two years shall not be construed that approval for committee is for indefinite period – Petition disposed of accordingly. [Paras 14,15 & 19]Title: The Mangal Land Loosers and Effected Transport Cooperative Society Limited vs. State of H.P. and others Page - 488

Constitution of India, 1950 – Article 226 –The petitioner filed the petition for quashing notice, whereby his candidature was kept on hold for producing registration certificate ignoring the fact that same has been already submitted by the petitioner at the time of evaluation process – Held - as per petitioner, he had submitted registration certificate dated 2.11.2020 - it is not the case of the petitioner that he was registered before the last date of submission of on-line application - The essential condition of advertisement leaves no room for doubt that the date of determining eligibility of all candidates in terms of essential qualification i. e experience was to be reckoned as closing date for submitting on line application-petitioner did not possess the requisite

minimum qualification of registration with H.P para medical council on last date of submission of on line recruitment application- it is no more res-integra that non submission of requisite certificate by a candidate in accordance with requirement of advertisement is sufficient ground to reject his candidature- The rejection of candidature of petitioner cannot be faulted - Petition dismissed. Title: Gulshan Kumar vs Himachal Pradesh Staff Selection Commission and others **(D.B.)** Page-853

Constitution of India, 1950 – Article 227 – **Code of Civil Procedure, 1908** – Order 6 Rule 17 – Suit for Permanent Prohibitory and mandatory injunction by Plaintiff – Preliminary objection raised in written statement with regard to authorization and competence of plaintiff to file the suit – Application under order 6 Rule 17 CPC filed by Plaintiff seeking amendment in the description of suit property and capacity of Plaintiff to file the suit – Amendment allowed by trial court – Challenge thereof – Held, that power to allow amendment is wide and can be exercised at any stage of proceedings – Proposed amendment would in no manner amount to changing the nature of suit as plaintiff wants to clarify his capacity to institute the suit – Impugned order upheld – Petition dismissed. Title: Ritesh Sharma vs. Pardeep Kumar Samantaroy and another Page-69

Constitution of India, 1950 – Article 227 - The petition under article 227 constitution of India, against the order passed by Ld. Senior Civil Judge vide which the suit filed by petitioner has been dismissed on account of non payment of costs imposed upon the petitioner by Hon'ble High Court in proceedings under article 227 constitution of India. Held- The earlier petition filed by petitioner under article 227 constitution of India stood dismissed by Hon'ble High Court imposing cost upon the petitioner. The reference of date in judgment imposing cost was only a time limit set by the court so that the petitioner subsequently could not take a plea that there was no time limit fixed by the court for payment of costs - The court works in continuity and change in presiding officer per se does not mean that the order passed by the earlier presiding officer loses efficacy, until or unless the some is assailed by way of appropriate proceedings and altered modified or set aside. The petition is allowed & order passed by trial court is set aside. Title: Sh. Naminder Singh vs. Sh. Atma Singh Page-761

Constitution of India, 1950 – Article 227 read with Order 39 Rule, 1 & 2

C.P.C.- The petition under Article 227 of the Constitution of India, Challenging order passed by Ld. Civil Judge dismissing an application under order 39 rule 1 & 2 CPC affirmed by appellate Court- Suit along with application under order 39 rule 1 & 2 CPC seeking injunction with the plea that suit land is joint land and respondents started raising construction on best portion of land adjoining to road.- Held, it is a matter of record that there is nothing on record to suggest that construction carried out by others co-sharers was ever objected by the plaintiff – Neither any civil suit nor any other proceedings was initiated to demonstrate that the act of others co-sharers was ever objected by plaintiff. This demonstrates that plaintiff selectively chose the act of respondents of carrying out construction on the joint land for approaching the court for first time- no explanation qua this during arguments. Hence, petitioner / plaintiffs have not been able to demonstrate either prima facie case or balance of convenience is in their favour and they would suffer irreparable loss if injunction is not granted- court does not find any perversity in the adjudication by Courts below -No merit- petition dismissed. Title: Mohan and others vs. Sh. Man Singh and others Page – 941

Constitution of India, 1950 – Article 226 - The petition for direction to respondent to promote the petitioner from the post of TGT (Arts) to the post of PGT (Arts) by including the name of petitioner in the list of promotees and maintaining his seniority- Held, the petitioner can not suffer for acts of omission intra branches of education department, because once the petitioner had exercised his option and the same was formally forwarded through proper channel by the principal of concerned school on 5.12.2013, the onus of the petitioner stood discharged - department to have had inquired from the schools through Deputy Directors of elementary education of concerned districts as to who all amongst TGT (Arts) had opted for promotion against the post of PGT (Arts) and omission on the part of department to do so ,cannot be used to the deterrent of the petitioner - The writ petition allowed by holding that denial of promotion to the petitioner against the post of PGT (Arts) purportedly on the ground that his option was not received by department before 3.2.2014, is not sustainable in eyes of law and petitioner entitled for promotion to the post of PGT (Arts) as per his entitlement. Title: Ganga Singh vs. State of H.P. and others Page – 912

Constitution of India, 1950 – Articles 14 & 226 - The petition for issuance of writ that petitioners are entitled to continue in service till the attainment of

age of 65 years in terms of scheme of GOI and respondents be restrained from retiring petitioners at the age of 58/60 years, Held, It is settled law that the recommendation of University Grants Commission or Schemes of department of Higher education ministry of human resource development, where ever are recommendatory, ipso facto are not applicable on the universities/ colleges within the purview of the state legislature until or unless they are expressly adopted by incorporating necessary amendments qua the same in the statues or ordinance of the universities or R & P Rules of the college concerned . It is the prerogative of the state whether or not to adopt the recommendation of UGC keeping in view its financial resources as well as other aspects - petitioners have no right to seek declaration that respondents be directed to allow them to continue to serve till the age of 65 years. Petition dismissed. Title: Dr. Devender Nath Kashyap vs. Union of India & others Page – 982

Constitution of India, 1950 – Articles 14, 16 & 226 - The petition for quashing notice for information keeping on hold recommendation of petitioner by commission to give her appointment – Held – respondent no. 3 had provisionally registered petitioner on 21.10.2019 and issued provisional certificate valid for one year - Respondent no.3 had issued another provisional certificate in favour of petitioner before date of evaluation/counseling - issue of registration of petitioner with respondent no.3 before the last date of submission of on line application remained more of form than substance and while dealing with substantive rights of parties courts cannot remain oblivious towards its duties to impart substantial justice - The form of particular transaction was not proper cannot be used to deny the person rights otherwise emanating from such deal-petitioner had made substantial compliance with requirement of advertisement so the stand of respondent no.1 that petitioner did not hold requisite qualification before last date of submission of on line application is not justified –thus rejection of candidature of petitioner is illegal being in violation of article 14 and 16 of constitution of India - The respondent no.1 is directed to consider and recommend the name of petitioner - The petition accordingly disposed of. Title: Pallavi Sharma vs. Himachal Pradesh Staff Selection Commission and others **(D.B.)** Page-846

Constitution of India, 1950 – Articles 14 & 226 - The petition for quashing and setting aside order/ Judgment dated 10.1.2018 in TA No. 6172/2019 by the HP Administrative Tribunal - Held – When the rights of respondents have been held to be at par with rights of the staff of Indira Gandhi High School,

Sehrol and Public High School - they could not be discriminated at the whims and fences of the authorities . The objections raised by petitioner appear to be fallacious being not substantiated - There was specific declaration by Ld Single Judge of Hon'ble High Court that respondents were similarly situated to employees of Indira Gandhi High School and Public High School. The petition being without merit, dismissed. Title: State of Himachal Pradesh & Ors. vs. Pushpa Thakur and others **(D.B.).** Page – 932

Constitution of India, 1950 – Articles 14 & 226 - The petition seeking direction to take into consideration the initial date of appointment of petitioner as Voluntary Teacher for the purpose of seniority and other consequential benefits like promotion and correction of seniority list - Petitioner initially appointed as a voluntary teacher vide order dated 17.2.1992 and his appointment was set aside by Hon'ble High Court in CWP filed by Ms. Anju Bala- Hon'ble Supreme Court in SLP being not satisfied by approach of Hon'ble high court though did not interfere with order of Hon'ble High Court and directed the state to adjust the petitioner in some other school as per his entitlement as a result of which he was re-engaged vide order dated 25.8.1993 but the state has withdrawn the seniority granted to petitioner of the service rendered by him before termination of his service by Hon'ble High Court - Held - Hon'ble Supreme Court while deciding the SLP filed by petitioner had not set aside the judgment passed by Hon'ble High Court in Anju Bala writ petition and only protection was provided to petitioner by directing the state to adjust the petitioner in suitable post of identical nature - Withdrawing seniority assigned to the petitioner by department was erroroneously least that was expected was that a show cause notice ought to have been issued to him before passing the final order - The order of withdrawl of seniority could not have been passed at the back of petitioner - The petition is allowed by quashing order of withdrawl with a direction that a show cause notice be issued to petitioner by competent authority with regard to withdrawl of his seniority thereafter decision upon the issue be taken by competent authority after hearing the petitioner in person or through authorized agent. Title: Sh. Gopal Krishan vs. State of Himachal Pradesh Page – 906

Constitution of India, 1950 – Articles 14,16 & 226 - The petition seeking the status of post of supervisor to petitioner from the date of completion of 10 years of daily wages service with all consequential benefits - Held - Sh. R. C Thakur and Ram Rattan etc who were similarly situated to the petitioner were

granted the benefits of regularization as supervisor on completion of 8 years of service as daily wages petitioners cannot be singled out, discriminated in the same and similar set of circumstances (facts) - The respondent has not been able to carve out a case of placing petitioners on a separate pedestal than Sh. R. C Thakur - The petition allowed - However petitioners are entitled to arrear only for period of 3 years prior to filing of petition. Title: Amolak Ram and others vs. State of Himachal Pradesh & another **(D.B.).** Page – 900

Constitution of India, 1950 – Articles 14,16 & 226 - The petition challenging the orders passed by tribunal- the candidates with B.Sc Nursing or GNM are eligible to be considered for appointment to post of Female Health Worker- Advertised by SSC in case they find place in merit list of candidates against their respective category- State is not justified in changing its stand in given facts of case – The proposition higher qualification will include lower qualification cannot be applied - universally as an indefeasible rule. Title: The State of H.P. vs. Gayatri Devi and others **(D.B.)** Page - 946

Constitution of India, 1950 – Articles 14,16 and 226 - The petition for issuance of writ of certiorari for quashing amendment to 2014 Rules, prescribing preferential mode of appointment for the System Officers working under the e-courts project for the post of Assistant Programmer and Recruitment Process- Held - The amendment in the Rules cannot stand the scrutiny of law as it violates Article 14 and 16 of constitution of India as classification so made vide amendment cannot be said to be reasonable - No reason has come to justify such act- To consider that system officers working under e-courts had gained special experience will only be fallacy- once the persons working under a specific project were held to have no right of preferential treatment in the appointment to the post of Assistant Programmer it was highly unreasonable and arbitrary on part of High Court to have recognised such preferential right in their favour by carrying amendment in Rules as their claim for regularization and preferential right of consideration for post of Assistant Programmer were already rejected by a Judicial Pronouncement - Petition is allowed - Amendment carried out in rules and recruitment process is quashed and set aside.Title: Mrs. Ruchi Kumari vs. The High Court of Himachal Pradesh and others **(D.B.)** Page – 917

Constitution of India, 1950 - Articles 226 and 227 – Letters Patent Appeals – Two separate applications for partition filed by the petitioner u/s 123 H.P.

Land Revenue Act – Final partition sanctioned by Assistant Collector 1St Grade, Nadaun challenged in appeal – Appeals dismissed by ADM Hamirpur exercising power of Collector – Revision petitions dismissed by Commissioner Mandi – Financial Commissioner (Appeals) accepted revision Petitions and directed A. C. 1st Grade to keep in view classification of land and valuation thereof while finalizing the partition proceedings – Appellant assailed the said order by way of CWP No. 633 of 2006 and CWP No. 634 of 2006 which were dismissed by Ld. Single Judge with a direction to A.C. 1st Grade to carry out the partition strictly as per mode of partition drawn on 23-05-1992 – Challenge thereof by way of instant LPA – Held, that revisional powers exercised by the Financial Commissioner (Appeals) were under Section 17 and there is nothing to hold that he had acted without jurisdiction – Orders of Collector and Commissioner Mandi Division found perverse and interfered in revision and also Financial Commissioner (Appeals) had not decided any substantive rights of the parties – Nothing found in the judgment passed by Ld. Single Judge sufficient to interfere therewith – Appellant failed to answer the query that what prejudice was caused to him by impugned judgment or order of Financial Commissioner, when mode of partition suggested between parties was neither modified nor set aside – Present case is classical example which sets out tactics being adopted by litigants to prolong the life of litigation beyond reasonable limits – Both appeals dismissed with costs of Rs. 10,000/- to be paid to the respondents. Title: Sh. Mehar Singh vs. State of H.P and others **(D.B.)** Page-354

Constitution of India, 1950 – Article 226 read with Section 427 (1) of Code of Criminal Procedure, 1973 – Petitioner is aggrieved by the certificate of imprisonment dated 27.10.2017 whereby the petitioner has been ordered to undergo sentence of second case after the expiry of sentence of first case – Held – the petitioner has committed offences of distinct & serious nature, in the cases in which he has been convicted – The petitioner whenever was granted the parole, misused the liberty and indulged in serious offences under the NDPS Act – In such circumstances the petitioner cannot be granted relief under Article 226 of Indian Constitution, which he failed to get from the Courts in exercise of their jurisdiction under Section 427 (1) Cr. P.C. – Petition dismissed. [Para 14] Title: Parahlad Kumar alias Raj Kumar vs. State of H.P and others **(D.B.)** Page-515

Constitution of India, 1950- Article 226 – Service matter - R & P Rules of

2010- Petitioner felt aggreived by the act of the respondents whereby he was not given the benefits of R & P Rules, 1992- Held- The patwaries are to be engaged or deployed in Muhal concerned on a contractual basis and not on regular basis as they are appointed in pursuance to the R & P Rules, 2010 and not on the basis of R & P Rules, 1992- Petition dismissed. (Para 5) Title: Krishan Chand vs. State of HP **(D.B.)** Page-562

Constitution of India, 1950- Article 226- Petitioner are aggrieved by the allotment of outlets by I0C in favour of Agro Industries and Sh. Satwant Singh alleging that the allotments are in violation of guidelines framed by Indian Roads Congress (IRC) and Ministry of Road Transport & Highways (MoRTH)- Held- The guidelines issued by IRC & MoRTH are not in conflict with each other and they operate in the same realm- Public works Department of Government of Himachal Pradesh has been following IRC & also the MoRTH guidelines- By non-compliance of the guidelines of IRC & MoRTH the rights of the petitioner who are existing fuel dealer are going to be affected- The respondents directed to make allotment in same villages/ places/ location after strict adherence to prescribed rules- Petition allowed. (Paras 15, 21 & 33) Title: M/S Aditya H.P. Centre vs. Union of India & Ors.**(D.B.).** Page-565

Constitution of India, 1950- Article-226 -Section 39 of vide order dated 12.1.2020 the respondent No.3 declared the election null and void- The petition alleged that opportunity of being heard was violated by respondent No.3- Held- When action of quasi Judicial authority results in an adverse Civil consequences against a person or body, then unless the statute by either expressly or by necessary implication excludes the principle of natural justice, hearing must be given to those persons or bodies before passing such orders and respondent No.3 being passing the harsh decision must had given opportunity of fair hearing to the affected parties- Petition allowed. (Paras 20 & 21) Title: Solan Vyapar Mandal vs. State of Himachal Pradesh **(D.B.)** Page-536

Constitution of India, 1950- Articles 14 & 226 - Petitioners aggrieved by the act of the respondents, whereby, they were deprived of grant of senior pay scale of Rs. 1800-3200 after completion of 12 years of continuous service with consequential benefits to the petitioners – Held – the judgment passed in Hans Raj and others filed O.A. (D) No: 1035 of 1994 in the erstwhile H.P. Administrative Tribunal is judgment in rem and judgment passed by Hon'ble High Court of H.P. in CWP No: 5709 of 2014 also held that similarly situated

persons are entitled for same benefits - Petitioner being otherwise similarly situated cannot be denied benefit – Respondent directed to grant higher pay scale of Rs. 1800-3200 in favour of petitioner after completion of 12 years of continuous service. [Paras 8 & 9] Title: Amar Lal & another vs. State of Himachal Pradesh & Ors. Page - 433

Constitution of India, 1950- Articles 14 & 226 **-** Fixation of Pension-Formulae- Department granted pension qua which petitioner have sought the revision of the pension as well as the arrears w.e.f. 01.01.2006 to 31.03.2013 in pursuance of instructions contained in Office Memorandum dated 14th October, 2009 - Held- there is lack of any justification in making the benefit accruable to pensioners under Office Memorandum dated 21st May, 2013 applicable w.e.f. 01.04.2013 rather than 01.01.2006 as done by earlier Office Memorandum dated 14th October, 2009, as cut-off date for grant of revised pension in favour of pre-2006 pensioners already stood fixed as 01.01.2006 by the Government itself vide its earlier Office Memorandum dated 14th October, 2009- Writ petition allowed – Petitioners held to be entitled for pre-revised pension in terms of Office Memorandum w.e.f. 01.01.2006 alongwith arrears. [Paras 22 & 25] Title: B. C. Gupta vs. State of Himachal Pradesh and others Page-422

'E'

Employee's Compensation Act, 1923 – Section 22 – Claim Petition under Section 22 filed by mother of the deceased dismissed by the Ld. Commissioner, holding that she has neither any cause of action nor locus standi to maintain the petition – Being aggrieved, instant appeal filed – Held, that appellant does not fall in the definition of dependant under Section 2(d) – Salary of appellant's husband more than Rs. 27,000/- per month – Appellant was not dependent on the deceased and can not claim compensation only on the count of being a legal heir of the deceased – No interference in the impugned judgment called for – Appeal dismissed in limine. Title: Santi Devi vs. Director of Health Services and others Page-382

'H'

H.P. Urban Rent Control Act, 1987 – Section 24 – Application under Section 21 filed by Petitioner / tenant seeking permission to deposit the rent in the court dismissed by Rent Controller – Order affirmed by Ld. Additional District

Judge – I – cum – Appellate Authority – Revision thereof – Held, that when prayer on behalf of tenant for deposit of rent in the court rejected, there was no occasion for the court to retain the amount in fixed deposit when no eviction petition was pending on account of arrears of rent – Revision disposed of with the observation that amount ordered to be deposited by the court shall be considered to be deposited towards arrears of rent if so held by Rent Controller in the eviction proceedings, if any, initiated by landlord on the ground of arrears of rent. (Paras 13, 14) Title: Chaman Thakur vs. Randhir Rana Page-27

H.P. Urban Rent Control Act, 1987 - Section 24(5) – Revision against Order **-**Civil Revision challenging the orders passed by Ld. Rent Controller setting aside dismissal order and restoring the Rent petition to its original number – A party should not suffer for the acts of omission of counsel- It is not mandatory that in every case ,issues have to be framed and discretion stands conferred upon the courts including Rent Controller, as to whether in the peculiar facts and circumstances of a particular case, issues need to be framed or not- the C.R- being without merit- dismissed. Title: Smt. Ravinder Kaur vs. Shri Rajiv Sood & Shri Vivek Sood Page-1020

Hindu Marriage Act, 1955 - Section 13 (1) (a) - The appeal against judgment and decree passed by Ld. District Judge whereby petition filed by the appellant filed under section 13 (1) (a) Hindu Marriage Act for dissolution of marriage has been dismissed - Held - the petition of dissolution of marriage was filed by appellant on 6.5.2008 where as marriage had been solemnized on 27.9.1984- the allegations which as per appellant constitutes cruelty was alleged to be initially of year 1990 and secondly after 2002 meaning thereby that as per appellant, the relation between parties remained cordial between 1990 to 2002 - Though there is no convincing evidence on record to prove allegation of appellant w.r.t the acts constituting cruelty prior to1990 yet as per him he had condoned such acts alleged to constitute cruelty and thereafter parties lived peacefully till 2002 - standard of proof required in the petition for dissolution of marriage under Hindu marriage act is preponderance of probability but that does not mean that party alleging act of cruelty can succeed without satisfying the court as to existence of alleged facts in accordance with law-from material, It can be said with certainty that appellant has failed to discharge the burden of proof required - The appellant is disentitled from claiming divorce on the ground of cruelty in view of section

23 (ii) HM Acts in the present case, there is sufficient material which disentitle the appellant from claiming divorce. The issue of desertion framed is misconceived as there was no such pleadings / the appellant cannot derive benefit by his plea that marriage between parties has been broken irretrievably as no such ground is envisaged under the Act and the court lacks jurisdiction to pass decree of divorce on any such ground not mentioned in Act. Appeal dismissed. Title: Ravinder Nath Rattan vs. Kanta Devi Page-701

Hindu Marriage Act, 1955 - Section 13 (1) (ib) – Petition for divorce on the ground of desertion under section 13 (1) (ib) filled by the Appellant dismissed by the trial court – Challenged by way of instant appeal – Held, that issues involved in the petition under Section 9 of the Act was directly and substantially the same as in the petition in hand – Petitioner / Appellant precluded from claiming that the respondent had left his company without any reasonable cause on the principle of 'res-judicata" - Statutory period of two years had not elapsed before filing the petition – No case made out for interference with the impugned judgment and decree – Appeal dismissed.Title: Tek Chand vs. Ratu Devi Page-302

'L'

Limitation Act, 1963 - Section 5 -Application for condonation of delay in maintaining Appeal against Award dated 07-08-2015 passed by Ld. District Judge (Forests) Shimla in Land Reference case – Held, that liberal approach in considering sufficiency of cause for delay should not override substantial law of limitation, especially when court finds no justification for delay – Reasons for delay in maintaining appeal not plausible – Plea taken in supplementary affidavit was never taken in the main application – No grounds exist to condone the delay – Application dismissed. (Paras 14, 15, 17) Title: State of Himachal Pradesh and others vs. Ram Krishan Page-118

Land Acquisition Act, 1894 – Section - The petition for direction to respondents 1 to 4 to cancel sanction letter dated 29.9.2010 alongwith mutation no. 389 attested on 30.9.2010 whereby exchange of land has been granted in favour of respondent No.5 and said land was vested in state of HP to be used in future for the public purpose only - Respondent No.5 agreed to transfer his said land in favour of industries department in lieu of govt land in some village proposed to be transferred by the said department in his favour -

The exchange was attested on 6.9.2012 which was challenged by petitioner - Held - The exchange of land between respondents No.5 and department of industries was made in the year 2010 - Mutation of exchange was attested on 6.9.2012 - There is no explanation as to why petitioner remained silent till July 2019 when he for the first time approached the court by way of this petition thus petition clearly suffers from delay. No reason for the transaction are either visible or proved the contention of petitioner about his first right to be considered for transfer of govt land given in exchange to respondent No.5 leaves no manner of doubt about his mother in filing the petition. The petitioner clearly appears to have abused process of law for his vested reasons - petition dismissed. Title: Jaswant Rai vs. State of H.P. and others **(D.B.)** Page – 737

Lok Adalat - Petitioner in the year 2021 seek to set aside an award passed by National Lok Adalat on 9.12.2017 on the ground that they had not authorized the ld counsel who had appeared on their behalf before the Lok Adalat- Held- The award was passed by Lok Adalat on 9.12.2017 whereby not only the appeal, but the cross objection was dismissed as withdrawn on the strength of statement made by perspective appearing on behalf of appellant as well as statement made by Sh. Surinder Verma, Advocate on behalf of present petitioner subsequent to the award, petitioner moved CWP under section 151 CPC for release of award amount in their favour, with averment that appeal had been finally disposed off vide order dated 9.12.2017 and they are in need of money - The application was supported by affidavit of petitioner and application was disposed off - Application and order would indicate that the petitioner were very well aware of the order dated 9.12.2017 passed by National Lok Adalat and order clearly records the fact that not only the appeal but cross objection was also dismissed and withdrawn. There cannot be the case of petitioner that there were two separate order passed on 9.12.2017 one dismissed the appeal and the other dismiss their cross objection, therefore there is no escape from the conclusion that the petitioner were very well aware of the order dated 9.12.2017. The moving of application for release of awarded amount after being aware of order dated 9.12.2017 clearly indicate that petitioner had accepted and acquired in the award dated 9.12.2017. so they cannot be permitted to set up a plea three years later that Sh. Surinder Verma, Advocate was not authorized by them to appear and make statement on their behalf before Lok Adalat and for their reason award be set aside having accepted the award, having acted upon it, the present petitioner are

now stopped from challenging it - The petition dismissed.Title: Roshan Lal and others vs. The Land Acquisition Collector and others Page-788

Lok Adalat - Petitioner in the year 2021 seek to set aside an award passed by National Lok Adalat on 9.12.2017 on the ground that they had not authorized the ld counsel who had appeared on their on their behalf before the Lok Adalat- Held- The award was passed by Lok Adalat on 9.12.2017 whereby not only the appeal, but the cross objection was dismissed as withdrawn on the strength of statement made by perspective appearing on behalf of appellant as well as statement made by Sh. Surinder Verma Advocate on behalf of present petition subsequent to the award, petitioner moved CWP under section 151 CPC for release of award amount in their favour, with averment that appeal had been finally disposed off vide order dated 9.12.2017 and they are in need of money. The application was supported by affidavit of petitioner and application was disposed off - Application and order would indicate that the petitioner were very well aware of the order dated 9.12.2017 passed by National Lok Adalat. The order clearly records the fact that not only the appeal but cross objection was also dismissed and withdrawn. There cannot be the case of petitioner that there were two separate order passed on 9.12.2017 one dismissed the appeal and the other dismiss their cross objection, therefore therein no escape from the conclusion that the petitioner were very well aware of the order dated 9.12.2017. The moving of application for release of awarded amount after being aware of order dated 9.12.2017 clearly indicate that petitioner had accepted the award dated 9.12.2017. They cannot be permitted to set up a plea three years later that Sh. Surinder Verma, Advocate was not authorized by them to appear make statement on their behalf before Lok Adalat and for their reason award be set aside having accepted the award, having acted upon it, the present petitioner are now stopped from challenging it petition dismissed. Title: Muni Lal and other vs. The Land Acquisition Collector and other Page-796

'M'

Motor Vehicle Act, 1988 - Section 147 read with Section 4 & 4-A of the Workmen's Compensation Act, 1923 – Assessment of insurance liability – At the time of accident, the deceased was 18 years old & his monthly income was Rs. 3000/- Tribunal granted compensation in sum of Rs. 3,39,000/-Held – Compensation amount not assessed in consonance with Section 4 & 4-A of the

Workmen's Compensation Act – Award modified. [Para 4(ii)(b)] Title: National Insurance Company Ltd. vs. Sh. Babu and others. Page – 617

Motor Vehicle Act, 1988 - Compensation Contention of Insurance Company that deceased was standing in the rear position of goods carriage vehicle is based upon the contents of the FIR – Contention was rejected – Held – Complainant was best person to prove the specific averments in the FIR who has not been examined by insurance company – Lack of evidence on record to prove that 7 or 8 persons including deceased were standing in rear position of vehicle as gratuitous passengers – Award rightly awarded. [Para 4 (i)(b) & (d)] Title: National Insurance Company Ltd. vs. Sh. Babu and others. Page –617

Motor Vehicle Act, 1988 - Section 166 – Determination of compensation – Principles of evidence applicability- Held – Standard of proof as in a criminal trial are not applicable in Motor accident claim cases – The applicant has to prove that preponderance of probabilities lies in his favour. [Para 4 (i)(c)] Title: National Insurance Company Ltd. vs. Sh. Babu and others. Page – 617

Motor Vehicle Act, 1988 - Section 166 – Maintainability of claim petition by LR's of deceased who himself was owner –cum- driver of the vehicle for indemnification from Insurance Company – Held – the LR of the deceased who himself was owner of the vehicle was not competent to file the claim of indemnification against Insurance Company – Petition not maintainable [Para 22] Title: Neelam Kumari and others vs. The National Insurance Company Page-589

Motor Vehicle Act, 1988 - Section 166 & 149(2) read with Section 102 of Indian Evidence Act, 1872 – Onus of proof regarding breach of policy – Claim repudiated on the ground that driving licence is fake – Held – Onus to prove the breach of the conditions of policy is on insurer. [Para 17-19] Title: Neelam Kumari and others vs. The National Insurance Company Page-589

Motor Vehicle Act, 1988 - Section 166/147(1) **–** Claim petition – Special contract of personal accident coverage – Insurance company failed to prove breach of condition, hence claimants held legally entitled for compensation for Rs. 2,00000 on personal accidental cover . [Paras 28 & 31] Title: Neelam Kumari and others vs. The National Insurance Company Page-589

Motor Vehicle Act, 1988 – Section 173 – Respondents No. 1-3 (claimants)

filed Petition under Section 166 on account of death of mother of respondents No. 1 & 2 and wife of respondent No. 3 – Petition allowed by MACT (III) Una and Insurance Company (Petitioner) held liable to pay compensation of Rs. 8,24,940/- alongwith interest @ 9% p.a. – Challenge thereof – Held, that vehicle in question was not being plied in violation of the terms and conditions of the Insurance Policy – Overwhelming evidence on record to suggest that offending vehicle i.e the motorcycle driven by respondent No. 3 resulting in serious injuries to Saroj Kumari (deceased) – However, no amount could have been awarded under the head of love and affection and loss of consortium/funeral charges also require to be assessed – Award passed by Ld. Motor Accident Claim Tribunal modified to Rs. 6,69,940/- - Appeal disposed of accordingly. Title: The New India Assurance Company Limited vs. Jyoti Bala and others Page-19

Motor Vehicle Act, 1988- Section 147 read with section 4 & 4-A of the Workmen Compensation Act, 1923- Assessment of Insurance liability- Criteria- A sum of Rupees 3,39,000/- awarded in favour of claimants as compensation- Held- The proviso to Section 147 states that policy shall not cover liability in respect of death, arising out of and in course of employment- Compensation amount not assesed in consonance with sections 4 & 4-A of Workmen's Compensation Act- Award modified. [Para 4 (ii) (b)] Title: National Insurance Company Ltd. vs. Sh. Mukhtiar Khan and others Page – 602

Motor Vehicle Act, 1988 – The appeal under section 173 M.V. Act with prayer to enhance amount awarded by M.A.C.T whereby Tribunal while allowing the claim petition under section 166 of Act awarded a sum of Rs. 1,11000/- along with interest at 6.1% p.a from date of filing the petition till deposit of amount in favour of claimant- Held, it is well settled that where claimant is not able to prove the actual income of deceased/ injured by way of documentary evidence of income of deceased/ injured court can proceed to assess the income on the basis of minimum wages prevalent that time - The salary certificate placed on record by claimant to prove salary of deceased son was neither proved in accordance with law nor was exhibited rather same was marked as 'Y"- Since deceased was well educated Tribunal considering him unskilled person ought to have assessed his income on the basis of minimum wages payable at that time i.e, Rs. 3300 p.m.- Tribunal further fell in error by applying multiplier on the basis of age of claimant whereas multiplier is/was to be applied on the basis of age of deceased (N.I.C vs. Praney Sethi AIR 2017

SC 5157) keeping in view of age of deceased 28 years at the time of accident the multiplier of 17 was required to be applied- since deceased was bachelor at the time of death 50% of his income is liable to be deducted towards personal expenses taking monthly income of deceased as Rs. 3300/- p.m, total loss of dependency is Rs. 471240/-. Appeal is partly allowed - Award passed by tribunal is modified to this extent. Title: Sumitra Devi vs. Krishan Lal & others Page-722

'N'

Narcotic Drugs & Psychotropic Substance Act, 1985- Section 20 – Commercial quantity – Recovery of 1 Kg 250 grams of cannabis – Held - Possession of contraband has to be proved by the prosecution – The evidence of I.O. does not corroborate the evidence of PW-3 in view of which the prosecution has failed to prove the possession of the contraband leading to acquittal of accused. [Paras 17-20] Title: Jaswant Singh vs. State of Himachal Pradesh **(D.B.)** Page-480

Narcotic Drugs & Psychotropic Substance Act, 1985- Section 54 read with Section 101 of Evidence Act – The prosecution is required to prove the possession of the contraband by the accused – Held – Prosecution failed to prove the possession of contraband by the accused, so other evidence is not sufficient to prove guilt of accused [Para 19] Title: Jaswant Singh vs. State of Himachal Pradesh **(D.B.)** Page-480

Narcotic Drugs & Psychotropic Substances Act, 1985 – Section 20 - The Appeal against judgment of conviction & sentence order for offence u/s 20 NDPS Act with allegation of appellant carrying 2.512 kgs Charas when intercepted by police party at Hulli at 6:00 P.M. - Held - PW 1, a police official, driver of police vehicle. He narrated the prosecution version of recovery of chars from bag being carried by appellant. His evidence is consistent & no worthwhile cross examination that would affect case of the prosecution. The evidence of DW1 is not to such an extent that would support the contention of ld. Counsel for appellant- it only indicates towards quarrel between accused & police without specifying the quarrel & intensity of enmity between accused & police. The enmity or hatred should be to such an extent which would push the police into wrongful framing of accused but intensity of evidence is not of such an extent to lead such conclusion. The rapats Ex PW6/A & Ex PW6/B indicates that on the date of offence, PW1 & other police officials left the police

station to do their duties. The name of PW1 is mentioned in Ex PW6 thus presence of PW1 is not doubtful. More over there was no suggestion to PW1 that he was not present at the spot of seizure. Therefore only because log book does not contain name of PW1, does not by itself indicates his absence - It is not a hard & fast rule that the evidence of official witnesses is required to be discarded only because they are official witnesses ultimately the statement of the witnesses would have to be given due weightage for what they are worth- Even evidence of sole witness is sufficient to bring home the guilt provided such evidence is honest, trustworthy & capable of being accepted. The discrepancies pointed by ld. Counsel do not stretch themselves to such an extent that would render entire case of prosecution doubtful. The recovery having been proved by prosecution beyond reasonable doubt, appreciation of evidence by trial Court is just and correct. The appeal being devoid of merit, dismissed. Title: Budhi Ram vs. State of H.P. **(D.B.)** Page -860

'P'

Protection of Women from Domestic Violence Act, 2002 – Section 23 - Application under Section 23 of the Act preferred by respondent allowed by Ld. ACJM (1) Una, interim maintenance of Rs. 2,000/- and Rs. 1,000/- awarded respectively – Appeal filed by respondents no. 1 & 2 under Section 29 of the Act for enhancement of interim maintenance allowed and amount of maintenance enhanced to Rs. 3,000/- and Rs. 2,000/- respectively – Challenge thereof – Held, that once husband is an able bodied person, he can not simply deny his legal obligation to maintain his wife – Taking into consideration price index and high cost of living, impugned order calls for no interference – Petition dismissed.Title: Sandeep Kumar vs. Nanko Devi alias Rekha and another Page-75

'W'

Workmen Compensation Act, 1923 – Section 30 – Appeal **-** The Appeal u/s 30 of the Workmen Compensation Act against the order passed by Commissioner under Workmen Compensation Act directing appellant Insurance Co. to pay compensation Rs. 4,22,585/- in favour of respondents No: 1 & 2 on account of death of late Sh. Vinod Kumar who allegedly died on account of Injuries suffered by him at construction site of respondent No. 8 - Held - the careful perusal of Sec. 4A suggests that where any employer is in default in paying the compensation under the Act within one month from the

date it fell due, the commissioner shall direct that the employer in addition to the amount of arrears shall pay simple interest thereon at 12% p.a. or such higher rate not exceeding the lending rate of any scheduled bank besides above, if court comes to a conclusion and forms an opinion that there is no justification qua the delay in making payment it can direct that employer to pay sum not exceeding 50% of such amount in addition to amount of arrears & interest thereon as penalty However such an order for payment of penalty cannot be passed under clause(b) without giving a reasonable opportunity to employer to show cause why it should not be passed - Sec. 4-A(3)(b) clearly provides that penalty, if any on account of delay in payment can be imposed upon the employer not on the Insurer as such award holding appellant Insurance Co. liable to pay the amount of penalty is not sustainable the remaining amount of compensation excluding 50% penalty u/s 4A(3)(b) shall be paid by appellant Insurance Co. the Court below is directed to decide the issue with regard to penalty if any to pay 50% penalty u/s 4A(3)(b) of the Act.Title: National Insurance Company Limited vs. Karan Bahadur and others Page-804

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The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad AIR 1973 SC 76;

'U'

Union of India and others Vs. Exide Industries Ltd and another, (2020) 5 SCC 274;

Union of India v. P. Gunasekaran (2015)2 SCC 610;

Union of India Vs Ibrahim Uddin and another (2012) 8 SCC 148;

Union Public Service Commission vs Girish Jayanti Lal Vaghela (2006) 2 SCC 482;

'V'

V.K. Bansal vs. State of Haryana, (2013) 7 SCC 211;

V.Surinder Mohan Versus State of Tamil Nadu(2019) 4 SCC 237;

Ved Praksh Garg vs. Premi Devi and others, AIR 1997 SC 3854;

Vicky @ Vikas vs. State (NCT of Delhi), (2020) 11 SCC 540;

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Takshila Private Industrial Training Institute .....Petitioner.

Versus

State of HP and Ors. ...Respondents**.**

CWP No. 721 of 2021
Reserved on: 24.6.2021
Date of Decision: 1.07.2021

Constitution of India, 1950 – Article 226-- Petitioner Institute established in the year 2011 – Affiliated with National Council of Vocational Training (NCVT) for Electrician Trade – Recommendation Committee of Respondent No. 3 refused to recommend the affiliation of additional 4th base unit in Electrician Trade for petitioner Institute – Petitioner preferred CWP No. 6128 of 2020 and Respondent No. 3 was directed to re-consider the case of the petitioner in accordance with applicable norms of affiliation – Recommendation Committee vide office memorandum order dated 03-02-2021 in reconsideration, rejected the prayer of Petitioner Institute for additional 4th base unit – Aggrieved and dissatisfied, filed present petition – Held, that in view of clarification issued by Directorate General of Training (DGT) to all State Directors of Training vide communication dated 22-01-2020, case of Petitioner Institute is to be decided without reference to the requirement of re-affiliation – 2018 Norms of affiliation require compliance of latest NCVT norms not intended to addresses the minimum number of trades which one Institute may have but it indicates towards standards and infrastructure of institute – Reliance of DGT upon the requirement of minimum four trades in order for an existing institution to apply for additional units/trades is unsustainable – Petition allowed and office memorandum dated 03-02-2021 quashed and set aside – Respondents directed to consider the case of petitioner for additional units in terms of report of Subcommittee without insisting upon the condition of having minimum four trades.

For the Petitioner: Mr. Aman Parth Sharma, Advocate.

For the Respondents: Mr. Ashwani Sharma, Additional Advocate General with Mr. Vikrant Chandel, Dy. A.G.., for respondents No. 1 and 2.
Mr. Rajinder Kumar, CGSC for respondents No. 3 and 4.
(Through Virtual Mode)

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dis-satisfied with office memorandum dated 3.2.2021, (Annexure P-9), issued by respondent No.4 in purported compliance of judgment dated 8.1.2021, passed by the Co-ordinate Bench of this Court in CWP No. 6128 of 2020, whereby respondent No.3 was directed to re-consider the case of the petitioner in accordance with applicable norms of affiliation, petitioner has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India.

2. For having bird's eye view, necessary facts for adjudication of the instant case, are that the petitioner-Institute after its establishment in the year, 2011 got itself affiliated with National Council of Vocational Training *(in short "**NCVT**")* for Electrician Trade for 2 (1+1) unit. Four additional units 1+1+2 were approved in 2014, whereafter, again in the year, 2019 three more units 1+1+1 were approved in favour of the petitioner-Institute and as of today's date, petitioner-Institute is affiliated for total nine units in the Electrician trade. On 2.12.2019, online affiliation portal came to be opened up by respondent No.4 for registering ITIs aspiring to apply for extension of trades/units, for shifting as per TGT Norms and for new ITIs willing to start session. Pursuant to aforesaid initiative taken by respondent No.3, petitioner institute within a stipulated period, applied for affiliation of additional 4th base unit in Electrician trade. Sub Committee of NCVT headed by respondent No.2 conducted a joint inspection of petitioner-Institute under stages 1, II and III as

provided in affiliation Norms of 2018 and after having found the petitioner institute eligible, recommended case of the petitioner for additional 4th base unit in Electrician trade vide letter dated 7.11.2020. On the basis of aforesaid recommendation of Sub- Committee of NCVT, the State council of Vocational Training (*in short "**SCVT**"*), granted affiliation to the petitioner institute for two shifts under SCVT Certificate, which is valid within the State. Based on the recommendation of NCVT Sub-committee, many aspirants applied for admission and were admitted in the institute, however, recommendation of Sub-committee NCVT was not accepted by the Recommendation Committee of respondent No.3. Recommendation Committee in its 16th meeting held on 25.11.2020, refused to recommend the affiliation of additional 4th base unit in Electrician Trade for petitioner-Institute. In the aforesaid background, petitioner approached this Court by way of CWP No. 6128 of 2020, praying therein to quash and set aside the report of Recommendation Committee of respondent No.3 qua the petitioner-Institute. Having found action of the respondents to be in total violation of affiliation norms, Division Bench of this court vide judgment dated 8.1.2021, passed following order:-

> *"In view of the above, we find that reasons as contained in the communication dated 9.12.2020/25.11.2020 (Annexure P-7) for rejecting the case of the petitioner seeking affiliation for additional 4th base Unit in Electrician Trade are not justified. Respondent No.3 has not considered the case of the petitioner for affiliation of additional 4th Base Unit in Electrician Trade in accordance with applicable Norms of Affiliation. Accordingly, writ petition is allowed. Annexure P-7, insofar as it pertains to rejection of the case of the petitioner is quashed and set aside. Respondent No.3 is directed to re-consider the case of the petitioner within a period of two weeks from today and pass an appropriate order in accordance with law."*

3. Pursuant to aforesaid direction issued by the Division Bench, matter again came to be re-considered by the Recommendation Committee of

DGT in its 19th meeting held on 15.1.2021, wherein Recommendation Committee vide office memorandum order dated 3.2.2021, while reiterating that it is mandatory to apply for re-affiliation to those ITIs, which are affiliated for more than five years and ITI should have minimum four trades for affiliation, rejected the prayer of the petitioner-Institute for additional 4th base unit. Being aggrieved and dis-satisfied with aforesaid order dated 3.2.2021, passed by the respondents in purported compliance of the judgment, petitioner has approached this Court in the instant proceedings, praying therein for following main reliefs:

> *"In view of the submission made herein above it is most humbly prayed that present petition may kindly be allowed and Annexure P-9 i.e. office memorandum dated 3.02.2021 in as much as agenda 19.3.2. of the 19th meeting held on 15.01.2021 may kindly be quashed and set-aside being illegal, unwarranted and untenable in the eyes of law and petitioner may kindly be held entitled for the additional 4th base unit with 3 shifts (1+1+1) for Electrician Trade as per the Joint Committee report of NCVT Sub-committee.*
> *iii. Respondent no.1 and 2 may kindly be directed to grant additional time to the petitioner institute for admission and counseling of the student."*

4. We have heard the learned counsel for the parties and gone through the records.

5. The Recommendation Committee in its meeting held on 25.11.2020, which decision otherwise stand quashed vide judgment dated 8.1.2021, passed by the Division Bench in CWP No.6128 of 2020, gave following reasons for not recommending the case of the petitioner-Institute:-

Sl. N	ITI's name MIS	Trades/ Units sought	ITI propose Units	Units recommended	Remarks by Scrutiny	Remarks by Recommendation Committee

o.	Code/Application Number	for affiliation		by SCI	Committee	
2	Takshila Private ITI, Near M.L.S.M. College Sundernagar, District Mandi, H.P. 175018 PR02000211	Electrician (NSQF)	3(1+1+1)	3(1+1+1)	ITI needs to upgrade to 4 trades for the session 2021	Not recommended Since ITI is more than 5 years old, should apply for minimum 4 for affiliation by session 2021

6. Close scrutiny of aforesaid reasons cited by the Recommendation Committee while rejecting case of the petitioner reveals that since petitioner-Institute is/was more than five years old, it ought to have applied for minimum four for affiliation by session 2021. Though aforesaid reasoning rendered on record by the respondent was not accepted by the Division Bench of this Court in previous litigation initiated at the behest of the petitioner i.e. CWP No.6128 of 2020 but since the petitioner has passed fresh order dated 8.1.2021, rejecting the case of the petitioner, this Court would now proceed to examine the correctness of the same vis-à-vis pleadings adduced on record by the respective parties.

7. It is not in dispute that the petitioner-Institute applied for additional 4th base unit in Electrician Trade pursuant to online application invited by respondent No.3. It is also not in dispute that the petitioner filed/applied well within the stipulated time. Before ascertaining the correctness and validity of the reasons given in the order impugned in the

instant proceedings, it would be apt to take note of some of the relevant provisions of the norms of affiliation prevalent in the year, 2018.

a) As per Section 2, applicants are required to submit the application through the web portal, the format whereof is provided in Annexures-2, 2(a) and 1. The instructions with regard thereto provide i*nteralia* as follows:

"ITI's can be opened for minimum of 4 trades and minimum of 1 units per shift per trade. ITIs with 3 and above star ratings on NCVT portal would be appreciated to add more units after two years/one year depending upon duration of trade."

b) Clause 3.1.2 deals with applications for additional trades/units, which reads as under:

I. No increase in intake shall be given to ITIs where FIR, CBI or CVC, any other Investigation agency/punitive action is initiated by DGT for any violation in the norms and standards and where enquiries are pending. Applications of such institutions shall be placed before the NCVT Subcommittee for taking appropriate action.

II. The ITIs shall mandatorily opt for "grading" before addition of trades/units in existing institutes.

III. Addition of trades/units in existing ITIs shall be permitted only if the ITI is complying with latest NCVT norms at least for additional trades/units."

c) Clause 3.7.1 deals with renewal of affiliation, and reads as follows:

"All the institutes shall be re-affiliated for every 5 years from date of affiliation. The institutes shall submit online application at least one year prior to expiry of affiliation/completion of five years of affiliation."

d) Clause 4.2 contains transitionary provisions for implementation of the 2018 Norms. Clause 4.2.3 thereof is substantially similar to Clause 3.1.2 as has been taken note herein above.

8. In the case at hand, Sub-committee of NCVT after having inspected the premises has already recommended the case of the petitioner for affiliation on 4th additional unit in the Electrician Trade and similarly, it is none of the case of the respondents that necessary affiliation of 4th additional

unit in Electrician Trade is not being given to the petitioner-Institute on account of FIR or any other investigation pending adjudication, rather precise case of the respondents is that as per current policy, it is mandatory to apply for re-affiliation to those ITIs, which are affiliated for more than five years and ITIs should have minimum four trades for affiliation.

9. Though at the cost of repetition, it may be again taken note that at no point of time, petitioner-Institute has applied for additional four trades, rather it simply prayed for affiliation of 4th additional unit in already existing Electrician Trade and as such, reason otherwise given in the impugned order dated 3.2.2021, rejecting case of the petitioner, is not sustainable being totally contrary to the 2018 Norms, but the moot question, which requires to be determined by this Court in the instant proceedings, is that whether existing institutes are/were required to upgrade to a minimum four trades before applying for affiliation of additional unit in already existing trade. Before exploring answer to the aforesaid question, this Court could lay its hand to communication dated 22.1.2020, addressed by the Directorate General of Training to all State Directors of training, which reads as under:

> *"As aware, every Institute affiliated with NCVT is to be re affiliated for every 05 years from date of affiliation and the Institute has to submit online application at least one year prior to expiry of affiliation/completion of five years of affiliation. Accordingly, DGT is receiving number of applications from the ITIs for renewal of afflation*
>
> *2. In this connection, it is to inform that due to administrative reasons the DGT will take up these applications applied for re-affiliation in due course of time. <u>However, status of affiliation of the particular ITI will remain the same until ITI is de-affiliated. Hence, the competent authority has decided that ITIs will be allowed to take admissions without insisting them for reaffiliation until further orders, subject to fulfilment of other criteria.</u>*

Unless otherwise stated, no ITI should send applications for Re-affiliation at this Directorate General.

3. The ITIs are advised to kindly visit the NCVT MIS Portal and follow the instructions published thereon on time to time."

10. It is quite apparent from the aforesaid communication that at present, status quo continues in respect of institutions, which are more than five years old and as of today, they can take admissions without applying for re-affiliation. In view of the aforesaid clarification issued by the Directorate General of Training, case of the petitioner-Institute is required to be decided without reference to the requirement of re-affiliation. ***First*** reason given by the respondents while passing impugned order is that it is mandatory to apply for re-affiliation to those ITIs, which are affiliated for more than five years, is not at all sustainable in view of the clarification issued by the Directorate General of Training. As far as ***second*** reason given in the impugned order that as per DGT norms and Guidelines, ITIs should have minimum four trades for affiliation, is not plausible at all because that cannot be applied while considering case of the petitioner for affiliation of additional unit in already existing trade in the institute. Norms of 2018, if read in conjunction, no where suggest that already existing ITIs are barred from applying for increase in the number of units if they do not have minimum four trades. Clause 2.1, as has been reproduced herein above, specifically deals with opening of new ITIs. As per this norm, ITIs can be opened for minimum four trades and minimum unit per shift per trades, but definitely there is no mention in the aforesaid clause that already existing ITIs shall be under obligation to add new trades to make them eligible for running ITI courses. Clause 3.1.2 as referred herein above, specifically deals with application for additional trades/units. As per this clause, no increase in intake shall be given to those ITIs against whom, some FIR or any other Investigation stands initiated by DGT on account of violation in the norms and standards.

Application for additional trades/units at the first instance shall be considered by sub-committee of NCVT for taking appropriate action. Clause 3.1.2 (iii) provides that addition of trades/units in existing ITIs shall be permitted only if the ITIs are complying with latest NCVT norms at least for additional trades/units Clause 3.7.1 provides for renewal of affiliation. As per the aforesaid clause, all the institutes shall be re-affiliated for every 5 years from date of affiliation and in this regard, institutes concerned shall submit online application at least one year prior to the expiry of affiliation/completion of five years of affiliation.

11. Though Mr. Rajinder Kumar, learned Central Government Standing Counsel, appearing for respondents No. 3 and 4, vehemently argued that party seeking permission to add trades/units is under obligation to comply with latest NCVT norms, wherein it has been provided that ITIs can be opened for minimum of four trades and minimum of one unit per trade, but we are unable to accept the aforesaid contention of learned Central Government Standing Counsel for the reason that latest NCVT norms nowhere cast substantive obligation, if any, upon the existing institute to establish at least four trades before seeking affiliation for additional trades/units in already existing trade. The reference in these instructions is to apply with latest NCVT norms. In the absence of norms requiring institute having four trades, the instructions do not support the case of the respondents. Bare reading of norms, as have been taken note herein above, clearly suggests that an institute seeking affiliation of 4th additional unit in already existing trade is required to comply with latest norms regarding infrastructure etc. Condition with regard to compliance of latest NCVT norms incorporated in the 2018 norms is not intended to address the minimum number of trades, which one institute may have, but it specifically indicates towards the standards and infrastructure an institute must have while seeking affiliation for additional unit in already existing trade.

12. High Court of Delhi vide judgment dated 19.5.2021, rendered in **W.P.(C) Nos. 94 and 99 of 2021** titled, ***Maya Devi Private ITI v. Directorate Genera*l of Training and Saraswati Private ITI v. Directorate General of training**, has also dealt with same proposition of law and has held as under:

> *"12. The other requirements of the 2018 Norms do not appear to me to put such a condition upon any old institution, so as to bar them from applying for increase in the number of units if they do not have a minimum of four trades. Each of the clauses cited on behalf of the DGT is dealt with below:*
>
> > *"(a) Clause 2.1 referred to hereinabove clearly refers only to new institutes. This is evident from the fact that this provision forms part of Chapter 2, which is titled "Accreditation and Affiliation Process for Establishing of ITI(s)". The quoted stipulation also expressly refers to the conditions upon which ITI(s) can be "opened".*
> >
> > *(b)As far as Clauses 3.1.2 and 4.2.3 are concerned, the condition stipulated for permission to add trades/units is that the institution should be in compliance with latest NCVT Norms for addition of additional trade/units. I am unable to accept the contention of learned counsel for the DGT that this introduces a substantive obligation upon the existing institutes to establish at least four trades, if they are to be granted permission for additional trades/units. The reference in these instructions, is to compliance with the latest NCVT Norms. In the absence of a norm requiring the existing institutions to have four trades, the instruction does not assist the case of the DGT at all. On a plain reading, it appears that the stipulation in fact requires the institute to comply with the latest norms regarding infrastructure etc. for the additional trades/units being permitted. The condition is intended not to address the minimum number of trades which the institutes must have, but the standards and infrastructure that must be available in the institute, for the additional trade or units which it proposes to establish."*

13. This position is supported by reference to the minutes of two meetings of the DGT's committees to which my attention has been drawn. The Recommendation Committee of the DGT at a meeting on 09.10.2019 [Agenda Item no. 9.5.7] recommended as follows:

> *"Agenda Item no. 9.5. 7*
>
> *REVIEW OF NORMS & CONDITIONS I.R.O. TRADE CAPACITY OF ITI(s) FOR SEEKING AFFILIATION*
>
> *It was informed that as per existing Affiliation norms, ITI(s) have to apply for minimum 4 trades for seeking affiliation. In some of cases, it was noticed that ITI(s) have applied for four trades but not having sufficient infrastructure against the 4 trades. In such cases, due to deficiencies in infrastructure, this committee had granted affiliation only in two/ three trades subject to condition that the ITI should fulfil the deficiency for the remaining trades within two months.*
>
> *The committee opined to issue clarifications in connection to the above norms/guidelines that ITI(s) have to get affiliation of at least in 4 different trades. In case, ITI does not have sufficient infrastructure, T&E etc. against the minimum 4 trades, neither partial nor conditional affiliation would be granted. Committee also advised to seek approval of the competent authority before issuing necessary clarifications." (Emphasis supplied.)*

14. The aforesaid decision was further considered in a meeting of the Committee held on 11.12.2020 [Agenda no. 17.9] wherein it was decided as follows:

> *"Agenda No 17.9: ITIs with minimum 4 trades-uniform policy on PAN India basis As decided in 9th Recommendation Committee meeting held on 9th October, 2019 vide agenda item 9.5.7 that New ITIs shall get affiliated for minimum 4 trades, however many existing ITIs are still running with less than 4 trades. Hence it is proposed that all ITIs shall run with minimum 4 trades, accordingly It is proposed the following:*

> *1. New ITIs shall get affiliated for minimum 4 trades, no partial affiliation will be granted.*
> *2. Existing ITI with less than 4 trades which are more than 5 years old shall get affiliated for minimum four trades by next admission session, failing which admissions to such ITIs will not be allowed in Future sessions.*
>
> *Recommendation committee:*
> *As per the Affiliation norms 2018, it is existing rule and shall be continued, as per the existing orders. However, for 2nd point the subcommittee will examine."*
>
> *(Emphasis supplied)*

15. Although reliance has been placed upon these minutes by both sides, I am of the view that they clearly indicate that even in the interpretation of the DGT, existing institutes were not required by virtue of the 2018 Norms to upgrade to a minimum of four trades. The meeting of 09.10.2019 refers to the requirement in the existing affiliation norms that ITI(s) have to apply for a minimum four trades for seeking affiliation. The implication is that this agenda item was concerned with applications of new institutes and not of existing institutes. Indeed, the opening words of the minutes of the meeting of 11.12.2020 quoted above, reflect the same understanding of the Recommendation Committee itself.

16. At the meeting of 11.12.2020, however, the Recommendation Committee proposed that all ITI(s) should run with a minimum of four trades and made the two recommendations quoted above. After noting the aforesaid proposal, the Committee specifically decided that the existing rule of the 2018 Norms would be continued as per the existing orders, and the second proposal would be examined by the Sub-Committee. These minutes place the matter beyond the pale of doubt. It was DGT's own interpretation that existing ITI(s) are, under the existing norms, permitted to run with less than four trades, and a proposal was made to establish a uniform rule that ITI(s) would not be permitted to run with less than four trades. It was also decided to refer this issue to a Sub-Committee. The DGT has not suggested that the proposal was accepted by the Sub-Committee or that any final decision was taken. Such a proposal therefore remains

just that, and does not constitute a binding decision which entitles the DGT to require affiliation with four trades, in respect of existing institutions, without notifying any fresh norms.

13. Besides above, Co-ordinate Bench of this Court while passing judgment dated 8.1.2021, passed in earlier petition i.e. CWP No. 6128 of 2020, filed by the petitioner, has already rejected the reasons, wherein same stand was taken by the respondents that case of the petitioner for affiliation for 4 additional units in Electrician Trade cannot be approved on account of non-reaffiliation after five years from the date of affiliation. Since aforesaid finding rendered by the Co-ordinate Bench in petition (supra) filed by the petitioner was never laid challenge, same has attained finality and as such, same is binding upon the respondents. However, in the case at hand, respondents ignoring the aforesaid categorical finding recorded by the court has again rejected the case of the petitioner vide impugned order dated 3.2.2021. Relevant paras of the afore judgment read as under:-

"It is evident that 4th Base Unit in Electrician Trade in petitioner institute was not approved by respondent No.3 on the ground that 'petitioner ITI was more than 5 years old and should apply for minimum 4 for affiliation by session 2021'. The reasons for rejecting the case of the petitioner, as contained in the impugned communication (extracted above) are not clearly worded. It does not stand to reason that an ITI in existence for five years should apply for minimum 4 for affiliation and having not applied for "minimum 4 for affiliation", its case for affiliation of 4th additional unit in Electrician Trade cannot be approved.

3(ii) It is the case of the petitioner that it had applied for additional 4th base Unit in Electrician Trade pursuant to generation of link on the webportal of respondent No.3 before the cut-off date. Petitioner has also placed on record the receipt in lieu of deposit of fees. The petitioner has also appended documents with the writ petition reflecting that in all the three stages of inspection, the duly constituted Sub-Committee of NCVT had recommended its case for addition of 4th base Unit in Electrician Trade.

3(iii) Respondent No.3 in its response to the writ petition has tried to come clear by advancing following reasons for rejection of petitioner's case:-

> *"2. That the Directorate General of Training (DGT) published the Affiliation Norms for ITI(s) Year-2018, whereby, some old norms have been revised and updated. As per these latest norms, ITI(s) are required to get affiliation for minimum 04 trades and minimum one unit per trade. Moreover, all the affiliated ITI(s) are required to get re-affiliation for every years from the date of affiliation. The institutes are required to submit online application at least one year prior to expiry of affiliation/completion of five years of affiliation. Copy of Affiliation Norms for ITIs year 2018 are annexed as annexure-R-3/1 (Colly). 3. That the matter of petitioner ITI, it is pertinent to mention that petitioner Institute has never applied for re-affiliation. Moreover, it is running single trade since 2011. Furthermore, it is also submitted that instead of applying for re-affiliation of petitioner ITI and affiliation for another three new trades than electrician, the petitioner ITI has applied for additional units in the same electrician trade, which cannot be considered as per prevailing norms. Accordingly, the application filed by the petitioner for the additional 4th Base unit has been rejected by the Recommendation Committee, DGT in its 16th meeting held on 25.11.2020."*

It is evident from the above extracted paras of respondent No.3's reply that according to the respondent as per Affiliation Norms for ITIs-year 2018:- (a) Affiliated ITIs are required to get re-affiliation for every five years from the date of affiliation (b) ITIs are required to get affiliation for minimum 4 trades and minimum one unit per trade. Petitioner unit is running since 2011 and has never ever applied for re-affiliation. Instead of applying for re-affiliation and for affiliation to the other three new trades, the petitioner had applied for additional unit in the

same electrician trade. The application filed by the petitioner for additional 4th base Unit in Electrician Trade was therefore rejected by the Recommendation Committee (DGT) in its 16th meeting held on 25.11.2020.

3(iv). Following clause from Affiliation Norms for ITIs year 2018 provides for re-affiliation:-

> *"Instructions for 3.7.1:*
> *All the institutes shall be re-affiliated for every 5 years from date of affiliation. The institutes shall submit online application at least one year prior to expiry of affiliation/completion of five years of affiliation."*

The petitioner institute was initially affiliated in the year 2011. The Affiliation Norms being pressed into service by respondent No.3 requiring re-affiliation after five years from the date of affiliation, came into existence in the year 2018. The ground of non re-affiliation, as a reason for rejecting petitioner's case was taken in the reply by respondent No.3. To this reply, petitioner has filed rejoinder with specific averments in para-2 that 'after 2018, the ITIs' can apply for affiliation etc., only on online portal, however, no link for the purposes of re-affiliation was ever generated on the site of the respondent'. No substantive rebuttal to this factual averment has been made by respondent No.3. In such circumstances, the reason now putforth in the reply for rejecting the case of the petitioner on the ground of its non re-affiliation after five years from the date of affiliation, does not hold good.

3(v). The petitioner ITI had applied for additional 4th base Unit in Electrician Trade with three shifts. Respondent No.3 submits that the petitioner was required to get affiliation for minimum four trades and minimum one unit per trade. Since the petitioner failed to do it therefore, its case was rejected. Learned counsel for respondent No.3 could not point out any provision in the Affiliation Norms 2018, which provides that an existing ITI has to get affiliation for minimum four trades."

14. Since two constitutional courts i.e. High Court of Delhi and this Court, in the judgments (supra) have already held that reliance of the DGT upon the requirement of a minimum of four trades in order for an existing institution to apply for additional units/trades is unsustainable, prayer made in the instant petition deserves to be accepted.

15. Consequently, in view of the detailed discussion made herein above as well as law relied upon, present petition is allowed and office memorandum dated 3.2.2021 (Annexure P-9) is quashed and set-aside and respondents are directed to consider the case of the petitioner for additional unit in terms of report given by the Subcommittee without insisting upon the condition of having minimum four trades within a period of six weeks from today. Accordingly, the present petition is disposed of along with all pending applications, if any.

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

Kalyan Singh ...Petitioner

Versus

Rasil Singh and others ...Respondents

CMPMO No. 25 of 2021
Decided on April 1, 2021

Code of Civil Procedure, 1908 – Order VII Rule 14 - Plaintiff filed suit against defendant for mandatory injunction directing defendant not to block the only path leading to his house – Application under order 7 Rule 14 CPC seeking permission to place on record enquiry report filed to prove that defendant had blocked the passage in 2015 which was opened with assistance of police – Application dismissed – Challenge thereof – Held, that there is no specific

detail of property in enquiry report – No fruitful purpose would be served by taking the said report on record – Petition dismissed. (Paras 4, 5).

For the petitioner	Mr. Pawan Gautam, Advocate.
For the respondents	Mr. Vivek Negi, Advocate, for respondents Nos. 1 and 2.
	Respondent No.3 ex parte.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Present petition filed under Art. 227 of the Constitution of India, lays challenge to an order dated 21.11.2020 passed by learned Senior Civil Judge, Nadaun, District Hamirpur, Himachal Pradesh, whereby an application under Order VII, rule 14 CPC, having been filed by the petitioner-plaintiff (hereinafter, 'plaintiff') seeking therein permission to place on record enquiry report submitted by one Kuldeep Singh, Head Constable No. 54, Police Station Nadaun, dated 12.1.2015, came to be dismissed.

2. Precisely, the facts of the case as emerge from the record are that the plaintiff filed a suit against the respondent-defendant (hereinafter, 'defendant') for mandatory injunction, directing defendant and or his assignees not to block the only path leading to the house of the plaintiff. learned Court below, after completion of pleadings, framed issues on 24.4.2018, whereafter, an application under Order VII, rule 14 CPC, came to be filed on behalf of the plaintiff seeking therein permission to place on record enquiry report, as detailed herein above. With the help and aid of the aforesaid report, plaintiff wants to prove that in the year 2015, defendant had blocked the passage leading to his house and same was subsequently opened with the intervention of the Police. Since learned Court below refused to take aforesaid

document on record, plaintiff has approached this Court in the instant proceedings, praying therein to set aside aforesaid impugned order dated 21.11.2020.

3. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by learned Court below, while passing impugned order dated 21.11.2020, this court finds no illegality or infirmity in the impugned order, as such, no interference is called for. Careful perusal of the enquiry report intended to be brought on record, reveals that in the year 2015, some passage allegedly blocked by the defendant was got opened by the police. Since defendant again blocked path, plaintiff was compelled to file the suit as referred to above seeking therein direction to the defendant not to block the only passage leading to the house of the plaintiff. Since there is no specific reference with regard to the land, over which defendant had caused obstruction, learned Court below, while dismissing the application filed under Order VII, rule 14 CPC, rightly observed that the report intended to be placed on record, cannot be said to have any kind of relationship with the suit property, especially when there is no mention, if any, of suit property. Though, having perused aforesaid enquiry report, this court finds that prior to filing of suit, there was some dispute *inter se* parties on account of obstruction caused to the path leading to the house of the plaintiff, but since the report does not contain specific details with regard to property, it is difficult to relate enquiry report with suit property.

4. Since there is no specific detail of property in enquiry report, no fruitful purpose would be served by taking aforesaid report on record. Moreover, factum with regard to enquiry report submitted by HC Kuldeep Singh was very much in the knowledge of the plaintiff at the time of filing of suit but no cogent and convincing reason has been assigned in the application for not filing the report alongwith suit. Though the plaintiff has claimed that aforesaid report was received by him under Right to Information Act after filing

of suit, but it is own admitted case of plaintiff that on the basis of aforesaid enquiry report, he had filed a contempt petition in the instant proceedings in the year 2017, against defendant for violating stay/injunction order. If aforesaid version is believed, even then there is no explanation as to why plaintiff waited for almost two years to move application under Order VII, rule 14 CPC seeking therein permission to place on record aforesaid enquiry report. Admittedly, in the case at hand, application under Order VII, rule 14 CPC, came to be filed in the year 2019, whereas, as per own case of plaintiff, aforesaid enquiry report had become available to him in the year 2016.

5. Consequently, in view of above, there is no illegality or infirmity in the impugned order, which is upheld. Petition is dismissed being devoid of any merit. Needless to say, it is always open for the plaintiff to file an application under Order XXVI, rule 9 CPC, for appointment of a local commissioner, to ascertain factum with regard to obstruction, if any, caused by the defendant on the path leading to his house. Material available on record reveals that plaintiff has already filed an application under Order XXVI, rule 9 CPC, praying therein for appointment of a local commissioner, which if not decided till date, be decided in accordance with law, by the learned Court below.

Pending applications stand disposed of. Interim direction, if any, is vacated.

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

The New India Assurance Company Limited ..Appellant

Versus

Jyoti Bala and others .....Respondents

FAO(MVA) No. 38 of 2017

Decided on: March 9, 2021

Motor Vehicle Act, 1988 – Section 173 – Respondents No. 1-3 (claimants) filed Petition under Section 166 on account of death of mother of respondents No. 1 & 2 and wife of respondent No. 3 – Petition allowed by MACT (III) Una and Insurance Company (Petitioner) held liable to pay compensation of Rs. 8,24,940/- alongwith interest @ 9% p.a. – Challenge thereof – Held, that vehicle in question was not being plied in violation of the terms and conditions of the Insurance Policy – Overwhelming evidence on record to suggest that offending vehicle i.e the motorcycle driven by respondent No. 3 resulting in serious injuries to Saroj Kumari (deceased) – However, no amount could have been awarded under the head of love and affection and loss of consortium/funeral charges also require to be assessed – Award passed by Ld. Motor Accident Claim Tribunal modified to Rs. 6,69,940/- - Appeal disposed of accordingly.

Cases referred:

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157;

Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;

For the appellant	:	Mr. Praneet Gupta, Advocate.
For the respondents	:	Mr. Dheeraj K. Vashishta, Advocate, for respondents Nos. 1 to 3. Mr. Gaurav Gautam, Advocate, for respondents Nos. 4 and 5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant petition filed under S. 173 of the Motor Vehicles Act, 1988 (hereinafter, 'Act') lays challenge to Award dated 29.9.2016, passed by learned Motor Accident Claims Tribunal (III), Una, District Una, in M.A.C. Petition No. 52/2013/2012, whereby learned tribunal below, while allowing

claim petition under S.166 of the Act, having been filed by the respondents Nos. 1 to 3/claimants (hereinafter, 'claimants'), saddled the appellant-Insurance company with the liability to pay a compensation of Rs.8,24,940/- alongwith interest at the rate of 9%, to the claimants.

2. Facts, as emerge from the record are that the claimants, by way of petition under S.166 of the Act, filed before Motor Accident Claims Tribunal (III), Una, District Una, claimed a sum of Rs. 10.00 Lakh as compensation on account of death of Smt. Saroj Kumari, who happened to be the mother of claimants Nos. 1 and 2 and wife of claimant No.3. According to the claimants, on 28.1.2011, respondent No.3 Lahori Ram had gone to Nanda Hospital alongwith his deceased wife, Saroj Kumari on motor cycle bearing registration No. HP19A-5708 but, while they were returning back to their home, a truck bearing registration No.HP64-6796, hit the motor cycle, as a consequence of which respondent No.3 and the deceased Saroj Kumari fell down on road and rear wheel of the truck crushed the head of the deceased, who died on the spot. Claimants Nos. 1 to 3 being dependent upon the deceased, filed claim petition before learned tribunal below, claiming compensation on account of mental agony and loss of love and affection. Besides above, claimants also claimed that a sum of Rs. 5,000/- spent by them on account of transportation of body of deceased from the hospital to Village Nakroh.

3. Respondents Nos. 4 and 5 being owner and driver of the vehicle filed a joint reply to the claim petition, claiming that the claimants are not entitled for any compensation because they were not dependent upon the deceased. Respondents though admitted that at the time of accident, vehicle was being driven by its driver, respondent No. 5, Jaswinder Singh, but denied that the accident took place on the relevant date, time and place.

4. Appellant-Insurance company, refuted the claim on the ground that the driver of the offending vehicle bearing registration No. HP64-6796 was not holding a valid and effective driving licence at the relevant time, as such, it is

not liable to indemnify the insured. Besides above, appellant-Insurance company also took a stand that since at the time of accident, vehicle was being driven in violation of the terms and conditions of insurance policy and the Act, it cannot be saddled with the liability to indemnify the insured.

5. On the basis of pleadings adduced on record by respective parties, learned tribunal below framed following issues on 13.3.2014:-

"1. Whether on 28.01.2011 at around 2.00PM .. chowk at Jhalera, the respondent No.2 was driving vehicle No. HP-64-6796 in a rash and negligent manner and by his rash and negligent driving, hit Smt. Saroj Kumari, who later on succumbed to injuries, as alleged? OPP
2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation, if so, how much and from whom? OPP
3. Whether petition is not maintainable? OPR
4. Whether the petition is bad for non-joinder of necessary parties? OPR
5. Whether the driver of truck No. HP-64-6796 was not holding valid and effective driving license? OPR-3
6. Whether the truck in question was being plied in violation of terms and conditions of insurance policy? OPR-3
7. Whether the present petition is result of collusion between petitioners and respondents No. 1 & 2? OPR-3
8. Relief:"

6. Subsequently, vide impugned Award dated 29.9.2016, learned tribunal below, on the basis of evidence led on record by respective parties, allowed the claim petition and saddled the appellant-Insurance company with the compensation of Rs.8,24,940/- to be paid to respondents Nos. 1 to 3 alongwith simple interest at the rate of 9% per annum from the date of filing of petition till the date of realization. In the aforesaid background, appellant-Insurance company has approached this Court in the instant proceedings.

7. Having heard learned counsel for the parties and perused the material available on record, this court finds that primarily challenge to the impugned

award has been laid by the appellant-Insurance company on two grounds viz., (1) amount awarded under conventional heads is on higher side and is against the judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157 and (2) since the vehicle in question was being driven by its driver without any valid and effective driving licence, learned Tribunal below ought not have burdened the appellant-Insurance Company with the compensation to be awarded to the claimants.

8. Though, careful perusal of the Award impugned in the instant proceedings, certainly reveals that learned Tribunal below, while awarding certain amounts under the conventional heads has failed to take note of law laid down by Hon'ble Apex Court in **Pranay Sethi** (supra), however, having carefully scanned the evidence available on record, this Court finds no merit in the other grounds raised by appellant-Insurance Company. Since the complainants have successfully proved on record that at the time of alleged accident, respondent No.5 i.e. driver was having valid and effective driving licence and vehicle in question was not being plied in violation of the terms and conditions of the insurance policy, appellant-Insurance Company has been rightly held liable to indemnify the insured.

9. Though, in the instant case, appellant-Insurance Company has made an attempt to carve out a case that the claimants were unable to prove that the deceased Saroj Kumari expired after being hit by the truck in question, but there is overwhelming evidence available on record, suggestive of the fact that on the date of alleged accident, the offending vehicle hit the motor cycle being driven by claimant No.3, as a consequence of which, respondent No.3 as well as deceased, Saroj Kumari sustained serious injuries. Moreover, this Court finds from the record that the appellant-Insurance Company did not lead any evidence in this case, and as uch, there appears to be no occasion for

this Court to accept the aforesaid contentions raised on behalf of the appellant-Insurance Company, at this stage.

10. However, learned counsel appearing for the appellant-Insurance Company, while referring to **Pranay Sethi** (supra) argued that the amount awarded under the heads of loss of love and affection is wrong and further higher amounts have been awarded under the heads of loss of consortium and funeral charges are on higher side. In **Pranay Sethi** (supra), Hon'ble Apex Court has held as under:

> "59. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the

deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

10. As per judgment (supra), no amount could have been awarded under the head of loss of love and affection and as such, award deserves to be modified on this account also. Further the amounts under other heads of loss of consortium to claimant No.3 and funeral charges also require to be assessed as per **Pranay Sethi** (supra). Besides this, learned Tribunal below has not awarded any sum under the head of loss of estate, which is required to be given to the claimants as per judgment (supra).

11. At this stage, learned counsel for the appellant-Insurance Company argued that this Court has no power to award any extra amount/enhance the amounts already awarded by learned Tribunal below, since no cross-objections/appeal has been filed by the claimants. On the issue of power of an appellate court to make additional award, reference may be made to a judgment rendered by Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, whereby, it has been

held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

12. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, this Court deems it fit to modify the award passed by learned Tribunal below as under:

Head	**Amount**
Loss of dependency (to claimants Nos. 1 to 3 only)	599940
Loss of estate (to claimants Nos. 1 to 3 only)	15000
Funeral charges (to claimants Nos. 1 to 3 only)	15000
Total	**629940**
Loss of consortium payable to claimant No.3	40000
Total compensation	**669940**

13. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and multiplier applied, and as such, same are upheld.

14. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is disposed of and impugned award passed by learned Tribunal below is modified to aforesaid extent only.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

Chaman Thakur ..Petitioner

Versus

Randhir Rana .....Respondent

Civil Revision No. 65 of 2020
Decided on: March 15, 2021

H.P. Urban Rent Control Act, 1987 – Section 24 – Application under Section 21 filed by Petitioner / tenant seeking permission to deposit the rent in the court dismissed by Rent Controller – Order affirmed by Ld. Additional District Judge – I – cum – Appellate Authority – Revision thereof – Held, that when prayer on behalf of tenant for deposit of rent in the court rejected, there was no occasion for the court to retain the amount in fixed deposit when no eviction petition was pending on account of arrears of rent – Revision disposed of with the observation that amount ordered to be deposited by the court shall be considered to be deposited towards arrears of rent if so held by Rent Controller in the eviction proceedings, if any, initiated by landlord on the ground of arrears of rent. (Paras 13, 14)

For the petitioner : Mr. Hitender Thakur, Advocate.

For the respondent **:** Ex Parte

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant revision petition filed under S.24(5) of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter, 'Act') lays challenge to order dated 17.12.2019 passed by learned Additional District Judge-I-cum-appellate authority, Shimla in Rent Appeal No. 69 of 2018, titled Chaman Thakur vs. Randhir Rana, affirming the order dated 13.11.2018 passed by learned Rent Controller, Court No.3, Shimla, whereby an application under S.21 of the Act read with Rule 8 of the Himachal Pradesh Urban Rent Control Rules, 1990 (hereinafter, 'Rules') having been filed by the petitioner-tenant, seeking therein permission to deposit the rent in the court, came to be dismissed.

10. On taking cognizance of the grounds taken in the revision petition, this Court issued notice to the respondent vide order dated 5.11.2020, but despite service, he has chosen not to come present, as such, he is ordered to be proceeded against ex parte.

11. Having heard learned counsel for the petitioner and perused the material available on record vis-à-vis the reasoning assigned in the impugned order, this Court finds that since the respondent-landlord (hereinafter, 'landlord') refused to accept the rent from the tenant and also withheld water supply, tenant allegedly made an attempt to give cheque amounting to Rs. 32,000/- to the landlord on account of arrears, which he refused to accept. Since the landlord refused to accept the cheque amounting to Rs. 32,000/- on account of arrears of rent, tenant by way of petition under S.21 of the Act, sought permission of the learned Rent Controller, Court No.3, Shimla to deposit an amount of Rs. 32,000- in the court by way of demand draft. Since,

aforesaid application having been filed by the tenant came to be rejected, petitioner has approached this Court by way of instant proceedings.

12. Having taken note of the fact that the tenant in his application neither specifically pleaded about the mode and manner in which he made an attempt to pay sum of Rs. 32,000/- nor proved the same by leading cogent and convincing evidence, this Court finds no illegality or infirmity in the impugned order passed by learned court below inasmuch as rejection of prayer made on behalf of the petitioner qua deposit of arrears of rent in the court is concerned, however, there appears to be considerable force in the submission made by the learned counsel for the petitioner that once the application seeking therein permission to deposit rent in the court was dismissed by court below, demand draft annexed with the application ought to have been returned to the petitioner.

13. Careful perusal of order dated 13.11.2018 passed by learned Rent Controller reveals that though the learned Rent Controller dismissed the application but directed the Nazir to keep the amount in the fixed deposit. Once, no eviction proceedings, if any, were pending in the court below, that too, on account of arrears of rent, there was no occasion for the court below to retain the aforesaid amount, especially when prayer having been made on behalf of tenant for deposit of rent in the court was rejected. Once the application, seeking therein permission to deposit the rent in the court is rejected, amount, if any, sought to be deposited or tendered in the court by way of demand draft, cannot be said to be valid tender of arrears of rent. In the normal circumstances, court, after rejection of application as referred to above, ought to have ordered refund of amount to the tenant.

14. Consequently, in view of above, present revision petition is disposed of with the observation that the amount ordered to be deposited by the Court vide impugned order dated 13.11.2019, shall be considered to be deposited towards arrears of rent, if so, held by learned Rent Controller in the eviction

proceedings, if any, initiated at the behest of landlord on the ground of arrears of rent.

All pending applications also stand disposed of.

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

Pradeep Chaudhary ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. Revision No. 66 of 2021
Reserved on: April 8, 2021
Decided on April 19, 2021

Code of Criminal Procedure, 1973 – Section 397 – Criminal revision against order passed by Ld. Additional Sessions Judge, Nalagarh dated 12-02-2021 vide which prayer for stay of conviction in case titled State of H.P. ---Vs.--- Mahesh Kumar & ors. was rejected – Held, that order granting stay of conviction is not the rule but an exception to be resorted in rarest of rare case, depending upon facts – Petitioner being MLA, will be disqualified on account of conviction in terms of Section 8(3) Representation of People Act 1951 and the present case falls under "exceptional" case which calls for stay of conviction recorded by learned trial court as it would lead to serious consequences – Petition allowed – Conviction recorded by trial court against petitioner stayed till final adjudication of the appeal.

Cases referred:

Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460;
Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473;
Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020)7 SCC 1;
Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283;
K.C. Sareen v. CBI, Chandigarh, 2001 (3) RCR (Criminal) 718: JT 2001 (6) SC 59;
Krishnan and another Versus Krishnaveni and another, (1997) 4 SCC 241;
Lily Thomas v. Union of India, (2013) 7 SCC 653;
Lok Prahari v. Election Commission of India, (2018) 18 SCC 114;
Novjot Singh Sidhu vs. State of Punjab, (2007) 2 SCC 574;

Padam Singh v. State of U.P., (2000) 1 SCC 621;
Ravikant S. Patil vs Sarvabhouma S. Bagali (2007) 1 SCC 673;
Retti Deenabandu and others v. State of Andhra Pradesh, 1977 SCC (Crl.) 173;
Shyam Narain Pandey v. State of U.P. (2014) 8 SCC 909;

For the petitioner	Mr. N.S. Chandel and Mr. B.C. Negi, Senior Advocates with Mr. Vikram Thakur, Advocate.
For the respondent	Mr. Ashok Sharma, Advocate General with Mr. Arvind Sharma, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant criminal revision filed under S. 397 CrPC, challenge has been laid to order dated 12.2.2021 passed by learned Additional Sessions Judge, Nalagarh, District Solan, in an application No.21/2021 filed in Cr. Appeal No. 21-NL/4 of 2021, titled Pardeep Chaudhary vs. State of Himachal Pradesh, whereby learned court below though suspended the sentence imposed upon the petitioner by learned Judicial Magistrate 1st Class, Court No.2, Nalagarh, District Solan, Himachal Pradesh vide judgment dated 14.1.2021 in Cr. Case No. 30/2 of 2013 titled state of HP vs. Mahesh Kumar and others, but rejected his prayer to stay the conviction recorded by learned court below in the aforesaid case.

2. For having bird's eye view, certain undisputed facts as emerge from the record are that a police challan under Ss. 143, 341, 147, 148, 149, 353, 332, 324 and 435 IPC and Ss. 3 and 4 of Prevention of Damage to Public Property Act, came to be presented in the court of learned Judicial Magistrate First Class, Court No.2 Nalagarh, District Solan, against the accused persons

including the petitioner, who at the relevant time was an elected member of legislative assembly in the State of Haryana.

3. Learned trial Court on the basis of evidence led on record by the prosecution, found the petitioner and other accused guilty of having committed offences punishable under Ss. 143, 341, 147, 148, 149, 353, 332, 324 and 435 IPC and accordingly, convicted and sentenced them as under:

Sr. No.	Section	Duration of imprisonment	Quantum of fine (in Rs.)
Under Indian Penal Code			
1.	143	6 months	5000
2.	147	2 years	10000
3.	148	3 years	10000
4.	324	3 years	10000
5.	332	3 years	10000
6.	341	1 month	500
7.	353	2 years	10000
8.	435	3 years	10000
Under Prevention of Damage to Public Property Act			
9.	3	3 years	10000
10.	4	3 years	10000

4. Being aggrieved and dissatisfied with aforesaid judgment of conviction recorded by learned trial Court, petitioner preferred an appeal in the court of learned Sessions Judge, Solan camp at Nalagarh/Additional Sessions Judge, Nalagarh, District Solan, Himachal Pradesh. Alongwith aforesaid appeal, petitioner also filed an application under Section 389(2) CrPC praying therein to stay/suspend the sentence and conviction imposed/recorded by learned trial Court during the pendency of the appeal. Learned Additional Sessions Judge below, vide order dated 12.2.2021, though suspended the sentence imposed by learned trial Court, subject to petitioner's depositing entire fine amount, but refused to stay the conviction. In the

aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein to stay the conviction after setting aside aforesaid order passed by learned first appellate court to the extent prayer of the petitioner for staying the conviction has been declined.

5. Mr. B.C. Negi and Mr. N.S. Chandel, Learned senior counsel duly assisted by Mr. Vikram Thakur, Advocate, representing the petitioner, vehemently argued that the impugned order passed by first appellate court below rejecting the prayer to stay the conviction deserves to be set aside, being totally contrary to the law laid down by Hon'ble Apex Court. Learned senior counsel further argued that the court below, while considering the prayer made on behalf of the petitioner to stay the conviction, has failed to take note of the consequences which will follow in the event of conviction being not stayed. They further stated that on account of judgment of conviction passed by learned trial Court, petitioner has been rendered disqualified to remain as a Member of Legislative Assembly in terms of S.8(3)of the Representation of the People Act, 1951. He submitted that the refusal to stay the conviction by learned court below would not only stifle the voice of the electorate, which elected the petitioner in the year 2019 for five years, but in the event of appeal being allowed, petitioner would suffer irreparably because, in that event, the tenure of the petitioner as an MLA shall come to an end, for which he cannot be compensated subsequently. Lastly, learned senior counsel, while making this court peruse the evidence adduced by the prosecution, vehemently argued that the findings of learned trial Court with regard to involvement of the petitioner in the alleged crime, are not based on cogent and convincing evidence, rather, the learned trial Court has been merely swayed by the fact that the public property has been damaged in the alleged incident. Learned senior counsel argued that the evidence available on record, nowhere proves beyond reasonable doubt that the petitioner was a part of the unlawful assembly and he incited violence. Learned senior counsel further argued that

the present is an "exceptional" case, where membership of the petitioner in the legislative assembly is at stake and as such, conviction in the case at hand deserves to be stayed.

6. Mr. Ashok Sharma, learned Advocate General, while supporting the impugned order passed by learned court below, contended that the judgment of conviction recorded by trial court is based on sound reasoning and evidence and it cannot be said that case of petitioner comes under purview of 'exceptional' case. He further argued that the offences committed by the petitioner being a Member of Legislative Assembly, not only show utter disregard of the petitioner to the rule of law but also reflects his criminal bent of mind. Learned Advocate General argued that the case of petitioner does not come within the ambit of 'exceptional' case because very purpose of Section 8(3) of the Representation of the People Act, 1951 is to prevent entry of persons, having criminal background, in the legislative bodies. Learned Advocate General further argued that otherwise also, pursuant to conviction and sentence imposed by learned trial Court, petitioner stands disqualified as a Member of Legislative Assembly in terms of S. 8(3) of the Representation of the People Act, 1951 and as such, it cannot be said that in case judgment of conviction is not stayed, serious consequences would follow. Learned Advocate General contended that the law is equal for all and no distinction can be carved out on the ground of petitioner being an elected Member of Legislative Assembly. Lastly, learned Advocate General contended that the revisional jurisdiction can only be invoked, where decision under challenge is grossly erroneous and findings recorded are based on no evidence but since in the case at hand, judgment of conviction is based on proper appreciation of law, no interference is called for, especially in exercise of power under revisional jurisdiction.

7. I have heard learned counsel for the parties and perused the material available on record.

8. Before ascertaining correctness and genuineness of the submissions made by learned senior counsel representing the petitioner, this court, at the first instance, deems it fit to deal with the scope of revisional and inherent jurisdiction of this Court under S.397 CrPC.

9. Bare perusal of S.397 CrPC, reveals that the court having revisional jurisdiction has power to call for and examine the record of any proceedings before any inferior criminal court situate within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court. Object of this provision is to set right a patent defect or an error of jurisdiction or law, however, there has to be a well-founded error and it may not be proper or appropriate for court to scrutinize order which on the face of it appears to be passed on careful consideration of material available on record. Revisional jurisdiction can be invoked, where decision under challenge is grossly erroneous and there is no compliance with the provision of law. Besides above, court can also exercise revisional jurisdiction if it finds that the order sought to be laid challenge is based on no evidence and the court passing the same has ignored the material evidence. By now it is well settled norm that the revisional jurisdiction is not to be exercised in a routine manner rather court should keep in mind that the exercise of revisional jurisdiction should not lead to injustice ex-facie. Reliance is placed upon judgment rendered by Hon'ble Supreme Court in **Amit Kapoor** v. **Ramesh Chander**, (2012) 9 SCC 460, wherein Hon'ble Apex Court has held as under:

> "13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to

whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C"

10. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, 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 or sentence or order. The relevant para of the judgment is reproduced as under:-

"8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the 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."

11. Hon'ble Apex Court in the judgment (supra) 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.

12. Though, there is no disagreement *inter se* parties, that the appellate court below, while suspending the sentence imposed by trial court under S.389(2) CrPC, has also the power to stay the conviction recorded by trial court in exceptional cases but yet this Court deems it fit to take note of some of judgments rendered by Hon'ble Apex Court on the subject in recent times, wherein it has been held that stay of conviction by an appellate court is an exception to be resorted to in rarest of rare cases.

13. In **Novjot Singh Sidhu** vs. **State of Punjab**, (2007) 2 SCC 574, Hon'ble Apex Court held that stay of order of conviction by appellate court is an exception to be resorted to in rarest of rare cases, after the attention of the appellate court is drawn to the consequences, which may ensue if conviction is not stayed. Hon'ble Apex Court in the judgment (supra) has held as under:

> "6. The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

14. Hon'ble Apex Court in **Ravikant S. Patil** vs **Sarvabhouma S. Bagali** (2007) 1 SCC 673, while reiterating aforesaid law laid down in **Navjot Singh Sidhu** (supra) further clarified that the disqualification arising out of conviction ceases to operate, after stay of the conviction.

15. Recently, a three-judge Bench of Hon'ble Apex Court in **Lok Prahari** v. **Election Commission of India,** (2018) 18 SCC 114 has summarized law on this point as under:

> "12. Section 389 of the Code of Criminal Procedure, 1973, empowers the appellate court, pending an appeal by a convicted person and for reasons to be recorded in writing to order that the execution of a sentence or order appealed against, be suspended. In the decision in Rama Narang v Ramesh Narang 5 , a Bench of three judges of this Court examined the issue as to whether the court has the power to suspend a conviction under Section 389 (1). This Court held that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, 1973. But in certain situations, it can become executable in a limited sense upon it resulting in a disqualification under other enactments. Hence, in such a case, it was permissible to invoke the power under Section 389 (1) to stay the conviction as well. This Court held:
>
> "19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in 4 Section 389 provides as follows :

"Suspension of sentence pending the appeal; release of appellant on bail. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. (2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto. (3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate

Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.
(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced." 5 (1995) 2 SCC 513 Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1)of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code."

11 In Navjot Singh Sidhu v State of Punjab 6 a Bench of two learned judges of this Court held that a stay of the order of conviction by an appellate court is an exception, to be resorted to in a rare case, after the attention of the appellate court is drawn to the consequences which may ensue if the conviction is not stayed. The court held:
"The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

12 The above position was reiterated by a Bench of three judges of this Court in Ravikant S Patil v Sarvabhouma S Bagali 7 , after adverting to

the earlier decisions on the issue, viz. Rama Narang v Ramesh Narang (supra), State of Tamil Nadu v A. Jaganathan8, K.C. Sareen v CBI, Chandigarh9, B.R. Kapur v State of T.N. (supra) and State of Maharashtra v Gajanan.10 This Court concluded as follows:-

"15. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying that consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction."

16. These decisions have settled the position on the effect of an order of an appellate court staying a conviction pending the appeal. Upon the stay of a conviction under Section 389 of the Cr.P.C., the disqualification under Section 8 will not operate. The decisions in Ravi Kant Patil and Lily Thomas conclude the issue. Since the decision in Rama Narang, it has been well-settled that the appellate court has the power, in an appropriate case, to stay the conviction under Section 389 besides suspending the sentence. The power to stay a conviction is by way of an exception. Before it is exercised, the appellate court must be made aware of the consequence which will ensue if the conviction were not to be stayed. Once the conviction has been stayed by the appellate court, the disqualification under sub-sections 1, 2 and 3 of Section 8 of the Representation of the People Act 1951 will not operate. Under Article 102(1)(e) and Article 191(1)(e), the disqualification operates by or under any law made by Parliament. Disqualification under the above provisions of Section 8 follows upon a conviction for

one of the listed offences. 11 Id at page 673 Once the conviction has been stayed during the pendency of an appeal, the disqualification which operates as a consequence of the conviction cannot take or remain in effect. In view of the consistent statement of the legal position in Rama Narang and in decisions which followed, there is no merit in the submission that the power conferred on the appellate court under Section 389 does not include the power, in an appropriate case, to stay the conviction. Clearly, the appellate court does possess such a power. Moreover, it is untenable that the disqualification which ensues from a conviction will operate despite the appellate court having granted a stay of the conviction. The authority vested in the appellate court to stay a conviction ensures that a conviction on untenable or frivolous grounds does not operate to cause serious prejudice. As the decision in Lily Thomas has clarified, a stay of the conviction would relieve the individual from suffering the consequence inter alia of a disqualification relatable to the provisions of sub-sections 1, 2 and 3 of Section 8."

16. Besides aforesaid judgment in **Lok Prahari** (supra), wherein Hon'ble Apex Court has taken note of all the earlier judgments rendered on the subject, it would be apt to take note of another judgment of Hon'ble Apex Court in **Shyam Narain Pandey** v. **State of U.P.** (2014) 8 SCC 909, wherein Hon'ble Apex Court has held that since sentence can be suspended after recording reasons therefore no hard and fast rules/guidelines can be laid that what such exceptional circumstances are where stay can be granted.

17. It is quite apparent from the aforesaid law laid down by Hon'ble Apex Court from time to time that the appellate court besides enjoying power to suspend the sentence has also the power to stay the conviction but in exceptional cases. Order granting stay of conviction is not the rule but an exception to be resorted in rarest of the rare cases, depending upon the facts of the case. Since power to stay conviction is by way of an exception, before it is exercised, appellate court must be made aware of the consequence, which will ensue if conviction is not stayed. Power of suspension of conviction is vested to the appellate court to ensure that he conviction on untenable or

frivolous grounds does not operate to cause serious prejudice. Hon'ble Apex Court in **Lily Thomas** v. **Union of India**, (2013) 7 SCC 653, has clarified that the stay of the conviction would relieve the individual from suffering the consequence inter alia of a disqualification relatable to the provisions of sub-sections 1, 2 and 3 of Section 8 of the Representation of the People Act, 1951. Order of disqualification passed prior to order of stay of order of conviction ceases to operate after stay of conviction.

18. Guided by the aforesaid law laid down by Hon'ble Apex Court, this Court now shall make an endeavour to find out, "whether the present is an exceptional case for grant of stay of the conviction, during the pendency of appeal, or not?"

19. The precise allegation against the petitioner, who was an MLA from Kalka Constituency at the relevant time, is that on 13.6.2011, he was part of an unlawful assembly, which had gathered at Barotiwala Chowk, Baddi, to agitate against the death of one person namely, Sucha Singh resident of Paploha, who, allegedly after having seen the traffic police, had climbed an electricity pole, with an intention to commit suicide. Record reveals that on 31.5.2011, Police had stopped Sucha Singh, for checking and he was allegedly beaten by the Traffic Police and after that, Sucha Singh climbed the electricity police and got electrocuted. He was admitted in PGI Chandigarh and a case under S.309 IPC was registered against him. On 5.6.2011, both the arms of said Sucha Singh were amputated and unfortunately on 13.6.2011, he died. It is further alleged that body of Sucha Singh was taken to Barotiwala Chowk, Baddi by his relatives, who started protesting against the police administration. Relatives of the deceased blocked the roads, where the petitioner, who was an elected representative, was called by one Bhag Singh to talk with the police. It is further alleged that the unlawful assembly in furtherance of common object not only wrongfully disrupted the smooth running of traffic but also caused damage to the public property. Allegedly, the

accused person being member of unlawful assembly, voluntarily caused simple hurt to police personnel present on the spot. Complainant, Amarjeet Singh (PW-8) informed the police regarding the incident, on the basis of which FIR, Ext. PW-8/B, came to be registered. During investigation, one CD was prepared by Constable Bhupender Singh (PW-2) and same was handed over to the Dy.SP. vide memo Ext. PW-2/B. During investigation, Constable Bhupender Singh, PW-2 got one duplicate CD prepared from Thakur Studio. During the course of investigation, Police found involvement of the petitioner alongwith others and accordingly he came to be charged under the aforesaid provisions of law.

20. Learned senior counsel representing the petitioner and learned Advocate General representing the respondent-State, during their submissions, invited attention of this Court to the evidence led on record of the prosecution regarding alleged involvement of the petitioner in the incident. Bare perusal of the evidence adduced on record by the prosecution suggests that the prosecution made an attempt to carve out a case that the petitioner, who was an MLA of Kalka constituency, was leading a crowd, which had gathered to agitate the death of above said Sucha Singh and he not only incited the crowd to damage the public property and beat police personnel present on the spot, but he himself also participated in the acts of damage to the public property. Since the appeal having been filed by the petitioner is yet to be decided by appellate court, it may not be appropriate for this Court to comment or make observations with regard to appreciation of evidence by learned trial Court. However, it is quite apparent from the material available on record that the identification parade of the petitioner as well as other co-accused was not got conducted by the investigating officer from the persons, who had allegedly seen the petitioner and other accused actively participating in the alleged incident. Material available on record nowhere suggests that the plea of alibi, if any, ever came to be raised on behalf of the petitioner, rather,

his presence on the spot is admitted. Though the prosecution witnesses, to demonstrate involvement of the petitioner in the alleged offence, deposed before the learned trial Court that the petitioner was a member of the unlawful assembly and had incited the crowd to commit unlawful acts but if their statements are read in entirety, they nowhere suggest that, prior to the alleged incident, they had an occasion to see the petitioner, who was an elected Member of Legislative Assembly from Kalka constituency at the relevant time and as such, it is not understood that how, on the date of alleged incident, they could identify the petitioner by name, especially when majority of the prosecution witnesses have stated that the involvement of the petitioner in the case at hand was found during the investigation.

21. Learned Advocate General, while placing reliance upon judgment rendered by Hon'ble Apex Court in **Binay Kumar Singh** v. **State of Bihar**, (1997) 1 SCC 283, contended that the non-identification of the accused by the injured persons cannot have any adverse impact on the prosecution case.

22. Having carefully perused the aforesaid judgment rendered by Hon'ble Apex Court, this Court finds that the submission of learned Advocate General cannot be accepted for the reason that in the case before Hon'ble Apex Court, none of the injured witnesses, identified the accused but the non-injured witnesses had identified some of the accused. If the aforesaid judgment is read in its entirety, it clearly suggests that when size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as participant in the rioting. Hon'ble Apex Court has held as under:

> "31. We have noticed that Mritunjaya (A-23) and Parmanand Sharma) and Madan Mohan Sharma son of Ambica (A-24) were identified by more than two witnesses as participants in the occurrence. Out of those witness the testimony of PW-10 and PW-32 was accepted by both courts. As for the remaining appellants both courts have accepted the

testimony of at least three witnesses each as referring to each appellant. There is no rule of evidence that no conviction can be based unless a certain minimum number cf witnesses have identified a particular accused as member of the unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as member of an unlawful assembly. All the same when size of the unlawful assembly is quite large(as in this case) and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as participant in the rioting. In Masalti vs. The State of utter Pradesh (AIR 1965 SC 202), a Bench of four Judges Of this court has adopted such a formula. It is useful to extract it here :

> "Where a criminal court has to deal with evidence pertaining to the commission of an office involving a large number of offence and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident."

23. In the case at hand, no identification parade of the petitioner was got conducted by the Police and all the prosecution witnesses had an occasion /opportunity to see the accused including the petitioner for the first time during trial itself. Moreover, PW-8, complainant S.I. Amarjeet Singh has turned hostile. There cannot be any quarrel with the submission of learned Advocate General that the version put forth by prosecution witnesses, who subsequently turned hostile, is to be read in support of prosecution case, inasmuch as it supports the case of prosecution. In the case at hand, complainant in his examination-in-chief stated that the present petitioner alongwith some of the other agitators was talking to the officials present on the spot, but in the meantime, few persons from the crowd started pelting

stones. If aforesaid version given by PW-8, who was an eye witness to the incident, is taken into consideration, it suggests that the petitioner though being an elected Member of Legislative Assembly was with the crowd but, while he was talking to the authorities present on the spot, other members of the crowd, of their own, without there being any incitement from the petitioner, started indulging in unlawful activities.

24. Similar version with regard to the petitioner having a word/discussion with the officials present on the spot, has been put on record by PW-5 LHC Sunita, who, in her statement given to the Court, has stated that the present petitioner alongwith other agitators, was talking to the officials present on the spot. She further stated that two public vehicles i.e. one Mahindra Pikup bearing registration No. HP-12C-5441 and bus bearing registration No. HP-14A-3176 were damaged and burnt. It also transpires from the record that nine police personnel were injured in the incident, out of which three were examined by the prosecution i.e. Sunita (PW-5), SI Amarjeet (PW-8) and Brahm Dass (PW-12) and only Sunita (PW-5) has deposed exactly about the injuries and other official witnesses did not support the prosecution story.

25. Cross-examination conducted upon prosecution witnesses, if perused in its entirety, suggests that an attempt has been made by the defence to carve out a case that the crowd, which had gathered at Barotiwala Chowk, intended to submit memorandum to the Deputy Commissioner and in this regard, petitioner was talking to the police personnel present on the spot, but in the meantime, some members of the crowd became unruly and indulged in illegal activities. No evidence worth credence has been led on record to show that there was meeting of minds and there was a common object of the 'crowd' and the petitioner. Similarly, there appears to be no evidence to show that the petitioner had knowledge of the 'common object' of the crowd so as to attract provisions of S.149 IPC, especially, when it has

come in the evidence of PW-1, that the crowd, all of a sudden, got aggressive on seeing the police.

26. Though, learned Advocate General, while making this court peruse statements of PW-3, PW-4 and PW-5 made a serious attempt to persuade this Court to agree with his contention that the petitioner was not only present on the spot alongwith other agitators, rather he incited the crowd to indulge in illegal activities, but having carefully perused evidence available on record, this court finds it difficult to accept the aforesaid contention of learned Advocate General. Though the material available on record clearly suggests that the petitioner was present on the spot, at the time of alleged incident, but the evidence to demonstrate his active involvement in the crime is lacking.

27. Leaving everything aside, careful perusal of judgment of conviction rendered by learned trial Court, clearly suggests that the CD (Exhibit P-1) of the incident dated 13.8.2011 prepared by Constable Bhupender Singh (PW-2), through official handi-cam, weighed heavily with the learned trial Court, while concluding the guilt of the petitioner and other accused. It is not in dispute that certificate under S.65B of the Indian Evidence Act, never came to be rendered on record qua the authenticity of the aforesaid CD. Learned court below has concluded in its judgment that the CD is a document and has been proved by its maker, constable Bhupender, PW-2, who recorded the video and it is an admissible document because the person who created it, has been examined. Statement of PW-2 reveals that out of original CD Exhibit P1, a duplicate CD was got prepared from Thakur Studio. Prosecution examined the relevant person to prove the aforesaid fact i.e. Sudesh Kumar (PW-9), who stated that he prepared the duplicate CD on the instructions of police. However, he does not remember mark of CD. This witness was declared hostile. In his cross-examination, PW-9 testified that there are his signatures on memo Ext. PW-2/A. Learned trial Court has

observed in the judgment that S. 65 of the Indian Evidence Act differentiates between the original information and copies made therefrom, the former being primary evidence and latter being secondary evidence and requisite criteria under Section 65 is unnecessary if the original document itself is produced.

28. Aforesaid interpretation of S.65B of the Indian Evidence Act given by learned trial Court appears to be erroneous for the reason that at no point of time, handicam with which incident was recorded, came to be produced in the court, rather, CD prepared from recordings of handicam came to be produced on record. Once, the handicam was not produced, it was incumbent upon prosecution to place on record certificate under S.65B of the Indian Evidence Act. It is another aspect that even in the CD so produced by the prosecution, petitioner is nowhere seen either damaging the public vehicles or beating the police personnel present on the spot. There is yet another aspect of the matter that in the judgment, it has nowhere come that the CD prepared through the handicam has been proved in accordance with law.

29. Hon'ble Supreme Court in **Arjun Panditrao Khotkar** v. **Kailash Kushanrao Gorantyal**, (2020)7 SCC 1, has held as under:

> "73. The reference is thus answered by stating that:
>
> 73.1 Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65Bof the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.
>
> 73.2 The clarification referred to above is that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer,

computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as "…if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act…" is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,…" With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

73.3 The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers."

30. At this stage, learned Advocate General contended that S.65B of the Indian Evidence Act, talks about documents/recordings generated from the computer but since in the case at hand, recording was done from handicam, S. 65B cannot be made applicable, With a view to strengthen aforesaid submission, learned Advocate General placed reliance upon following judgments:

1. AIR 1961 (SC) 1325
2. (1985) 4 SCC 30
3. 1992 Supp (1) SCC 489
4. 1992 Supp (2) SCC 77
5. (1994) 6 SCC 479
6. (1995) 4 SCC 341
7. (2001) 7 SCC 525

31. While relying upon aforesaid judgments, learned Advocate General contended that when a particular word has not been defined under the statute, plain meaning of the word as used in common parlance is required to be given to that word.

32. Having perused aforesaid judgments relied upon by learned Advocate General, though this court sees no reason to differ with the aforesaid submission of learned Advocate General because admittedly when a particular word is not defined under the relevant statute/Act, it is to be given the meaning as understood in common parlance, however, aforesaid analogy cannot be applied to the word "computer" which though has not been defined under the Indian Evidence Act, but has been elaborately defined under the Information Technology Act, which reads as under:

> "2 (i) —computer‖ means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;
> (t) —electronic record‖ means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

33. If the definition as given to "electronic record" under Ss. 2(i) and 2(t) is read in its entirety, it clearly includes "handicam" also because that, besides recoding images, also records sound. The very object and purpose of amending the Indian Evidence Act, especially S.65 thereof is/was to prove electronic record as defined under aforesaid provisions.

34. Hon'ble Apex Court in **Anvar P.V.** v. **P.K. Basheer**, (2014) 10 SCC 473 has held as under:

> "20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.
>
> 22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

35. Though the court, while suspending the conviction and sentence, is required to go through whole evidence, without commenting on its merit, but, while carrying out such exercise, it requires to satisfy itself whether a strong case is made out against appellant or not? Prosecution is obliged to

prove its case beyond all reasonable doubts and not on preponderance of probabilities.

36. Petitioner was elected as an MLA in the year 2019, meaning thereby if the petitioner is/was allowed to complete his normal tenure, he would have served his constituency till the year 2024. Since the petitioner has rendered himself disqualified to be an MLA on account of conviction and sentence, which exceeds term of two years, he would not only be deprived of his membership in the legislative assembly but would it would also stifle the voice of electorate of the constituency of the petitioner, which not only elected him in the year 2019 but also at an earlier occasion in the year 2009. Besides above, petitioner would also be debarred from contesting the elections on account of his being convicted and sentenced for more than two years, in terms of S.8(3) of the Representation of the People Act, 1951, in case the conviction is not stayed. Though the appeal against judgment of conviction and order of sentence stands filed in the appellate court but since considerable time may be consumed in the disposal of the appeal, prayer has been made on behalf of the petitioner to stay the conviction so that he does not lose his membership and an opportunity to serve his constituency for the complete term of five years. Certainly in a democratic set up, restriction on exercise of such right can be considered hardship to the petitioner, especially if he is able to show that conviction and sentence are not based upon cogent and convincing evidence and he has a fair chance to succeed in appeal against the conviction and sentence recorded by the trial court.

37. Though the appeal of the petitioner is to be decided by the appellate court in the totality of evidence available on record, but having noticed aforesaid aspects of the matter, this court is of the view that the case at hand comes under the category of 'exceptional' case and, in case conviction is not stayed, petitioner's political career would be ruined. Besides above, this Court finds that on account of conviction, petitioner has been rendered

disqualified to be a Member of Legislative Assembly and, in case conviction is not stayed, he would not be able to contest the elections, which are otherwise bound to be held within six months of occurrence of the vacancy, as has been provided under Section 151A of the Representation of the People Act, 1951. Conclusion of appeal pending before appellate court may take some time, and in the event of appeal being allowed and petitioner being acquitted, he cannot be compensated for the loss of the term as MLA, which may even end by the time the appeal concludes.

38. In the case at hand, the petitioner has been rendered disqualified on account of conviction in terms of S.8(3) of the Representation of the People Act, 1951 and immediately after his disqualification, vacancy has occurred. Once vacancy has occurred, there is every likelihood of fresh election, which in any eventuality is to be conducted within a period of six months from the date of occurrence of vacancy.

39. Another submission of learned Advocate General that once the petitioner on account of conviction stands disqualified in terms of S.8(3) of the Representation of the People Act, 1951, order staying conviction shall have no relevance, is wholly misconceived and deserves outright rejection. Hon'ble Apex Court in **Lily Thomas** v. **Union of India**, (2013) 7 SCC 653 has categorically held that disqualification arising on account of conviction does not continue to operate after stay of conviction. Hon'ble Apex Court has held as under:

> "35. ... In the aforesaid case, a contention was raised by the respondents that the appellant was disqualified from contesting the election to the Legislative Assembly under sub-section 93) of Section 8 of the Act as he had been convicted for an offence punishable under Sections 366 and 376 of the Penal Code and it was held by the three-Judge bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification under sub-sections (1), (2) or (3) of Section 8 of the Act

will nto operate from the date of order of stay of conviction passed by the appellate court under Section 389 of the Code or the High Court under Section 482 of the Code."

40. True it is that power under S.389 CrPC is to be exercised sparingly and with circumspection so as to stay the conviction, yet it is equally true that principle of law is to be applied as per peculiar facts and circumstances of each case. There cannot be a straightjacket formula rather, each case is to be examined in its own peculiar facts and circumstances. In case, conviction of petitioner is not stayed, he will suffer the consequences, which cannot be compensated subsequently in any terms and are irreversible.

41. In case **Padam Singh** v. **State of U.P.**, (2000) 1 SCC 621, Hon'ble Apex Court has held that presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court.

42. In **Retti Deenabandu and others** v. **State of Andhra Pradesh**, 1977 SCC (Crl.) 173 , Hon'ble Apex Court has held that the conviction for an offence entails certain consequences. Conviction also carries with it a stigma for the convicted person. A convicted person challenging his conviction. in appeal not only seeks to avoid undergoing the punishment imposed upon him as a result of the conviction, but he also wants that other evil consequences flowing from the conviction should not visit him and that the stigma which attaches to him because of the conviction should be' wiped out.

43. Reliance placed by learned Advocate General on judgment rendered by Hon'ble Apex Court in **K.C. Sareen** v. **CBI, Chandigarh**, 2001 (3) RCR (Criminal) 718: JT 2001 (6) SC 59, may not have much bearing on the present case. In the aforesaid judgment, Hon'ble Apex Court has held that when a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that

he should be treated as corrupt until he is exonerated by a superior court. However, the petitioner, in the case at hand is not charged under Prevention of Corruption Act, rather, under Indian Penal Code that too for not having committed any heinous crime such like murder, rape, dacoity or the cases of moral turpitude. Moreover, after passing of judgment in **K.C. Sareen** (supra), Hon'ble Apex Court has rendered a number of judgments, wherein it has been held that judgment of conviction can be stayed in "exceptional" cases. Since, there is no hard and fast rule/guidelines as to what are those exceptional circumstances, Hon'ble Apex Court in **Shyam Narain Pandey** v. **State of U.P.** (2014) 8 SCC 909, has attempted to cull out certain circumstances, which can be termed to "exceptional" circumstances, as under:

> "5. It has been consistently held by this Court that unless there are exceptional circumstances, the appellate court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rule or guidelines as to what are those exceptional circumstances. However, there are certain indications in the Code of Criminal Procedure, 1973 itself as to which are those situations and a few indications are available in the judgments of this Court as to what are those circumstances.
>
> 6. It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving

> moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

44. In view of the law laid down by Hon'ble Apex Court and peculiar facts and circumstances of the case, it can be said that the present case falls under "exceptional" case, which calls for stay of the conviction recorded by learned trial Court, as it would lead to serious consequences for the petitioner. Having taken note of the peculiar facts and circumstances of the present case and the law laid down by Hon'ble Apex Court on the subject, this Court has no hesitation to conclude that it is just and expedient in the interests of justice to stay the conviction of the petitioner during pendency of appeal pending before learned Sessions Judge.

45. Accordingly, in view of the detailed discussion held supra and the law taken note above, present petition is allowed. Order dated 12.2.2021 passed by learned Sessions Judge, Solan camp at Nalagarh/Additional Sessions Judge, Nalagarh, District Solan, in application No.21/2021 filed in Cr. Appeal No. 21-NL/4 of 2021, titled Pardeep Chaudhary vs. State of Himachal Pradesh is modified and findings of conviction recorded by learned trial Court against the petitioner, are stayed, till the final adjudication of the appeal.

46. Reference as has been made to the evidence available on record, is for the purpose of determining/inferring exceptional case, if any, and observations, if any, made qua the evidence adduced on record by the prosecution shall not be construed to be a reflection on the merits of the

appeal pending before first appellate Court, which shall be decided on its own merit and in the totality of the evidence available before it.

All pending applications stand disposed of. Record of the court below, if received, be sent back forthwith.

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

Mohinder Singh and another .....Appellants

Versus

State of Himachal Pradesh ....Respondent

Cr. Appeal No. 81 of 2019
Decided on: March 2, 2021

Code of Criminal Procedure, 1973 - Section 374 – Appeal against judgment of conviction and order of sentence dated 02-03-2019 passed by Ld. Special Judge, Una under Ss. 447 and 34 IPC and Section 3 (1)(g) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Held, that no evidence to show that complainant was dispossessed by accused from land in question – No plausible explanation for the delay in filing FIR – Once possession of land in question not delivered to the complainant after culmination of partition proceedings, no question of his dispossession – Judgment/order of conviction passed by Learned Court below not legally sustainable – Appeal allowed – Impugned judgment of conviction set aside.

Cases referred:

Devi Singh and others vs. State of M.P. decided on 1.7.2002, (2003) CrLJ 147;
State of Rajasthan Etc. Gokula vs. Ram Bharosi & Ors, (1998) 6 SCC 564;

For the appellants : Mr. Vivek Singh Attri and Mr. Abhinav Purohit, Advocates.

For the Respondent **:** Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant appeal filed under S.374 CrPC, lays challenge to judgment of conviction and order of sentence dated 2.3.2019, passed by learned Special Judge, Una, District Una, Himachal Pradesh in Cr. Case No. 2 of 2016, whereby, learned Court below, while holding the appellants-accused (hereinafter, 'accused') guilty of having committed offences punishable under Ss. 447 and 34 IPC and S.3(1)(g) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter, 'Act'), convicted and sentenced them to undergo simple imprisonment for one month and to pay a fine of Rs. 500 /- each under Section 447 of IPC and in default of payment of fine to further undergo simple imprisonment for seven days. Besides this, accused have been convicted and sentenced to under go simple imprisonment for six months and to pay a fine of Rs. 5,000/- each for commission of offence punishable under S.3(1)(g) of the Act and in default of payment of fine to further undergo simple imprisonment for one month.

2. Facts, borne out from the record reveal that FIR No. 138 dated 19.8.2015 (Ext. PW-8/A) came to be lodged against the accused under Ss. 447 and 34 IPC and S. 3(1)(v) of the Act at Police Station Amb, District Una, Himachal Pradesh on the allegations that the land belonging to complainant Vinod Kumar, who is a member of the Scheduled Caste, measuring 0-01-53 Hectares comprising of Khasra No. 1509/775 (Khewat No. 192/181), situate in Village Harwal, Tehsil Amb, District Una, Himachal Pradesh has been wrongfully grabbed by the accused. Complainant named herein above alleged that he belongs to a Scheduled Caste and the accused persons, being upper class, have unauthorizedly occupied his land, as such appropriate action in

accordance with law be taken against them. After completion of investigation, police presented Challan in the competent Court of law. Learned Court below, on being satisfied that a prima facie case exists against the accused, framed charges against them for the commission of offences punishable under Ss. 447 and 34 IPC and S. 3(1)(g) of the Act and subsequently, on the basis of the evidence collected on record by the prosecution, held the accused guilty of having committed offences punishable under the aforesaid provisions of law vide impugned judgment of conviction and sentenced them, as per description given above.

3. Being aggrieved and dissatisfied with the impugned judgment of conviction and order of sentence passed by learned Court below, accused have approached this Court in the instant proceedings seeking their acquittal after setting aside the judgment of conviction recorded by learned Court below.

4. Having heard learned counsel for the parties and perused the evidence collected on record by the prosecution, this court finds that since the year 2004 accused were in illegal possession of the land owned by the complainant, Vinod Kumar but the FIR which ultimately culminated into Challan under S.173 CrPC, was filed approximately after 11 years of the alleged wrongful dispossession of the complainant from the land. Though the material available on record reveals that prior to filing of FIR in question, complainant had been raising issue with regard to his forcible dispossession from the land in question before other statutory authorities prescribed for redressal of grievances of persons belonging to Scheduled Caste category but till the date of filing of FIR, Ext. PW-8/A, no legal proceedings ever came to be instituted at the behest of the complainant seeking possession of his property/land, unauthorizedly occupied by the accused. Similarly, this court finds from the evidence collected on record by the prosecution that though by leading cogent and convincing evidence on record, prosecution has successfully proved on record that the land in question belongs to the

complainant, Vinod Kumar and same is in unauthorized possession of the accused, but there is no evidence worth credence that the complainant, Vinod Kumar was dispossessed by accused from the land in question. Complainant, Vinod Kumar while deposing as PW-1, stated that the accused persons are running a school and around the school, there is boundary wall, which has been constructed on his land. This witness also deposed that the spot was inspected firstly by Kanungo and thereafter by the Tehsildar and these authorities in their reports submitted to the higher authorities have categorically reported the factum with regard to unauthorized possession of the accused over the suit land. This witness (PW-1) in cross-examination, while admitting that he inherited disputed land from his father, also admitted that other co-sharers had assailed aforesaid order before the Collector, but he did not receive any such summons in this regard. This witness also admitted that the partition proceedings inter se cosharers were also initiated and thereafter, cosharers were put in possession of their respective shares. Most importantly, this witness categorically deposed in his cross-examination that since he was not present on the spot at the time of delivery of possession, he was not delivered the possession. Though, other prosecution witnesses namely PW-2 Gurmeet Singh, PW-3 Jeet Singh, PW-4 Ram Nath and PW-5 Anil Kumar, while supporting the version put forth by PW-1, complainant Vinod Kumar, categorically deposed that the accused have encroached upon the land of the complainant and demarcation was conducted in their presence but they nowhere stated that the complainant Vinod Kumar was put in possession qua share of land assigned to him in the partition proceedings. Otherwise also, if statements having been made by aforesaid witnesses are perused in conjunction, they suggest that the accused obstructed passage to the land of the complainant by erecting boundary wall. PW-7 Rameshwar Dass, Tehsildar has deposed that he directed the Kanungo to demarcate disputed land. This witness also deposed that PW-6 Kuldeep, Kanungo, after having demarcated

the disputed land furnished his report, which was accepted by him vide order dated 6.9.2015 (Ext. PW7/B). Aforesaid witness also produced on record reports Exts. PW-7/F, PW-7/G, PW-7/H, perusal whereof reveals that on the spot, it was fond that Khasra No. 1509/775 was in possession of the accused persons, whereupon they had planted trees and flowers. Similarly, report Ext. PW-7/G, reveals that Khasra No. 1509/775 was encroached by the accused. Document Ext. PW 7/H i.e. reply given to complainant by Tehsildar under the Right to Information Act shows that a boundary wall has been fixed around Khasra No. 1509/775, as a consequence of which path to the land comprised in Khasra No. 1509/775 has been blocked. PW-8 Jatinder, investigation officer has also stated that during investigation he found that Khasra No. 1509/775 was occupied by the accused. If statements made by the aforesaid prosecution witnesses are read juxtaposing the documentary evidence led on record by respective parties, this court finds that the land comprising of Khasra Nos. 1508/775, 1509/775 and 1512/776 was earlier part of Khasra No. 775, which was purchased and possessed by a number of co-sharers. During partition proceedings, initiated at the behest of some of co-owners, land comprising of Khasra No. 1509/775 fell in the share of complainant, Vinod Kumar. Perusal of Ext. DD reveals that the land comprising in Khasra No. 1510/775 owned by accused is adjoining to land comprising of Khasra No. 1509/775.

5. Though the reports Exts. PW-7/F and PW-7/G reveal that the accused have encroached upon land of the complainant in Khasra No. 1509/775, but once it a stands admitted by PW-1 complainant himself that he, after conclusion of partition proceedings, was never put in possession of land in question, there appears to be considerable force in the submission of Mr. V.S. Attri, learned counsel for the appellant, that since there was no evidence worth credence with regard to dispossession of complainant from the land, learned court below has erred while concluding guilt of the accused

under S.3(i)(g) of the Act. Besides the statement of PW-1 that he was not put into possession of land in question and he was not present at the time of delivery of possession, action taken report Ext. PW7/G submitted by Tehsildar Amb to Sub Divisional Officer(Civil), Amb, reveals that the complainant was contacted through mobile phone to remain present on the spot on 22.11.2014 but he showed his inability to remain present since he had undergone surgery. Perusal of aforesaid documents clearly reveals that the Tehsildar Amb pursuant to directions issued by Sub Divisional Officer(Civil), Amb, District Una, Himachal Pradesh visited the spot to ascertain the factum with regard to dispossession of the complainant, Vinod Kumar from the land in question by the accused. Aforesaid reports further reveal that the partition proceedings No. 178/P-2002 inter se cosharers were concluded on 1.10.2003, whereafter, Mutation No. 326, dated 23.11.2014 was entered /attested in favour of the respective cosharers qua the land in their possession. Father of the complainant Nikku Ram was allotted Khasra Nos. 775/3 (0-1-53) 776/1 (0-10-76) 777/1 (0-07-39) 777/3 (0-03-15) and 776/3 (0-04-09) Kita 5, measuring 0-26-92 Hectares, whereas accused, after conclusion of aforesaid partition proceedings, became owner by way of mutation No. 326, qua Khasra Nos. 1510/775 (0-01-54), 1513/776 (0-16-00) and 1519/777 (0-09-25), situate in Village Harwal, Nangal Jaryala. Tehsil Amb. In his report (Ext. PW-7/G), Tehsildar, Amb has submitted that he visited the spot in the presence of Col. Mahender Singh Parmar and Rekha Rani, Pradhan, Gram Panchayat Nangal Jaryala and after perusal of revenue record, he found that warrant of possession was executed on 26.11.2004 qua missal of partition No. 178/P-2002, attested on 1.10.2003. Though, as per the Misal of partition No. 178/P-2002, attested on 1.10.2003, possession was delivered on the spot to the parties but since it stands admitted by complainant Vinod Kumar that he was not present at the time of delivery of possession and no possession was delivered to him, it cannot be concluded that the complainant was

dispossessed from the land in question by the accused, who admittedly being cosharer were subsequently found to be in illegal possession of some portions of the land of the complainant, Vinod Kumar.

6. At the cost of repetition, it may be observed that though there is evidence to the effect that the accused are in unauthorized possession of land belonging to the complainant, but there is no evidence much less cogent evidence available on record, suggestive of the fact that accused forcibly dispossessed the complainant, Vinod Kumar from the land in question rather, there was dispute inter se so many cosharers qua specific portions of land jointly owned by them and in the partition proceedings initiated at the behest of a few of co-owners, land comprising of Khasra No. 1509/775 fell to the share of the complainant, Vinod Kumar. There is no evidence led on record to prove that after passing of order dated 1.10.2003 by the revenue authority in the partition proceedings, steps, if any, ever came to be taken by the complainant, Vinod Kumar for taking possession of land from the accused. Though, the factum with regard to illegal occupation of land belonging to the complainant, Vinod Kumar by accused was in the knowledge of the complainant since the year 2004, but despite this, he did not take any effective steps for taking back the possession of his land. Even the FIR which is subject matter of the present case, came to be lodged in the year 2015, i.e. after 11 years of partition proceedings, in which complainant Vinod Kumar was assigned his share, i.e. Khasra No. 1509/775 in the joint land. There is no plausible explanation for the delay in filing the FIR, save and except that the complainant had been pursuing his case before other statutory authorities.

7. Leaving everything aside, bare perusal of S. 3(i)(g) of the Act suggests that to attract aforesaid provision of law, it is incumbent to prove that the member of Scheduled Caste or Scheduled Tribe was wrongfully

dispossessed from the land or premises. It would be apt to reproduce S. 3(1)(g) of the Act as under:

> "3(1)(g) ....wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights, including forest rights, over any land or premises or water or irrigation facilities or destroys the crops or takes away the produce therefrom."

8. Though, in the case at hand, there is overwhelming evidence available on record that the accused have not only blocked /obstructed the passage going to the land of the complainant Vinod Kumar but they have also encroached upon the land belonging to the complainant by erecting boundary wall but, definitely there is no evidence that aforesaid land came to be occupied by the accused after dispossessing the complainant, Vinod Kumar from the land in question. Evidence, if read in its entirety, reveals that the accused alongwith other cosharers including complainant Vinod Kumar, were in possession of certain portions of the land, which admittedly prior to partition was joint inter se parties. Since there was dispute with regard to specific portions as well as extent of land, inter se some of co-sharers, some of the cosharers initiated partition proceedings and in those partition proceedings, Khasra No. 1509/775 measuring 0-01-53 Hectares fell to the share of the complainant Vinod Kumar. Though, in the aforesaid proceedings, complainant Vinod Kumar was also held entitled for possession of land comprised in Khasra No. 1509/775, but he himself has admitted in his statement that possession qua aforesaid land was never delivered to him. Once possession qua aforesaid land comprising of Khasra No. 1509/775 measuring 0-01-53 Hectares was not delivered to the complainant, Vinod Kumar, after culmination of partition proceedings, there is no question of his dispossession, if any, from the land in question, by the accused, who were admittedly owners of adjoining land comprising of Khasra No. 1510/775.

9. Though the prosecution with a view to prove possession of the complainant Vinod Kumar qua land in question has successfully proved on record that pursuant to order dated 1.10.2003 passed by revenue authorities in the partition proceedings, warrant of possession was issued in favour of complainant Vinod Kumar, but that itself is not sufficient to prove possession of the complainant Vinod Kumar over the land in question, especially, when there is no evidence led on record suggestive of the fact that pursuant to warrant of possession, complainant Vinod Kumar was ever put in actual physical possession of the land.

10. Leaving everything aside, PW-1 complainant Vinod Kumar has categorically admitted that since he was not present at the time of delivery of possession, he was not put in possession of land in question. Once, complainant Vinod Kumar (PW-1) himself has admitted that he was not put in possession of land in question, there was no occasion for learned Court below to hold accused guilty of having committed offence punishable under S. 3(1)(g) of the Act. Once, complainant was not put in physical possession of the land in question, there is/was no question of his dispossession from the same by the accused. Reliance is placed upon **Devi Singh and others** vs. **State of M.P.** decided on 1.7.2002, (2003) CrLJ 147, wherein, Madhya Pradesh High Court has held as under:

> "...there has to be actual dispossession from land or premises, belonging to the members of the category of Scheduled Castes or Scheduled Tribes or interference with the enjoyment. Unless this part of the section is met out, there can not be any prosecution for commission of the said offence much less conviction. Thus, the pre-requisite condition is either dispossession or interference with enjoyment of his rights over any land, premises or water. If the prosecution fails to fulfil this, then the necessary consequence would be acquittal of the charged persons."

11. To attract aforesaid provisions, it was incumbent upon the prosecution to prove that pursuant to issuance of warrant of possession in the partition proceedings, complainant, Vinod Kumar was put in physical possession of land in question and thereafter, he was wrongfully dispossessed from the same by the accused, however, such evidence in the case at hand is totally missing.

12. Similarly, there appears to be no evidence available on record, which can be said to be sufficient to rope in the accused under S.447 IPC, which provides punishment for commission of offence under S.441 IPC i.e. criminal trespass. Bare reading of S. 441 reveals that, "whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, shall be liable to be punished under S.447 IPC."

13. In the case at hand, as has been discussed in detail herein above, there is no evidence that after issuance of warrant of possession by revenue authorities, complainant, Vinod Kumar was put in physical possession of the land in question, as such, it could not have been held by learned Court below that the accused dispossessed complainant Vinod Kumar from his land comprising of Khasra No. 1509/775.

14. To prove offence if any, under S.441 IPC, it is also necessary to prove 'intent' of the accused to dispossess the complainant from his lawful premises or the land. In the case at hand, no evidence worth credence has been led on record by the prosecution that the accused with an intent to grab the land of the complainant unauthorizedly dispossessed him from his premises/land, as such, learned Court below has fallen in grave error while holding accused guilty of having committed offence punishable under S.447 IPC.

15. Reliance is placed upon **State of Rajasthan Etc. Gokula** vs. **Ram Bharosi & Ors**, (1998) 6 SCC 564, wherein, High Court has held as under:

“In the case of Rajinder v. State of Haryana (1995 5 SCC187) where one of us (Mukherjee,J.) was a party this Court was considering the issue of right of private defence available to accused under the provisions of the Indian Penal Code. The court said that the fascicle of Sections 96 to 106 IPC codify the entire law relating to right of private defence of person and property including the extent of and the limitation to exercise of such right. In that case after examining the record that Court was of the view that the only legitimate and reasonable inference that can the only legitimate and reasonable inference that can be drawn is that the accused party had gone to the disputed land with a determination to cultivate it and, for that purpose, fully prepared to thwart any attempt made by complainant party to disturb such cultivation and meet any eventuality. After referring to the provisions of various Sections aforementioned, this Court observed as under :-

> "It is evident from the above provision that unauthorised entry into or upon property in the possession of another or unlawfully remaining there after lawful entry can answer the definition of criminal trespass it, and only if, such entry can answer the definition of criminal trespass if, and only it, such entry or unlawful remaining is with the intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. In other words, unless any of the intentions referred in Section 441 is proved no offence of criminal trespass can be said to have been committed. Needless to say, such an intention has to be gathered from the facts and circumstances of a given case. Judged in the light of the above principles it cannot be said that the complainant party committed the offence of "criminal trespass" for they had unauthorisedly entered into the disputed land, which was in possession of the accused party, only to persuade the latter to party, only to persuade the latter to withdraw thereupon and not with any intention to commit any offence or to insult, intimidate or annoy them. Indeed there is not an iota of material on record to infer any such intention.

That necessarily means that the accused party had no right of private defence to property entitling them to launch the murderous attack. On the contrary, such murderous attack not only gave contrary, such murderous attack not only gave the complainant party the right to strike back in self-defence but disentitled the accused to even claim the right to private defence of person.

We hasten to add, that even if we had found that the complainant party had criminally trespassed into the land entitling the accused party to exercise their right, of private defence we would not have been justified in disturbing the convictions under Section 302 read with Section 149 IPC, for Section 104 IPC expressly provides that right of private defence against "criminal trespass" does not extend to the voluntary causing of death and Exception 2 to Section 300 IPC has no manner of application here as the attack by the accused party was premeditated and with an intention of doing more harm than was necessary for the purpose of private defence, which is evident from the injuries sustained by the three deceased, both regarding severity and number as compared to those received by the four accused persons. However, in that case we might have persuaded ourselves to set aside the convictions for the minor offences only, but then that would have been, needless to say, a poor solace to the appellants."”

16. In view of the detailed discussion made and the law taken note herein above, impugned judgment/order of conviction passed by learned Court below is not legally sustainable and deserves to be set aside being based on mis-appreciation of the evidence and provisions of the relevant law.

17. Consequently, present appeal is allowed. impugned judgment of conviction is set aside. Accused is acquitted of the offences charged against him. Bail bonds, if any, furnished by the accused are discharged. Record of the case be sent back forthwith. All pending applications also stand disposed of.

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

Ritesh Sharma .. Petitioner

Versus

Pardeep Kumar Samantaroy and another .....Respondents

CMPMO No. 213 of 2020
Decided on: March 31, 2021

Constitution of India, 1950 – Article 227 – **Code of Civil Procedure** – Order 6 Rule 17 – Suit for Permanent Prohibitory and mandatory injunction by Plaintiff – Preliminary objection raised in written statement with regard to authorization and competence of plaintiff to file the suit – Application under order 6 Rule 17 CPC filed by Plaintiff seeking amendment in the description of suit property and capacity of Plaintiff to file the suit – Amendment allowed by trial court – Challenge thereof – Held, that power to allow amendment is wide and can be exercised at any stage of proceedings – Proposed amendment would in no manner amount to changing the nature of suit as plaintiff wants to clarify his capacity to institute the suit – Impugned order upheld – Petition dismissed.

Cases referred:

Chakreshwari Construction Private Limited vs. Manohar Lal, (2017)5 SCC 212;

Gurbhaksh Singh and othersr vs. Buta Singh and another , 2018 AIR (SC) 2635;

Rajeev Kumar Singhal vs. Mukul Garh and others, 2019 (2) Him. L.R. (HC) 899;

For the petitioner : Mr. Vivek Singh Attri, Advocate.

For the respondents **:** Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Instant petition filed under Art. 227 of the Constitution of India, is directed against order dated 18.12.2019 passed by learned Civil Judge, Dalhousie, District Chamba whereby an application having been filed by respondent-plaintiff (hereinafter, 'plaintiff') under Order VI rule 17 CPC, praying therein for amendment of plaint came to be allowed.

2. For having a bird's eye view of the matter, certain undisputed facts emerge from the pleadings available on record are that plaintiff filed suit for permanent prohibitory and mandatory injunction restraining respondents/defendants (hereinafter, 'defendants') from interfering in any manner in the suit land comprised Khata Khatauni No.268/375, Khasra No. Kita 26, measuring 1-42-30 hectares situate at Mauja Bakrota, Tehsil Dalhousie, Chamba, Himachal Pradesh (hereinafter, 'suit land'). Defendants in their written statement to the plaint specifically raised preliminary objection with regard to authorization and competence of the plaintiff to file the suit. Apart from above, defendants claimed in the written statement that the subject "Khyber House" is different property from St. John Church and the shops and the houses adjoining to it. Defendants claimed that St. John Church is property of Indian Church Trustees (ICT). After having noticed aforesaid objection raised by defendants with regard to competence of the plaintiff to institute the suit and details of the suit property, plaintiff preferred an application under Order VI, rule 17 CPC, before framing of issues, seeking therein permission to amend plaint on the ground that at the time of filing of suit, plaintiff despite due diligence, inadvertently mentioned the name of church as "Saint John Church" whereas, its real name was "Sadhu Sunder Singh Chapel". Besides above, plaintiff also submitted that the words "and the shops" as mentioned in the description of suit property were also required to be deleted Plaintiff also claimed that while filing the suit, he was unable to

mention with regard to photographs he intended to place on record to demonstrate his ownership and possession. By way of amendment, plaintiff also prayed to clarify his capacity to file the suit as Bishop of Diocese of Amritsar and to correct the title of suit, from Chairman of Church of England, Jnana Mission Property to Bishop of Diocese of Amritsar, Chairman Church of England, Jnana Mission, which owns and possesses Church of England, Jnana Mission Property. Plaintiff claimed that the amendments sought by way of application are necessary for proper adjudication of the case.

3. Defendants opposed the aforesaid prayer made on behalf of plaintiff on the ground that the amendment soughts, if allowed would amount to changing the nature of the suit. Defendants claimed before learned court below that by way of amendment, plaintiff is seeking amendment in the title of suit and thereby introducing a new plaintiff as the suit has been filed for and on behalf of Bishop Diocese of Amritsar, Chairman, Church of England, Jnana Mission, which is a new entity and in case, aforesaid amendment is allowed, it would change title of the suit.

4. Learned court below, having taken note of pleadings adduced in the application at hand, proceeded to allow the amendment as prayed for. In the aforesaid background defendants have approached this Court in the instant proceedings praying therein to quash the order allowing the amendment.

5. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by learned court below, while passing impugned award this court finds no illegality or infirmity in the impugned order, as such, no interference is called for.

6. Mr. Vivek Singh Attri, learned counsel for the defendants vehemently argued that bare perusal of averments contained in the application seeking amendment to suit, itself suggests that the plaintiff has sought to change entire complexion of suit by way of amendment, which is not permissible under law.

7. Per contra, Mr. Aman Sood, learned counsel for the defendants, while supporting impugned award, submitted before this Court that proposed amendment if allowed, would in no manner change complexion of suit, rather would enable the learned court below to adjudicate controversy inter se parties in a most effective manner.

8. By now it is well settled that power to allow amendment is wide and can be exercised at any stage of proceedings in the interest of justice, provided that party seeking amendment is able to show that pleading sought to be incorporated by way of amendment could not be pleaded at first instance at the time of filing suit/written statement, despite due diligence. (See: **Gurbhaksh Singh and othersr** vs. **Buta Singh and another** , 2018 AIR (SC) 2635).

9. Similarly, Hon'ble Apex Court in **Chakreshwari Construction Private Limited** vs. **Manohar Lal**, (2017)5 SCC 212, has culled out certain principles while allowing or rejecting the application for amendment, which are as under:-

> "13. The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in several cases. In Revajeetu Builders and Developers vs. Narayanaswamy & Sons, (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)
>
> > "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
> >
> > (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
> >
> > (2) whether the application for amendment is bona fide or mala fide;
> >
> > (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation.

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

10. It is quite apparent from the aforesaid exposition of law, that court, while considering application under Order VI, rule 17 CPC for amendment of plaint is required to see whether proposed amendment, if denied, would, in fact, lead to injustice or lead to multiplicity of litigation. Similarly, it is also required to be seen by the court, while considering application under Order VI, rule 17 CPC, that whether application for amendment is bona fide or mala fide and amendment, if allowed, would fundamentally change the nature and character of the suit.

11. This Court in **Rajeev Kumar Singhal** vs. M**ukul Garh and others**, 2019 (2) Him. L.R. (HC) 899, has held that courts should be extremely liberal in granting prayer for amendment unless irreparable loss is caused to the other side.

12. In the case at hand it is not in dispute that the application seeking amendment of plaint came to be filed immediately after filing of written statement by the defendants, wherein defendants specifically took objection with regard to authorization and capacity of the plaintiff to file the suit. As has been observed above, court while exercising power under Order VI rule 17 CPC can proceed to allow amendments which are necessary for deciding the controversy inter se parties

13. In the case at hand, plaintiff filed suit for permanent prohibitory and mandatory injunction qua Khata Khatauni No. 268/375 Khasra Nos. Kita 26, measuring 01-42-30 Hectare situate at Mauza Bakrota, Tehsil Dalhousie, District Chamba, Himachal Pradesh. By way of amendment, plaintiff seeks to amend description of the suit property and also wants to clarify his capacity to file the suit. Since the plaintiff has specifically filed suit qua Khasra numbers as detailed herein above, amendment as sought for, if allowed, would in no manner amount to changing the nature of suit. Perusal of original plaint itself suggests that plaintiff has filed suit for permanent prohibitory injunction restraining the defendants from interfering in the suit property which stands entered in the record of rights, in the name of Church of England, Khyber House, which contains St. John Church and the shops and the houses adjoining it. If the amendment to the name and description of the suit property, is allowed, suit property remains same in Khata Khatauni No. 268/375. Plaintiff has claimed in the application that the description of property has been inadvertently mentioned as St. John Church and the shops and the houses adjoining to it. Since the defendants resisted the plaint on the ground that the suit has been filed by an incompetent and unauthorized person claiming himself to be the Chairman, Church of English, Jnana Mission Property, plaintiff with a view to clarify aforesaid aspect of the matter, sought permission to amend the plaint. As per plaintiff is he is Bishop Diocese of Amritsar, Chairman of Church of England, Janana Mission Property at Khyber House, Upper Bakrota, Tehsil Dalhousie, District Chamba. Though, in the case at hand, suit stands filed in the name of Bishop Diocese of Amritsar, Chairman of Church of England, Janana Mission Property at Khyber House, whereas it ought to be Chairman of Amritsar Diocesan Trust Association, which owns and possesses Church of England, Jnana Mission Property. By way of amendment (supra) plaintiff wants to clarify his capacity to institute the suit and the amendment, if permitted, in no manner would change the

nature of the suit. Plaintiff has averred in application that he was unable to mention the photographs, which he wants to place on record to show his ownership of the suit property. Since plaintiff has filed suit for permanent prohibitory and mandatory injunction, photographs intended to be placed on record, may be necessary to demonstrate possession of the plaintiff over the suit property. In the case at hand, plaintiff by way of amendment wants to amend description of suit property and his authorization to file the suit. Since Khasra Numbers of the suit property would remain the same, despite there being amendment allowed qua description of the suit property and authorization of plaintiff, no serious prejudice can be said to be caused to the defendants, in case amendment is allowed.

14. In the case at hand, amendment has been sought before settlement of issues and nature of amendment if permitted is not such, that it would change the nature and characteristic of the suit, rather, amendment, if allowed, would enable learned court below to decide the controversy inter se parties in a most effective manner.

15. Having perused the amendment proposed by the plaintiff, in its entirety, this court is in full agreement with learned court below that proposed amendment if allowed would not cause any prejudice to the defendants and in no manner, change complexion of the suit..

16. Consequently, in view of the detailed discussion supra, the impugned order is upheld, as a result whereof, present petition is dismissed.

Pending applications, if any, are disposed of. Interim direction, if any, is vacated.

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

Sandeep Kumar ...Petitioner

Versus

Nanko Devi alias Rekha and another ...Respondents

Cr. Revision No. 272 of 2020
Reserved on: March 16, 2021
Decided on March 19, 2021

Protection of Women from Domestic Violence Act, 2002 – – Section 23 - Application under Section 23 of the Act preferred by respondent allowed by Ld. ACJM (1) Una, interim maintenance of Rs. 2,000/- and Rs. 1,000/- awarded respectively – Appeal filed by respondents no. 1 & 2 under Section 29 of the Act for enhancement of interim maintenance allowed and amount of maintenance enhanced to Rs. 3,000/- and Rs. 2,000/- respectively – Challenge thereof – Held, that once husband is an able bodied person, he can not simply deny his legal obligation to maintain his wife – Taking into consideration price index and high cost of living, impugned order calls for no interference – Petition dismissed.

Cases referred:

Shamima Farooqui vs. Shahid Khan JT 2015 (3) SC 576;

For the petitioner Mr. Y.P. Sood, Advocate.
For the respondents Mr. Karan Singh Parmar, Advocate

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dissatisfied with the order dated 5.8.2020 passed by learned Additional Sessions Judge-II, Una, District Una, Himachal Pradesh, in Cr. Appeal No. 75/2019, whereby appeal under S.29 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter, 'Act') having been filed by the respondents against order dated 2.11.2019 passed by learned Additional Chief Judicial Magistrate, Court No.1, Una, District Una, Himachal Pradesh in CrMA No. 3660 of 2019 filed under S.23 of the Act, has been allowed and interim maintenance of Rs. 2,000/- and Rs.1,000/- awarded in favour of respondents Nos. 1 and 2 respectively by learned trial Court has

been enhanced to Rs. 3,000/- and Rs. 2,000/-, petitioner-husband (hereinafter, 'petitioner') has approached this Court in the instant proceedings.

6. Precisely, the facts of the case as emerge from the record are that the respondents by way of application under S.23 of the Act prayed for interim maintenance, while averring therein that her marriage with the petitioner was solemnised on 22.6.2018 as per Hindu rites and rituals at Village Lamlehri, Tehsil and District, Una, Himachal Pradesh. Respondent No.1 further averred in the application that prior to initiating proceedings under the Act, she had moved various complaints to the Police qua acts of violence but subsequently, on account of consistent maltreatment, she was compelled to stay with her parents at her parental house. Respondent claimed that she was completely dependent upon her parents for her daily needs and facing great difficulty to maintain herself and her minor daughter. Respondent No.1 submitted before learned trial Court that the petitioner is an able bodied person, having finances from sale, purchase and repair of the mobiles at Village Lamlehri, from which profession, he was earning more than Rs.50,000/- per month. She claimed that she has not been paid a single penny by the petitioner for maintenance as well as for upkeep of her minor daughter and, at present, both had been living at the mercy of her parents and maternal uncle and as such, petitioner be directed to provide her maintenance pendente lite to the tune of Rs.8,000/- per month each and a sum of Rs.25,000/- towards litigation expenses.

7. Petitioner, while refuting aforesaid claim, submitted before learned trial Court by way of reply to the application that at no point of time, he maltreated the respondents or taunted her for not bringing sufficient dowry articles and gifts. He also denied the allegation with regard to beatings allegedly given by him to respondent No.1. Petitioner claimed before learned trial Court that engagement of his younger brother was proposed to be done with the sister of respondent No.1, but she was found to have relations with

some other person. Petitioner also alleged that he had caught respondent No.1 red-handed, talking over phone to some unknown person. While denying the claim for interim maintenance, petitioner claimed before learned trial Court that in the month of September, 2018, respondent No.1 of her own, went to her parental house and she being a qualified and able bodied person, earns Rs. 300-400 per day approximately from tailoring, embroidery and beautician, which is sufficient to maintain herself as well as their daughter. Apart from above, petitioner specifically denied that he earns more than Rs.50,000/- per month, rather, claimed that he is unemployed and has no source of income, as such, in the aforesaid background, prayed for dismissal of application filed by respondents under S.23 of the Act, for interim maintenance.

8. Learned Additional Chief Judicial Magistrate, on the basis of pleadings adduced on record, held respondents entitled for interim maintenance of Rs.2,000/- and Rs.1,000/- respectively, from the date of filing of the petition till disposal. Aforesaid order passed by learned trial Court was never laid challenge before appellate court by the petitioner, rather, the respondents filed an appeal under S.29 of the Act, praying therein for enhancement of interim maintenance awarded by learned trial Court. Learned Additional Sessions Judge-II, Una, while accepting the aforesaid appeal filed by the respondents, enhanced the amount of maintenance awarded by learned trial Court to Rs.3,000/- and Rs. 2,000/- respectively. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for the quashment of order of enhancement passed by learned Court below.

9. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis the reasoning assigned by first appellate Court, this Court finds that the precise grouse of the petitioner is that the learned Court below, before awarding/enhancing the amount of interim maintenance, ought to have, prima facie arrived at a conclusion that the

petitioner had committed act of domestic violence or there was any likelihood of the petitioner committing such acts. Mr. Y.P. Sood, learned Counsel appearing for the petitioner, while making this Court peruse the orders impugned before this court, vehemently argued that at no point of time, learned Courts below made an effort to conduct some preliminary enquiry in terms of S.23 of the Act, to arrive at a definite conclusion that the petitioner had committed acts of domestic violence. Mr. Sood states that the order of interim maintenance in terms of S.23 of the Act has been passed merely on the basis of pleadings adduced on record by the respondents. Mr. Sood contended that, it is own admission of respondent No.1 that in the month of September, 2018, she of her own went to her parental house and at no point of time, specific incidents of domestic violence, ever came to be pointed out to the Court, enabling it to pass the order of interim maintenance. Lastly, Mr. Sood contended that though in the application, respondents claimed that the petitioner earns Rs.50,000/- per month but learned Courts below on account of lack of evidence have not accepted the aforesaid plea of the respondents but yet merely applying guess work, proceeded to conclude that the monthly income of the petitioner is Rs.8000/-, as such, learned first appellate Court has erred while enhancing the amounts of interim maintenance awarded by learned Court below, which otherwise could not have been awarded, without there being an enquiry conducted under S.23.

10. Per contra, Mr. Karan Singh Parmar, learned counsel for the respondents, supported the impugned orders passed by first appellate Court and contended that since learned Court below was not satisfied with the claim of the respondents that the petitioner earns Rs.50,000/-, it rightly considered monthly income of the petitioner at Rs.8,000/-.

11. Before ascertaining the correctness and genuineness of the submissions/arguments advanced by the petitioner, it would be apt to take note of S.23 of the Act, which provides as under:

> "23. Power to grant interim and ex parte orders.—
> (1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.
> (2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent."

12. Careful perusal of the aforesaid provision of law clearly reveals that a Magistrate, in any proceedings before it under the Act, can pass interim order as it deems just and proper. Sub-section (2) of S.23 requires that prior to passing of an interim order, Magistrate should be satisfied that the application seeking interim maintenance, prima facie, discloses that the respondent had or has committed act of domestic violence or there is likelihood that the respondent may commit the act of domestic violence, but there is no provision to conduct any preliminary enquiry, rather, Magistrate to ascertain, act, if any, of domestic violence is only under obligation to go through the averments/allegations contained in the application for interim maintenance. Though, Mr. Sood vehemently argued that the application nowhere reveals act, if any, of domestic violence allegedly committed by the petitioner but, if the application made by the respondents, which has been taken note in the order impugned in the instant proceedings, is perused in its entirety, it certainly indicates the acts of domestic violence allegedly committed by the petitioner. At this stage, it would be apt to take note of the definition of "domestic violence", as defined under S.3 of the Act, which provides as under:

> "3. Definition of domestic violence.—For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,—

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes—

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested;

(iv) "economic abuse" includes—

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, house hold necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the

aggrieved person, payment of rental related to the shared house hold and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, 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."

13. Verbal, emotional abuse or economic abuse have been termed to be 'domestic violence'. Apart from above, any action which injures or causes harm whether physical or mental, to the aggrieved person also falls under the definition of 'domestic violence'. In the case at hand, petitioner, by way of filing reply to the application has himself stated that he had caught respondent No.1 red-handed talking to some other person, which clearly indicates act of domestic violence allegedly committed by him against respondent No.1-wife. Aforesaid allegation is itself sufficient to constitute mental agony and emotional abuse, as provided under the definition of domestic violence. Apart from above, petitioner has nowhere disputed that no money was offered by him to the respondent No.1-wife enabling her to sustain herself as well as her child, which act of the petitioner also falls under the definition of 'domestic violence', i.e. economic abuse. Reply filed by the petitioner to the appilation also indicates another act of emotional abuse, whereby he has claimed that

there was a proposal of engagement inter se his brother and sister of the respondent No.1, but she had relations with some other person.

14. If aforesaid averments contained in the reply to the application are read juxtaposing the allegations contained in the application under S.23 of the Act filed by the respondents, it cannot be said that the learned Courts below erred while awarding interim maintenance under S.23 of the Act, since, the averments contained in the application disclose prima facie acts of domestic violence allegedly committed by the petitioner, no fault, if any, can be said to have been committed by learned Courts below, while entertaining application under S.23 of the Act.

15. Material available no record reveals that though the respondent No.1/wife claimed that the petitioner earns Rs. 50,000/- on account of sale/purchase/repair of mobiles but since she failed to place on record evidence, if any, with regard to her aforesaid claim, learned Courts below rightly assessed the income of the petitioner at Rs. 8,000/- considering him to be a labourer. It is not in dispute that as of today, a sum of Rs.300/- per day is payable to the persons working on daily wages under MNREGA and if income is calculated /assessed on the aforesaid basis, no fault, if any can be found with the order of learned trial Court inasmuch as it proceeded to assess income of the petitioner at Rs.8,000/-. Allegations with regard to non-payment of any money by the petitioner on account of maintenance otherwise stand duly substantiated by the stand taken by the petitioner in his reply, wherein he has stated that the respondent No.1 being qualified, competent and able-bodied lady, earns Rs.300/400 per day approximately from the work of tailoring, embroidery and beautician, which is sufficient to maintain her and her daughter. Claim of the petitioner that he is unemployed and has no source of income has no relevance because the petitioner, being husband of the respondent No.1 and father of respondent No.2, is otherwise under obligation to maintain them. It is well settled by now that if husband is able bodied and

is in a position to support himself, he is under legal obligation to support and maintain his wife, who is entitled to receive maintenance under S.23 of the Act, which qualifies as an absolute right. Reliance is placed upon judgment the Hon'ble Supreme Court in **Shamima Farooqui** vs. **Shahid Khan** JT 2015 (3) SC 576, wherein it has been held as follows:-

> "15. .....Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. While determining the quantum of maintenance, this Court in Jabsir Kaur Sehgal v. District Judge Dehradun & Ors. [JT 1997 (7) SC 531: 1997 (7) SCC 7] has held as follows:-
>
> > "The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."
>
> 16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai [JT 2008 (1) SC 78 : 2008 (2) SCC 316], it has been ruled that:-
>
> > "Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal [1978 (4) SCC 70] falls within constitutional sweep of Article

> 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat [JT 2005 (3) SC 164]".

16.1. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

17. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Prakash Bodhraj v. Shila Rani Chander Prakash [AIR 1968 Delhi 174] wherein it has been opined thus:-

> "An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

16. It is quite apparent from the aforesaid enunciation of law that once husband is an able bodied person he cannot simply deny his legal obligation to maintain his wife. Taking into consideration aforesaid facts coupled with the price index and high cost of living, impugned order passed by learned first appellate Court enhancing the maintenance amounts as observed

above, can, in no manner be, said to be excessive and thus calls for no interference.

17. In result of the aforesaid discussion, I find no merit in the petition and the same is dismissed. Judgment passed by learned first appellate Court is upheld. Parties are left to bear their own costs. All pending applications stand disposed of. Interim directions, if any, also stand vacated. Record, if called, be sent back forthwith.

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

Smt. Davinder Parmar and another

.....Applicants/Plaintiffs

Versus

Chander Kanta (now deceased) through her legal representatives Randeep Singh

...non-applicant/defendant

OMP No. 392 of 2020 in OMP No. 2 of 2018
In Civil Suit No. 4080 of 2013
Reserved on: February 23, 2021
Decided on: February 26, 2021

Code of Civil Procedure 1908 – Order XXXIX Rules 1 & 2, 4 - Section 151 – Applicants/Plaintiffs preferred civil suit for declaration claiming joint ownership to the extent of 1/6 share in suit property 2013 – No application under Order 39 Rules 1 & 2 filed initially – Civil suit dismissed in default on 10-11-2017 – Later, application under Order 9 Rule 9 and Section 151 CPC filed for restoration – During pendency of the said application, application under order 39 Rules 1 & 2 CPC came to be filed and parties were directed to maintain status quo qua nature & possession over suit property – Application filed under order 39 Rule 4 for vacation of said order – Held, that application, if any, under Order 39 Rules 1 & 2 CPC can be filed/maintained by the plaintiffs after restoration of suit and not before that – Recourse to inherent power under Section 151 in conflict with specific provision of statute not permissible – No separate application filed under Order 39 Rules 1 & 2 at the

time of filing suit – Also, requisite ingredients i.e. prime facie case, balance of convenience, irreparable loss not in favour of applicants – Application devoid of merit, dismissed.

Cases referred:

Abdul Rahim B. Attar, Javed Abdul vs Atul Ambalal Barot And Rajendra AIR 2003 (Bombay) 120;

Ashok Kapoor vs. Murtu Devi 2016 (1) Shim. LC 207;

Basant Lal v. Lakshmi Chand AIR 2007 Allahabad 32;

Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719;

M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;

Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., J.T. 1995(2) S.C. 504;

National Institute Of Mental vs C. Parameshwara AIR 2005 242;

For the Applicants: Mr. K.D. Sood, Senior Advocate with Mr. Sukrit Sood, Advocate.

For the Non-applicant: Mr. Satyen Vaidya, Senior Advocate with Mr. Bhairav Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant application filed under Order XXXIX, rules 1 and 2 read with S.151 CPC, prayer has been made behalf of the applicants/plaintiffs (hereinafter, 'applicants') to restrain the non-applicant/defendant from selling, transferring and encumbering the suit property i.e. four storeyed building known as "33, The Mall, Shimla" or leasing out the same during the pendency of the suit. Pursuant to order dated 1.12.2020, whereby this Court, while directing the non-applicant/defendant to maintain status quo qua nature and possession of the suit property directed the non-applicant/defendant to file reply to the application, non-applicant/defendant has filed the reply. Specific

ground with regard to maintainability of the application has been raised on behalf of the non-applicant/defendant.

2. For having bird's eye of the matter, certain undisputed facts, which may be germane for the proper adjudication of the application are that the applicants filed Civil Suit bearing No. 4080 of 2013, titled Smt. Davinder Parmar vs. Chander Kanta and another, for declaration to the effect that the plaintiffs jointly are owners to the extent of 1/6th share in the four storeyed building known as "33, The Mall, Shimla" and mutation No. 141, dated 27.7.2005 be declared void, illegal and inoperative against the right of the plaintiffs and they be declared in joint possession of the property. Aforesaid suit was filed in the year 2013, but alongwith the plaint, no application under Order XXXIX, rules 1 and 2 CPC seeking therein restraint order, if any, against non-applicant/defendant ever was instituted. After completion of pleadings, court proceeded to frame issues vide order dated 26.10.2015 and thereafter, evidence commenced. On 9.3.2016, plaintiffs' evidence was closed in the affirmative, as per the statement of learned counsel appearing for the plaintiffs and thereafter, the matter repeatedly was listed for recording evidence of the defendants. While the evidence on behalf of the non-applicant/defendant was being led, an application under Order VIII, rule 1A(3) read with S.151 CPC was filed on behalf of the non-applicant/defendant, seeking leave of the court to place on record and prove certain documents. Though the aforesaid application, after completion of pleadings was heard in part on 2.6.2017 but since on 10.11.2017, none appeared on behalf of the plaintiffs, suit having been filed by them was dismissed in default vide order dated 10.11.2017 alongwith all pending applications. Subsequently, in the month of January, 2018, an application under Order IX, rule 9 read with S.151 CPC, was filed on behalf of the applicants/plaintiffs, praying therein for restoration of civil suit dismissed in default on 10.11.2017, alongwith an application under S.5 of Limitation Act, for condonation of delay. Vide order dated 5.7.2018, delay in filing the application bearing OMP No. 14/2018, was condoned, however, this court having taken note of the pleadings adduced on record by respective parties in the aforesaid application for restoration, framed following issues vide order dated 11.9.2018:

"OMP No. 14 of 2018

i) On the contentious pleadings of the parties, the following issues are framed: i) Whether good, sufficient and adequate cause has been made out by the plaintiff/applicant, for recalling the order, pronounced, on 10.11.2017 ? OPP

ii) Relief.

Issues are readover and explained to the parties. No other issue arises nor claimed by any of the parties. Now, for plaintiff/applicant's evidence, on the aforesaid issue, subject to steps being taken, within a week, the matter be listed, on a date to be fixed by the Registry of this Court."

3. After passing of aforesaid order, evidence commenced in the application for restoration and statement of one AW was recorded. Since, notice issued to Harminder Singh Parmar could not be served on account of his not being available in the country, two weeks' time was granted to the applicants/plaintiffs for taking fresh steps for summoning aforesaid witness. On 27.12.2019, it transpired that the summons issued to AW-2 have been received back unserved with the report that Harminder Singh has gone to New Zealand, as such, further time was granted to the applicants/plaintiffs for taking fresh steps but, in the meantime, applicants/plaintiffs filed OMP No. 392 of 2020, under Order XXXIX, rules 1 and 2 CPC, praying therein to issue restraint order against non-applicant/defendant. Vide orders dated 1.12.2020 this Court directed the parties to maintain status quo qua nature and possession of suit property. After passing of aforesaid order, non-applicant/defendants besides filing reply to this application, also filed an application bearing OMP No. 456 of 2020 under Order XXXIX, rule 4 CPC praying to vacate the order dated 1.12.2020 passed by this Court in OMP No. 392 of 2020 in OMP No. 2 of 2018.

4. I have heard learned counsel for the parties and perused the material available on record.

5. Since the question with regard to maintainability of the application has been specifically raised by the non-applicant/defendant, this Court deems it appropriate to decide the same at the first instance, before going into the merits of the case. It is not in dispute that the application under Order XXXIX, rules 1 and 2 CPC was not filed in the main suit, which

otherwise stands dismissed in default vide order dated 10.11.2017, rather, same has been filed in OMP No. 14 of 2018 filed under Order IX, rule 9 CPC, wherein prayer has been made to restore the civil suit dismissed in default vide order dated 10.11.2017.

6. The moot question, which needs to be adjudicated in the present case is, "whether the application under Order XXXIX, rules 1 and 2 CPC, seeking therein restraint order can be considered in a decided suit, especially in the proceedings initiated under Order IX, rule 9 CPC, praying therein for restoration of civil suit dismissed in default."

7. Mr. K.D. Sood, learned Senior Counsel duly assisted by Mr. Sukrit Sood, Advocate, appearing for the applicants/plaintiffs, vehemently argued that since the application filed on behalf of applicants/plaintiffs under Order IX, rule 9 CPC is still pending adjudication, applicants/plaintiffs are well within their right to file an application under Order XXXIX, rules 1 and 2 CPC, seeking therein restraint order. Mr. Sood, learned Senior Counsel, further contended that since this Court has already taken cognizance of the application filed on behalf of applicants/plaintiffs under Order IX, rule 9 CPC and in those proceedings, evidence is being recorded, prayer made on behalf of the applicants/plaintiffs to restrain the non-applicant/defendant from selling, transferring, encumbering the suit property or changing nature thereof by creating new tenancy, deserves to be allowed. Mr. Sood, learned Senior Counsel further contended that in case prayer made in the aforesaid application is not accepted at this stage, very purpose of filing civil suit No. 4080 of 2013, shall be defeated. While claiming that the application under Order XXXIX, rules 1 and 2 CPC can be filed in proceedings filed under Order IX, rule 9 CPC, Mr. Sood, learned Senior Counsel invited attention of this Court to judgment rendered by Hon'ble High Court of Allahabad in **Basant Lal** v. **Lakshmi Chand** AIR 2007 Allahabad 32. Lastly, Mr. Sood, learned Senior Counsel submitted that even otherwise, under S.151 CPC, this Court has inherent powers to grant interim injunction to meet the ends of justice and to prevent abuse of process of law.

8. Mr. Satyen Vaidya, learned Senior Counsel duly assisted by Mr. Bhairav Gupta, Advocate, appearing for the non-applicant/defendant, while refuting the aforesaid submissions made on behalf of learned Senior Counsel appearing for the applicants/plaintiffs,

strenuously argued that since there is no legally constituted suit pending before this Court, application under Order XXXIX, rules 1 and 2 CPC, filed in a disposed of suit, cannot be considered and deserves outright rejection. Mr. Vaidya, learned Senior Counsel, appearing for the non-applicant/defendant, further contended that the application under Order IX, rule 9 CPC for restoration, was filed in the month of January, 2018 and at that time, no application, if any, was filed under Order XXXIX, rules 1 and 2 CPC, and as such, present application, which has been filed after about one and half years of filing of application for restoration of the suit deserves to be dismissed being devoid of any merit. Lastly, Mr. Vaidya, learned Senior Counsel argued that otherwise also, perusal of the averments contained in the application seeking therein restraint order, reveals no prima facie case, if any, in favour of the applicants/plaintiffs. He further submitted that it is admitted case of the applicants/plaintiffs that the non-applicant/defendant are in exclusive possession of suit property, on the basis of Will executed by one Smt. Gurbachan Kaur and as such, balance of convenience cannot be said to be in favour of the applicants/plaintiffs.

9. It is not in dispute that the application under adjudication has been filed in OMP No. 14 of 2018 i.e. an application under Order IX, rule 9 CPC, for restoration of civil suit which stands dismissed in default vide order dated 10.11.2017 passed by this Court. Bare reading of provisions contained under Order XXXIX, rules 1 and 2 CPC clearly suggests that application, if any, for temporary injunction can be filed in a pending suit and not in a decided suit. In the case at hand, civil suit having been filed by the applicants/plaintiffs stands dismissed for non-prosecution. No doubt, applicants/plaintiffs by way of an application under Order IX, rule 9 CPC, have prayed for restoration of civil suit dismissed in default, but till the time civil suit is restored to its original number, there is no legally constituted suit pending before this Court and, as such, application filed under Order XXXIX, rules 1 and 2 CPC, cannot be entertained, especially when in that application, specific prayer has been made to restrain the non-applicant/defendant from selling, transferring and encumbering the suit property during the pendency of the suit. Application, if any, under Order XXXIX, rules 1 and 2 CPC can be filed /maintained by the plaintiffs after restoration of suit and not before that. Though, Mr.

K.D. Sood, learned Senior Counsel has placed reliance upon decision rendered by High Court of Allahabad in **Basant Singh** (supra), but this Court, having carefully perused the judgment in its entirety, finds that in the aforesaid judgment, it has been nowhere held that an application under Order XXXIX, rules 1 and 2 CPC, can be filed in a decided suit, rather, it has been categorically ruled in the aforesaid judgment, that even after dismissal of suit, pending an application under Order IX, rule 9 CPC, court may grant interim injunction, in exercise of its inherent powers under S.151 CPC. This court finds that in the aforesaid judgment, High Court of Allahabad has specifically dealt with the expression "all proceedings in any court of civil jurisdiction" as mentioned under S.141 CPC. It has also been held in the aforesaid judgment that an application filed for restoration of second appeal, dismissed as having been abated and the substitution application falls within the meaning of phrase, "all proceedings in any court of civil jurisdiction" and as such, it is open for the court to pass appropriate orders for injunction in the suit during the pendency of aforesaid application. But the question still remains that, under what provision of law, such power can be exercised. In the aforesaid judgment, it has been held that an application for restoration of suit or second appeal dismissed in default or having been abated, falls within the expression, "all proceedings" in terms of provisions contained under S.141 CPC, but the very effect of aforesaid findings, if any, would be that such application would be decided in terms of procedure laid down in the Code (Code of Civil Procedure). However, careful perusal of specific provisions laid down under Code of Civil Procedure for temporary injunction under Order XXXIX, rules 1 and 2 CPC, nowhere provides for filing an application for temporary injunction in a decided suit, rather said application can be filed in a suit which is pending adjudication. Though, in the aforesaid judgment, it has been held that injunction, if any, sought during the pendency of an application for restoration, can be granted, but in exercise of power under S.151 CPC.

10. Mr. Sood, learned Senior Counsel, further argued that since the application under adjudication has been filed under Order XXXIX, rules 1 and 2 read with S.151 CPC, this Court, while exercising power under S.151 CPC can proceed to consider prayer made therein. However, this Court is of the view that before invoking provisions of S.151 CPC, Court is

required to satisfy itself that, whether the order prayed for is necessarily required to be passed to meet the ends of justice and to prevent the abuse of process of law? Needless to say that the inherent power cannot be exercised so as to nullify the provisions of the Code. Where a court deals expressly with a particular matter provisions should normally be regarded as exhaustive and in that situation, it would not be proper for the court to invoke provisions contained under S.151 CPC. Reliance is placed upon **National Institute Of Mental vs C. Parameshwara** AIR 2005 242. It has been held in the aforesaid judgment as under:

> "12. In the case of Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal , it has been held that inherent jurisdiction of the Court to make orders ex debito justitiae is undoubtedly affirmed by Section 151 CPC, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, Section 10 CPC has no application and consequently, it was not open to the High Court to bye-pass Section 10 CPC by invoking Section 151 CPC. …."

11. Similarly, recourse to inherent power in face or in conflict with the specific provisions of Statute is not permissible. Inherent power cannot be invoked to nullify any statutory provisions of statute. Reliance is placed upon **Abdul Rahim B. Attar, Javed Abdul** vs **Atul Ambalal Barot And Rajendra** AIR 2003 (Bombay) 120. It has been held in the aforesaid judgment as under:

> "....t is well settled that express provisions of law in a statute would by necessary implication exclude the exercise of inherent powers in regard to that particular Act where specific remedy is provided in accordance with the codified law. It is also well settled that recourse to inherent powers in the face of or in conflict with the specific provisions of a statute is not permissible. Inherent powers cannot be exercised to nullify the effect of any statutory provision. The Apex Court in Vareed Jacob v. Sosamma Geevarghese and Ors. has held that "if there is express provision covering a particular topic, then Section 151 of C.P.C. cannot be applied."

12. If the prayer made on behalf of the applicants/plaintiffs for exercise of power under S.151 CPC is examined vis-à-vis factual matrix of the case, this court is afraid that such power can be exercised in the instant case. Careful perusal of the suit filed in the year 2013, reveals that the same was filed for declaration to the effect that the applicants/plaintiffs are joint owners of the suit property to the extent of $1/6^{th}$ share. While seeking aforesaid declaration, no prayer, if any, was ever made on behalf of the applicants/plaintiffs seeking decree of permanent prohibitory injunction. Moreover, alongwith the aforesaid suit, no separate application, if any, under Order XXXIX, rules 1 and 2 CPC, ever was filed on behalf of applicants/plaintiffs seeking therein restraint order against the non-applicant/defendant(s).

13. Applicants/plaintiffs, while fairly admitting the factum with regard to possession of the non-applicant/defendant over the suit property, kept on prosecuting their suit without making a specific prayer to issue restraint order during the pendency of the suit, which was subsequently dismissed in default vide order dated 10.11.2017. Even after dismissal of the suit in default, the application under the provisions of Order IX, rule 9 CPC, was filed after an inordinate delay. Since the court was not convinced with the reasons assigned for recalling the order dated 10.11.2017, specific issues were framed in the aforesaid application and time was granted to the parties to lead evidence. Since the applicants/plaintiffs were unable to serve their witnesses, evidence on their behalf could not be concluded, as such, application filed under Order IX, rule 9 CPC, is still pending adjudication. Interestingly, the applicants/plaintiffs, for some unknown reasons, chose not to file application, if any, for injunction at the time of filing of application under Order IX, rule 9 CPC, rather, the same was filed approximately one and half years after filing of the application under Order IX, rule 9 CPC, detailing therein altogether different reasons, which otherwise were never brought on record in the original suit. It has been specifically averred in the application under adjudication that one shop, which has been ordered to be vacated, is likely to be further sold/transferred by the non-applicant/defendant during the pendency of the suit and, in case, non-applicant/defendant(s) is/are not restrained from selling/transferring or creating third party interest, great prejudice would be caused to the applicants/plaintiffs. Averments contained in

the application itself suggest that the non-applicant/defendant being owner of suit property, instituted eviction proceedings against the tenants occupying certain portions of the property but, at no point of time, effort, if any, was ever made on behalf of the applicants/plaintiffs to get themselves impleaded in the eviction proceedings on the ground that they are co-owners of the suit property. It has been nowhere stated in the application that the factum with regard to pendency of eviction proceedings initiated at the behest of non-applicant/defendant in the competent court of law was not in the knowledge of the applicants/plaintiffs, as such, this Court has reasons to presume that the applicants/plaintiffs were having knowledge of pendency of the eviction proceedings against a few of the tenants occupying certain parts of the suit property, but, they purposely withheld aforesaid facts from this Court at the time of filing the suit. It is only after passing of eviction orders that the applicants/plaintiffs suddenly woke up from deep slumber and filed the application under Order XXXIX, rules 1 and 2 CPC, that too, in a decided suit.

14. Having taken note of the fact that in the main suit, no prayer for issuance of a decree of temporary/permanent prohibitory injunction was ever made, coupled with the fact that no separate application for temporary injunction was filed under Order XXXIX, rules 1 and 2 CPC, alongwith the suit, this Court finds no reason to invoke power under S.151 CPC, to pass injunction, especially when the main suit stands dismissed in default. Otherwise also, once there is a specific provision under the Code to get the civil suit restored, inherent power under S.151 CPC, cannot be invoked to undo the benefits, if any, reaped by one party on account of negligence of the other party. Otherwise also, applicants/plaintiffs have not approached this Court, with clean hands, as such, prayer made on their behalf for exercise of power under S.151 CPC, deserves to be rejected, which otherwise can be exercised sparingly to prevent abuse of process of court. There is nothing on record, suggestive of the fact that at any point of time, non-applicant/defendant abused process of law, rather, civil suit having been filed on behalf of applicants/plaintiffs was dismissed due to their own negligence. If the averments contained in original suit are read in its entirety, it is the own case of the applicants/plaintiffs that mutation No. 141, dated 27.7.2005, has been wrongly attested in favour of the non-

applicant/defendant on the basis of a Will, meaning thereby that the mutation of suit property was attested in favour of non-applicant/defendant(s), on the basis of a Will, which otherwise is not under challenge in the main suit, as is evident from the specific prayer made therein. Since it is not in dispute inter se parties that the non-applicant/defendant(s) is/are in possession of the suit property on the basis of the Will, validity whereof has not been laid challenge, no prima facie case otherwise can be said to be existing in favour of applicants/plaintiffs. Though, in the case at hand, the applicants/plaintiffs have claimed that the balance of convenience lies in their favour but having taken note of the fact that non-applicant/defendant, after becoming owner of the property in question on the strength of Will, initiated eviction proceedings against tenants and got them successfully evicted, it can be safely concluded that the balance of convenience lies in favour of the non-applicant/defendant and not in favour of the applicants/plaintiffs.

15. Hon'ble Apex Court in case **Mahadeo Savlaram Shelke** v. **The Puna Municpal Corpn.,** J.T. 1995(2) S.C. 504, relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719 has aptly interpreted the phrases, “prima facie case”, “balance of convenience” and “irreparable loss”. Hon'ble Apex Court has observed in the judgment (supra) that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiffs could be adequately compensated, if injunction is refused. The existence of prima facie right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking

relief and that there is no other remedy available to the party except the one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a material one, namely the one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Hon'ble Apex Court has held as under:

> "...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only

that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

16. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost important, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling Co.Ltd. & Ors.** v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction.

17. A Coordinate Bench of this Court in **Ashok Kapoor** vs. **Murtu Devi** 2016 (1) Shim. LC 207, had an occasion to deal with the issue of injunction, wherein it, having taken note of various judgments rendered by Constitutional courts, concluded as under:

"47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the

defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands."

18. Otherwise also, as far as plea with regard to irreparable loss is concerned, same cannot be accepted at this stage on account of the facts and circumstances of the case noted above, rather, this Court is of the view that in the event of suit being allowed after its restoration, applicants/plaintiffs can get their appropriate share in the property by filing appropriate proceedings. There is yet another aspect of the matter that bare perusal of the application under adjudication itself suggests that a prayer has been made to restrain the non-applicant/defendant from selling, transferring or encumbering the suit property during the pendency of the suit and there is no specific prayer that till the time, application filed under Order IX, rule 9 CPC is decided by the Court, parties to the lis may be directed to maintain status quo qua nature and possession of the property.

19. Consequently, in view the detailed discussion made herein above, present application is dismissed being devoid of any merit. Order dated 1.12.2020, stands vacated.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Kikar Singh ....Petitioner

Versus

State of HP and others ..Respondents

CWP No. 741 of 2021
Reserved on: April 30 2021

Decided on: May 3, 2021

Constitution of India, 1950 - Article 226 – Petitioner applied for the post of Senior Laboratory Technician advertised by Respondent No. 3 – Petitioner placed at Sr. No. 1 in the waiting list under OBC (Wards of Ex-Serviceman) – Grievance of the petitioner remain that respondents No. 5 & 6 secured more marks than candidates of General category (Wards of Ex-serviceman) who ought to be placed at Sr. No. 1 & 2 in merit list under general category and petitioner ought to be selected against category OBC (Wards of Ex-Serviceman) – Held, that the candidates, who are entitled to the benefit of special category reservation, can compete and be selected against the posts meant for general category on the basis of their merit – Respondent-State to consider candidature of respondents no. 5 & 6 against the posts meant for general category – Petitioner at Sr. No. 3 in the OBC (Wards of Es-Servicemen) category has consequently right to be selected against one of the posts reserved for OBC (Wards of Es-Servicemen Category) – Selection made by respondent no. 3 vide Annexure P-4 set aside – Respondent No. 3 directed to redraw the selection list of all the categories qua selection in question – Petition allowed. (Paras 16, 17, 23)

Cases referred:

Anil Kumar Gupta vs. State of U.P, (1995) 5 SCC 173;
R.K. Sabharwal and others v. State of Punjab and others, (1995) 2 SCC 745;
Rajesh Kumar Daria v. Rajasthan Public Service Commission and others, (2007) 8 SCC 785;

For the petitioner	Mr. Yogesh Kumar Chandel, Advocate.
For the respondents	Mr. Ajay Vaidya, Senior Additional Advocate General with Mr. Sudhir Bhatanagar and Mr. Ashwani Sharma, Additional Advocates General, for respondents Nos. 1 and 2. Mr. Rajinder Thakur, Advocate, for respondent No.3 Respondents Nos. 4 to 6, ex parte.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Precisely the question, which has fallen for adjudication in the case at hand is, "whether a candidate belonging to any of the vertical reservation categories on the basis of his/her merit is entitled to be selected in the open or general category and, in such eventuality, whether his/her selection is to be counted towards the quota granted for vertical category?"

2. Before exploring/ascertaining an answer to the aforesaid question, it would be apt to take note of certain undisputed facts, which may be germane for the adjudication of the case at hand.

3. Respondent No.3, vide advertisement No. 35-3/2019 dated 28.12.2019 (Annexure P-1) advertised 10 posts of Senior Laboratory Technician (now Medical Laboratory Technician Grade-II) under post code 749. Such posts were reserved for various categories as follows:

Gen.(WXM)	05
SC(WXM)	02
ST(WXM)	01
OBC (WXM)	02
Total	10

4. Petitioner being eligible in terms of the educational qualifications prescribed in the aforesaid advertisement, applied for the post under the category of OBC (Wards of Ex-servicemen). Vide Notification dated 3.12.2020 (Annexure P-3), the petitioner was declared successful under Roll No. 749000007 in the screening test and was further directed to appear for the evaluation process on 15.12.2020. Though the petitioner appeared for the evaluation process on the given date, but in the final merit list, declared on 28.1.2021 (Annexure P-4), he could not secure a place, rather, he was placed at Sr. No. 1 in the waiting list, under the OBC(Wards of Ex-serviceman)

(Annexure P-5). Perusal of Notification dated 28.1.2021, whereby result for the post under post code 749, was declared, reveals that in total 7 candidates were selected against 10 posts viz., 4 against General (Wards of Ex-serviceman), 2 under OBC(Wards of Ex-serviceman) and 1 under SC(Wards of Ex-serviceman), and three posts, one under each category of General, SC and ST (all Wards of ex-servicemen), remained vacant on account of non-availability of candidates in those categories.

5. Precisely, the grievance of the petitioner is that since candidates namely Neha Kumari and Brajesh Parihar (respondents Nos. 5 and 6 herein), who had applied against the category of OBC (Wards of Ex-serviceman) and SC (Wards of Ex-serviceman), respectively had secured more marks than the candidates of General (Wards of Ex-serviceman), they ought to have been placed at Sr. Nos. 1 and 2 in the merit list. Since the candidates placed at Sr. Nos. 3 and 5 (respondents Nos. 5 and 6), despite having stood at first and second positions, respectively, were declared successful under OBC (W.Exsm) and SC(W.Exsm) categories respectively, petitioner, who had also applied under the category of OBC(W.Exsm), was not declared selected against the said category. A list of candidates selected is as under:

Sr. No.	Roll No.	Name	Total marks	Category
1.	749000001	Rajender Kumar	39.80	Gen (W.Exsm)
2.	749000009	Lalit Kumar	41.24	General (W.Exsm)
3.	749000012	Neha Kumari	49.00	OBC (W. Exsm)
4.	749000017	Ankita Kumari	39.37	OBC (W.Exsm)
5.	749000024	Brijesh Parihar	43.80	SC (W. Exsm)
6.	749000027	Prakash Chand Katoch	39.51	Gen (W. Exsm)
7.	749000036	Manoj Kumar	38.91	Gen (W. Exsm)

6. Perusal of the final result declared by the Controller of Examinations for the post in question (Annexure P-6), clearly reveals that respondents Nos. 5 and 6, who had applied against the post of OBC (W.Exsm) and SC (W.Exsm), secured 49 and 43.80 marks, respectively, whereas, candidates selected against General (W.Exsm) category namely Rajender Kumar, Lalit Kumar, Prakash Chand Katoch and Manoj Kumar, secured 39.80, 41.24, 39.51 and 38.91 marks, respectively.

7. Petitioner before this Court is a candidate who belongs to OBC (W.Exsm) category and his precise grievance is that grave injustice has been caused to him by selecting respondents Nos. 5 and 6 against two posts reserved for the categories of OBC (Wards of Ex-servicemen) and SC (Wards of Ex-servicemen). Since, respondents Nos. 5 and 6 secured more marks than the candidates belonging to General (Wards of Ex-servicemen) category, they ought to have been considered against the posts meant for the General (Wards of Ex-servicemen) and in that case, the petitioner would have been selected against one post reserved for the OBC (Wards of Ex-servicemen) category alongwith another candidate, namely Ankita Kumari, who otherwise stands selected against the post in question under the category of OBC(Wards of Ex-servicemen) being second in the list of candidates under the OBC(Wards of Ex-servicemen) category. In the aforesaid background, prayer has been made by the petitioner that the offer of appointment made to respondent No.4 against the post reserved for the General (Wards of Ex-servicemen) be quashed and set aside and a direction be issued to the Department to consider the candidature of the respondents Nos. 5 and 6 against the posts meant for the General (Wards of Ex-servicemen) category, being more meritorious and the resultant vacancy, which becomes available under OBC (Wards of Ex-servicemen)category, be filled up by selecting and appointing the petitioner.

8. Mr. Yogesh Kumar Chandel, learned counsel appearing for the petitioner, while inviting attention of this Court to a recent judgment rendered by Hon'ble Apex Court in **Saurav Yadav & Ors** v. **State of Uttar Pradesh and Ors**, (Misc. Application No. 2641/19 in SLP(C) No. 23223/2018, decided on 18.12.2020, argued that a candidate belonging to any vertical reservation categories is entitled to be selected under the General or the Open category and, as such, respondents, while drawing final merit list, ought to have considered the candidature of respondents Nos. 5 and 6 under General (Wards of Ex-servicemen) category and one of the posts under the OBC (Wards of Ex-servicemen) category ought to have been offered to the petitioner.

9. Learned Additional Advocate General, while supporting the impugned decision of the respondent-State, contended that since respondents Nos. 5 and 6 had participated under particular categories, they could not have been considered against the posts meant for General (Wards of Ex-servicemen) category. He further contended that the criteria of evaluation was fair and equitable as the candidates, who participated under a particular category, are and could have been considered under that category only. To strengthen aforesaid submission, learned Additional Advocate General as well as learned counsel appearing for the respondent No.3, placed heavy reliance upon a judgment rendered by learned Single Judge of this Court in case titled **Vikas Kumar** v. **State of H.P. & ors.**, CWP No. 7214 of 2010, decided on 11.12.2014.

10. We have heard the learned counsel appearing for the parties and perused the record minutely.

11. There is no dispute that respondents Nos. 5 and 6, who had applied against the post in question under the categories of OBC and SC (both Wards of Ex-servicemen), secured more marks than the candidates, who had applied under the category of General (Wards of Ex-servicemen). It is also not in dispute that the petitioner herein applied against the post meant for

OBC(Wards of Ex-servicemen) and he was at sr. No.3 amongst the candidates, who had applied under the category of OBC(Wards of Ex-servicemen). If the contention raised on behalf of the petitioner is accepted that respondents Nos. 5 and 6, who had secured more marks than the candidates of the General (Wards of Ex-servicemen) category, ought to have been considered against the posts meant for the General (Wards of Ex-servicemen), selection of respondent No.4-Manoj Kumar under the category of General (Wards of Ex-servicemen) is required to be quashed.

12. By now, it is well settled that if candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong.

13. A five-judge Bench of Hon'ble Apex Court in **R.K. Sabharwal and others** v. **State of Punjab and others**, (1995) 2 SCC 745, has categorically held that when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts, shown at the reserve points are to be filled from amongst the members of the reserve categories and the candidates belonging to general category are not entitled to be considered for the reserved posts. Per contra, the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation.

14. Though, Hon'ble Apex Court in case **Rajesh Kumar Daria** v**. Rajasthan Public Service Commission and others**, (2007) 8 SCC 785, has specifically clarified that a candidate belonging to any of vertical reservation categories, on the basis of his/her own merit, is entitled to be selected under the open/general category, in such eventuality, his/her selection is not be counted towards the quota reserved for such vertical reservation categories, but since some conflicting judgments on the issue came to be rendered by

various Constitutional Courts, the Hon'ble Apex Court in latest judgment in **Saurav Yadav** (supra) having taken note of various judgments rendered in past by it as well as other Constitutional Courts, reiterated that the candidates belonging to any of the vertical reservation categories are entitled to be selected under the open/general category, if such, candidates belonging to reserved category are selected on the basis of their merit, their selection would not be counted against the quota for such vertical reservation categories that they belong.

15. Hon'ble Apex Court in **Sauav Yadav** (supra), has held as under:

"22. The principle that candidates belonging to any of the vertical reservation categories are entitled to be selected in "Open or General Category" is well settled. It is also well accepted that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong. Apart from the extracts from the decisions of this Court in Indra Sawhney11 and R. K. Sabharwal15 the observations by the Constitution Bench of this Court in Shri V.V. Giri vs. Dippala Suri Dora and Others34, though in the context of election law, are quite noteworthy.

> "21. … In our opinion, the true position is that a member of a Scheduled Caste or Tribe does not forego his right to 32 (2010) 3 SCC 119 33 (2017) 12 SCC 680 34 (1960) 1 SCR 426 seek election to the general seat merely because he avails himself of the additional concession of the reserved seat by making the prescribed declaration for that purpose. The claim of eligibility for the reserved seat does not exclude the claim for the general seat; it is an additional claim; and both the claims have to be decided on the basis that there is one election from the double-member constituency.
>
> 22. In this connection we may refer by way of analogy to the provisions made in some educational institutions and universities whereby in addition to the prizes and scholarships awarded on general competition amongst all the candidates, some prizes and scholarships are reserved for candidates

belonging to backward communities. In such cases, though the backward candidates may try for the reserved prizes and scholarships, they are not precluded from claiming the general prizes and scholarships by competition with the rest of the candidates."

23. The High Courts of Rajasthan, Bombay, Uttarakhand, and Gujarat have adopted the same principle while dealing with horizontal reservation whereas the High Court of Allahabad and Madhya Pradesh have taken a contrary view. These two views, for facility, are referred to as the "first view" and the "second view" respectively. The second view that weighed with the High Courts of Allahabad and Madhya Pradesh is essentially based on the premise that after the first two steps as detailed in paragraph 18 of the decision in Anil Kumar Gupta and Others 13 and after vertical reservations are provided for, at the stage of accommodating candidates for effecting horizontal reservation, the candidates from reserved categories can be adjusted only against their own categories under the concerned vertical reservation and not against the "Open or General Category".

24. Thus, according to the second view, different principles must be adopted at two stages; in that:-.

(I) At the initial stage when the "Open or General Category" seats are to be filled, the claim of all reserved category candidates based on merit must be considered and if any candidates from such reserved categories, on their own merit, are entitled to be selected against Open or General Category seats, such placement of the reserved category candidate is not to affect in any manner the quota reserved for such categories in vertical reservation.

(II) However, when it comes to adjustment at the stage of horizontal reservation, even if, such reserved category candidates are entitled, on merit, to be considered and accommodated against Open or General Seats, at that stage the candidates from any reserved category can be adjusted only and only if there is scope for their adjustment in their own vertical column of reservation.

Such exercise would be premised on following postulates: -

(A) After the initial allocation of Open General Category seats is completed, the claim or right of reserved category candidates to be admitted in Open General Category seats on the basis of their own merit stands exhausted and they can only be considered against their respective column of vertical reservation.

(B) If there be any resultant adjustment on account of horizontal reservation in Open General Category, only those candidates who are not in any of the categories for whom vertical reservations is provided, alone are to be considered.

(C) In other words, at the stage of horizontal reservation, Open General Category is to be construed as category meant for candidates other than those coming from any of the categories for whom vertical reservation is provided.

25. The second view may lead to a situation where, while making adjustment for horizontal reservation in Open or General Category seats, less meritorious candidates may be adjusted, as has happened in the present matter. Admittedly, the last selected candidates in Open General female category while making adjustment of horizontal reservation had secured lesser marks than the Applicants. The claim of the Applicants was disregarded on the ground that they could claim only and only if there was a vacancy or chance for them to be accommodated in their respective column of vertical reservation.

26. Both the views can be compared and the issues involved in this matter can be considered in the light of a hypothetical illustration with following assumptions: -

(i) The total seats available are 100; comprising of 50 seats for 'Open/General Category'. The reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes is at 20%, 10% and 20% respectively and all candidates from these reserved categories are otherwise eligible to be considered against Open General Category.

(ii) The percentage of seats available for 'Women' by way of compartmentalized horizontal reservation is 30%.

(iii) Out of all qualified candidates, when first 50 meritorious candidates are picked up to fill up the seats for 'Open/General Category':-

(a) There are only 11 women in first 50 candidates in 'Open/General Category'; and

(b) the last five persons in the 'Open/General Category' viz., the candidates at Serial Nos.46, 47, 48, 49 and 50 are–

Sl. No. 46 - Open Category - Male
Sl. No 47 - Open Category - Male
Sl. No. 48 - Scheduled Caste – Male
Sl. No. 49 - Scheduled Caste - Male
Sl. No. 50 - Scheduled Caste – Female

(c) first four female candidates in the waiting list, who do not belong to any of the reserved categories, are having overall merit position at Serial Nos. 52, 64, 87 and 88.

(d) Going by the steps indicated in paragraph 18 of the decision in Anil Kumar Gupta and Others 13, at the stage of filling up seats for Scheduled Castes Category, there are 7 females among 20 candidates with last 2 candidates being females whose overall ranking in the merit list is at Serial Nos. 80 and 86.

(e) Similarly, the seats for Scheduled Tribes and Other Backward Categories are filled up.

(f) Out of 20 candidates selected in Other Backward Category there are 09 females.

The basic features of this illustration can be put in the following tabular format.

TOTAL SEATS : 100				
CATEGORIES	OPEN/ GENERAL	SCHEDULED CASTES	SCHEDULED TRIBES	OTHER BACKWARD CLASSES
SEATS AVAILABLE	50	20	10	20
MINIMUM SEATS FOR WOMEN	15	6	3	6
SEATS OCCUPIED BY WOMEN BEFORE	11	7	3	9

APPLICATION OF HORIZONTAL RESERVATION				
SHORTFALL, IF ANY	4	NIL	NIL	NIL

27. Having allocated first 50 seats in Open General Category and filled up other vertical column of reservation, the next step is to effect horizontal reservation for women. If the reservation for women was to be "overall horizontal reservation", there are 30 women (11+07+03+09) and nothing further is required to be done.

However, if the horizontal reservation for women is to be taken as "compartmentalized", as we are concerned in the present matter and the instant illustration, the appropriate steps must comprise of following:-

(A) Since the shortfall for women is of four seats in Open / General Category, last four male candidates namely those at Serial Nos. 46, 47, 48 and 49 initially allocated to Open/General Category, will have to be displaced. The candidate at Serial No. 50, being a woman, cannot be displaced.

(B) The male candidates at Serial Nos.46 and 47 being from Open/General Category, after such displacement will be completely out of reckoning as they cannot go to any reserved category.

(C) The candidates at Serial Nos.48 and 49 being more meritorious than the candidates originally placed in the vertical column of reservation for Scheduled Castes, must go back to their own vertical column. This will cause resultant displacement of two candidates in that vertical column of reservation. The 20th candidate, whose overall merit position is at Serial No.86, though a female, but being in excess of quota for Scheduled Castes females and a male candidate immediately above the 19th candidate will thus get displaced.

27.1 If we go by the second view, the female candidates at Serial Nos.52, 64, 87 and 88 must be accommodated against Open General Category seats whereas the candidate at Serial No.86, though more meritorious then those at Serial Nos.87 and 88, must be left without any seat.

On the other hand, if we go by the first view, the claim of reserved category candidates if they are more meritorious, has to be considered, in which case the candidate at Serial No.86 will be required to be accommodated. Resultantly, the candidate at Serial No.88 must give way.

There can be various such permutations and combinations and in a given case, the concerned female candidates from reserved category in the Waiting List for their respective vertical columns of reservation, may be more meritorious than the female candidates in the Waiting List for Open / General Category seats. The instant illustration is given to highlight the situation that can possibly emerge if the second view is adopted.

28. The second view, based on adoption of a different principle at the stage of horizontal reservation as against one accepted to be a settled principle for vertical reservation, may thus lead to situations where a less meritorious candidate, not belonging to any of the reserved categories, may get selected in preference to a more meritorious candidate coming from a reserved category. This incongruity, according to the second view, must be accepted because of certain observations of this Court in Anil Kumar Gupta and Others13 and Rajesh Kumar Daria[14]. The following sentences from these two decisions are relied upon in support of the second view:-

"But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom." [from paragraph 18 of Anil Kumar Gupta[13]]

"But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations." [from paragraph 9 of Rajesh Kumar Daria[14]]

29. These sentences are taken to be a mandate that at the stage of horizontal reservation the candidates must be adjusted /accommodated against their respective categories by deleting corresponding number of candidates from such categories and that the principle applicable for vertical (social reservation) will not apply to horizontal (special reservation). In our view, these

sentences cannot be taken as a declaration supporting the second view and are certainly being picked out of context.

The observations in paragraph 18 in Anil Kumar Gupta and Others[13] contemplated a situation where if "special reservation candidates" entitled to horizontal reservation are to be adjusted in a vertical column meant for "social reservation", the corresponding number of candidates from such "social reservation category" ought to be deleted.

It did not postulate that at the stage of making "special or horizontal reservation" a candidate belonging to any of the "social reservation categories" cannot be considered in Open/General Category. It is true that if the consideration for accommodation at horizontal reservation stage is only with regard to the concerned vertical reservation or social reservation category, the candidates belonging to that category alone must be considered. For example, if horizontal reservation is to be applied with regard to any of the categories of Scheduled Castes, Scheduled Tribes or Other Backward Classes, only those candidates answering that description alone can be considered at the stage of horizontal reservation. But it is completely different thing to say that if at the stage of horizontal reservation, accommodation is to be considered against Open/General seats, the candidates coming from any of the reserved categories who are more meritorious must be side-lined. That was never the intent of the observations sought to be relied upon in support of the second view.

Similarly, the observations in Rajesh Kumar Daria[14] were in the context of emphasizing a distinguishing feature between vertical and horizontal reservations; in that:-

(a) At the stage of vertical reservation, the reserved category candidates selected in Open/General category are not to be counted while filling up seats earmarked for the corresponding reserved categories.

(b) But the same principle of not counting the concerned selected candidates is not to apply for horizontal reservation.

Adopting principle (a) at the stage of horizontal reservation, the respondents in Rajesh Kumar Daria[14] had separately allocated 11 seats for women in General Category as part of special or horizontal reservation, though another set of

11 women candidates had got selected, according to their own merit, in General Category quota. The quota of 11 seats for women having been already satisfied, this Court negated the theory that their number be disregarded while making horizontal reservation for women. It was in that context that the distinction between vertical and horizontal reservations was highlighted by this Court in paragraph 9 of the decision. The subsequent sentence "thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women" in the very same paragraph and the illustration given thereafter are absolutely clear on the point.

30. The decision of this Court in Public Service Commission, Uttaranchal vs. Mamta Bisht[19] was also completely misunderstood. In that case one Neetu Joshi had secured a seat in General Category on her own merit and she also answered the category of horizontal reservation earmarked for "Uttaranchal Mahila". The attempt on part of Mamta Bisht, the original writ petitioner, was to submit that said Neetu Joshi having been appointed on her own merit in General Category, the seat meant for "Uttaranchal Mahila" category had to be filled up by other candidates. In essence, what was projected was the same stand taken by the respondents in Rajesh Kumar Daria[14], which was expressly rejected in that case. It is for this reason that para 15 of the decision in Public Service Commission, Uttaranchal vs. Mamta Bisht[19] expressly returned a finding that the judgment rendered by the High Court in accepting the claim of Mamta Bisht was not in consonance with law laid down in Rajesh Kumar Daria[14] and the appeal was allowed. This decision is thus not of any help or assistance in support of the second view.

31. The second view is thus neither based on any authoritative pronouncement by this Court nor does it lead to a situation where the merit is given precedence. Subject to any permissible reservations i.e. either Social (Vertical) or Special (Horizontal), opportunities to public employment and selection of candidates must purely be based on merit. Any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality. There can be special

dispensation when it comes to candidates being considered against seats or quota meant for reserved categories and in theory it is possible that a more meritorious candidate coming from Open/General category may not get selected. But the converse can never be true and will be opposed to the very basic principles which have all the while been accepted by this Court. Any view or process of interpretation which will lead to incongruity as highlighted earlier, must be rejected.

32. The second view will thus not only lead to irrational results where more meritorious candidates may possibly get sidelined as indicated above but will, of necessity, result in acceptance of a postulate that Open / General seats are reserved for candidates other than those coming from vertical reservation categories. Such view will be completely opposed to the long line of decisions of this Court.

33. We, therefore, do not approve the second view and reject it. The first view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is correct and rational.

34. It must be stated here that the submissions advanced by the Advocate General for Uttar Pradesh as recorded in the order dated 16.03.2016 before the Single Judge of the High Court (quoted in paragraph 9 hereinabove) were absolutely correct. The Single Judge and the Division Bench of the High Court completely erred in rejecting the stand taken on behalf of the State. It appears that after such rejection, the Procedure laid down for completing the recruitment exercise as referred to in the order dated 22.02.2019 passed by the Division Bench of the High Court (quoted hereinabove in paragraph 11) had stated in step 4.1 that candidate not belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes category alone would be considered against general category. Said Procedure and especially step 4.1 was erroneous but was perhaps guided by the declaration issued by the High Court earlier. On the other hand, the stand taken by the Advocate General for Maharashtra as recorded by the High Court of Bombay in Charushila vs. State of Maharashtra[25] was correct.

> 35. We must also clarify at this stage that it is not disputed that the Applicant no.1 and other similarly situated candidates are otherwise entitled and eligible to be appointed in 'Open/General Category' and that they have not taken or availed of any special benefit which may disentitle them from being considered against 'Open/General Category' seat. The entire discussion and analysis in the present case is, therefore, from said perspective."

16. It is quite apparent from the aforesaid law laid down by Hon'ble Apex Court that the candidates, who are entitled to the benefit of special category reservation, can compete /be selected against the posts meant for general category on the basis of their merit. Contrary view, if any, taken would result in selecting candidates in general category with lesser merit, which otherwise is not permissible. Aforesaid law laid down by Hon'ble Apex Court, which is virtually a reiteration of the earlier law laid down in **R.K. Sabharwal** (supra) and **Rajesh Kumar Daria** (supra), has been violated by the respondent-State, by not considering candidature of respondents Nos. 5 and 6 against the posts meant for the general category, as result of which, petitioner, who is at Sr. No.3 in the OBC (Wards of Ex-servicemen) category has lost his right to be selected against one of the posts reserved for the OBC (Wards of Ex-servicemen) category.

17. Reliance placed by respondents Nos. 1 to 3 upon the judgment in **Vikas Kumar** (supra) rendered by learned Single Judge of this Court, is wholly misconceived and cannot be applied in the facts of the present case, especially in view of the law laid down by Hon'ble Apex Court in **Saurav Yadav** (supra). Perusal of the aforesaid judgment rendered by learned Single Judge of this Court, reveals that it, after having taken note of the judgment rendered by Hon'ble Apex Court in **Anil Kumar Gupta** vs. **State of U.P**, (1995) 5 SCC 173 and **Rajesh Kumar Daria** (supra), arrived at the following conclusion:

> "10. The proper and correct course for the respondents in this case was to have first filled up all the ten vacancies on the basis of merit and then fill up the special reservations i.e. Ex-serviceman, IRDP and Home Guard. If the quota fixed for horizontal reservation was already satisfied, no further question would arise. But in case there was a shortfall and the reservation had not been satisfied, the requisite number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories i.e. Ex-serviceman, IRDP and Home Guard by deleting the corresponding number of candidates therefrom."

18. Hon'ble Apex Court in **Saurav Yadav** (supra) has categorically held in paragraphs Nos. 28 and 29 of the judgment, as has been taken note herein above, that the second view, based on adoption of a different principle at the stage of horizontal reservation as against one accepted to be a settled principle for vertical reservation, may thus lead to situations where a less meritorious candidate, not belonging to any of the reserved categories, may get selected in preference to a more meritorious candidate coming from a reserved category.

19. In the afore paragraphs of the latest judgment rendered by Hon'ble Apex Court, their Lordships have clarified that the observations made in paragraph-18 of **Anil Kumar Gupta** (supra) and paragraph-9 of **Rajesh Kumar Daria** (supra) cannot be taken as a declaration supporting the second view and are certainly being picked out of context. Hon'ble Apex Court, in the aforesaid judgment has also clarified that the observations made in paragraph-18 of **Anil Kumar Gupta** (supra) contemplated a situation, where if "special reservation candidates" entitled to horizontal reservation are to be adjusted in vertical column meant for "social reservation", the corresponding number of candidates from such "social reservation category", ought to be deleted. It did not postulate that at the stage of making "special or horizontal

reservation", a candidate belonging to any of the "social reservation category" cannot be considered against open or general category.

20. In the afore paragraphs of the judgment rendered by Hon'ble Apex Court, their Lordships have clarified that the observations made in paragraph-18 of **Anil Kumar Gupta** (supra) and paragraph-9 of **Rajesh Kumar Daria** (supra) cannot be taken as a declaration supporting the second view and are certainly being picked out of context. Hon'ble Apex Court in the aforesaid judgment, has further held that the observations in paragraph 18 in **Anil Kumar Gupta** (supra) contemplated a situation where if "special reservation candidates" entitled to horizontal reservation are to be adjusted in a vertical column meant for "social reservation", the corresponding number of candidates from such "social reservation category" ought to be deleted. Hon'ble Apex Court further observed that at the stage of making "special or horizontal reservation" a candidate belonging to any of the "social reservation categories" cannot be considered in Open/General Category.

21. Since the findings rendered by learned Single Judge in **Vikas Kumar** (supra) are also based upon wrong interpretation of judgments rendered by Hon'ble Apex Court in **Anil Kumar Gupta** (supra) and **Rajesh Kumar Daria** (supra), same cannot be made applicable/relied upon in the facts of the present case.

22. In view of the detailed discussion made supra, we are of the firm view that the selection made by respondent No. 3 vide Annexure P-4 is not in conformity with the law laid down by Hon'ble Apex Court on the subject, and deserves to be quashed and set aside.

23. In view of above, the petition is allowed. Annexure P-4 is quashed and set aside, being contrary to the settled legal position. Respondent No.3 is directed to, within two weeks from today, in conformity with the observations made herein supra, re-draw the selection list of all the categories qua the

selection in question, and proceed thereafter, to sponsor the names of the selected candidates to the requisitioning Department.

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

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

State of Himachal Pradesh and others……. .Applicants

Versus

Ram Krishan ….Respondent

CMP(M) No. 1278 of 2018
Decided on: March 8, 2021

Limitation Act, 1963 – Section 5 - Application for condonation of delay in maintaining Appeal against Award dated 07-08-2015 passed by Ld. District Judge (Forests) Shimla in Land Reference case – Held, that liberal approach in considering sufficiency of cause for delay should not override substantial law of limitation, especially when court finds no justification for delay – Reasons for delay in maintaining appeal not plausible – Plea taken in supplementary affidavit was never taken in the main application – No grounds exist to condone the delay – Application dismissed. (Paras 14, 15, 17)

Cases referred:

Lanka Venkateshwarlu Vs. State of Andhra Pradesh and others (2011) 4 SCC 363;

Oriental Aroma Chemical Industries Ltd. V. Gujarat Industrial Development Corporation and another, (2010) 5 SCC 459;

For the applicants : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

For the respondent **:** Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Since there is a delay of two years, ten months and eight days in maintaining the accompanying appeal, whereby applicants/appellants intend to lay challenge to Award dated 7.8.2015, passed by learned District Judge (Forests), Shimla in Land Reference No. 36-S/4 of 2013/12, instant application has been filed, seeking therein condonation of delay in maintaining the appeal.

2. By way of detailed reply to the application, aforesaid prayer made on behalf of the applicants/appellants has been seriously opposed by the non-applicant/respondent, who has categorically stated in the reply that the delay of more that 1042 days has not been explained properly and no plausible explanation qua inordinate delay in filing the appeal has been rendered on record.

3. Before proceeding further to decide the application at hand on its merit, it may be noticed that, having taken note of aforesaid objection raised by the non-applicant/respondent, this Court, with a view to afford an opportunity to the applicants/appellants to explain the delay, granted time to file a supplementary affidavit and also summoned the record with regard to the legal opinion rendered by the Law Department to file appeal in this Court. On 5.7.2019, this Court, having carefully perused the record, vis-à-vis explanation rendered in the application, concluded that the applicants/appellants have not approached this Court with clean hands, rather, an attempt has been made to hoodwink the court by placing on record wrong facts, as such, this Court directed Shri Jitender Dhiman, Superintending Engineer, 14th Circle, Himachal Pradesh Public Works Department, Rohroo, to remain present in the court. Though, on 26.7.2019, aforesaid officer came present in the court, but this Court, on the vehement

request of learned Additional Advocate General, granted time to file the supplementary affidavit, explaining therein the delay.

4. I have heard learned counsel for the parties and perused the material available on record.

5. Careful perusal of the pleadings adduced on record by the applicants qua the delay in filing the accompanying appeal, clearly reveals that the Award sought to be laid challenge by way of accompanying appeal was pronounced by learned District Judge (Forests) on 7.8.2015 and an application for procuring certified copy thereof was made on 20.8.2015. Though the certified copy of the Award was delivered on 31.8.2015 to the office of applicant/appellant No.4, but since the file was misplaced in the office of applicant/appellant No.4, same could not be processed further for obtaining the opinion/advice of the Law Department. As per applicants/appellants, factum with regard to passing of Award dated 7.8.2015 by learned District Judge (Forests) came to the notice of the Department, at the time when case file pertaining to another case titled Yadvender vs. State and another was received with the advice of the Government to file appeal in that matter. Since aforesaid file in Yadvender's case was received in the month of March, 2018 and file of the case at hand was wrongly tagged with the aforesaid file, appeal could not be filed within the prescribed period of limitation.

6. Interestingly, in the application at hand, it has been averred that on 1.5.2018, Government, in consultation with the Law Department, advised the Department to file an appeal, whereas, record reveals that the factum with regard to passing of Award, sought to be laid challenge, by way of accompanying appeal was very much in the knowledge of the Department, because, District Attorney (Forests) had been regularly putting in appearance in the execution petition filed by the non-applicant/respondent in the executing court.

7. Mr. Jitender Dhiman, Superintending Engineer, 14th Circle, Himachal Pradesh Public Works Department, Rohroo, in his supplementary affidavit, dated 14.8.2019, stated that after passing of Award by learned District Judge (Forests), office of District Attorney (Forests), applied for the certified copy vide application dated 20.8.2015 and a certified copy of the Award was supplied by the Copying Agency on 31.8.2015, whereafter, District Attorney (Forests) examined the Award and, vide letter dated 13.9.2015, forwarded the Award with case file to the office of Executive Engineer, Himachal Pradesh Public Works Department, Rohroo. He has further stated that the case file was not diarized in the office of Executive Engineer, Himachal Pradesh Public Works Department, but was misplaced somewhere and, as such, no steps for filing the appeal in the case at hand, could be taken within the stipulated time. However, if said facts placed on record by way of supplementary affidavit are read juxtaposing the initial facts placed before this Court by way of application under S.5 of the Limitation Act, it can be safely inferred that the applicants, while filing application for condonation of delay, have not approached this Court with clean hands, rather, have made an effort to hoodwink this Court by twisting the facts. The plea taken in the supplementary affidavit was never taken in the main application, rather, there is no mention, if any, with regard to opinion rendered by District Attorney (Forests) qua the Award passed by the reference court.

8. Reply to the application filed on behalf of the non-applicant/respondent reveals that on 2.4.2018, District Attorney (Forests), representing the applicants before learned Court below, stated that the amount shall be deposited and, at no point of time, apprised learned Court below with regard to the appeal proposed to be filed in the superior court of law laying therein challenge to the Award passed by the reference court. It has been further averred in the reply filed by the non-applicant/respondent that in the execution petition filed by him, a substantial amount of Rs.13,36,697/-

stands released to him and, as of today, only a sum of Rs.1,50,987/- is recoverable. Since the factum with regard to the opinion, if any, rendered by District Attorney (Forests) was in the knowledge of the applicants, it is not understood that on that on what basis, the applicants permitted learned Court below to release the substantial amount of Rs.13,36,697/-. Since no specific rejoinder qua aforesaid aspect of the matter has been filed on behalf of the applicants, averments contained in the reply deserver to be accepted. It has been stated in the rejoinder that substantial amount came to be released in favour of the non-applicant/respondent on account of misconception of facts, but the facts, which led to such 'misconception', have not been placed on record. Though, the applicants have taken a stand that the file was misplaced in the office of applicant No.4 and the same was not traceable till the time, file of connected matter was received alongwith the advice rendered by Law Department, but there is no denial qua the factum with regard to pendency of the execution petition filed by the non-applicant/respondent before the executing Court. Pleadings adduced on record clearly reveal that learned District Attorney (Forests) kept on representing the Department in execution petition filed by the non-applicant/respondent and matter repeatedly came to be adjourned on the request of learned District Attorney (Forests) for depositing the award amount. For the reasons stated herein above, appeal intended to be filed against Award dated 7.8.2015 in Land Reference No. 36-S/4 of 2013/12 is hopelessly time barred. Since no cogent and convincing reasons have been rendered on record, there appears to be no justification for this Court to condone the delay.

9. Their Lordships of the Hon'ble Supreme Court in **Oriental Aroma Chemical Industries Ltd. V. Gujarat Industrial Development Corporation and another**, (2010) 5 SCC 459 have held that the liberal approach should be adopted in condoning the delay of short duration and stricter approach in cases of inordinate delay. Their Lordships have held as under:

"14. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.

29. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate – Collector, Land Acquisition, Anantnag v. Mst. Katiji (1987) 2 SCC 107, N. Balakrishnan v. M. Krishnamurthy (1998) 7 SCC 123 and Vedabai v. Shantaram Baburao Patil (2001) 9 SCC 106. In dealing with the applications for condonation of delay filed on behalf of the State and its agencies/instrumentalities this Court has, while emphasizing that same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time causing delay – G. Ramegowda v. Spl. Land Acquisition Officer (1988) 2 SCC 142, State of

Haryana v. Chandra Mani (1996) 3 SCC 132, State of U.P. v. Harish Chandra (1996) 9 SCC 309, State of Bihar v. Ratan Lal Sahu (1996) 10 SCC 635, State of Nagaland v. Lipok Ao (2005) 3 SCC 752, and State (NCT of Delhi) v. Ahmed Jaan (2008) 14 SCC 582.

10. Their Lordships of the Hon'ble Supreme Court in **Lanka Venkateshwarlu Vs. State of Andhra Pradesh and others** (2011) 4 SCC 363 have held that liberal approach in considering sufficiency of cause for delay should not override substantial law of limitation, especially when court finds no justification for delay. Their Lordships have held as under:

"19. We have considered the submissions made by the learned counsel. At the outset, it needs to be stated that generally speaking, the courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. This principle is well settled and has been set out succinctly in the case of Collector, Land Acquisition, Anantnag & Ors. Vs. Katiji & Ors. ((1987) 2 SCC 107).

29. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of Balwant Singh (supra), as follows:-

"25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation."

"26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to

explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

26. Having recorded the aforesaid conclusions, the High Court proceeded to condone the delay. In our opinion, such a course was not open to the High Court, given the pathetic explanation offered by the respondents in the application seeking condonation of delay.
27. This is especially so in view of the remarks made by the High Court about the delay being caused by the inefficiency and ineptitude of the government pleaders.
28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.
29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and

> unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not form the basis of exercising discretionary powers."

11. Recently, Hon'ble Apex Court in **The State of Madhya Pradesh & Os.** Vs. **Bherulal**, Special Leave to Petition (C) diary No. 9217 of 2020, decided on 15.10.2020, has reiterated that in the absence of plausible and acceptable explanation, delay cannot be condoned mechanically merely because the Government or its wing is seeking condonation of delay. It has further been held by Hon'ble Apex Court in the judgment (supra) that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice but, if there is reason to believe that the officials manning the posts have not performed their duties with diligence or commitment, delay, if any, in filing an appeal, cannot be condoned. Hon'ble Apex Court has held as under:

> "3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government (Collector, Land Acquisition, Anantnag & Anr vs. Mst. Katiji & Ors. (1987) 2 SCC 107). This position is more than elucidated by the judgment of this Court in Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. (2012) 3 SCC 563 where the Court observed as under:
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> > "12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they

have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red- tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay." Eight years hence the judgment is still unheeded!

12. In the case at hand, substantial amount already stands released in favour of the respondent in the presence of learned District Attorney (Forests),

as such, it can be safely presumed that the present application seeking therein condonation of delay in filing the accompanying appeal is only filed to protect these officers, who remained negligent while discharging their duties. While dealing with similar facts in the judgment (supra), Hon'ble Apex Court has deprecated this practice and has observed as under:

> "6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsels appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation."

13. In the past, this court, having taken note of the lengthy administrative process involved in filing appeals, had been taking a lenient view, while condoning the delay but, it appears that such liberal approach of this Court has emboldened the officials of the Department, who, at the first instance take no steps to obtain certified copies of the verdicts within the prescribed period and then keep on sitting over the file for long periods, for no reason.

14. The reasons for delay in maintaining accompanying appeal as rendered by the applicants in the case at hand, are not plausible, rather, despite repeated opportunities, applicants have chosen not to place the true facts before this Court, while filing appeal within the stipulated period.

15. Interestingly, the application filed for condonation of delay reveals that some action was initiated against the personnel responsible for misplacing the file, but, till date, nothing has been placed on record, suggestive of the fact that any disciplinary action has been taken against the erring personnel, rather, applicants, by way of supplementary affidavit and counter affidavit, have again made an attempt to justify their action, by concealing material facts. Otherwise also, law cannot come to the rescue of those, who were not diligent in pursuing their remedies. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those who are vigilant with their rights, and not those that sleep thereupon.

16. Though, having taken note of the aforesaid conduct of the applicants, this Court would have proceeded to order an enquiry into the matter, but on the vehement request of Mr. Sudhir Bhatnagar, learned Additional Advocate General, it refrains from doing so.

17. In view of detailed discussion made herein above, this Court does not find any reason to condone the delay, in result, the application is dismissed being devoid of merit.

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

Ravinder Kumar Barwal ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 1803 of 2020
Reserved on: March 8, 2021
Decided on March 22, 2021

Constitution of India, 1950 – Article 226 – Petitioner having rendered service in Indian Air Force, re-employed as Assistant District Attorney in 2001 against the post reserved for ex-serviceman category – Petitioner opted to

count his previous military service for the purpose of retirement benefits on superannuation – Later, petitioner prayed for permission for withdrawal of option exercised by him under Rule 19 of CCS (Pension) Rules 1972 alleging that same is not accepted – Government conveyed the decision that once Petitioner has already exercised the option under Rule 19, the same can not be withdrawn – Challenge thereof – Held, that Petitioner failed to deposit entire amount received by him on account of military pension – Instead of depositing the remaining amount as required by the Government, Petitioner prayed for withdrawal of consent – No provision to withdraw option once exercised under Rule 19 – No plausible explanation rendered on record qua long delay in approaching the court – Petition dismissed being devoid of merits. (Paras 24,25,30)

Cases referred:

B.S. Bajwa and another vs. State of Punjab and others, (1998)2 SCC 523;

Banda Development Authority, Banda vs. Moti Lal Agarwl and Ors., 2011 AIR SCW 2835;

Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu, 2014 AIR SCW 1171;

I. Chuba Jamir & Ors. versus State of Nagaland & Ors., reported in 2009 AIR SCW 5162;

State of Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519;

For the petitioner	Mr. Ajay Chandel, Advocate.
For the respondents	Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Precise question, which has fallen for adjudication in the case at hand, is, "whether the option once exercised in terms of rule 19 of the CCS (Pension) Rules, 1972 (hereinafter, 'Rules') to count past military service, can be withdrawn at a subsequent stage, that too after lapse of about 10 years or not?"

18. For having birds' eye view of the matter, certain undisputed facts as emerge from the record are that the petitioner, after having rendered service in the Indian Air Force, came to be reemployed as a Assistant District Attorney in the Department of Prosecution in the year 2001 against the post reserved for the ex-serviceman category. Petitioner joined against the aforesaid post in the Department of Prosecution on 28.12.20001. On 4.10.2002, petitioner opted to count his previous military service as qualifying service for the purpose of retirement benefits on account of military service on his superannuation in terms of rule 19 of the Rules. Vide letter No. DPr-B(3)3/2001-4314 dated 3.5.2003, Director Prosecution, Himachal Pradesh called upon the petitioner to deposit /refund amount received by the petitioner on account of commutation amount, interest on commutation, gratuity, interest on gratuity and pension received during re-employment. Besides above, vide communication dated 21.5.2003 (Annexure R-5 of the reply), District Attorney, Sirmaur at Nahan, Himachal Pradesh while acknowledging the letter written by the petitioner disclosing therein factum with regard to receipt of Rs. 1,93,678 also furnished /made available detail of the payment proposed to be recovered by the Department in terms of rule 19(3) (a), wherein it has been specifically provided that a Government servant, who opts for Clause (b) of sub-rule (1) shall be required to refund the pension, bonus or gratuity received in respect of his earlier military service, in monthly instalments not exceeding thirty-six in number, the first instalment beginning from the month following the month in which he exercised the option. Vide aforesaid communication, office of District Attorney, Sirmaur also informed the petitioner that a sum of Rs. 5,150/- on account of first installment and remaining 19 installments at the rate of Rs.5,147 per month shall be recovered from his salary for the month of May, 2003 paid in June, 203. After issuance of aforesaid communication, petitioner vide communication dated 25.9.2003, (Annexure P-2) addressed to the Director of Prosecution, furnished

complete details with regard to the amount received by him on account of pension, gratuity and commutation of pension etc. and informed the Department that a total sum of Rs. 2,99,118/- received by him from his previous service rendered in the Indian Air Force stands deposited and said factum qua aforesaid deposit be recorded in his service record. Vide communication dated 23.3.2004 (Annexure P-3), Senior Deputy Accountant General (A&E), Himachal Pradesh informed the District Attorney, Sirmaur at Nahan that sums of Rs.90,735/- and Rs. 1,98,086/- stand received in July, 2003 (7/2003) through Challans Nos. 7 and 16. Vide communication dated 20.9.2004, Annexure P-5, District Attorney Sirmaur informed the Director of Prosecution Himachal Pradesh that the petitioner has refunded the amount of commutation and pension with interest to the State of Himachal Pradesh and also enclosed with the aforesaid communication verification certificate issued in favour of the petitioner by Accountant General (A&E) Himachal Pradesh. It appears that the office of Director of Prosecution, after having received aforesaid communication from the office of District Attorney, Sirmaur, sent a letter No. DPr-B(3)3/2001-9102 dated 20.11.2003, to the office of Additional Chief Secretary (Home) to the Government of Himachal Pradesh, who in turn vide letter No. Home(Prose)B(3)3/2001 dated 24.11.2003 (Annexure P-4), addressed to the Director of Prosecution advised the Department to get the amount refunded by the petitioner recalculated/authenticated from the DDO concerned in the prescribed manner, so that whole amount along with interest is refunded to the State complete in all respects, as per prevalent Government instructions. After having received aforesaid instructions from the Additional Chief Secretary (Home) to the Government of Himachal Pradesh, Director of Prosecution directed the District Attorney Sirmaur vide communication dated 16.10.2004 (Annexure P-6) to supply the complete details with regard to the amount refunded by the petitioner. However, it appears that before aforesaid information could be furnished to Director of Prosecution by the District

Attorney Sirmaur, petitioner, vide communication dated 10.11.2010 (Annexure P-7), prayed for withdrawal of option exercised by him under Rule 19 of CCS (Pension) Rules, 1972. In the aforesaid communication, petitioner claimed that though he after exercise of option under Rule 19 of the CCS (Pension) Rules had deposited Rs.2,99,118/- through different vouchers in the year 2003 but since his option under Rule 19 of the Rules has not been accepted by the Government despite lapse of 7 years and no Notification in this regard has been published, he should be permitted to withdraw his option. Besides above, petitioner claimed that he was intimated that the rate of interest is not 6% but it was to be calculated at the rate of interest applicable to GPF accumulations plus 2% penal rate of interest, which is on higher side, as such, while expressing his inability to deposit another sum of Rs.20,000/-, petitioner prayed for withdrawal of option. Vide communication dated 10.8.2011 (Annexure P-8), Under Secretary (Home) to the Government of Himachal Pradesh, asked the Director of Prosecution, Himachal Pradesh to inform whether the required amount of Rs.20,000/- has been deposited with the Government treasury till date or not and, if not, what action has been initiated by the concerned office. However, the petitioner again vide communication dated 16.9.2011 (Annexure P-9), addressed to the Director of Prosecution, while expressing his inability to pay the additional amount, prayed that the option given by him earlier may be treated as withdrawn not being financially beneficial to him. In response to the aforesaid representation filed by the petitioner, Director of Prosecution, vide communication dated 12.7.2012 (Annexure P-10), informed the petitioner that the matter was taken up with the Government and vide letter No. Home(Prose)-B(3)-3/2001, dated 3.7.2012, it has been conveyed that once the petitioner has already exercised the option to count his past military service under Rule 19 of the Rules, same has attained finality and it cannot be withdrawn at this stage after a lapse of ten years. Petitioner, despite having received aforesaid decision from the

department, made representations dated 6.5.2013 and 20.2.2018, Annexures P-11 and P-12, respectively, seeking therein permission of the Government to withdraw the option exercised by him under Rule 19 of the Rules, at the time of his reemployment. Office of Director of Prosecution, vide communications dated 1.8.2018 (Annexure P-14)and 10.8.2018 (Annexure P-13), reiterated that the option once exercised cannot be withdrawn.

19. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for the following main reliefs:

> "a) That the impugned orders dated 12-07-2012 (Annexure P10) and orders dated 03.07.2012, 31.08.2013 and 01.08.2018 (Annexure P14) may kindly be ordered to be quashed and set-aside and consequently the option of the petitioner under Rule 19(1) may kindly be declared to have been validly withdrawn in the interest of justice.
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> b) That the respondents may be directed to refund the amount of Rs.2,99,118/- deposited by the petitioner in the year 2003 along with interest @ 12% from the date of deposit by the petitioner with the respondents till its refund."

20. Respondents by way of a detailed reply, have refuted aforesaid claim on the ground that the option once exercised under Rule 19 of the Rules cannot be allowed to be withdrawn after a lapse of 10 years. Besides above, the respondents have claimed that once the petitioner himself deposited amount of Rs.2,99,118/- vide communication dated 25.9.2003, and prayed to record the factum of aforesaid deposit in service record, prayer to withdraw the aforesaid option after a considerable period of ten years cannot be allowed.

21. I have heard learned counsel for the parties and perused the material available on record.

22. Before proceeding further to adjudicate the matter, rule 19 of the Rules ibid, may be taken note, which provides as under:

19. Counting of military service rendered before civil employment

(1) A Government servant who is re-employed in a civil service or post before attaining the age of superannuation and who, before such re-employment, had rendered military service, may, on his confirmation in a civil service or post, opt either -

(a) to continue to draw the military pension or retain gratuity received on discharge from military service, in which case his former military services shall not count as qualifying service; or

2(b) to cease to draw his pension and refund -

(i) the pension already drawn, and

(ii) the value received for the commutation of a part of military pension, and

(iii) the amount of 3[retirement gratuity] including service gratuity, if any, and count previous military service as qualifying service, in which case the service so allowed to count shall be restricted to a service within or outside the employee's unit or department in India or elsewhere which is paid from the Consolidated Fund of India or for which pensionary contribution has been received by the Government :

Provided that -

(i) the pension drawn prior to the date of re-employment shall not be required to be refunded.

(ii) the element of pension which was ignored for fixation of his pay including the element of pension which was not taken into account for fixation of pay on re-employment shall be refunded by him,

(iii) the element of pension equivalent of gratuity including the element of commuted part of pension, if any, which was taken into account of fixation of pay shall be set off against the amount of 1[retirement gratuity] and the commuted value of pension and the balance, if any, shall be refunded by him.

Footnote : 1. Substituted vide G.I., Dept. of P. & P.W., Notification No. 2/18/87-P. & P.W. (PIC), dated the 30th July, 1988. Published as S.O. No. 2388 in the Gazette of India, dated the 6th August, 1988.

EXPLANATION. - In this clause, the expression `which was taken into account' means the amount of pension including the pension equivalent of gratuity by which the pay of the Government servant was reduced on initial re-employment, and the expression `which was not taken into account' shall be construed accordingly.

(2) 2(a) The authority issuing the order of substantive appointment to a civil service or post as is referred to in sub-rule (1) shall along with such order require in writing the Government servant to exercise the option under that sub-rule within three months of date of issue of such order, if he is on leave on that day, within three months of his return from leave, whichever is later and also bring to his notice the provisions of Clause (b).

(b) If no option is exercised within the period referred to in Clause (a), the Government servant shall be deemed to have opted for Clause (a) of sub-rule (1)

(3) (a) A Government servant, who opts for Clause (b) of sub-rule (1) shall be required to refund the pension, bonus or gratuity received in respect of his earlier military service, in monthly instalments not exceeding thirty-six in number, the first instalment beginning from the month following the month in which he exercised the option.

(b) The right to count previous service as qualifying service shall not revive until the whole amount has been refunded.

(4) In the case of a Government servant, who, having elected to refund the pension, bonus or gratuity, dies before the entire amount is refunded, the unrefunded amount of pension or gratuity shall be adjusted against the 3[death gratuity] which may become payable to his family.

(5) When an order is passed under this rule allowing previous 1[ ] military service to count as part of the service qualifying for civil pension, the order shall be deemed to include the condonation of interruption in service, if any, in the military service and between the military and civil services."

23. Aforesaid rule clearly reveals that the Government servant, who is reemployed in civil service or post before attaining age of superannuation

and, before such reemployment had rendered military service may, on his appointment to civil service or post, opt, either to continue to draw military pension or retain the gratuity received by such member from military service, in which case his approved military service shall not be counted as a qualifying service or he shall cease to draw his pension or refund the pension already drawn and value received for the commutation of military pension and amount of retirement gratuity including service gratuity and count previous military service as qualifying service. Rule 192(a) provides that the authority issuing the order of substantive appointment to a civil service or post as is referred to in sub-rule (1) shall along with such order require in writing the Government servant to exercise the option under that sub-rule within three months of date of issue of such order. Rule 19(2)(b) further provides that if no option is exercised within the period referred to in Clause (a), the Government servant shall be deemed to have opted for Clause (a) of sub-rule (1). Rule 19(3)(a) further provides that the Government servant, who opts for Clause (b) of sub-rule (1) shall be required to refund the pension, bonus or gratuity received in respect of his earlier military service, in monthly instalments not exceeding thirty-six in number.

24. In the case at hand, it is not in dispute that the petitioner after having rendered service in Indian Air Force, came to be selected as an Assistant District Attorney in the Department of Prosecution in the year 2001, against vacancy reserved for ex-serviceman. It is also not in dispute that the petitioner, pursuant to his appointment against the aforesaid post, exercised the option under Rule 19(1)(b) to count his previous military service as qualifying service for the purpose of retirement benefits on account of military benefits. It is also not in dispute that pursuant to aforesaid option exercised by the petitioner in terms of rule 19(1)(b) of CCS (Pension) Rules, 1972, respondent Department vide communication dated 21.5.2003, furnished details of recoveries proposed to be effected from the salary of the petitioner on

account of military pension received by him. However, perusal of communication dated 25.9.2003 (Annexure P-2) placed on record by the petitioner suggests that he deposited entire sum of Rs.2,99,118/- on account of commutation amount, interest on commutation amount, gratuity amount and interest and gratuity pension received during reemployment. Aforesaid amount deposited by the petitioner was duly acknowledged by the office of Senior Deputy Accountant General vide communication dated 8.5.2004 and 23.5.2004, Annexure P-3.

25. Vide letter dated 16.10.2004, annexure P-6, Director of Prosecution directed District Attorney, Sirmaur to supply recalculation of the DDO concerned in the prescribed manner and to ensure that the whole amount alongwith interest as applicable on GPF accumulations from time to time for the period from the date of receipt of pensionary benefit to the date of their refund to the Government is deposited. Though, the Department, after having received aforesaid communication from the office of respondent No.3, requested the petitioner to furnish aforesaid details but as per record available with respondent No.4 no information was furnished by the petitioner. In the meantime, petitioner was transferred to Chachyot at Gohar, District Mandi, Himachal Pradesh and he relinquished charge of the post of Assistant District Attorney Nahan on 2.10.2005 and as such, in his absence, recalculation in terms of aforesaid communication could not be carried out. Subsequently, the DDO/District Attorney, Sirmaur at Nahan recalculated the interest on pensionary benefits, DCRG and commutation of pension. On recalculation of interest on the amounts of Death-cum-Retirement Gratuity and commutation of pension on the interest applicable to GPF accumulations alongwith penal interest at the rate of 2%, District Attorney found the petitioner liable to pay initial amount of Rs.8,430/- (Annexure R-4). After ascertaining the amount through respondent No.4, vide letter No. DA/SRM/NHN/B(3)11/2001-53 dated 30.5.2003 (Annexure R-5), it was found that the petitioner was required

to deposit interest at the rate of 6%, however, the fact remains that the petitioner instead of depositing aforesaid amount, vide communications dated 10.11.2010, 16.9.2011, 6.5.2013 and 20.2.2018, requested the respondents to permit him to withdraw the option exercised by him at the time of joining the post of Assistant District Attorney.

26. As has been taken note herein above, aforesaid request having been made by the petitioner was not acceded to by the Department on the ground that the option once exercised under Rule 19 of the Rules cannot be withdrawn that too after a lapse of 10 years.

27. Mr. Ajay Chandel, learned Counsel appearing for the petitioner, while making this Court peruse the provisions contained under Rule 19 of the Rules ibid, vehemently argued that since the option exercised by the petitioner on 4.10.2002 in terms of Rule 19 was never accepted by the Department, same would be deemed to have been withdrawn. He further submitted that though the petitioner of his own had deposited a sum of Rs.2,99,118/- on account of military pension but since he had not deposited the complete amount, the option, if any, exercised by him cannot be termed to be an option in terms of Rule 19(1), which provides for deposit of complete amount of pension received prior to civil employment. Lastly, Mr. Chandel while referring to Rule 19(5) argued that since no order at any point of time was passed allowing previous military service to count as part of service qualifying for civil pension, option, if any, exercised by the petitioner is of no consequence.

28. To the contrary, Mr. Sudhir Bhatnagar, learned Additional Advocate General, vehemently argued that there is no provision under Rule 19 of the Rules to withdraw an option once exercised. Mr. Bhatnagar, learned Additional Advocate General, strenuously argued that once petitioner himself deposited Rs.2,99,118/-, on account of military service, it cannot be said that there was any requirement as such, for the Department to pass written order accepting the option.

29. Having carefully perused rule 19 of the Rules, this Court finds substantial force in the submissions made by learned Additional Advocate General, that there is no provision to withdraw option once exercised. Similarly, this Court does not find any provision under Rule 19 of the Rules that specific order, if any, is/was required to be passed by the Government accepting the option exercised by the petitioner in terms of Rule 19(1) of the Rules. If the provision contained under Rule 19(5) are perused minutely, same suggest that written order allowing previous military service to count as part of service qualifying for civil pension is required to be passed. This provision nowhere suggests that order accepting the option, if any, exercised under Rule 19(1) of the Rules is required to be passed by the Department.

30. True, it is that in the case at hand, this Court was unable to lay its hand to order, if any, passed by the respondents under Rule 19(5) of the Rules, allowing previous military service rendered by the petitioner to count as part of service qualifying for civil pension, but such omission, if any, on the part of respondents would in no manner, help the petitioner as far as prayer with regard to withdrawal of option exercised by him is concerned. It appears that since the petitioner failed to deposit entire amount received by him on account of military pension, necessary order/Notification under rule 19(5) could not be issued by the respondents. Since there was a dispute inter se petitioner and the respondents with regard to the calculations qua amount received by the petitioner from military pension, matter remained pending for quite considerable time. Respondent Department asked the petitioner to deposit Rs.20,000/- in addition to what he had already deposited at the time of exercise of option under Rule 19(1) of the Rules, but he instead of depositing aforesaid amount, made request to permit him to withdraw his option as such, necessary orders in terms of Rule 19(5) of the rules never came to be issued /passed.

31. Leaving everything aside, this court from bare perusal of aforesaid provisions contained under CCS (Pension) Rules, 1972 is unable to find out any provision which enables the petitioner to withdraw the option exercised by him at the time of reemployment. In the case at hand, prayer for withdrawal of option came to be made on behalf of the petitioner for the first time in the year 2010 i.e. ten years after his reemployment as Assistant District Attorney in the Department of Prosecution.

32. Material available on record clearly reveals that the aforesaid prayer of the petitioner was rejected in the year 2012, itself but the petition at hand came to be filed in the year 2020 i.e. after an inordinate delay of eight years. Though, the petitioner has placed on record certain representations suggestive of the fact that even after rejection of claim in the year 2012, he kept on pursuing his case with the Department till the year 2018 but it is well settled by now that the repeated representations do not give limitation.

33. True it is that there is no limitation period provided for filing writ petition under Art. 226 of the Constitution of India, but even then, a person approaching a court in writ jurisdiction, is expected to approach the Court within a reasonable time. There is no plausible explanation rendered on record qua delay of eight years and as such, prayer having been made by the petitioner otherwise deserves to be rejected on the ground of inordinate delay.

34. By now, it is well settled that relief cannot be extended to the persons who have approached the court after a long delay, especially who approach the court after inordinate delay. Reliance is placed on **B.S. Bajwa and another** vs. **State of Punjab and others**, (1998)2 SCC 523, wherein the Hon'ble Apex Court has held as under:-

> "7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing

> from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

35. The Hon'ble Apex Court in case titled as **State of Uttar Pradesh and others** vs. **Arvind Kumar Srivastava and others**, 2014 AIR SCW 6519, held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> "24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be

> pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."

36. Even Division Bench of this Court, while placing reliance upon the aforesaid judgments passed by Hon'ble Apex Court, has held in LPA No.604 of 2011, titled **Karan Singh Pathania** vs. **State of H.P. and Others** that "fencer cannot be held entitled to any relief"

37. In **I. Chuba Jamir & Ors.** versus **State of Nagaland & Ors.,** reported in 2009 AIR SCW 5162, the Apex Court has held that the inordinate delay is a very valid and important consideration. It is apt to reproduce para 17 of the judgment herein:

> "17. On a careful consideration of the materials on record and the submissions made by Mr. Goswami we are unable to accept the claims of the appellants-writ petitioners. In our view the inordinate delay of 7 or 8 years by the appellants-writ petitioners in approaching the High Court was a very valid and important consideration. This aspect of the matter was also brought to the notice of the Single Judge but he proceeded with the matter without saying anything on that issue, one way or the other. It was, therefore, perfectly open to the Division Bench to take into consideration the conduct of the appellants-writ petitioners and the consequences, apart from the legality and validity, of the reliefs granted to them by the learned single Judge."

38. In **Banda Development Authority, Banda** vs. **Moti Lal Agarwl and Ors.**, 2011 AIR SCW 2835, similar principle has enunciated by Hon'ble Apex Court, wherein it has been held as under:

> 15. In our view, even if the objection of delay and laches had not been raised in the affidavits filed on behalf of the BDA and the State Government, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under Section 6(1) and filing of the writ petition and declined relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing the residential scheme and third party rights had been created.
>
> The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition.
>
> xxx xxxx xxx
>
> 25. In this case, the acquired land was utilized for implementing Tulsi Nagar Residential Scheme inasmuch as after carrying out necessary development i.e. construction of roads, laying electricity, water and sewer lines etc. the BDA carved out plots, constructed flats for economically weaker sections and lower income group, invited applications for allotment of the plots and flats from general as well as reserved categories and allotted the same to eligible persons. In the process, the BDA not only incurred huge expenditure but also created third party rights. In this scenario, the delay of nine years from the date of publication of the declaration issued under Section 6(1) and almost six years from the date of passing of award should have been treated by the High Court as more than sufficient for denying equitable relief to respondent No.1."

39. Hon'ble Apex Court in **Chennai Metropolitan Water Supply and Sewerage Board and others** vs. **T.T. Murali Babu**, 2014 AIR SCW 1171, has

held that the doctrine of delay and laches should not be lightly brushed aside. Hon'ble Apex Court has held as under:

> "16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that

> matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

40. Though, the claim of the petitioner is that at no point of time, option exercised by him under Rule 19 was accepted by the Department but bare perusal of the communication dated 29.5.2003 (Annexure R-5) annexed with the reply clearly reveals that the Department after having received information with regard to certain deposits made by the petitioner, apprised the petitioner with regard to recoveries proposed to be effected from his salary on account of military pension received by him. There may not be any formal order available on record accepting the option exercised by the petitioner but aforesaid communication itself suggests that the Department after having accepted the option exercised by the petitioner under Rule 19, started effecting recoveries from the salary of the petitioner, so that military pension received by him is recovered in terms of Rule 19 (3) (a).

41. Having taken note of the fact that the petitioner after having deposited Rs.2,99,118/-, himself requested the Department to record factum with respect to deposit made by him in service record, this court finds no force in the claim of the petitioner that the option exercised by him under Rule 19 was never accepted by the Department, rather, the material available on record suggests that the Department, after having accepted the option exercised by the petitioner under Rule 19 permitted him to deposit a sum of Rs.2,99,118/- and subsequently on having found deficiency in the amount, again called upon the petitioner to deposit Rs.20,000/-.

42. Otherwise also, the writ petition filed by the petitioner suggests that he while expressing his inability to deposit the additional amount of Rs.20,000/- informed the Department that since he has already received

substantial amount on account of military pension, it would not be beneficial for him to exercise option under Rule 19(1) of the Rules. However, aforesaid excuse rendered on record by the petitioner, by no stretch of imagination, can be said to be reasonable and plausible enabling the Department to accept his request for withdrawal of option exercised by him since there is no specific provision, under the rules for withdrawal of option once exercised.

43. Leaving everything aside, this Court is of the view that since there is no specific provision contained under Rule 19, making it incumbent upon the Department to accept the option in writing coupled with the fact that there is no provision with regard to withdrawal of option once exercised by him, prayer made in the instant petition cannot be allowed.

44. It is quite apparent from the averments contained in the petition that the petitioner after having found the benefits attached to military service more beneficial has now purposely decided to withdraw his option which otherwise is not permissible at this stage.

45. Moreover, despite the Department asking the petitioner time and again to deposit the additional amount , it is the petitioner who chose not to deposit the same, as such, now, he cannot be allowed to take benefit of his own wrongs, by claiming that since the entire amount in terms of option exercised by him was not deposited, same has not attained finality or that the same can be withdrawn at this stage.

46. There is yet another aspect of the matter viz., in case petitioner is permitted to withdraw his option, natural corollary would be that the petitioner would be stripped off, of the benefits received by him, by counting past military service as qualifying service for civil post, which may include seniority and promotion and, if at this stage, these benefits are undone, it would result in unsettling a settled position, i.e. re-determination of seniority, promotions etc. Otherwise also, it is settled law that in service matters, a person should approach the court of law within a reasonable time, but in the

case at hand, petitioner has approached this Court for withdrawal of option exercised by him in the year 2001, after around nineteen years i.e. in the year 2020, as such, the writ petition at hand is hopelessly barred by limitation.

47. In view of detailed discussion made herein above, I find no merit in the present petition and the same is dismissed. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Manjeet Singh Saini ....Petitioner

Versus

Union of India and others ..Respondents

CWP No. 2911 of 2021
Reserved on: July 2, 2021
Decided on: July 5, 2021

Constitution of India, 1950 – Article 226**-** Petitioner being posted as Assistant Professor (Special Education) at composite Regional Centre (CRC) Sundernagar for skill Development, Rehabilitation & Empowerment of Persons with disabilities regularly discharging duties of Officer-in-charge-However, vide office letter dated 03-05-2021, respondent no. 3 has been ordered to take over the charge of officer-in-charge, CRC Sundernagar – Challenge thereof – Held, No dispute regarding policy decision dated 09-02-2021 which forms basis to issue impugned office order – Petitioner being one of the Assistant Professor was given opportunity to work as officer-in-charge, CRC Sundernagar and he can't claim any right to remain in such post for an indefinite period – As per Rotation policy issued by Central Vigilance Commission dated 11-09-2013, senior most Assistant Professor is to be given charge of the office of officer-in-charge, CRC but petitioner having served for more than 18 years, cannot be permitted to stake claim alleging that above rotation policy came into operation w.e.f. 09-02-2021 which is not having prospective effect - Petition dismissed.

For the petitioner	Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate.
For the respondents	Mr. Balram Sharma, Assistant Solicitor General of India, for respondents Nos. 1 and 2. Mr. Kush Sharma and Mr. Yudhvir Singh Thakur, Advocates, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant writ petition filed under Art. 226 of the Constitution of India, lays challenge to office order dated 3.5.2021, Annexure P-6, whereby respondent No.3 Dr. Shatrughan Singh, Assistant Professor, Composite Regional Centre, Sundernagar, has been directed to take over the charge of Officer-In-Charge, CRC Sundernagar for a term of two years or till further orders in addition to his own duties with effect from 10.5.2021, in place of the petitioner, who was otherwise holding said office since the year 2003.

2. For having a bird's eye view of the matter, certain undisputed facts germane for the adjudication of the present dispute are that the respondent No.2 i.e. National Institute for the Empowerment of Persons with Visual Disabilities (Divyangjan) (hereinafter, 'Institute'), earlier known as the national Institute for the Visually Handicapped, Dehradun, is a society registered under the provisions of Societies Registration Act, 1860 with effect from 21.10.1982, an autonomous body governed by its Executive Council. For the management and administration, the Institute has formulated its own by-laws/rules and regulations, which otherwise stand duly approved by the Ministry of Social Justice and Empowerment, Government of India. The Ministry of Social Justice and Empowerment, Department for Empowerment of Persons with Disabilities (Divyangjan) functions for the empowerment and upliftment of the differently-abled persons and as such a total number of

seven National Institutes and twenty Composite Regional Centre for Skill Development, Rehabilitation and Empowerment of Persons with Disabilities ('CRC', for short), have been set up in the various parts of the country. CRC's function as an extended arm of the National Institutes. Administration and jurisdiction of the CRC's has been distributed and re-distributed amongst National Institutes, vide communication date 7.5.2020, issued under the signatures of the Under Secretary, Ministry of Social Justice and Empowerment, Department for Empowerment of Persons with Disabilities (Divyangjan). In the year 2001, one such CRC came to be established at Sundernagar, District Mandi, Himachal Pradesh. The administration and jurisdiction of the aforesaid CRC vests with the National Institute Dehradun, Uttrakhand. Currently, CRC Sundernagar has four posts of Assistant Professors on regular basis viz. (1) Assistant Professor (Special Education)-cum-Officer-In-Charge, (2) Assistant Professor (Clinical Psychology), (3) Assistant Professor (Speech and hearing) and, (4) Assistant Professor (Physical Medicines and Rehabilitation). As per prevalent practice, the senior most Assistant Professor is given the additional duties of administration and accounts and he/she acts as an Officer-In-Charge.

3. Post of Assistant Professor (Special Education)-cum-Officer-In-Charge, prior to the issuance of impugned office order dated 3.5.2021, was being manned by the petitioner whereas, respondent No.3, who pursuant to the aforesaid impugned order, has been given the charge of the Officer-In-Charge, CRC Sundernagar is otherwise Assistant Professor (Clinical Psychology). Undisputedly, petitioner joined the service as a Teacher (Special Education) at special centre functioning under respondent No.2 in the year 1989, whereafter, he was transferred and posted at CRC Srinagar (J&K). Upon establishment of CRC Sundernagar, which is under the administration and control of respondent No.2, petitioner besides his having been posted as

Assistant Professor (Special Education), also came to be designated as Officer-In-Charge, vide letter dated 13.7.2001.

4. Material available on record further reveals that in the absence of the petitioner, respondent No.3, who happened to be Assistant Professor (Clinical Psychology) was given the charge of Officer-In-Charge, CRC Sundernagar on many occasions. Petitioner, since his posting as Assistant Professor (Special Education) vide letter dated 13.7.2001(Annexure P-2) has been regularly discharging duties of Officer-In-Charge, CRC Sundernagar, but now, since vide office letter dated 3.5.2021 (Annexure P-6), respondent No.3 has been ordered to take over the charge of the Officer-In-Charge, CRC Sundernagar, petitioner has approached this court, in the instant proceedings, praying therein for the following main reliefs:

> "I. That the present Writ Petition be allowed and impugned office order dated: 03-05-2021 (Annexure P-6) be set aside and Petitioner be allowed to carry on holding the charge of Officer In-Charge at Composite Regional Centre (s) for Skill Development, Rehabilitation & Empowerment of Persons with Disabilities, Sundernagar, District: Mandi, H.P.
>
> II. That in alternate the Respondent No.2 be directed to withdraw the impugned office order dated: 03-05-2021 and be directed to allow the Petitioner to continue discharging duties as Officer In-Charge."

5. We have heard learned counsel for the parties and perused the material available on record.

6. It is not in dispute that the petitioner, prior to issuance of impugned office order dated 3.5.2021 (Annexure P-6) had been discharging the duties of Officer-In-Charge, CRC Sundernagar uninterruptedly for eighteen years, but it is also not in dispute that the aforesaid office order dated 3.5.2021 (Annexure P-6) came to be issued pursuant to the communication dated 9.2.2021 (Annexure P-5), whereby competent Authority has approved policy of rotation of Office (I/c) in CRC's. At this stage, it would be apt to take note of the aforesaid communication, which is extracted thus:

"I am directed to refer to your letter No. NIEPVD/CRC-2020/Misc. dated 28.12.2020 on the subject mentioned above and to say that Competent Authority has approved the policy of rotation of Officer (I/C) in CRCs. The policy of rotation is as under:

i. The charge of the In-charge will be given on seniority basis amongst the Assistant Professors.
ii. The period of the Charge shall be for the duration of only 02 years.
iii. Whenever the Officer-In-Charge proceeds on leave/official tour/out of station (including on holiday) it wall be his/her responsibility to hand over the charge to the next officer in line of the panel.
iv. The rotation will only be given to those officers: -

a) Whose ACRs will be "Very Good" for the last three years.
b) There should not be any vigilance case pending against the officer.
c) NO officer should be found trapped in any of the sexual harassment cases.
d) The officer having any cases related to their post/seniority/scale of pay etc. If found to be prejudice will not be entitled to the post of In charge.

3. You are requested to take necessary steps in this regard.
4. This issues with the approval of Joint Secretary (NI) DEPWwD and Chairperson, EC, NIEPVD, Dehradun."

7. Careful perusal of the aforesaid policy formulated by respondent No.1, though reveals that the charge of the office of Officer-In-Charge will be given on seniority basis from amongst the Assistant Professors but only for two years, meaning thereby, after completion fo two year, person next in seniority would become entitled to hold the charge of the office of Officer-In-Charge of a particular CRC. Policy further reveals that whenever the Officer-In-Charge proceeds on leave/official tour/out of station (including on holiday) it wall be

his/her responsibility to hand over the charge to the Assistant Professor next in seniority. The policy clearly suggests that a person, whose ACR's are below 'Very Good' for the last three years and cases against him/her has been registered by Vigilance, shall not be considered for giving duties of Officer-In-Charge. Besides above, any officer, found involved in cases of sexual harassment, has not been held entitled to hold the office of Officer-In-Charge.

8. Though, in the case at hand, petitioner has laid challenge to the office order dated 3.5.2021 (Annexure P-6), whereby respondent No3. has been directed to take over as Officer-In-Charge, CRC Sundernagar, but no challenge has been laid to the policy dated 9.2.2021 (Annexure P-5), whereby competent Authority has approved the policy of rotation of officers and, pursuant to which, impugned office order dated 3.5.2021 (Annexure P-6) has been issued.

9. Mr. R.K. Gautam, Senior Advocate duly assisted by Mr. Gaurav Gautam, Advocate, vehemently argued that that the impugned office order dated 3.5.2021, cannot be made applicable in the of the petitioner, for the reason that the same has been issued in complete violation of the rotation policy formulated by respondent No.1, dated 9.2.2021 (Annexure P-5). While referring to the aforesaid rotation policy, Mr. Gautam, learned senior counsel contended that the petitioner, who is the senior most Assistant Professor, ought to have been continued as Officer-In-Charge, CRC Sundernagar for next two years, after formulation of the rotation policy, which came into force with effect from 9.2.2021. He further contended that since the aforesaid rotation policy has come into force on 9.2.2021, it cannot be applied retrospectively in case of the petitioner, who admittedly prior to issuance of aforesaid rotation policy, had been discharging the duties of Officer-In-Charge, CRC Sundernagar for eighteen years. Lastly, Mr. Gautam, learned senior counsel contended that the petitioner has no quarrel /grouse, if any, against the formulation of the rotation policy, but benefit arising out of same cannot be denied to the petitioner, on the ground that he has already held the office of

Officer-In-Charge, CRC Sundernagar, for 18 years, because roster, if any, qua post in question would commence from the date of issuance of communication dated 9.2.2021, wherein, admittedly, senior Assistant Professor ranking No.1 in seniority, has been held entitled to hold the office of Officer-In-Charge.

10. Mr. Balram Sharma, learned Assistant Solicitor General of India and Mr. Kush Sharma, Advocate, appearing for respondents Nos. 1 and 2 and respondent No.3, respectively , while refuting aforesaid submissions made on behalf of learned senior counsel appearing for the petitioner, contended that since the petitioner has already served as Officer-In-Charge, CRC Sundernagar, for 18 years, he cannot claim any benefit under new policy of rotation formulated vide communication dated 9.2.021. Mr. Sharma, learned Assistant Solicitor General of India submitted that the rotation policy dated 9.2.2021 has been formulated to ensure that all the Assistant Professors working in CRC's are given a chance to discharge duties of Officer-In-Charge and one person may not hold the said office for an indefinite time.

11. Mr. Kush Sharma, learned counsel for respondent No.3, while referring to the reply filed on behalf of respondents Nos. 1 and 2 and respondent No.3 contended that since the petitioner already stands relieved from the post of Officer-In-Charge, coupled with the fact that FIR has been registered against the petitioner under Ss. 354A, 355 and 34 IPC and S.3(1)(i) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 at Police Station Sundernagar, he is otherwise not eligible to be posted as Officer-In-Charge in view of policy formulated by the competent Authority.

12. Material available on record reveals that pursuant to office order dated 3.5.2021, handing/taking over of charge of the Officer-In-Charge was to be completed by 2.30 pm on 10.5.2021 but since the petitioner was not available at the station and was not coming forth to hand over charge, Director of respondent No.2 Institute, vide order dated 10.5.2021, having taken note of the fact that the petitioner is on medical leave, directed respondent No.3 to

take over charge of the post for a term of two years. Vide aforesaid communication, Director, respondent No.1 institute also directed the petitioner to hand over charge, once he returns from medical leave (Annexure R-2 of the reply filed by respondent No.2).

13. On 11.5.2021, respondent No.3 took over the charge of the Officer-In-Charge, CRC Sundernagar and since then, he has been discharging duties of Officer-In-Charge, CRC Sundernagar.

14. Though, the petitioner filed the petition on 10.5.2021, but the same came to be listed on 13.5.2021. This court, while issuing notice to respondents, ordered that the petitioner would be permitted to hold the office of Officer-In-Charge of CRC Sundernagar till further orders, however, by that time, the petitioner stood relieved in absentia and in his place, respondent No.3 had already joined as Officer-In-Charge, CRC Sundernagar. Factum with regard to petitioner having been relieved on 11.5.2021, and taking over of charge by respondent No.3, was neither brought to the notice of the court at the time of passing of order dated 13.5.2021 nor the same have been disputed at the time of final hearing.

15. Similarly, there is no dispute inert se parties that impugned office order has been issued in compliance to policy decision of competent Authority, to post Assistant Professor against the post of Officer-In-Charge on rotation basis. Petitioner has not laid challenge to the aforesaid policy decision taken by the competent Authority vide communication dated 9.2.2021 and he has no quarrel/grouse against the same, as has been fairly submitted by learned senior counsel appearing for the petitioner.

16. The moot question, which needs determination in the instant case is, “whether the policy decision taken by the competent Authority on 9.2.2021 is prospective in nature or can be given retrospective effect? No doubt, by now it is well settled that any instruction be it statutory or administrative, have prospective operation unless otherwise provided but, having taken note of the

background, in which rotation policy came to be formulated, this Court, before exploring answer to the aforesaid question, definitely needs to look into the object and the purpose of formulation of policy of rotation.

17. True it is that perusal of the aforesaid letter dated 9.2.2021, nowhere reveals that it shall be effected retrospectively but, as has been observed hereinabove, before deciding the date of applicability, this Court needs to understand the very object and the purpose of formulation of the policy of rotation. The very purpose and the object of this policy are to ensure that one person does not remain posted at one post/place for an indefinite period and, other persons, who are similarly situate, are not deprived of opportunity of being given the additional charge of the office of Officer In Charge.

18. Reply filed by respondents Nos. 1 and 2 clearly reveals that position of Officer-In-Charge in CRC is not designated post, rather it has been provided to look after routine work of CRC by such officer, who is given charge of this post in addition to his/her duties, and such arrangement has been made to ensure smooth functioning of the CRC's, which are otherwise under the administrative control of the National Institute or other Institutes. Since the petitioner being one of the Assistant Professors was given opportunity to work as Officer-In-Charge, CRC Sundernagar, he cannot claim any right to remain in such post for an indefinite period.

19. Learned senior counsel for the petitioner otherwise has not been able to point out any document available on record suggestive of the fact that the petitioner was in receipt of any financial benefits over and above salary draw by him as Assistant Professor. This count finds from the record that the rotation policy as referred to above, has been otherwise formulated in compliance to circular dated 11.9.2013 issued by the Central Vigilance Commission to various Ministries/Departments/Organisations for identification of sensitive posts for ensuring that the staff working on these posts are strictly transferred after 2-3 years, to avoid development of vested

interests (Annexure R-1 of reply filed by respondent No.2). Communication dated 11.9.2013 issued by the Central Vigilance Commission reveals that the Commission having taken note of the fact that rotation/transfers are not being effected in many organisations and some officers continue to remain in same post for long periods, and in this process, have indulged in corrupt practices, advised the heads/CEO's of the Departments/Organizations to ensure that periodical rotation of officers holding sensitive posts/job is made. As per aforesaid advisory issued by the Central Vigilance Commission, officials should not be retained in same place/post for longer period in the Government departments/PSU's/Banks/Organisations etc. No doubt, as per rotation policy referred to above, senior most Assistant Professor is to be given charge of the office of Officer-In-Charge, CRC's but, in the case at hand, petitioner has already served as Officer-In-Charge, CRC Sundernagar for more than 18 years, as such, he cannot be permitted to stake a claim that since aforesaid rotation policy came into operation with effect from 9.2.2021, it can have prospective effect and in that process, he being senior most Assistant Professor, is entitled to continue for another two years as Officer-In-Charge.

20. Since, very purpose and object of issuance of aforesaid rotation policy after issuance of advisory by the Central Vigilance Commission is to ensure that no officer/person is retained in same post for a long period so that he/she does not indulge in corrupt activities, plea raised on behalf of the petitioner with regard to date of application of the rotation policy, may not have much relevance. Though, this Court having taken note of the object and purpose of issuance of rotation policy by the competent Authority, finds no illegality or infirmity in the decision of the respondents, inasmuch as handing over of charge of the office of Officer-In-Charge to respondent No.3, who is next in seniority, is concerned, but even otherwise, replies filed by respondents suggest that the petitioner is not entitled to hold the post of Officer-In-Charge in terms of latest rotation policy formulated by the competent Authority.

Respondents in their replies have categorically stated that one criminal case vide FIR No. 0071, dated 13.3.2021 stands already registered against the petitioner at Police Station Sundernagar under Ss. 354A, 355 and 34 IPC and S.3(1)(i) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Annexure R-4).

21. Clause (iv) sub-clause (b)(c) of the rotation policy clearly suggests that the charge/rotation will not be given to those officers, against whom any vigilance case is pending or he/she is found to be involved in any sexual harassment case.

22. Factum with regard to lodging of FIR as detailed herein above, has not been denied by the petitioner in the rejoinder having been filed by him to the replies filed by respondent Nos. 2 and 3. No doubt, mere registration of a criminal case may not be sufficient to conclude/rule out complicity of a person named in the FIR but since it has been specifically provided in the rotation policy that the persons, against whom any vigilance case or sexual harassment case has been registered shall not be entitled to hold the post of Officer-In-Charge, petitioner cannot claim to continue as Officer-In-Charge, CRC Sundernagar being senior most Assistant Professor. Since no challenge has been laid to aforesaid rotation policy formulated by the competent Authority, there is no occasion for this court to comment qua the condition of registration of vigilance or sexual harassment case incorporated in the Policy. Since petitioner has already served for 18 years as Officer-In-Charge, CRC Sundernagar, he cannot claim fresh appointment in terms of rotation policy formulated on 9.2.2021, especially keeping in view the purpose and object, for which said rotation policy has been issued in terms of advisory of the Central Vigilance Commission.

23. Otherwise, petitioner has failed to bring to the notice of this Court infringement of any fundamental right so as to enable him to invoke

jurisdiction of this Court since neither this is a promotion nor any financial benefits are attached to such post.

24. The plea raised on behalf of the petitioner that mere registration of a case does not point out his guilty, does not have any relevance, as the only embargo provided in the policy dated 9.2.2021 is that no vigilance case should be pending against an officer and he should not be found trapped in sexual harassment case and there is no recital of person being convicted in such offence, as such, mere registration/pendency of such case(s) is enough to debar such person from holding the post of Officer-In-Charge, especially when no challenge has been laid to said clause of the policy or the entire policy for that matter.

25. In view of above, we find no merit in the present petition, which is accordingly dismissed, alongwith all the applications. Interim order(s), if any, stand vacated.

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

Smt. Sarita Devi ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 4189 of 2020
Decided on March 30, 2021

Constitution of India, 1950 – Article 226 – Husband of petitioner allegedly suffered accident while driving scooty and died later on – Application seeking Ex-gratia filed by the petitioner came to be rejected by SDO (Civil) Bhoranj on the ground that her husband died on account of cardiac arrest and not road accident – Challenge thereof – Held, that factum of husband of the petitioner falling from scooty immediately before death is not disputed – Death of husband of the petitioner cannot be said to be natural rather, same can be said to have been caused on account of accident – Petition allowed –

Respondents directed to make the payment of Ex-gratia to the petitioner on account of death of her husband.

For the petitioner Mr. Lalit K. Sharma, Advocate.

For the respondents Mr. Kunal Thakur and Ms. Svaneel Jaswal, Deputy Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of present petition filed under Art. 226 of the Constitution of India, petitioner has prayed for the following main relief(s):

> "I. That the writ in the nature of certiorari may kindly be issued thereby quashing and setting aside the impugned order Annexure P-6 dated 10/7/2020 passed by respondent No.3.
>
> II. That after setting aside the **Annexure P-6**, by way of writ of mandamus the respondent may be directed to release Ex-gratia payment of Rs.4 Lakh to the petitioner under norms of assistance from State Disaster Response Fund (SDRF) and National Disaster Response Fund (NDRF) under HP DM and Relief Manual 2012 forthwith."

2. For having bird's eye view of the matter, certain undisputed facts as emerge from the record are that on 24.1.2020, husband of the petitioner Vipan Kumar suddenly fell down from scooty bearing registration No. HP-74-8971, being driven by him, while he was on his way to his work place. Above noted person, after having suffered accident, immediately informed his brother-in-law over his mobile phone that he has met with an accident and at present having pain in his chest. Before the aforesaid brother-in-law and other relatives could reach the spot of accident, husband of the petitioner was removed to the CH Bhoranj, where he expired during treatment. Police after having received information, lodged a formal complaint and got the post-mortem conducted on the body of the deceased. Medical Officer opined in the post-mortem report that the husband of the petitioner died on account of

cardiac arrest. Petitioner being wife of the deceased, filed an application to the Sub Divisional Officer(Civil), Bhoranj, seeking *ex gratia* on account of death of her husband in a road accident under the Disaster Management and Relief Manual, 2012.

3. Since it is not in dispute *inter se* parties that the person dying or suffering injuries in a road accident, is entitled to *ex gratia,* this Court sees no reason to refer to the various provisions of the Himachal Pradesh Disaster Management and Relief Manual, 2012. The only condition for becoming eligible for *ex gratia* payment under the Manual is that one should have suffered injuries or died in the road accident and it should not be a natural death.

4. Application, seeking *ex gratia* having been filed by the petitioner came to be rejected vide communication dated 10.7.2020 (Annexure P-6) by the Sub Divisional Officer(Civil), Bhoranj, on the ground that the husband of the petitioner did not die on account of road accident, rather on account of cardiac arrest. Being aggrieved with the passing of annexure P-6, dated 10.7.2020, petitioner has approached this Court in the instant petition, praying therein for the reliefs as have been reproduced herein above.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds that there is no dispute *inter se* parties that at the time of alleged accident, husband of the petitioner was riding a scooty. Paragraphs Nos. 3 and 4 of the reply filed by the respondents, clearly suggest that the husband of the petitioner, after having fallen from the Scooty, suffered heart attack but since cause of death was given as cardiac arrest, prayer made on behalf of the petitioner for grant of *ex gratia* came to be rejected on the ground that the deceased husband of the petitioner died a natural death.

6. Having carefully perused the post-mortem report, this Court though finds that after having seen the body of deceased husband of the

petitioner, Medical Officers have concluded that the cause of death of the husband of the petitioner was cardiac arrest, but, as has been taken note here in above, deceased, immediately after the accident, telephonically informed his brother-in-law, Rajender Jaryal, as is evident from his statement given to the Police (Annexure P-4), that he has met with an accident and feeling pain in his chest, meaning thereby the deceased suffered trauma after the accident and started feeling pain in the chest. Since the deceased husband of the petitioner suffered pain in his chest, after the alleged fall from the Scooty, cause of death may be cardiac arrest, but still it cannot be ruled out that the deceased suffered heart attack after having suffered trauma/shock in the accident. No doubt, the post-mortem report nowhere suggests any external injury on the body of the deceased, on account of accident, but cardiac arrest can definitely occur on account of shock and trauma. Trauma may cause arterial spasm and it is likely that a functional inhibition or coronary spasm may cause sudden death that sometimes follow upon blows to the chest. Reference is made to Chapter 6, Death and Its Cause of "The Essentials of Forensic Medicine and Toxicology" authored by Dr. K.S. Narayan Reddy (Twenty Seventh Edition 2008), wherein under the "concealed trauma", causes leading to cardiac arrest have been detailed as under:

> "CONCEALED TRAUMA: (a) Cerebral concussion: This may cause death without any external or internal marks of injury.
>
> **(b) NECK INJURY:** Cervical spinal fracture-dislocation may occur in diving fall on head, impact down stair with a wall-facing from oblique impact or by fall of some object on the head, in such a way as to cause the dislocation especially with the head thrown back. The dislocation may be associated with tears of the ligaments and with the displacement of the skull from the spine. Sudden movements of the head over the spine with displacement may cause contusion and laceration of the spinal cord and rapid death. If death is delayed, there

may be oedema softening and necrosis of the cord. Injury to the spinal cord causes spinal concussion and may cause death. Unconsciousness is not seen in all persons, but all get up with residual tingling, numbness, weakness of arms or legs and gait defects. Routine autopsy and X-ray may not show any abnormality. The dislocation of the cervical segments is often self-reducing and externally there may not be any injury, or there may be abrasions on the brow or chin. Complete dissection of spine is essential. The spinal cord, cut longitudinally, may show internal bruising. Death may be instantaneous.

(c) BLUNT INJURY TO THE HEART: Contusion of the chest as in steering –wheel impacts, head-on collisions from blast or heavy punching, may temporarily or permanently derange the heart without much evidence of trauma. Contusion of the heart may cause death. Trauma may cause arterial spasm and it is likely that a functional inhibition or coronary spasm may cause sudden death that sometimes follow upon blows to the chest.

(d) INHIBITION OF THE HEART: (Vagal inhibition; vaso-vagal shock; reflex cardiac arrest; nervous apoplexy or **Instantaneous Physiological death**); Sudden death occurring within seconds or a minute or two due to minor trauma or relatively simple and harmless peripheral stimulation are caused by vagal inhibition. Pressure on the baroreceptors situated in the carotid sinuses, carotid sheaths, and the carotid body (located in the internal carotid artery just above the bifurcation of common carotid artery, and situated about the level of angle of mandible) causes an increase in blood pressure in these sinuses with resultant slowing of the heart rate, dilatation of blood vessels and a fall in blood pressure. In normal persons, pressure on the carotid sinus causes minimal effects with a decrease in heart rate of

less than six beats per minute and only a slight reduction (less than 10 mm. Hg) in blood pressure. Some individuals show marked hypersensitivity to stimulation of the carotid sinus characterized by bradycardia and cardiac arrhythmias ranging from ventricular arrhythmias to cardiac arrest. Stimulation of the carotid sinus baroreceptors causes impulses to pass via Hering's nerve to the afferent fibres of the glossopharyngeal nerve (9th cranial nerve); these in turn link in the brainstem to the nucleus of the vagus nerve (both cranial nerve). Parasympathetic efferent impulses then pass to the heart via the cardiac branches of the vagus nerve. Stimulation of these fibres causes a profound bradycardia. This reflex arc is independent of the main motor and sensory nerve pathways. (Fig. 6-5). There is wide network of sensory nerves in the skin, pharynx, glottis, pleura, peritoneum covering viscera or extending into the spermatic cord, cervix, urethra, perineum and celiac plexus. Afferent fibres from these tissues pass into the lateral tracts of the spinal cord, affect local reflex connections over several segments and also pass to the brain. The vagal nucleus is controlled by the synaptic connections in the spinal cord, which may be facilitated from both the sensory central cortex and from the thalamic centres. The latter may be responsible for emotional tone noted in the vagal reflex.

Parasympathetic stimulation of the heart can be initiated by high neck compression, pressure on carotid sinus or sometimes by direct pressure over the trunk of the vagus nerve.

Causes: (1) The commonest cause of such inhibition is pressure on the neck particularly on the carotid sinuses as in hanging or strangulation. (2) Unexpected blows to the larynx, chest, abdomen, and genital organs. (3) Extensive injuries to the spine or other parts of the body. (4) Impaction of food in larynx or unexpected inhalation of fluid into the

upper respiratory tract. (5) Sudden immersion of body in cold water. (6) the insertion of an instrument into the bronchus, uterus, bladder or rectum (7) Puncture of a pleural cavity unusual for producing a pneumothorax (8) Sudden evacuation of pathological fluids, e.g., ascetic or pleural (9) Sudden distension of hollow muscular organs, e.g., during attempts at criminal abortion, when instruments are passed through the cervix or fluids are injected into the uterus. (10) In degenerative diseases of the heart, e.g., sinus bradycardia and partial or complete A-V Block; Parasympathetic stimulation further depress the heart rate and may produce a Stokes-Adams attack which may be fatal. There is great variation in individual susceptibility. Death from inhibition is accidental and caused by microtrauma.. The stimulus should be sudden and abnormal for the reflex to occur. The reflex is exaggerated by ah high state of emotional tension and also any condition which lowers voluntary cerebral control of reflex responses, such as a mild alcoholic intoxication a degree of hypoxia or partial narcosis due to incomplete anaesthesia."

7. A bare reading of the excerpts of the Book (supra), reveals that sudden death occurring within seconds or a minute or two due to minor trauma or relatively simple and harmless peripheral stimulation is caused by vagal inhibition. Pressure on the baroreceptors situated in the carotid sinuses, carotid sheaths, and the carotid body (located in the internal carotid artery just above the bifurcation of common carotid artery, and situated about the level of angle of mandible) causes an increase in blood pressure in these sinuses with resultant slowing of the heart rate, dilatation of blood vessels and a fall in blood pressure.

8. Besides this, 'natural death' has been described in the aforesaid Book as the death caused entirely by the disease and the trauma or poison did

not play any part in bringing it about. In the present case, there is every possibility that the husband of the petitioner suffered trauma and shock subsequent to fall from the Scooty.

9. If the aforesaid explanation rendered in the book referred to above, is taken into consideration, it can be safely inferred/presumed that cardiac arrest can be caused on account of sudden fall and shock.

10. In the case at hand, factum with regard to riding of scooty and fall there from immediately before death is not disputed, rather in the reply filed by respondents Nos. 1 to 3, in paras Nos. 3 and 4 of reply on merits, said respondents have admitted the factum of husband of the petitioner falling from the scooty and suffering cardiac arrest. Once, road accident is admitted, prayer made on behalf of the petitioner for *ex gratia* requires consideration in terms of the Manual. In the facts and circumstances of the case, as have been taken note herein above in detail, death of husband of the petitioner cannot be said to be natural rather, same can be said to have been caused on account of accident.

11. In view of the detailed discussion made herein above, present petition is allowed. Annexure P-6, dated 10.7.2020 is quashed and set aside. Respondents are directed to make payment of *ex gratia* to the petitioner on account of death of her husband, in terms of the Manual (supra), within a period of four weeks, from today. All pending applications stand disposed of.

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

Chughi Devi & others ...Appellants.

Versus

Nika Ram & others ..Respondents.

RSA No. 7 of 2021-B
Date of Decision: July 5, 2021

Code of Civil Procedure, 1908 – Section 100- Regular Second Appeal-- Civil suit preferred by Predecessor-in-interest of appellants no. 1-4 and proforma respondents No. 6-10 dismissed by Ld. Civil Judge (Junior Division) – Appellants No. 1-4 preferred first appeal wherein respondents No. 6-10 were arrayed as proforma respondents No 6-10 which appeal was dismissed by Ld. Additional District Judge – Challenged in present Second Appeal – Held, that Respondent No. 6 was one of the plaintiffs who attended the proceedings before First Appellate Court through his counsel, who expired during pendency of the said appeal – Judgment & decree passed by the first Appellate Court quashed and set aside – Case remanded to first Appellate Court with a direction to allow the appellants to take consequential steps on the death of respondent No. 6 and thereafter to decide the question of substitution of his legal representatives.

Cases referred:

Dewana and another vs. Gian Chand Malhotra and others, Latest HLJ 2011 (HP) 1420;

Gurnam Singh (dead) by legal representatives and others vs. Gurbachan Kaur (dead), (2017) 13 SCC 414;

Gurnam Singh (Dead) through Legal Representatives and others vs. Gurbachan Kaur (Dead) by Legal Representatives (2017) 13 SCC 414;

Jagan Nath and others vs. Ishwari Devi, 1988 (2) Shim.L.C. 273;

Jagdish vs. Ram Karan and others, 2002(1) CLJ (H.P.) 232;

Jaswant Singh vs. State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674;

Karam Chand and others vs. Bakshi Ram and others, 2002(1) Shim.L.C. 9;

Ram Rakha and others vs. Brahma Nand and others, 1994 (Supp) S.L.C. 29;

Sher Singh and others vs. Raghu Ram and others, 1981 S.L.C. 25;

Tara Wati and others vs. Suman & others, Latest HLJ 2018 (HP) 1046;

For the Appellants: Mr.Romesh Verma, Advocate, through Video Conferencing.

For the Respondent: Mr.Surender Verma, Advocate, for respondents No.1 to 3, through Video Conferencing.

Respondents No.4, 5, 7 to 10 are *ex-parte* vide order dated 22.03.2021.

Respondent No.6 is stated to have expired.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral)

Predecessor-in-interest of appellants No.1 to 4 and proforma respondents No.6 to 10 had filed Civil Suit No.54 of 2007 and for their death during pendency of the suit, appellants No.1 to 4 and respondents No.6 to 10 were brought on record as plaintiffs. Suit was dismissed vide judgment and decree dated 30.06.2015, passed by learned Civil Judge (Junior Division) Court No.2, Sundernagar, District Mandi, H.P., in Civil Suit No.54 of 2007, titled as *Parwati (deceased through L.Rs.) vs. Nikka Ram & others.*

2. Dismissal of the suit was assailed by the appellants No.1 to 4 by filing Civil Appeal No.187 of 2015, titled as *Chughi Devi & others vs. Nikka Ram & others.* Whereas, other plaintiffs, who are respondents No.6 to 10, did not opt to assail the judgment and decree passed by the trial Court and thus in first appeal also, were arrayed as proforma respondents No.6 to 10 alongwith other defendants and proforma defendants. This appeal was dismissed by learned Additional District Judge, Sundernagar, District Mandi, H.P., vide judgment and decree dated 10.11.2020.

3. Present Regular Second Appeal has been preferred by appellants No. 1 to 4 assailing aforesaid judgment and decree dated 10.11.2020 passed in Civil Appeal No.187 of 2015, arraying parties in the same fashion as were before learned Additional District Judge Sundernagar.

4. On issuance of notice to respondents all other respondents except respondent No.6 were served, and it was reported that respondent No.6

had expired during pendency of the first appeal which is also evident from the death certificate of respondents No.6, placed on record by the appellants alongwith CMP(M) No.348 of 2021 which indicates that he had expired on 28.07.2018 i.e. after filing of the first appeal on 31.07.2015, but before dismissal thereof vide judgment and decree dated 10.11.2020. Respondent No.6 was one of the plaintiffs, however, he did not assail the impugned judgment and decree whereby suit was dismissed. But before First Appellate Court, he had attended the proceedings by ensuring his representation through his learned counsel and was duly represented.

5. This Court, vide judgment dated 24.05.2021, passed in RSA No.261 of 2019, titled as *Jaishi Ram vs. Manohar Lal and others* after taking into consideration relevant provisions of law as well as judgments passed by this High Court previously and also pronouncements of the Supreme Court in cases ***Gurnam Singh (Dead) through Legal Representatives and others vs. Gurbachan Kaur (Dead) by Legal Representatives,*** reported in ***(2017) 13 SCC 414; Sher Singh and others vs. Raghu Ram and others, 1981 S.L.C. 25; Ram Rakha and others vs. Brahma Nand and others, 1994 (Supp) S.L.C. 29; Jagdish vs. Ram Karan and others, 2002(1) Current Law Journal (H.P.) 232,*** referred in ***Dewana and another vs. Gian Chand Malhotra and others, Latest HLJ 2011 (HP) 1420*** and also judgments in ***Jaswant Singh vs. State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674; Jagan Nath and others vs. Ishwari Devi, 1988 (2) Shim.L.C. 273; Karam Chand and others vs. Bakshi Ram and others, 2002(1) Shim.L.C. 9;*** and ***Gurnam Singh (dead) by legal representatives and others vs. Gurbachan Kaur (dead), (2017) 13 SCC 414,*** referred in ***Tara Wati and others vs. Suman & others, Latest HLJ 2018 (HP) 1046***, has held as under:-

> "9. It is well settled that a decree in favour of or against a dead person is nullity. For non substitution of legal

representatives of deceased defendant, out of several defendants, may cause abatement of appeal against the deceased defendant or as a whole, depending upon the effect of non substitution of legal representatives of deceased defendant on the relief claimed. Appellant/plaintiff has set up a case of ignorance of death of defendants.

10. In view of judgments relied upon by the appellant, referred supra, an application for setting aside abatement and substitution of legal representatives of deceased defendants should have been made and dealt with by the Court in which abatement occurred as abatement is automatic irrespective of passing of or not passing of such order by the Court and question whether suit to abate in toto or in part, has also to be decided by the same Court where during pendency of the appeal one of parties had expired before hearing the arguments and where he was a necessary party to the lis and his legal representatives have not been brought on record, and issues as to whether there was sufficient cause for setting aside the abatement or whether legal representatives of deceased are to be brought on record or not in relation to a suit or appeal, at the first instance, are also to be decided by the Court, in which the suit or appeal was pending at the time of death of party and the abatement took place."

6. By way of an amendment applicable to Delhi, Himachal Pradesh, Punjab and Haryana High Courts, there is addition to sub rule (3) of Rule 14 of Order 41 Code of Civil Procedure (CPC), which reads as under:-

"*Delhi, Himachal Pradesh and Punjab, Haryana and Chandigarh.*—(i) Add the following as sub-rule (3):

"(3) it shall be in the discretion of the appellate court to make an order, at any stage of the appeal whether on the application of any party or on its own motion, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the court whose decree is complained of, or at any proceedings subsequent to the decree of that court, or on the legal representatives of any such respondent:

Provided that—

(a) That court may require notice of the appeal to be published in any newspaper or in such other manner as it may direct:

(b) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal.”””

7. In present case respondent No.6 has contested the suit as plaintiff in the trial Court and was duly represented in the First Appellate Court also. Therefore, benefit of provisions added by way of amendment, referred supra, is also not available to the parties in present case.

8. Consequently, the judgment and decree passed by the Appellate Court is quashed and set aside and case is remanded to first Appellate Court with direction to allow the appellants to take consequential steps on the death of respondent No.6-Traru Ram and thereafter to decide the question of substitution of his legal representatives, if any; and question of exemption to the plaintiffs from necessity of substituting the legal representatives of deceased defendants; and also question of abatement, if any, as the case may be on the basis of steps so taken by the appellants. Needless to say that first Appellate Court shall consider and decide all the pleas and counter pleas of the parties after affording the parties due opportunity of being heard.

9. The contesting parties are directed to ensure their appearance through their learned counsel representing them before learned First Appellate Court on 05.08.2021, either virtually or physically as possible and permissible in peculiar circumstances on account of pandemic Covid-19. It is made clear that no fresh notice shall be issued to the parties by learned first Appellate Court for ensuring their presence. It is clarified that respondents who have been proceeded *ex-parte* in the Courts below or in this Court need not to be served afresh. However, in case they appear voluntarily, they shall

be permitted to join the proceedings. First Appellate Court shall hear the contesting parties and decide the appeal afresh in accordance with law.

10. Consequential steps on account of death of respondents shall be taken by the plaintiffs/appellants preferably on the first date of hearing, but not later than two weeks thereafter. Reply thereto, if any also be filed within four weeks, positively and the first Appellate Court shall make an endeavor to decide the application and appeal preferably on or before 31.12.2021.

Appeal stands disposed of in aforesaid terms alongwith pending applications.

Copy of judgment be transmitted to learned first Appellate Court for record/compliance.

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

Sham Kumar .....Petitioner

Versus

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

Cr.W.P No. 3 of 2021
Decided on: 07.07.2021

Constitution of India, 1950 - Article 226 – Prayer made for issuance of the writ, in the nature of habeas corpus, for immediate release of detenu, Ms. Rajwinder Kaur and to appoint warrant officer to enable the release of detenu – Allegations that respondent no. 4-6 threatened to kill their daughter Ms. Rajwinder Kaur, rather allow her marriage with the petitioner and want to solemnize her marriage forcibly with other boy against her wish – Held, that, Ms. Rajwinder Kaur did not echo the same feeling towards the petitioner as contended by the petitioner and she did not complain of any compulsion employed against her not to marry a person of her choice – Even, in inquiry

into the allegations of petition do not verify its contents – No fundamental right of Ms. Rajwinder Kaur violated – Petition dismissed.

Cases referred:

Girish vs. Radhamony K. and others (2009) 16 SCC 360;
Indian Woman Says Gang Raped on Orders of Village Court Published in Business and Financial News, (2014) 4 SCC 786;
Shafin Jahan vs. Asokan K.M. and others, (2018) 16 SCC 368;

For the petitioner: Mr. Hemant Kumar Thakur, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Himanshu Mishra, Additional Advocate Generals for respondents No. 1 to 3.

Mr. Anup Rattan, Advocate for respondents No. 4 to 6.

The following judgment of the Court was delivered:

Satyen Vaidya, J. (Oral)

By way of instant petition, the petitioner has prayed for issuance of writ, in the nature of *habeas corpus,* for immediate release of detenu namely, Ms. Rajwinder Kaur aged 23 years daughter of Sh. Nirmal Singh, resident of Village Belna, Tehsil Haroli, District Una, H.P. and to appoint Warrant Officer to enable the release of detenu from the alleged illegal confinement of respondents No. 4 to 6. Further prayer has also been made seeking direction to respondents No. 2 and 3 to provide protection to the life and liberty of the petitioner and detenu.

2. Before adverting to the merits of the case, a glance at the proceedings of this Court in the instant petition, needs mention. *Vide* order dated 26.03.2021, this Court had directed the Superintendent of

Police, Una to produce Rajwinder Kaur/corpus before this Court on 30.03.2021. On the date fixed, Ms. Rajwinder Kaur/corpus was produced in the custody of ASI Baldev Raj and LC Savita No. 156, Police Station, Haroli, District Una, H.P. In addition, parents of the parties and the petitioner also remained present before the Court.

3. On 30.03.2021, this Court had passed the following order:-

> "*Having interacted with the parties for a considerable time, we are of the considered view that they do require further time to reconcile with the prevalent situation. Accordingly, we deem it proper to defer hearing of the case by four week. Ordered accordingly. List on 27.04.2021*."

4. In pursuance to the directions issued by this Court, the State filed instructions dated 29.06.2021 on 6th July, 2021. Copies of the instructions so submitted by the State were ordered to be supplied to the learned counsel for the petitioner and the case was ordered to be listed today.

5. We have heard learned counsel for the petitioner and have also perused the record.

6. Necessary facts culled out from the petition are as under:-

a) The petitioner claimed himself to be an old standing friend of Ms. Rajwinder Kaur who is stated to be aged 23 years;

b) The petitioner contended that he and Ms. Rajwinder Kaur had decided to marry but respondents No. 4 to 6 (father and brothers of Ms. Rajwinder Kaur) were not agreeable;

c) The petitioner was being threatened by respondents No. 4 to 6 and the Ms. Rajwinder Kaur was also being given beatings by them and was not being allowed to pursue her higher studies;

f) Respondents No. 4 to 6 are stated to be conservative and had threatened that they would kill their daughter, rather to allow her marriage with the petitioner. The religion of the parties is also stated to be different.

g) On 11.03.2021, the petitioner alleges to have received a text message from Ms Rajwinder Kaur to the effect that her father wanted to solemnize her marriage forcibly with other boy against her wish and if it happened, she would die.

h) The petitioner alleges to have approached respondents No. 2 and 3, but without any response.

I) On these averments, the petitioner has sought the reliefs as noticed above.

7. Ms. Rajwinder Kaur was produced before this Court on 30.03.2021. This Court had interacted with the parties for a considerable time and it could not be inferred from the conduct of Ms. Rajwinder Kaur that any fetters were placed on her either by respondents No. 4 to 6 or any other person. She did not complain that she was being forced not to marry a person of her choice.

8. In ***Girish*** vs. ***Radhamony K. and others (2009) 16 SCC 360***, the Supreme Court has held as under:-

> *"3. Anjana Devi appeared in court and stated that she was a major and that she had married the appellant herein and she was living with him. Curiously enough, the High Court, instead of dismissing the petition and leaving the parties to take recourse to such other remedy which may be available to them in accordance with law, passed the impugned order directing registration of a case for offences allegedly punishable under Sections 366, 366-A and 376 of the Penal Code, 1860. In our opinion, the High Court had no jurisdiction to given this direction.* ***In a habeas corpus petition all that is required is to find out and***

> ***produce in Court the person who is stated to be missing. Once the person appeared and she stated that she had gone of her own free will, the High Court had no further jurisdiction to pass the impugned order in exercise of its writ jurisdiction under Article 226 of the Constitution."***

9. In view of the aforesaid position of law, this petition could have been disposed of on 30.03.2021 itself on production of Ms. Rajwinder Kaur, but this Court thought it prudent to grant the parties more time to reconcile with the prevalent situation.

10. The petitioner has placed reliance upon the judgment passed by the Supreme Court in Shakti Vahini vs. Union of India, WP (C) No. 231 of 2010. This Court is not oblivious to the settled legal position that the right to marry a person of one's choice is integral to Article 21 of the Constitution.

11. In ***Indian Woman Says Gang Raped on Orders of Village Court Published in Business and Financial News, (2014) 4 SCC 786***, the Hon'ble Supreme Court has held as under:-

> "16. Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. The response is certainly a "yes". The State is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the State's incapacity or inability to protect the fundamental rights of its citizens."

12. In ***Shafin Jahan*** vs. ***Asokan K.M. and others, (2018) 16 SCC 368***, the Hon'ble Supreme Court has held as under:-

> "86. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken

> away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners."

13. The facts of the instant case, however, do not call for any interference or directions from this Court under Article 226 of the Constitution of India. Firstly, Ms. Rajwinder Kaur did not echo the same feeling towards the petitioner as contended by the petitioner in his petition and secondly, she did not complain of any compulsion being employed against her not to marry a person of her choice.

14. The facts were further verified by the State. An inquiry into the allegations of petitioner were conducted by a team of police officials including Lady Constable and the President and Ward Member of concerned Panchayat. In her statement recorded by the aforesaid team, Ms. Rajwinder Kaur had stated that she did not want to marry the petitioner.

15. It is worth noticing that instant petition remained pending before this Court for more than three months but not even a whisper came from Ms. Rajwinder Kaur providing any credence to the contentions made by the petitioner.

16. The petition contains only vague and bald allegations and throughout the proceedings of the petition, no corroboration to such allegations could be attached. The petitioner had not even provided his credentials either in the petition or at any subsequent stage, in the absence of which, the petition cannot be said to be *bonafide*.

17. The petitioner though has placed on record a copy of FIR dated 26.08.2021 registered with Police Station, Haroli, Distict Una, but on perusal of its contents, we could not find anything suggesting that the alleged assault on petitioner by respondents No. 4 to 6 was for the reason as stated in the petition. There is no whisper of petitioner's alleged relationship with Ms. Rajwinder Kaur in the complaint lodged by the petitioner with the police. The petitioner, has also sought help of Annexure P-2, which allegedly is a text message sent by Ms. Rajwinder Kaur to him. Even if the said message is taken to have been scribed by Ms. Rajwinder Kaur, it does not mention her wish to marry the petitioner.

18. In absence of any material to infer violation of any fundamental right of Ms. Rajwinder Kaur to marry a person of her choice and fetters being illegally placed by respondents No. 4 to 6 or any other person to deter her from marrying a person of her choice, the directions as sought by the petitioner cannot be issued by this Court, therefore, the petition being devoid of merits is dismissed.

Before parting, it is made clear that the State is legally bound to protect all its citizens, in accordance with law. In the peculiar circumstances of the case, we direct that in case of any complaint being

made by Ms. Rajwinder Kaur daughter of Sh. Nirmal Singh, resident of Village Belna, Tehsil Haroli, District Una, H.P., alleging violation of any of her fundamental or legal right to the police or any other authority, the same shall be promptly attended to by providing her all necessary assistance, in accordance with law.

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

Dr. Sanjay Chadha .....Petitioner

Versus

State of Himachal Pradesh and others .....Respondents

CWP No.767 of 2021

Reserved on: 1st July, 2021

Decided on: 9th July, 2021

Constitution of India, 1950 – Article 226 – Petitioners' request for premature retirement on medical grounds was turned down by the respondents on 03-01-2018 for not completing qualifying service of 20 years and, subsequently on 27-03-2019 nearing completion of 20 years of service due to paucity of staff – Show cause notice issued by the respondents to the petitioner for unauthorized absence of duty w.e.f. 18-11-2019 – Challenge thereof – Held, that any government servant with satisfactory service record may retire from service on completion of 20 years of regular service, after 3 months' notice is accepted by the appropriate authority as per rules – the contention of deemed premature retirement of the petitioner can not be accepted in view of the provisions of applicable rules – Petition dismissed.

Cases referred:

C.V. Francis v. Union of India (2013) 14 SCC 486;

Himachal Pradesh Horticultural Produce Marketing & Processing Corporation Ltd. Versus Suman Behari Sharma (1996) 4 SCC 584;

Padubidri Damodar Shenoy v. Indian Airlines Ltd., (2009) 10 SCC 514;
State of Uttar Pradesh and others Versus Achal Singh (2018) 17 SCC 578;
Tek Chand v. Dile Ram (2001) 3 SCC 290;

For the Petitioner: Mrs. Ranjana Parmar, Senior Advocate with Mr. Karan Singh Parmar, Advocate.

For the Respondents: Mr. Anil Jaswal, Additional Advocate General.
(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Petitioner's request for premature retirement on medical grounds was turned down by the respondents on 03.01.2018 as he had not completed the qualifying service of twenty years at that time. His same request made second time on 27.03.2019, when he was about to complete twenty years, was rejected on 19.06.2019 allegedly due to paucity of staff. Respondents issued show cause notice to the petitioner on 06.01.2021 for his unauthorized absence from duty w.e.f. 18.11.2019. Aggrieved, he filed the instant writ petition, primarily seeking a direction to the respondents to retire him prematurely besides praying for quashing of orders passed by them rejecting his such requests. Petitioner has also prayed for quashing of show cause notice issued to him. During pendency of the petition, the respondents have also issued a charge-sheet to the petitioner for his wilful absence from duty.

2. Facts:-

2(i). Petitioner joined the respondent-Department on 30.06.1999 as Horticulture Development Officer, which is a Class-I post.

2(ii). On 10.09.2017, citing medical problems of his own and that of his aged mother, petitioner requested for premature retirement. His request was not accepted by the respondents on the ground that he had not completed qualifying regular service of twenty years at that time. Relevant portion of communication dated 03.01.2018 (Annexure P-2), rejecting petitioner's request for premature retirement, reads as under:-

> *"I am directed to refer to your letter No.4-859/99(PF)-Udyan- I dated 30.10.2017 on the subject cited above and to say that the matter has been examined in consultation with the Department of Personnel and it has been observed that Sh. Sanjay Chadha, HDO does not fulfil the eligibility criteria of 20 years of regular service for pre-mature retirement as defined in the instructions issued by the Department of Personnel vide their letter No.Per (AP-B)B(18)-1/2006 dated 01.08.2013. Consequently, his representation for pre-mature retirement is rejected."*

2(iii). On medical grounds, petitioner applied for Extraordinary Leave (EOL) on 26.07.2018. The respondents on 27.08.2018 (Annexure P-4) granted ex-post facto sanction of eight months' EOL w.e.f. 30.07.2018 to 26.03.2019. The period was to count towards petitioner's annual increment and service. The terms of sanction of EOL read as under:-

> *"It is, certified that Dr. Sanjay Chadha, Deputy Project Director, ATMA, Mandi, would have continued to officiate against the post though he was on leave yet the period of said leave shall count towards his annual increment.*
>
> *It is, certified that the officer will submit his joining report at the same place and post from where he proceeded on leave."*

2(iv). On petitioner's request, ex-post facto sanction of 96 days' earned leave w.e.f. 01.04.2019 to 28.06.2019 was accorded to him on 28.05.2019. The terms of leave remained the same as extracted earlier.

2(v). Citing his ill health as well as medical problems of his aged mother, petitioner on 27.03.2019, sent

a communication to the respondents, once again requesting for premature retirement by submitting that he would be completing twenty years of qualifying service on 30.06.2019. He also stated that his letter be treated as three months' notice mandated under the Rules. The petitioner pleads that he was not given any written response by the respondents to his request for premature retirement, however, he came to know that respondents had rejected his request on count of paucity of staff. Petitioner on 03.07.2019, requested the respondents to reconsider his prayer for premature retirement.

2(vi). On 28.11.2019, ex-post facto sanction was accorded in favour of the petitioner of 149 days' half pay leave w.e.f. 03.07.2019 to 11.11.2019 on the basis of medical fitness certificate on same usual terms and conditions as extracted earlier.

2(vii). In response to petitioner's application for further leave, the respondents on 31.12.2019 (Annexure P-11), directed him to join his duty within three days from the date of receipt of the communication. Failing which, the petitioner was to appear before the Medical Board for second medical opinion. This direction to the petitioner was repeated by the respondents in their various subsequent communications (Annexures P-12 to P-14). The petitioner despite these directions, did not join duties. On 06.01.2021, the respondents issued him a show cause notice (Annexure P-15), conveying that the petitioner is on unauthorized absence from duty w.e.f. 18.11.2019. His wilful absence and non-performance of regular duties showing negligence towards government duty tantamount to misconduct. Petitioner was given an opportunity to immediately report for duty as well as to submit justification for his repeated unauthorized absence within fifteen days, failing which disciplinary action was to be initiated against him. Petitioner submitted his response to the show cause notice on 18.01.2021 and on 03.02.2021, filed present petition for the following substantive relief:-

> *"i. That the order dated 03.01.2018 (Annexure P-2), Communication dated 31.12.2019 Annexure P-*

11, Communication dated 08.01.2020 Annexure P-12, Communication dated 23.01.2020 Annexure P-13, Communication dated 25.06.2020 Annexure P-14, Annexure P-15 dated 06.01.2021 may very kindly be quashed and set aside and respondent may be directed to retire the petitioner prematurely from due date with all consequential benefits."

3. Contentions:-

Heard learned counsel for the parties and gone through the record.

3(i). Learned Senior Counsel for the petitioner argued that the petitioner's request for premature retirement was turned down by the respondents on 03.01.2018 only on the ground that at that time, he did not have twenty years of qualifying regular service required under the rules. On 27.03.2019, petitioner again requested for his premature retirement, submitting that he would be completing twenty years of qualifying service on 30.06.2019 and therefore, on medical grounds, he may be allowed to retire prematurely and his letter be considered as three months' notice for this purpose. Learned Senior Counsel further argued that the respondents did not decide petitioner's request for premature retirement. Therefore, petitioner has to be deemed to have been prematurely retired after completion of three months' notice on petitioner's completing twenty years of qualifying service, i.e. on 30.06.2019. Learned Senior Counsel also submitted that the petitioner is not in a position to discharge his duties as Horticulture Development Officer on account of his own health problems and on account of ill health of his aged mother and it is for this reason that the petitioner remained on leave of one kind or the other ever since 30.07.2018 till 17.11.2019. It was submitted that for want of sympathetic action in the matter on part of the respondents, in the peculiar circumstances, petitioner apart from repeating his prayer for

premature retirement, had no other option, but to remain absent w.e.f. 18.11.2019 onwards. Therefore, learned Senior Counsel alternatively submitted that the respondents be directed to retire the petitioner prematurely from the due date alongwith all consequential benefits.

3(ii). Learned Additional Advocate General contended that the petitioner has no *locus standi* as he has not completed qualifying service of twenty years required for premature retirement. He submitted that the order dated 27.08.2018 (Annexure P-4), granting ex-post facto sanction of eight months' extraordinary leave to the petitioner w.e.f. 30.07.2018 to 26.03.2019, was superseded by office order dated 08.08.2019 (Annexure R-2). In terms of office order dated 08.08.2019, the period of extraordinary leave was not to count towards petitioner's annual increment and qualifying service for the purpose of pension. Therefore, in view of order dated 08.08.2019, eight months' extraordinary leave granted to the petitioner w.e.f. 30.07.2018 to 26.03.2019 is not to be counted towards his qualifying service. Excluding this period, the petitioner does not complete required qualifying service of twenty years as on 30.06.2019. Therefore, petitioner was not eligible for premature retirement.

Learned Additional Advocate General also submitted that the petitioner is unauthorizedly absent from duties w.e.f. 18.11.2019. Despite being issued repeated directions, petitioner did not report for duty. A show cause notice was issued to him in this regard on 06.01.2021. Petitioner thereafter filed the present petition. On 26.02.2021, an order was issued (Annexure R-7), giving him last opportunity to immediately report for his duties, failing which disciplinary action was to be initiated against him. Since the petitioner failed to join his duties, memorandum under Rule 14 of CCS(CCA) Rules, 1965 was issued to the petitioner on 19.03.2021 (Annexure PM-1), containing following two charges:-

"Article of Charge-I

Statement of Article of charge framed against Dr. Sanjay Chadha, Subject Matter Specialist (Hort.), working as Dy. Project Director, ATMA, Mandi

That Dr. Sanjay Chadha while working as Dy. Project Director, ATMA, Mandi applied for Extraordinary leave w.e.f. 30.07.2018 to 26.03.2018 i.e. eight months (240 days) and availed the same. Thereafter w.e.f. 18.11.2019 to till date he is on unauthorized absence from Govt. duty. Dr. Chadha did not perform his duties regularly and showing negligence towards Govt. duty. Dr. Chadha was/is wilful absence from Govt. service without any valid reasons. This act of said Dr. Sanjay Chadha, SMS (Hort.)-cum-DPD, ATMA tantamount to a gross misconduct and he is liable to be charged under CCS(Conduct) Rules, 1964.

Article of Charge-II

That Dr. Sanjay Chadha, while working as Dy. Project Director, ATMA Mandi disobeyed the orders of the higher authorities and did not join back till date. Repeatedly, Show Cause Notice and reminders were issued by the Govt. and Department but he did not join back. This act of said Dr. Sanjay Chadha, SMS (Hort.) tantamount to be a misconduct and gross negligence of duty thereby violating Rule 3 of CCS (Conduct) Rules, 1964."

On the basis of above submissions, learned Additional Advocate General prayed for dismissal of the writ petition.

4. Observations:-

The respondents-State has framed the Himachal Pradesh Services (Premature Retirement) Rules, 1976 (in short 'Rules'). Rule 3(1) of these rules is about the respondents' right to prematurely retire a government servant, whereas

under Rule 3(2), a government servant can request for his premature retirement. For the purpose of present dispute, Rule 3(2) is relevant. This rule as it stands today, pursuant to amendments carried out in it vide notifications dated 10.09.1987, 16.03.2012,
20.09.2012 and 01.08.2013, reads as under:-

> *"3(2) Any Govt. employee may, after giving at least three months' previous notice in writing to the appropriate authority retire from service on the date on which he-*
>
> *(a) completes 30 years of qualifying service; or*
>
> *(i) attains the age of-50 years in respect of Class I and Class II officers who have entered Govt. service before attaining the age of thirty-five years;*
>
> *(ii) 55 years in case of all other Class I and Class II officers and all the Class III employees; and*
>
> *(iii) 55 years in case of such Class IV employees who entered Govt. service after 23rd July, 1966.*
>
> *Provided that any Government servant with satisfactory service record may, after giving notice of not less than 3 months in writing to the appropriate authority, retire from service on completion of 20 years of regular service after such notice has been accepted by the appropriate authority;*
>
> *Provided further that no employee under suspension or against whom disciplinary proceedings are either contemplated or have already been initiated shall be allowed to retire except with the specific approval of the appropriate authority."*

4(i). Completion of qualifying service:-

4(i)(a). Pleaded case of the respondents is that to become eligible to seek premature retirement, the petitioner was required to possess qualifying service of twenty years. Since he did not possess this much length of service, therefore, his

request for premature retirement was turned down by the respondents on 03.01.2018. Petitioner requested once again for premature retirement on 27.03.2019 by submitting that he would complete twenty years of qualifying service on 30.06.2019. He requested the respondents to retire him prematurely on his completion of twenty years of qualifying service and to treat the request letter as his three months' notice envisaged under the Rules.

4(i)(b). The respondents in their reply besides pointing out that petitioner's request for premature retirement made second time was not accepted due to paucity of staff, also submit that the petitioner had not completed twenty years of qualifying service as on 30.06.2019. Therefore, he was not eligible for premature retirement. Whereas, the petitioner contends that as on 30.06.2019, he had completed twenty years of regular service, therefore, he was eligible for premature retirement. The bone of contention between the parties is eight months' period w.e.f. 30.07.2018 to 26.03.2019. According to the petitioner, for this period of eight months, the respondents had already sanctioned extraordinary leave in his favour vide Annexure P-4, dated 27.08.2018. While sanctioning the leave, it was clearly indicated in the office order that the period shall be counted towards petitioner's annual increment and towards his service. Whereas, the stand of the respondents is that Annexure P-4, i.e. office order dated 27.08.2018, relied upon by the petitioner for counting eight months' extraordinary leave sanctioned in his favour stood superseded by office order dated 08.08.2019 (Annexure R-2). Order dated 08.08.2019 had withdrawn the terms of office order dated 27.08.2018. Office order dated 08.08.2019 stipulated that eight months' period of extraordinary leave sanctioned in favour of the petitioner will not count towards increment and towards qualifying service for the purpose of pension.

4(i)(c). The respondent is a sovereign State. Sovereign is expected to act in a rational, impartial and in a manner known to law. Sovereign State is not expected to act in an arbitrary and whimsical manner. An order passed

sanctioning extraordinary leave and allowing it to be counted for the purpose of increment and qualifying service of beneficiary cannot be superseded a year later to deny the beneficiary the benefit of counting the extraordinary leave towards increment and qualifying service. The petitioner had already accepted office order dated 27.08.2018 and had acted upon it believing its sanctity. During hearing of the case on 01.07.2021, a specific query was put to learned Additional Advocate General as to the reason for supersession of order dated 27.08.2018 by order dated 08.08.2019. In response, the respondents filed memo of instructions dated 30th June, 2021, which does not indicate any specific reason for withdrawing the benefit of counting period of extraordinary leave towards increment and qualifying service of petitioner. No basis for passing office order dated 08.08.2019 in supersession of office order dated 27.08.2018 has forth come. Respondents subsequently also have sanctioned various leaves in favour of the petitioner and allowed him the benefit of counting the leave period towards his service and increment. No reason has been pointed out by the respondents for acting in a different manner for eight months' leave period in question and that too for withdrawing the benefits of counting the leave period towards increment and salary, a year after conferring the benefits for the same period. The power vested in the respondents is to be exercised in accordance with law. Therefore, for want of any cogent and legal explanation, in my considered view, the benefit extended to the petitioner under office order dated 27.08.2018 cannot be withdrawn vide office order dated 08.08.2019. Consequently, the period from 30.07.2018 to 26.03.2019 has to be counted towards petitioner's qualifying service. It is not in dispute that by including this period, the petitioner completes twenty years of service as on 30.06.2019. Therefore, plea taken by the respondents that the petitioner did not possess twenty years of qualifying service on 30.06.2019 is negated.

4(ii). Deemed Premature Retirement:-

Learned Senior Counsel for the petitioner contended that since the petitioner had issued three months' notice to the respondents on 27.03.2019, requesting them to prematurely retire him from service on his completion of twenty years qualifying service on 30.06.2019 and since the respondents did not reject petitioner's request for premature retirement, therefore, the petitioner has to be deemed to have prematurely retired from service on 30.06.2019. It will be apposite to first refer to the legal position regarding 'deemed' premature retirement.

4(ii)(a). In ***(1996) 4 SCC 584***, titled ***Himachal Pradesh Horticultural Produce Marketing & Processing Corporation Ltd. Versus Suman Behari Sharma***, Hon'ble Apex Court was considering a case of premature retirement of an employee of Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited (HPMC). The erstwhile Himachal Pradesh Administrative Tribunal had held that employee of HPMC had a right to retire from service by giving three months' notice in writing and that there was no question of acceptance of such request by HPMC. View of the Tribunal was not affirmed by the Apex Court in light of specific provisions contained in Byelaw No.3.8 of HPMC. It was held that under the byelaw, the employee has a right to request for voluntary retirement on completion of requisite years of service, but his desire will materialize only if he is 'permitted' to retire and not otherwise. If the permission for voluntary retirement is not granted, the employee would not be able to retire. The relevant portion of the judgment reads as under:-

> *"8. Clause (2) of the Bye-law inter-alia provides for voluntary retirement from service of HPMC on completion of 25 years' service or on attaining the age of 50 years whichever is earlier. The employee, however, has a right to make a request in that behalf and his request would become effective only if he is 'permitted' to retire. The words "may be ... permitted at his request" clearly indicate that the said clause does not confer on the employee a right to retire on completion of either 25 years' service or on attaining the age of 50 years. It confers on the employee a right to make a request to permit him to retire. Obviously, if*

request is not accepted and permission is not granted the employee will not be able to retire as desired by him. Para (5) of the Bye-law is in the nature of an exception to para (2) and permits the employee who has not completed 25 years' service or has attained 50 years of age to seek retirement if he has completed 20 years satisfactory service. He can do so by giving three months' notice in writing. The contention of the learned Counsel for HPMC was that though Para 5 of the Bye-law relaxes the conditions prescribed by para 2, the relaxation is only with respect to the period of service and attainment of age of 50 years and it cannot be read to mean that the requirement of permission is dispensed with. On the other hand, the learned Counsel for the respondent submitted that as para 5 opens with the words "Notwithstanding the provision under para 2" and the words" may be...permitted at his request" are absent that would mean that the employee has a right to retire after giving three months' notice and no acceptance of such a request is necessary. We cannot agree with the interpretation canvassed by learned Counsel for the respondent. The Bye-law has to be read as a whole. Para 2 thereof confers a right on the employee to request for voluntary retirement on completion of 25 years' service or on attaining the age of 50 years, but his desire would materialize only if he is permitted to retire and not otherwise. Ordinarily, in a matter like this an employee who has put in less number of years of service would not be on a better fooling than the employee who has put in longer service. It could not have been the intention of the rule-making authority while framing para 5 of the Bye-law to confer on such an employee a better and a larger right to retire after giving three months' notice in writing. The words "seek retirement" in para 5 indicate that the right which is conferred by it is not the right to retire but a right to ask for retirement. The word "seek" implies a request by the employee and corresponding acceptance or permission by HPMC. Therefore, there cannot be automatic

retirement or snapping of service relationship on expiry of three months' period.

9. *The Tribunal also failed to appreciate that the following observations made by the Andhra High Court in Gummadi Sri Krishana Murthy v. Distt. Educational Officer*

> *"On the facts of this case, we are of the view that the rules above-mentioned intended that the employee has to give advance notice to the employer so that the latter could make necessary arrangements for employing some other person. It was also the intention of the rules that this privilege given to the employer could not be exercised beyond a reasonable period here fixed as three months for the employee should equally know where he stands. For example, the employee might have opted to retire because of offers of employment elsewhere or he might wish to make some other arrangement in regard to his own affairs. In such a situation, the employer could not be given a unilateral right to communicate his acceptance or otherwise at his own sweet will and without any limitation as to time."*

were by way of justification of rule which provided that "provided that the competent authority shall issue an order before the expiry of the notice period accepting or rejecting the notice." The High Court has not laid down a general proposition of law that when an employee seeks voluntary retirement the employer has to exercise his privilege of accepting or rejecting the request within a reasonable time and if a period is fixed for giving a notice in that behalf then the decision has to be taken within the period so fixed.

10. *We are, therefore, of the opinion that the Tribunal was wrong in holding that under para 5 of the bye-law the employee has a right to retire after giving three months' notice and that the respondent stood retired with effect from 26-2-1991 on expiry of three months' notice period as the respondent's request for retirement was not rejected within that period. We, therefore, allow this appeal and set aside the order passed by the Tribunal. It will be open to the appellant to proceed further with the*

proposed enquiry if it is otherwise expedient and permissible to do so. However, in view of the facts and circumstances of the case there shall be no order as to costs."

4(ii)(b). In ***(2018) 17 SCC 578,*** titled ***State of Uttar Pradesh and others Versus Achal Singh***, Hon'ble Apex Court after taking note of various precedents, held that whether voluntary retirement is automatic or an order is required to be passed depends on phraseology used in particular rule under which the retirement is to be ordered or voluntary retirement sought. Relevant portion of the judgment while discussing Rule 56(2) of U.P. Fundamental Rules is as under:-

"12. In our opinion, whether voluntary retirement is automatic or an order is required to be passed would depend upon the phraseology used in a particular rule under which retirement is to be ordered or voluntary retirement is sought. The factual position of each and every case has to be seen along with applicable rules while applying a dictum of the Court interpreting any other rule it should be in pari material. Rule 56(2) deals with the satisfaction of the Government to require a government servant to retire in the public interest. For the purpose, the Government may consider any material relating to government servant and may requisition any report from the Vigilance establishment.

22. In State of Haryana, (1999) 4 SCC 293, this Court also observed that:

"9. … Some rules are couched in language, which results in an automatic retirement of the employee upon the expiry of the period specified in the employee's notice. On the other hand, certain rules in some other departments are couched in the language which makes it clear that even upon expiry of the period specified in the notice, the retirement is not automatic and an express order granting permission is required and has to be communicated. The relationship of master and servant in the latter type of rules continues after the period specified in the notice till such acceptance is communicated … the

refusal of permission could also be communicated after three months and the employee continues to be in service."

It is the aforesaid later observations made by this Court, which are squarely applicable to the rule in question as applicable in the State of Uttar Pradesh."

After considering Suman Behari Sharma's case, supra and ***(2009) 10 SCC 514***, titled ***Padubidri Damodar Shenoy v. Indian Airlines Ltd., (2013) 14 SCC 486***, titled ***C.V. Francis v. Union of India*** and ***(2001) 3 SCC 290***, titled ***Tek Chand v. Dile Ram***, following was observed in respect of Rule 56 of U.P. Fundamental Rules:-

"28. In our opinion, Rule 56(c) does not fall in the category where there is an absolute right on the employee to seek voluntary retirement. In view of the aforesaid dictum and what is held by this Court, we find that the prayer made to make a reference to a large Bench, in case this Court does not follow the earlier decision is entirely devoid of merit as on the basis of what has been held by this Court in the earlier decisions, we have arrived at the conclusion. This Court has authoritatively laid down the law umpteen number of times."

Finally, it was held as under:-

"42. There are several decisions of the High Court, namely, Anil Dewan v. State, State of Punjab v. Harbir Singh Dhillon and Kalpana Singh v. State of Rajasthan, which were cited to show that the decision in Dinesh Chandra Sangma had been followed. We have considered the aforesaid decisions and we find that it would depend upon the scheme of the Rules. Each and every judgment has to be considered in the light of the provisions which came up for consideration and question it has decided, language employed in the Rules, and it cannot be said to be of general application as

already observed by this Court in State of Haryana."

4(ii)(c). The contention of deemed premature retirement of petitioner cannot be accepted in view of the provisions of the applicable Rules. It is under the proviso to Rule 3 that the petitioner was seeking premature retirement. The provisos to Rule 3 Sub-Rule 2 as incorporated in the Rules by virtue of the amendments carried out (already extracted above) provide that any government servant with satisfactory service record may, after giving notice of not less than 3 months in writing to the appropriate authority, retire from service on completion of 20 years of regular service *after such notice has been accepted by the appropriate authority*. Therefore, the contention raised by learned Senior Counsel for the petitioner that the petitioner shall be deemed to have been prematurely retired on completion of his twenty years of qualifying service on 30.06.2019 cannot be accepted. There is nothing on record to show that the notice of premature retirement was ever accepted by the respondents. Rather, the stand of the respondents is that petitioner's request for premature retirement was once again rejected by them on 19.06.2019. Though petitioner denies receipt of this communication. Be that as it may. The upshot of above discussion is that there cannot be 'deemed' premature retirement under provisos to Rule 3(2) of H.P. Services (Premature Retirement) Rules, 1976.

4(iii). Duties discharged by the petitioner:-

Petitioner availed and was granted extraordinary leave w.e.f. 30.07.2018 to 26.03.2019 and earned leave from 01.04.2019 to 28.06.2019. 149 days' half pay leave was sanctioned to him w.e.f. 03.07.2019 to 11.11.2019. Ever since 18.11.2019, the petitioner has remained absent unauthorizedly till date and for that reason, the respondents have initiated disciplinary proceedings against him under Rule 14 of the CCS(CCA) Rules, 1965 on 19.03.2021. Initiation of disciplinary proceedings does not per se bar premature

retirement of a government servant under the applicable rules. Existence of such circumstances attract second proviso to Rule 3(2), whereunder premature retirement can only be granted with specific approval of the Competent Authority. In the facts of instant case, disciplinary proceedings were initiated against the petitioner on 19.03.2021, i.e. after filing of the writ petition.

No other point was urged.

5. Relief:-

Prayer of the petitioner is that he be retired prematurely on his completing twenty years of service, i.e. on 30.06.2019. The main stand taken and pleaded by the respondents that petitioner did not possess the required twenty years of qualifying service as on 30.06.2019 has been rejected as discussed above in paras 4(i)(a)-(c) of this judgment. In view of the above discussion, the respondents are directed to reconsider the petitioner's request of premature retirement in accordance with law within a period of two weeks from today. While reconsidering the case, the observations made in the judgment shall be kept in view.

The writ petition is disposed of in the above terms. Pending miscellaneous application(s), if any, also stand disposed of.

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

Chet Ram .....Petitioner.

Versus

State of HP and Ors. ....Respondents.

CWPOA No. 501 of 2019
Date of Decision: 08.07.2021

Constitution of India, 1950 - Article 226 – Respondent no. 4 having found eligible was selected for the post of language Primary Assistant Teacher (PAT), SDO Sadar, District Bilaspur who joined as such on 04-04-2006 – Petitioner challenged the selection by way of O.A. No. 3136/2007 in erstwhile H.P. State

Administrative Tribunal and on being transferred, a coordinate Bench quashed and set aside appointment of respondent no. 4 and directed respondents to fill up the post as per earlier selection made in the interview in the year 2006 and merit list so drawn – Being aggrieved, LPA No. 64 of 2013 filed by respondent no. 4 allowed and Division Bench remanded the case back to Ld. Single Judge for hearing – Held, that only two categories, i.e. candidate having 10+2 examination or with higher academic examination duly recognized by University and H.P. Government could have been considered for the post in question – Respondent no. 4 had passed "Prak Shastri" which is not equivalent to 10+2 as per record – Marks awarded to respondent no. 4 for possessing "Prak Shastri Certificate" in merit list so drawn required to be excluded being not equivalent to 10+2 and total marks of respondent no. 4 comes to 35 whereas Petitioner was awarded 55 marks – Petitioner being higher in merit deserve to be appointed against the post in question – Petition allowed – Selection of respondent no. 4 quashed & set aside – Respondents directed to offer appointment to the petitioner as PAT from the date of interview. Title: Chet Ram vs. State of HP and Ors. Page-195

For the petitioner:	Mr. Sanjeev Bhushan, Senior Advocate with Mr Rakesh Chauhan, Advocate.
For the respondents:	Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for the respondents/State.
For the respondent No.4:	Mr. Rajesh Kumar, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Pursuant to advertisement issued in January, 2006 Annexure A-1, petitioner as well as respondent No.4 applied for the post of language Primary Assistant Teacher(hereinafter referred to as PAT) in the office of SDO, Sadar, District Bilaspur. Selection/interview committee constituted for the purpose of selection of Primary Assistant Teacher after having found the respondent No.4 eligible, selected him for the post in question and as such he

gave his joining on 4th April, 2006 (Annexure A-3) at Government Primary School, Solda, District Bilaspur.

2. Petitioner after being declared unsuccessful laid challenge to the selection of respondent No.4, in aforesaid selection process, by way of Original Application No. 3136/2007 in erstwhile H.P. State Administrative Tribunal. Since the Himachal Pradesh Administrative Tribunal came to be abolished, aforesaid original application having been filed by petitioner came to be transferred to this Court and accordingly same was re-registered as CWP(T) No.16072/2008. On 17th October, 2011 coordinate Bench of this Court while placing reliance on the judgment rendered by a Division Bench of this Court in **Arjun Singh** vs. **Pawan Kumar & Others**, LPA No. 251 of 2011, decided on 7th September, 2011, quashed and set aside the appointment of respondent No.4 to the post of Primary Assistant Teacher in Government Primary School, Soldha and directed respondents to fill-up the post in question as per the earlier selection made in the interview held in the year, 2006 and the merit list drawn at that time.

3. Being aggrieved and dissatisfied with the aforesaid judgment passed by the Coordinate Bench of this Court, respondent No.4 preferred LPA bearing No. 64 of 2013, which ultimately came to be decided on 6th May, 2013. Division Bench of this Court while allowing aforesaid LPA No. 64 of 2013, having been filed by respondent No.4 observed that learned Single Judge before applying ratio of the decision rendered by Division Bench in Arjun Singh's case (Supra) has not recorded any findings with regard to the eligibility of the appellant and as such judgment is not sustainable. In the aforesaid background, Division Bench vide judgment dated 6th May, 2013 remanded the case back to the learned Single Judge for deciding afresh. In this background the matter has again come up for hearing in this Court.

4. I have heard the learned Counsel for the parties and have gone through the records.

5. Precisely, the grouse of the petitioner is that since at the time of interview held in January/March, 2006, respondent No.4 did not possess requisite qualification i.e. 10+2, he could not have been selected against the post in question.

6. Mr. Sanjeev Bhushan, learned senior counsel representing the petitioner, while inviting the attention of this Court to the advertisement, issued for filling-up the post(s) in question and the scheme formulated by Government for appointing Primary Assistant Teacher Annexure A-4, vehemently argued that since there was no provision to consider any qualification equivalent to 10+2, interview Committee while drawing merit list could not have awarded any marks to the respondent No. 4 for his having possessed certificate of **"Prak Shastri"**.

7. Mr. Rajesh Sharma, learned counsel representing respondent No.4 while refuting aforesaid submissions made on behalf of the petitioner contended that since its stands specifically provided in the advertisement as well as scheme that a person possessing higher qualification can also apply for the post, candidature of the respondent No.4, who was having degree of "Shastri" rightly came to be considered by the interview committee. Besides above, Mr. Rajesh Sharma contended that though no specific mention has been made with regard to **"Prak Shastri"** and **"Shastri"** in the advertisement as well as scheme but since both these qualifications have been termed to be equivalent to 10+2 and B.A., interview committee rightly awarded respondent no. 4 marks qua both the qualifications as referred above.

8. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while defending the selection of respondent No.4 invited the attention of this Court to notification dated 31st August, 1982 (Annexure D-1 annexed with supplementary affidavit filed by Director Elementary Education, Himachal Pradesh, dated 13.7.2011) and contended that as per aforesaid notification

certificate/degree awarded qua courses **"Madhyama"** and **"Shastri"** have been termed to be equivalent to "Higher Secondary" and "B.A".

9. Mr. Sudhir Bhatnagar, learned Additional Advocate General, further submitted that though certificate issued by Rashtriya Sanskrit Sansthan qua **"Madhyama"** has been termed to be equivalent to Senior Secondary but since respondent No. 4 at the time of interview possessed degree of Shastri recognized by Rastriya Sanskrit Sansthan, he was eligible to apply for the post in question, as such no illegality and infirmity, if any, can be said to have been committed by the interview committee while selecting respondent No.4 against the post in question.

10. Before ascertaining correctness and legality of the submissions made on behalf of the parties to the lis, it is apt to take note of "educational qualification" prescribed under advertisement in question as well as scheme formulated by Government for appointment to the post of Primary Assistant Teacher, which is reproduced herein below:-

Eligibility and Educational Qualification

> "The minimum essential qualifications for the post of Prathmik Sahayak Adhyapak Primary Assistant Teacher (PAT) shall be, "A pass in 10+2 examination" from a Board or a University duly recognized by the H.P. Govt. Candidates with higher academic qualification shall also be eligible to apply. The candidates with professional qualifications in the field of education will be preferred".

11. It is apparent from the reading of eligibility conditions prescribed in advertisement as well as scheme (Annexures A-1 & A-4 that minimum essential qualification for the post of Primary Assistant Teacher (PAT) Is "pass in 10+2 examination" from a Board or a University duly recognized by Himachal Pradesh Government. Apart from above, person with Higher Academic Qualification is also entitled to apply against the post in question.

Candidates with professional qualification in the field of education are required to be given preference.

12. It can safely be inferred from the reading of the aforesaid provisions provided in the advertisement as well as scheme (Annexures A-1 & A-4) that a candidate having passed 10+2 examination or Higher Academic Education qualification shall be eligible to apply and definitely there is no mention of word "equivalent" to basic qualification "10+2 examination". As per advertisement as well as scheme, person having passed 10+2 examination or having higher academic qualification could have applied to the post of Primary Assistant Teacher. Since there is no specific mention of word "equivalent to 10+2 examination", a certificate/degree, if any, issued by any Board or University equivalent to 10+2 could not have been considered by the respondents while determining the eligibility of persons applying against the post in question. Only two categories i.e. candidate having 10+2 examination or with higher academic examination duly recognized by University and H.P. Government could have been considered for the post in question. Claim of the respondent No. 4 is that since he had passed **"Prak Shashtri"** which has been termed to be equivalent to 10+2, interview committee rightly awarded him 22.13 marks for his having possessed basic qualification i.e. 10+2 but such submission of him is not tenable at all.

13. Firstly, there is no material worth credence available on record suggestive of the fact that certificate of **"Prak Shastri"** awarded by H.P. University is equivalent to 10+2 and secondly once in the advertisement as well as scheme, it has not been provided specifically that candidate possessing qualification equivalent to 10+2 is also eligible to apply, no marks if any could have been awarded to respondent no.4 against the marks fixed/provided for having qualification of 10+2. Respondent-State while justifying selection of

respondent No.4 has only placed on record notification dated 31.8.1982 (Annexure D-1/T annexed with supplementary affidavit filed by Director Elementary Education), perusal whereof nowhere reveals that certificate of **"Prak Shashtri"** issued by H.P. University is equivalent to 10+2, rather perusal of aforesaid notification reveals that there is no mention at all if any of certificate issued by University in **"Prak Shastri".** No doubt in the aforesaid notification degree of "Shastri" has been termed to be equivalent to be Bachelor of Arts, i.e. B.A. meaning thereby petitioner having possessed Higher qualification though was eligible to apply for the post in question but he could not have been awarded any marks in interview for his having possessed certificate of **"Prak Shastri",** which as per respondent No.4 is equivalent to 10+2.

14. During proceedings of the case Sh. Rajesh Sharma, learned counsel representing the respondent No.4 though made available certificate of **"Prak Shastri"** issued in favour of respondent No.4 by H.P. University but he was unable to place on record any document suggestive of the fact that aforesaid qualification of **"Prak Shastri"** is equivalent to 10+2. 15.

Leaving everything beside, having carefully perused advertisement as well as scheme formulated by Government for selection of PAT, this court has no hesitation to conclude that once it was not specifically mentioned in the advertisement/scheme that person having qualification equivalent to 10+2 is also eligible to apply, the interview committee constituted for the selection to the post of PAT could not have awarded any marks to the petitioner for his having possessed **"Prak Shastri"** certificate, which is claimed to be equivalent to 10+2. Merit drawn by interview committee annexure A-6 annexed with application bearing No. 14172/2013 filed by petitioner clearly reveals that in total respondent No. 4 has been awarded 57.13 marks, whereas petitioner has been awarded 55 marks. 57.13 marks awarded to petitioner includes 22.13 marks awarded to him on account of his having possessed **"Prak Shastri**

certificate". Since **"Prak Shastri"** was not the qualification prescribed in the advertisement as well as scheme, no marks could have been awarded to respondent No.4 qua the same and as such 22.13 marks awarded to the respondent No.4 on that account is required to be excluded from total marks and as such total marks of respondent No.4 comes out to be 35. Since petitioner came to be awarded 55 marks in total, he being higher in merit deserves to be appointed against the post in question.

16. Consequently, in view of detailed discussion made hereinabove, instant petition is allowed and selection of respondent No. 4 is quashed and set aside and respondents are directed to offer appointment to the petitioner as PAT in Government Primary School Soldha from the date of interview.

Petition stands disposed of in the afore terms, alongwith all pending applications. Interim directions, if any, stand vacated.

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

Rangila Ram .....Petitioner

Versus

State of Himachal Pradesh and Ors. ....Respondents

CWPOA No. 2063 of 2020
Decided on: 7.7.2021

Constitution of India, 1950 – Article 226 – Petitioner appointed as Work Inspector on daily wage basis in the Department of PWD, Himachal Pradesh – Regularization of services made from retrospective date pursuant to the directions of Division Bench in CWP in similarly situated cases – Petitioner not granted promotion immediately after completion of three years service in the feeder category of diploma holder work inspector – Being aggrieved, O.A. No. 2992 of 2017 filed before Erstwhile H.P. State Administrative Tribunal which came to be transferred after abolition of tribunal – Held, that Petitioner was regularized w.e.f. 01-01-2001 who became eligible to be promoted against the post of Junior Engineer (Civil) on 01-01-2004 – 85 posts of Junior Engineer were available in the State of H.P. and claim of respondents that there were no

posts of Junior Engineer (Civil) available in the year 2004 contrary to record – Petition allowed – Respondents directed to promote the petitioner as Junior Engineer from amongst the category of Work Inspector/ Diploma Holder in Civil Engineering from the date of his having completed three years service in the feeder category with all consequential benefits.

For the Petitioner	:	Mr. Surinder Saklani, Advocate.
For the Respondents	:	Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General, for the State.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Petitioner, who is a diploma holder in Civil Engineering, was appointed as Work Inspector on daily wage basis w.e.f. 1.6.1990 in the department of PWD, Himachal Pradesh. Services of the petitioner, subsequently, came to be regularized w.e.f. 21.3.2003 in terms of the regularization policy framed by the State of Himachal Pradesh and in that process, was assigned Seniority No. 1133 in the final seniority list of Work Inspectors issued by the respondents. However, subsequently, pursuant to the directions issued by the Division Bench of this Court, in CWP filed by some of the similarly situate persons, regularization of the petitioner against the post in question was also made from the retrospective date and accordingly, the corrigendum was issued by respondent No.2 to this effect and seniority number of the petitioner was changed from 1133 to 967(A) (Annexure A-1). Reply of the respondents revels that the category of Work Inspector alongwith 27 other industrial and non-industrial categories stands re-designated as Junior Technician with job specification vide Govt. notification No.Fin-(C)B(7)-6/88-VI dated 30.8.1997, followed by Notification No. Fin-(C)B(7)-6/88-VI dated 24.3.1998 w.e.f. 1.1.1986, (Annexure R-1 alongwith

reply field by the respondents). Newly formed category of Junior Technician came to be granted three tier pay scale in the ratio of 20:30:50 as per their circle seniority. The Junior most 50% of the total cadre strength of Technician is to be placed as Junior Technician (Work Inspector) in the pre-revised pay scale of Rs. 3120-5160, next senior 30% as Technician Grade-II (Work Inspector) with pay scale of Rs. 4020-6200 and the senior most 20% are to be placed as Technician Grade-I (Work Inspector) in the pay scale of Rs. 4550-7220, w.e.f. 1.1.1996. Petitioner being appointee of year 1.1.2001 as Work Inspector was to be placed as Junior Technician (Work Inspector) in the pre-revised pay scale of Rs.3120-5160 in terms of notification dated 30.8.1997 (Annexure R-1). Thereafter, as per circle seniority of Junior Technician Work Inspector) to which the petitioner belongs, he was to be placed as Technician Grade-II (Work Inspector) and thereafter, as Technician Grade-I Work Inspector) in the ration of 20:30:50. The category of Work Inspector now Junior Technician (Work Inspector) is one of the feeder category for promotion to the post of Junior Engineer (Civil). Petitioner being fully qualified to be promoted to the post of Junior Engineer (Civil) came to be promoted w.e.f. 31.12.2005, against 3.5% quota meant for Diploma holder Junior Technician (Work Inspector) under Clause-11 (iv) of R&P Rules of Junior Engineer (Civil) i.e. Annexure A-2. Though pursuant to aforesaid promotion order issued by the respondent, petitioner joined on 4.1.2006, but since he was not granted promotion immediately after completion of three years service in the feeder category of diploma holder Work Inspector, he made representations to the department to promote him to the post of Junior Engineer (Civil) against 3.5 % quota meant for diploma holder from the date of his having completed three years service in the feeder category i.e. Work Inspector now Junior Technician. Besides above, petitioner also claimed higher pay scales in the cadre of Work Inspector now Junior Technician (Work Inspector), but such prayer of him was also not acceded to by the respondents on the ground that after the

issuance of notification dated 30.8.1997, common category of Junior Technician (Work Inspector) has been granted three tier pay scale which has been further clarified by the Government/Finance Deptt. vide letter No. Fin(PR) B(7)-45/2010 dated 29.5.2014.

2. As per respondents, after revision of 1.1.1996, pay scale of Rs. 5000-8100/- never remained in force and as such, he is not entitled to be granted higher pay scale. In the aforesaid background, petitioner filed OA No. 2992 of 2017 before the Erstwhile HP State Administrative Tribunal, praying therein for following reliefs:

> *(a) That the respondents may very kindly be directed to promote the applicant as Junior Engineer from amongst the category of Work Inspector (Diploma Holder in Civil Engineering) after completion of 3 years service on the post of Work Inspector by convening a review D.P.C. with effect from 2004 with all consequential benefits to pay, arrears, seniority et.*
>
> *(b) That the applicant be granted the pay scale of Rs.5000-8100 to the post of Work Inspector from the date of regularization i.e. 1.1.2001 upto the period the applicant worked on the post of Work Inspector with all consequential benefits.*

3. After the abolition of the Erstwhile HP State Administrative Tribunal, aforesaid Original Application came to be transferred to this Court for adjudication and now same stands re-registered as CWPOA No. 2063 of 2020.

4. I have heard the learned counsel for the parties and perused the material available on record.

5. Careful perusal of the corrigendum dated 28.4.2012 (Annexure A-1) clearly reveals that petitioner came to be regularized against the post of Work Inspector w.e.f. 1.1.2001 and as such, he became eligible to be considered for promotion to the post of Junior Engineer (Civil) against 3.5% quota meant for Diploma holder Junior Technician (Work Inspector) under

Clause-11(iv) of R&P Rules of Junior Engineer (Civil) w.e.f. 1.1.2004 i.e. Annexure A-2.

6. In the case at hand, respondents promoted the petitioner to the post of Junior Engineer w.e.f. 31.12.2005, whereas as per clause-11 (IV) of R&P Rules, of Junior Engineer (Civil), petitioner ought to have been considered for promotion to the post of Junior Engineer (Civil) immediately after completion of three years of service in the feeder category of diploma holder i.e. Work Inspector. Since in the case at hand, petitioner was regularized w.e.f. 1.1.2001 vide corrigendum dated 28.4.2012, he had become eligible to be promoted against the post of Junior Engineer (Civil) on 1.1.2004, whereas in the case at hand, petitioner was promoted to the post of Junior Engineer w.e.f. 31.12.2005 against 3.5% quota meant for Diploma Holder Junior Technician. Respondents in their reply, though have virtually admitted that the petitioner had become eligible to be promoted to the post of Junior Engineer after completion of three years service in feeder category of diploma holder Work Inspector, but they have stated in their reply that such promotion could not be granted automatically, rather same could be made subject to the availability of vacancy.

7. Respondents have claimed that since no post of Junior Engineer (Civil) was available in the quota meant for Diploma Holder Junior Technician Work Inspector when the petitioner had completed three years service in the feeder category, diploma holder Work Inspector, he was rightly not promoted w.e.f. 1.1.2004 against the 3.5% quota meant for Diploma holder Junior Technician (Work Inspector). Since there is no dispute inter-se parties that petitioner after having become regularized in the feeder category of Work Inspector in the year, 2004, had become eligible to the promotion to the post of Junior Engineer (Civil) Annexure A-2, there appears to be no necessity to refer /take into consideration R&P Rules framed by the respondent-State for regulating the services of the Junior Engineer (Civil).

8. Precise ground raised by the respondents for not promoting the petitioner to the post of Junior Engineer (Civil) immediately after his having completed three years is that no post of Junior Engineer (Civil) was available. However, aforesaid claim put forth by the respondents has been seriously disputed by the petitioner, in rejoinder to the reply filed by the respondents, wherein petitioner has categorically stated that similarly situate persons were promoted to the post of Junior Engineer (Civil) w.e.f 15.3.2003. Having carefully perused averments contained in the rejoinder, which is duly supported by an affidavit as well as documents annexed therewith, this Court finds that two persons namely Jagdeep Bhagchandani and Vipin Kumar were promoted as Junior Engineer w.e.f. 15.3.2003 and 17.3.2007, respectively.

9. Besides above, this Court finds that petitioner has also placed on record vacancy position of Junior Engineer other than Tribal/ difficult area as on 31.7.2004 (Annexure P-10 available at page 113 of the paper book). Aforesaid document clearly reveals that on 31.7.2004, 85 posts of Junior Engineer were available in the State of Himachal Pradesh that too in the areas other than Tribal /difficult area. Aforesaid facts and documents placed on record by the petitioner by way of rejoinder have been not refuted/disputed by the respondents and as such, there is no reason for this Court to disbelieve the same. Since claim of the petitioner to the post of Junior Engineer against 3.5% quota meant for Diploma holder Junior Technician (Work Inspector) was to be considered after completion of three years service in the category of diploma holder, Work Inspector, petitioner, who was regularized w.e.f. 1.1.2001, ought to have been promoted to the post Junior Engineer (Civil) against 3.5% quota w.e.f. 1.1.2004. However, in the case at hand, respondents have granted promotion to the petitioner w.e.f. 31.12.2005 and they have claimed before this Court by way of reply filed on affidavit that in the year, 2004 there were no posts of Junior Engineer (Civil) available, whereas such claim of the respondents put forth before this court is totally

contrary to the record adduced on record by the petitioner by way of rejoinder filed to the reply filed by the respondents. In the year, 2004, not only 85 posts of Junior Engineer in the State were available, but respondents while adopting pick and choose method, granted promotion to the similarly situate persons w.e.f. 2003 and 2007. Since posts were available in the year 2004, when petitioner had completed three years service in feeder category of the diploma holder Work Inspector, case of the petitioner ought to have been considered by the respondents from due date i.e. 1.1.2004.

10. Since issue with regard to grant of higher pay scale in the cadre of Work Inspector now Junior Technician stands settled inter-se petitioner and respondents, learned counsel for the petitioner does not press the relief qua the same in the instant petition.

11. Consequently, in view of the detailed discussion made herein above, present petition is allowed and respondents are directed to promote the petitioner as Junior Engineer from amongst the category of work inspector (diploma holder in Civil Engineering) from the date of his having completed three years service in the feeder category by convening a review DPC w.e.f.1.1.2001, with all consequential benefits. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Mehar Singh .....Appellant.

Versus

Hem Chand and Ors .....Respondents.

RSA No. 199 of 2020
Date of Decision: 7.7.2021.

Code of Civil Procedure, 1908 - Section 100 - Regular Second Appeal– Suit for permanent prohibitory injunction restraining the defendants from blocking

the common path in the suit land connecting his land to the main road – Suit dismissed by trial court – Appeal against the said judgment dismissed by the first Appellate Court – Challenge thereof – Held, that plaintiff has not been able to prove on record that there exists path in suit land which is owned & possessed by the defendants – The concurrent findings of facts and law recorded by both the courts below based upon correct appreciation of evidence and are not perverse – Appeal dismissed.

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264;

For the appellant: Mr. O.P. Sharma, Senior Advocate with Mr. Gurmeet Bhardwaj, Advocate.

For the respondents: Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal lays challenge to the judgment and decree dated 9.7.2019, passed by the learned Additional District Judge-I, Shimla, in CA No. 45-S/13 of 2018, affirming the judgment and decree dated 15.9.2018, passed by the learned Civil Judge-II (Sr. Div.), Shimla, District Shimla, H.P., , whereby civil suit bearing CS No. 119-1 of 2015 having been filed by the appellant/plaintiff *(herein after referred to as "the plaintiff")* came to be dismissed.

2. Plaintiff filed a suit for permanent prohibitory injunction, restraining the respondents/defendants (*in short "the defendants*") from blocking public path, averring therein that he is one of the co-owner in possession of land comprised in khasra No.79 Khewat, Khatauni No.1min/1 situate at Mohal Shahal, Tehsil Shimla Rural, District Shimla, H.P., and in the year, 2009, he started construction work of his house at Shahal. The land of the defendant is adjoining to the aforesaid land of the plaintiff. Plaintiff

alleged that defendant is putting obstruction on the common path, which is only passage connecting his land to the main road. Plaintiff alleged that defendants are trying to block path of the plaintiff, which exists at the boundary of khasra No. 78 since year 2009. Plaintiff alleged that defendant not only blocked the passage leading to his house from the main road, but has also blocked the common path leading to his newly constructed house and as such, he is incurring huge losses. In the aforesaid background, plaintiff prayed that his suit may be decreed and defendants may be restrained from blocking the common path and creating any nuisance near the house of the plaintiff situate on khasra No.79.

3. Aforesaid claim put forth by the plaintiff came to be resisted by the defendants, who specifically denied that plaintiff has started construction in the year, 2009. Defendants alleged that the plaintiff filed a false complaint before SDM (Rural) with respect to the path and present suit has been filed solely with a view to grab the path through the cultivated land of the defendants. Defendants spe their land. Defendants in their written statement claimed that alternative path exists for the land of the plaintiff, which is being used by him prior to filing of the suit. Defendants categorically stated in their reply that after completion of new construction, plaintiff is intending to use shortcuts to his house using land of the defendants. Defendants have specifically stated in their reply that there exists no common path through the land in any manner, rather plaintiff is trying to obtain path from the land of the defendants by dint of force and by adopting legal means. Defendants stated in their written statement that since there exists no path, there is no question of creating any hindrance. Defendants have further stated in their written statement that nothing was found against them during the inquiries conducted by the departmental authorities and as such, now the petitioner with view to harass them have filed the present suit.

4. By way of replication to the aforesaid written statement, plaintiff while denying the claim put forth by the defendants reiterated the averments contained in the suit. In the replication, plaintiff claimed that there exists common path through the land of the defendants as per Wajib-Ul-Uraz. On the basis of aforesaid pleadings adduced on record by the respective parties, court below framed following issues:

> "*1. Whether plaintiff is entitled for a decree of permanent prohibitory injunction , as prayed for? ..OPP*
> *2. Whether suit is not maintainable? OPD.*
> *3. Whether the plaintiff has suppressed the material facts from this court?....OPD*
> *4. Whether plaintiff is estopped by his act and conduct from filing the present suit? OPD*
> *5. Whether suit is not properly valued for the purpose of court fee and jurisdiction? …OPD.*
> *6. Whether plaintiff has no cause of action to file the present suit? OPD*
> *7. Whether suit has not been framed as per the requirement of Order 7 Rule 3 CPC? …OPD.*
> *8. Relief."*

5. Subsequently, on the basis of pleadings as well as evidence led on record by the respective parties, learned trial Court, dismissed the aforesaid suit filed by the plaintiff vide judgment dated 15.9.2018. Plaintiff, being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court filed an appeal under Section 96 of CPC in the court of learned Additional District Judge-I, Shimla, which also came to be dismissed vide judgment dated 9.7.2019. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, laying therein challenge to the impugned judgments and decrees passed by the courts below.

6. With the consent of the learned counsel for the parties, matter is being disposed of at admission stage. Record perused.

7. Mr. O.P. Sharma, learned Senior counsel, appearing for the plaintiff, while making this court peruse judgments and decrees passed by the courts below vis-à-vis evidence led on record by the plaintiff, vehemently argued that both the courts below have failed to appreciate the evidence in its right perspective, as a consequence of which, great prejudice has been caused to the plaintiff, who on account of obstruction caused by the defendants is not only incurring huge losses as his construction material lying on the spot is not being used. While referring to Ext.PW2/A i.e. Wajib-Ul-Arz, Mr. Sharma, argued that both the courts below have misread and misinterpreted the aforesaid document, perusal whereof clearly reveals that there is path/passage, which passes through, khasra No.78 and same is being used by the villagers for years together.

8. Mr. Romesh Verma, learned counsel for the plaintiff strenuously argued that there is no illegality and infirmity in the impugned judgments and decrees passed by the courts below because same are based upon the proper appreciation of the evidence adduced on record by the respective parties. Mr. Verma, contended that otherwise also, no interference, if any, of this court is called for in the instant proceedings, filed under Section 100 CPC on account of concurrent finding of fact and law recorded by the courts below. While referring to the grounds of appeal as well submissions made by the learned Senior counsel representing the plaintiff, Mr. Verma, contended that since no perversity, if any, in the impugned judgments and decrees has been pointed out by the plaintiff, instant appeal filed at the behest of the plaintiff deserves outright dismissal. Lastly, Mr. Verma, argued that there is no evidence, be it ocular or documentary, led on record by the plaintiff suggestive of the fact that path, if any, leading to the house of the plaintiff passes through the land of the defendants. While making this Court peruse pleadings as well as documents adduced on record by the plaintiff, Mr. Verma, contended that neither any spot map nor tatima showing passage, if any, passing through the

land of the defendant ever came to be placed on record, and as such, court below rightly held that suit of the plaintiff is not as per the requirement of Order 7 Rule 3 CPC.

9. Having heard the learned counsel for the parties and perused material available on record by the respective parties vis-à-vis reasoning assigned by the courts below while passing impugned judgments and decrees, this Court finds no illegality and infirmity in the same, which otherwise appear to be based on proper appreciation of evidence led on record by the respective parties and as such, no interference is called for.

10. Though in the case at hand, plaintiff by way of filing suit for permanent prohibitory injunction, restraining the defendant from blocking public path claimed that passage leading to his house not only passes through the land of the defendants, but it has been also shown as a public passage in Wajib-Ul-Az Ext.PW2/A. However, careful perusal of Wajib-Ul-Az tendered in evidence by the plaintiff nowhere suggests that there is any path/passage through khasra No. 78, which admittedly belongs to the defendants. Similarly, there is no material on record suggestive of the fact that aforesaid passage, if any, passing through khasra No. 78 is/was being used by the plaintiff and other villagers for years together. In the case at hand, plaintiff though alleged that there exists path through the land of the defendant, but revenue record placed on record i.e. Jamabandi for the year, 2009-10 Ext.Dx1 suggests that same belongs to the defendant and nature of this land is *Bakhal Abal*. There is no specific mention in the revenue record that some path/passage passes through the aforesaid land/khasra number. Otherwise also, if the statement of PW3 i.e. plaintiff, is perused, he has nowhere claimed/stated specifically that there is permanent passage leading to his house through khasra No.78, which otherwise is owned and possessed by the defendants. Plaintiff, in his examination in chief, has nowhere stated that since when he as well as other villagers had been using the aforesaid path

existing on the land of the defendants, rather he has simply in very vague manner has stated that he as well as other villagers have been using this path for centuries.

11. Though plaintiff with a view to demonstrate that passage passes through the land of the defendant tendered on record some photographs, but same never came to be proved in accordance with law and as such, rightly were not read in evidence by the courts below. Most importantly, no photograph, if any, with regard to obstruction/blockage of path by the defendant has been tendered on record. Moreover plaintiff in his examination in chief has nowhere stated that photographs tendered on record i.e. Mark-D are of the alleged path.

12. Plaintiff while deposing as PW4 before the court below deposed that he is owner in possession of the joint property comprised in khasra No. 79 khewat Khatauni No.1 min/1 situate at Mohal Shahal, Tehsil and District Shimla, H.P., whereas defendants are the owner of the joint land i.e. khasra No. 78. As per the plaintiff, defendants have obstructed the government path, which is only passage connecting his house to the main road. Interestingly, plaintiff in his examination in chief, deposed that defendants are trying to obstruct common path situate on the boundary of khasra No. 78, but, as has been taken note herein above, there is no revenue record available on record suggestive of the fact that common path, if any, exists between khasra Nos. 78 and 79. Plaintiff claimed that common path exists at the boundary of khasra No.78 since the year 2001. Though in his cross-examination, he admitted that he got his land demarcated, but failed to place on record report of demarcation, from where certainly, factum with regard to existence of common path, if any, between khasra Nos. 78 and 79 could be ascertained. He also admitted in his cross-examination that person namely Khem Chand had filed case against him before the court No.1 at Shimla. He also admitted that in demarcation, he was found to have encroached on the land of some other

person. Plaintiff also admitted that as per Ext.DX1 nature of the land is recorded as Bakhal Abal. While denying suggestion put to him that no path exists through khasra No. 78, plaintiff admitted that next to khasra No. 78 is the land of Hari Nand and Khem Chand. Plaintiff also admitted that neither the school authorities nor the panchayat officials ever filed any complaint against the defendant regarding blockage/obstruction of the alleged path. Aforesaid admission made by the plaintiff in his cross-examination is of great significance for the reason that if there was common passage passing through the land of the defendant, and the same was being used by the children going to the school as well as other villager, complaint ought to have been made. However in the case at hand, neither complaint nor objection, if any, has been raised by the school authorities as well as panchayat.

13. PW3 Abhi Ram, who happened to be neighbor of the plaintiff, stated that plaintiff started construction of his house 3-4 years ago. He deposed that there was a path through the land of the plaintiff as well defendants. He also stated that said path used to lead towards the school. He also stated that path was blocked few years ago and same was being used by the plaintiff to reach his house. This witness also deposed that they had been using path through the land of the Hari Nand to reach their fields since many centuries. He also stated that earlier people of panchayat used this passage to go to the school and bus-stand and there is no other path to reach the house of the plaintiff. Most importantly, this witness stated that other path to reach the house of the plaintiff is long, meaning thereby, there is an alternative road /path available to the house of the plaintiff.

14. PW1 is the reader in the office of SDM Rural Shimla, who came present before the court alongwith Ext.PW1/A i.e. complaint filed by the plaintiff against the defendants. PW2 Sh. Madan Singh, Patwari, Patwar Circle, Bhont brought the copy of Wajib-Ul-Arz i.e. Ext.PW2/A .

15. Having carefully perused evidence adduced on record, by the respective parties, be it ocular or documentary, this court finds that plaintiff has not been able to prove on record that there exists path in khasra No. 78 owned and possessed by the defendants. Neither, the plaintiff specifically deposed before the court below that there is common path recorded in the revenue record leading to the house of the plaintiff through land of the defendants, nor any of the plaintiff witnesses categorically stated that defendants have obstructed/blocked the passage leading to the house of the plaintiff, rather all the plaintiff witnesses categorically admitted that khasra No.78, wherein allegedly, path leading to the house of the plaintiff has been blocked, belongs to the defendant Hari Nand. Plaintiff, with a view to prove factum with regard to existence of passage in Khasra No. 78 placed heavy reliance upon the Wazib-Ul-Arz Ext.PW2/A, but as has been taken note herein above, no path, if any, passing through the khasra No. 78 has been shown to be recorded in Wazib-Ul-Arz. Apart from above, no path in the aforesaid khasra number can be seen in the tatima Ext.PW4/B. Though in the case at hand, plaintiff alleged that path exists in the corner of khasra No. 78, but interestingly, he failed to give description of the corner of the khasra No. 78, where admittedly path exists. Neither he placed on record any spot map nor any tatima specifically depicting the existence of path through khasra No. 78 and as such, court below rightly recorded the finding that suit has been not framed as per requirement of Order 7 Rule 3 CPC, which specifically provides that where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case, such property can be identified by the boundaries or numbers in a record of settlement or survey the plaint shall contain specific details of boundaries or numbers.

16. In the case at hand, though plaintiff alleged that defendant blocked the passage to his house, passing through khasra No. 78, but in his

examination-in-chief, he himself stated that there was a path on the boundary of khasra No. 78, which is admittedly adjoining to the property of the plaintiff in khasra No. 79. Since path, if any, exists on the boundary of khasra Nos. 78 and 79, plaintiff with a view to prove factum with regard to existence of path ought to have placed on record some spot map or tatima specifically depicting therein existence of path.

17. Having carefully perused entire evidence available on record, this Court finds no illegality and infirmity in the impugned judgments and decrees passed by the courts below and as such, no interference is called for. Moreover, no question much less substantial has been raised in the instant appeal for determination/adjudication and as such, present appeal deserves to be dismissed.

18. At this stage, Mr. Romesh Verma, learned counsel, contended that this court has very limited jurisdiction to re-appreciate the evidence in the instant proceedings, especially in view of the concurrent findings of facts and law recorded by the courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264,*** relevant para whereof reads as under:-

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent***

findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

19. It is quite apparent from the aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned courts below cannot be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by the learned courts below, rather same are based upon correct appreciation of evidence and as such, same deserves to be upheld.

20. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, the appeal fails and dismissed accordingly. There shall be no order as to costs.

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

Ms. Anjana Kumari .....Appellant.

Versus

Sh. Jhina Ram .....Respondent.

RSA No. 123 of 2019

Date of Decision: 12.7.2021.

Code of Civil Procedure, 1908 –Section 100—Regular Second Appeal – Suit for possession of the suit property on the basis of ownership filed by the plaintiff decreed by the Trial Court – Judgment and decree of the trial court affirmed by the Ld. Appellate Court – Challenged by way of present RSA – Held, that the status of defendant can be termed to be of gratuitous licensee over the suit property being relative of the plaintiff – No right & interest acquired over the suit property by the defendant – Plea of the defendant that he was inducted as a tenant not established – Concurrent findings of trial court and first Appellate Court based on correct appreciation of evidence and are not perverse – Appeal dismissed.

Cases referred:

Behram Tejani v. Azeem jagani (2017) 2 SCC 759;
Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264;
Maria Margarida Sequeira Fernandes and Ors v. Erasmo Jack De Sequeira (dead) through LRs., (2012) 5 SCC 370;
Rame Gowda v. M. Varadappa Naidu, (2004) 1 SCC 769;

For the appellant: Mr. Aditya Thakur, Advocate, through video conferencing.

For the respondents: Mr. H.S. Rana, Advocate, through video conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal filed under Section 100 of the CPC, lays challenge to the judgment and decree dated 31.10.2018, passed by the learned Additional District Judge-II Solan, District Solan, H.P., in CA No. 34 ADJ-II/13 of 2017, affirming the judgment and decree dated 7.7.2017, passed by the learned Civil Judge-II(Jr. Div.), Solan, District Solan, H.P., whereby civil suit bearing case No. 313/1 of 2014/10 having been filed by the respondent/plaintiff *(herein after referred to as "the plaintiff")* came to be decreed.

21. Precisely, facts of the case, as emerge from the record are that, plaintiff filed a suit for possession averring therein that plaintiff is absolute owner in possession of the land comprised in Khata/Khatauni No.84/267, Khasra No.1192/1074/890 and 1080/902, kitas 2, measuring 549 Sq. meters, situated in Mauza Dehun, Pargana Bharoli Khurd, Tehsil and District Una, alongwith building existing thereupon known as Geeta Bhawan. Plaintiff averred in the suit that appellant/defendant (*herein after referred to as "the defendant")* has no right, title or interest being absolute stranger over the suit property, which is the self acquired property of the plaintiff. Perusal of plaint reveals that defendant is daughter-in-law of the plaintiff, however on account of some differences, plaintiff had disowned and disinherited the defendant and her husband from his property and to this effect, advertisement was published in daily newspaper on 3.3.2010. Plaintiff alleged that defendant has forcibly kept one room, one kitchen and toilet having an area of 14.81 Sq.meters in the aforesaid building and is not vacating the premises despite repeated requests. As per the plaintiff, defendant had also given undertaking to vacate the premises before police, but she instead of honouring her commitment has misbehaved and threatened the plaintiff with dire consequences and as such, plaintiff served the defendant with legal notice. Plaintiff also averred in the plaint that defendant is Trained Graduate Teacher in GSSS at Kanda and she has illegally locked the premises in dispute with a view to harass him. Plaintiff claimed that since he being owner of the premises is legally entitled for its possession and defendant has no right, title or interest over the suit property, defendant is liable to pay mesne profits @ Rs.2000/- per month alongwith interest @ 12 per annum to the plaintiff from the date of filing the suit.

22. Defendant by way of written statement refuted the aforesaid claim put forth by the plaintiff in his plaint and claimed before the court below that she is TGT in Education Department Since 2001. She claimed before the

court below that her father in law i.e. plaintiff had provided her two room set on the first floor of the building to live alongwith her husband and daughter, and in this regard, he used to take Rs. 1500 per month as rent. Since Month of July, 1999, she had been residing in the said premises as a tenant, however, in the month of March, 2010, plaintiff wrongly dispossessed her from one room out of the two room set and as such, she is in possession of the one room set since March, 2010 and had been paying Rs. 750/- p.m. as rent. Besides above, defendant also claimed before the court below that she provided funds to the plaintiff for construction of the second floor in the building by withdrawing money from GPF and as such, she has right in the building as owner of the second floor. On the basis of aforesaid pleadings adduced on record by the respective parties, court below framed following issues:

> "*1. Whether the defendant is entitled to a decree for possession, as prayed for? ..OPP*
> *2. Whether the plaintiff is also entitled for decree of mesne profits at the rate of Rs.2000/- per month, as prayed for? OPP.*
> *3. Whether* the suit of the plaintiff is not maintainable in the present form*?....OPD*
> *4. Whetherthe plaintiff has not come to the Court with clean hands? OPD*
> *5. Whether the plaintiff has no cause of action to file and maintain the present suit? …OPD.*
> *6. Whether the suit of the plaintiff is not properly valued for the purpose of Court fee and jurisdiction?.. OPD*
> *7. Whether the plaintiff is estopped from filing the present suit due to own acts, conduct and acquiescences? …OPD.*
> *8. Relief."*

23. Subsequently, on the basis of pleadings as well as evidence led on record by the respective parties, learned trial Court, decreed the aforesaid suit filed by the plaintiff vide judgment dated 7.7.2017 to the effect that he is

entitled to the decree of possession of one room, one kitchen and toilet having an area of 14.81 Sq.meters situate in the first floor of the building known as Geeta Bhawan existing over a portion of the land comprised in Khata/Khatauni No.84/267, Khasra No.1192/1074/890 and 1080/902, kitas 2, measuring 549 Sq. meters, situated in Mauza Dehun, Pargana Bharoli Khurd, Tehsil and District Una.

24. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, defendant filed an appeal under Section 96 of CPC in the court of learned Additional District Judge-II, Solan, which came to be dismissed vide judgment dated 31.10.2018. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, laying therein challenge to the impugned judgments and decrees passed by the courts below.

25. On 4.11.2020, aforesaid appeal having been filed by the defendant came to be admitted by this Court on following substantial questions of law:

1. *Whether the Ld. Appellate Court is legally right in affirming the judgment and decree dated 07.07.2017 passed by the Ld. Trial Court when the Ld. Trial Court's judgment is not based on the actual disputed premises involved in the dispute, and thus the observations and findings so recorded and returned by the Ld. Trial Court were required to be accepted, upheld and affirmed by the Ld. Appellate Court?*
2. *Whether the suit filed by the plaintiff is maintainable as the disputed premises so occupied by the defendants, as tenant, falling within the jurisdiction of Municipal Council, Solan, where the provisions of the H.P. Urban Rent control Act, 1987 are applicable?*
3. *Whether under two sets of rival pleadings of the parties to the suit where on one hand the plaintiff is pleading the possession of the defendant as permissive one, and on the other hand the defendant is pleading as tenant of the plaintiff in the disputed premises where the provisions of the H.P. Urban Rent Control Act, 1987 are*

applicable, the specific issue with respect to the relationship of landlord and tenant was required to be framed and decided?

4. *Whether, in view of the pleadings and subsequent evidence surfacing and brought on record by both the parties, the issue was required to be framed by the Ld. Trial Court with respect to the existence of tenancy between the parties, and, further in appeal the Ld. Appellate Court was required to remand the case to the Ld. Trial Court by framing proper issues?*
5. *Whether on account of filing of affidavit Ex.PW-3/A by the plaintiff, in evidence, of Sh. Virender Singh (PW-3) who is the son of the plaintiff and whom he has disowned and disinherited and who has further not been produced for his cross-examination in the court an adverse inference is required to be drawn against the plaintiff?*

26. Mr. Aditya Thakur, learned counsel appearing for the appellant while making this Court peruse the impugned judgments and decrees passed by the courts below vis-à-vis evidence adduced on record by the respective parties vehemently argued that judgments and decrees passed by the courts below are not sustainable in the eye of law as same are not based upon proper appreciation of evidence and as such, appeal having been filed by the defendant deserves to be accepted. While referring to the judgment passed by the learned Additional District and Sessions Judge, Solan, Mr. Thakur, argued that since PW3 Virender never appeared in the witness box, learned first Appellate Court ought not have placed reliance on the affidavits having been tendered on record by him by way of evidence. Learned counsel for the appellant defendant further contended that both the courts below have given altogether different description of the property because subject matter of the suit having been filed by the respondent-plaintiff is /was one room, one kitchen and toilet having an area of 14.81 Sq.meters situate at a place known as Geeta Bhawan, whereas courts below have wrongly referred to the entire

building as well as land adjacent thereto, to be suit property and as such, on this sole count, judgments and decrees passed by the courts below deserve to be quashed and set-aside. Lastly, Mr. Thakur, contended that since defendants successfully proved on record by leading cogent and convincing evidence that she was inducted as a tenant in the premises in question and had been paying rent regarding the same, court below ought not have decreed the suit of the plaintiff. He further argued that since suit property falls within the municipal limits, plaintiff ought to have filed eviction proceedings under the Rent Control Act and not suit for possession.

27. Mr. H.S. Rana, learned counsel representing the respondent-plaintiff, while supporting the impugned judgments and decrees passed by the courts below vehemently argued that there is no illegality and infirmity in the impugned judgments, rather they are based upon proper appreciation of evidence and as such, no interference is called for. Mr. Rana, contended that otherwise also, this court while exercising powers under Section 100 CPC has very limited powers to interfere with the concurrent findings of the fact and law recorded by the courts below. He argued that since learned counsel for the appellant have not been able to point out any perversity in the impugned judgments and decrees passed by the courts below and there is no question of law, much less substantial, involved in the case, appeal having been filed by the appellant deserves outright rejection.

28. Since all the substantial questions of law are interlinked and answer to them can be explored on the basis of evidence led on record by the respective parties, this Court deems it fit to consider and decide the same together.

29. Having heard learned counsel for the parties and perused material available on record, this court finds that respondent-plaintiff claiming himself to be owner of the premises in question filed a suit for possession and mandatory injunction in the court of Civil Judge (Jr. Div.),

Solan District Solan, H.P., averring therein that defendant, who otherwise happens to be daughter in law of the plaintiff, has unauthorizedly put lock in one room, one kitchen and toilet having an area of 14.81 Sq.meters situate in the first floor of the building known as Geeta Bhawan existing over a portion of the land comprised in Khata/Khatauni No.84/267, Khasra No.1192/1074/890 and 1080/902, kitas 2, measuring 549 Sq. meters, situated in Mauza Dehun, Pargana Bharoli Khurd, Tehsil and District Una. Careful perusal of the impugned judgments and decrees reveal that courts below have not given wrong details of the property rather, with a view to bring more clarity, have given complete details of the property, especially of Geeta Bhawan, which exists over the portion of the land comprised in Khata/Khatauni No.84/267, Khasra No.1192/1074/890 and 1080/902, kitas 2, measuring 549 Sq. meters, situated in Mauza Dehun, Pargana Bharoli Khurd, Tehsil and District Una and as such, no illegality can be said to have been committed by the court on this count. Similarly, this Court finds that plaintiff filed suit for possession and mandatory injunction on the premise that defendant has unauthorizedly put lock on the suit property, details whereof, is given herein above. Pleadings adduced on record by the plaintiff nowhere suggest that plaintiff filed suit claiming therein that he had inducted the defendant Smt. Anjana Kumari as a tenant in the premises in question, rather his precise case is that defendant is his daughter in law, but on account of acts and conduct of his son as well as of defendant, he disowned and disinherited them from his property and to this effect had also issued advertisement in daily newspaper dated 3.3.1010 (Divya Himachal).

30. Precise case, as has been set up by the plaintiff, is that defendant has forcibly kept one room, one kitchen and toilet having an area of 14.81 Sq.meters in the building in question. Since despite repeated requests, defendant failed to vacate the premises in question, plaintiff filed suit for possessions. Since defendant never came to be inducted as a tenant in the

premises in question, there was no occasion, if any, for the plaintiff to file eviction proceedings under the Rent Control Act. Though in the case at hand, defendant with a view to resist the suit of the plaintiff, attempted to carve out a case that she was inducted as a tenant in the premises in question, but she failed to lead cogent and convincing evidence on record to that effect. Defendant claimed that plaintiff, who happened to be her father in law, provided her two room set on the first floor of the building to live alongwith her husband and daughter and he used to take Rs. 1500 as rent from her, but she failed to place on record any receipt of rent. Defendant also set up a case that in the month of March 2010, plaintiff wrongly dispossessed her from one room out of two room set and, thereafter, she is in possession of one room and in this regard, plaintiff has been charging Rs. 750 per month as rent, however, aforesaid plea having been taken by the defendant could not be proved on record by the defendant by leading cogent and convincing evidence.

31. Plaintiff with a view to prove his absolute ownership placed on record jamabandi for the year, 2007-08 (Ext.P1/B), perusal whereof reveals that plaintiff is owner in possession of the suit land bearing khweat /Khatauni No. 84/267, khasra No. 1192/1074/890 and 1080/902, kitas 2, measuring 549 Sq.meters land. Jamabandi further reveals that building namely Geeta Bhawan, stands constructed on 279 square meter, whereas remaining land is vacant. Plaintiff with a view to prove the rental value of the one room set examined PW2 Anil Bhatt, who happened to be a tenant in the premises. This witness also examined Virender Singh as PW3 , but since he failed to appear in the witness box, evidence, if any, led by way of affidavit, was rightly not read by the learned trial court. Admittedly, learned first appellate Court while upholding the decree passed by the learned trial court, has referred to the evidence led on record by PW3, but same has definitely not weighed with the court while upholding the judgment of learned trial Court. PW4 Mohinder Lal, who is an official of Divya Himachal Newspaper also

proved the news item Ext.PW1/C issued by the plaintiff for disowning his son and daughter in law. PW5 Suresh Sharma, while proving the site plan of the set Ext.PW5/A admitted that he had prepared the site plan. PW6 Lenin Chandel, who was one of the tenant, came to be examined to prove the rental value of the one room set. Defendant besides examining herself as DW1 also examined Smt. Suman as DW2 to prove the factum that she is tenant and in this capacity, was paying Rs. 750 per month to the plaintiff. DW1 Anjana kumari deposed before the court below that she is TGT in the Education Department since October, 2001. She deposed that till July, 2008, she remained posted in GSSS Gaggal, Tehsil Pachhad, District Sirmour and since then, she is residing in the disputed premises. Careful perusal of the aforesaid version put forth by the defendant itself suggests that prior to July, 2008, she was not residing in the building rather, she started residing in the same after July, 2008. She also deposed that she took two room set on rent from her father-in-law for a monthly rent of Rs. 1500 in the month of July, 2008 but thereafter she was dispossessed by the plaintiff from one room in the month of March, 2010. Since plaintiff categorically denied that defendant was inducted by him as a tenant in the premises in question, onus was upon the defendant to prove that she was in occupation of the premises in dispute in the capacity of tenant and she had been paying regular rent to the owner i.e. Plaintiff. Interestingly, neither any rent agreement nor any receipt, if any, issued by the plaintiff, ever came to be exhibited.

32. By now it is well settled that tenancy is a bilateral contract and the factum of tenancy is not only required to be pleaded, but it is required to be proved in accordance with law. Defendant while deposing before the court below has categorically admitted that she is having no receipt of the rent. Though defendant with a view to prove that she was regularly paying the rent to the plaintiff examined DW2 Ms. Suman, who otherwise happens to be her sister, but if statement of this witness is perused in its entirety, it nowhere

suggests that the defendant was residing in the premises in question as tenant and she was regularly paying the rent.

33. Interestingly, in the case at hand, defendant while claiming herself to be tenant has taken two contradictory pleas. On the one hand, defendant claimed herself to be tenant in the premises in question, on the other hand, has pleaded that she provided funds to the plaintiff for the construction of the second floor in the premises in question by taking withdrawals from her GPF account and as such, she has every right in the building as a owner of the second floor. Aforesaid two contradictory pleas taken by the defendant falsify the claim of the plaintiff in *toto*. Plea of tenancy as well as ownership of the defendant is defeated on the concept of *ipse dixit.* Court below after having scanned evidence rightly concluded that at best status of the defendant can be termed to be gratuitous licensee being the relative of the plaintiff. No one can acquire title to the property if he or she is/was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property. In this regard, reliance is placed on judgment passed by Hon'ble Supreme Court in ***Maria Margarida Sequeira Fernandes and Ors v. Erasmo Jack De Sequeira (dead) through LRs., (2012) 5 SCC 370***, wherein it has been held that possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts. Pleadings and documents establish title to a particular property and to prove possession, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

> *"97. Principles of law which emerge in this case are crystallized as under:-*
>
> *1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.*
>
> *2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.*
>
> *3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.*
>
> *4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.*
>
> *5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession."*

34. No doubt in order to protect the possession, a person has to be in a settled possession, but a person occupying the premises as gratuitous licensee or agent at the instance of the owner will not amount to having actual physical possession. Reliance is placed on judgment passed by the Hon'ble Supreme Court in case titled ***Rame Gowda v. M. Varadappa Naidu, (2004) 1 SCC 769***, wherein it has been held that *"the 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt of concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as*

an agent or a servant acting at the instance of the owner will not amount to actual physical possession."

35. In the case at hand, pleadings adduced on record clearly reveal that at no point of time, defendant ever came to be inducted as a tenant in the premises in question, rather she being daughter-in-law of the plaintiff, was given two room set in the premises in question. Since defendant as well as her husband came to be disowned by the plaintiff, he rightly filed suit for possession qua the property in occupation/possession of the defendant, not in the capacity of tenant against the defendant, who, otherwise, at no point of time, was inducted as a tenant. A person holding premises gratuitously or in the capacity as a caretaker or a servant would not acquire any right or interest in the property and even long possession in that capacity would be of no legal consequences. In this regard, reliance is placed upon Judgment passed by the Hon'bel Apex Court in case titled as ***Behram Tejani v. Azeem jagani (2017) 2 SCC 759***.

36. Since it stands established on record that at no point of time, defendant was inducted as tenant, in the premises in question, there was no occasion, if any, for the plaintiff to file eviction proceedings under the Rent Control Act. Similarly, there is no evidence worth credence available on record that defendant was paying rent qua the property in question, rather evidence adduced on record clearly indicate that defendant was in possession of the premises in question on account of her relationship i.e. daughter in law of the plaintiff and as such, she otherwise being in possession, if any, cannot claim to have acquired status of tenant with the passage of time. The substantial questions of law are answered accordingly.

37. Moreover, this court has very limited jurisdiction to re-appreciate the evidence in the instant proceedings, especially in view of the concurrent findings recorded by the courts below. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and***

Others vs. Ranganath and Others, (2015) 4 SCC 264, relevant para whereof reads as under:-

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***

38. It is quite apparent from the aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned courts below cannot be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by the learned courts below, rather same are based upon correct appreciation of evidence and as such, same deserves to be upheld.

39. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this

Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, the appeal fails and dismissed accordingly. There shall be no order as to costs.

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

Om Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1134 of 2021
Reserved on : July 15, 2021.
Date of Decision : July 20, 2021

Code of Criminal Procedure, 1973 – Section 439 - Protection of Children from Sexual Offences Act, Section 4 – FIR No. 88 of 2020 dt. 21-11-2020 P.S. Pachhad registered u/s 376 IPC, Sec – 4 POCSO Act against Petitioner – Petitioner arrested on 22-11-2020 and is in judicial lock up – Prayer made for enlargement on bail – Held, that petitioner and victim are teenagers and on completing 18 years of age in March 2020, petitioner considered to be major – Considering principles and factors relevant to be considered at the time of deciding bail application with reference to facts and circumstances, petition allowed and Petitioner ordered to be released on bail subject to conditions.

For the petitioner : Mr. Chander Shekhar Thakur, Advocate.

For the respondent : Mr. Gavrav Sharma, Deputy Advocate General, for respondent/State.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Petitioner has approached this Court, for enlarging him on bail, by invoking provisions of Section 439 Code of Criminal Procedure (in short 'CrPC'), in case FIR No. 88 of 2020, dated 21.11.2020, registered in Police Station Pachhad, District Sirmaur, HP, under Section 376 of the Indian Penal Code (in short 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' in short).

2. Apart from filing status report, record was also produced. Learned Deputy Advocate General has placed on record photocopies of relevant statements of complainant, victim, father of accused and DNA profiling report of State Forensic Science Laboratory.

3. Prosecution case in nutshell is that complainant Rajesh Kumar (father of victim) and Matka Ram (father of accused), are related to each other as the daughter of Matka Ram is married to Tapender Singh, who is real brother of complainant Rajesh Kumar. Members of both families, including victim and other children, being closely related to each other, had been visiting each other's houses and staying there for considerable time, sometimes months together.

4. Victim, also used to visit and stay in the house of Matka Ram frequently. In April, 2020, she had visited the house of Matka Ram for two – three days and after staying for two and a half months at her home she had again gone to the house of Matka Ram.

5. On 16.11.2020, when victim came back home, her mother had suspected that she (victim) was pregnant and it was disclosed by mother to father (complainant). Upon inquiry by mother, victim had disclosed that petitioner/accused had developed physical relations with her, causing her pregnant. Age of victim at that time was mere 15 years. In these

circumstances, father of the victim had approached the police and lodged the complaint, on the basis of which FIR, in question, has been registered on 21.11.2020.

6. During investigation, victim alongwith her mother was taken to Medical College, Nahan, for medical check-up but the victim and her mother, in writing, had refused to undergo medical check-up. Pregnancy of victim was verified through UPT Test and she was found carrying pregnancy of 16 to 18 weeks.

7. Statement of the victim was also recorded under section 164 Cr.PC before Magistrate wherein she had stated that she was pregnant and no one had violated her person forcibly, and everything had happened according to her desire. To a question that who caused pregnancy, she had disclosed that it was petitioner, but with clarification that her parents had not sent her forcibly to the home of Om Singh but she had gone to the house of Om Singh swayed by her wish and desire and she had refused to undergo medical check-up for the reason that when it had come to light that she was pregnant, then there was no purpose of undergoing medical check-up.

8. Victim was found to be minor and, therefore, a case under Section 376 of IPC and Section 4 of POCSO Act was made out and, therefore, petitioner was called for interrogation who had admitted physical relations with the victim and thus was arrested by the police on 22.11.2020. Since then, after remaining in police custody, he is in judicial lock-up. Date of birth of the petitioner is 18.03.2002, and therefore, at the time of commission of the alleged offence in April 2020, he had just completed 18 years as his age at that time was 18 years and 15 days.

9. Learned counsel for the petitioner submits that petitioner as well as victim are teenagers and, though the petitioner, for completing 18 years of age in March, 2020, has been considered to be major, but fact remains that for a few days he would have been treated as child in conflict with law, and in such

eventuality he would have been handed over to his parents or kept in child care home instead of sending him behind bars. It is further submitted that at this juncture of age instead of keeping the petitioner in jail, he would have been provided counselling alongwith victim as both have developed physical relations, probably for over powered by physical attraction during their closeness while residing in one and the same house, and also for liking each other, as petitioner was wishing and still ready to marry victim but for her age he has landed in the jail.

10. Learned Deputy Advocate General has submitted that petitioner has spoiled the life of a minor and has committed a heinous crime and, therefore, he is not entitled for bail.

11. Considering principles and factors relevant to be considered at the time of deciding bail application with reference to aforesaid facts and circumstances placed before me, and submissions made by learned counsel for the petitioner as well as learned Additional Advocate General, but without commenting on merit, on the contentions of rival parties, I am of the considered opinion that petitioner is entitled for bail, at this stage.

12. Accordingly, present petition is allowed and petitioner is ordered to be released on bail in case FIR No. 88 of 2020, dated 21.11.2020, registered in Police Station Pachhad, District Sirmaur, HP, on his furnishing personal bond in the sum of `70,000/- (rupees seventy thousand only), with one surety in the like amount, to the satisfaction of the concerned Trial Court/Special Judge, within two weeks from today, upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to ensure presence of petitioner/accused at the time of trial and also subject to following conditions:-

(i) That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;

(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 Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that the petitioner shall not obstruct the smooth progress of the investigation/trial;

(iv) that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;

(v) that the petitioner shall not misuse his liberty in any manner;

(vi) that the petitioner shall not jump over the bail;

(vii) that in case petitioner indulges in repetition of similar offence(s) then, his bail shall be liable to be cancelled on taking appropriate steps by prosecution;

(viii) that the petitioner shall not leave the territory of India without prior permission; and

(ix) that the petitioner shall inform the Police/Court his contact number and shall keep on informing about change in address and contact number, if any, in future.

13. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

14. In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

15. Trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV-7139 dated 18.03.2013.

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

17. Petition is disposed of in aforesaid terms.

18. Petitioner is permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy but if required, may verify it from Website of the High Court.

Dasti copy on usual terms.

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

Hem Chand ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr.M.P.(M) No. 981 of 2021
Reserved on: 15.07.2021
Date of Decision: July 20, 2021

Code of Criminal Procedure, 1973 - Section 439 – FIR No. 32 of 2021 dated 15-05-2021 registered at P.S. Arki under Section 18 (c) of Narcotics Drugs and Psychotropic Substances Act 1985 – Petitioner (accused) arrested on the same day – Prayer made for enlargement on bail – Held, that ownership and possession of land from where 1190 plants of opium poppy were allegedly found not ascertained to be of the accused (Petitioner) – Liberty of the petitioner cannot be curtailed on the basis of unverified piece of evidence – Petition allowed – Petitioner ordered to be released on bail subject to conditions.

For the Petitioner: Mr.Anirudh Sharma, Advocate, through Video Conferencing.

For the Respondent: Mr.Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court invoking provisions of Section 439 Code of Criminal Procedure (in short 'Cr.P.C.') in case FIR No.32 of 2021, dated 15.05.2021, registered in Police Station Arki, District Solan, H.P., under Section 18(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'), for enlarging him on bail.

2. Status report stands filed, stating therein that during patrolling, on 15.05.2021, police party had received a reliable information at 10.15 a.m. that petitioner-accused had cultivated opium poppy in the land owned by him near his cowshed in Village Bapdon, Tehsil Arki, District Solan, H.P. Whereupon, a written information, under Section 42(2) of NDPS Act, was sent to Sub Divisional Police Officer, Darlaghat. Thereafter, police party reached the spot and found that near cowshed of petitioner, in one field, there was large scale cultivation of opium. Kumari Neha Garg, Patwari of the area and Madhu Bala, Pradhan of concerned Gram Panchayat were also called on the spot by making telephonic calls to them. After perusing revenue record, Patwari had identified the land in question in the ownership, possession and cultivation of petitioner-Hem Chand. Therefore, petitioner-Hem Chand was called on the spot, who, as per prosecution case, had admitted cultivation of opium poppy in his field, but he could not produce any licence or permit for doing so. In the presence of witnesses, total 1190 plants of opium poppy were removed

from the field and were taken in to possession and seized by the police party by following the procedure.

3. On the basis of Rukka sent to the Police Station for registration, FIR under Section 18 of NDPS Act was registered.

4. It is also stated in the status report that on cursory glance by the Patwari, land whereupon opium poppy was found to be cultivated was identified in the ownership and possession of petitioner-Hem Chand. In the aforesaid circumstances, petitioner was arrested at 7.45 p.m. on the same day.

5. It is further stated in the status report that during interrogation, petitioner had disclosed that he had cultivated opium plants for personal use as he came to know that these plants were used as effective medicine to cure certain diseases and, therefore, as a hobby, he had cultivated opium plants as he himself was addict of opium.

6. On weighing, total weight of all plants was found to be 15.925 kilograms, but weight of these plants is irrelevant as table appended to NDPS Act does not prescribe any quantity of opium poppy plants for classifying it into small, commercial or intermediate quantity. Cultivation of opium is prohibited under Section 8 of NDPS Act and punishment for cultivation of opium poppy has been provided, alongwith other offences, under Section 18 of NDPS Act. Sections 18(a) and 18(b) provide sentence for offence involving small quantity and commercial quantity respectively. But there is no such quantity prescribed for opium plants found to be cultivated in contravention of NDPS Act. Such offence shall be punishable under Section 18(c) of NDPS Act which provides punishment in any other case, i.e. other than the cases covered under Sections 18(a) and 18(b), but punishable under Section 18 of the NDPS Act, and, therefore, cultivation of opium poppy is to be covered under Section 18(c) of the Act, to which punishment extendable upto 10 years

with fine extendable up to one lac rupees has been provided, but without any limit of minimum sentence which may be imposed under this Section.

7. It is submitted on behalf of the petitioner that ownership and possession of petitioner has not been properly identified and verified and is yet to be ascertained and proved, however, petitioner has been implicated in the case on the basis of opinion of Patwari given after cursory glance of the record, but without any demarcation and, therefore, this vital fact which is crucial for determining the complicity of accused in commission of alleged offence, has yet to be established on record by the prosecution and, therefore, on the basis of such unverified piece of evidence, liberty of petitioner should not be curtailed. It is further submitted that petitioner is ready to abide by any condition imposed by the Court in case he is enlarged on bail.

8. Learned counsel for the petitioner has pointed out that in identical case, learned Special Judge, who has rejected bail application filed by the petitioner, on 31.5.2021, had confirmed the anticipatory bail on the very same day i.e. 31.05.2021 of a person, accused for identical offence. The case file of another case is not before this Court and slightest difference in the facts and circumstances, particularly in a criminal case may lead the Court to arrive at a different conclusion despite the fact that on cursory glance, another case appears to be same. Therefore, this point raised on behalf of the petitioner is of no help to him. However, taking into consideration provisions of Section 18(c) of the NDPS Act, principles and factors relevant to be considered at the time of deciding bail application with reference to material placed before me, and submissions made on behalf of parties, I am of the considered opinion that at this stage, petitioner may be enlarged on bail.

9. Accordingly, petition is allowed and petitioner is ordered to be released on bail in case FIR No.32 of 2021, dated 15.05.2021, registered in Police Station Arki, District Solan, H.P., on his furnishing personal bond in the sum of `70,000/- with one surety in the like amount, to the satisfaction of the

trial Court/Special Judge, within four weeks from today, upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to ensure presence of petitioner/accused at the time of trial and also subject to following conditions:-

(i) That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;
(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 Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;
(iii) that the petitioner shall not obstruct the smooth progress of the investigation/trial;
(iv) that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;
(v) that the petitioner shall not misuse his liberty in any manner;
(vi) that the petitioner shall not jump over the bail;
(vii) that in case petitioner indulges in repetition of similar offence(s) then, his bail shall be liable to be cancelled on taking appropriate steps by prosecution;
(viii) that the petitioner shall not leave the territory of India without prior permission; and
(ix) that the petitioner shall inform the Police/Court his contact number and shall keep on informing about change in address and contact number, if any, in future.

12. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any

other or further condition on the petitioner as it may deem necessary in the interest of justice.

13. In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

14. Trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

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

16. Petition is disposed of in aforesaid terms.

17. Copy dasti.

Petitioner is permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy but if required, may verify it from Website of the High Court.

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

Geeta Ram

.....Petitioner

Versus

State of Himachal and others .....Respondents.

CWP No. :2741 of 2021
Reserved on : 13.07.2021
Decided on : 20.07.2021

Constitution of India, 1950 -Article 226 – Vide advertisement notice dated 13-10-2020, posts of Trained Graduate Teachers (TGT) were proposed to be filled from eligible candidates of disabled persons category – On 21-10-2020, notification published in Rajpatra vide which 4% posts were reserved for disabled persons in Elementary Education Department and upper limit of 60% disability was prescribed for deaf and hard of hearing candidates – Petitioner called for counseling but not selected on the ground that he had 70% disability of hearing impairment and hence ineligible – Being aggrieved, Petitioner has challenged the rejection – Held, that no material to show that on what basis upper limit of 60% of disability for deaf and hard of hearing persons was prescribed for the post of TGT (Arts) which is arbitrary, irrational hence illegal – Petition allowed – Notification dated 19-09-2020 published on 21-10-2020 in Rajpatra, Himachal Pradesh quashed to the extent it prescribes upper limit of disability at 60% for deaf and hard of hearing candidates for the post of TGT (Arts) – Respondents no. 1-3 directed to offer appointment to the post of TGT (Arts) to the petitioner forthwith by placing him according to his merit along with payment of arrears of salary and permissible dues.

Cases referred:

V.Surinder Mohan Versus State of Tamil Nadu(2019) 4 SCC 237;

For the petitioner:	Mr. Jiya Lal Bhardwaj, Advocate.
For the respondents:	Mr. Ashok Sharma, Advocate General with Mr. Shiv Pal Manhans, Mr. Vikas Rathore, Mr. Hemanshu Mishra, Addl. A.G. and Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. A.G for respondents No.1 to 3.

(Through Video Conferencing).

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner has filed instant petition seeking following substantive reliefs:-

> a) That a writ in the nature of certiorari may kindly be issued declaring disabled persons having more than 60% disability of Deaf and Hard of Hearing ineligible

for appointment to the posts of Trained Graduate Teacher (Arts) in pursuance to the notification dated 19th September, 2020, published in Rajpatra Himachal Pradesh on 21st October, 2020, as ultra-virus, inoperative and non-est;

b) That a writ in the nature of mandamus may kindly be issued directing respondents No.1 to 3 to offer the appointment to the petitioner on the post of Trained Graduate Teacher (Arts) strictly as per his merit, w.e.f. 19.4.2021, with all consequential benefits, such as Seniority, Pay along with arrears to be paid by respondents No.1 to 3 @ 9% per annum, from the date same fell due till its realization and further the petitioner be considered senior to respondent No.4;

2. Respondent No.2 on 13.10.2020 forwarded advertisement notice to the Director Public Relations, Government of Himachal Pradesh for publication in Newspapers, whereby posts of Trained Graduate Teachers (Arts, non-medical and medical) were proposed to be filled from eligible candidates of disabled persons category. Total 84 posts of Trained Graduate Teachers (Arts) (TGT Arts for brevity) were sought to be filled, which included total 25 posts for persons suffering from hearing impairment (10 posts merit wise and 15 posts batch wise).

3. As per advertisement notice dated 13.10.2020, the eligible candidates could find their names on the website of Director of Elementary Education, Himachal Pradesh and could apply for rectification of any incorrect information pertaining to them on or before 20.10.2020. It was also prescribed that in case any eligible candidate did not find his/her name on official website of Director of Elementary Education, Himachal Pradesh, he could apply on plain paper till 20.10.2020.

4. On 21.10.2020 a Notification came to be published in Rajpatra Himachal Pradesh purportedly under Section 34 of the Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as Act) whereby the Government of Himachal Pradesh was pleased to identify posts of 4% reservation to disabled

persons in the Elementary Education Department. At Sr. No.1 of this notification, upper limit of 60% disability was prescribed for deaf and hard of hearing candidates for the post of TGT (Arts) meaning thereby that a candidate having more than 60% disability in said category was not eligible.

5. Petitioner is having permanent disability to the extent of 70% on account of hearing impairment. He possessed all prescribed qualifications for post of TGT (Arts). Name of the petitioner was made available on the aforesaid official website. He received letter dated 9.11.2020 requiring him to appear for counseling on 5.12.2020 at 11.00 A.M in the office of the Deputy Director Elementary Education, Shimla. Petitioner participated in counseling which eventually took place on 7.12.2020.

6. Petitioner remained unsuccessful in final selection on the ground that he had 70% disability of hearing impairment and hence was ineligible. Aggrieved against his rejection on the aforesaid grounds, the petitioner has assailed the same by way of instant petition, mainly on the following grounds-:

(a) On the date of advertisement i.e. 13.10.2020, there was no upper limit of disability prescribed for being eligible to the post of TGT (Arts) and the upper limit so prescribedvide Notification published on 21.10.2020 could not be applied retrospectively.

(b) The prescription of upper limit of disability at 60% was illegal, arbitrary and irrational, being not commensurate to the requirement for the post, especially when no such prescription was there for the post of Drawing, Yoga and Music Teachers besides Junior Basic Teachers and Post Graduate Teachers.

(c) Petitioner, to the knowledge of respondent(s), was having disability to the extent of 70% with respect to his hearing impairment, still he was allowed to participate in the selection process and thereby creating estoppel against the respondent.

7. Respondents No.1 to 3 were put to notice, who filed their joint reply, contending inter alia that the Notification under Section 34 of the Act published in the Rajpatra on 21.10.2020 has to be reckoned to have come into force on 19.9.2020. The respondents have not disputed the legal position that

recruitment process is to be governed by the Rules prevalent at the time of advertisement of the posts. It is nowhere disputed by the respondents that the date of advertisement or the last date for submission of application was not as alleged by the petitioner.

8. We have heard learned counsel for the petitioner as well learned Advocate General for respondents No.1 to 3 and have carefully gone through the documents placed on file. We, however, did not feel necessary to issue notice to respondent No.4 against whom no substantive relief was claimed.

9. It is no more *res-integra* that the recruitment process is to be governed by the Rules prevalent at the time of advertisement. Respondents No. 1 to 3 themselves have fairly admitted the legal position in this regard and have relied upon the full Bench judgment of this Court in CWP 8523 of 2011 titled **Berojgar Shastri Sangh Welfare Society** Versus **State of H.P.and others,** decided on 12.11.2013.

10. In the present case, the advertisement is dated 13.10.2020 or in any case of a date prior to 20.10.2020, as the last date for submission of application and rectification of incorrect information on the website was 20.10.2020, therefore, the Rules prevalent at the time of issuance of advertisement shall prevail. Admittedly the Notification under Section 34 of the Act was published in Rajpatra Himachal Pradesh on 21.10.2020, which was later in time to the issuance of advertisement. The upper limit so prescribed at 60% disability for deaf and hard of hearing candidates prescribed through the said Notification cannot be applied retrospectively to the case of petitioner and similarly situated persons. The contention of the respondents that the Notification dated 19.9.2020, though published on 21.10.2020, has come into effect from19.9.2020 itself, is not sustainable.

"Section 2(q) of the Act defines Notification as under:-

> (q) "notification" means a notification published in the official gazette and the expression "notify" or "notified" shall be construed accordingly".

Since the notification in question was issued under Section 34 of the Act,it mandatorily required publication in official gazette for its applicability.

11. A Coordinate Bench of this Court in CWP No.3634 of 2019 titled as **Prabhu Kumar** Versus **State of Himachal Pradesh and others** decided on 29.9.2020, had occasion to adjudicate the question whether the prescription of upper limit of disability percentage for determining the eligibility of petitioner disabled candidates under the provision of Act was permissible?.Placing reliance upon judgment passed by Hob'ble Supreme Court in **V.Surinder Mohan** Versus **State of Tamil Nadu(2019) 4 SCC 237**, it was held:

> "5(a) " *The sum and substance of above discussion is:-*
>
> *a) Respondents have the right to fix the extent of maximum disability for determining the eligibility of candidates belonging to physically handicapped category for the posts reserved for them under The Rights of Persons with Disabilities Act, 2016. The ceiling limit of disability, however, has to be determined by the employer after due deliberations with Department of Social Justice &Empowerment and in consultation with committee of experts in the concerned field of medicine to be constituted by respondent No.1 for the purpose. We accordingly direct the State Government through respondent No.1 to forthwith issue necessary instructions in this regard to all concerned departments for compliance henceforth".*

12. In the case in hand, the respondents 1 to 3 have not placed any material on record to show as to on what basis the upper limit of 60% of disability for deaf and hard of hearing persons was prescribed for the post of TGT (Arts). There is nothing on record to suggest that respondents No.1 to 3 before prescribing the aforesaid limit of 60% of disability had any deliberation with experts and department of Social Justice and Empowerment. In absence of such exercise, the prescription of 60% as upper limit for deaf and hard of

hearing persons for the purpose of selection to the post of Trained Graduate Teachers (Arts) cannot be sustained.

13. Respondents No.1 to 3 have not denied that the said prescription was not for Drawing, Yoga and Music Teachers besides teachers in the cadre of Junior Basic Teacher and Post Graduate Teacher. It being so, the action of respondents No. 1 to 3 in prescribing aforesaid upper limit of 60% as eligibility condition for deaf and hard of hearing candidates for the post of Trained Graduate Teachers (Arts) is arbitrary, irrational hence illegal. The determination as envisaged under Sections 33 and 34 of the Act cannot be left to the sole discretion of employer.

14. The plea of the petitioner that estoppel applied against the respondents No.1 to 3 becomes redundant in view of the findings recorded by us hereinabove.

15. In view of above the petition is allowed, we hold that the action of respondents No.1 to 3 in denying the selection of the petitioner for the post of Trained Graduate Teacher (Arts) under category of posts reserved for disabled persons (deaf and hard of hearing) is arbitrary, illegal, irrational and violative of Articles 14 and 16 of the Constitution of India. Accordingly, notification dated 19.9.2020 published on 21.10.2020 in Rajpatra Himachal Pradesh, Annexure P-12, is quashed to the extent it prescribes upper limit of disability at 60% for deaf and hard of hearing candidates for the post of Trained Graduate Teachers (Arts).

16. Respondents 1 to 3 are directed to offer appointment to the post of Trained Graduate Teachers(Arts) to the petitioner forthwith by reckoning such appointment from the date on which other selected candidates were given appointment in the same category by placing him according to his merit.

17. It is trite that in case a person was denied his/her lawful due by the other without such person being accessory to it, he /she will be entitled to all consequential reliefs which flow from the main relief granted to him,

consequently the respondents are directed to pay the arrears of salary and all permissible dues to the petitioner from the date from which he is appointed to the post of Trained Graduate Teacher (Arts). The petition is accordingly disposed of with no orders as to costs.Pending miscellaneous application(s), if any, are also disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

1. CWP No. 4423 of 2020

Aakash Srivastava ..... Petitioner.

Versus

State of HP and Ors. ...Respondents.

2. CWP No. 4245 of 2020

Gaurav Katoch .....Petitioner.

Versus

State of HP and Ors. ...Respondents.

3. CWP No. 4424 of 2020

Meenakshi Devi .....Petitioner.

Versus

State of HP and Ors. ...Respondents.

4. CWP No. 4425 of 2020

Ankita Singh .....Petitioner.

Versus

State of HP and Ors. ...Respondents.

5. CWP No. 4427 of 2020

Maninder Singh .....Petitioner.

Versus

State of HP and Ors. ...Respondents.

6. CWP No. 4428 of 2020

Vikram Jeet Singh .....Petitioner.

Versus

State of HP and Ors. ...Respondents.

7. CWP No. 2894 of 2021

Sunil Kumar .....Petitioner.

Versus

State of HP and Ors. ...Respondents.

CWP No. 4423 of 2020 a/w
CWP Nos. 4245, 4424, 4425, 4427,
4428 of 2020 and 2894 of 2021
Reserved on 2.7.2021
Date of Decision: 20.7.2021

Constitution of India, 1950 – Article 226 – Department of Education, Government of H.P. framed terms and conditions for the appointment of Professor, Associate Professor, Assistant Professor, Tutor Senior Residents and Junior Residents (on contractual basis) in 4 newly opened Government Medical Colleges in the year 2016 – Due to inadequate qualified medical faculty, respondents recruited the contractual faculty for Medical Colleges as per regulations – Petitioners appointed as tutor in different specialties for six months against posts advertised for Pt. Jawahar Lal Nehru Government Medical College, Chamba and Dr. Radhakrishnan Government Medical College, Hamirpur – The service of petitioners not regularized despite of

regularization policy – The condition of repeat tenure came to be completely modified vide notification dated 22-06-2019 of Resident Doctor Policy defeating purpose of regularization policy – Challenge thereof – Held, that in the year 2015, i.e. prior to opening of newly opened medical colleges, posts of Tutor, Senior Residents etc were created in various departments – Notification dated 26-05-2016 issued by Department of Medical Education and Research shows creation of 80 posts in various departments in newly opened medical colleges – As such, prayer for regularization by the petitioners cannot be rejected on the ground that there is no substantive post – Petitioners possessing requisite qualification as prescribed by MCI and Resident Doctor Policy, cannot be denied the benefit of regularization – Resident Doctor Policy for the year 2019 nowhere debars a candidate from seeking regularization against the post of Tutors, Senior Residents and Junior Residents after completion of their contract – Barring stipulation in R & P Rules against their staking claim for regularization flawed, arbitrary – Petition allowed – Respondents directed to regularize the service of the petitioners against the posts of Senior Resident / Tutor in their respective specialties.

For the Petitioner(s): Mr. Chander Narayan Singh and Rakesh Kumar Dogra, Advocates.

For the Respondent(s): Mr. Ajay Vaidya, Senior Additional Advocate General, for the State.

Mr. J.L. Bhardwaj and Mr. Sanjay Bhardwaj Advocates, for respondents No.7 and 8 in CWP No. 4423 of 2020 and for respondent No. 7 in 4428 of 2020.

Mr. Ajay Sharma, Senior Advocate with Mr. Amit Jamwal, Advocate, for respondent No.7 in CWP Nos. 4424 & 4425 of 2020 and Mr. Jyoitrmay Bhatt, Advocate, for respondent No.8 in CWP No. 4425 of 2020.

Mr. Surinder Sharma, Advocate, for respondent No.7 in CWP No. 4427 of 2020.

Mr. Yogesh Kumar Chandel, Advocate, for respondent No.8 in CWP No. 4424 of 2020.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Since common questions of facts and law are involved in the above captioned petitions and all the petitioners have prayed for similar relief(s), with the consent of the learned counsel for the parties, all the cases are taken up together for final disposal.

2. In the year, 2016, Government of Himachal Pradesh, decided to open four medical colleges in the State i.e. ***1.) Dr. YS Parmar Medical College Nahan; 2.) Sh. Lal Bahadur Shastri Government Medical College, Mandi; 3.) Pt. Jawahar Lal Government Medical College, Chamba; and 4.) Dr. Radha Krishan Government Medical College, Hamirpur, H.P***. Vide notification dated 22.4.2016 (Annexure P-12), Department of Medical Education, Government of Himachal Pradesh, framed terms and conditions for the appointment of Professor, Associate Professor, Assistant Professor, Tutors, Senior Residents and Junior Residents (*on contractual basis*), in the newly opened Government Medical Colleges, which reads as under :

> " Terms and conditions for the appointment of Professor, Associate Professor, Asstt. Professor, Tutors, Senior Residents and Junior Residents (on contract basis) in the newly opened Government Colleges in the State of Himachal Pradesh
>
> ***1.*** *The Professor/Associate Professor/Asstt. Professor/Tutor/Senior Resident/Junior Resident in the Department of Medical Education, H.P. will be engaged on contract basis initially for one year, which may be extendable on year to year basis.*
>
> ***2****. The Professor/Associate Professor/Asstt. Professor/Tutor/Senior Resident/Junior Resident*

appointed on contract basis will be paid consolidated fixed contractual amount as mentioned in Annexure-A (which shall be a fixed amount of pay). An annual increase @ of 3% in contractual emoluments for the subsequent years will be allowed if contract is extended beyond one year and no other allied benefits such as senior/selection scales etc. shall be given.

3. *The Addl. Chief Secretary/Pr. Secretary/Secretary (Health) to the Government of Himachal Pradesh will be appointing and disciplinary authority.*

4*. He /she will not be governed by the rules, regulations and orders in force from time to time as applicable to other government servants such as CCS (CCA) Rules, 1965 and CCS (Conduct) Rules, 1964 as are applicable in Himachal Pradesh.*

5. *Before submitting the report to the Government the contract appointee shall sign an agreement as per Annexure–B.*

6. *The service of the Contract Appointee will be purely on temporary basis. The appointment is liable to be terminated in case the performance/conduct of the contract appointee is not found satisfactory.*

7. *During the contract service, no advance will be given to him / her.*

8*. Contractual Appointee Professor/Associate Professor/Asstt. Professor/Tutor/Senior Resident/Junior Resident will be entitled for one day's casual leave after putting in one month service. However, the contract employee will also be entitled for 12 weeks Maternity Leave and 10 day's Medical Leave. He/She shall not be entitled for Medical Re-imbursement and LTC etc. No Leave of any other kind except above is admissible to the contractual appointee Professor/Associate Professor/Asstt. Professor/Tutor/ Senior Resident/Junior Resident. Provided that the un-availed Casual Leave and Medical Leave can be accumulated upto the Calendar Year and will not be carried forward for the next Calendar Year.*

9. *Unauthorized absence from the duty without the approval of the Controlling Officer shall automatically lead to the termination from the contract. Contract Appointee shall not be entitled for contractual amount for the period of absence from duty.*

10*. Transfer of a contract appointee will be permitted from one place to another after putting three years of service at one place.*

11. *Selected candidate will have to submit a certificate of his/her fitness from Medical Board, DDU Hospital, Shimla-1. Woman candidate pregnant beyond 12 weeks will stand temporarily unfit till the confinement is over. The woman candidate will be reexamined for the fitness.*

12*. Contract appointee will be entitled to TA/DA if required to go on tour in connection with his/her official duties at the same rate as applicable to regular officials at the minimum of pay scale.*

13. *The candidate engaged on contract basis under these Rules shall have no right to claim for regularization/ permanent absorption as Professor in the Department at any stage.*

14. *The appointment is provisional and is subject to the educational qualification and other certificates being verified through the proper channels and if the verification reveals that the claim to belong to reserve categories, as the case may be is false, the services will be terminated forthwith without assigning any further reasons and without prejudice to such further action as may be taken under the provisions of the Indian Penal Code for production of false certificate.*

15. *He/she will have to give a declaration to the effect that he/she has only one living spouse, if married.*

16. *He/she will have to take an oath of allegiance/faithfulness to the Constitution of India or making a solemn affirmation.*

17. *He/she will have to produce all the certificates in original at the time of joining this appointment."*

But since adequate qualified medical faculty was not available to be appointed in newly opened Government Medical Colleges, respondents repeatedly advertised the posts of Assistant Professor, Associate Professor and Professor in leading national newspaper and recruited recognized qualified medical faculty on contract basis against the sanctioned posts through walk-in-interviews. The respondents recruited the contractual faculty for these Medical Colleges as per regulations framed by the Medical Council of India and Recruitment and Promotion Rules formulated by the respondent-State for the posts in question after having followed all the necessary codal formalities and since then, above named college has undergone various MCI inspections.

3. In the year, 2016, Director, Medical Education and Research, Himachal Pradesh, issued an advertisement inviting therein applications from candidates fulfilling the eligibility criteria for selection of Senior Residents in various specialties of Pt. Jawahar Lal Nehru Govt. Medical College, Chamba and Dr. Radhakrishnan Government Medical College, Hamirpur, H.P., on tenure basis initially for a period of six months through walk-in-interview (Annexure P-13). In the aforesaid advertisement, it stood specifically mentioned/prescribed that tenure of Senior Residency can be extended upto three years as per performance. Eligibility and essential qualification as well as other service conditions qua the posts advertised through aforesaid advertisement read as under:

> "Appointment of Senior Residents through <u>WALK-IN-INTERVIEW</u>
>
> FOR THE PERIOD OF SIX MONTHS ON TENURE BASIS FOR THE POSTS OF SR. RESIDENTS IN PT. JAWAHAR LAL NEHRU GOVT. MEDICAL COLLEGE, CHAMBA AND DR.

RADHAKRISHNAN GOVT. MEDICAL COLLEGE, HAMIRPUR, HIMACHAL PRADESH.
The venue……

CLASSIFICATION: CLASS-I (GAZETTED) TENURE POST
The appointment to these posts will be for the period of six months on tenure basis. Once selected the Senior Resident will serve for six months and the post occupied so fall vacant only if he/she tenders resignation or his/her services are terminated by the appointing authority after following the procedure outlined in the policy. The Senior Resident will only be issued teaching experience certificate as per instructions issued to this effect by the Govt. from time to time.

Eligibility & Essential Qualifications:
Recognized Post Graduate (MD/MS) or DNB in the concerned speciality or superspeciality from a University recognized by the MCI failing which the PG Diploma in the concerned speciality/recognized by the MCI. For Non-Clinical subjects recognized MD/MS in the concerned speciality, recognized Diploma in the concerned subject, Ph.d and M.Sc. from the recognized University.

PAY & ALLOWANCES:
i) The GDOs (regular employees of H.P.H.S. (Gen. cadre) on their appointment as Senior Resident will continue to draw pay and allowances/increments as admissible to them in their pay-scale.

ii) The Specialist (PG) doctors appointed on contract by the Government and the PG doctors appointed as Senior Resident as Direct Candidate will be paid emoluments on selection as Sr. Resident as under:-

1st year Rs.55,000/- fixed per month.
2nd year Rs.57,,500/- fixed per month.
3rd years Rs.60,000/- fixed per month

AGE LIMIT: 45 Years and below:

i) Provided that upper age limit will not be applicable to the candidate already in service of the government including those who have been appointed on adhoc or on contract basis by the Govt.

ii) Provided further that upper age limit is relaxable for Scheduled Castes/Scheduled Tribes/Other categories of persons to the extent permissible under the general or special order(s) of the Himachal Pradesh Government.

iii) Age limit for direct recruitment will be reckoned on the first day of the year in which the post(s) are advertised for inviting application.

METHOD OF RECRUITMENT:

i) From GDOs (75%)

ii) Direct Recruitment (25%)

These posts will be filled up in the ratio of 75:25 from GDO and Direct candidate respectively. In case of non-availability of candidate in one category the posts in such faculty will be filled-up from the other category.

The GDO category shall include the doctors appointed on regular or contract basis by the Government of Himachal Pradesh.

Provided that the only those GDO's whether appointed on regular or on contract basis, shall be eligible for selection as Sr. Resident who have served in the peripheral health institutions of the State of Himachal Pradesh for a period of at least two years after completion of their Post-Graduation.

Provided further that this provision shall not apply to the specialities of 1. **Anatomy 2.Physiology 3.Pharmacology 4.Pathology 5.Microbiology and 6.Biochemistry.**

SELECTION PROCEDURE: The Sr. Resident will be selected from amongst the eligible candidates on the basis of a walk-

in-interview and selection will be made as per the following criteria:-
The distribution of marks for the walk-in-interview will be as follows:-

PG (MD/MS)Degree Marks (in concerned Speciality)	*40 Marks*
MBBS Marks (Cumulative total marks of 1st, 2nd and 3rd professional exam.)	*40 Marks*
Gold Medal (in MBBS or PG degree)	*10 Marks*
Publication of papers in Journals of reputation to be decided by the Principal of the concerned Medical College.	*10 Marks (1.0 Marks for each published work subject to maximum of 10 Marks)*

Provided that where PG marks are not available and only grade has been awarded, the merit of the candidate will be determined on the basis of total marks (Cumulative total marks of 1st, 2nd and 3rd professional exam.) obtained in MBBS examination.

REPEAT TENURE REGULATION:
i) There will be no repeat tenure for in-service GDOs (including contractual appointees) as Senior Residents in any specialty.
ii) The repeat tenure will be available to only Direct candidates. Provided that repeat tenure will be for six months at a time.

iii) If a Direct candidate selected as Senior Resident is unable to complete the term of three years, he/she will be eligible to appear in the interview of Senior Resident and get selected in the same or other specialty. He/she will also be entitled to be selected as Sr. Resident in a super specialty.

iv) If an in-service GDOs is unable to complete the term of three years he/she shall stand debarred from doing Senior Residency for a period of three years.

REMOVAL/RESIGNATION FROM POSTS OF SENIOR RESIDENTS:

Once appointed, the incumbent can be removed from the post any time after joining in case of misconduct, misbehavior, acts of commission/omission, unbecoming of a public servant. The HOD will make a formal request in writing to the Principal of the Medical College for removing the delinquent appointee. The Principal of the Medical College will take final decision in the matter after hearing both the parties. It will be necessary to give due opportunity to the concerned Sr. Resident to explain his/her position. Any Sr. Resident shall have to give one month's notice or salary in lieu thereof to resign and the concerned Principal accept the same.

NECESSITY OF NOC:

No application of in-service candidates (GDOs/adhoc /contract/ RKS) will be entertained by **the Principal unless the "No objection Certificate" is issued by the Principal Secretary (Health) to the Government of Himachal Pradesh, Shimla-171002 / Director Health Services, H.P.** in the case of regular GDOs and adhoc/contract/RKS appointee doctors by the state Govt.

IMPORTANT INSTRUCTIONS:

1. Candidates will be allowed to apply in one specialty only.
2. Speciality once chosen will be final and if selected, the candidates will not be permitted to change Specialty at any

stage during this period/tenure except as provide under rules.

3. Incomplete or wrongly addressed applications shall not be considered at all and shall be rejected out-rightly. The DME will make no further correspondence with the candidate in the matter.

4. The in-service GDOs/candidates are required to route their applications through proper channel for obtaining NOC from the competent authority i.e. Additional Chief Secretary (Health) to the Govt. of Himachal Pradesh, Shimla/DHS, HP Shimla as the NOC will have to be produced at the time while appearing in the walkin-interview on 16.12.2016 and 27.12.2016 respectively.

5. The candidate should enclose the certified/attested copies of the following certificates/documents along-with application form:-

a) Certificate of Matriculation or its equivalent examination (for verification of age).

ii) Detail marks certificate of Professional examination (Degree/Diploma).

iii) Certificate of distinction obtained by a candidate in the qualifying examination, Medals, Publications and position in the University qualifying examination(s) if any.

iv) Service certificate form concerned Chief Medical Officer as well as DHS, HP regarding serving in the peripheral institutions after completion of his/her post-graduation.

v) Character certificate from the employer /Head of the institution.

vi) Registration Certificate from Medical Council.

vii) Attempt certificate in respect of MBBS 2. P.G.

Rest of the terms & conditions will apply the same as contained in the new policy issued by the Government vide Notification No: HFW-B(A)2-4/2007- dated 4.1.2012 and

addendum dated 4.2.2012, 20.6.2012, 26.9.2012, 4.6.2013 & 29.8.2013 to this effect from time to time."

4. All the petitioners herein applied and participated in the interviews and were declared successful in their respective fields. Vide letter dated 10.4.2017, the respondent-State gave approval to appoint the petitioners as tutor in different specialties as per their qualification. Copy of appointment letter issued in case of one of the petitioner namely Akash Srivastava is Annexure P-14.

5. Though appointment of the petitioners was initially for six months, but admittedly same came to be renewed year after year. Copy of notifications dated 24.10.2019 and 27.5.2020 annexed with the petition of Akash Srivastava are placed as P-15 Colly. Vide communication dated 4.5.2017, issued under the signatures of Under Secretary (Personnel) to the Government of Himachal Pradesh, Government took a policy decision to regularize the services of contractual appointees in the government departments (P-16), who have completed three years continuous service as on 30.9.2017. Again, in the year, 2019, respondents vide notification dated 21.2.2009 (Annexure P-17), again decided that services of contractual appointees, who have completed three years continuous service as on 31.3.2019 and 30.9.2019 shall be regularized after 31.3.2019 and 30.9.2019, respectively.

6. Careful perusal of aforesaid regularization policy formulated by the Government of Himachal Pradesh, reveals that regularization, if any of the contractual appointees, who have completed three years continuous service is/was to be made on the basis of seniority subject to the condition that eligibility criteria prescribed in the R&P Rules for the post, was adhered to/observed at the time of their initial recruitment on contract basis. Since despite there being aforesaid policy decision taken by the respondents, services of the petitioners were not regularized, they applied for information

under RTI, regarding applicability of aforesaid notifications dated 4.5.2017 and dated 21.2.2019. Vide communication dated 13.5.2019, petitioners were informed that letter dated 21.2.2019, is applicable to all the functionaries to whom it was sent. Copy of RTI application along information received stands enclosed as P-18 (Colly) with the writ petition filed by one of the petitioner namely Akash Shrivashtava.

7. During the subsistence of contract of the petitioners, respondent-State in terms of notification dated 22.6.2019 (Annexure P-19), notified Resident Doctor Policy for regulating the appointment of Senior/Junior Residents in the department of Medical Education, which reads as under :

> "**1**. **Short Title**.—This policy may be called **'Policy for Residency in the Government Medical Colleges in the State of Himachal Pradesh**' in short '**Resident Doctor Policy'**.
>
> **2**. **Commencement**.—The Policy shall come into effect from the date of notification.
>
> **3**. **Definitions**.—Notwithstanding anything to the contrary
>
> **3.1**. 'Senior Resident' or 'Tutor-Specialist' shall mean the doctors who have completed their Post Graduation in any clinical and non-clinical specialty as recognized by Medical Council of India.
> **3.2**. 'Junior Resident -Non Academic' or 'Tutor-General' shall mean the doctor who is a MBBS degree holder and is not pursuing a Post Graduation course.
> **3.3**. 'Junior Resident -Academic' shall mean the doctor who is a MBBS degree holder and is pursuing a Post Graduation course.

4. **Number of Posts**.—As notified by the State Government from time to time.

5. **Classification**.—Class-I (Gazetted) Tenure Post.

6. Age Limit.—45 Years and below.

6.1. Provided that the upper age limit will not be applicable to the candidate already in service of the Government including those who have been appointed on adhoc or on contract basis by the Government.

6.2. Provided further that upper age limit is relaxable for Scheduled Castes/Scheduled Tribes/Other categories of persons to the extent permissible under the general or special order(s) of the Himachal Pradesh Government.

6.3. Age limit for direct recruitment will be reckoned on the first day of the year in which the post(s) are advertised for inviting application.

7. Senior Residents/Tutor-Specialist:

7.1. Essential Qualification(s)/Eligibility :

For Clinical Subjects.—Post Graduate (MD/MS/MDS) or DNB in the concerned specialty from a University/Institution recognized/permitted by the MCI/DCI; failing which the PG Diploma in the concerned specialty recognized/permitted by the MCI/DCI.

For non-clinical subjects.—Recognized MD/MS/DNB in the concerned specialty or qualifications as prescribed in the concerned specialty by the schedule-I of the existing Himachal Pradesh Medical Education Service Rules:

Provided that the percentage of Tutor-specialists in non-clinical subjects from non-medical backgrounds shall not exceed the limit prescribed as per the norms fixed by Medical Council of India;

Further provided that GDOs/Direct Candidates who have furnished bond to serve the State after Post Graduation in lieu of sponsorship/stipend shall be required to serve a period of minimum one year in field posting or any such period which may be prescribed by the PG/SS policy as

notified from time to time before being eligible for Senior Residency in the State.

7.2. Method of Recruitment:

7.2.1. The Senior Resident/Tutor-Specialist shall be selected on the basis of application invited by the Director, Medical Education & Research, Himachal Pradesh.

7.2.2.The recruitments will be conducted thrice in every year as per the following schedule:

	First Round	Second Round	Third Round
Requisition to be sent by Principals to DME & R by	End of November	End of March	End of July
Vacancies to be sent in requisition	Vacancies as on date + vacancies anticipated (on the basis of completion of tenure of incumbents occupying the posts) till end of January.	Vacancies as on date + vacancies anticipated (on the basis of completion of tenure of incumbents occupying the posts) till end of May.	Vacancies as on date + vacancies anticipated (on the basis of completion of tenure of incumbents occupying the posts) till end of September.
Advertisement of Post in.	Second week of December	Second week of April	Second week of August
Personal appearance for verification of documents to be conducted	First fortnight of January	First fortnight of May	First fortnight of September.

in.			

7.2.3.The interested and eligible candidates as per the advertisement shall apply to the Director, Medical Education & Research, Himachal Pradesh within the time period as stipulated by the advertisement on application form as prescribed at Annexure-1. The interested and eligible candidates shall also provide their preference list listing out all the Government Medical Colleges where seats are available in their respective specialties/specialties for which they are applying.

7.2.4.The Director, Medical Education & Research, Himachal Pradesh shall send the list of all the candidates (including GDOs and Direct candidates) who have applied for the post(s) to the Director Health Services, Himachal Pradesh for issuance of No Objection Certificate with regard to the completion of the mandatory peripheral service and to scrutinize any discrepancy in status of a candidate with respect to being a GDO or a direct candidate. Such information shall be furnished by the Director Health Services within a week of the issuance of demand letter by the Director Medical Education. The Director Medical Education shall simultaneously draw a specialty wise merit list based on the documents submitted at the time of making applications keeping the following general principles in mind:

(a) The distribution of marks for drawing up of merit shall be as under:—

Sl. No.	Detail	Marks
1.	MBBS Marks (Cumulative total marks of 1st, 2nd & 3rd Professional examination).	30
2. .	PG(MD/MS) Degree Marks (in concerned specialty)	40
3.	Period of service of State	As per **Annexure-2**

4.	Publication of papers in Index Journals as first author or corresponding author (Published papers or papers in respect of which letter of acceptance has been issued shall be counted).	2 marks for each published work subject to maximum of 20 marks.

(b) The candidates who have done MD/MS/DNB in a particular subject shall be higher in merit then the candidates who have done diploma in that particular specialty, irrespective of the marks earned. Similarly, for the non-clinical subjects, candidates belonging to non-medical side shall always be placed below in merit to candidates of the medical side irrespective of the marks earned and the inter se merit of the candidates from non-medical background shall be determined on the basis of marks obtained in the Essential Qualification examinations like M.Sc. etc.

(c) In case, the PG marks are not available in respect of even one candidate in a particular specialty, the PG marks shall not be taken into account while drawing up the merit of that particular specialty.

7.2.5. A date shall be fixed by the Director, Medical Education & Research, Himachal Pradesh which shall be notified in the advertisement for verification of documents. The candidates shall be required to be mandatorily present during the verification of documents, otherwise their candidature shall be deemed rejected.

7.2.6. After the verification of documents and after issuance of NOC by the Director Health Services, the Director Medical Education & Research, Himachal Pradesh shall allot the Medical Colleges to various candidates on the basis of merit and as per the preferences furnished by them at the time of making application subject to availability of vacancy in that particular Medical Colleges. In no case, shall the preference list be allowed to be changed after the

submission of application. In case two applications have been submitted by one candidate for one department, the preference list as contained in the application latest submitted shall be considered.

7.2.7. The DME & R-HP shall forward the proposal for Medical College wise appointment of the Senior Residents/Tutor-Specialist to Government for issuing necessary orders in this regard.

7.3. Terms and conditions :

7.3.1.The appointment will be ordinarily for a period of three years subject to satisfactory yearly performance appraisals which shall be brought to the notice of the Principal by the concerned Head of Department. The Principal shall intimate the Government if the services of a Senior Resident/Tutor-Specialist need to be discontinued in view of non-satisfactory performance. The post occupied by the Senior Resident/Tutor-Specialist so will fall vacant only if the tenure is completed OR he/she tenders resignation OR his/her services are terminated.

7.3.2. GDOs shall continue to draw the emoluments and pay admissible to him/her with due allowances and increments during the period of Senior Residency. The direct candidates who join as Senior Resident in any of the Government Medical Colleges after completion of prescribed mandatory period of field posting as per policy notified vide letter No. HFW-B(F)4- 9/2017-II, dated 27-02-2019 or any other policy notified in its supersession, shall be eligible to draw the pay as prescribed for a Senior Resident. Similarly, the candidates who join directly as Senior Resident shall draw the pay as prescribed for a Senior Resident.

7.3.3. The salary of Senior Resident shall be drawn against the sanctioned post of Senior Resident in that Government Medical College. The GDOs selected for Senior Residency will furnish their 'Last Pay Certificate' (LPC) duly issued by their last establishment for the

purpose of drawing salary against the post of Senior Resident.

7.3.4. The Senior Residents shall be entitled to leave as may be notified by the Government from time to time.

7.3.5. GDOs/Direct Candidates who have furnished bond to serve the State after Post Graduation in lieu of sponsorship shall be required to serve a period of minimum one year in field posting before being eligible for Senior Residency in the State and for this purpose the last date of submission of applications shall be taken as the cut-off date. However, this condition shall not be applicable to the direct candidates who have not availed sponsorship of the State while doing Post Graduation and who are not bound by conditions of any bond.

7.3.6. The condition of mandatory one year of field posting shall be equally applicable to all the specialties. Candidates of non-clinical specialties like Microbiology, Pathology etc. shall be posted at field institutions. Candidates of specialties like Anatomy, Physiology, Nuclear Medicine etc., in respect of which there is no sufficient work in field institutions, shall be posted as Medical Officer in Medical Colleges as per the availability of non-teaching post. Such candidates posted on non-teaching post shall not be clubbed with Senior Residents for the purpose of roster etc. and it shall be ensured by the Principals that no teaching responsibility is assigned to them. Such candidates shall also not be eligible for the grant of teaching experience.

7.4. Repeat Tenure:

7.4.1. There will be no repeat tenure for any candidate as Senior Resident/Tutor Specialist in any specialty in a particular Government Medical College.

7.4.2. A Senior Resident who has completed his/her tenure in one specialty will however be eligible for Senior Residency in the concerned super specialty department; provide that such candidates shall be placed below the

fresh candidates while drawing up merit irrespective of the marks earned.

7.5. Teaching Experience :

7.5.1. Senior Residents will be issued teaching experience certificate by the concerned Principal, which will be valid for promotion and appointment as Assistant Professor in the respective faculty as per R&P Rules notified by the Government.

7.5.2. Senior Residents who are pursuing Senior Residency in super specialty departments of the Government Medical Colleges of the State shall be eligible to be awarded teaching experience in their own specialty; provided that the concerned specialty is the parent department of concerned super specialty.

7.5.3. The candidates who have availed maternity/paternity leave during the period of Senior Residency shall be entitled to grant of teaching experience for the period of maternity/paternity leave admissible as per rules.

7.6. Inter-transferability:

7.6.1. No Senior Resident in any institution of the State will be allowed to shift to any other institution without formal resignation from the former institution.

7.6.2. However, instances where inter-transferability is sought on couple case grounds may be given consideration subject to the availability of departmental vacancy of Senior Resident in the institution to which transfer is being sought.

7.6.3. No other exception will be made to clause 7.6.1. However, the State Government reserves the right to transfer/depute a Senior Resident/ Tutor-Specialist from one Government Medical College to another, if the administrative exigencies demand so.

8. Junior Residents/Tutor-General:

8.1. Eligibility : Direct candidates and those regularly appointed GDOs who possess a MBBS Degree as

recognized by Medical Council of India will be eligible for the post of Junior Resident/Tutor-General. These positions will not be offered to any Post Graduate doctor/contractual GDOs.

8.2. Method of Selection:

8.2.1. These posts will be filled up by the Principal of concerned Government Medical College through walk-in-interviews by prior notification of vacancies and inviting applications for the same.

8.2.2.Walk-in-interviews for these posts shall also be conducted thrice a year as prescribed for the post of Senior Resident.

8.2.3.The applications received will be considered as per the following criteria:

(a) First preference would be given to the direct MBBS doctors who are not in the employment of the Government of Himachal Pradesh. The selection will be made purely on the basis of merit of candidate in MBBS examinations.

(b) Second preference would be given to GDOs whose spouses are working, in order of preference, as Senior Resident or Faculty in the respective Government Medical College or in the State/ Central Government (including semi–government/autonomous bodies fully or partially funded by the Government). In case there is more than one applicant for particular position, the applicant having higher score in MBBS examination will be selected.

8.2.4. For the smooth conduct of patient care services, if any post of Senior Resident in any clinical specialty remains vacant despite advertisement in the last round of recruitment by the Director, Medical Education & Research, Himachal Pradesh and recruitment of manpower against that post is absolutely necessary in public interest, the Principal of the concerned Government Medical College may fill up the post by

way of Junior Resident through walk-in-interview subject to fulfilment of following conditions:

(a) The Principal shall seek prior permission of Director, Medical Education & Research, Himachal Pradesh for advertising these posts of Senior Resident against which a Junior Resident is proposed to be recruited. The Director, Medical Education & Research, Himachal Pradesh shall accord permission for the same only if the said post was advertised previously but no suitable candidate could be recruited against that post.

(b) It also shall be ensured by the concerned Principal that such Junior Resident who are occupying the posts of Senior Resident shall not exceed 20% of the total posts of Senior Resident in that Department.

(c) Such Junior Residents shall be appointed for a term of maximum of six months at a time following which the post shall be advertised as Senior Resident in the next round of recruitment.

(d) Such Junior Resident shall be payable pay and allowances as prescribed for their post and not for the post of Senior Resident.

8.3. Terms and conditions:

8.3.1. Junior Resident will be appointed for a term of one year at a time. Extension beyond one year will only be allowed in exceptional cases and with the prior concurrence of the State Government.

8.3.2. GDOs appointed on regular basis, on their selection as Junior Resident will continue to draw pay and allowances/increments as admissible to them in their pay scale. MBBS doctors appointed in the direct category will get emoluments as may be prescribed from time to time by the State Government.

9. Casualty Medical Officers and Blood Bank Medical Officers:

The posts of already created Casualty Medical Officers and Blood Bank Medical Officers in Medical Colleges will be filled up separately on tenure basis by the Government by way of transfer from the cadre of GDO's (regular) of the HPHS. Tenure shall normally be for three years.

10. Removal/Resignation from posts of Senior/ Junior Residents/Tutor:

10.1.Once appointed, the incumbent can be removed from the post any time after joining in case of misconduct, misbehaviour, acts of commission/ omission, unbecoming of a public servant. The HOD will make a formal request in writing to the Principal of the concerned Medical College for removing the delinquent appointee. The Principal of the concerned Medical College will take decision in the matter after hearing both the parties. It will be necessary to give due opportunity to the concerned Senior Resident/ Junior Resident to explain his/her position. The Principal shall forwarded his/her recommendations to the Government, and the final decision shall be taken at the level of Government, being the appointing authority.

10.2. Similarly, if the performance is non-satisfactory as reported by the Head of Department during annual performance appraisals, the Principal shall hear the parties and forward the case to the Government for discontinuation of services, if so required, alongwith his/her findings and recommendations.

10.3. Any Senior/Junior Resident shall have to give one month's notice or salary in lieu thereof to resign and the concerned Principal will accept the same.

11. Reservation: Reservation roster for direct candidates will be applied as per rules applicable in the State of

> Himachal Pradesh. However, if candidates of reserved category are not available in any category, then the post will be filled up from General category.
>
> **12.** Power to relax/change/amend the policy: Where the State Government is of the opinion that it is necessary or expedient to do so, it may, for reasons to be recorded in writing relax/change/amend any of the provision(s) of this policy.

8. Terms and conditions contained in the aforesaid Resident Doctor Policy, are *para materia* same to terms and conditions formulated/prescribed by the respondents at the time of inviting applications for the posts of senior residents of various specialties of Pt. Jawahar Lal Nehru Government Medical College and Dr. Radhakrishnan Government Medical College, Hamirpur, in the year, 2016 save and except condition with regard to "Repeat Tenure". Terms and conditions formulated at the time of inviting applications in the year, 2016, provided that there will be no repeat tenure for in-service GDO's (including contractual appointees) as Senior Residents in any specialty and repeat tenure will be available to only direct candidates, but same shall be for six months at a time. In the aforesaid terms and conditions formulated at the time of advertisement issued in the year, 2016, it was also provided that if a direct candidate selected as Senior Resident is unable to complete the term of three years, he/she will be eligible to appear in the interview of Senior Resident and get selected in the same or other specialty. He/she will also be entitled to be selected as Sr. Resident in a super specialty and if an in-service GDOs is unable to complete the term of three years, he/she shall be debarred from doing Senior Residency for a period of three years.

9. However, aforesaid condition of repeat tenure came to be completely modified in Resident Doctor Policy circulated in the year, 2019. Repeat tenure, as provided in aforesaid Resident Doctor Policy, reads as under:

> **"7.4. Repeat Tenure:**

> **7.4.1.** There will be no repeat tenure for any candidate as Senior Resident/Tutor-Specialist in any specialty in a particular Government Medical College.
>
> **7.4.2.** A Senior Resident who has completed his/her tenure in one specialty will however be eligible for Senior Residency in the concerned super specialty department; provide that such candidates shall be placed below the fresh candidates while drawing up merit irrespective of the marks earned."

10. As per the aforesaid clause, no candidate can have a repeat tenure as a senior resident/tutor specialist in any specialty, particularly, in GMC, however, a senior resident, who has completed his/her tenure in one specialty will be entitled for Senior Residency in the concerned super specialty department, but he/she shall be placed below the fresh candidates while drawing up merit irrespective of the marks earned. In the aforesaid background, all the petitioners herein after having completed three years as senior residents/tutor approached the respondents for their regularization against the post(s) they were appointed on contractual basis, but fact remains that respondents did not accede to the request of the petitioners herein, whereas in terms of Regularization Policy framed from time to time, proceeded to regularize the contractual service of Medical Officers in the Directorate of Health Service over and above the R&P Rules. Copies of the notifications dated 5.8.2017 and 17.2.2018, regularizing the services of the Medical Officers in the Directorate of Health Services are annexed as Annexure P-21. Respondents instead of considering the claim of the petitioners for regularization issued fresh advertisement qua the post of senior residents/tutor specialist, against which, petitioners had already rendered three years continuous service on contract basis (Annexure P-21). Petitioners besides making comprehensive representation dated 28.9.2020 to respondent No.1 (Annexure P-23) also applied for the post in question in terms of fresh advertisement. Though, all the petitioners herein, stood selected against the

post in question in their specialty, but since they were not given appointment at Pt. Jawahar Lal Nehru Government Medical College, Chamba, where they were earlier working, they filed representation, to the Secretary (Health) to the Government of Himachal Pradesh, praying therein to allow them to continue in the same college again. Since no heed, if any, was paid to the aforesaid request made by the petitioners, they have approached this in the instant proceedings praying therein for following main reliefs:

> "i) Issue a writ of Certiorari, Mandamus or other appropriate writ or direction quashing Notification dated 22.06.2019 Clause 7.4 (Repeat Tenure) under 7.4.1. which forbids repeat of tenure from any candidate as Senior Resident/Tutor-Specialist in any specialty in a particular Government Medical Collage, for all intents and purposes.
>
> ii)Issue a writ of Certiorari, Mandamus or other appropriate writ or direction quashing the advertisement,(Annexure P-21) qua one post of Sr. Resident/Tutor-Specialist (Physiology) against which the Petitioner is already working) at Pt. Jawahar Lal Government Medical College, Chamba , for all intents and purposes.
>
> iii). Issue a writ of Certiorari, Mandamus or other appropriate writ or direction in case the result card/merit list is prepared in reference to the advertisement,(Annexure P-21) ,the same may kindly be quashed for all intents and purposely accordingly.
>
> iv). Issue a writ of Certiorari, Mandamus or other appropriate writ or direction ,directing the respondents to regularize the contractual services of the petitioner after completion of his three years of Contractual services, in

terms of the regularization policy of the respondent State against the post of Sr. Resident/Tutor-Specialist (Physiology) at Pt. Jawahar Lal Government Medical College, Chamba on which petitioners is presently working, for all intents and purposes.

v). Issue a writ of Certiorari, Mandamus or other appropriate writ or direction quashing the action of the respondents i.e. the respondent no.5 from replacing one contractual employee(i.e. the Petitioner) by another contractual employee."

11. We have heard the learned counsel for the parties and perused the material available on record.

12. Precisely, in the petitions at hand, this Court needs to decide two following questions; **1.)** *whether the petitioners, who being duly qualified and eligible were appointed as tutors in the department of Anatomy, physiology, pharmacology and microbiology on contract basis, can claim regularization against the post of Tutors and Senior Residents in terms of regularization policies framed by the state of Himachal Pradesh;* ***2.)*** *Whether condition of "repeat tenure" provided under clause 7.4 of the Resident Doctor Policy notified vide notification dated 22.6.2019, is unfair, unlawful, un-constitutional and defeats the purpose of regularization policy*.

13. Having heard learned counsel for the parties and perused material available on record, this Court sees no dispute *inter-se* parties qua the fact that respondents after having failed to appoint the qualified medical faculty in newly opened Medical Colleges, framed terms and conditions for appointment of the Professors, Associated Professors, Assistant Professors, Tutors, Senior Residents and Junior Residents (on contractual basis) vide notification dated 22.4.2016 (Annexure P-12). As per aforesaid terms and conditions, Professors, Associate Professors and Assistant Professors in the

department of Medical Education are/were to be engaged on contractual basis initially for a period of one year, which could be extended on year to year basis. Appointment made if any, in terms of aforesaid terms and conditions formulated vide notification dated 22.4.2016 is to be made purely on temporary basis and candidate shall not have any right to claim for regularization/permanent absorption as Professor in the Department at any stage. Condition No. 13 of aforesaid terms and conditions specifically provides that they are barred for claiming regularization/permanent absorption against the post of Professors in the Department of Medical Education, but definitely not against other posts of Associate Professors, Assistant Professors, Tutors/Senior Residents and Junior Residents. Rather R&P Rules notified in Rajpatra vide department notification No. Health-A(A)(3) 6 98 dated 2.12.1999, which came to be amended vide notification dated 10.1.2006 clearly provides that post of Assistant professors shall be filled up ***(i)*** 50 % by promotion, failing which by recruitment or on contract basis; and ***(ii)*** 50% by direct recruitment or on contract basis, in the manner specified in Appendix-D appended with the aforesaid notification.

14. Similarly, clause 10 of aforesaid terms and conditions provides for transfer of a contract appointee from one place to another after putting three years service at one place, meaning thereby, condition of repeat tenure as contained in clause 7.4 of the Resident Doctor Policy is/was not binding on the candidates, who immediately after promulgation of terms and conditions vide notification dated 22.4.2016 applied for the appointment against various posts in the department of Medical Education on contract basis. Similarly, it is undisputed that after framing of aforesaid terms and conditions vide notification dated 22.4.2016, respondents invited applications by way of an advertisement from candidates fulfilling the eligibility criteria for selection of Senior Residents in various specialties of Pt. Jawahar Lal Nehru Government Medical College, Chamba and Dr. Radhakrishnan Government Medical

College, Hamirpur H.P., on tenure basis initially for a period of six months, but same could be extended upto three years as per performance. Terms and conditions provided alongwith aforesaid advertisement though provided for "repeat tenure" regulation, but it categorically provides that the repeat tenure will be available to only direct candidates, but for six months at a time. However, in-service GDOs including contractual appointees are not held entitled for "repeat tenure". Material available on record clearly reveals that all the petitioners herein though were initially appointed on tenure basis for six months, but they were given extension on year to year basis and as of today have served the respondent department for more than three years uninterruptedly.

15. During proceedings of the case, Mr. Ajay Vaidya, learned Senior Additional Advocate General, representing the State, while refuting the claim of the petitioners for regularization in terms of Regularization Policy(s) framed by the Government of Himachal Pradesh , argued that since there are no substantive posts of Senior Residents/tutor specialists in the Department of Medical Education, benefit, if any, of regularization in terms of aforesaid Regularization Policy, cannot be claimed by the petitioners. Besides above, Mr. Vaidya, learned Senior Additional Advocate General, also argued that regularization policy formulated by the Government of Himachal Pradesh for regularization of persons, who have completed three years regular service on contract basis, cannot be applied in the case of the petitioners keeping in view the nature and responsibility attached to the post in question. However, learned Senior Additional Advocate General, was unable to dispute that in terms of aforesaid regularization policies, Medical Officers, 1st Class Gazetted (General Wing) in the Department of Health and Family Welfare appointed on contractual basis stand regularized in terms of regularization policy framed by the Government from time to time.

16. On 2.7.2021, this Court after having heard aforesaid submission of Mr. Vaidya, learned Senior Additional Advocate General, that there are no substantive posts, against which, services of the petitioners can be regularized, reserved the judgment, but before judgment could be dictated, petitioners filed an application bearing CMP No. 7057 of 2021, enclosing therewith notification dated 26.5.2016, issued by the Department of Medical Education and Research (Annexure P-28) with regard to creation of 80 posts of different faculty in different departments in the newly opened Medical Colleges, which reads as under:

"The Governor of Himachal Pradesh is pleased to order creation of following posts in each of the proposed three new Medical Colleges to be established at Nahan, Hamirpur and Chamba:

(A) Faculty in each Medical College:

Sr. No.	Name of the Department	Professor	Associate Professor	Assistant Professor	Tutor	Sr. Resident	Jr. Resident	Other Faculty
1	Anatomy	01	01	02	04	--	--	--
2	Physiology	01	01	02	04	--	--	--
3	Biochemistry	01	01	01	04	--	--	--
4	Pharmacology	01	01	02	02	--	--	--
5	Pathology	01	03	03	04	--	--	--
6	Microbiology	01	01	01	03	--	--	--
7	Forensic Medicine	01	--	01	02	--	--	--
8	Community Medicine	01	02	02	04	--	--	1 Post each of Epidemiologist-cum Asst. Profess

								or and Statistician-cum-Asst, Professors 2 post LMO= 2 posts
9	General medicine	01	03	04	--	06	12	--
10	Pediatrics	01	01	02	--	03	06	--
11	Tuberculosis & Respiratory Diseases	01	--	01	--	02	03	--
12	Dermatology, Venereology and Leprosy	01	--	01	--	02	03	--
13	Psychiatry	01	--	01	--	02	03	--
14	General Surgery	01	03	04	--	06	12	--
15	Orthopedics	01	01	02	--	03	06	--
16	Oto-Rhino-Laryngology	01	--	01	--	02	03	--
17	Ophthalmology	01	--	01	--	02	03	--
18	Obstetrics & Gynecology	01	02	03	--	03	06	ANMC Post MWOs Post
19	Anaesthesiology	01	02	03	--	08	--	--
20	Radio-Diagnosis	01	01	01	--	05	--	--
21	Dentistry	01	--	01	--	02	--	--
22	Physical medicines & Rehabilitation	01	--	01	--	02	01	00
23	Radio Therapy	01	01	01	03	--	--	--

	Total	23	24	43	30	48	58	06

and as such, matter again came to be listed before this Court on 5.7.2021. This Court after having heard the learned counsel appearing for the parties and perused material available on record, allowed the aforesaid application and ordered that the document annexed with the application be taken no record.

17. Mr. Ajay Vaidya, learned Senior Additional Advocate General, after having perused aforesaid communication was unable to dispute that in the year, 2015 i.e. prior to opening of newly opened medical colleges, posts of Tutor, Senior Residents and Junior Residents in various departments of Medical Colleges were created alongwith various other posts of teaching faculty as well as para-medical staff. Careful perusal of aforesaid notification clearly reveals that there are sanctioned/substantive posts of Sr. Residents/Tutors in the department of physiology, anatomy, microbiology and pharmacology, in the newly opened medical colleges including Pt. Jawahar Lal Nehru Government Medical College, Chamba and as such, prayer made for regularization on behalf of the petitioners in terms of the regularization policy after completion of three years of service on contract basis cannot be rejected on the ground that there is no substantive post qua which services of the petitioners can be regularized.

18. At this stage, it is important to take note of the fact that recently Government of Himachal Pradesh, vide communication dated 30.3.2021, again decided to regularize the services of the contractual appointees, who have completed three years continuous service as on 31.3.2021. As per aforesaid notification, services of contractual appointees, who have completed three years, shall be regularized after 30.9.2021, however such regularization shall be subject to the condition that eligibility criteria prescribed in the R&P Rules for the post was observed/adhered to at the time of the initial

recruitment on contract. Interestingly, in the case at hand, respondents though have created substantive posts of Tutor, Senior Residents and Junior Residents in the newly opened Medical Colleges, as has been taken note herein above, but at no stage, made an endeavor/effort to include the aforesaid posts in R&P Rules.

19. Appendix-B appended with the Himachal Pradesh Medical Education Service Rules, promulgated vide notification dated 2.12.1999 (P-1), which subsequently came to be amended vide notification dated 10.1.2006 (Annexure P-3) clearly reveals that only posts of Lecturer, Lecturer (Dentistry), Assistant Professor, Assistant Professor (Super Specialty), Assistant Professor (Dentistry), Assistant Professor, Assistant Professor (Dentistry), Professor, Professor (Dentistry), Principal and Director, Medical Education and Research, came to be governed by the Himachal Pradesh Medical Education Service Rules. Though, posts of Professor, Associate Professor and Assistant professor proposed to be filled up on contractual basis in terms of notification dated 22.4.2016, whereby Government after having taken decision to open four new medical colleges in the State framed terms and conditions for the appointment of Professor, Associate Professor, Assistant Professor, Tutors, Senior Residents and Junior Residents on contractual basis, could have been governed /regulated by the Himachal Pradesh Medical Education Service rules, wherein admittedly posts of Professor, Associate Professor and Assistant Professor, stand included, but since no person having requisite qualification was available, respondents framed terms and conditions for appointment of Professor, Associate Professor and Assistant Professor alongwith posts of Tutors, Senior Residents and Junior Residents on contract basis.

20. In the year, 2016, respondents while inviting applications for fulfilling eligibility criteria of Senior Residents in various specialties of newly opened medical colleges prescribed following qualifications:

> *"Recognized Post Graduate (MD/MS) or DNB in the concerned speciality or superspeciality from a University recognized by the MCI failing which the PG Diploma in the concerned speciality/recognized by the MCI. For Non-Clinical subjects recognized MD/MS in the concerned speciality, recognized Diploma in the concerned subject, Ph.d and M.Sc. from the recognized University."*

Aforesaid qualification, as has been prescribed for the selection of Senior Residents in various specialties is equivalent to the qualification, which has been otherwise provided for the post graduate qualifications in HP Medical Education Service Rules as is evident from Annexure 1, of aforesaid Medical Rules (available at page 44 of the paper book. Besides above, respondents with a view to bring more clarity with regard to Eligibility Criteria and to govern the service conditions of Senior Residents or Tutor Specialists and Junior Residents, formulated aforesaid Resident Doctor Policy (Annexure P-19)

21. Clause 7.1 of the aforesaid policy, wherein essential qualification as well as eligibility has been prescribed clearly suggests that same is *para materia* same to the terms and conditions circulated by the respondents at the time of inviting applications for selection of senior residents in various specialties of newly opened Medical Colleges in the year, 2016. Aforesaid condition of essential qualification/eligibility, if read juxtaposing qualification prescribed by the Medical Council of India, it cannot be said that petitioners, who belong to the category of anatomy, physiology, pharmacology and microbiology, do not possess the requisite qualification, rather in the department of anatomy, physiology, Pharmacology, Biochemistry, microbiology, non medical teachers can be appointed to the extent of 30 percent of the total number of posts in the department. A non-medical approved medical MSC qualification shall be sufficient qualification for

appointment as Lecturer in the subject oncerned, but for promotion to higher teaching post, a candidate mut possess the Ph.D. Degree in the subject. Heads of the departments of pre and para clinical subjects must possess recognized basic university degree qualification i.e. MBBS or equivalent qualification. Otherwise also, it is none of the case of the respondents that petitioner(s) do not possess requisite qualification, rather their precise case is that since posts of Tutors, Senior Residents and Junior Residents do not fall in Himachal Pradesh Medical Education Service Rules, appointment made on contract basis qua the aforesaid posts cannot be said to be made in terms of R&P Rules and as such, they cannot claim the benefit of regularization policy framed by the Government from time to time. Aforesaid stand taken by the respondents cannot be accepted for the reason that respondents though created posts of Tutors, Senior Residents and Junior Residents in the newly opened Medical Colleges, but purposely not included such posts in the Himachal Pradesh Medical Education Service Rules so that incumbents working against such posts do not stake any claim for regularization. However, respondents though may not have included posts of Tutors, Senior Residents and Junior Residents in the Medical Education Service Rules, but definitely, with a view to regulate/govern their services, framed certain terms and conditions in terms of notification dated 22.4.2016, and thereafter, also framed Resident Doctor Policy, providing therein essential qualification / eligibility as well as other conditions governing the service. It is also not in dispute that the respondents after having found the petitioners suitable in terms of essential qualification/eligibility as prescribed in "Resident Doctor Policy" and terms and conditions contained in the notification dated 22.4.2016 selected them against the post of Tutors, Senior Residents and Junior Residents initially for six months, but subsequently, extended their contract on years to year basis. Respondents may not have taken steps to include posts of Tutors, Senior Residents and Junior Residents in the Medical Education Service Rules, but

once they framed "Resident Doctor Policy", regulating/governing the services of the aforesaid category of doctors and thereafter, made appointments on the basis of terms and conditions contained in Resident Doctor Policy as well as terms and conditions contained in notification dated 22.4.2016, it cannot be said that Eligibility Criteria prescribed in the R&P Rules for the aforesaid posts was not applied at the time of initial recruitment of the petitioners on contract basis. Interestingly, doctors possessing same and similar qualification as is/was possessed by the petitioners herein, after being selected as Medical Officers (General Wing) on contract basis, have been accorded benefit of regularization in terms of aforesaid policies framed by the Government from time to time. No doubt, R&P Rules for the post of Medical Officers, Class-I gazetted (General Wing), in the department of Health and Family Welfare stand framed vide notification dated 9.3.2012, but if, condition of essential qualification/ eligibility provided in the aforesaid R&P Rules framed for regulating the service of General Duty Officers (GDO's) is perused vis-à-vis condition of essential qualification/eligibility prescribed for Tutors, Senior Residents and Junior Residents, it cannot be said that petitioners herein do not possess requisite qualification, rather they are equally qualified and possess qualification as framed by MCI, as provided under R&P Rules framed for governing the service of GDOs.

22. Since despite there being creation of posts of Tutors, Senior Residents and Junior Residents, respondents failed to include such posts in the Himachal Pradesh Medical Education Service Rules, coupled with the fact that petitioners possess requisite qualification as prescribed by MCI and Resident Doctor Policy, they cannot be denied the benefit of regularization on the pretext that they do not qualify eligibility criteria prescribed in the R&P Rules. At this stage, Mr. Ajay Vaidya, learned Senior Additional Advocate General, argued that since the petitioners came to be appointed in terms of notification dated 22.4.2016, wherein it has been specifically provided that

candidates engaged on contract basis under these rules shall have no right to claim regularization/permanent absorption, petitioners cannot seek regularization in terms of the regularization policy formulated by the Government after their initial appointment, however, having carefully perused terms and conditions provided vide notification dated 22.4.2016, (Annexure P-12), this Court finds no force in the afore submissions made by learned Senior Additional Advocate General, because in the terms and conditions as referred herein above, though it has been provided that services of the appointees will be purely on contract basis, but in clause 13 of the terms and conditions, it has been categorically provided that candidate engaged on contract basis under these rules, shall have no right to claim for regularization/permanent absorption as "Professor" in the Department at any stage.

23. In the case at hand, petitioners are not seeking their regularization against the post of Professor, rather against the posts of Tutors, Senior Residents and Junior Residents, respectively. Though, in the Resident Doctor Policy, it is provided that there will be no repeat tenure for any candidate as Senior Resident/Tutor-Specialist in any specialty in a particular Government Medical College, but right has been reserved to him or her to apply for senior residency in the concerned super specialty irrespective of the marks earned. If the Resident Doctor Policy for the year, 2019 is perused in its entirety, it nowhere debars a candidate from seeking regularization against the post of Tutors, Senior Residents and Junior Residents after completion of their contract.

24. Mr. Vaidya, further argued that keeping in view the nature and responsibility attached to the post in question, benefit of regularization in terms of regularization policy framed by the Government of Himachal Pradesh cannot be extended to the petitioners. He argued that regularization policy framed by the Government from time to time, does not apply to the

Department of Medical Education, but aforesaid argument of him, is totally devoid of any merit. Bare perusal of Regularization Policy dated 30.3.2021, clearly reveals that same is addressed to all heads of the departments of Himachal Pradesh and it has been nowhere mentioned in the notification that same shall not apply to the Department of Medical Education. Otherwise also, aforesaid argument advanced by Mr. Vaidya, learned Senior Additional Advocate General, is total contrary to the record, because Medical Officers 1st Class Gazetted (General Wing) in the department of Health and Family Welfare, who were also eligible to be appointed as Tutors, Senior Residents and Junior Residents in various Medical Colleges have been already given benefit of the aforesaid policy of regularization framed by the government from time to time. Since aforesaid Medical Officers have been already extended the benefit of regularization in terms of regularization policy framed by the Government, prayer made on behalf of the petitioners for regularization cannot be denied on the pretext of onerous responsibility(ies) and duties attached to the post in question. Medical Officers working in the department of Health And Family Welfare and tutors, Junior Residents and Senior Residents working in Medical Colleges have same nature of job with same responsibilities and as such, there cannot be any discrimination *inter-se* both the categories as referred herein above. Recruitment and Promotion Rules, prescribed for the post of Medical Officer, General Wing, if perused in its entirety, clearly suggest that service of candidates on contract will be purely on temporary basis and candidates engaged on contract basis under these rules, shall have no right to claim regularization/permanent absorption in the department at any stage. However, as has been taken note herein above, respondents despite there being aforesaid condition contained in the R&P Rules framed for the category of Medical Officers 1st Class Gazetted (General Wing) in the Department of Health and Family Welfare, have regularized the services of some of the doctors belonging to this category in

terms of regularization policy framed by the State Government. Hence, argument advanced by the learned Senior Additional Advocate General, that petitioners and other similarly situate persons are bound by terms and conditions contained in the notification, wherein it has been specifically provided that persons appointed on contract basis shall not have any right to seek regularization /permanent absorption, is otherwise bound to fail on the ground of discrimination. Once such condition provided under R& P Rules framed for the Medical Officers 1st Class Gazetted (General Wing) in the Department of Health and Family Welfare, has not been enforced by the Government while regularizing their services, same also cannot be pressed while considering claim of the petitioners for regularization in terms of Regularization Policy.

25. Since the State of Himachal Pradesh has accorded the benefit of regularization of the services, to, persons, similarly situate to the petitioners, therefore, any stipulation in the R&P Rules barring the contractual appointee(s) to stake any claim for regularization is deemed to be waived and abandoned. Even otherwise, when the petitioners were recruited though theirs undergoing the requisite processes, as, stipulated in the R&P Rules, and, their induction did occur against the substantive posts concerned, they are entitled to regularization in terms of regularization policy. Furthermore, since incontemporaniety with their induction into service, even on a contractual capacity, the State of Himachal Pradesh, has sanctioned the relevant posts against which they were appointed in a substantive capacity, through, on a contractual basis, therefore, the barring stipulation in the R&P Rules against their staking any claim for regularization, appears to be flawed, irrational, as well as arbitrary. Moreover, the benefit of regularization cannot be denied to the petitioners, especially when similarly situate persons rendering their services in the medical department have been extended the benefit of regularization.

26. Clause 7.4 of Resident Doctor policy, lays down the rule that there will be no repeat tenure for any candidate as Senior Resident/Tutor-Specialist in any speciality in a particular Government Medical College, however, clause 7.4.2 provides that a Senior Resident, who has completed his/her tenure in one speciality will however be eligible for Senior Residency in the concerned super speciality department provided that such candidates shall be placed below the fresh candidates while drawing up merit irrespective of the marks earned.

27. Mr. C.N. Singh, learned counsel appearing for the petitioners argued that aforesaid condition imposed/incorporated in the Resident Doctor Policy is unfair, unlawful, unconstitutional and defeats the purpose of Regularisation policy. He furthered argued that aforesaid provision has been notified with the *mala-fid*e motive to throw the petitioners from the job and stop them from pursuing their Ph.D., so that subsequently, they do not claim regularization against the posts. Mr. Ajay Vaidya, learned Senior Additional Advocate General, while justifying incorporation of aforesaid provision of "repeat tenure" contended that very purpose and object to provide posts of Senior Residents/Tutor Specialists in different specialties is to provide adequate experience to the postgraduate doctors so that subsequently, they become entitled to be appointed as Assistant Professor in the different medical colleges.

28. Purpose and object to create posts of Senior Residents/Tutor Specialists in any specialty can be gathered from the channel of promotion provided to the post of Assistant Professor in Medical Education Service Rules. If the aforesaid Medical Education Service Rules are perused in its entirety, it clearly reveal that Lecturer having three years regular service, can be considered for promotion against the post of Assistant Professor, but in case, he /she is not available, then Member of the HP Medical Civil Services (General Wing), having recognized post graduation degree with at least three

years' teaching experience as Lecturer, Registrar/Tutor/Senior Resident/Junior Resident in the concerned specialty can be considered for promotion to the post of Assistant Professor. However, in case both the aforesaid categories are not available, in that eventuality, posts of Assistant Professor can be filled up by way of direct recruitment or on contract basis. No doubt, very purpose and object of creating posts of Tutors and Senior Residents and Junior Residents, appears to provide essential teaching experience to the Lecturers, who possess three years' regular service and to the members of HP Civil Medical Service (General Wing), having recognized post graduate degree in the concerned specialty, but same time, careful perusal of Medical Education Service Rules clearly suggests that member of HP Civil Medical Service (General Wing), having recognized post graduate degree is required to have at least three years teaching experience as Lecturer/Registrar, Demonstrator/Tutor/ Senior Resident/Chief resident after doing post- graduation in the concerned specialty. If one is already working as a lecturer, he/she only needs to have three years of continuous service to become eligible to be promoted against the post of Assistant Professor, whereas member of HP Civil Medical Service (General Wing) after having possessed recognized post-graduation degree can only be promoted against the post of Assistant Professor, if he/she has teaching experience as Lecturer/Registrar, Demonstrator/Tutor/ Senior Resident/Chief resident. Though there is no mention, if any, of feeder category in the Medical Education Service Rules, but definitely, post, if any, of lecturer can be considered to be at par with posts of Tutors/Senior Residents. As has been stated herein above, a lecturer with three years continuous service can be considered for promotion to the post of Assistant Professor, but Member of HP Civil Medical Service having recognized post-graduation degree can only be considered for promotion to the post of Assistant Professor if he/she has teaching experience of three years as lecturer, tutor or senior residents. It is

not in dispute that General Duty Officers, who happen to be members of HP Civil Medical Service (General Wing, possess same qualification i.e. post graduation, as is required to be possessed by the candidate desirous of becoming Senior Resident/Tutor, meaning thereby, candidate after having completed his post graduation, has two options; ***1***) to join against the post of Medical Officer (General Wing) in the department of Health and Family Welfare; or ***2***) opt for post of Senior Resident/Tutor. Medical Officer (General Wing) in the Department of Health and Family Welfare becomes eligible to be promoted against the post of Assistant Professor after his/her having acquired three years teaching experience as lecturer/Senior Residents or tutor, whereas Senior Residents/Tutors working in the medical college though have not been included in the feeder category for the post of Assistant Professor, but careful reading of the HP Medical Education Service (Second Amendment) Rules, 2006 (available at page 92) clearly suggest that apart from lecturer and member of HP Civil Medical Service, person having three years teaching experience as lecturer, Registrar, Demonstrator, tutor/Senior Resident/Chief Resident is also eligible to be considered for promotion to the post of Assistant professor.

29. Dehors the above, even otherwise, the petitioners' chances of promotion, to the promotional post of Assistant Professor, is/are to be protected though they became inducted into service as contractual employees by the respondents recoursing the contemplation(s) carried in the R& P Rules, Rules whereof are extracted hereinafter:

30.

1	2	3	4	5	6	7	8
	Assistant Professor	90	Class-I Gazetted (Technical)	16350 - 20100	Selection	45 years &	As given in Appe

						below	ndix "B" of this Annexure
	Assistant Professor (Super Speciality)	12	Class-I Gazetted (Technical)	163500-20100	Selection	45 years and Below	As given in Appendix "B" of this Annexure
	8	9	10	11	12	13	
	Age: Not applicable E.Q:yes	(i) 50% by appointment (by selection) failing which by direct recruitment. (ii) 50% by direct recruitment in the manner specified in Appendix "B"	By promotion from amongst the Lecturer who possess Three years regular service or regular combined with continuous ad hoc (rendered upto 31.3.1998) service, if any in the grade which by appointment (by selection from amongst members of H.P. Civil Medical Service (General Wing) having recognized post-graduation degree or its equivalent qualification, in the concerned speciality and possess as last three years teaching experience as Lecturer/Registrar/Demonstrator/Tutor/Sr. Resident/Chief Resident in	As may be constituted by the Govt. From time to time.	As require under the Law		

			the concerned speciality after doing post graduation in the concerned speciality failing				
	Age: Not Applicable	50% by appointment (by selection) failing which by direct recruitment. (i) 50% by direct recruitment in the manner specified in Appendix "B"	By appointment (by selection from amongst the ember of the Himachal Pradesh Civil Medical Services (General Wing) having post Graduate Degree or Post Doctoral degree its equivalent qualification concerned super-speciality and possess at least three year teaching experience as Lecturer/Registrar/Demonstrator/Tutor/Sr. Resident/Chief Resident in the concerned Speciality after doing post-Graduation in the concerned speciality failing which by direct recruitment.	As may be constituted by the Govt from time to time.	As require undue law.		

30. If the petitioners, who were admittedly contractual appointees are not allowed to continue beyond the period of three years in a department where they served as tutor/Junior residents/senior residents, benefit of regularisation in terms of regularisation policy extended to them would be redundant. After regularisation against the post of Sr. Resident/Tutor, petitioners would not only remain on that post indefinitely, rather they being one of the feeder category for promotion to the post of Assistant Professor would also become eligible for promotion to the post of Assistant Professor alongwith other two feeder categories i.e. lecturers with three years teaching experience and members of HP Civil Medical Service having recognized postgraduate degree and possess at least three years experience as Lecturer/Registrar, Demonstrator/Tutor/ Senior Resident/Chief resident. Otherwise also, once the petitioners or other similarly situate persons are ordered to be regularized against the post of Senior Residents/tutor, they being members of Medical Service would otherwise become eligible to be considered for the post of Assistant Professor. Scheme for regularization does facilitate the compliance by the respondents of condition (supra), which preserves their legitimate right for being considered for promotion to the post of Assistant Professor. Since a percentem of promotional quota is reserved for the resident tutors/Senior Resident(s), given theirs comprising the relevant stream of promotion to the promotional post of Assistant Professor, respondents are required to ensure that the petitioners continue to serve in the feeder category till the time they are not promoted to the higher post i.e. Assistant Professor. Any curbing or curtailing of the period/tenure of contractual appointees, in their respective speciality, would definitely close their chances for being promoted to the post of Assistant Professor. Though petitioners and other similarly situate persons after having acquired three years teaching experience as tutor/Sr. Resident, would become eligible for promotion to the post of Assistant Professor, but such benefit of promotion

can only be extended to them in case they are allowed to exist in the feeder category. Once Senior Residents/tutors are debarred from continuing in the same specialty after a period of three years, in terms of clause-7.4 i.e. repeat tenure, they would be no more on the rolls of the department and teaching experience gained by them on account of their having served as Senior resident/tutor, which otherwise make them eligible for promotion to the post of Assistant Professor, would go in vain. After discontinuation of category of the petitioner from the substantive posts of Sr. Resident/Tutor, fresh batch of postgraduate would join at their place and they also after completion of three years would be out of the rolls of the Government and in this process, very object and purpose to create posts of Sr. Resident/Tutor shall be defeated. No doubt person having three years teaching experience as Tutor can compete under 50% quota of direct recruitment to the post of Assistant Professor, but once he /she has chance to be promoted to the post of Assistant Professor under 50% quota of promotion, condition of "Repeat Tenure" cannot be allowed to sustain. HP Medical Education Service Rules (Annexure P-1) provide following essential qualifications for the post of Assistant Professor, which read as under:

> ***"3. Assistant Professor***
> ***Essential qualifications -(i)*** *A recognized medical qualification included in the first or second Schedule or Part-II of the third Schedule (other than Licentiate qualifications) to the Indian Medical Council Act, 1956. Holders of Educational qualification included in Part-II of the Third Schedule should also fulfil the conditions stipulated in subsection (3) of Section 13 of Indian Medical Council Act. 1956.*
> ***(ii)*** *A post-graduate degree in the concerned speciality mentioned in Part-A of Annexure–II or its equivalent qualifications.*
> ***(iii)*** *Atleast 3 years teaching experience as Lecturer/Registrar/Demonstrator, Resident after doing post-graduation in the concerned speciality in any recognized Medical College.*

Desirable qualifications- (i) *Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh.*
(ii) *Publication of research papers in Index Journals.*

4. Assistant Professor (Super-Speciality).
Essential qualifications-
(i) *A recognized medical qualification included in the first or second Schedule or Part-II of the third Schedule (other than licentiate qualifications) to the Indian Medical Council Act, 1956. Holders of Educational qualification(s) included in Part-II of the third Schedule should also fulfil the conditions stipulated in subsection (3) of Section 13 of Indian Medical Council Act. 1956.*
(ii) *Post-graduate and post-doctoral degrees as mentioned in part-A of Annexure –II or its equivalent qualifications in the concerned Super-speciality.*
(iii) *Atleast 3 years teaching experience as Lecturer/Registrar/Demonstrator/ Resident after doing post-graduation in the concerned speciality in any recognized Medical College.*
Note*-Two/Three Years degree course while doing D.M./M.Ch. shall be counted as teaching experience for the purpose of appointment as Assistant Professor (Super-Speciality).*
Desirable qualifications- (i) *Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh.*
(ii) *Publication of research papers in Index Journals."*

31. In the aforesaid clause of essential qualification, a candidate aspiring to be recruited against the direct quota besides having basic qualification also needs to have three years teaching experience as Lecturer, Registrar and Demonstrator and Resident after doing post graduation in the concerned speciality in any recognised medical college. Had the respondent included category of Sr. Residents/tutors in the aforesaid clause, Sr. Resident/tutor after having completed their three years period would have

otherwise become eligible to be appointed against the post of Assistant Professor. However, in the case at hand, neither Sr. Resident/Tutor have been held entitled to be considered to be appointed against the post of Assistant Professor under direct quota nor they have been kept as one of the feeder category among other two feeder categories for their being considered for promotion to the post of Assistant Professor against 50 % quota and as such, condition of "repeat tenure" provided under clause 7.4 cannot be said to be lawful, rather existence of such rule in the Doctor Resident Policy would be totally unfair and unlawful. Allowing the respondents to bar the "repeat tenure" against the post of Sr. Resident/tutor in the apposite feeder channel, would render all the previous service rendered by the petitioners and other similarly situate persons redundant/effaced. Moreover, petitioners, despite falling in the relevant point of roster, as meant for them vis-à-vis the promotional post of Assistant professor would be completely ousted from the categories, who, otherwise are eligible to be promoted against post of Assistant Professor under 50 % quota mentioned for promotion. As a corollary, this Court finds illegality and infirmity in the afore condition barring the "repeat tenure" to the petitioners, against the contractual post of Residents/tutors/tutor specialist and as such, same is declared arbitrary and unjust and accordingly, same deserves to be quashed and set-aside, as a consequence of which, selected candidates against the post concerned are required to be offered letters of appointment forthwith by the respondents provided the initial selection of the candidate concerned is /was in complete adherence of the relevant norms.

32. Consequently, in view of the detailed discussion made herein above, all the petitions are allowed and respondents are directed to regularize the service of the petitioners against the posts of Senior Resident/tutor in their respective specialties forthwith. Similarly clause 7.4 of Doctor Resident Policy is declared to be arbitrary and unjust and as such, same is also

quashed and set-aside, as a consequence of which, respondents are directed to permit the petitioners to continue serving as Senior Residents/tutor specialists, in the medical college, where they were appointed. Needful shall be done by the respondents expeditiously, preferably, within one week. Secretary (Medical Education) shall ensure the aforesaid compliance and affidavit of compliance be filed on or before 12.8.2021.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, ACTING CHIEF JUSTICE AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

The H.P. State Electricity Board Limited
and another .....Petitioners.

Vs.

Sh. Nanak Chand and others .....Respondents.

Review Petition No. 34 of 2018
Date of Decision: 16.07.2021

Code of Civil Procedure, 1908 – Order 47 r/w Sections 114 and 151 – Original Application preferred by the respondents seeking conferment of work charge status from the date they had completed 10 years of continuous service allowed by erstwhile H.P. State Administrative Tribunal – Writ Petitions preferred against the order by HPSEB dismissed vide Judgment date 04-09-2017 – Present review petition filed seeking review of the said judgment – Held, that non- consideration of an issue of limitation whether it was raised or not amounts to an error apparent on the face of record and calls for interference – Petition allowed – Judgment dated 04-09-2017 passed in CWP No. 2398 of 2016 titled as HPSEB Ltd & another - vs. – Nanak Chand & ors. And other connected matters is reviewed and recalled.

For the petitioners: Mr. Ashok Sharma, Senior Advocate, with Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. A.K. Gupta, Advocate.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ravi Malimath, Acting Chief Justice*(Oral):*

This is a petition filed under Order 47, Rule 1 read with Sections 114 and 151 of the Code of Civil Procedure, seeking review of judgment dated 4th September, 2017, passed in CWP No. 2398 of 2016, titled as *HPSEB Ltd. & another* Vs. *Nanak Chand and others & other connected matters.*

2. The brief facts of the case are that the respondents/applicants filed Original Applications before the erstwhile learned Himachal Pradesh State Administrative Tribunal seeking conferment of work charge status from the date they had completed 10 years of continuous service. Vide order dated 24.09.2015, the same was allowed by relying on the judgment passed by the Hon'ble Supreme Court in *Mool Raj Upadhayaya Vs. State of H.P. and others*, reported in 1994 Supp. (2) SCC 316 and other judgments. The same came to be challenged by the respondent therein, namely, the Himachal Pradesh State Electricity Board Limited. By the judgment under review, dated 4th September, 2017, the writ petitions were dismissed by relying on various judgments, as relied upon therein. Thereafter, the instant Review Petition has been filed.

3. The learned Senior Advocate appearing for the review petitioners contends that the judgment under review suffers from an error apparent on the face of record. He contends that there is substantial delay in approaching the learned Tribunal and, therefore, no relief could be granted to the respondents herein and that the question of delay has not been considered by the learned Tribunal. On a challenge being made to the impugned order passed by the learned Tribunal before the High Court, the High Court has also

not adverted to the delay. Notwithstanding the merits of the case, he contends that non-consideration of the question of limitation would render the matter to be hit by an error apparent on the face of record. In support whereof, he relied on the judgment of the Hon'ble Supreme Court in *Ramesh Chand Sharma Vs. Udham Singh Kamal and others,* reported in(1999) 8 Supreme Court Cases 304 and *D.C.S Negi Vs. Union of India and others,* reported in (2018) 16 Supreme Court Cases 721.

4. The same is disputed by Mr. A.K. Gupta, learned counsel appearing for the respondents. He contends that there is no error apparent on the face of record. He further submits that in identical circumstances, relief has been granted by the Board itself to various employees, therefore, such a relief requires to be granted to the respondents herein. He further submits that even though there was a delay in certain cases, the applicants therein have received favourable orders from the learned Tribunal and those orders having been implemented by the Board, therefore, now the Board to file this petition, so far as these respondents are concerned, is unjustified. Hence, he prays that the petition be dismissed.

5. Heard learned counsels.

6. The primary contention is on delay. The case of the Board is that the ground of delay was pleaded before the Tribunal but the same was not considered. That it was duty of the Tribunal to consider the same. Even before the Hon'ble High Court, the ground of delay has not been considered. Failure to consider the ground of delay is therefore, an error apparent on the face of the record. Hence, by relying on the aforesaid judgment of the Hon'ble Supreme Court, he pleads that the petition be allowed.

7. We have examined the records. A number of cases were filed before the Tribunal. The ground of delay has not been raised in each and every case before the Tribunal. However, we notice that the grounds of delay were pleaded in some of the cases before the Tribunal. Further more, the ground of

delay was not considered in the order under Review, ostensibly on the ground that the same was not considered by the Tribunal. Non-consideration of the grounds of delay has, therefore, not only led to gross miscarriage of justice but also the same would amount to an error apparent on the face of the record.

8. The Hon'ble Supreme Court in identical circumstances, referred to the said question in *D.C.S. Negi's case (supra)*, wherein, it was held in para-14 as follows:

> *"14. In the present case, the Tribunal entertained and decided the application without even adverting to the issue of limitation. The learned counsel for the petitioner tried to explain this omission by pointing out that in the reply filed on behalf of the respondents, no such objection was raised but we have not felt impressed. In our view, the Tribunal cannot abdicate its duty to act in accordance with the Statute under which it is established and the fact that an objection of limitation is not raised by the respondent/non-applicant is not at all relevant."*

9. The learned Senior Advocate for the Board contends that the question of delay has been raised in a couple of cases, though there was a batch of cases and he is not sure that such a ground was pleaded in all the cases.

10. Be that as it may, the Hon'ble Supreme Court has held in para-14 of the judgment (*supra*) that even though there was no objection with regard to the question of delay, the Tribunal cannot abdicate its duty to act in accordance with the Statute under which it is established and the fact that an objection of limitation was not raised is not at all relevant. The facts involved herein are identical. Hence, we find that there was an error apparent on the face of record, which calls for interference.

11. Regarding the submission of the learned counsel for the respondents that there was no delay and therefore, the prayer for review should not be allowed, we are of the considered view that what is an error apparent on

the face of record is the non-consideration of the ground of limitation. Whether the limitation requires to be condoned or not is a matter to be decided when the question of limitation is considered. Merits of the contention on limitation cannot be decided by us in these proceedings. It has to be decided in the appropriate Court. It is, therefore, in that Court, that an objection, that the petitions are within limitation or otherwise, can be raised and which shall be considered. We are of the view that being a Review Court, we cannot go into the question whether the petitions are hit by limitation or not.

12. It is suffice to hold that based on the aforesaid judgment of the Hon'ble Supreme Court, non-consideration of an issue of limitation whether it was raised or not, amounts to an error apparent on the face of record and hence the same calls for interference.

13. For all the aforesaid reasons, the petition is allowed. The judgment dated 4th September, 2017, passed in CWP No. 2398 of 2016, titled as *HPSEB Ltd. & another Vs. Nanak Chand and others and other connected matters* is reviewed and recalled. The writ petitions are restored to file.

14. In view of the pendency of the matter for a long period of time, we request the learned Bench to take up the matter as expeditiously as possible.

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

Tek Chand .....Appellant

Versus

Ratu Devi .....Respondent

F.A.O. No. 162 of 2012
Judgment reserved on: 15.7.2021
Decided on: 23.7.2021

Hindu Marriage Act, 1955 - Section 13 (1) (ib) – Petition for divorce on the ground of desertion under section 13 (1) (ib) filled by the Appellant dismissed

by the trial court – Challenged by way of instant appeal – Held, that issues involved in the petition under Section 9 of the Act was directly and substantially the same as in the petition in hand – Petitioner / Appellant precluded from claiming that the respondent had left his company without any reasonable cause on the principle of 'res-judicata" - Statutory period of two years had not elapsed before filing the petition – No case made out for interference with the impugned judgment and decree – Appeal dismissed.

For the appellant:- Mr. B.C. Verma, Advocate.

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

(Through Video Conference)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Appellant, by way of the instant appeal, has assailed the judgment and decree dated 20.07.2011, passed by learned District Judge, Mandi, HP, in case H.M.P. No.30/2008 titled Tek Chand Versus Ratu Devi.

2. Appellant was petitioner before the trial Court. He sought a decree of divorce on the ground of desertion under Section 13(1)(ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act' for short). The petition filed by the petitioner was dismissed vide judgment and decree impugned in the present appeal. The parties, for the sake of convenience and clarity, herein are addressed in the same manner as before the trial Court i.e. as petitioner and respondent.

3. The petition for dissolution of marriage was instituted by the petitioner on 11.09.2008. Petitioner had averred that respondent was his legally wedded wife since 1990. Two sons and a daughter were born out of their wedlock, who were minors at the time of filing of the petition.

4. Petitioner further alleged that respondent started disobeying and neglecting him on petty matters, so much so, that she turned indifferent and

hostile towards him and the children. It was also contended by petitioner that he was physically disabled, and for this reason, respondent started ignoring him.

5. According to petitioner, he and parents of the respondent were residents of the same village. Respondent without caring for the maintenance and welfare of minor children, started living for longer duration at the house of her parents. Repeated efforts by petitioner to call her back were ignored by respondent. She finally withdrew herself from the company of the petitioner w.e.f. 30.08.2006, whereafter she completely deserted and neglected the petitioner.

6. Petitioner also mentioned in the petition that he had also filed a case under Section 9 of the Act against the respondent on an earlier occasion but the same was dismissed by learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, H.P., *vide* judgment and decree dated 07.08.2008.

7. Per contra, respondent by way of written reply denied all the averments made in the petition in generality. In addition, respondent took a specific stand that so long as she lived in her matrimonial home her life was made miserable by the petitioner, who always quarreled with her. Petitioner was blamed to be the creator of entire trouble. According to respondent, petitioner did not treat her as his life partner. She was ill-treated and maltreated regularly.

8. It was further contended by respondent that in February, 2006, she was turned out from her matrimonial home by the petitioner without any reasonable cause or excuse. She also alleged of being manhandled by the petitioner.

9. As per respondent, she lodged a complaint with Gram Panchayat Baila, Tehsil Chachiot, District Mandi, where a compromise dated 04.04.2006 was arrived *inter se* the parties and petitioner agreed to keep her with him in future without giving her any cause of annoyance or complaint. On such assurance/ promise respondent stayed with petitioner intermittently.

10. Respondent further alleged that on 08.09.2006, petitioner swore an affidavit before Notary Public promising not to torture or maltreat the respondent and to keep her with him providing all necessities of life. As per respondent, she joined the company of petitioner for about 15 days immediately after 08.09.2006 but was again ill-treated and forced to leave the matrimonial home.

11. Respondent admitted the factum of filing of and decision in the petition under Section 9 of the Act filed by petitioner. She, however, asserted that the petition was hotly contested by her and the petitioner was found at fault being responsible for willfully deserting and neglecting the respondent after administering beatings to her.

12. Respondent specifically denied that she left her matrimonial home w.e.f. 30.08.2006 and asserted that she lived in the company of the petitioner for about 15 days after 08.09.2006 and she was turned out of the matrimonial home by the petitioner on or about 25.09.2006.

13. In short, defence of respondent was that her absence from matrimonial home was not without reasonable cause.

14. The averments made in the reply by the respondent were not rebutted by the petitioner by filing rejoinder.

15. Learned trial Court framed following issues arising from the pleadings of the parties:

1. Whether the respondent has deserted the petitioner without reasonable cause? OPP

2. Relief.

16. Parties were put to trial. Petitioner besides himself, as his own witness, (PW-1), examined one Sh. Inder Singh as PW-2. On the other hand, respondent examined herself as RW-1, besides one Sh. Ram Singh as RW-2. In addition, petitioner tendered copy of "Parivar" register Ext. PA in evidence. Respondent also placed on record certain documents viz. photocopy of compromise "Mark X", photocopy of compromise "Mark Y", copy of affidavit Mark

Z" and photocopy of order dated 7.8.2008 passed by learned Civil Judge(Junior Division), Chachiot at Gohar, District Mandi"Mark Z".

17. Learned Trial Court, after taking into consideration oral as well as documentary evidence on record, proceeded to dismiss the petition of the petitioner by holding that there was no evidence to conclude that the respondent had left the company of the petitioner with an intention to permanently bring cohabitation to an end. Learned trial Court held that necessary ingredients for seeking divorce on the ground of desertion were not proved by the petitioner.

18. Petitioner has assailed the impugned judgment mainly on the following grounds: -

i) The findings recorded by learned trial Court were vitiated on account of misreading and mis-appreciation of pleadings and evidence of the parties.

ii) Respondent had failed to prove factum of complaint having been filed by her against petitioner to the Gram Panchayat. It was inferable from record that respondent has deserted the petitioner with no intention to join his company.

19. I have heard learned Counsel for the parties and have gone through the records carefully.

20. Petitioner tendered his examination-in-chief by way of affidavit Ext. PA. Contents of Ext. PA and petition weresubstantially identical. In cross examination petitioner denied that he maltreated respondentand that a complaint was made by respondent against him to the Panchayat on 04.04.2006. He also denied that the matter was patched up on his statement made before Gram Panchayat. He further denied having made false allegations against respondent before the police and also having sworn an affidavit dated 08.09.2006. He denied that respondent remained with him till 25.09.2006. It was also denied that on 30.08.2006, he had given beatings to his wife and torn her clothes. He even denied that the case filed by him under Section 9 of the Act was dismissed by learned Civil Judge (Junior Division) Chachiot at Gohar,

District Mandi, H.P. by observing that petitioner was at fault. Petitioner admitted that respondent remained nicely with him and the children up to 30.08.2006 and that he had filed a case under Section 9 of the Act against respondent.

21. PW-2, Inder Singh also tendered his examination-in-chief by way of an affidavit in which he specifically stated that after about 10 years of peaceful married life respondent started disobeying and neglecting the petitioner on petty matters. She turned indifferent and hostiletowards petitioner and minor children. Respondent ignored the children and the petitioner and ultimately left the society of petitioner w.e.f. 30.08.2006 permanently. In cross-examination, he admitted his signature on document "Mark-X"at point "A" but feigned ignorance about its contents. He denied that the petitioner used to maltreat respondent.

22. Respondent also tendered her examination-in-chief by way of an affidavit RW1/A in which she reiterated the stand taken in her written reply. In her cross-examination, she admitted that she was residing inthe house of her parents since last 4-5 years. She admitted that her husband was disabled and walked with the help of crutches. However, she clarified when she startedresiding with her parents, at that timeher husband wasnot disabled. She denied that she left her husband in a disabled condition and she did not want to reside with her husband on account of his disability.

23. It is evident from the cross-examination of this witness that material facts stated by her on oath, were neither challenged nor contradictory. Facts,*viz.* complaint was made by her to Gram Panchayat Baila, compromisewas affected thereafter,petitioner swore an affidavit dated 08.09.2006 to the effect that he would not torture and maltreat respondent and respondent resided with the petitionertill 25.09.2006 remained unchallenged.

24. RW-2, Ram Singh also tendered his examination-in chief by way of an affidavit Ext. RW-2/A. He stated that in February 2006, respondent was hammered by petitioner without any cause or excuse and was turned out of matrimonial home. She made a complaint to Gram Panchayat Baila. Petitioner

swore an affidavit dated 08.09.2006 stating therein that he would not torture and maltreat respondent. Petitioner failed to keep his words andturnedrespondent out from matrimonial house. In cross-examination RW-2 admitted that petitioner was disabled but qualified that he had become disabled recently and was alright earlier. He denied that petitioner was not giving beatings to the respondent. He admitted that respondent had not visited the petitioner after his becoming disabled.

25. In order to make out a case for dissolution of marriage on the ground of desertion under the Act, certain basic and jurisdictional facts become necessary to be pleaded and proved. Section 13(1)(ib) of the Act reads as under:-

> ***"Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground:***
> ***that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition."***

26. The explanation appended to Section 13(1) further reads as under:-

> ***"In this sub Section, the 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."***

27. In order to succeed, it was for petitioner to plead and prove *firstly* that the respondent had deserted him for a continuous period of two years immediately preceding the date of filing of petition, *secondly* that such desertion was without reasonable cause and without the consent or against the wish of petitioner and *thirdly* that respondent had willfully neglected him.

28. Perusal of oral evidence led by the parties reveal that the petitioner has failed to discharge the burden placed upon him. It was for the petitioner to plead and prove that respondent had deserted him for continuous period of two years immediately preceding the date of filing of petition without any reasonable

cause. Except the bald statement of petitioner there is no corroboration to his version. Though, PW-2 has stepped into witness box to support the case of the petitioner but his testimony cannot be put to much use for the reason that he had not disclosed as to how he was aware about the facts which were very personal to petitioner and respondent?. How and in what manner he was related to the family of petitioner or respondent? In absence of such explanation this witness can be presumed to be a procured witness. Statement of PW-2 is otherwise also not worth credence especially when he claimed himself to be a Vice President of Panchayat and feigned ignorance about contents of document Mark-X despite the fact that he admitted his signature on such document. For the reasons so stated, the statement of PW-2 cannot be relied upon for the purpose of being corroborative to the claim of the petitioner.

29. The evidence led by petitioner, as noted above, lacks in essence. He admits in first line of his cross examination that respondent was nice to him till 30.8.2006. As per petitioner, respondent had permanently left him on 30.8.2006. If everything was fine till 30.6.2008 then what happened on said date prompting respondent to leave home, remained unexplained. Petitioner by making such statement has wiped out his allegations, as made by him in the petition, against respondent.

30. Learned Counsel for the petitioner has vehemently urged that the respondent has failed to prove her assertions with respect to maltreatment etc. at the hands of the petitioner, so much so that she had not been able to prove the allegations of complaint being made by her to Gram Panchayat Baila, Tehsil Chachiot, District Mandi, H.P., resultant compromise arrived *inter se* the parties on 04.04.2006 and subsequent affidavit sworn in by the petitioner on 08.09.2006. Even though, learned counsel for the petitioner is right in saying that the documents produced by the respondent were not proved in accordance with law, but the petitioner cannot escape from the consequences of not contradicting respondent in her cross examination on the aspect of execution of

said documents especially when such documents were pressed into service to prove the factum of ill and mal-treatment of respondent at the hands of petitioner.

31. Above all, the parties were not at dispute that there had been a previous litigation between them in pursuance to petition under Section 9 of the Act filed by the petitioner against the respondent. It is also not disputed that the Court which adjudicated upon said petition had jurisdiction to decide the matter. The judgment and decree passed in said petition find place on record as "mark Z". None of the parties have disputed the correctness and authenticity of the photocopy of judgment dated 07.08.2008 passed by learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, H.P. in HMP No. 1-III/2007. The issues framed in said judgment find place at page-3 thereof which read as under: -

1. *Whether the respondent has left the society of the petitioner without any reasonable cause as alleged? OPP.*

2. *Whether the petition filed is not maintainable as the petitioner has maltreated respondents and has treated her cruelty and has deserted her as alleged? OPR.*

3. *Relief.*

32. On the above issues, learned Civil Judge (Jr. Divn.), Chachiot at Gohar, District Mandi, H.P. has returned following specific findings in para-15 of the judgment:-

> ***"In the present case, it has come on record that the petitioner is estopped and cannot walk. However, the sole ground does not in any manner entitle the petitioner to the relief of restitution of conjugal rights and solely on the ground sympathy of the court cannot be attracted. It has come on record that the petitioner used to ill-treat the respondent and regarding if the respondent had also approached the panchayat who had tried to settle the dispute amicably. The demeanor of the petitioner was also watched throughout the proceeding of the litigation which too was not found***

satisfactory. beside his sole testimony no other evidence has been adduced by the petitioner in support of his pleadings. On the other hand, as discussed by me above, the respondent has been able to establish that she is not residing with the petitioner since, he used to physically beat her and ill-treat her. Thus, on my above findings, the issue no.1 is decided against the petitioner and issue no 2 is decided in favour of the respondent."

33. From the above, it is clear that the issues involved in the petition under Section 9 of the Act were directly and substantially the same as in the petition in hand, therefore, the findings recorded by learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, H.P. in Case No. HMP No.1-III/2007 having attained finality became *res-judicata* between the parties. The petitioner, therefore, was precluded from claiming that the respondent had left his company without any reasonable and probable cause, which is *sine-qua-non* for grant of relief to the petitioner.

34. In light of above discussion, no fault can be found in the impugned judgment as far as appreciation of the evidence is concerned. Learned Trial Court has considered and taken into account the oral as well as documentary evidence on record. The view arrived at by learned trial Court is reasonable and does not suffer from any perversity.

35. Section 13 (1) (ib) of the Act also makes it imperative that a minimum period of two years of desertion is required to elapse in order to entitle a person to institute petition under said section. The language of aforesaid provision of the Act leaves no doubt about the mandate of the legislature in this behalf because the expression used is "deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition".

36. In the case in hand, though petitioner had mentioned a specific date, i.e. 30.08.2006, on which respondent had left his house, but respondent had taken a specific stand that she resided in the house of the petitioner for

about 15 days w.e.f. 08.09.2006 till about 25.09.2006 and thereafter left the matrimonial home.

37. While assessing the material on record, in order to appreciate rival contentions in this behalf, it can be said that the petitioner has not led any corroborative evidence to prove the actual date of desertion. He only relied upon his own statement in this behalf. The respondent, on the other hand, in her examination-in-chief tendered by way of an affidavit Ext. RW1/A, specifically mentioned about the factum of the affidavit dated 08.09.2006, having been sworn by the petitioner and also that she thereafter joined the company of the petitioner and resided with him for about 15 days till about 25.09.2006. In cross examination of the respondent, conducted on behalf of the petitioner, this part of the statement has not been challenged at all, meaning thereby that the petitioner admitted this version of the respondent. This being so, the conclusion that the petition was filed by the petitioner prematurely without waiting for statutory period of two years, becomes inevitable. The petition was instituted on 11.09.2008 and as concluded above, respondent has been able to prove that she lived in the company of the petitioner till 25.09.2006. The statutory period of two years had not elapsed before filing the petition. Hence, the petition was not maintainable and liable to be dismissed on this score alone.

38. Though, this fact escaped from the notice of the learned trial Court, yet, this Court in exercise of appellate jurisdiction is not precluded from noticing the illegality apparent on the face of record and to adjudicate on it in accordance with law.

39. The appellant has failed to make out any case for interference with the impugned judgment and decree, hence, the same is affirmed. Consequently, the appeal is dismissed with no order as to costs. Decree sheet be drawn accordingly.

40. Record of learned Trial Court be returned.

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

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

Sukh Ram ...Petitioner

Versus

Smt. Surtu Devi ...Respondent

C.R. No.: 111 of 2019
Decided on:12.07.2021

Code of Civil Procedure, 1908 – Section 115 – Objections preferred in Execution Petition for execution of decree for possession – Order passed on 29-03-2017 adjourning the case for settlement of issues and later on case listed for consideration on 30-05-2019 – Objections filed by the petitioner dismissed and warrant of possession ordered to be issued – Challenge thereof- Held, that once order stood passed by the Ld. Executing Court that issues are required to be framed for the purpose of determination of objections, then recalling said order is completely non-speaking order which is not sustainable – Jurisdiction vested in the Ld. Executing Court has been exercised by it with material irregularity which renders order dated 07-05-2019 bad in law – Resultantly, impugned order dated 13-06-2019 also not sustainable in law – Petition allowed – Order dated 13-06-2019 quashed and set aside – order dated 07-05-2019 also quashed and set aside and the matter is remanded back to the Ld. Executing Court with a direction that issues be framed in terms of order dated 29-03-2017 and then objections be decided.Title: Sukh Ram vs. Smt. Surtu Devi Page-313

For the petitioner : Mr. B.S. Chauhan, Sr. Advocate
with Mr. Munish Datwalia,
Advocate.

For the respondent : Mr. Praveen Chandel,
Advocate.

(Through Video Conference)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Section 115 of the Code of Civil Procedure, the petitioner has prayed for the following relief:-

> *"It is, therefore, prayed that the petition may kindly be allowed in view of the submission made here in above and order dated 13.06.2019 (Annexure P-4) passed in Ex. Petition No. 29/2004 titled as Surtu Devi vs. Sukh Ram may be ordered to be set aside and quashed in the facts and circumstances of the case."*

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

A decree for possession of land bearing Khasra No. 805, measuring 3-12-17 bighas and Khasra No. 899, measuring 2-1-2 bighas, situated in Mohal Darat Bagla, Tehsil Jogindernagar, District Mandi, H.P. has been passed in favour of the respondent/Decree Holder by the Court of learned Civil Judge (Jr. Divn.), Jogindernagar, on 30.11.2012, which judgment has attained finality as the appeal preferred against the same by the defendant stood dismissed. These facts are not in dispute. Thereafter an execution petition was filed by present respondent/Decree Holder for the execution of the decree. Vide Annexure P-2, Objections were filed against the same by the present petitioner/Judgment debtor, *inter alia* taking the stand that after the passing of the judgment, the matter stood compromised between the Decree Holder and the Judgment Debtor and Decree Holder had held out that the decree shall not be executed and that the suit land shall be partitioned. In the reply, which was filed to the Objections by the Decree Holder, it was specifically denied that any compromise was ever entered into

between the parties. Record demonstrates that thereafter the matter was listed on several dates before the learned Executing Court for consideration.

3. On 07.03.2017, the objections were heard and the case was ordered to be listed for orders on objections on 29.03.2017. However, on 29.03.2017, no orders were pronounced on the objections and rather the learned Executing Court passed by the following order:

> *"The case is listed for order on objection. However, issues are not yet framed. Now to come up for settlement of issues on 20.05.2017."*

4. The grievance of the petitioner is that despite a specific express order having been passed by the Court that Issues were required to be framed, on 07.05.2019, learned Executing Court, all of a sudden, passed the following effect:-

> *"The case was inadvertently listed for determination of points, however, there is no need of determination of point. Let case be listed for consideration on 30.05.2019."*

5. Thereafter, impugned order dated 13.06.2019 has been passed vide which the objections filed by the petitioner have been dismissed and warrant of possession has been ordered to be issued.

6. Mr. B.S. Chauhan, learned Senior Counsel appearing for the petitioner has argued that once learned Executing Court, in its wisdom, on 29.03.2017, had ordered the framing of Issues, then, the act of the learned Executing Court of unilaterally and *suo motu* reviewing the same vide order dated 07.05.2019 is not sustainable in law because no reasons stand mentioned by the learned Executing Court in its order dated 07.05.2019 as to why there was a change in heart and as to why learned Executing Court was of the view that the case was inadvertently listed for determination of points on previous occasion. Learned Senior Counsel has argued that once there was an order for framing of Issues, then, learned Executing Court was bound to have had framed the Issues and after calling upon the parties to record their

evidence in support of their respective contentions qua the Issues, appropriate order should have been passed by the learned Executing Court on the Objections. Failure on the part of the learned Executing Court to do so, has resulted in grave injustice to the petitioner, and in this background, learned Senior Counsel submits that the impugned order be set aside and the case be remanded back to the learned Executing Court for adjudication afresh after framing the Issues.

7. Opposing the petition, Mr. Praveen Chandel, learned Counsel for the respondent has submitted that there is no infirmity in the order passed by learned Executing Court on 07.05.2019, vide which, it ordered that case was inadvertently listed for determination of points because in the absence of any compromise having been entered into between the parties, there was no need to frame any Issue. He further submitted that on 17.05.2019 when the order was passed by learned Executing Court, no objections were raised qua the said order by the judgment debtor nor any protest was made thereafter and it is only because the main Objections have been decided against the present petitioner that this petition has been filed to defeat the ends of justice. On these bases, he submitted that the present petition be dismissed.

8. I have heard learned Counsel appearing for the parties and also gone through the impugned orders as well as the documents appended with the petition.

9. Under the provisions of Section 115 of the Code of Civil Procedure, the High Court interferes with the orders passed by the learned Courts below on the happening of any of the following three things: (1) If the impugned order has been passed by the Court by exercising jurisdiction not vested in it; (2) if the impugned order has been passed by the Court by not exercising jurisdiction vested in it; and/or (3) if the impugned order has been passed by the Court below by exercising jurisdiction vested in it with material irregularity. In the considered view of the this Court, this case falls in the

third category. No doubt, there was no bar for the learned Executing Court to have decided the Objections to the execution, either by framing the Issues or without framing the Issues, but once order stood passed by the learned Executing Court that issues are required to be framed for the purpose of determination of the Objections, then the act of learned Executing Court of arbitrarily recalling said order vide order dated 07.05.2019, which is completely a non-speaking order, as it does not reflects as to how learned Executing Court came to the conclusion that determination of Issues was not needed, is not sustainable in law. Here it is not a case where the earlier order passed by learned Executing Court ordering that Issues be framed was challenged by the Decree Holder either before the superior Court of law or before that Court itself, seeking recall of said order. Record also does not demonstrates that before passing order on 07.05.2019, any opportunity was given by the learned Executing Court to the Judgment Debtor as to why the previous orders be not recalled. That being the case, the jurisdiction vested in the learned Executing Court has been exercised by it with material irregularity for the reason that the Court could not have arbitrarily departed from its earlier orders in the absence of there being any challenge to the same. This renders order dated 07.05.2019 passed by learned Executing Court as bad in law. Resultantly, impugned order dated 13.06.2019 is also not sustainable in law because minimum the law required was that once learned Executing Court had earlier ordered that Issues were required to be framed to decide the Objections, then, it was incumbent upon the learned Executing Court to have had framed the Issues and after giving opportunity to the parties to lead their respective evidence decided the same as per law.

10. In view of the discussion held hereinabove, this petition succeeds and order dated 13.06.2019 is quashed and set aside. It is further held that order dated 07.05.2019, vide which, the learned Executing Court held that there was no need of determination of any point, is also quashed

and set aside and the matter is remanded back to the learned Executing Court with the direction that the Issues be framed in terms of earlier order dated 29.03.2017, and thereafter, the Objections be decided after giving reasonable opportunity to both the parties to lead their respective evidence. Taking into consideration the fact that the Execution petition has been filed for execution of a decree passed in the year 2012, it is ordered that Issues shall positively be framed by the learned Executing Court in the execution petition on the Objections filed by the Judgment Debtor within two weeks from today and as from the date of framing of Issues, only two opportunities each shall be given to the parties to lead their respective evidence on self responsibility with regard to their respective contentions and the Issues so framed, and thereafter, appropriate orders on the Objections be passed on or before 30.11.2021.

11. It is clarified that this Court has not expressed any view with regard to the merit of the case and the execution petition shall be taken to its logical conclusion by the learned Executing Court uninfluenced by any observation made by this Court while disposing of this petition.

With these observations, the petition stands disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Sh. Tilak Raj ....Petitioner.

Versus

Municipal Council, Hamirpur and another ...Respondents.

CWP No. 7811 of 2012
Reserved on: 02.03.2021.

Decided on : 29.04.2021

Constitution of India, 1950 -Article 226 – Petitioner running a business of selling tea, eatables etc. from a stall/rehri in ward no. 6 Hamirpur on payment of Rs. 200/- to M.C. Hamirpur – Stall/rehri vacated by Petitioner in lieu of understanding that one shop was to be allotted to the petitioner on payment of construction cost of Rs. 85,000/-. Petitioner deposited the said amount but no shop allotted to him and money was also returned – Challenged in the instant petition – Held, that petitioner was not eligible for allotment of the shop and no indefeasible right has accrued upon him for allotment of the shop – Petition disposed of accordingly but with an observation that in the event of some shops being still vacant with respondent no. 2, one of the shops be offered to the petitioner subject to acceptance of offer by the petitioner and execution of agreement in this regard.

For the petitioner : Mr. Suneet Goel, Advocate.

For the respondents :Mr. Anil Kumar God, Advocate for respondent No. 1.
Mr. Ashok Sharma, Advocate General with M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has sought a direction that the respondents be directed to allot one shop to him in the Complex constructed around the Stadium, Hamirpur, on receipt of assessed amount of `85,000/-.

2. The case of the petitioner is that he was running the business of selling tea, eatables etc. from a stall/rehri near the boundary wall of Taxi Stand-cum-Stadium in Ward No. 6, Hamirpur, for the last many years. The petitioner was duly authorized to hold the stall at the location from where he was running his business and he was paying an amount of `200/- in this regard to the Municipal Council, Hamirpur. Alongwith the petition, he has appended as Annexure P-2 the Tehbazari tickets to demonstrate that he was paying an amount of `200/- per month to the Municipal Council, Hamirpur. As per the petitioner, in the month of July, 2011, respondents requested him to remove his stall/rehri for the purpose of construction of shops around the Stadium at Hamirpur. In lieu thereof, it was agreed that respondents shall allot one of the shops proposed to be constructed around the Stadium to the petitioner. He was to be rehabilitated/relocated in the said shop on payment of construction cost of `85,000/-. It is further the case of the petitioner that he deposited the said amount vide receipt dated 27.07.2011 (Annexure P-3). As per him, respondent-Council passed resolution No. 7/2011 on 14.06.2011, whereby the shops proposed to be constructed around the Stadium were to be allotted to the existing stall/rehri holders. In the month of February, 2012, petitioner came to know that the respondent-Council was not intending to make allotment of the shop to him as was agreed to by the Council earlier. The petitioner thereafter made a representation to the Sub Divisional Magistrate, Hamirpur, for allotment of one shop to him, who in turn marked his request to the Chief Executive Officer of respondent No. 1. However, vide letter dated 18.02.2012, respondent intimated the petitioner that the list of the beneficiaries stood finalized and it was not possible to accommodate the petitioner. According to the petitioner, spot verification of the stalls/rehris was done to finalize the list of allottees of the shops proposed to be constructed around the Stadium, however, as the petitioner was not present at the spot on the date of spot inspection due to illness of his mother, the amount earlier

deposited by him was returned to him vide cheque No. 025306, dated 27.09.2011, after a lapse of about two months. The petitioner again represented to the Sub Divisional Magistrate, Hamirpur, vide annexure P-5. He also approached the Executive Officer of respondent No. 1, but he was informed that as the list of beneficiaries stood finalized, the petitioner could not be accommodated. Thereafter, the petitioner also made a representation to the Deputy Commissioner (Annexure P-6), but he was again informed vide Annexure P-7 dated 03.05.2012 that as the list of beneficiaries stood finalized, the petitioner could not be accommodated. The petitioner filed a civil suit bearing No. 48 of 2012 in the Court of learned Civil Judge (Senior Division), Court No. 1, Hamirpur, for a decree of permanent prohibitory injunction restraining the respondents from making allotment of shops around the Stadium, and in case, the allotment stood made, then, for a decree of mandatory injunction directing the respondents to make allotment of one shop in his favour also. Alongwith the civil suit, an application for interim relief was also filed. Though initially, interim relief was granted in favour of the petitioner, however, the suit was subsequently withdrawn by the petitioner, with liberty to seek appropriate remedy for the redressal of his grievance. It is in this background that the present petition stood filed by the petitioner praying for the relief already mentioned hereinabove. As per the petitioners, denial of the shop to him by respondents is bad in law as the stall/rehri was vacated by him in lieu of the clear understanding that one shop was to be allotted to the petitioner on the payment of construction cost of `85,000/- and despite the fact that he duly deposited the said amount, no shop was allotted to him and money was also subsequently returned to him, which act of the respondent-Council, according to the petitioner, is arbitrary as other persons similarly situated as the petitioner were accommodated and the petitioner has been wrongly denied the allotment of the shop.

3. The petition is opposed by the respondent-Council *inter alia* on the ground that the sole authority for the purpose of shop allotment was with the Committee of the Society for Promotion of Sports, Culture, Education and other Developmental Activities, which was a society registered under Himachal Pradesh Societies Registration Act 2006 to be headed by Deputy Commissioner, Hamirpur. It is further the case of said respondent that the allotment of the shops was the sole prerogative of the society and the replying respondent had no major role in the allotment of the shops. As per said respondent, meeting of the society was held on 17.09.2012 to finalize the criteria of allotment of shops, and it was unanimously decided that allotments were to be made to the persons who had been displaced from the places where the shops stood constructed. This was subject to the condition that allotments were to be made to the *bonafide* residents of Himachal Pradesh and only to one person of a family and not to both husband and wife simultaneously. The shopping complex was constructed by Himachal Pradesh Public Works Department, Hamirpur, and replying respondent was only a member of the society and it was the society, which was having the authority to take decisions for allotment of the shops. On the directions of the Deputy Commissioner, Sub Divisional Magistrate alongwith revenue officials had visited the spot where shopping complex was to be constructed to finalize the list of beneficiaries. The petitioner was not found carrying out any business on the spot and the Sub Divisional Magistrate verbally directed the replying respondent to remove his name from the list of beneficiaries. The name of the petitioner was initially added in the list on account of his depositing a sum of `85,000/-, which was thereafter refunded to him. As per the said respondent, at the time of spot inspection, neither the petitioner nor any rehri was found in the planning area, i.e. Taxi Stand-cum-Stadium to be run by the petitioner and as the petitioner was not found eligible to be included in the list of beneficiaries, his name was therefore rightly ordered to be removed from the said list.

4. During the pendency of this petition, an application under Order 1, Rule 10 of the Code of Civil Procedure was moved by the petitioner for impleadment of Committee of the Society for Promotion of Sports, Culture, Education and other Developmental Activities, through Deputy Commissioner, Hamirpur, as respondent No. 2, which was allowed by this Court vide order dated 24.12.2019.

5. The stand of respondent No. 2 before this Court is that the meeting of the Committee was held on 23.05.2018 in compliance to the order passed by this Court dated 10.05.2018 in CWP No. 10874 of 2012, titled as Balbir Chand & others vs. State of HP and others, for an amicable settlement. In this meeting, the petitioner outrightly declined the offer for allotment of one shop on the top floor of the complex and further a second round of deliberation was held, wherein the petitioner came forth with a written demand to settle the dispute if he was allotted two shops on the ground floor. Another attempt was made wherein it was proposed that the spot be visited alongwith the petitioner to settle the dispute by allotting him a single shop, but in spite of that, the petitioner remained adamant for allotment of two shops. It is further the stand of the said respondent that as the petitioner was not found eligible for allotment of shop in the new complex as he was not running any business within the planning area, nor he was displaced on account of construction of the shops, therefore, his name was rightly removed from the list of beneficiaries and simply because the petitioner deposited some amount, the same could not entitle him for the allotment of the shop. It is further the stand of respondent No. 2 that the construction of the shops was done in the larger interest of public and the process of allotment was done by following due process of law in terms of the eligibility criteria.

6. By way of rejoinder, which has been filed by the petitioner to the replies filed by the respondents, he has reiterated his case and denied the stand of the respondents.

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

8. The case of the petitioner in a nutshell is that he was running a stall/rehri at a place whereupon respondents proposed to construct a Sports Complex and the petitioner was called upon to vacate the spot alongwith other such persons so that the place could be utilized for the construction of the sports complex. It is further the case of the petitioner that he was assured that in lieu of vacation of the place, he will be allotted a shop in the complex proposed to be constructed on his depositing a sum of `85,000/-, which amount was duly paid by him but despite this, his name was arbitrarily removed from the list of beneficiaries and the said amount was returned to him despite the fact that he was eligible for allotment of the shops.

9. The case of the petitioner that he was eligible for allotment of the shop has been denied by both the respondents. In my considered view, the onus to prove that the petitioner was entitled for allotment of the shop was upon him, who failed to rebut, by placing any cogent material on record, the stand of the respondents, that the petitioner was not found running any business in the planning area. Incidentally, it is the admitted case of the parties that the planning area was visited by Sub Divisional Magistrate alongwith other revenue officers/officials on the direction of the Deputy Commissioner, Hamirpur and during the site inspection, the petitioner was not found running any business at the spot. Though, the petitioner has tried to explain it by saying that he was not present at the spot on the relevant date on account of illness of his mother but except bald assertions so made in the petition, no material has been placed on record by the petitioner to prove this fact. In this background, it is difficult to believe that the petitioner was in fact eligible for the allotment of the shop and that his name was arbitrarily removed from the list of beneficiaries. The Court concurs with the stand taken by the respondents that as the petitioner was not eligible for allotment of the shop,

therefore, by simply paying the amount of `85,000/-, no indefeasible right has accrued upon him for allotment of the shop. As far as placing on record the Tehbazari receipts is concerned, in my considered view, this will also not improve the case of the petitioner for the simple reason that from the said receipts, it is not clear that the petitioner was running any business/stall etc. in the planning area.

10. Incidentally, in the reply which has been filed by respondent No. 2, said respondent has taken a specific stand that the petitioner was offered a shop on the top floor, which he refused to take despite repeated endeavours made in this regard by the said respondent. According to respondent No. 2, the petitioner was insisting upon for allotment of two shops on the ground floor. Be that as it may, though this Court does not finds any merit in the present petition so as to issue a writ of mandamus directing the respondents to offer a shop to the petitioner by holding that the petitioner was wrongly excluded from the list of beneficiaries, yet, keeping in view the stand taken by respondent No. 2, this writ petition is disposed of with the observation that in the event of some shops being still vacant with respondent No. 2, one of the shops be offered to the petitioner within 15 days from today, on same terms on which shops were offered to other persons, and in case the petitioner accepts such offer within 15 days of the receipt of offer, then, appropriate agreement etc. in this regard be entered into with him. It is further clarified that in case the petitioner does not agrees to the offer of allotment of the shop, then, respondent No. 2 shall be at liberty to deal with the vacant shop(s) in such manner as it deems fit.

With these observations, the writ petition stands disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Sh. Mohan Lal ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWPOA No. 132 of 2020
Decided on: 01.03.2021.

Constitution of India, 1950 – Article 226 – Process initiated by the respondent – department to fill up six posts of drivers – 3 posts were for general category, 2 posts were reserved for S.C. and one post for ST category – Petitioner belongs to SC category whose grievance remains that appointment given to selected candidates by the respondent-department bad in law, he being meritorious than two general category candidates – Challenged by way of instant petition – Held, that act of respondent-department of not offering appointment to candidates belonging to SC category against posts meant for general category on the basis of their merit being higher than candidates belonging to general category bad in law – Denial of appointment for the post of driver to the petitioner against post reserved for SC category also bad in law – Petition disposed of with a direction to the respondents to offer appointment to the petitioner against post reserved for SC category as from the date other incumbents stood appointed against said posts alongwith consequential benefits including that of seniority.

Cases referred:

R.K. Sabharwal and others vs. State of Punjab and others (1995) 2 SCC 745;

For the petitioner : Mr. L.N. Sharma, Advocate.

For the respondents : M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General for respondents No. 1 and 2.

: Mr. N.K. Thakur, Sr. Advocate
with Mr. Divya Raj Singh,
Advocate for respondent No. 3.

: Mr. Balvinder Singh, Advocate
vice Mr. Dalip K. Sharma,
Advocate for respondent No. 5.

: Mr. Pawan Gautam, Advocate for
respondent No. 6.

: Mr. Sandeep K. Pandey, Advocate
for respondent No. 8.

: Mr. Avinash Jaryal, Advocate for
respondent No. 9.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

> *"(i) That the impugned appointment order dated 12.1.2016(A-1) (Colly.) and impugned rejection dated 25.5.2016(A-5) may kindly quashed and set aside being contrary to law.*
> *(ii) That the directions may kindly be issued to the respondents to offer appointment as driver to the applicant being more meritorious to respondents No. 3 and 4.*
> *(iii) That any other writ, order or direction as this Hon'ble Court may deem just and proper in the facts and circumstances of the case may also be issued and justice be done."*

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

In the year 2016, process was initiated by the respondent-department to fill up six posts of drivers. Out of the six posts so advertised, three posts were for open/General category, two posts were reserved for Scheduled Caste category and one post for Scheduled Tribe category. The petitioner before this Court is a candidate who belongs to Scheduled Caste category. His grievance is that appointment given to the selected candidates by the respondent-department is bad in law as the petitioner who was more meritorious than two of the candidates selected under the General/open category, has been denied appointment to the post of driver by following a procedure for selection of reserved category candidates unknown to law and contrary to law laid down by Hon'ble Supreme Court of India in R.K. Sabharwal and others vs. State of Punjab and others, (1995) 2 Supreme Court Cases 745. He submits that those candidates who have been offered appointment and whose names are reflected in Annexure A-2 appended with the petition, have obtained following final marks:-

(1) Sh. Inderjeet (Sr. No. 40) (General Category) = 35.83;

(2) Sh. Sunil Kumar (Sr. No. 66) (General Category) = 35.83;

(3) Sh. Muni Lal (Sr. No. 91) (General Category) 39.66;
(4) Sh. Harjeet Kumar (Sr. No. 59) (Scheduled Caste category) =36.83;

(5) Sh. Heera Lal (Sr. No. 90) (Scheduled Caste category) = 37.66; and

(6) Sh. Jagdish Singh (Sr. No. 48) (Scheduled Tribe Category) =37.50.

3. The petitioner, as per the final result list, secured 36.33 marks, i.e. more marks than two of the selected candidates, namely, Sh. Inderjeet and Sh. Sunil Kumar, yet petitioner has been denied appointment to the post of

Driver on the ground that he secured less marks than candidates selected under Scheduled Caste category and therefore, was not entitled for appointment. The stand of the petitioner is that two of the candidates belonging to Scheduled Caste category admittedly had secured more marks than the General Category selected candidates. Then in these circumstances, the department should have offered appointment to the meritorious candidates, though belonging to the reserve category against the post meant for General/ open category and the resultant vacancy of reserved category then should have been offered to the candidates belonging to reserved category as per merit. On this count, the contention of the petitioner is that present petition be allowed and appointment of the candidates less meritorious to the petitioner be quashed and set aside and direction be issued to the respondent-department to offer appointment to the petitioner against the post of Driver.

4. Learned Additional Advocate General has supported the act of the department by submitting that there is no illegality committed by the department by offering appointment to the selected candidates because *inter se* merit which was obtained by the candidates of the category concerned has been duly maintained and amongst them whoever was found more meritorious was offered appointment.

5. Learned Counsel appearing for private parties adopted the arguments of the State and further submitted that the criteria which was followed by the Government was fair and equitable, as a candidate, who participated in a particular category, could and should have been considered for that particular category only and as the petitioner belongs to Scheduled Caste category, he could have been considered for appointment against Scheduled Caste category only and admittedly private respondents are more meritorious than the petitioner. Alternatively, it has been argued that in case the Court comes to the conclusion that the candidates belonging to the

General Category, who have been offered appointment, are less meritorious than the candidates who stand selected under Scheduled Caste category, then the appointment of the private respondents be protected keeping in view the fact that they have been in service since the year 2016.

6. I have heard learned Counsel for the parties and also gone through the pleadings as well as record of the case.

7. There is no dispute on the factual matrix involved in the case, which demonstrates that admittedly two candidates selected under the General Category, namely, Inderjeet and Sunil Kumar, were less meritorious than the candidates selected against the Scheduled Caste category as well as Scheduled Tribe categories. The act of the respondent-department of not offering appointment to the candidates belonging to Scheduled Caste and Scheduled Tribe Categories on the basis of their merit against the posts meant for General Category when said candidates had secured more marks than the candidates belonging to General Category, is arbitrary, unconstitutional and not sustainable in the eyes of law. It is settled law that a person belonging to Scheduled Caste or Scheduled Tribe category, if on merit, secures more marks in a competition than a candidate belonging to General category, then such candidate has to be offered appointment against the post meant for General category and the resultant seats reserved for Scheduled Caste and Scheduled Tribe categories are thereafter to be offered to such candidates who are belonging to reserved categories and who can occupy the posts on the basis of their merit.

8. A five Judge Bench of Hon'ble Supreme Court of India in **R.K. Sabharwal and others vs. State of Punjab and others** (1995) 2 Supreme Court Cases 745, has been pleased to hold that when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the

candidates belonging to general category are not entitled to be considered for the reserved posts. On the other hand, the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation.

9. This law laid down by Hon'ble Supreme Court of India has been violated by the respondent-department by not offering the posts belonging to General Category to the meritorious candidates of Scheduled Caste and Scheduled Tribe categories, who have scored more marks than candidates of General Category appointed against the said posts. Merit list demonstrates that Shri Muni Lal, a candidate belonging to General Category was No. 1 in the merit followed by Sh. Heera Lal and Shri Jagdish Singh. That being the case, the posts meant for General Category had to be offered to them on the basis of their respective merit and the posts reserved for Scheduled Caste and Scheduled Tribe categories thereafter ought to have been offered to the candidates belonging to these particular categories on the basis of merit obtained by the candidates of these categories. The act of the respondent-department of not preparing a merit list in terms of what has been observed hereinabove has resulted in grave injustice to the candidates like the petitioner who indeed were entitled for appointment against the posts meant for Scheduled Caste category on the basis of merit obtained by them. The Court reiterates that as Shri Heera Lal and Shri Jagdish Singh, candidates belonging to Scheduled Caste and Scheduled Tribe categories respectively, were more meritorious than Shri Inderjeet and Shri Sunil Kumar, the candidates belonging to General Category, these two candidates should have been offered appointment against General categories posts. Shri Harjeet Kumar but obvious had to be offered appointment against the posts meant for Scheduled Caste category as there were only three posts meant for General Category but the second post belonging to Scheduled Caste category had to be

offered to the petitioner who was the next candidate in merit after Shri Harjeet Kumar in the merit of Scheduled Caste category candidates.

10. In view of what has been held hereinabove, this writ petition is allowed by holding that the act of the respondent-department of not offering appointment to candidates belonging to Scheduled Caste category against posts meant for General Category on the basis of their merit being higher than candidates belonging to General Category, is bad in law and by further holding that denial of appointment for the post of driver to the petitioner against a post reserved for Scheduled Caste category is also bad in law. Respondents are accordingly directed to offer appointment to the petitioner against a post reserved for Scheduled Caste category as from the date other incumbents stood appointed against said posts. As the selection of the selected candidates has been made as far back as in the year 2016 and since then, they are continuously in service, the Court is not setting aside the appointment of the selected candidates but is directing that the department has to be more careful in future while filling up the posts so that this kind of illegalities are not repeated. The petitioner be offered appointment forthwith but with effect from the date appointment was offered to other incumbents. The appointment shall also entail consequential benefits including that of seniority but the monetary benefits shall be notional, as up to the date the petitioner actually joins the service, and thereafter, actual benefits shall be given to the petitioner.

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

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

Sh. Sant Ram ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWPOA No. 7712 of 2019
Decided on: 01.03.2021.

Constitution of India, 1950 - Article 226 – Petitioner serving as a Class – IV employee with the respondent – department retired at the age of 58 years filed CWP No. 1693 of 2010 with a grievance that, as he was serving in Forest Department of Government of Himachal Pradesh as class - IV employee, he should be superannuated at the age of 60 years – Petitioner was permitted to continue upto the age of 60 years in previous CWP – Present petition filed claiming differential amount of leave encashment – Held, that there is nothing on record to demonstrate that after filing of the petition of the petitioner that he should retire at the age of 60 years, any demand of interest on the amount of leave encashment was raised by the State from the petitioner – Leave encashment earlier paid to the petitioner was so paid taking into consideration that he was to superannuate at the age of 58 years and now only balance of two additional years has to be paid to the petitioner – Petition allowed – Differential amount of leave encashment ordered to be paid to the petitioner by respondent-department within a period of three months.

For the petitioner : Mr. Devender Sharma, Advocate
vice Mr. C.N. Singh, Advocate.

For the respondents :M/s Sumesh Raj, Dinesh Thakur
and Sanjeev Sood, Additional
Advocate Generals with Ms. Divya
Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

There is a very limited issue involved in the present writ petition. The petitioner, who was serving as a Class-IV employee with the respondent-department, was earlier retired at the age of 58 years. Feeling aggrieved by the

fact that he was retired at the age of 58 years, he approached this Court by way of CWP No. 1693 of 2010, titled as Sant Ram vs. State of H.P. and others, with the prayer that, as the petitioner was serving in the Forest Department of the Government of Himachal Pradesh as a Class-IV employee, therefore, he should be superannuated at the age of 60 years and not at the age of 58 years as his services stood regularized in the year 2010 retrospectively w.e.f. 01.01.2000. Said writ petition was allowed by this Court vide judgment dated 27.10.2010 in the following terms:-

> *"The petitioner approached this Court when he was sought to be superannuated on attainment of age of 58 years on the ground that his regularization is after 2001. During the pendency of the Writ Petition, it is seen that the department has regularized the services of the petitioner retrospectively w.e.f. 01.01.2000. Order dated 20.07.2010, is taken on record. Therefore, in any case, the petitioner can be continued upto the age of 60 years. Accordingly, the writ petition is allowed as above."*

2. Now the surviving grievance of the petitioner is that though he served the respondent-department till the age of 60 years, yet leave encashment, to which he was entitled to in lieu of serving till the age of 60 years, has not been paid to him and the same was paid only till the age of 58 years. It is in this background that this writ petition has been filed with the prayer that the respondents be directed to release the differential amount of leave encashment, i.e. `11,505/- with interest thereon @ 12% per annum on account of delay in release of the said amount.

3. The petition is being opposed by the respondent-State *inter alia* on the ground that it was after his having retired at the age of 58 years that petitioner approached the Court by way of earlier writ petition and as all retiral benefits, including leave encashment stood duly paid to him when petitioner was superannuated at the age of 58 years and as the petitioner did not refund the said amount to the department, therefore, if he insists to be paid difference of leave encashment on having retired from service at the age

of 60 years on account of judgment passed by this Court, then the petitioner be directed to pay to the government the interest on the amount of leave encashment which stood paid to him when he was earlier retired at the age of 58 years.

4. I have heard learned Counsel for the petitioner as well as learned Additional Advocate General and I have gone through the pleadings as also the record of the case.

5. Annexure A-5, which is an office order passed by the Divisional Forest Officer, Karsog Forest Division, demonstrates that earlier the leave encashment which was paid to the petitioner on his superannuation at the age of 58 years was `95098/-. As per the same order, leave encashment, as was admissible to the petitioner on retirement at the age of 60 years, was `1,06,603/-. The balance leave encashment which was reflected in this order, as payable to the petitioner, was `11,505/-.

6. As it is not in dispute that the petition filed by the petitioner before this Court feeling aggrieved by the act of the State Government of retiring him at the age of 58 years, was allowed by this Court in his favour, therefore, now for all intents and purposes, the petitioner stood retired from service of the respondent-department at the age of 60 years. That being the case, when the difference in leave encashment is of a meager amount of `11,505/- and as the petitioner happens to be a Class-IV employees, in the considered view of this Court, it will be in the interest of justice, in case, this petition is disposed of with the direction that the balance amount of leave encashment amounting to `11,505/- be paid to the petitioner, without insisting upon him to pay interest as demanded by the State.

7. The contention raised by learned Additional Advocate General that this amount can be paid only if the petitioner pays interest on the amount of leave encashment which was earlier released in his favour while retiring him at the age of 58 years is without merit because there is nothing

on record to demonstrate that after the petition of the petitioner to the effect that he should be retired at the age of 60 years, was allowed by this Court, any such demand was raised by the State from the petitioner. Even otherwise, the leave encashment earlier paid to the petitioner was so paid to him by taking into consideration the fact that he was to superannuate at the age of 58 years and now only balance of two additional years has to be paid to the petitioner.

8. Accordingly, this petition is allowed with the direction that balance differential amount of `11,505/- of leave encashment shall be paid to the petitioner by the respondent-department within a period of three months from today. It is directed that in case balance amount is paid to the petitioner by the respondent-department within the time granted by the Court, then respondent-department shall not be liable to pay interest thereupon, however, in case balance amount is not paid to the petitioner within the said time frame, then respondent-department shall be liable to pay simple interest thereupon at the rate of 6% per annum from the date of this decision.

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

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

Ms. Ankita Bhardwaj ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWPOA No. 486 of 2020
Date of Decision : July 14 , 2021

Constitution od India, Article 226 – Petitioner and respondent no. 6 originally belonging to District Bilaspur were enrolled in Employment Exchange Office, Ghumarwin –- Respondent no. 6 appointed as language

teacher vide order dated 09-02-2016 in District Solan, through Staff Selection Commission against post reserved for ward of Freedom fighter – Not knowing about said appointment, Employment Exchange Officer, Ghumarwin on 15-09-2016, had sponsored name of respondent no. 6 as well as petitioner, for batch wise appointment to the post of Language teacher reserved for ward of freedom fighter – Interview conducted – Petitioner approached the erstwhile H.P. State Administrative Tribunal and process for appointment to the post of Language Teacher, batch wise, against quota reserved for ward of freedom fighter ordered to be kept in abeyance – Challenge thereof – Held, that as per "H.P. State Litigation Policy and its adoption, instead of settling the cases or redressing grievances at their own level, or rectifying mistake, Departments are contesting cases for years together – Direction issued to Chief Secretary to take necessary steps in consonance with policy to issue reminders to avoid unnecessary litigation - Services of respondent no. 6 regularized, who is not averse against consideration of the candidature of the petitioner for the post in question excluding respondent no. 6 – Petition allowed accordingly and respondent Department directed to consider the candidature of the petitioner to the post of Language Teacher, batch wise basis, in District Bilaspur, reserved for ward of freedom fighter excluding candidature of respondent no. 6.

For the petitioner : Mr. Onkar Jairath, Advocate.

For the respondent : Mr. Gaurav Sharma, Deputy Advocate General, for respondents No. 1 to 5-State.

Mr. K.B. Khajuria, Advocate, for respondent No. 6.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. (Oral)

Petitioner has approached this Court, being aggrieved by omission and commission of respondents, seeking direction to respondent No.3 not to

consider the candidature of respondent No. 6 for the post of Language Teacher against the post reserved for Ward of Freedom Fighter and further direction to consider the case of the petitioner against the said post to be filled on batch-wise basis in District Bilaspur, HP.

2. Undisputed facts are that petitioner and respondent No. 6 belong to the category of Ward of Freedom Fighter. Vide order dated 9.2.2016, respondent No. 6 has been appointed as Language Teacher in District Solan, through Staff Selection Commission, against the post reserved for Ward of Freedom Fighter and since then she is serving as such in District Solan. Her initial appointment was on contract basis but now she has been regularized. After making appointment, through Staff Selection Commission, the respondent - Department had initiated process for batch-wise recruitment to the post of Language Teacher. Petitioner and respondent No. 6 originally belong to District Bilaspur and were enrolled in Employment Exchange Office, Ghumarwin, District Bilaspur, HP. Having no knowledge about the appointment of respondent No. 6 as Language Teacher, respondent No. 5 – Employment Exchange Officer, Ghumarwin, on 15.09.2016, had sponsored name of respondent No. 6 as well as petitioner, for batch-wise appointment to the post of Language Teacher, reserved for category of Ward of Freedom Fighter. In sequel thereto, the concerned Authority had interviewed the petitioner as well as respondent No. 6 on 26.9.2016. However, before issuance of any appointment letter to respondent No. 6, petitioner approached the erstwhile H.P. State Administrative Tribunal and vide order dated 7.10.2016, it was directed by the Tribunal that process for appointment to the post of Language Teacher, batch-wise, against the quota reserved for Ward of Freedom Fighter, be kept in abeyance.

3. In reply filed on behalf of the Department of Elementary Education, it is categorically admitted that respondent No. 6 has already been appointed as Language Teacher in District Solan by availing the benefit of reservation

provided to the category of Ward of Freedom Fighter from general category and as per instructions circulated by Government of Himachal Pradesh vide letter No. PER(AP)-C-F(4)-4/96, dated 5th May, 2001, those sons/grand-sons/ daughters/grand-daughters of Freedom Fighter who have been appointed on regular basis as well as the married daughters/grand-daughters, shall not be entitled for benefit of reservation provided to the Wards of Freedom Fighter in services, against the identical posts, in the same scale.

4. Response of the respondent No. 5 i.e. the District Employment Officer, Bilaspur is that the main function of the Employment Exchanges is to register the names of the candidates and sponsor their particulars to the employer strictly as per the criteria i.e. qualification, age etc. fixed by the employer and the names of petitioner as well as respondent No. 6 were sponsored by the Employment Exchange, Ghumarwin, in response to requisition dated 18.7.2016, as both of them were found registered in the category of Ward of Freedom Fighter and there was no information about the appointment of respondent No. 6 in District Solan, as Language Teacher and, therefore, her name was not struck off from the live register of the Employment Exchange.

5. The crux of the reply of the State is that had it been in the notice of the concerned Authority that respondent No.6 has been appointed as a Language Teacher against the post reserved for category of Ward of Freedom Fighter, her candidature would not have been considered for the same post, reserved for the same category.

6. The present petition was filed in the year 2016. Response thereto also were filed in the years 2016 and 2017. It is apparent from the reply that mistake by the respondents – Departments, which may be bonafide, but was detected in the year 2016. But instead of rectifying the same by cancelling the candidature of respondent No. 6 to the post of Language Teacher, to be filled on batch-wise basis, in District Bilaspur against the post reserved for Ward of

Freedom Fighter, respondents – Departments continued to wait for the judicial pronouncement. It is a sorry state of affairs as it is expected from the State, for reducing the burden of unwarranted litigation in the Courts, to rectify its mistakes on its own particularly when such mistake is apparent on the face of record and is admitted by the Departments/Authority(ies) concerned.

7. It is apt to record here that the Government of Himachal Pradesh has approved 'H.P. State Litigation Policy' (hereinafter referred to as 'Policy') in the year 2011 and the same has not only been circulated by the Principal Secretary (Home) to the Government of Himachal Pradesh, vide communication No.Home(Prosecution)(F)101/2010, dated 7.3.2011, to all the Principal Secretaries/Secretaries to the Government of Himachal Pradesh and all the Head of Departments in Himachal Pradesh, but has also been uploaded on the Website of Prosecution Department from the link of Home Department website **www.himachal.nic.in/home.**

8. It has also been communicated to all that Policy outlines broad guidelines of litigation strategies to be followed by the State Government or its agencies with a view to reduce litigation to save avoidable costs on unproductive litigation so as to reduce unavoidable load on judiciary with respect to Government induced litigation.

9. The Policy has been made applicable to any claim and litigation involving the State or its agencies including litigation before Courts, Tribunals, inquiries and in arbitration and matters pending in other alternative dispute resolution processes. All concerned have been requested to take necessary steps in accordance with this Policy after immediately forming Departmental Litigation Monitoring Committee in the Department and also appoint Nodal Officers to monitor the pendency and future litigation being faced by the Department in terms of Policy.

10. As per Policy, it is compulsory obligation upon the State and its agencies to act honestly and fairly in handling claims and litigation, which

includes dealing with claims promptly and not causing unnecessary delay in the handling of claims; paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clearly established that at least part of the claim is payable; acting consistently in the handling of claims and litigation; endeavoring to avoid litigation, wherever possible; where it is not possible to avoid litigation, keeping the costs of litigation to minimum, including by: i) not requiring the other party to prove a matter which the State or an agency knows to be true; and ii) not contesting clearly established liability if the State or an agency knows that the dispute is really about quantum; not taking advantage of a claimant who lacks the resources to agitate a legitimate claim before any competent Court; not relying on technical defences unless the interests of the State or a State agency would be prejudiced adversely; and not to file/continue appeals/ revisions etc unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, provided that a decision to file/continue the appeal is made as soon as practicable and to file second appeals only on substantial questions of law.

11. Despite approval and adoption of aforesaid Policy, it has been seen that Departments, like present case, are invariably, instead of settling the claims or redressing grievances at their own level or rectifying the mistake wherever it is apparent on the face of record, are contesting cases vigorously for years together. Another case, where despite noticing and admitting mistake, Department/ Government did not rectify it, is **CWPOA No.7684 of 2019,** titled as ***Netar Singh v. The State of H.P.*,** wherein also reply was filed in the year 2017, admitting the mistake, but till 2021 no action for rectifying the same was taken and it was observed by this High Court that despite having noticed the mistake, no steps have been taken to rectify it and to redress the grievance of the petitioner that too after filing reply-affidavit to that effect. Such practice deserves to be deprecated. It can be done by the

Government by issuing reminders, time-to-time, to all concerned and Court may also enforce this Policy by imposing heavy costs upon the State, recoverable from the concerned Officers/officials responsible for overburdening the Courts with unwarranted and avoidable litigation.

12. It is also relevant to note that in **CWP No.1498 of 2017,** titled as ***State of H.P. v. Raju Ram,*** a Division Bench of this High Court has directed as under:

> "11. Under these circumstances, we direct the Chief Secretary to the Government of Himachal Pradesh to convene a meeting of the Principal Secretaries of the Government of Himachal Pradesh, in apprising them of the existence, importance, significance, advantages and benefits of adhering to the Litigation Policy, in letter and spirit. In turn, it is expected of the Principal Secretaries to convene a meeting in their respective Departments, sensitizing the stakeholders with regard thereto. This would only help curtail the problem of docket explosion and prevent cause any unnecessary inconvenience and expenditure by innocent persons.
>
> 12. We further direct the Chief Secretary as also the Principal Secretaries to the Government of Himachal Pradesh to have all the cases reviewed, periodically, in terms of the H.P. State Litigation Policy. This alone would generate lot of good will to the State."

13. A Division Bench of this High Court in **CWPIL No.133 of 2017,** titled as ***Court on its own Motion v. State of Himachal Pradesh,*** after observing that State, as a model employer, is expected to show fairness in action and directed as under:

> "36. We notice that State has formulated a Litigation Policy with the avowed object of not only reducing litigation, saving avoidable cost on unproductive litigation, reducing avoidable load on judiciary with respect to Government induced litigation. This is in tune with the mandate of Article 39-A of the

Constitution of India, obligating the State to promote equal justice and provide free legal aid. In fact, by virtue of clause 1.4 (d to h) of the State Litigation Policy, the State is under an obligation to take steps to reduce litigation, wherever possible. Now, if the employees are not paid their salaries within time, obviously, they are left with no remedy but to rush to the Courts.

37. Of late, litigation pertaining to employees of the State has increased and it is not that State is the petitioner. The action assailed is of mis-governance or avoidable omissions on the part of the Government. Why should the State force an employee to litigate in a case where emoluments/salaries, which are undisputed, are not disbursed in time.

38. .....

39. In the light of the aforesaid discussion and position of law, in exercise of our writ jurisdiction, we deem it necessary to pass the following directions:-

> A. The Chief Secretary to the Government of Himachal Pradesh, shall provide a mechanism for enabling the employees to vent out their grievances of non-disbursement of due and admissible wages/salaries/emoluments. And one such mechanism being of setting up a 'Web Portal' at the level of the Principal Secretary/ Secretary of the concerned Department(s), where the employees can lodge their grievances/complaints. Such grievances/ complaints shall be processed and adequately responded to within a period of one week. This would facilitate speedy redressal of genuine grievances and prevent unnecessary litigation, clogging the wheels of administration of justice. Such endeavour shall not only be in the spirit of Litigation Policy, framed by the State Government. We see great advantage in the use of information and technology. Not only it would result into effective and efficient redressal of grievances, if any, but also improve efficiency in the affairs of governance of the State.

B. All the Head of Departments of Government of Himachal Pradesh/Government Institutes/State Instrumentalities to ensure that in future emoluments to all employees of their respective Departments/Institutes are disbursed in time;

C. In case of said emoluments not being disbursed on schedule, except in the event of the emoluments being withheld as per law, the State/ instrumentality of the State shall be liable to compensate the employees concerned by paying statutory interest or the existing rate for saving bank deposit account provided by the State Bank of India, whichever is higher;

D. Immediately thereto, the Head of the Departments/Instrumentality of the State shall hold an inquiry, which shall be completed within a period of 30 days, to ascertain the omission on the part of the concerned person, resulting in delay of disbursement on schedule; and

E. Pursuant to the findings of the inquiry, the interest which stands paid to such employee, shall be recovered from the erring officer(s)/officials(s).”

14. In present case also, huge exemplary costs, recoverable from the Officers and officials proportionately, according to their pay, may be imposed upon the Department. But, taking a lenient view no cost is being imposed, with direction to the Chief Secretary, Government of Himachal Pradesh, to look into the matter and issue appropriate instructions, reminders and to take all necessary steps in consonance with the Policy to reduce unnecessary and unwarranted avoidable litigation in order to save not only public exchequer but also energy in terms of time and human resources for utilizing the same in creative developmental work of public interest.

15. A mechanism should be developed ensuring that all such type of cases are placed before the Departmental Litigation Monitoring Committee by the Officer/official concerned and responsibility of the officer/official, who

failed to do so, should be fixed. Also, there must be periodical audit of litigation and working of Monitoring Committee and there must be effective a consequential action to ensure accountability.

16. Mr. K.B. Khajuria, learned counsel for respondent No. 6 has submitted that he has instructions to communicate that services of respondent No. 6, who was appointed on contract basis, now stands regularized and, therefore, respondent No. 6 is not averse against consideration of the candidature of the petitioner for the post in question excluding respondent No. 6.

17. For the aforesaid facts and circumstances, petition is allowed and the respondents – Department is directed to consider the candidature of the petitioner to the post of Language Teacher, on batch-wise basis, in District Bilaspur, reserved for the Ward of Freedom Fighter, excluding the candidature of respondent No. 6 against the said post and in case petitioner is found eligible and is in merit for appointment as such, appointment shall be offered to her on or before 16th August, 2021. If petitioner is found suitable to be appointed, then petitioner shall be entitled for all benefits of service, but with notional monetary benefits, from the date of appointment of others as Language Teacher, on batch-wise basis, pursuant to the interview conducted on 26.9.2016 in District Bilaspur, till issuance of appointment letter to her including counting of service for the purpose of seniority, regularization and pensionary benefits etc. and in such eventuality, petitioner shall be deemed to have been appointed alongwith others appointed through the same selection process and her case for regularization shall be considered on the basis of the said date of appointment and her services from that date till her appointment shall be taken into consideration on notional basis for all intents and purposes except actual payment of monetary benefits. However, for the purpose of fixation of pay, the said period shall be taken into consideration for fixation of increments and other monetary benefits on notional basis by

considering her to have been appointed on the date of her deemed appointment.

18. The Chief Secretary to the Government of Himachal Pradesh is directed to take necessary steps to ensure effective implementation of the Policy as observed and directed supra and to file compliance affidavit, in this regard, on or before 31.8.2021. The Registry shall list this case, on 7.9.2021, for orders for that purpose only.

Petition is allowed and disposed of in the aforesaid terms. Pending miscellaneous applications, if any, also stand disposed of accordingly.

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

Mohini Ram ....Appellant.

Vs.

State of Himachal Pradesh and another ..Respondents.

RSA No. 178 of 2020
Date of Decision: 26.07.2021

Code of Civil Procedure, 1908 - Section 100- Regular Second Appeal – Suit for declaration challenging the ejectment order of the appellant from the suit land dismissed by the trial court – First appeal dismissed – Challenged by way of instant RSA – Held, that there are concurrent findings of both the courts that status of the plaintiff over the suit land was that of encroacher – No perversity found in the said findings - Nothing on record to demonstrate that appellant had inherited any interest upon the suit land – No substantial question of law involved in the appeal – Appeal dismissed.

For the appellant: Mr. Y. P. S. Dhaulta, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s Sumesh Raj, Adarsh Sharma & Sanjeev Sood, Additional Advocate Generals & Mr. J.

S. Guleria, Deputy Advocate Generals, for respondent No. 1.
Respondent No. 2 *ex parte*.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this Regular Second Appeal, the appellant/plaintiff has prayed for setting aside of judgment and decree dated 05.02.2019, passed by the Court of learned Civil Judge, Court No. 2, Nalagarh, District Solan, H.P. in Civil Suit No. 102/1 of 2013, titled as *Mohani Ram Vs. State of Himachal Pradesh and another*, vide which, the suit for declaration with consequential relief of permanent prohibitory injunction filed by the appellant/plaintiff stood dismissed by the learned Court below as well as for setting aside of judgment and decree dated 13.12.2019, passed by the Court of learned Additional District Judge, Nalagarh, District Solan, H.P. in Civil Appeal No. 59-NL/13 of 2019, titled as *Mohani Ram Vs. State of Himachal Pradesh and another*, vide which, the appeal preferred by the present appellant against the judgment and decree passed by the learned Trial Court, stood dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that the appellant-plaintiff (hereinafter referred to as "the plaintiff") filed a suit for declaration with consequential relief of permanent prohibitory injunction, on the pleadings that he was a permanent resident, proprietor and *Khewatdar* of Village Musselwal, Tehsil Nalagarh, District Solan, H.P. The suit land comprised in Khasra No. 235/92/1, Khata Khatauni No. 215/224, situated in Village Musselwal, Pargana Nalagarh, Tehsil Nalagarh, District Solan was in possession of his predecessor-in-title, who had raised construction of a residential house and *Khokha* (small shop) etc. over the same on 10.04.1963. Part of the suit land was also used as a Courtyard and the plaintiff through his predecessor-in-title was coming in peaceful, continuous and uninterrupted

possession of the same, over which, a residential house, Courtyard as well as a *Khokha* (small shop) were now existing. The house was renovated and reconstructed from time to time. *Shamlat* land before coming into force of the H. P. Village Common Lands (Vesting & Utilization) Act, 1974 (hereinafter referred to as "the 1974 Act) was in possession of the proprietors of Village Musselwal, including the suit land, which was part of the State of Punjab before the year 1966. Constructed *Shamlat* land stood saved from vesting in the Gram Panchayat under the provisions of the above Act. It was mandatory for the statutory authorities under the aforesaid Act to make inquiry regarding the vesting of *Shamlat* land in the Gram Panchayats. In the present case, no such inquiry was ever made. The authorities had failed to comply with the mandatory provisions of the Statute to initiate inquiry regarding vestment of suit land and in this background, the proceedings, which stood initiated against the plaintiff of ejectment under the provisions of Section 163 of the Himachal Pradesh Land Revenue Act, 1954 were bad, so also was the warrant of possession issued against him. The ejectment order passed by the Assistant Collector, 1st Grade, Nalagarh, H.P. in case No. 44/12, titled as *State Vs. Mohani Ram* and warrant of possession issued by the revenue officer/officials in the said case were wrong, illegal, null and void and also inoperative and ineffective, being without jurisdiction. According to the plaintiff, as the statutory authorities had failed to comply with the mandatory provisions of law, therefore, the Civil Court was having powers to look into the legality of the order passed by the revenue authorities and in this background, suit stood filed praying for a decree of declaration with consequential relief of permanent prohibitory injunction qua the suit land against the defendants.

3. The suit was contested by the defendants, *inter alia*, on the ground that the plaintiff had not substantiated the averments made in the plaint with any documentary proof qua his being proprietor and *Khewatdar* upon the suit land, as contended by the plaintiff. It was further pleaded by the defendants

that the plaintiff was an encroacher over the suit land and was earlier dispossessed from the same vide *Rapat* No. 732, dated 24.07.2010. *Patwari* concerned again reported on 29.05.2012 regarding the encroachment made by the plaintiff on the Government land, comprised in Khasra No. 235/92/1, measuring 1-0 Marla by constructing a *Khokha* on the same and Assistant Collector, 2nd Grade, Nalagarh initiated the encroachment proceedings against the plaintiff on the basis of the said report of the *Patwari*. The proceedings were decided after complying with the principles of natural justice and ejectment orders were passed by the Assistant Collector, 2nd Grade on 30.10.2012 against the plaintiff. According to the defendants, the status of the plaintiff was that of an encroacher upon the suit land and he had no right and title over the same and had no locus to maintain the suit. The land in question was in exclusive ownership of the State of Himachal Pradesh under the provisions of the Himachal Pradesh Village Common Lands (Vesting and Utilization) Act, 1974 and prior to vestment in the State of Himachal Pradesh, was owned and possessed by the Gram Panchayat at the relevant time. Plaintiff had encroached upon the Government land and now wanted to usurp the same, though he was a stranger qua the same. The suit land stood encroached upon by the plaintiff in the year 2010 by constructing a *Khokha* and again in the year 2012, post his ejectment in the earlier case in the year 2010.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

> *"1. Whether the plaintiff is entitled for the decree of declaration to the effect that ejectment order/warrant of dispossession dated 19.03.2013, passed by A.C. IInd Grade, Nalagarh, in case No. 44/12, titled as "State Vs. Mohani Ram" and warrant of dispossession dated 19.03.2013, issued by Field Kanungo are wrong, illegal, null and void, as prayed for?OPP*

2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP

3. Whether the suit is not maintainable, as alleged? OPD

4. Whether the plaintiff has no cause of action to file the present suit, as alleged? OPD

5. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD-1

6. Whether suit is not properly valued for the purpose of Court fee and jurisdiction, as alleged OPD-1

7. Whether suit is bad for non-compliance of mandatory provision under Section 80(1) CPC, as alleged? OPD-1

8. Whether the plaintiff is estopped from filing the present suit due to his own act and conduct, as alleged? OPD-1

9. Whether this Court is having no jurisdiction to try the present suit, as alleged? OPD-1

10. Whether suit is bad for non-joinder and mis-joinder of necessary parties, as alleged? OPD-2

11. Relief.

5. On the basis of the evidence adduced by the respective parties in support of their respective pleadings, the issues were decided as under:-

"Issue No. 1: No.

Issue No. 2: No.

Issue No. 3: Yes.

Issue No. 4: Yes.

Issue No. 5: Yes.

Issue No. 6: No.

Issue No. 7:	*No.*
Issue No. 8:	*No.*
Issue No. 9:	*No.*
Relief:	*Suit of the plaintiff is dismissed as per operative part of the judgment."*

6. The suit was dismissed by the learned Trial Court by holding that the averments made by the plaintiff that his predecessor-in-title raised construction of a residential house and *Khokha* (small shop) upon the suit land on 10.04.1963 and part of the disputed land was used as a Courtyard, had not been proved and in fact the suit stood filed on fictional bundle of facts. In the course of cross-examination of the plaintiff as well as his witness Ram Prakash, numerous contradictions were there, including to the effect that though the plaintiff had denied the *Khokha* shown in photographs Ex. D-1 and D-2, however, PW-1 Ram Prakash, one of the witnesses of the plaintiff, had admitted the same. In terms of the Jamabandi, State of Himachal Pradesh was the absolute owner in possession of the suit land and it was an admitted case that ejectment order was passed against the plaintiff on the basis of a complaint preferred by the Gram Panchayat Rajpura and plaintiff had earlier also been evicted from the suit land. Learned Court also held that the proceedings initiated under Section 163 of the Himachal Pradesh Land Revenue Act were taken to their logical conclusion by following the fundamental principles of natural justice and that the status of the plaintiff was that of an encroacher upon the suit land and he had no right to remain upon the same and continue to obstruct the general public. Learned Trial Court also held that the plaintiff miserably failed to demonstrate that any vestment had occurred as per the provisions of the 1974 Act. On these bases, learned Trial Court dismissed the suit.

7. In appeal, learned Appellate Court, while affirming the findings returned by the learned Trial Court, further held that even otherwise the vestment of the suit property in the State of Himachal Pradesh was not open to scrutiny of the Civil Court and no evidence in this regard was brought on record. Learned Appellate Court held that Civil Court cannot look into the question of lawful and legal vestment in view of Section 10 of the 1974 Act, which creates a complete bar for Civil Court to entertain and decide a suit, wherein declaration sought for is about the validity of the vestment of the land in the State Government under the provisions of the said Act. It further held that the relief sought for by the plaintiff that the suit land could not have vested under the provisions of the said Act, could not be entertained and decided by the Civil Court and the remedy of the aggrieved persons was somewhere else. Learned Appellate Court held that as per the statement of DW-1 Rameshwar Dass alongwith the statement of DW-2 and also Ex. DW1/A and Ex. DW2/A, no fault could be attributed to the proceedings which stood initiated against the plaintiff under Section 163 of the Himachal Pradesh Land Revenue Act, as the record demonstrated that the plaintiff was indeed an encroacher upon the suit land. On these basis, learned Appellate Court also held that the plaintiff was not entitled for any relief of permanent prohibitory injunction.

8. Feeling aggrieved, the plaintiff/appellant filed this appeal.

9. I have heard learned counsel for the appellant as well as learned Additional Advocate General. I have also gone through the judgments and decrees passed by both the learned Courts below as well as the record of the case, which was called for by the Court.

10. Though the case of the plaintiff, as put forth in the plaint, was that the suit land was coming in peaceful, continuous and uninterrupted possession of the plaintiff through his predecessor-in-title, who had raised construction of a residential house, Courtyard as well as a *Khokha* (small shop) over the same on 10.04.1963, however, there is not even an iota of evidence led

by the plaintiff to demonstrate this fact. In other words, the plaintiff has miserably failed to demonstrate that his predecessor-in-title had constructed any *Khokha* upon the suit land in the year 1963, as alleged or the plaintiff, in any manner, was in possession of the suit land, as before the date on which the Gram Panchayat initiated proceedings against him for being an encroacher upon the same. There are concurrent findings returned by both the learned Courts to the effect that the status of the plaintiff over the suit land was that of an encroacher. During the course of arguments, learned counsel for the appellant could not demonstrate that there was any perversity in the findings returned by the learned Courts below to the effect that earlier also, an order of eviction stood passed against the plaintiff qua the suit land under Section 10 of the 1974 Act, which was duly given effect to by way of ejectment of the plaintiff, but thereafter, the plaintiff again encroached upon the suit land, which culminated into the initiation of fresh proceedings against him under Section 163 of the Himachal Pradesh Land Revenue Act, on the basis of a fresh complaint of the concerned Gram Panchayat. It could also not be demonstrated from the record that the proceedings so initiated under Section 163 of the Himachal Pradesh Land Revenue Act were not conducted by the authorities in consonance with the relevant Rules. Be that as it may, as no perversity could be pointed out during the course of arguments by the appellant qua the findings returned by both the learned Courts below that the plaintiff was having no title whatsoever upon the suit land and as the status of the plaintiff upon the same is indeed that of an encroacher, these being findings of fact returned against the plaintiff, this Court finds that said findings are clearly borne out from the record of the case and the same neither warrant any interference nor on the basis of the said findings, it can be said that this appeal is worth admission, because no substantial question of law is involved in the same.

11. Now, referring to the submission made by learned counsel for the plaintiff with regard to the provisions of the 1974 Act and non-

implementation of the same by the revenue authorities, this Court is of the view that except a bald ascertain made in the plaint with regard to the predecessor-in-title of the plaintiff being in possession of the suit land since the year, 1963, not even an iota of evidence has been placed on record by the plaintiff to demonstrate that he had inherited any interest upon the suit land, as mentioned in the plaint on the basis of some right upon the same of his predecessor-in-title. On the other hand, the defendants have been able to prove their case that the plaintiff was an encroacher upon the suit land and no rights ever stood conferred upon him under the provisions of the 1974 Act. Thus, in the absence of any evidence being on record to demonstrate that any right had accrued upon the plaintiff qua the suit land under the provisions of the 1974 Act, this Court does not find that any substantial question of law, even with regard to the 1974 Act is involved in this appeal, more so, in view of the findings returned by the learned Appellate Court with regard to the 1974 Act in general and Section 10 thereof in particular.

12. In view of the findings returned hereinabove, as this Court finds no merit in the appeal, the same is dismissed, so also the pending miscellaneous applications, if any. Record be returned.

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

LPA No. 122 of 2008

Sh. Mehar Singh .....Appellant

Versus

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

LPA No. 123 of 2008

Sh. Mehar Singh .....Appellant

Versus

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

LPA Nos. 122 & 123 of 2008
Reserved on: 19.07.2021
Decided on: 28.07.2021

Constitution of India, 1950 - Articles 226 and 227 – Letters Patent Appeals – Two separate applications for partition filed by the petitioner u/s 123 H.P. Land Revenue Act – Final partition sanctioned by Assistant Collector 1St Grade, Nadaun challenged in appeal – Appeals dismissed by ADM Hamirpur exercising power of Collector – Revision petitions dismissed by Commissioner Mandi – Financial Commissioner (Appeals) accepted revision Petitions and directed A. C. 1st Grade to keep in view classification of land and valuation thereof while finalizing the partition proceedings – Appellant assailed the said order by way of CWP No. 633 of 2006 and CWP No. 634 of 2006 which were dismissed by Ld. Single Judge with a direction to A.C. 1st Grade to carry out the partition strictly as per mode of partition drawn on 23-05-1992 – Challenge thereof by way of instant LPA – Held, that revisional powers exercised by the Financial Commissioner (Appeals) were under Section 17 and there is nothing to hold that he had acted without jurisdiction – Orders of Collector and Commissioner Mandi Division found perverse and interfered in revision and also Financial Commissioner (Appeals) had not decided any substantive rights of the parties – Nothing found in the judgment passed by Ld. Single Judge sufficient to interfere therewith – Appellant failed to answer the query that what prejudice was caused to him by impugned judgment or order of Financial Commissioner, when mode of partition suggested between parties was neither modified nor set aside – Present case is classical example which sets out tactics being adopted by litigants to prolong the life of litigation beyond reasonable limits – Both appeals dismissed with costs of Rs. 10,000/- to be paid to the respondents.

Cases referred:

Ambadas Khanduji Shineand others vs. Ashok Sadashiv Mamurkar and others 2017(14) SCC 132;

D. Sasi Kumar vs. Soundararajan 2019(9) SCC 282;

Gurudassing Nawoosing Panjwani Versus State of Maharashtra and others 2015 AIR SCW 6277;
Mohd. Inam vs. Sanjay Kumar Singhal and others 2020(7) SCC 327;
The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad AIR 1973 SC 76;

For the appellant: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Vikas Rathore, Mr. Hemanshu Misra, Mr. Shiv Pal Manhans, Addl. A.Gs and Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. A.Gs for the respondent-State.

Mr. Arjun Lal, Advocate for respondents No. 2 to 5 and 5(a) to (f).

(Through video conferencing)

The following judgment of the Court was delivered:

Satyen Vaidya, J.

Since the common question of law and facts are involved in both these appeals, therefore, the same are being decided by this common judgment.

2. By way of these Letters Patent Appeals, the appellant has assailed the judgments dated 20.8.2008 passed by learned Single Judge of this Court in CWP No. 633 of 2006 and CWP No. 634 of 2006

BRIEF FACTS :

3. Petitioner filed two separate applications under Section 123 of the Himachal Pradesh Land Revenue, Act (hereinafter referred to as the 'Act' in short) for partition of land comprised in Khasra Nos. 2, 3, 74, 76 and 101

situated in Tikka Chalbara, Tappa Nauhangi, Tehsil Nadaun, District Hamirpur, H.P. and land comprised in Khasra Nos. 171 and 174 situated in Tikka Lahar Nauhangi, Tehsil Nadaun, District Hamirpur before the Assistant Collector 1st Grade, Nadaun in 1991. Both the cases i.e. 36/91 & 44/91 were proceeded simultaneously. The mode of partition were framed on 23.05.1992 and final partition were sanctioned by Assistant Collector 1st Grade, Nadaun on 22.04.1994.

4. Predecessors-in-interest of respondents No. 2 to 4 and respondents No. 5(i) to (viii) filed separate appeals i.e. 10 of 1994 & 27 of 1993 before the Collector Hamirpur under Section 14 of the Act against the orders dated 22.04.1994 passed by Assistant Collector 1st Grade, Nadaun. The appeals were dismissed by the Additional District Magistrate, Hamirpur exercising the powers of Collector under the Act on 01.03.1995. Sh. Shambu and Sh. Sita Ram, the predecessors-in-interest of respondents No. 2 to 4 and respondents No. 5(i) to (viii) filed revision petition Nos. 65 of 95 & 64 of 95 under Section 17 of the Act before Commissioner, Mandi Division against the order dated 01.03.1995 passed by Collector, Hamirpur. Commissioner Mandi Division dismissed the revision petition Nos. 435/96 & 436/96 on 22.08.1996. Sh. Shambu and Sh. Sita Ram filed further revision before the Financial Commissioner (Appeals) Himachal Pradesh, against the order dated 22.08.1996 passed by Commissioner, Mandi Division. The Financial Commissioner (Appeals) accepted the revision petitions on 05.05.2006 and directed the Assistant Collector 1st Grade to keep in view classification of land and valuation thereof while finalizing the partition proceedings to ensure that justice is done to both the parties.

5. Appellant assailed the orders dated 05.05.1996 passed by the Financial Commissioner (Appeals) before this Court by filing CWP No. 633 of 2006 and CWP No. 634 of 2006 under Articles 226/227 of the Constitution of India. Learned Single Judge of this Court dismissed both petitions vide

separate judgments dated 28.08.2008 with the direction to the Assistant Collector 1st Grade to carry out the partition strictly as per mode of partition drawn on 23.05.1992, within a period of 10 weeks from the date of judgments.

6. The appellant has laid challenge to the judgment passed by learned Single Judge mainly on the following grounds:-

a) Scope of interference in the writ petition was to examine only ground as set-up in the writ petition and there was no scope to travel beyond. Learned Single Judge could have examined only the legality and validity of the order passed by the Financial Commissioner.

b) Learned Single Judge has taken a wrong view of the whole matter, in view of the fact that the parties had raised no objection before Assistant Collector 1st Grade on 22.04.1994 and presumption was attached to such orders.

c) The learned Single Judge could not have gone into partition proceedings and his jurisdiction was confined only to decide the question as to whether the order of Financial Commissioner was lawful or not.

7. At the time of hearing of the matter, learned Senior Advocate representing the appellant has canvassed the preposition that the second revision under the Act was not maintainable.

8. Per contra, learned counsel for the respondents has made specific submissions that writ petition filed by the appellant was not maintainable and under the given facts of the case, writ of Certiorari could not be issued. The judgments passed by learned Single Judge have been supported on behalf of the respondents on all counts.

9. We have heard learned counsel for the parties and have gone through the records including the writ record of CWP Nos. 633 of 2006 and 634 of 2006.

10. The appellant has laid challenge to the impugned judgment on the ground that the orders dated 05.05.1996 passed by Financial Commissioner (Appeals) could not be sustained by the writ Court as the same

were without jurisdiction. As per appellant, Financial Commissioner (Appeals) did not possess jurisdiction to entertain the second revision under the Act.

11. The revisional powers are conferred by Section 17 of the Act, which reads as under: -

> "17. ***Power to call for, examine and revise proceedings of Revenue Officers***. - *(1) The Financial Commissioner may at any time call for the record of any case pending before [or disposed of by] any Revenue Officer subordinate to him.*
>
> *(2) A Commissioner or Collector may call for the record of any case pending before, or disposed of by, any Revenue Officer under his control.*
>
> *[(3) If in any case in which a Commissioner or Collector, has called for a record, is of the opinion that the proceedings taken or order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner.*
>
> *(4) The Financial Commissioner may in any case called for by himself under sub-section (1) or reported to him under sub-section (3), pass such order as he thinks fit: Provided that he shall not under this section pass an order reversing or modifying any proceeding or order of a subordinate Revenue Officer and effecting any question of right between private persons without giving those persons an opportunity of being heard.]"*

12. The reading of above said provision reveals that the revisional powers of Financial Commissioner under the Act are not circumscribed. These powers are free from any fetters as he can call for the records of any case pending before (or disposed of) by any Revenue Officer subordinate to him. Section 7 of the Act defines classes of Revenue Officers as under: -

> *"7.* ***Classes of Revenue Officers***. *-7[(1) There shall be the following classes of Revenue Officers, namely-*
>
> *(a) the Financial Commissioner;*
> *(b) the Commissioner;*
> *(c) the Collector;*

(d) the Assistant Collector of the first grade; and
(e) the Assistant Collector of the second grade.]
(2) The Deputy Commissioner of a district shall be the Collector thereof.
(3) The State Government may appoint any Assistant Commissioner, 1[XXXXXXX] or Tehsildar to be an Assistant Collector of the first or of the second grade, as it thinks fit, and any Naib-Tehsildar to be an Assistant Collector of the second grade.
(4) Appointment under sub-section (3) shall be by notification and may be of a person specially by name or by virtue of his office or of more persons than one by any description sufficient for their identification.
(5) Subject to the provisions of this Act, the jurisdiction of the Financial Commissioner extends to the whole of the Himachal Pradesh and of the Commissioners and of the Collectors and Assistant Collectors to the divisions and districts respectively, in which they are for the time being employed.

13. Section 8 of the Act provides that there shall be one or more Financial Commissioners to be appointed by the State Government. The conjoint reading of Section 7(v) and 8(i) of the Act leaves no manner of doubt that the Financial Commissioner holds the highest authority amongst the ranks of Revenue Officers and that is why, his revisional powers under Section 17 of the Act are unqualified.

14. Further the perusal of Section 17(iii) of the Act provides that in case the Commissioner after calling for the records of any revenue Court subordinate to him is of the opinion that the proceedings taken or order made should be modified or reversed, he shall report the case with his opinion thereto for the orders of the Financial Commissioner. It is thus evident that in exercise of revisional jurisdiction by the Commissioner, he cannot modify or reverse the orders of his subordinate revenue officers and such powers also vests in the Financial Commissioner.

15. The power of revision is creation of statute. In order to assess the scope and extent of the revisional power of an authority emanating from a particular statute, the powers of revision provided under such statute can only be looked into and there cannot be any universal principles of law for assessing the extent and scope of revisional power.

16. In the case in hand, the revisional powers exercised by the Financial Commissioner (Appeals) were under Section 17 of the Act and there is nothing in the Act to hold that Financial Commissioner (Appeals) had acted without jurisdiction. The plea raised by the appellant is answered accordingly. A Coordinate Bench of this Court in **LPA 184 of 2007** titled **Charan Dass deceased through LRs Versus Subhadra Devi and Others** decided on 23.11.2016 had occasion to deal with the identical proposition. Placing reliance upon **Gurudassing Nawoosing Panjwani Versus State of Maharashtra and others** reported in **2015 AIR SCW 6277**, it was held that Financial Commissioner had jurisdiction under section 17 of the Himachal Pradesh Land Revenue Act to entertain second revision petition.

17. Learned Senior Advocate representing the appellant has also tried to persuade this Court by raising an argument in alternative that, even if. Financial Commissioner (Appeals) had the jurisdiction, his order could not be sustained by writ court having been passed in excess of jurisdiction. It has been submitted that the Financial Commissioner (Appeals) had limited revisional jurisdiction. He could not set aside the findings of fact recorded by the revenue officers below without such findings being perverse. In support of this submission, learned Senior Advocate has relied upon the judgments of the Hon'ble Supreme Court titled as ***Mohd. Inam*** vs. ***Sanjay Kumar Singhal and others***, reported in ***2020(7) SCC 327***, titled ***D. Sasi Kumar*** vs. ***Soundararajan*** reported in ***2019(9) SCC 282***, titled ***Ambadas Khanduji Shineand others*** vs. ***Ashok Sadashiv Mamurkar and others*** reported in ***2017(14) SCC 132*** and titled ***The Managing Director (MIG) Hindustan***

Aeronautics Ltd. Balanagar, Hyderabad and another vs. ***Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad***, reported in ***AIR 1973 SC 76***.

18. The judicial precedents pressed into service on behalf of appellant reiterate the settled proposition of law with respect to revisional powers of authorities/tribunals/courts under different statutes. Similar reiteration has been made In **Charan Dass deceased through LRs Versus Subhadra Devi and Others** *supra*whereit has been held that the revisional powers under Section 17 of the Act are akin to powers under section 115 of the Code of Civil Procedure. Such powers cannot be used to upset findings of facts recorded by authorities below and have to be exercised with care and caution only to examine the orders on the touch stone of legality and not on the question of facts unless it is found that the orders are perverse and factually incorrect.

19. With due deference to the above noted settled legal position, we find that the appellant cannot avail its benefit for the reasons that orders dated 04.03.1995 passed in Case Nos. 27 of 1993 & 10 of 1994 by the Collector Hamirpur and order dated 22.08.1996 passed by the Commissioner Mandi, Division Mandi in Case Nos. 64/95 & 65/95 reveal that none of the authorities had taken care to make any reference to the records without which it is hard to understand as to how the said authorities could have appreciated the real grievance of the persons preferring the appeal or revision, as the case may be, before them.

20. The perusal of impugned judgment, however, reflects that Sh. Shambu and Sh. Sita Ram, predecessors-in-interest of respondents No. 2 to 4 and 5(i) to (viii) had been raising objections at every step, whereas, neither Collector Hamirpur nor the Commissioner Mandi Division had made any effort to make reference to such objections. Any adjudication by the said authorities

without looking into the details of such objections and consideration thereon suffer from perversity.

21. Applying the general principles of revisional powers as discussed above to the case in hand, the order of Financial Commissioner (Appeals) cannot be said to be perverse, in view of the fact that firstly the orders of Collector and Commissioner Mandi Division were perverse and required interference for the reasons recorded above and secondly Financial Commissioner (Appeals) had not decided any substantive rights of the parties. The only direction to the Assistant Collector 1st Grade, Nadaun was to keep in view the classification of land and valuation thereof while finalizing the partition so as to ensure that justice is done to both the parties.

22. Learned counsel for the respondents has also placed reliance on the judgment passed by Hon'ble Apex Court in **2006(13) SCC 449** and **2020(16) SCC 478** and has canvassed that normally, the Division Bench, while hearing Letters Patent Appeal, would not, unless there exists cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. Even the Court of first appeal which is the final Court of appeal on fact may have to exercise some amount of restraint. There is no dispute about this settled position of law. We have not found anything in the judgment passed by learned Single Judge sufficient to interfere therewith. Learned Single Judge has elaborately dealt with the factual position and has arrived at findings of fact on the basis of record. The appellant has not been able to persuade us to hold that the findings of fact recorded by the learned Single Judge were wrong or perverse. In absence of which, there is no material to interfere with the judgment passed by learned Single Judge.

23. It has also been submitted on behalf of the appellant that writ Court was not justified to travel beyond the scope of grounds as set-up in the writ petition. The argument so raised deserves rejection. The grounds raised in the writ petition were general in nature and the learned Single Judge while

deciding CWP No. 633 of 2006 and CWP No. 634 of 2006 has taken pains to consider the matter ornately by meticulously scanning the records, which exercise none of the revenue officers had done. Learned Single Judge has specifically held that the order passed by the Financial Commissioner sans details but the conclusion drawn by him was correct.

24. It has further been asserted on behalf of the appellant that order dated 22.04.1994 finalizing the partition was passed by the Assistant Collector 1st Grade and at the time of its passing, no objections were raised by either of the parties as recorded in the said order itself. Learned Single Judge, after going through the records, has found such submissions to be incorrect. According to records, the predecessors-in-interest of respondents No. 2 to 4 and 5(i) to (viii) have been making objections at various stages including the objection to the effect that their consent as recorded in the order dated 22.04.1994 was incorrectly recorded. In view of the fact that records of the case proved otherwise, the presumption, if any, to the order dated 22.04.1994 passed by the Assistant Collector 1st Grade, Nadaun stood rebutted.

25. We may place it on record that the appellant has not been able to answer the pointed query from this Court that what prejudice was caused to the appellant by the impugned judgment or order of Financial Commissioner, when the mode of partition suggested between the parties was neither modified nor set aside. The substantive rights of the parties were not at all affected. It was only a direction to the Assistant Collector 1st Grade to finalize the partition proceedings strictly as per mode of partition drawn on 23.05.1992. The appellant has not been able to show that, in fact, the final partition drawn on 24.04.1994 was strictly in accordance with the mode of partition. It is trite that there cannot be any deviation from the mode of partition suggested between the parties having attained finality and the final partition has to follow such mode in letter and spirit.

26. Before parting, we consider necessary to place it on record that present case is the classical example which sets out tactics being adopted by litigants to prolong the life of litigation beyond reasonable limits with a purpose to deny the adversary benefits of his lawful due. This litigation is almost thirty years old and still without any result. Generation has passed, but it could not enjoy the fruits of their own property. Notwithstanding the fact that the Financial Commissioner (Appeals) passed order dated 5.5.2006 and directed the Assistant Collector 1st Grade only to draw the final partition by taking into consideration classification and value of land, the appellant preferred to assail it before writ court and further in appeal before this Court and the process has consumed more than fifteen years.

27. In view of the discussion made hereinabove, no fault can be found in the impugned judgment. Accordingly, both the appeals are dismissed with cost of Rs. 10,000/- to be paid to the respondents.

Pending application(s), if any. are also disposed of accordingly.

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

Churago Devi (deceased) through her legal representatives Smt. Parvati Devi and others

.....Appellants/Defendants

Versus

Ram Lal .....Respondent/Plaintiff.

RSA No. 451 of 2001
Reserved on: 16th July, 2021
Decided on: 29th July, 2021

Code of Civil Procedure, 1908 - Section 100 – Regular Second Appeal – Suit of the plaintiff for Permanent Injunction and in alternative for possession of the suit land dismissed by the trial court – First appeal allowed and decree of possession of the suit land passed in favour of the plaintiff holding that

defendants failed to prove the plea of adverse possession – Challenge thereof – Held, that the fact that plaintiff had set up his title under a transaction of sale from Late Sh. Gulaba Ram was in the knowledge of the defendants – Defendants cannot be allowed to deny the said title subsequently – Possession howsoever long, if permissive, will not be a bar for a person having title to seek the decree of possession – Plea of adverse possession not established by defendants – Exercise of Jurisdiction by Ld. Lower Appellate Court can not be said to be illegal or materially irregular – Also, parties were fully aware about the case of each other, and have contested the case by availing opportunity to lead evidence, question of framing or non-framing of issue becomes insignificant – Appeal dismissed.

Cases referred:

Amar Chand Vs Madan Lal Latest HLJ 2019 (HP) 1014;
Chatti Konati Rao and others Vs *Palle Venkata Subba Rao, JT 2010 (13) SC 578;*
Karnataka Board of Wakf Vs Govt. Of India, (2004) 10 SCC 779;
Satish Kumar Gupta and others Vs State of Haryana and others (2017) 4 SCC 760;
Union of India Vs Ibrahim Uddin and another (2012) 8 SCC 148;

For the appellants: Mr. G.D. Verma Sr. Advocate with Mr. Romesh Verma, Advocate.

For the respondent: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate,

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Appellants have preferred Regular Second Appeal under Section 100 of the Code of Civil Procedure (for brevity "Code") against judgment and decree dated 07.07.2001, passed by learned Additional District Judge, Solan in Civil Appeal No.41-S/13 of 1999 arising out of judgment and decree dated 28.9.1999 passed by learned Sub Judge, 1st Class, Arki in civil suit No. 122/1 of 1995.

2. Appellants in present appeal were defendants in civil suit No. 122/1 of 1995 and the predecessor in interest of respondent herein was

plaintiff. For the sake of convenience and clarity the Parties hereafter shall be referred in the same manner as were before the trial court.

3. Plaintiff filed suit for permanent prohibitory injunction against the defendants seeking to permanently restrain them from interfering in the suit land. In alternative relief of possession qua the suit land was also sought. Suit land was described as land comprised in Khewat No.8/10, Khasra Nos.8, 24 min, 25 min and 47/30 measuring 21-8 bighas as per "Jamabandi" for the year 1989-1990.

4. The premise of the suit was that plaintiff had purchased land comprised in Khewat No.2/2, Khasra Nos.4, 8, 14, 24, 28 and 30, kitas 6, measuring 29.11 Bighas from Gulaba Ram, predecessor in interest of defendant No.1. Mutation of sale was attested in favour of plaintiff on 23.1.1972 as Mutation No.103. Land purchased by plaintiff from Gulaba Ram in subsequent revenue record came to be described as the suit land detailed above. Plaintiff sold some part of the land purchased from Gulaba Ram to Rati Ram and Mutation No. 104 was attested in that behalf.

5. Plaintiff contended in the suit that Gulaba Ram had moved an application for correction of revenue entries, in respect of suit land, before Assistant Collector, 2nd Grade, Arki *vide* case No.16-13/B. This application was decided on 17.03.1983 by Assistant Collector, 2nd Grade, Arki holding that the land was in self cultivation of Gulaba Ram in the capacity of relative of plaintiff.

6. It was alleged that defendants were interfering in the possession of plaintiff under the garb of wrong revenue entries recorded in the column of possession. Plaintiff admitted to have filed a Civil Suit earlier which was withdrawn.

7. Defendants by way of written statement raised following preliminary objections to the claim of plaintiff:

(i) Plaintiff had no *locus-standi* to file the suit;

(ii) Suit was time barred;

(iii) Suit was bad for want of necessary parties;

(iv) Suit was barred by the provisions of order 23 Rule 1 and Order 2 Rule 2 of the Code in view of the earlier suit Nos. 6/1 of 1994 filed by plaintiff and dismissed on 3.6.1994.

(v) Suit was not maintainable;

(vi) Suit was barred by principle of estoppel and acquiescence etc.

(vii) Plaint was without any cause of action;

(viii) Suit was not valued properly and Court fee was not appropriately affixed.

8. On merits, it was contended that at the time of mutation, on the basis of alleged sale, possession of suit land was not delivered to plaintiff. Gulaba Ram, had refused to deliver the possession and had denied the sale deed. He was never divested from the suit land. There was no legal sale. In alternative plea of having become owner by perfection of title by adverse possession was also raised on behalf of defendants. It was specifically pleaded by defendants that possession of plaintiff was wrongly recorded in revenue record on the basis of Mutation No.103. The revenue entries were subsequently corrected and name of Gulaba Ram was recorded as possessor of suit land. Gulaba Ram had executed Will of his entire movable and immovable properties in favour of defendant No.2 Devi Ram. Sale deed set up by plaintiff was also alleged to be result of fraud and misrepresentation.

9. Learned trial court framed following issues:-

"Issue No.1 Whether the plaintiff is owner in possession of the suit land as alleged?

...OPP

Issue No.2 Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed for?

...OPP

Issue No.3 Whether the plaintiff has no locus-standi to file the present suit?

...OPD

Issue No.4 Whether the suit is time barred?

...OPD

Issue No.5 Whether the suit is bad for want of necessary party?

...OPD

Issue No.6 Whether the suit is barred under provision of order 23 rule 1 and order 2 rule 2 CPC as alleged?

...OPD

Issue No.7 Whether the suit is not maintainable?

...OPD

Issue No.8 Whether the plaintiff is estopped from filing the present suit.

...OPD

Issue No.9 Whether the plaintiff has no cause of action?

...OPD

Issue No.10 Whether the suit is not properly valued for the purpose of court fee and jurisdiction?

...OPD

Issue No.11 Whether the defendants have become owners of the suit land by way of adverse possession?

...OPD

Issue No.12 Whether the alleged gift is not valid for want of delivery of possession as alleged?"

...OPD

Relief.

10. Parties were put to trial. Plaintiff examined himself as DW-1 besides Sh. Rati Ram and Sh. Daulat Ram as PWs No.2 and 3. Documents Ext. P-1 to P-10 were tendered in evidence. On the other hand, defendant No.2, Sh. Devi Ram, examined himself as DW-1 besides Sushil Kumar, Nathu Ram, Khajana Ram and Mansa Ram as DWs No.2 to 5. Documents Ex.DW-1/A to Ex.DW-1/D and Ex. DW-2/A were produced on record. Learned trial court decided issues No.1 to 3, 5 to 10 and 12 in negative whereas issues No.4 and 11 were answered in affirmative. Suit of plaintiff was dismissed. Specific findings with respect to defendants having perfected title over the suit land by way of adverse possession were recorded.

11. Aggrieved against the judgment and decree passed by learned trial court, plaintiff filed an appeal under Section 96 of the Code. The said appeal came to be decided by learned Additional District Judge, Solan as Civil Appeal No.41-S/13 of 1999 vide judgment and decree dated 7.7.2001. Learned lower Appellate Court after setting aside the judgment and decree passed by learned trial court passed a decree of possession of the suit land in favour of plaintiff by holding that the defendants had failed to prove adverse possession and hence plaintiff having proved his title was entitled to the possession of suit land. Relief of permanent prohibitory injunction was consequently denied.

12. The judgment and decree dated 7.7.2001 passed by lower Appellate Court in Civil Appeal No.41-S/13 of 1999 is under challenge in the present appeal. This appeal has been admitted on following substantial questions of law:-

1. ***Whether suit filed by the plaintiff was barred under Order 2, Rule 2 CPC in view of the dismissal of his early suit No.6/1 of 1994 on 3.6.1994.***

2. ***Whether the present suit filed by the respondent was not maintainable, in view of the provisions of***

order 23 CPC because earlier suit No.6/1 of 1994 with respect to same subject was dismissed on 3.6.1994.

3. Whether due to non-consideration of Exhibit DW1/B Mutation No.103 and copy of order passed by the Ld. Assistant Collector-II Grade, Arki in application for correction Ex.P-10 dated 17.3.1983 and Ex.DW 1/A order dated 3.6.94 passed by Sub Judge, Arki the findings are vitiated.

4. Whether despite sale deed Ex. AW1/A registered on 1.1.1970, Gulaba continued to hold, occupy and possess the suit land during his life time to the knowledge of plaintiff and in view of the plea of adverse possession having been raised and proved, he and his successors have acquired ownership rights over the suit land.

13. Questions Nos 1 and 2, as noted above, are being taken up together for discussion as well as disposal, as the same set of facts and law is involved.

14. In their written statement, the defendants had taken specific objections to the effect that suit of plaintiff was barred under Order 2 rule 2 and also under Order 23 rule 1 of the Code. These objections were raised on the basis that plaintiff had earlier filed Civil Suit No.6/1 of 1994, which was dismissed on 3.6.1994. Issue No.6 was also framed on such objections.

15. A copy of order dated 3.6.1994 passed by learned Sub Judge, First Class, Arki in case No.6/1 of 1994 was produced on record as Ext. DW-1/A. As per this order, suit titled Devi Ram Vs. Parago widow of Gulaba Ram and others was ordered to be dismissed in default under Order 9 rule 8 of the Code on account of non-appearance of plaintiff or his counsel. Besides this, no other evidence was produced by defendants to prove their objections.

16. Order 2 rule 2 of the Code mandates that all claims which plaintiff is entitled to make in respect of the cause of action should be included

in one suit and where plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not be entitled to sue subsequently in respect of portions so omitted or relinquished. It means that in order to hold a suit to be barred by order 2 rule 2 of the Code, cause of action and claims made in earlier suit must be ascertained with certainty, which can only be gathered from the pleadings in earlier suit, therefore, in order to prove issue No.6, it was incumbent upon defendants to have placed and proved on record the pleadings in Civil Suit No.6/1 of 1994.

17. Similarly, Order 23 rule 4 of the Code prescribes legal bar precluding a person from instituting any fresh suit in respect of such subject matter or claim which was either abandoned as a whole or in part or had withdrawn from such suit or part of its claim without the permission of the Court granting liberty to institute a fresh suit in respect of such subject matter of the suit or such part of the claim under rule 3 of Order 23**.**

18. In order to take benefit of Order 23 Rule 4 of the Code again the least requirement is to place and prove on record the pleadings in the earlier suit. In absence of which, the Court is precluded from forming an opinion on the objection as to suit being barred under order 23 rule 4 of the Code.

19. In the case in hand, as noted above, a copy of order Ext. DW-1/A has only been placed on record. On the basis of this document alone neither the cause of action nor subject matter and claims in the previous suit can be ascertained. Learned trial court had also decided Issue No.6 against the defendants by holding that in absence of pleadings in earlier suit, the defendants could not succeed in proving issue No.6. Defendants had accepted such findings and had not challenged or assailed the same before learned lower Appellate Court either by way of filing cross-objections under Order 41 rule 22 or by seeking indulgence of the Code under Order 41 rule 33 of the Code.

20. In absence of any evidence to substantiate the objections under order 2 rule 2 and under order 23 rule 4 of the Code and also in absence of any challenge to findings on Issue No.6 by defendants, this Court is unable to differ from the findings returned by learned trial court on Issue No.6 and the same are affirmed.

21. The next substantial question of law framed in this appeal poses a question as to whether non-consideration of Ext. DW-1/B, Mutation No.103 and Exhibit P-10 order dated 17.3.1983 passed by Assistant Collector, Second Grade, Arki and order dated 3.6.1994 passed by Learned Sub Judge, First Class, Arki Ext. DW-1/A vitiates the findings?

22. Learned Trial Court had considered Ext DW-1/A while deciding issue No.6 but had found itself unable to hold issue No.6 as proved in absence of the pleadings in the earlier suit. As noted above, these findings had attained finality as were not assailed before learned Lower Appellate Court by defendants, therefore, said Court had no occasion to consider Ext DW-1/A.

23. With regard to non-consideration of Ext DW-1/B and Ext P-10, it is evident from the records that these documents were duly considered by learned Trial Court while returning findings on issues No.1 and 11. It can also not be said that learned Lower Appellate Court had avoided or omitted to consider such piece of evidence. It is made out from paras 25 to 27 of the judgment passed by learned Lower Appellate Court that the factum of Exhibit P-10 was taken into account and due consideration was given to its contents.

24. In any case perusal of document Ext DW-1/B, Mutation No.103, reveals that though the objection was raised by Gulaba Ram with respect to the sale deed as well as delivery of possession in favour of plaintiff, the mutation, nevertheless, was attested in favour of plaintiff *vide* order dated 23.1.1972. There is nothing on record to suggest that this mutation Ext DW-1/B was assailed or challenged by defendants before the competent authority.

Though, it is settled that mutation does not confer title yet having attained finality, its contents become relevant for collateral purposes.

25. There is yet another piece of evidence on record i.e. an application submitted by Gulaba Ram, on 2nd February, 1983 before Assistant Collector, Second Grade, Arki seeking correction in the revenue records of suit land. This document has been proved on record by defendants themselves as Ext DW-1/C. Contents of this document clearly reveal that Gulaba Ram had admitted the factum of sale deed having been executed by him in favour of plaintiff. It was further admitted that plaintiff had sold half share out of suit land in favour of Ratti Ram and thereafter had left Gulaba Ram and his wife. Gulaba Ram only claimed himself to be in possession of suit land. Assistant Collector, 2nd Grade, Arki passed order dated 17.3.1983, Ext P-10, on application Ext DW-1/C and returned specific findings that though Gulaba Ram, was in possession of the land but his possession was not as tenant but was as relative of plaintiff. Undisputedly Gulaba Ram was the maternal uncle of plaintiff.

26. From the conjoint reading of Ext DW-1/C and Ext P-10, it comes out that Gulaba Ram had admitted to have sold suit land to plaintiff. He raised dispute about the possession, which was ordered to be recorded in his favour on 17.3.1983 by Assistant Collector, Second Grade, Arki. Therefore, Exhibit DW-1/C and Exhibit P-10 attained finality, hence defendants being successors of Gulaba Ram, are estopped from challenging the title of suit land in favour of plaintiff.

27 The matter can be looked into from another angle. The fact that plaintiff had set up his title under a transaction of sale from late Sh. Gulaba Ram, was in the knowledge of the defendants at least on 13.4.1971 i.e. the date of recording of an order by Assistant Collector, Second Grade, Arki in mutation proceedings of Mutation No.103, Exhibit DW-1/B. Once Gulaba

Ram was aware of this fact it was for him to avoid the consequences of said transaction by getting it declared null and void. The contract of sale set up by plaintiff against Gulaba Ram was voidable at the option of Gulaba Ram, but the record reveals that he had chosen not to challenge the title set up by plaintiff in himself by taking appropriate steps/remedy before the appropriate forum. The defendants cannot subsequently be allowed to deny the title of plaintiff in the suit land especially when they had raised the plea of adverse possession.

28. Defendants while framing the substantial question No.7 in the list of questions so filed along with the memorandum and grounds of appeal before this Court have specifically admitted that despite registration of sale deed Exhibit AW-1/A on 1.1.1970 late Sh. Gulaba Ram, continued to hold, occupy and possess the suit land during his life time to the knowledge of plaintiff and hence legal requirements to prove adverse possession in his favour were fulfilled. The tone and tenor of substantial question of law so framed by defendants leaves no manner of doubt that the defendants never had any misgiving about the execution of sale deed by late Sh. Gulaba Ram, in favour of plaintiff. This can also be inferred from an half-hearted attempt of raising a plea in the written statement to the effect that late Sh. Gulaba Ram was rustic, illiterate and aged person and if there was any sale deed it was a result of fraud and misrepresentation. No further details as required under Order 6 Rule 4 of the Code were provided, not only the plea of fraud and mis-representation was not raised as per mandate of law, defendants led no evidence to prove this assertion. It can be said that defendants had taken all sorts of defences just to confuse the issue.

29. Next substantial question of law on which present appeal has been admitted is reproduced as under:

> ***Whether despite sale deed Ex. AW1/A registered on 1.1.1970, Gulaba continued to hold, occupy and possess the suit land***

during his life time to the knowledge of plaintiff and in view of the plea of adverse possession having been raised and proved, he and his successors have acquired ownership rights over the suit land.

30. Defendants had raised the plea of adverse possession and thereby having perfected the title over the suit land. Specific issue was framed as issue No.11. Learned trial court decided issue No.11 in favour of defendants and held them to have perfected title over the suit land by way of adverse possession. Learned Lower Appellate Court has set aside such findings by holding that defendants had failed to prove their adverse possession.

31. The findings recorded by learned lower Appellate Court on the issue of adverse possession cannot be faulted as neither there were pleadings nor proof in accordance with law of the plea of adverse possession by the defendants. In the written statement the defendants had averred as under:-

....“moreover in the alternative the defendants and their predecessor since the alleged sale deed continued in possession of the suit land, as owner, openly, peacefully, continuously to the knowledge of all including the plaintiff and thus have perfected the title by way of adverse possession”. Hence the suit is time barred”.

32. From the above noted contents of written statement, it cannot be inferred that from which date the defendants were claiming their hostile possession on the suit land. There is no evidence on this point led by the defendants. Specific pleading followed by proof as to commencement of hostile possession is *sine qua non* for establishment of adverse possession. The continuity, openness, peaceable enjoyment of such hostile possession have to follow. In absence of proof of commencement of hostile possession, the rest of the factors like openness peaceable enjoyment and continuity in possession

become inconsequential. Hon'ble Supreme Court in **Karnataka Board of Wakf Vs Govt. Of India,** (2004) 10 SCC 779, vide para 11 has held as under:

> "11. In the eye of the 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 the 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 Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka.) 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 the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [Mahesh Chand Sharma (Dr.) vs. Raj Kumari Sharma.]

33. Learned Trial Court, without any pleading or proof, to this effect, had clearly erred in holding that since Gulaba Ram had denied delivery of possession to plaintiff vide Exhibit DW-1/C as recorded in order dated 13.4.1971, his adverse possession would start from the said date. Leaving

apart non-consideration of settled legal principles, learned Trial Court did not even take into account contents of documents Exhibit DW-1/C and Exhibit P-10, which clearly proved that no case of possession of Gulaba Ram being adverse to the true owner was either claimed or made out.

34. Another fact cannot be ignored that none of the heirs or legal representatives of Gulaba Ram had stepped into witness box. DW-1 Sh. Devi Ram (Defendant No.2) had represented defendant No.1 as a witness on the basis of power of attorney executed by defendant No.1. Devi Ram (Defendant No.2) was claiming independent right to the suit land under a Will alleged to have been executed by Gulaba Ram, in his favour. There is nothing on record to show that DW-1 (Defendant No.2) had any personal knowledge with respect to the facts of the case material for adjudication.

35. It is trite that possession howsoever long, if permissive, will not be a bar for a person having title to seek the decree of possession. Reference can be had from para 14 of the judgment in ***Chatti Konati Rao* and others** Vs ***Palle Venkata Subba Rao, JT 2010 (13) SC 578 :***

> "14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter."

36. The only bar of limitation is created under Article 65 of the Limitation Act, according to which the suit for possession on the basis of title has to be filed within 12 years from the date the possession becomes adverse. As held earlier the defendants have failed to prove adverse possession qua the suit land in their favour, therefore, the suit cannot be held to be barred by limitation.

37. At the time of hearing, learned Senior Advocate, representing defendants-appellants has laid stress with vehemence on the issue that learned Lower Appellate Court had accepted sale deed Exhibit AW-1/A by way of additional evidence against the specific mandate of Order 41 Rule 27 of the Code, hence, a substantial question of law arises to this effect and may be decided accordingly. Reliance has been placed on **Union of India Vs Ibrahim Uddin and another** (2012) 8 SCC 148 and **Satish Kumar Gupta and others Vs State of Haryana and others** (2017) 4 SCC 760.

38. There is no dispute with legal proposition that appellate Court can exercise jurisdiction under Order 41 rule 27 of the Code for allowing additional evidence only on satisfaction of one or more of the requirements prescribed therein. Learned Lower Appellate Court had allowed the admission of document Exhibit AW-1/A by way of additional evidence on the ground that such document was found necessary by Court to enable it to pronounce the judgment and also to do substantial justice.

39. Keeping in view the facts of the case, it can be said that the learned lower Appellate could pass the judgment even in absence of document Ext AW-1/A (Sale Deed) for the reason that there was sufficient material on record, as detailed above, to prove the admissions of Gulaba Ram with respect to sale of suit land in favour of plaintiff. The exercise of jurisdiction by learned lower Appellate Court cannot be said to be illegal or materially irregular because it had also considered the additional evidence necessary for the

purpose of doing substantial justice between the parties. No prejudice was caused to the defendants and they were afforded opportunity to rebut such evidence.

40. The fate of this appeal will not change even if the document Ext AW-A/1 is ignored. This Court, thus, is not in agreement with the contention raised on behalf of defendants.

41. It has also been argued on behalf of defendants that there was clear contradiction between the contents of sale deed Ext. AW-1/A and the statement of AW-1, Daulat Ram with respect to payment of consideration amount and hence the sale could not be considered to be complete as against Gulaba Ram. This contention is also being noted only to be rejected. Defendants have not uttered even a single word in this behalf either in the pleadings or in evidence. Moreover, the settled principle of law is that in case of consideration amount remaining unpaid to the seller in transactions of sale of immovable property, the transaction as such will not be rendered void. The seller can always claim consideration amount from the purchaser. In the present case the defendants have never claimed such amount from plaintiff much less making any endeavour to avoid sale transaction through process of law. Reference can be had from paras 26 to 28 of judgment rendered by this Court in **Amar Chand Vs Madan Lal** Latest HLJ 2019 (HP) 1014:

> *"26 The real test is the intention of the parties. In order to construe a sale, the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either before or after the sale. The conduct of the parties and the evidence on record need to be examined to ascertain the intention of the parties.*
>
> 27. This Court in *Shri Kripa Ram and others vs. Maina (2002 (2) Shimla Law Cases 213) has held:*
>
> *"That presumption of the due execution of the document arises from the endorsement of the Sub Registrar under Section 60 of the Act."*
>
> 28. In *Kanwarani Madna Vati and another vs. Raghunath Singh and other, (AIR 1976, HP 41), it has been held that in view of the provisions of the Registration Act, Registration of a document leads a*

presumption of the correctness of the endorsement made on the document of registering officer."

42. It has also been contended on behalf of defendants that the suit was bad for non-joinder of necessary parties. It was argued that Gulaba Ram was survived by a daughter named Parwati besides defendant No.1 and in her absence no effective and executable decree could be passed. This plea also deserves rejection. From the cause of action pleaded by plaintiff in the plaint it cannot be said that he had any grievance against the daughter of Gulaba Ram. He apprehended injury from defendants as arrayed by him in the suit. In any case, Parwati did not raise any grievance in this regard before trial court or first appellate court. No further ground has been made out that the decree as sought by plaintiff could not be passed in absence of Parwati. She never claimed possession of the suit land. Otherwise also the objection now becomes redundant as Parwati is already on record as appellant.

43. No other substantial question remains to be answered in present appeal.

44. The appeal is accordingly dismissed with no orders as to costs.

CMP No.9850 of 2018

45. Defendants, during the pendency of RSA No.451 of 2001, have filed an application under order 14 Rule 5 read with Section 151 CPC for framing the additional issues and has made a prayer in following terms:

"It is therefore, prayed that this application may kindly be allowed and the necessary issues on the points and pleadings referred to above may kindly be ordered to be framed."

46. In the application, defendants have reproduced all the objections raised in the written statement and have alleged that all the issues arising out of the pleadings were not framed.

47. Response was filed by plaintiff to the said application and was opposed being belated. It was also submitted that defendants, by way of the

application under reference, were trying to rake up new issues which was not permissible. It was further contended that defendants did not make such prayer either before the Trial Court or lower Appellate Court.

48. On perusal of the contents of application, it transpires that the defendants have made vague averments without specifying as to which issue was not framed. Total 12 numbers of issues were framed by learned Trial Court and on their perusal this Court is unable to find as to which of the plea on the defendants was not covered.

49. The parties have been litigating since 1995 and it is not the case of defendants that at any stage of the litigation they were taken by surprise. The settled proposition of law is that where the parties are fully aware about the case of each other and have contested each other's case by availing opportunity to lead evidence, the question of framing or non-framing of issue becomes insignificant. In the case in hand, the defendants have contested the litigation for more than 25 years and were fully aware about the case set up by the plaintiff. The defendants have contested the case of plaintiff on all accounts, hence, no prejudice can be pleaded by defendants at the stage.

50. Having no merits, the application is also dismissed.

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

Santi Devi .....Appellant

Versus

Director of Health Services and others .....Respondents

FAO(ECA) No.132 of 2021

Decided on: 30th July, 2021

Employee's Compensation Act, 1923 – Section 22 – Claim Petition under Section 22 filed by mother of the deceased dismissed by the Ld.

Commissioner, holding that she has neither any cause of action nor locus standi to maintain the petition – Being aggrieved, instant appeal filed – Held, that appellant does not fall in the definition of dependant under Section 2(d) – Salary of appellant's husband more than Rs. 27,000/- per month – Appellant was not dependent on the deceased and can not claim compensation only on the count of being a legal heir of the deceased – No interference in the impugned judgment called for – Appeal dismissed in limine.

For the Appellant: Mr. Daleep Singh Kaith, Advocate.

For the Respondents: Ms. Ritta Goswami, Additional Advocate General with Mr. Shriyek Sharda, Senior Assistant Advocate General, for respondents No.1 and 2-State.

(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge (Oral)

The claim petition filed under Section 22 of the Employee's Compensation Act, 1923 (in short 'Act') by the mother of the deceased has been dismissed by the learned Commissioner, Employee's Compensation Act, Rampur Bushahr, District Shimla on 15.03.2021, holding that she had neither any cause of action nor the *locus standi* to maintain the petition. The widow and minor daughter of the deceased have been held entitled to the compensation amount, being dependent upon the deceased in terms of Section 2(d) of the Act. Aggrieved, instant appeal has been preferred by the mother of the deceased.

2. Facts:-

2(i). A claim petition was preferred by the appellant under the Employee's Compensation Act, with the averments that

her son-Sunil Kumar was employed with respondents No.1 to 3. During the course of his employment, he met with an accident on 16.07.2016 and died on the spot. Deceased was 27 years old at the time of the accident. He had left behind his wife-Smt. Vinakshi/ respondent No.5, his minor daughter-Kumari Neha/ respondent No.6 and the appellant (mother) as his legal heirs. The appellant and respondents No.5 & 6 were dependent upon deceased's earning. A compensation of Rs.16,00,000/- alongwith interest @ 12% per annum was prayed for.

2(ii). Respondents No.5 and 6 had preferred their separate claim petition. They opposed the claim petition filed by the present appellant by filing their separate reply. They raised preliminary objections that the appellant had no cause of action to file the petition and that the petition was not maintainable on her behalf. Respondents No.5 and

6 further submitted that the deceased-Sunil Kumar was employed as a Driver in an ambulance by the respondents No.1 to 3 on monthly salary of Rs.9,698/-. The ambulance met with an accident on 16.07.2016 at Badrash. Sunil Kumar succumbed to the injuries suffered by him. These two respondents, i.e. widow and daughter of the deceased, also highlighted the fact that subsequent to the death of Sh. Sunil Kumar, the appellant ousted them from their home and that they were residing in the parental house of respondent No.5. It was further the case of respondents No.5 and 6 that appellant's husband (deceased's father) was serving as a Foreman in SJVN Limited at Jhakri and drawing monthly salary of Rs.27,561/-. Therefore, the appellant was not dependent upon the deceased. It was only respondents No.5 and 6, who were dependent upon the deceased and entitled to the compensation.

2(iii). Learned Commissioner, on the basis of the pleadings of parties, framed various issues including the following

two issues on the maintainability and locus standi of the appellant to maintain the petition:-

> *"6. Whether the petitioner has no cause of action to file the present petition, as alleged? OPR*
> *7. Whether the petitioner has no locus standi to file the present petition, as alleged? OPR"*

After considering the pleadings & evidence and after hearing the arguments, learned Commissioner, vide judgment dated 15.03.2021, held that the deceased-late Sh. Sunil Kumar was employed with respondents No.1 to 3 (respondents No.1 and 2 being principal employer and respondent No.3 being Contractor). He died during the course of his employment. His monthly salary was held to be Rs.8,500/-. After applying the relevant factor, compensation of Rs.8,54,280/- was worked out. Additionally, an amount of Rs.5,000/- towards performing last rites of the deceased and a penalty amount of Rs.50,000/- was also assessed by the learned Commissioner. The vehicle was found to be insured by respondent No.4 and therefore, liability to bear the burden of compensation was fastened upon it alongwith interest @ 12% per annum from the date of the accident till the date of actual payment of the entire amount. Respondent No.3 was held liable to pay the penalty amount of Rs.50,000/-.

2(iv). Respondents No.5 and 6, being dependants upon the deceased Sh. Sunil Kumar, have been held entitled to receive the entire compensation amount. In fact, respondents No.5 and 6 have filed their separate claim petition for compensation. Learned Commissioner observed that their claim would be considered in that petition itself. The claim petition filed by the appellant was dismissed on the ground that she was not entitled for

any compensation, being not a dependent upon deceased as per Section 2(d) of the Act. Since the petitioner has not been held entitled for the compensation amount, she has filed the instant appeal.

3. Heard learned counsel for the appellant and learned Additional Advocate General for respondents No.1 and 2.

Learned counsel for the appellant submitted that the case of the appellant falls under Section 2(d)(iii) of the Act. The appellant is the mother of the deceased and therefore, she is entitled for the compensation. Her claim petition could not have been dismissed. Learned Additional Advocate General supported the judgment passed by the learned Commissioner.

4. The claim petition was filed by the appellant under Section 22 of the Act. Under Section 22 of the Act, the application for compensation can be moved only by a dependant. The section reads as under:-

> *"22. Form of application.– (1) Where an accident occurs in respect of which liability to pay compensation under this Act arises, a claim for such compensation may, subject to the provisions of this Act, be made before the Commissioner.*
>
> *(1A) Subject to the provisions of sub-section (1), no application for the settlement of any matter by Commissioner, other than an application by a dependant or dependants for compensation, shall be made unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement.*
>
> *(2) An application to a Commissioner may be made in such form and shall be accompanied by such fee, if any, as may be prescribed, and shall contain, in addition to any particulars which may be prescribed, the following particulars namely:–*

(a) a concise statement of the circumstances in which the application is made and the relief or order which the applicant claims;

(b) in the case of a claim for compensation against an employer, the date of service of notice of the accident on the employer and, if such notice has not been served or has not been served in due time, the reason for such omission;

(c) the names and addresses of the parties; and

(d) except in the case of an application by dependants for compensation a concise statement of the matter on which agreement has and of those on which agreement has not been come to.

(3) If the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner."

The word 'dependant' has been defined under Section 2(d). The definition is as under:-

"2(d) "dependant" means any of the following relatives of deceased employee, namely:–

- *(i) a widow, a minor [legitimate or adopted] son, an unmarried [legitimate or adopted] daughter or a widowed mother; and*
- *(ii) if wholly dependant on the earnings of the [employee] at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;*
- *(iii) if wholly or in part dependant on the earnings of the [employee] at the time of his death,-*
  - *(a) a widower,*
  - *(b) a parent other than a widowed mother,*
  - *(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter [legitimate or illegitimate or adopted] if married and a minor or if widowed and a minor,*
  - *(d) a minor brother or an unmarried sister or a widowed sister if a minor,*
  - *(e) a widowed daughter-in-law,*
  - *(f) a minor child of a pre-deceased son,*

(g) *a minor child of a pre-deceased daughter where no parent of the child is alive, or*

(h) *a paternal grandparent if no parent of the employee is alive;*

Explanation.– For the purposes of sub-clause (ii) and items (f) and (g) of sub-clause (iii), references to a son, daughter or child include an adopted son, daughter or child respectively."

As mother of the deceased, the appellant does not fall in Section 2(d)(i). The appellant does not even fall in Section 2(d)(ii) and 2(d)(iii). Learned Commissioner after appreciating the evidence, has returned factual findings that the appellant's husband is alive and working in SJVN Limited, Jhakri. The salary of the appellant's husband is more than Rs.27,000/- per month. Deceased Sunil Kumar alongwith his family, consisting of his wife-respondent No.5 and minor daughter-respondent No.6, was residing separately from the appellant. Learned Commissioner has also noticed the admission made by the appellant in her cross-examination that her husband (deceased's father) bears all expenses of her own family. Learned Commissioner was correct in concluding that the appellant was not a dependent upon the deceased. Only those relations, who were dependent upon the deceased in terms of the provisions of the Act, are entitled to the compensation under the Act. No other person has a right to claim compensation. Appellant cannot claim compensation under the Act only on count of being a legal heir of the deceased. In the facts of the case, the appellant did not fall in any of the categories under Section 2(d) of the Act. No interference in the impugned judgment, therefore, is called for. The appeal is accordingly dismissed in limine.

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

Vidya Sagar .....Petitioner

Versus

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

Cr.M.P(M)No. 1274 of 2021
Reserved on: 29.07.2021
Decided on: 30.07.2021

Code of Criminal Procedure, 1973 -Section 439 – Petitioner has sought his release on bail in FIR No. 50 of 2021 P.S. Jogindernagar District Mandi under Section 20 ND&PS Act for being in possession of 1 Kg 20 gram charas – Held, that though weight or contraband in report of SFSL, Junga after deducting weight of carry bag or parcel cloth is 0.990 kg but in report under Section 173 CrPC, it is mentioned as 1 kg 20 grms – Court at this stage has not to scan evidence collected by the investigating agency minutely – Fact whether commercial or intermediate quantity was found from the person of petitioner can only be decided after recording of evidence by competent court – Petitioner is an accused in another case under Section 20 ND&PS Act and has been apprehended with larger quantity of contraband within almost one year – Rigors of Section 37 ND&PS Act also prohibits release of petitioner on bail – Petition dismissed.

For the petitioner: Mr. Karan Singh Kanwar, Advocate.

For the respondents: Mr. Hemanshu Misra, Additional Advocate General.

(Through video conferencing)

The following judgment of the Court was delivered:

Satyen Vaidya, J.

Petitioner has sought his release on bail in case registered vide FIR No. 50 of 2021 dated 10th March, 2021 at Police Station, Jogindernagar, District Mandi, H.P under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (in short 'the NDPS Act')

2. Petition has been filed on the ground that the petitioner is a law abiding citizen and has no art and part in the commission of any offence. He has been falsely involved in the case. The quantity of alleged contraband recovered in the case is doubtful. There is no compliance of mandatory provisions of the NDPS Act.

3. It has further been submitted on behalf of the petitioner that he is permanent resident of village Chhuchhal, Post Office Ropa, Tehsil Padhar, District Mandi, H.P. and there is no likelihood of petitioner fleeing from the course of justice. Petitioner has undertaken that in case of his release on bail, he will abide by all the conditions imposed by the Court.

4. On notice, the respondent has submitted the status report. Its perusal reveals that the petitioner was apprehended with 1 kg 20 grams of charas on 10.03.2021 at place Kadhaar by the police party. The recovery was effected in presence of independent witnesses named Yashodha Devi wife of Hemant Ram and Piar Singh son of Katku. The investigation was carried and petitioner was arrested. He was remanded to police custody till 12th March, 2021, on which day, he was ordered to be kept in judicial custody. On 12.03.2021, the certification of the inventory, as per Section 52A of the NDPS Act was done by learned JMIC, Jogindernagar.

5. The respondent, in the status report, has also submitted that the petitioner is an accused in another case registered vide FIR No. 65/2020 dated 28.02.2020, registered at Police Station, Sadar, District Mandi, H.P. under Section 20 NDPS Act and trial in the said case was pending.

6. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have gone through the status report as well as the report under Section 173 Cr.P.C., placed on record by the petitioner along-with documents annexed therewith.

7. At the out set, learned counsel for the petitioner has drawn the attention of the Court to the report of State Forensic Science Laboratory, Junga, in which the weight of the contraband after deducting the weight of carry bags and parcel cloth is mentioned as 0.990 Kgs. On the strength of the said report, it has been submitted on behalf of the petitioner that since the intermediate quantity of contraband is involved in the case in hand, therefore, the rigors of Section 37 of the NDPS Act are not applicable.

8. No doubt, the report of State Forensic Science Laboratory, relied upon by the petitioner mentions the weight of contraband as 0.990 kgs., but it is revealed from the report under Section 173 Cr.P.C submitted by the police that during investigation certification of the inventory and photographs of contraband was got done from learned JMIC, Jogindernagar and as per said certification, contraband weighs 1 Kg 20 grams

9. Learned counsel for the petitioner submits that the probably the weight of the contraband at the time of certification included the weight of parcel cloth and the carry bags and hence the contraband cannot be said to be of commercial quantity. Order passed by a Co-ordinate Bench of this Court on 12.05.2020 in Cr.M.P(M) No. 603 of 2020 titled as Gokul Chand vs. State of H.P. has been relied upon by the petitioner in which also, the cannabis after deducting the weight of wrappers, poly bags etc. was found to be 0.989 Kgs. and the Court had proceeded to grant the bail.

10. It has also been contended on behalf of the petitioner that though he is an accused in an earlier case registered vide FIR No. 65/2020 dated 28th February, 2020 at Police Station, Sadar, District Mandi, H.P. with the allegations of having been apprehended with 480 grams of charas, but the

said fact cannot be taken to be a deterrent in grant of bail to the petitioner in the present case on the ground that the offence in both the cases is yet to be proved against the petitioner and till such time, he is to be presumed an innocent. Learned counsel for the petitioner has placed reliance on the judgment of the Apex Court in Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and another, (2012) 2 SCC 382, relied upon by a Co-ordinate Bench of this Court in Ashish Sardana vs. State of H.P., Cr.M.P(M) No. 1423 of 2019 decided on 2nd September, 2019. The relevant para of the judgment reads as under:-

> *"10. It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc."*

11. The Court at this stage has not to scan the evidence collected by the investigating agency minutely. The fact whether the commercial or intermediate quantity was found from the person of petitioner can only be decided after recording of evidence by the Court of competent jurisdiction. The Court at this stage, has to look into the available material only to form *prima-facie* opinion for the disposal of this application. In the teeth of the fact that learned Judicial Magistrate 1st Class while exercising power under Section 52A of the NDPS Act has certified inventory of the contraband as well as photographs of such contraband which reveal the weight of the contraband to be 1 kg 20 grams, the quantity involved in the case thus, *prima-facie,* appears to be commercial quantity. Learned counsel for the petitioner has not been able to make out any ground so as to take the case of the petitioner out

of rigors of Section 37 of the NDPS Act. From the available records, reasonable grounds for believing that the petitioner is not guilty of the alleged offence and that he is not likely to commit any offence while on bail, are not made out.

12. It has been brought on record that the petitioner is an accused in another case under Section 20 of the NDPS Act registered vide FIR No. 65/2020 dated 28th February, 2020 at Police Station, Sadar, District Mandi, H.P. in which he is alleged to have been carrying 480 grams of charas. Though, petitioner is stated to be on bail in the said case, but it cannot be ignored that the petitioner has been apprehended with larger quantity of contraband within almost one year.

13. This Court is not in agreement with the contentions raised on behalf of the petitioner. Firstly, the rigors of Section 37 of the Act prohibits the release of petitioner on bail and secondly, his own act dis-entitles him from being released on bail. The fact remains that menace of drugs has infected a large number of population including alarming number of students and adolescents. With all deference to the judgments cited on behalf of the petitioner, it cannot be said as a absolute rule that the criminal history of the person has to be ignored altogether while deciding his bail application. The Apex Court in Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496 while culling out principles to be kept in mind while deciding petitions for bail has held character, behavior, means, position and standing of the accused and also the likelihood of the offence being repeated as one of the relevant consideration. The serious dimensions of the drug abuse in the society makes the offence of which the petitioner is accused to be of extreme serious nature. The repeated involvement of the petitioner in offence under Section 20 NDPS Act for the same offence, that too, with 480 grams and 1 kg 20 grams of contraband, cannot be over-looked. In the given facts of the case, it also cannot be said that petitioner, if released on bail, shall not indulge in

the same activity again. Petitioner cannot draw help from the order passed in Cr.P.M(M) No. 603 of 2020, as noted above, for the reason that facts in the said case were different and the petitioner in that case had no criminal antecedents.

14. In view of the discussion made above, the bail petition deserves dismissal and the same is accordingly dismissed.

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 hereinabove.

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

Sandeep Kumar alias Sonu .....Petitioner

Vs.

State of Himachal Pradesh .....Respondent

Cr. M.P.(M) No.: 1385 of 2021
Reserved on: 29.07.2021.
Date of Decision: 30.07.2021

Code of Criminal Procedure, 1973 -Section 439 – Petitioner has sought release on bail in case FIR No. 34 of 2020 dated 01-02-2020, P. S. Sadar, Hamirpur under Sections 454, 380 read with Section 34 of IPC – Held, Challan presented against the petitioner and investigation qua him is complete – Nothing on record to suggest that petitioner is accessory in any manner, in non – apprehension of other co-accused by the police – Fact that petitioner is an accused in other case FIR No. 06/2020 u/s 454, 380 read with Section 34 IPC not a sole factor to keep him in custody for prolonged duration as the guilt is yet to be proved in cases against him – No apprehension of accused fleeing from the course of justice – Bail Petition allowed – Petitioner ordered to be released on bail subject to conditions.

Cases referred:

Dattaram Singh Vs. State of Uttar Pradesh and another(2018) Vol III SCC page-22;

For the petitioner: Mr. Ankit Dhiman, Advocate.

For the respondents: Mr. Hemanshu Misra, Additional Advocate General.

(Through Video Conference)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, petitioner is seeking his release on bail, under Section 439 of the Code of Criminal Procedure (hereinafter referred to as the Code) in case FIR No. 34/2020, dated 1.2.2020, registered at Police Station Sadar Hamirpur, District Hamirpur, H.P., under Sections 454, 380 read with Section 34 of the Indian Penal Code.

2. In support of his case, the petitioner has submitted that he has been falsely implicated and has nothing to do with the offences in question. The petitioner has undertaken to join the investigation and further is ready and willing to furnish appropriate personal and surety bonds. He has further submitted not to hamper or tamper with the investigation, in any manner.

3. On notice, respondent has filed status report, which reveals that the petitioner is accused of the offence alleged to have been committed on 01.02.2020 in the house of the complainant, whereby, theft of valuable jewellery was made after committed house breaking. The petitioner is alleged to have been accompanied by other co-accused having common intention to commit said offence. It is further submitted that the petitioner could be arrested only on 08.04.2021, he remained in police custody till 12.04.2021 and thereafter

remanded to judicial custody. Petitioner is stated to be habitual offender. It is alleged that he is accused in similar case under Sections 380, 454 of the Indian Penal Code, in case, registered vide FIR No. 6/2020, dated 08.01.2020 at Police Station Sarkaghat, District Mandi, H.P. and is facing trial. He is also alleged to be an accused in case under Sections 279, 304A of the Indian Penal Code. The petitioner is also stated to have been convicted twice under the provisions of Gambling Act at Jawalamkhi, District Kangra, H.P. and fined Rs. 50/- on each occasion. Challan is stated to have been filed against the petitioner, which is pending in the Court of learned Judicial Magistrate Ist Class, Court No. 2, Hamirpur, District Hamirpur, H.P.

4. I have heard learned counsel for the petitioner and learned Additional Advocate General for the State. The petitioner is in custody since 08.04.2021. The fact that challan has been presented against him evidences the fact that the investigation qua him is complete. There is nothing on record to suggest that the petitioner is assessory, in any manner, in non-apprehension of other co-accused by the police. The nature of offences under the Gambling Act or under Sections 379, 304 A of Indian Penal Code with which petitioner has been charged on previous occasions are in no way akin to the offence involved in the present case. The fact that the petitioner has been arrayed as an accused in another case vide FIR No. 06/2020, dated 08.01.2020, under Sections 454, 380 read with Section 34 of Indian Penal Code, Police Station Sarkaghat, District Mandi, H.P. can not be taken to be a sole factor to keep the petitioner in custody for prolonged duration as the guilt, if any, of the petitioner is yet to be proved in the cases against him.

5. In ***Dattaram Singh Vs. State of Uttar Pradesh and another(2018) Vol III SCC page-22,*** it has been held as under:-

> *"2.* 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.
>
> 3. xxx xxx xxx
>
> 4. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in Inhuman Conditions in 1382 Prisons."

6. The respondent has not been able to place on record any material to show that in case of petitioner being enlarged on bail, he shall not be available for the trial or shall be an impediment in completion thereof. It comes out from the details of the status report itself that in the present case petitioner was arrested by police on the date when he had visited the Court premises at Sarkaghat, District Mandi, H.P. to attend the hearing of a case pending against him in pursuance of FIR No. 6/2020. This shows that the petitioner is attending the hearing of the other case, as detailed above.

7. The petitioner is permanent resident of Village Drang, Post Office Jawalamukhi, District Kangra, H.P. and there is no real apprehension of his absconding or fleeing from the course of justice. In the facts of the case further incarceration of petitioner is not justified.

8. The bail petition is accordingly allowed. The petitioner is ordered to be released on bail in FIR No. 34/2020, dated 01.02.2020, registered at Police Station Sadar Hamirpur, District Hamirpur, H.P., on his furnishing personal bond in the sum of Rs. 20,000/- with one surety in the like amount to the satisfaction of the learned Trial Court, subject, however, to the following conditions:-

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

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

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

The application stands disposed of.

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

Dile Ram .....Petitioner

Versus

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

CWP No. 3162 of 2021
Reserved on: 24.07.2021
Decided on: 30.07.2021

Constitution of India, 1950 -Article 226 **-** Online applications from eligible candidates for 215 posts of Lecturer (School-new) Commerce invited by respondent on 10-12-2019 – Petitioner applied under the Economically Weaker Section (EWS) category but his candidature rejected on the ground that he had not submitted requisite EWS certificate in support of his eligibility – Challenged by way of instant petition – Held, that Petitioner had not submitted requisite EWS certificate though had applied under EWS category – Non-submission of requisite certificates by a candidate in accordance with requirement of Advertisement is sufficient ground to reject his candidature – Petition disposed of with a direction to consider selection of Petitioner in case he finds merit amongst general category candidates.

Cases referred:
Bedanga Talukdar vs. Saifudaullah Khan and others (2011) 12 SCC 85;
Karnataka State Seeds Development Corporation Ltd. and Another vs. H.L. Kaveri and others, 2020(3) SCC 108;

For the petitioner: Mr. Jai Dev Thakur, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. R. S. Dogra, Sr. Addl. A.G, Mr. Shiv Pal Manhans, Mr. Vinod Thakur, Addl. A.Gs and Mr. Bhupinder Thakur, Dy. A.G. for respondent No.1.

Mr. Vikrant Thakur, Advocate for respondent No.2.

(Through video conferencing)

The following judgment of the Court was delivered:

Satyen Vaidya, J.

By way of instant petition, the petitioner has assailed the rejection of his candidature for the post of Lecturer (School-new) Commerce on the ground that he had not submitted requisite Economically Weaker Section (EWS) certificate in support of his eligibility.

2. Respondent Public Service Commission issued Advertisement No. 22 of 2019 on 10.12.2019 inviting online applications from the eligible candidates for 215 posts of Lecturer (School-new) Commerce besides posts in other subjects in the Department of Higher Education, Himachal Pradesh. Last date for submission of applications, as per Advertisement, was 30.12.2019 till 11.59 p.m. It was clearly stipulated that candidates must possess documents of their eligibility and should produce such documents on

the date of Written Objective Type Examination. It was also made clear that the candidates who fail to submit the requisite documents on the day of Written Objective Type Examination, their candidature will be rejected straightway and no further opportunity would be granted to them for submission of documents.

3. Petitioner, in pursuance to above noted Advertisement, applied for the post of Lecturer (School-new) Commerce under the Economically Weaker Section (EWS) category. As per petitioner, he had submitted the self-attested copies of all requisite documents along-with Economically Weaker Section certificate in support of his eligibility on the date of written examination i.e. 23.02.2020.

4. In reply, respondent No.2 has categorically maintained that the petitioner had neither submitted EWS certificate in support of his eligibility at the time of submitting online application nor on the day of Written Objective Type Examination held on 23.02.2020. Petitioner has not been able to controvert the factual position placed on record by respondent No.2.

5. It is established from the record that though petitioner had applied under the EWS category, but had not submitted requisite EWS certificate as aforesaid. In view of such undisputed position, no fault can be found with the action of respondent No.2, rejecting the candidature of the petitioner, on this sole ground. It is no more *res-integra* that non-submission of requisite certificates by a candidate in accordance with requirement of Advertisement is sufficient ground to reject his candidature. Reference can be made to the judgment dated 08.10.2020 passed by a Co-ordinate Bench of this Court in CWP No. 4276 of 2020, titled Monika Koti vs. H.P. Public Service Commission, wherein identical proposition has been dealt with by placing reliance on the judgments passed by Hon'ble Apex Court in ***Bedanga Talukdar*** vs. ***Saifudaullah Khan and others (2011) 12 SCC 85*** and

Karnataka State Seeds Development Corporation Ltd. and Another vs. ***H.L. Kaveri and others, 2020(3) SCC 108***.

6. Recently, in writ petition (C) No. 571 of 2021, titled ***Deepak Yadav and others*** vs. ***Union Public Service Commission and Another***, the Hon'ble Supreme Court has again reiterated the aforesaid legal position.

7. In view of the above discussion, the petitioner cannot have any claim for consideration under EWS category, however, taking a pragmatic view, we deem it appropriate to observe that non-submission of EWS certificate by petitioner will not take away his right to be considered as a candidate for posts under general category, if otherwise found eligible. We have noticed from the Advertisement dated 10.12.2019 that total 80 number of posts of Lecturer (School-new) Commerce were advertised for general category candidates. Petitioner has appeared in Written Objective Type Examination on 23.02.2020 and in case he finds merit amongst general category candidates, he be considered for selection under the said category with the purpose to meet the ends of justice.

8. The petition is accordingly disposed of with the directions as above. Pending application(s), if any. are also disposed of accordingly.

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

Het Ram .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWPOA No.5227 of 2019.
Reserved on: 23.07.2021.
Date of decision: 28.07.2021.

Constitution of India, 1950 - Article 226 – Departmental proceedings initiated against the petitioner on the basis of inquiry report submitted by respondent no. 4 – Petitioner accordingly charge-sheeted on 17-01-2005 on the charges of non-maintenance of record including other charges and supplementary charges – Petitioner placed under suspension on 1-3-2005 – Finally, Inquiry officer submitted his inquiry report on 11-04-2011, copy of which was sent to the Petitioner on 21-05-2011 who was required to submit reply within 10 days but did not submit his reply – Order of dismissal of petitioner from government service issued on 20-06-2011 – Petitioner preferred CWP No. 4980 of 2011 which was decided on 29-07-2011 and respondents were directed to consider the matter afresh taking note of representation of the petitioner - The inquiry conducted afresh but inquiry report dated 11-04-2011 stand as such – Punishment order dated 23-11-2013 issued against the petitioner – Appeal preferred by the petitioner dismissed – Being aggrieved, Petitioner preferred the instant petition – Held, that scope of judicial review in matter of inquiry is very limited – Financial irregularity of Rs. 32,70,953/- has been detected - Inquiry report reveals that petitioner had withdrawn cash from the bank but no entries to this effect made in cash book – Appellate Authority rightly appreciated the facts – Petition dismissed.

Cases referred:

State of Bihar and others vs. Phulpari Kumari (2020) 2 SCC 130;

For the Petitioner : Mr. S.P. Chatterji, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocate Generals and Mr. Bhupinder Thakur, Deputy Advocate General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

"i) That the impugned order dated 23.11.2013, **Annexure P-13** and order dated 14.3.2014, **Annexure P-16** may be quashed and set aside;

ii) That the petitioner may be ordered to be reinstated in service with all consequential benefits including back wages, seniority and promotion etc."

2. The facts of the case, in brief, are as under:

2(a) On dated 08.09.2003, Shri Surender Pal, Up-Pradhan and Shri Yog Raj, Ward Member of Gram Panchayat, Sadyana moved a complaint against the petitioner before respondent No.3 which was further entrusted to respondent No.4 for detailed inquiry and report. Accordingly, the Inquiry Officer (Respondent No.4) conducted the enquiry into the matter and submitted enquiry report on 27.07.2004 with the recommendation to initiate departmental proceedings against the petitioner.

2(b) The petitioner was accordingly charge sheeted on 17.01.2005 on the charges of non-maintenance of record, not handing over the charge on transfer, non production of record before the Chartered Accountant, disobedience of the order of the higher authority and misbehave with Inquiry Officer. On 12.08.2005, supplementary charges for raising loan amounting to Rs. 50,000/- from Bank of Baroda, Mandi, H.P. and Rs.63,000/- from HP State Co-operative Bank, Kotli by forging the signatures of Block Development Officer, Sadar, were levelled against the petitioner. Another supplementary charge for misappropriation of Panchayat fund amounting to Rs.32,200/- was also levelled against the petitioner on 06.09.2005. The Additional District Judge, Mandi, was appointed as Inquiry Officer to enquire into the charges levelled against the petitioner.

2(c) The petitioner was also placed under suspension on 01.03.2005. His suspension order was revoked on 23.01.2007 by the Director, Rural Development and he was transferred to Development Block, Seraj.

2(d) A criminal case bearing FIR No. 156 dated 16.04.2005 under Section 471 IPC was registered against the petitioner for raising loan amounting to Rs.50,000/- from Bank of Baroda, Mandi, H.P. and Rs.63,000/- from HP State Co-operative Bank, Kotli by forging the signatures of the Block Development Officer, Sadar.

2(e) The Inquiry Officer (ADM, Mandi) after conducting the inquiry submitted his inquiry report on 23.11.2006. Accordingly, a show cause notice was issued to the petitioner and after considering his reply thereon, punishment order dated 23.04.2007 was passed. The petitioner preferred an appeal against the punishment order and the same was dismissed by the Director, Rural Development on 30.10.2007.

2(f) As per different audit reports, it was found that the petitioner committed serious financial irregularities. He neither attended the audit objections nor handed over the record to his successors. Besides, the petitioner withdrew the amount from the banks, but that withdrawal was not taken into account. Therefore, a show cause notice dated 16.06.2008 was issued to the petitioner.

2(g) The petitioner was placed under suspension on 03.09.2008 and charge-sheet was issued against him on 06.12.2008 in which Sub Divisional Officer (Civil), Sadar, was appointed as Inquiry Officer. The main allegation against the petitioner in the charge-sheet was that of misappropriation of government funds amounting to Rs.32,70,953.00 as he had failed to maintain and produce the proper record of receipt and utilization of that funds during audit.

2(h) The Inquiry Officer submitted his inquiry report on 11.04.2011 and a copy of the same was sent to the petitioner on 21.05.2011 and he was required to submit his reply within 10 days, who, in turn, did not submit his reply within the stipulated time and even within the extended time upto 15th June, 2011, therefore, the order of dismissal from government service was issued on 20.06.2011.

2(i) The petitioner preferred CWP No. 4980 of 2011 before this Court which was decided on 29.07.2011. This Court had directed the respondents to consider the matter afresh taking note of the representation furnished by the petitioner and after affording an opportunity of hearing to him.

2(j) In compliance of the order of this Court, the petitioner was granted an opportunity for personal hearing before respondent No.3 and after going through the record, he was given an opportunity to produce all relevant record/documents pertaining to the Gram Panchayat mentioned in the charge-sheet. Accordingly, the matter was again handed over to Sub Divisional Officer (Civil), Sadar, on 14.09.2011 with a direction to submit the report within two months.

2(k) The Inquiry Officer submitted his report on 31.08.2012 i.e. after 11 months wherein he pointed out that the petitioner used to seek opportunities time and again on one pretext or other and finally requested for re-audit. The Inquiry Officer concluded that the charges proved against the petitioner in his earlier inquiry report dated 11.04.2011 stand as such.

2(l) It was found from the inquiry report dated 31.08.2012 that the petitioner neither produced record nor handed over the proper record to his successor Panchayat Secretaries. Therefore, the petitioner was directed to hand over the record to concerned Panchayat Secretaries and obtain certificates of compliance from them, but the Panchayat

Secretaries of Gram Panchayats Kothi Gehri, Sardhwar, Sehali, Dusra Khaboo and Sadyana certified that the petitioner has not handed over the record. The petitioner was requesting for re-audit without handing over the charge to his successors, thereby adopting a dilatory tactics to prolong the matter. Therefore, punishment order dated 23.11.2013 was issued against the petitioner.

2(m) The petitioner preferred an appeal before Special Secretary-cum- Director, Rural Development against the aforesaid punishment order which was decided by the appellate authority.

3. Aggrieved by the orders passed by the respondent-authority as affirmed by the appellate authority, the petitioner has filed the instant petition for the reliefs as have been set out hereinabove.

4. It is vehemently contended by Shri Chatterji learned counsel for the petitioner that since the order of dismissal was passed by an authority who even was not an appointing authority, therefore, the same is not only in violation of Article 311 of the Constitution of India, but the same is unconstitutional and void ab-initio and is required to be set aside on this ground alone.

5. He further argues that issuance of repeated charge-sheets and penal action thereupon amounts to double jeopardy. Therefore, being a case of double jeopardy, the second charge-sheet dated 06.12.2008 is not sustainable in the eyes of law. He further argues that even otherwise the charge-sheet is defective as it is not in accordance with the rules, therefore, the petitioner could not have been ordered to be removed from service.

6. Lastly, it is argued that in the inquiry conducted against the petitioner, there was no loss caused to the State Exchequer and since the petitioner was under suspension, therefore, it was for the respondent-department to have removed the audit objection, rather than prosecuting the petitioner.

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

8. At the outset, it needs to be noticed that the entire thrust of the petitioner's arguments is directed against the orders passed by the Disciplinary Authority and all factual and legal grounds have been directed against the said authority. Whereas, it is the admitted case of the parties that the petitioner had filed an appeal before the Appellate Authority, who vide its detailed order dated 14.03.2014 has dismissed the same.

9. Under the service jurisprudence, it is the settled legal position that when the order of the Disciplinary Authority is considered by the Appellate Authority and a decision is passed, it merges with the order of the Appellate Authority. Doctrine of merger and principle of natural justice would apply as the appellate authority decides the entire factual and legal question involving in the matter assailing the order of the Disciplinary Authority. Even though, the petitioner has assailed the orders of the Disciplinary Authority as also the Appellate Authority, however, it would be noticed that there are no separate grounds of challenge questioning the order passed by the Appellate Authority and all the grounds from Ground(A) to (H) are only directed against the Disciplinary Authority and, therefore, without laying specific challenge to the order of the Appellate Authority, not much relief can otherwise be granted to the petitioner because, as observed above, the decision of the Disciplinary Authority gets merged with the order of the Appellate Authority.

10. The scope of interference in service matters/ disciplinary proceedings is extremely limited where the Court can see whether:-

> "(*a). the enquiry is held by a competent authority;*
> *(b). the enquiry is held according to the procedure prescribed in that behalf;*
>
> *(c). there is violation of the principles of natural justice in conducting the proceedings;*

(d). the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

(e). the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f). the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
(g). the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h). the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

(i). the finding of fact is based on no evidence.

11. The Writ Court shall not :

(i). re-appreciate the evidence;
(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;
(iv). go into the reliability of the evidence;
(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience.

(Refer: ***Union of India and others*** *vs.* ***P. Gunasekaran (2015) 2 SCC 610***).

12. In ***State of Bihar and others*** *vs.* ***Phulpari Kumari (2020) 2 SCC 130***, the Hon'ble Supreme Court also held that the scope of judicial review in matter of inquiry is very limited. The interference with the orders passed pursuant to a disciplinary inquiry can only be in a case of "no evidence". Sufficiency of evidence is not within the realm of judicial review. The standard of proof as required in a criminal trial is not the same in a departmental inquiry. Strict rules of evidence are required to be followed by the Criminal Court where the guilt of the accused is required to be proved beyond reasonable doubt. On the other hand, preponderance of probabilities is the test adopted in finding the delinquent guilty of the charge in departmental proceedings.

13. As regards the contention of the petitioner that he was removed from service by the authority other than the Appointing Authority, it would be noticed that Rule 12(2)(a) of the CCS(CCA) Rules, 1965 shows that any penalty prescribed under Rule 11 of the 1965 Rules can be imposed by any other authority empowered in this behalf by a general or special order of the Governor. In terms of Para-17 of the Standing Orders notified by the Department of Rural Development on 21.04.2004 under Rules 26 & 27 of the Rules of Business of Government of Himachal Pradesh in exercise of the powers conferred by Clauses (2) and (3) of Article 166 of the Constitution show that the Deputy Commissioner of the concerned District is competent to impose major penalty. Not only this, these powers have further been reiterated vide notification dated 11.03.2013 when the cadre of the Panchayat Secretaries was converted from District to State cadre. Therefore, the Deputy Commissioner, Mandi was fully competent to impose major penalty upon the petitioner.

14. Now, adverting to the second contention of the petitioner regarding there being double jeopardy. I am at a complete loss to appreciate such contention, merely because the petitioner has been repeatedly issued charge-sheets for his separate and distinct misconduct for which he also happened to be punished on some occasions, therefore, this would not amount to double jeopardy.

15. Article 20(2) of the Constitution of India reads as under:-

"2) No person shall be prosecuted and punished for the same offence more than once."

16. In order to enable a citizen to invoke the protection of Clause (2) of Article 20 of the Constitution of India, there must have been both prosecution and punishment in respect of the same offence.

17. Double jeopardy is a concept which shall amount to violation of Article 20(2) of the Constitution of India and is also barred under Section 300 of the Code of Criminal Procedure. Thus, it would be clear that the only condition precedent for applicability of principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence which unfortunately is not the factual position in this case.

18. As regards the contention of the petitioner that there was no loss caused to the State Government, I again do not find any merit in such contention. For, it is well settled that a delinquent can otherwise be proceeded departmentally, if not in a Court of law for any misconduct which essentially may not result in any financial loss.

19. In the instant case, financial irregularity of Rs.32,70,953/- has been detected and the same has been calculated on the basis of amount withdrawn from the Bank or collected from the public, but no corresponding entry made in the cashbook or deposited in the Bank. The inquiry report reveals that the petitioner had withdrawn cash from the Bank, but no entries to this effect were made in the cashbook. Similarly, he had issued receipts on account of collection of house tax and issuance of ration cards, but the same were not accounted for. Only the counter-foils were found and here also no amount was mentioned in the counter-foils. The petitioner has neither maintained the cashbook properly nor deposited the cash in the Bank. Even, during the course of inquiry, he has repeatedly stated that he could not say anything in respect of the audit objections

without seeing the records. Therefore, the Appellate Authority was absolutely right in observing as under:-

> "....It is strange that he was asking for seeing the record which he had failed to maintain. Had he maintained the record there would have been no problem in producing the same during the inquiry. He cannot take the defence that the audit objections were to be settled by the concerned Panchayat Secretary as without proper maintenance of cash books and other registers this amount can not be accounted for. It is apparent from the inquiry report that he had failed to maintain the cash books and hence the above amount can not be account for even by the concerned Panchayat Secretary...."

20. Apart from the above, what is more disturbing is the fact that even after the present inquiry, some other matters of embezzlement done by the petitioner have been brought into the notice of the respondents by Block Development Officer, Sadar and Seraj which additionally convinces this Court not to interfere with the order of penalty imposed in the instant case.

21. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Suresh Kumar ....Petitioner.

Versus

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

CWPOA No. 4075 of 2020
Decided on: 27.07.2021.

Constitution of India, 1950 - Article 226 – Petitioner engaged as a Driver on daily wage basis in Hamirpur Division of Forest Department – Petitioner has

put in 240 days work in each calendar year till filing of Original Application (O.A.) in erstwhile H.P. Administrative Tribunal which stands transferred after its abolition – Earlier, competent authority was directed vide order passed in O.A. No. 4909 of 2017 filed by petitioner for considering his claim of regularization as a driver but the same was rejected – Being aggrieved, instant petition filed – Held, that as per regularization policy framed by the government dated 22-04-2016, daily wage worker was to be regularized on completion of 7 years of service as on 31-02-2016, provided he had put in 240 days in each calendar year – Petitioner having fulfilled the criteria entitled to be considered for regularization as on 31-03-2016 – Post of driver available in the department on 31-12-2015 – Petition allowed and respondents directed to regularize the services of the petitioner as Driver w.e.f. 01-04-2016 with all consequential benefits including seniority.

For the petitioner : Mr. Ramakant Sharma, Advocate.

For the respondents : Mr. Adarsh Sharma and Sumesh Raj, Additional Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This petition was initially filed as Original Application before learned Himachal Pradesh Administrative Tribunal, which after the abolition of the learned Tribunal has been transferred to this Court and registered as civil writ petition.

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

The petitioner was engaged as a Driver on daily wage basis in Hamirpur Division of the Forest Department of the State. It is not in dispute that since his engagement and till the filing of the original application, which

now stands transferred to this Court and registered as writ petition, the petitioner had put in 240 days work in each calendar year.

3. Petitioner approached erstwhile Tribunal earlier by way of original application No. 4909 of 2017, titled as Suresh Kumar vs. State of Himachal Pradesh and another, *inter alia* praying for his regularization as a Driver in the respondent-department, which original application stood disposed of by learned Tribunal in the following terms:-

> *"6. In view of the above, the original application is disposed of in terms of the aforesaid CWP No. 2735 of 2010 and the connected matters, with a direction to the respondents/competent authority that subject to the above verification and on finding the applicant to be similarly situate as above, benefit of the said judgment, if the same has attained finality and implemented, shall also be extended to him alongwith consequential benefits, if any, as per law, within three months from the date of production of certified copy of this orderalongwith copy of the aforementioned judgment before the said authority by the applicant."*

4. Vide order dated 18.01.2018 passed by the competent authority in compliance to the directions passed by learned Tribunal (appended with the petition as Annexure A-5), the competent authority rejected the claim of the petitioner of regularization, feeling aggrieved by which, the petitioner has preferred the present petition, praying for the following reliefs:-

> *"i) That the impugned order dated 18.01.2018 Annexure A-5 may very kindly be quashed and set aside.*
> *ii) That the respondents may very kindly be directed to regularize the services of the applicant as Driver with effect from the completion of daily wage service i.e. 01.01.2013 with all consequential benefits in the interest of justice.*
> *iii) That the entire record of the case of the applicant may kindly be ordered to be summoned from the respondents for the kind perusal of the Hon'ble Tribunal.*
> *iv) That any such or further order which this Hon'ble Tribunal may deem just and proper in the facts and circumstances of the case,*

may also kindly be passed in favour of the applicant and against the respondents."

5. It is a matter of record that during the pendency of this petition, services of the petitioner have been regularized by the respondents w.e.f. 28.06.2021.

6. I have heard learned Counsel for the petitioner as well as learned Additional Advocate General and gone through the pleadings as well as documents appended therewith.

7. During the course of hearing of the case, on 13.07.2021, this Court passed the following order:-

"Heard for some time. The Court stands informed that now the services of the petitioner have been regularized. Learned Additional Advocate General to inform the Court as to on which date, the post against which the petitioner has now been regularized, actually became available with the department.

List on 23.07.2021 for continuation."

8. In compliance to above quoted order, learned Additional Advocate General has placed on record the instructions which so stand imparted to the office of learned Advocate General from the office of Principal Chief Conservator of Forests, Himachal Pradesh, dated 22nd July, 2021, which are ordered to be taken on record as jointly prayed for by learned Counsel for the parties.

9. It is not in dispute that after the engagement of the petitioner and before his regularization by the respondent-department, two policies stood issued by the Government of Himachal Pradesh regarding regularization of daily waged workers. The petitioner has placed on record as Annexure A-6, a copy of policy of regularization of daily waged workers/contingent paid workers, dated 19th June, 2017, in terms whereof, the government took a conscious decision that daily waged/contingent paid workers, who have

completed 5 years of continuous service (with a minimum of 240 days in a calendar year except specified otherwise for the tribal areas) as on 31.03.2017, may be regularized only against available vacancies in the respective Departments. Alongwith the reply filed by the State, copy of an earlier policy issued by the respondent-State, dated 22nd April, 2016, is appended as Annexure R-4, in terms whereof the government had decided that daily waged workers/contingent paid workers, who have completed 7 years of continuous service (with a minimum of 240 days in a calendar year except specified otherwise for the tribal areas) as on 31.03.2016 and due to complete 7 years service as on 30.09.2016, may be regularized only against available vacancies in respective Departments.

10. When the matter was being heard earlier, learned Additional Advocate General submitted that undoubtedly the right of regularization, in terms of the policy mentioned hereinabove, accrued upon the petitioner, but the same does not *ipso facto* mean that as from the date of completion of requisite number of years in terms of policies mentioned hereinabove, the person concerned is conferred an unfettered right of regularization. Said right of regularization accrues in favour of an employee only from the date, when a post, against which such a person can be regularized, becomes available. It is in this background that the Court had passed order dated 13.07.2021 to find out as to when did the post/vacancy became available with the department against which the petitioner was regularized in the year 2021.

11. A perusal of the instructions which have been made available to the Court by learned Additional Advocate General, mentioned hereinabove, demonstrates that vacant posts of driver were available with the department on 31.12.2015, yet, though the petitioner became eligible after the commencement of regularization policy of the government dated 22nd April, 2016, he was offered appointment on regular basis only on 28.06.2021 pursuant to approval accorded by the government dated 16.04.2021.

12. Relevant portion of the instructions (supra) is quoted herein below:

> *"5. It is further submitted that though, as per available record in this office, 3 vacant posts of Driver were available in the department on 31.12.2015 but the petitioner became eligible for regularization after the commencement of regularization policy dated 22.04.2016. He was given offer of appointment vide this office letter No. Ft. 43-50/2017/(E-II) OA dated 28.06.2021 (Annexure R-III) pursuant to approval accorded by the Government vide letter No. FFE-A(E) 2-27/2018 dated 16.04.2021 (Annexure R-I) in view of undertaking given by the respondents in OA No. 892/2018 now registered as CWPOA 4075/2020 which is pending adjudication. Against this offer, he joined as driver on 29.06.2021.*
>
> *It is, therefore, requested that the above case may kindly be defended as per the advice/opinion conveyed by the Government of HP vide letter No. FFE-A(E)2-27/2018 dated 16.4.2021 (Annexure R-I) and Hon'ble High Court may kindly be apprised of facts accordingly."*

13. As mentioned hereinabove also, the petitioner was initially engaged on daily wage basis on 01.01.2008. In terms of regularization policy framed by the government dated 22.04.2016 (Annexure R-4) appended with the reply of the State, a daily wage worker was to be regularized on completion of 7 years service as on 31.03.2016, provided such worker had put in minimum 240 days in each calendar year. The petitioner herein completed 7 years of continuous service as daily wage driver by putting 240 days in each calendar year as on 01.01.2016. Thus, on 31.03.2016, in terms of the provisions of the policy of regularization framed by the State Government dated 22.04.2016, the petitioner was entitled to be considered for regularization as he fulfilled the criteria of having 7 years service as daily waged worker as on 31.03.2016, with 240 days in each calendar year. Now, but of course, the right of regularization could have been claimed by the

petitioner and could have been conferred upon the petitioner, provided the post of Driver was available. The instructions (supra) demonstrate that three posts of driver were available in the department as on 31.12.2015 and it was against one of these vacant posts that the petitioner was ultimately regularized in the year 2021. This is not in dispute. In the considered view of the Court, once the post of driver was available in the department on 31.12.2015 and right of regularization accrued in favour of the petitioner, post completion of 7 years service as daily waged driver, in terms of policies of regularization dated 22.04.20216 w.e.f. 01.09.2016, then the petitioner ought to have been regularized against the available post of driver w.e.f. 01.04.2016 and denial of the same by the respondents to the petitioner is arbitrary. It is not the stand of the State that the petitioner was not regularized in the year 2016 either because of non-availability of vacancies or that there were other daily waged drivers senior to the petitioner, who were to be accommodated before the petitioner. Therefore also, the act of the respondents of not regularizing the petitioner w.e.f. 01.04.2016, i.e. the date when he became eligible to be considered for regularization as per policy of the State in vogue for regularization of daily wagers, is not sustainable in law. The policy of regularization of daily waged/contingent paid workers has been framed by the State itself, which is to be applicable to all its departments. As it was a conscious decision taken by the State that daily waged/contingent paid workers, who fulfilled the criteria as laid down in regularization policy dated 22.04.2016, be regularized post completion of 7 years service against the available vacancies, then, the petitioner ought to have been given the benefit of said policy of regularization from due date and denial of the same to the petitioner without any cogent explanation is not sustainable in law.

14. Accordingly, in view of the findings returned hereinabove, this writ petition is allowed by holding that the petitioner is entitled for regularization against the post of Driver w.e.f. 01.04.2016 and the

respondents are directed to regularize the services of the petitioner as Driver w.e.f. 01.04.2016 with all consequential benefits, including seniority. It is clarified that as from 01.04.2016 up to the date of filing of the original application, monetary benefits shall be conferred notionally and as from the date of filing of the original application, i.e. 28.02.2018, actual monetary benefits shall be paid to the petitioner. Arrears be paid within six months.

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

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

Between:-

CHARAN DASS,
S/O SH. NANAK CHAND, R/O
VILLAGE GUJANDALI,SUB TEHSIL
TIKKAR,

DISTRICT SHIMLA, H.P.....PETITIONER

(BY MR. B.N. SHARMA, ADVOCATE)AND

1. THE STATE OF HIMACHAL PRADESH THROUGH DISTRICT COLLECTOR, SHIMLA, H.P.

2. THE DIVISIONAL FOREST OFFICER, CUM COLLECTOR CUM AUTHORIZED OFFICER UNDER LANDREVENUE ACT AND H.P. PUBLIC PREMISES ACT, DIVISION ROHRU,
DISTRICT SHIMLA, H.P.....RESPONDENTS

(BY MS. RITTA GOSWAMI, ADDITIONAL ADVOCATE GENERAL WITH MS. SEEMA SHARMA, DEPUTY ADVOCATE GENERAL AND MR. SHRIYEK SHARDA,SENIOR ASSISTANT ADVOCATE GENERAL)

Civil Misc. Petition Main (Original) No. 162 of 2021

Date of Decision: 13.08.2021

Code of Civil Procedure, 1908 - Order-26, Rule 9- Appointment of Local Commissioner for ascertaining the age of apple trees over the suit land- Held- Possession of the petitioner over the suit land is not in dispute so no fruitful purpose is going to be served by the appointment of the Local Commissioner for ascertaining the age of apple plants starting to be growing over it. [Para 4]

Code of Civil Procedure, 1908 - Order-26, Rule 9- Appointment of Local Commissioner- The application for appointment of Local Commissioner moved by the plaintiff at argument stage – The provision of Order-26, Rule 9 CPC cannot be used to fill up lacuna in evidence - Petition dismissed. [Para 4]

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

O R D E R

The application moved by the petitioner/plaintiff under Order 26 Rule 9 of the Code of Civil Procedure (CPC), seeking appointment of Local Commissioner for ascertaining the age of apple plants statedly growing over the suit land, has not found favour with the learned Trial Court. Aggrieved, the petitioner has filed the instant petition.

2. Facts:-

2(i). The respondents issued a notice to the petitioner under the provisions of H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (in short 'Act'). The petitioner thereafter filed a civil suit with

prayers, inter alia, that entries in the revenue record pertaining to the suit land are wrong, illegal, without jurisdiction and contrary to the provisions of law. It was further prayed that those revenue entries and the notice issued to the petitioner under the Act be declared as null and void.

2(ii). The suit filed by the petitioner/plaintiff was resisted by the respondent-State. For the purpose of present controversy, it be noted that the stand of the respondent-State in the written statement was that it was owner of the suit land for the last 50 years. The ownership of the State over the suit land was reflected in the revenue record. The petitioner/plaintiff and his predecessor had encroached over the government land for the last many years. It was further stated that the plaintiff being fully aware of the encroachment over the suit land, had applied for regularization of the same during the year 2002.

2(iii). Upon consideration of pleadings of the parties, issues were framed in the civil suit on 03.07.2017. The parties led evidence in support of their contentions. The entire evidence in the case was led by 20.03.2019. The matter thereafter was repeatedly fixed for arguments. On 13.01.2020, the petitioner/plaintiff moved an application under Order 26 Rule 9 CPC for appointing 'scientific Local Commissioner to investigate and ascertain the age of plants over the suit land'. The application was opposed by the respondents. It was finally dismissed by the learned Trial Court vide order dated 09.07.2021, which is impugned in the present petition.

3. Contentions:-

Learned counsel for the petitioner argued that the Local Commissioner is required to be appointed for ascertaining the age of apple

plants standing over the suit land. This, according to learned counsel, is necessary not only to determine the possession of the petitioner over the suit land, but also to determine the date of commencement of said possession. Learned Additional Advocate General opposed the prayer and submitted that the provisions of Order 26 Rule 9 CPC are not met with in the instant case. Learned Additional Advocate General contended that the application is nothing, but an attempt to linger on the civil proceedings initiated by the petitioner/plaintiff to overcome the warrant of ejectment issued against him under the provisions of H.P. Public Premises Act.

4. Observations:-

Heard learned counsel for the parties and gone through the documents on record.

In terms of Order 26 Rule 9 CPC, in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court. Satisfaction that appointment of Local Commissioner is necessary, has to be that of the Court. In the facts of the case, possession of the petitioner over the suit land is not disputed by the respondent-State. The petitioner has pleaded his possession over the suit land, which fact has been admitted by the respondent-State in its written statement. The stand of the State is that the suit land is owned by the State of Himachal Pradesh. The land is recorded in the ownership of the State in the revenue record for past around fifty years. Possession of the petitioner is that of an encroacher. Since the possession of the petitioner over the suit land is not in dispute, then obviously, no purpose is going to be served by appointing a Local Commissioner for ascertaining the age of apple plants

stated to be growing over it. In any case, the age of apple plants in itself will not prove actual possession of the petitioner/plaintiff over the suit land.

One more important aspect worth noticing is that the evidence in the case was admittedly over on 20.03.2019. The matter thereafter was repeatedly fixed for arguments. It was at this stage that the application under Order 26 Rule 9 CPC was moved by the petitioner/plaintiff on 13.01.2020. The application, in these circumstances, was nothing, but an attempt on the part of the petitioner for protracting the litigation. There was no matter in dispute, which required elucidation with the aid of Local Commissioner. It is well settled that provisions of Order 26 Rule 9 CPC cannot be used to fill lacunae, if any, in the evidence of the parties. Therefore, I find no error in the impugned order passed by the learned Trial Court, dismissing the application filed by the petitioner/plaintiff.

For all the aforesaid reasons, the present petition lacks merit and is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

1. ***CWPOA No. 6391 of 2019***

B. C. Gupta ....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

2. ***CWPOA No. 6220 of 2019***

Tara Dutt Sharma and others ....Petitioners.

Vs.

State of Himachal Pradesh and others ....Respondents.

3. *CWPOA No. 7876 of 2019*

Ashok Kuma Mahajan ....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWPOA No. 6391 of 2019 a/w CWPOA Nos. 6220 and 7876 of 2019
Reserved on: 01.07.2021
Date of Decision: 15.07.2021

Constitution of India, 1950- Articles 14 & 226**-** Fixation of Pension-Formulae- Department granted pension qua which petitioner have sought the revision of the pension as well as the arrears w.e.f. 01.01.2006 to 31.03.2013 in pursuance of instructions contained in Office Memorandum dated 14th October, 2009 - Held- there is lack of any justification in making the benefit accruable to pensioners under Office Memorandum dated 21st May, 2013 applicable w.e.f. 01.04.2013 rather than 01.01.2006 as done by earlier Office Memorandum dated 14th October, 2009, as cut-off date for grant of revised pension in favour of pre-2006 pensioners already stood fixed as 01.01.2006 by the Government itself vide its earlier Office Memorandum dated 14th October, 2009- Writ petition allowed – Petitioners held to be entitled for pre-revised pension in terms of Office Memorandum w.e.f. 01.01.2006 alongwith arrears. [Paras 22 & 25]

Cases referred:

K.S. Puttaswamy Vs. Union of India, (2019) 1 SCC 1;

1. *CWPOA No. 6391 of 2019*

For the petitioner: Mr. Rajnish Maniktala, Senior Advocate, with Mr. Naresh Verma, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate

Generals and Ms. Divya Sood, Deputy Advocate General.

2. *CWPOA No. 6220 of 2019*

For the petitioners: Mr. B. Nandan Vashisht, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General.

3. *CWPOA No. 7876 of 2019*

For the petitioner: Mr. S. S. Sood, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

As similar issues of facts and law are involved in these three writ petitions, they are being disposed of by a common judgment.

2. The petitioner in CWPOA No. 6391 of 2019 retired from the post of Deputy Secretary on 30.11.1988, on attaining the age of superannuation. His grievance is with regard to the in action on the part of the respondents of not revising his pension, in terms of Para 4.2 of Office Memorandum No. Fin(Pen) A(3)-1/09, Part II, dated 14.10.2009, published in Gazette No. 1464/vit/2009, dated 30.10.2009, read with Notification No. Fin(PR) B-7/2009, dated 26.08.2009, published in Gazette No. 108/Gazette 2009, dated 26.08.2009 and Office Memorandum dated 21.05.2013, which according to the petitioner is applicable in his case w.e.f. 01.01.2006 instead of 01.04.2013. Similarly, petitioners in CWPOA No. 6220 of 2019, total 6 in numbers, retired on attaining the age of superannuation before 01.01.2006 and their grievance is also similar. The details of superannuation of the said petitioners are as under:

"1. Tara Dutt Sharma, retired as Deputy Secretary on 30.11.2002, PPO No. 60057/HP.
2. Khem Chand Sharma, retired as Deputy Secretary on 31.01.2002, PPO No. 54722/HP.
3. Virender Kumar Sood, retired as Under Secretary on 31.10.1999, PPO No. 45195/HP.
4. Nand Lal Bhardwaj, retired as Sr. Pvt. Secretary on 31.12.2000, PPO No. 50254/HP.
5. Shanti Swaroop Sood, retired as Deputy Secretary on 31.07.2003, PPO No. 60321/HP.
6. Jugal Kishore Sud, retired as Principal School Cadre on 31.10.1999, PPO No. 48027/HP."

3. Petitioner in CWPOA No. 7876 of 2019 retired from the post of Chief Engineer, I & PH Department on 30.06.2004 and his grievance is also the same.

4. For the sake of brevity, the Court shall be referring to the pleadings and Annexures from CWPOA No. 6391 of 2019.

5. According to the petitioners, pay revision took place on 01.01.2006 and their pre-revised pay scales were accordingly revised vide Resolution dated 29th August, 2008 (Annexure A-3). The Central Government accepted the recommendations of the 6th Pay Commission, in terms whereof, the pension was required to be 50% of the average emoluments, received during past 10 months or the last pay drawn, whichever was more beneficial to the retiring employee. The revised pension structure was to become effective from 01.01.2006 and 40% of the arrears were to be paid in cash for the years 2006-09 and the remaining 60% in the years 2009-10.

6. To be more precise, the relevant recommendation, i.e., recommendation No. 2, which stood accepted by the Government, was as under

> *"2. Linkage of full pension with 33 years of qualifying service should be dispensed with. Once an employee renders the minimum pensionable service of 20 years, pension should be paid at 50% of the average emoluments received during the past 10 months or the pay last drawn, whichever is more beneficial to the retiring employee. Simultaneously, the extant benefit of adding years of qualifying service for purposes of computing pension/related benefits should be withdrawn as it would no longer be relevant. (5.1.33)"*

This was followed by issuance of Office Memorandum, dated 1st September, 2008 (Annexure A-4), on the subject "*Implementation of Government's decision on the recommendations of the Sixth Central Pay Commission-Revision of pension of pre-2006 pensioners/family pensioners etc.",* vide which, sanction of the President was conveyed qua revision of pension of pre-2006 pensioners. Clause-1 and Clause 4.2 of the said Office Memorandum provided as under:

> *"1. The undersigned is directed to say that in pursuance of Government's decision on the recommendations of Sixth Central Pay Commission, sanction of the President is hereby accorded to the regulation, with effect from 1.1.2006, of pension/family pension of all the pre-2006 pensioners/family pensioners in the manner indicated in the succeeding paragraphs. Separate orders will be issued in respect of employees who retired/died on or after 1.1.2006.*
>
> …. …. ….
>
> *4.2 The fixation of pension will be subject to the provision that the revised pension, in no case, shall be lower than fifty percent of the minimum of the pay in the pay band plus the grade pay corresponding to the pre-revised pay scale from which the pension had retired. In the cae of HAG+ and above scales, this will be fifty percent of the minimum of the revised pay scale."*

This was followed by issuance of Office Memorandum dated 14th October, 2009 (Annexure P-5) by the Finance (Pension) Department of the Government of Himachal Pradesh, in terms whereof, the respondent-State accorded sanction to the Regulation with effect from 01.01.2006 of pension/family pension of all the pre-2006 pensioners/family pensioners, in the manner indicated in the said Office Memorandum. Clause 4.2 of the Office Memorandum, *inter alia*, provided that the fixation of pension will be subject to the provision that revised pension, in no case, shall be lower than fifty percent of the minimum of the pay band plus the Grade pay corresponding to the pre-revised pay scale from which the pensioner had retired.

7. Thereafter, vide Office Memorandum dated 21st May, 2013 (Annexure A-11) on the subject *"Revision of pension of pre-2006 pensioners-reg."*, the Finance (Pension) Department of the Government of Himachal Pradesh, ordered that in pursuance to instructions contained in Office Memorandum, dated 14th October, 2009, the Governor of Himachal Pradesh was pleased to order that pension of pre-2006 pensioners, as revised w.e.f. 01.01.2006, in terms of Para 4.1 or Para 4.2 of the aforesaid OM would be further stepped up to 50% of the sum of minimum of pay in the pay band and the Grade Pay corresponding to the pre-revised pay scale from which the pensioner had retired, as arrived at with reference to fitment tables attached with H. P. Civil Services (Revised Pay) Rules, 2009, notified on 26.08.2009.

8. This was followed by issuance of Communication dated 31st July, 2013 (Annexure A-12), in case of the petitioner in CWP No. 6391 of 2019, on the subject *"Revision of pension of pre-2006 pensioners/family pensioners"*, in terms whereof, the family pension of the petitioners was revised, but w.e.f. 01.04.2013.

9. The grievance of the petitioners, thus, is that vide Office Memorandum dated 21.05.2013, their pension in accordance with Office Memorandum dated 14th October, 2009 is required to be fixed at 50% of the emoluments w.e.f. 01.01.2006 and not w.e.f. 01.04.2013, as has been done by the respondent-Department. It is in this background that these petitions have been filed, primarily praying for the relief that the respondents be directed to revise the pension of the petitioners w.e.f. 01.01.2006 instead of 01.04.2013 and arrears be paid to them for the period between 01.01.2006 to 31.03.2013.

10. The stand of the State is that though the State Government took a conscious decision on 14th October, 2009 to grant pension and other pensionery benefits to the employees, who had retired before 01.01.2006 and after 01.01.2006 and said Memorandum had attained finality, in terms of Office Memorandum dated 14th October, 2009, the pension and family pension was to be governed according to Clauses- 9 & 10 contained therein and said decision was never challenged by the petitioners, who duly accepted it at the relevant time. According to the State, the decision which was taken by the Government to grant the revised pension to post 01.01.2006 retirees by conferring upon them the actual benefits of revised pension w.e.f. 01.04.2013, was a Policy decision and a prudent decision, which could not be subject to judicial scrutiny. The claim was barred by delays and latches and petitioners cannot simply seek benefits, as might have been granted to the employees of other States. On these grounds, the State prayed for dismissal of the petitions.

11. I have heard learned counsel for the parties and gone through the pleadings.

12. As agreed during the course of arguments, this Court is not going into the individual issue raised by the petitioners, but is deciding the main issue between the petitioners and the respondent-State as to whether the petitioners are entitled to the benefit of revised scale w.e.f. 01.01.2006 or is the State justified in conferring upon them the said benefit w.e.f. 01.04.2013.

13. Before proceeding further, it is observed by the Court that as the relief prayed for by the petitioners is with regard to pension/revision of pension, the same being a continuing cause of action, therefore, it cannot be said that the petitions are hit by delays and latches. Otherwise also, cause of action accrued in favour of the petitioners post issuance of Office Memorandum dated 21st May, 2013 and as after the abolition of the erstwhile learned Himachal Pradesh Administrative Tribunal, these cases stand transferred to this Court and are being heard as writ petitions, therefore, the question of limitation, as envisaged under the Administrative Tribunals Act, shall not arise.

14. The sole prayer of the petitioners is that their pension be revised w.e.f. 01.01.2006 instead of 01.04.2013. The factum of the benefit of revision of pay scale having been conferred by the State to the petitioners is not in dispute. This means that the entitlement of the petitioners to receive the revised pay scale is also not in dispute. Thus, the only point which requires adjudication is as to whether the State is justified in conferring the benefit of revised pay scale w.e.f. 01.04.2013 vide Office Memorandum dated 21.05.2013 or the petitioners are entitled for the same w.e.f. 01.01.2006.

15. In the reply, which has been filed by the State, in the preliminary objections raised, it stands mentioned that a conscious decision for regulation of pension/family pension of pre-2006 pensioners/family pensioners was taken by the Government of Himachal Pradesh, which led to the issuance of Instructions dated 14th October, 2009, in terms whereof, the fixation of pension was subject to the provision that revised pension, in no case, shall be lower than 50% of the minimum of the Pay Band plus the Grade Pay corresponding to the pre-revised pay scale from which the pensioner had retired. With regard to family pension, the revised family pension was to be not less than 30% of the minimum of Pay Band plus Grade Pay corresponding to the pre-revised Pay Scale, in which the deceased Government servant had worked last.

16. It is further the stand of the State that in the years 2013-14, the Government took a decision to step up the pension and family pension of pre-2006 pensioners to 50% and 30%, respectively to the sum of pay of minimum of pay in the Pay Band plus Grade Pay corresponding to pre-revised Pay Scale, from which the Government servant had retired and accordingly Instructions dated 21.05.2013 were issued. These instructions were made effective w.e.f. 01.04.2013. It is further the stand of the State that in case the prayer of the petitioners is acceded to, then the same will lead to great burden upon the State exchequer.

17. This Court is of the considered view that the primary reason as to why Office Memorandum dated 21.05.2013 has been made applicable w.e.f. 01.04.2013, is to escape this financial liability. A perusal of Office Memorandum dated 21st May, 2013 demonstrates that it was stated therein that in continuation to instructions contained in this Office Memorandum dated 14.10.2009, the Governor of Himachal Pradesh is pleased to order that pension to pre-2006 pensioners, as revised w.e.f. 01.01.2006, in terms of Para 4.1 or Para 4.2 of the aforesaid OM would be further stepped up to 50% of the sum of minimum of the pay in the Pay Band and Grade Pay corresponding to pre-revised Pay Scale, from which the pensioner had retired, but w.e.f. 01.04.2013.

18. In fact, vide Office Memorandum dated 21st May, 2013, what was being stepped up, was the Pay Scale, in continuation of Instructions contained in Office Memorandum dated 14.10.2009. Now, when one peruses Office Memorandum dated 14th October, 2009, the same demonstrates that said Office Memorandum was given effect w.e.f. 01.01.2006. That being the case, it is not understood as to why Office Memorandum dated 21st May, 2013 has been made applicable prospectively, rather than from the date from which the pension of pre-2006 pensioners has been revised. This, indeed, is a discriminatory act on the part of the respondents. It is again reiterated that simply on the ground of the same entailing financial implications, the benefit

could not have been curtailed by making the same prospective. It is settled law that pension is not a bounty, but hard earned property of a retiree. Petitioners before this Court are senior citizens, most of whom are more that 80 years in age. It is in lieu of their services rendered to the respective Departments of the Government that they are earning pension. In this background, the State is not doing any favour by either granting pension to the petitioners or revising the same. The stand of the State that its power to take decision with regard to revision of Pay Scales is not sub-subservient to the recommendations of Central Pay Commission is not being disputed, but fact of the matter remains that the revision of the Pay Scale has been done by the Government of Himachal Pradesh by following the recommendations of Central Pay Commission. Though the stand of the State is that it does not follow the recommendations of Central Pay Commission, but the benefits which stand contained in the Instructions issued by the respondent-State are, indeed, influenced by the recommendations of the Central Pay Commission and are quite *pari materia* thereto.

19. In ***K.S. Puttaswamy*** Vs. ***Union of India***, (2019) 1 SCC 1, the Hon'ble Supreme Court has been pleased to hold that pension is not a largesse or bounty conferred by the State. Pension, as a condition of service, attaches as a recompense for the long years of service rendered by an individual to the State and its instrumentalities. Pensioners grow older with passing age. Many of them suffer from the tribulations of old age including the loss of biometrics. It is unfair and arbitrary on the part of the State to deny pension to a pension entitled to it by linking pensionary payments to the possession of an Aadhaar number or to its authentication. This, indeed, is a reiteration of the well settled stand of the Hon'ble Apex Court on the issue right from *D.S. Nakara* Vs. *Union of India*, (1983) 1 SCC 305.

20. The Court does not finds any valid justification in making the benefits accruable to pensioners under Office Memorandum dated 21st May,

2013 applicable w.e.f. 01.04.2013, rather than 01.01.2006, as was done by earlier Office Memorandum dated 14th October, 2009.

21. Cut off date, though may be the prerogative of the State, but the same cannot be fixed in an arbitrary manner. In the present case, the pensioners have been classified into two categories by the State, i.e., pre-2006 and post-2006. That being the case, when it comes to the revision of pension of pre-2006 retirees, it is but natural that the revised pensionary benefits have to be conferred upon them w.e.f. 01.01.2006. In fact, even vide Office Memorandum dated 21st May, 2013, the pension of pre-2006 pensioners stands revised w.e.f. 01.01.2006, but the order has been made effective from 01.04.2013 and it has been ordered that there shall be no change in the amount of revised pension/family pension paid w.e.f. 01.01.2006 to 31.03.2013 and no arrears will be payable.

22. The plea of burden of financial exchequer, in the considered view of the Court, cannot be permitted to be taken by the State, at least in the matter of pension. As already observed herinabove, as pension is not a bounty or gratuitous payment depending upon the sweet will or grace of the employer, the date from which the pensioner shall be entitled for the benefit of revision thereof, cannot be arbitrarily determined by the employer and, indeed, a pensioner is entitled for the actual benefits from the date from which revision of pension has to come into force.

23. Though the Courts have accepted that it is the domain of the executive authority generally to fix the cut off dates, but the Courts do have the power to interfere, if the cut off date appears to be on the face of it blatantly discriminatory and arbitrary. (See *State of Punjab & others Vs. Amar Nath Goyal, (2005) 6 SCC 754).*

24. In the present case, the cut off date for the grant of revised pension in favour of pre-2006 pensioners already stood fixed as 01.01.2006 by the Government itself vide its earlier Office Memorandum dated 14th October,

2009. In these circumstances, when Office Memorandum dated 21st May, 2013, in terms of the language contained in the same, was also in continuation to instructions contained in Office Memorandum dated 14th October, 2009, then the curtailment of benefits by fixing the cut off date to be 01.04.2013, rather than 01.01.2006, is indeed blatantly discriminatory and arbitrary.

25. In view of the discussions held hereinabove, these writ petitions are allowed. Office Memorandum dated 21st May, 2013, to the effect that it makes orders effective w.e.f. 01.04.2013, is held to be bad and it is ordered that pre-revised pension in terms of said Office Memorandum shall be payable to the petitioners w.e.f. 01.01.2006 alongwith arrears. In the event of arrears being paid within a period of four months from today, no interest shall be payable upon the same, but in case the arrears are not paid within the said period, the the same shall entail simple interest @6% per annum from the date of filing of the writ petitions. Writ petitions stand disposed of in above terms, so also pending miscellaneous applications, if any.

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

Amar Lal & another .....Petitioners

Versus

State of Himachal Pradesh & Ors. ....Respondents

CWP No.2140 of 2019
Date of Decision: 6.8.2021

Constitution of India, 1950- Articles 14 & 226**-** Petitioners aggrieved by the act of the respondents, whereby, they were deprived of grant of senior pay scale of Rs. 1800-3200 after completion of 12 years of continuous service with consequential benefits to the petitioners – Held – the judgment passed in Hans Raj and others filed O.A. (D) No: 1035 of 1994 in the erstwhile H.P. Administrative Tribunal is judgment in rem and judgment passed by Hon'ble

High Court of H.P. in CWP No: 5709 of 2014 also held that similarly situated persons are entitled for same benefits - Petitioner being otherwise similarly situated cannot be denied benefit – Respondent directed to grant higher pay scale of Rs. 1800-3200 in favour of petitioner after completion of 12 years of continuous service. [Paras 8 & 9]

For the Petitioner: Ms. Suman Thakur, Advocate.

For the Respondents: Mr. Sudhir Bhatnagar and Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Narender Thakur, Deputy Advocate General.

Through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Petitioners herein were appointed as Surveyors in the Department of Irrigation and Public Health ***(for short 'I &PH')*** on 20.11.1986 and 24.12.1979 respectively. They became entitled for benefit of senior scale of Rs.1800-3200 on their having completed 12 years regular service as Surveyors. Though, the matter was considered by the Pay Anomaly Committee in its meeting held on 26.6.1995 for grant senior scale of 1800-3200 on completion of 12 years of service as Surveyors in the department of I&PH, but since representation having been filed by the association of the petitioner's was not accepted, person namely Hans Raj and others filed O.A.(D)No.1035 of 1994 in the erstwhile H.P. Administrative Tribunal, praying therein to direct the respondent-State to pay scale of Rs. 1800-3200 on completion of 12 years of service, as was given in the case of Surveyors of Agriculture Department. The aforesaid original application was allowed by the Tribunal to the extent that the respondents were directed to obtain the latest position of the scale of Surveyors as granted by the Government of Punjab to

the Surveyors of Irrigation Department in compliance to the orders of the Hon'ble High Court of Punjab and Haryana, and to grant the same scale to the Surveyors in the department of Irrigation and Public Health and Public Works Department in Himachal Pradesh also, within a period of three months.

2. Pursuant to aforesaid directions issued in Hans ***Raj case*** (Supra), respondent-State granted pay scale of Rs. 1800-3200 on completion of 12 years regular service to all the persons, who were working as Surveyors in I & PH department with consequential benefits w.e.f.14.10.1993. Since, benefit in terms of the judgment passed by learned Tribunal in ***Hans Raj case*** (supra) was not granted to the person namely, Tilak Raj Sood, he approached this Court by way of CWP No.7330 of 2013, which came to be disposed on 15.11.2013, reserving liberty to above named person to file representation. However, fact remains that petitioner's representation was rejected vide order dated 2.4.2014 on the ground that judgment rendered by learned Tribunal in ***Hans Raj case*** (Supra) was in judgment in personam and there was delay. In the aforesaid background, above named person Tilak Raj again filed CWP No. 5709 of 2014, seeking therein direction to the respondents to grant him pay scale of Rs.1800-3200 immediately after completion of 12 years of continuous service in terms of the judgment passed by learned Tribunal in ***Hans Raj case*** (Supra). Co-ordinate Bench of this Court allowed the aforesaid petition and directed the respondents to place the petitioner in the pay scale of Rs.1800-3200, immediately after completion of 12 years of continuous service as Surveyor/Junior Engineer and release the arrears with interest @ 9% per annum (Annexure P-11).

3. In the aforesaid judgment, Co-ordinate Bench of this Court categorically observed that equals have been treated un-equals by the respondents while denying the pay scale of 1800-3200 to the petitioner i..e Tilak Raj after completion of 12 years of service. In the aforesaid judgment, this Court also clarified that judgment rendered by Tribunal in ***Hans Raj case***

*(*supra) was not in personam and as such, petitioner i.e. Tilak Raj ought to have been granted same relief, which has been granted to his colleagues vide letter dated 10.6.2013. Aforesaid judgment rendered by Co-ordinate Bench of this Court has attained finality and as such, petitioners herein also placed reliance upon the same while claiming senior scale of 1800-3200 on their having completed 12 years service as Surveyors/ Junior Engineers. However, fact remains that petitioners despite their having completed 12 years have been not granted aforesaid senior scale of Rs.1800-3200 and as such, they have been repeatedly compelled to approach the court of law for redressal of their grievance.

4. Prior to filing of the petition at hand, petitioners alongwith other similarly situate persons approached erstwhile H.P. Administrative Tribunal by way of T.A. No.1012 of 2015, titled as ***Amar Lal Thakur and others versus The State of Himachal Pradesh and others***, seeking therein similar relief, as has been prayed for in the instant petition. Aforesaid petition having been filed by the petitioners and other similarly situate person came to be disposed of vide judgment dated 8.1.2018, passed by learned Tribunal, directing the respondents/competent authority to extend the benefit of judgment passed by learned Tribunal in ***Hans Raj case*** (supra) and judgment dated 29.11.2010 passed by this Court in CWP(T) No.4868 of 2008, titled as ***Surveyors Association and others versus State of Himachal Pradesh and others***, if they are found to be similarly situate. It is not in dispute that aforesaid judgments were not laid challenge by the respondent-State in the superior court of law and as such, same have attained finality. Pursuant to aforesaid judgment, petitioners herein as well as other similarly situate persons filed representation ***(Annexure P-16)*** to the respondents, seeking therein benefit of senior pay scale in terms of the aforesaid judgments passed by learned Tribunal as well as this Court, however, facts remains that aforesaid representation was rejected vide order dated 4.1.2019, passed by

Superintendent Engineer, I&PH Circle Shimla, on the ground that higher pay scale of Rs.1800-3200 remained effective till 31.12.1995, whereafter new/revised pay scale was implemented with effect from 01.01.1996, whereby a uniform pay scale to Surveyor was allowed and no such higher pay scale on completion of 12 years of service as Surveyor was allowed. In nutshell, the representation of the petitioners was rejected on the ground that higher pay scale of Rs.1800-3200 stands merged with revised pay scale implemented with effect from 01.01.1996. In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein following reliefs:-

> ***"i). That the order passed by the Superintending Engineer on dated 4.1.2019 may kindly quashed and set-aside.***
>
> ***ii). That the writ of mandamus may kindly be issued to the respondents with the direction to grant initial pay scale with effect from 1984 with all the consequential benefits to the petitioners.***
>
> ***iii). That the writ of mandamus may kindly be issued to the respondents to grant senior pay scale of Rs.1800-3200 after the completion of 12 years of continuous service, with all the consequential benefits to the petitioners.***
>
> ***iv). That the Hon'ble Court may kindly directed the respondents to grant consequential benefits from the date of filing of original application in the year 1996."***

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that there is no

dispute interse parties that the petitioners herein were initially appointed in the Department of Irrigation and Public Health on 20.11.1986 and 24.12.1979 respectively as Surveyors. It is also not in dispute that petitioners stand promoted as Junior Engineers and they have also completed 12 years regular services after their being appointed as Surveyors in the department.

6. Reply filed on behalf of the respondents reveals that petitioner No.2, Sh. Kamal Kumar, who was initially appointed as Surveyor on 24.12.1979 and had completed 12 years regular service in the year 1991 was granted pay scale of Rs.1800-3200 after completion of 12 years regular service as Surveyor as on 31.12.1991 i.e. prior to implementation of the revised pay scale of 01.01.1996 as per the judgment rendered in **Hans Raj case(supra)**, copy of fixation orders stands annexed as Annexure R-1 with the reply filed by the respondents. Prayer of petitioner No.1, Amar Lal has been rejected on the ground that he did not complete 12 years regular service in the year1998 i.e. prior to implementation of revised pay scale w.e.f. 1996, which became applicable with effect from 1.1.1996, rather he completed 12 years regular service in the year, 1998 by which time, new/revised scale to surveyors had come in application. As per the respondents, grant of higher pay scale of Rs.1800-3200 remained effective till 31.12.1995, whereafter new/revised pay scales were implemented with effect from 01.01.1996 and as such, petitioner, who have completed 12 years service as Surveyors after implementation of revised pay scale cannot be granted pay scale of Rs.1800-3200, which was being paid prior to 0.1.01.1996.

7. Learned Deputy Advocate General while defending the action of the respondents in not granting higher pay scale to the petitioners was unable to demonstrate from the record that communication, if any, issued by the respondent-State specifically clarifying therein that higher pay scale of Rs.1800-3200 to the Surveyors in the department of I&PH shall not be given to those persons, who completed 12 years service after 1.1.1996, rather this

Court finds from the record that to have higher pay scale of Rs.1800-3200 one was only required to complete 12 years regular service as Surveyor. In the case at hand, it is not in dispute that petitioner No.1, Amar Lal has completed 12 years service as Surveyor in the year 1998. Defence taken by the respondents that higher pay scale of Rs.1800-3200 remained effect till 31.12.1995, whereafter new/revised pay scale with effect from 01.01.1996 came to be implemented, cannot be made ground to reject the claim of the petitioner for grant of higher pay scale of Rs.1800-3200 after his having completed 12 years regular service as Surveyor. Petitioners like other similarly situate persons in the department, who their after having completed 12 years regular service as Surveyors have been already granted higher pay scale of Rs.1800-3200, are also entitled to grant of aforesaid scale of Rs.1800-3200 from due date. This Court finds from the office order dated 10.6.2013 ***(Annexure P-14)*** that pursuant to the approval of Finance Department as conveyed vide Additional Chief Secretary (IPH) to the Government of Himachal Pradesh vide letter No. IPH-A-B(9)-3/2011, dated 10.6.2013, pay scale of Rs.1800-3200 has been granted to all the petitioners in ***Hans Raj case (supra)*** in compliance of the judgment and as such, no discrimination, if any, can be made with the petitioners, who like other Surveyors in the I&PH Department have also completed 12 years service. Judgment rendered by learned Tribunal in ***Hans Raj case*** (supra) has already attained finality. Co-ordinate Bench of this Court in CWP No.5709 of 2014, dated 23.4.2015 has already held that judgment passed in Hans Raj case (supra) is not judgment in personam, but judgment in rem and as such, all the similarly situate persons to the petitioners in ***Hans Raj case*** (Supra) are entitled to higher pay scale of Rs.1800-3200 on their having completed 12 years of service. It is also not in dispute that aforesaid judgment rendered by this Court in CWP No.5709 of 2014, has also attained finality. This Court finds from the impugned order dated 4.1.2019 ***(Annexure P-17)*** that respondents while rejecting the prayer

made on behalf of the petitioners have taken all together different stand by stating that department has not granted the benefit to any incumbent/ Surveyor on the analogy of Punjab Pay Scale so far except Hans Raj's case and one State is not bound to follow the rules and regulations applicable to the employees of the other State or if the State has adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulation in other State. Once Court of law accepting the prayer of the petitioners in ***Hans Raj case*** that they are also entitled to higher pay scale on the analogy of Punjab Pay Scale, directed respondents to pay higher pay scale of Rs.1800-3200 to the petitioners in that case, respondents cannot be allowed to raise aforesaid ground for the rejection of claim of the petitioners herein. Learned Tribunal below in Hans Raj Case (supra) and this Court in judgment dated 23.4.2015 passed in CWP No.5709 of 2014 has clarified that judgment passed in Hans Raj case is not judgment in personam but judgment in rem and as such, petitioner being otherwise similarly situate cannot be denied benefit of higher pay scale of Rs.1800-3200 after his having completed 12 years that too on the ground raised in the impugned order dated 4.1.2019.

8. Consequently, in view of the above, the present petition is allowed and respondents are directed to grant higher pay scale of Rs.1800-3200 to the petitioners from the date of their having completed 12 years service with consequential benefits. Since, it is not in dispute that petitioner No.2, Kamal Kumar, has completed 12 years regular service in the year 1991 and thereafter he was promoted as Junior Engineer, respondents could not have granted him higher pay scale of Rs.1800-3200 with effect from 14.1.1993, as is evident from the fixation order (Annexure R-1). Further, petitioners herein in compliance to the directions contained in the instant judgment are entitled to higher pay scale from the date they completed 12 years service as Surveyors. Consequential benefits, if any, be released in

favour of the petitioners forthwith. Pending applications, if any, also stands disposed of.

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

Amar Singh & others .....Petitioners

Versus

Vishal Kumar .....Respondent

Civil Revision No.148 of 2019
Date of Decision: 24.07.2021

Code of Civil Procedure, 1908 – Section 115, Order-7, Rule 11 (A) read with Section 151 C.P.C.- Application filed by the defendants for the rejection of the plaint on the ground that plaintiff is stranger to the suit land, as, suit land was sold in favour of the defendant by predecessor of plaintiff, was dismissed – Held- the Ld. Trial Court has failed to appreciate that Sh. Suhru Ram, predecessor – in – interest of the plaintiff cease to be owner of suit land by virtue of exchange and sale deeds and as such the plaintiff was not having any cause of action to file the suit against the defendants – Petition allowed as a consequence of which the suit filed by the plaintiff for permanent prohibitory injunction is rejected. [Paras 17 & 18]

Cases referred:

Dahiben vs. Arvindbhai Kalyanji Bhanusali(Gajra) dead through legal representatives and others,(2020)7 Supreme Court cases 366;
Kuldeep Singh Pathania vs. Bikram Singh Jaryal 2017(2) Civil Court Cases, 2019(S.C.);
Swamy Atmananda vs. Sri Ramakrishna Tapovanam,(2005) 10 SCC 51;

For the Petitioners : Mr. Vivek Negi, Advocate.

For the Respondent : Ex-parte.

Through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Civil Revision Petition under Section 115 of the Code of Civil Procedure has been filed against the order dated 3.9.2019 passed by learned Senior Civil Judge, Nadaun, District Hamirpur, Himachal Pradesh in CMA No.50 of 2017 in Civil Suit No.301 of 2016, whereby application under Order 7 Rule 11(A) read with Section 151 CPC, having been filed by the petitioners-defendants ***(hereinafter referred to as the defendants***), praying therein for rejection of the plaint, having been filed by the respondent-plaintiff ***(hereinafter referred to as the plaintiff),*** came to be dismissed.

2. Since despite service, respondent-plaintiff failed to put in appearance either in person or through counsel, therefore, he was ordered to be proceeded against ex-parte on 25.8.2020.

3. For having bird's eye view, certain undisputed facts as emerge from the record are that the plaintiff filed a Civil Suit for permanent prohibitory injunction restraining the defendants, their family members, agents and servants from raising any kind of construction, cutting trees and changing nature of land compromised in Khata No.23min, Khatauni No.33-37, Khasra No.97098, Kita 2, area measuring 00-4-20 hectares as per jamabandi for the year 2010-2011, situate at Mahal Ambi, Mauza Bhumpal, Tehsil Nadaun, District Hamirpur, Himachal Pradesh till the partition of the land as per law. Besides above, plaintiff also prayed that in case the defendants succeed in raising any sort of construction over the suit land during the pendency of the suit then decree for joint possession by way of demolition by mandatory injunction directing the defendants to restore the suit land to its original position may also be passed.

4. Record reveals that alongwith aforesaid civil suit plaintiff had filed an application for stay bearing CMA No.285 of 2016 (Annexure P-2). Initially, learned court below directed the parties to maintain status quo qua nature, character, construction, cutting of valuable trees and possession over the suit land vide order dated 30.11.2016, however, subsequently aforesaid application came to be dismissed vide detailed order dated 5.9.2019.

5. Aforesaid claim of the plaintiff as set up in the suit came to be resisted by the defendants by filing written statement, wherein they specifically took a stand that entire suit land stand sold to them by predecessor-in-interest of plaintiff and as such, plaintiff being totally stranger to the suit land has no right, whatsoever to file the suit against them claiming therein joint possession. Before suit having been filed by the plaintiff could be taken to its logical ends, defendants filed an application under Order 7 Rule 11 CPC, praying therein for rejection of plaint (Annexure P-5), averring therein that since suit land already stands sold in favour of the defendants by predecessor-in-interest of the plaintiff, plaintiff has no cause of action to file the suit. Defendants specifically averred in the aforesaid application that the grandfather of the plaintiff namely Sh. Suhru Ram had sold out his entire share to defendant No.1 and his brother in the year 2001. Defendants also claimed in the aforesaid application that defendants No.2 to 4 are sons of defendant No.1 and have constructed their houses and shops over the suit land. While seeking rejection of the plaint, defendants claimed in the application that the plaintiff had filed suit on the basis of wrong revenue record in connivance with the revenue staff. Since suit of the plaintiff is based upon true revenue record, wherein admittedly defendants have been shown to be owner of the suit property, prayer made in the application for rejection of the plaint deserves to be accepted.

6. Aforesaid application having been filed by the defendants came to be contested by the plaintiff, who in reply to the application claimed that he inherited the estate of his grandfather Sh. Suhru Ram through Will and he is the owner in possession of the suit land alongwith other property and land at Tika Ambi, Mauza Bhumpal. Plaintiff also claimed that he and his family members have their houses over the suit land and at no point of time any sale deed came to be executed by his grandfather in favour of defendant No.1 and his brother. Plaintiff claimed that if there is any sale deed, the same is result of fraud and misrepresentation and cannot be taken into consideration. Besides above, plaintiff claimed that the ancestral house is still in his possession and his family members and house of defendant No.1 is not over the suit land, rather house of the defendants is over another Khasra numbers.

7. Learned court below on the basis of the pleadings adduced on record in the application filed under Order 7 Rule 11 CPC, framed the following issues:-

"1. Whether the plaintiff has cause of action to file the present suit, as prayed for ?OPP."

8. Defendants with a view to prove their case examined two witnesses and placed on record sale deed Ex.AW2/A. On the other hand, plaintiff with a view to rebut the defendant's evidence examined one witness and placed on record copy of GPA as well as jamabandi Ex.RW1/B.

9. Learned trial Court on the basis of the pleadings adduced on record though came to the conclusion that documentary evidence adduced on record clearly reveals that the plaintiff is not owner in possession of the suit land and has no interest in the suit land to file the suit, but yet proceeded to reject the application filed by the defendants on the ground that while deciding the application under Order 7 Rule 11 CPC, he is only to take into

consideration the averments contained in the plaint. Learned court below categorically recorded in the order impugned in the instant proceedings that averments contained in the written statement as well as reply to the instant application and documents placed on record by the defendants cannot be looked into at the time of deciding the application under order 7 Rule 11 CPC. Learned Court below also placed reliance upon the judgment passed by Hon'ble Apex Court in **Kuldeep Singh Pathania vs. Bikram Singh Jaryal,** 2017(2) Civil Court Cases 219(S.C), wherein Hon'ble Apex Court had held that Court is to take decision looking at the pleadings of the plaintiff only and not on the rebuttal made by the defendants or any other material produced by the defendants while deciding the application under order 7 Rule 11(a) CPC. In the aforesaid background, defendants have approached this Court in the instant petition, praying therein to quash and set-aside the impugned order dated 3.9.2019.

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

11. Precisely, the challenge has been laid to aforesaid impugned order on the ground that once court below on the basis of pleadings adduced on record by the respective parties had arrived at definite conclusion that plaintiff has no interest in the suit land to file the suit for permanent prohibitory injunction against the defendants, there was no occasion for the learned court below to reject the application filed under Order 7 Rule 11(a) CPC.

12. Mr. Vivek Negi, learned counsel representing the petitioners-defendants while referring to Ex. RW1B i.e. copy of jamabandi placed on record by the plaintiff while contesting the application under order 7 Rule 11(a) CPC, contended that once plaintiff himself placed on record copy of

jamabandi, perusal whereof clearly reveals that predecessor-in-interest of the plaintiff Sh. Suhru Ram had given his 1/16 share in exchange to Thenu Ram and in this regard, mutation No.4 stood attested, Court below had no option but to accept the prayer made in the application under Order 7 Rule 11(a) CPC. While referring to the findings recorded by court below in para-9 of the impugned order, Mr. Negi, contended that it stands duly recorded in the impugned order that there is a entry in the jamabandi regarding sale deed, by which Suhru Ram sold out his entire share i.e.0.06.90 hectares to defendant and his brother Brahmu in the year, 2001. Mr. Negi, further argued that once court below on the basis of aforesaid jamabandi had clearly concluded in the order impugned in the instant proceedings that revenue authorities passed order of Fard Badar on 22.12.2016 and cleared the position that Suhru Ram ceased to be owner of the suit land by virtue of aforesaid exchange and sale deeds, it ought to have rejected the plaint of the plaintiff for non -disclosure of any cause of action.

13. Having carefully perused the material available on record vis-à-vis reasoning assigned by the court below while passing the impugned order, this court finds that the plaintiff claiming himself to be the joint owner in possession of the suit land filed suit for permanent prohibitory injunction restraining the defendants from raising any kind of construction, cutting trees and changing nature of suit land till the partition of the land as per law, but defendants by way of written statement categorically stated before the Court below that since suit land already stands sold to the defendants by predecessor-in-interest of the plaintiff and mutation of land in question stands attested/ sanctioned in favour of the defendants, there is no cause of action, if any, in favour of the plaintiff to file suit.

14. True, it is that court while considering application under order 7 Rule 11(a)CPC is only required to see pleadings adduced on record by way of plaint by the plaintiff and definitely pleadings adduced on record by way of written statement cannot be looked into by the court while ascertaining the merit of the application, if any, filed under order 7 Rule 11(a)CPC, but court below while taking note of averments contained in the plaint is also under obligation to look into the documents filed by the plaintiff alongwith the plaint, as has been held by Hon'ble Apex Court in the recent judgment passed in case titled **Dahiben vs. Arvindbhai Kalyanji Bhanusali(Gajra) dead through legal representatives and others,**(2020)7 Supreme Court cases 366. In the aforesaid judgment Hon' ble Apex Court has categorically held that documents filed alongwith the plaint, are required to be taken into consideration for deciding the application under Order 7 Rule 11(a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint. Relevant paras of aforesaid judgment are reproduced herein below:-

> "23.1 We will first briefly touch upon the law applicable for deciding an application under Order VII Rule 11 CPC, which reads as under:
>
> "11**. Rejection of plaint.–** The plaint shall be rejected in the following cases:–
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed in undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on

being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevent by any cause of exceptional nature for correction the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

(emphasis supplied)

23.2. The remedy under Order VII Rule 11 is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

23.3. The underlying object of Order VII Rule 11 (a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11 (d), the Court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

23.4. In Azhar Hussain v. Rajiv Gandhi (1986 Supp SCC 315), this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted

to waste judicial time of the court, in the following words :(SCC P.324, para 12).

> "12. …The whole purpose of conferment of such power is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the Court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even if an ordinary civil litigation, the Court readily exercises the power to reject a plaint, if it does not disclose any cause of action."

23.5. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to.

23.6 Under Order VII Rule 11, a duty is cast on the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint2, read in conjunction with the documents relied upon, or whether the suit is barred by any law.

23.7. Order VII Rule 14(1) provides for production of documents, on which the plaintiff places reliance in his suit, which reads as under :

> "14. ***Production of document on which plaintiff sues or relies***.– (1)Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.
>
> (2)Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.
>
> (3)A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or

entered accordingly, 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 document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

(emphasis supplied)

23.8. Having regard to Order VII Rule 14 CPC, the documents filed alongwith the plaint, are required to be taken into consideration for deciding the application under Order VII Rule 11 (a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

23.9. In exercise of power under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.

23.10. At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration.

23 11. The test for exercising the power under Order VII Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V.Sea Success I & Anr.,4 which reads as:(SCC P.562, para 139).

"139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments

made in the plaint are taken to be correct in their entirety, a decree would be passed."

23.12. In Hardesh Ores (P.) Ltd. v. Hede & Co.5 the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. D. Ramachandran vs. R.V.Janakiraman, (1999) 3 SCC 267.

23.13. If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order VII Rule 11 CPC.

23.14. The power under Order VII Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai v. State of Maharashtra.(2003)1SCC 557. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain Vs. Rajiv Gandhi, 1986 Supp SCC 315.

23.15. The provision of Order VII Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clause (a) to (e) are made out. If the Court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the Court has no option, but to reject the plaint.

24. "Cause of action" means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material

facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.

24.1 In Swamy Atmanand v. Sri Ramakrishna Tapovanam (2005)10 SCC 51 this Court held: (SCC p.60,para 24)

"24. A cause of action, thus, means every fact, which if traversed, it would be necessary for the plaintiff to prove an order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded" (emphasis supplied)

24.2. In T. Arivandandam v. T.V. Satyapal & Anr (1977)4 SCC 467, this Court held that while considering an application under Order VII Rule 11 CPC what is required to be decided is whether the plaint discloses a real cause of action, or something purely illusory, in the following words : (SCC p.470, para 5).

"5. ...The learned Munsiff must remember that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under O. VII, R. 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing ..."

(emphasis supplied).

24.3. Subsequently, in I.T.C. Ltd. v. Debt Recovery Appellate Tribunal,10 this Court held that law cannot permit clever drafting which creates illusions of a cause of action. What is required is that a clear right must be made out in the plaint.

24.4. If, however, by clever drafting of the plaint, it has created the illusion of a cause of action, this Court in Madanuri Sri Ramachandra Murthy v. Syed Jalal11 held that it should be nipped in the bud, so that bogus litigation will end at the earliest stage.The Court must be vigilant against any

> camouflage or suppression, and determine whether the litigation is utterly vexatious, and an abuse of the process of the court.

15. No doubt, prior to aforesaid exposition of law in the aforesaid case, Hon'ble Apex Court in its earlier judgment passed in ***Kuldeep Singh Pathania vs. Bikram Singh Jaryal*** 2017(2) Civil Court Cases, 2019(S.C.), which has been taken into consideration by the court below while rejecting the application under Order 7 Rule 11(a) CPC had held that court while considering the application under Order 7 Rule 11(a) is only under obligation to take into consideration pleadings of plaintiff only and not the rebuttal made by the defendants. However, in the subsequent judgment, as has been reproduced hereinabove, Hon'ble Apex Court has clarified that documents annexed with the plaint are required to be taken into consideration by the court while considering/deciding the application under Order 7 Rule 11(a) CPC. Interestingly, in the case at hand court below though on the basis of the pleadings adduced on record by the plaintiff arrived at a definite conclusion that it is clear from the documentary evidence adduced on record that the plaintiff is no more owner in possession of the suit land and he has no interest in the suit to file suit for permanent prohibitory injunction against the defendants, but yet proceeded to dismiss the application having been filed by the defendants under order 7 Rule 11(a)CPC on the ground that it is not required to take into consideration the defence set up by the defendant in his written statement for rejection of plaint under order 7 Rule 11 CPC. The question whether plaint discloses any cause of action, is to be decided by looking at the averments contained in the plaint itself and not the defence set up in the written statement. Though, this Court finds no quarrel with the aforesaid preposition of law as taken into consideration by the court below while deciding the application under Order 7 Rule 11 CPC having been filed by the defendants, but since documents filed with the plaint, forms part of the plaint, Court considering the prayer for rejection of plaint is under obligation

to go through the same before giving decision on the application filed under Order 7 Rule 11 CPC. In the case at hand, plaintiff with a view to rebut the claim of the defendants/applicants placed on record the copy of jamabandi Ex.RW1/B for the year 2010-11, perusal whereof clearly reveals that the predecessor-in-interest of plaintiff Sh. Suhru Ram had given 1/16 share in exchange to Thenu Ram and in this regard, mutation No.4 also stands attested. Similarly, there is entry in the jamabandi regarding sale deed, by which Suhru Ram i.e. predecessor-in-interest of plaintiff sold out his entire share i.e. 0.06.90 hectares to defendant and his brother in the year, 2001.

16. Leaving everything aside, revenue authorities while passing order of Fard Badar on 22.12.2016 has clarified the position that Sh. Suhru Ram, predecessor-in-interest of the plaintiff ceased to be owner of the suit land by virtue of aforesaid exchange and sale deeds. Since aforesaid documents were placed on record by the plaintiff himself, court below ought to have read the same in conjunction with the averments contained in the plaint. Had court below bothered to read aforesaid documents alongwith the averments contained in the plaint, probably application having been filed by the defendant would have been accepted. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in **Swamy Atmananda vs. Sri Ramakrishna Tapovanam,(**2005) 10 SCC 51, wherein it has been categorically held that cause of action is bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. If all the material facts as evolved by the plaintiff in the plaint are taken into consideration in the light of the documents adduced on record by the plaintiff himself, it cannot be said that he has cause of action, if any, to

file suit against the defendants. Plaintiff himself while refuting the claim of the defendants placed on record copy of jamabandi Ex.RW1/B, which itself suggests that plaintiff is not owner in possession of the suit land, rather suit land stands sold to the defendants by predecessor-in-interest of plaintiff in the year, 2001.

17. Having carefully perused the averments contained in the plaint as well as documents annexed therewith, details whereof finds mention in the impugned order itself, especially para-9 of the order, this Court has no hesitation to conclude that court below has failed to appreciate the law in its right perspective, as a result of which, findings to the detriment of the defendants have come on record.

18. Consequently, in view of the above, the present petition is allowed and impugned order dated 3.09.2019 passed by learned Court below is quashed and set-aside and application under Order 7 Rule 11 CPC having been filed by the defendant is accepted and suit filed by the plaintiff for permanent prohibitory injunction is rejected for non-disclosure of any cause of action

19. The instant petition stands disposed of in the aforesaid terms alongwith pending applications, if any.

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

Shri Ram Transport Finance Company ....Appellant

Versus

Mukund Lal ...Respondent/accused

Cr. Appeal No.: 200 of 2021
Decided on: 02.08.2021

Code of Criminal Procedure, 1973 - Section 378 – Appellant is aggrieved by the order of National Lok Adalat, whereby due to absence of the complainant, the proceedings against accused were stopped under section 256 Cr. P.C. and accused acquitted –Held- Lok Adalat is not the substitute for the regular court and in absence of power enshrined under section 256of Criminal Procedure Code being expressly conferred upon the Lok Adalat by the provisions of Legal Services Authorities Act, 1987, the same, by no stretch of imagination can be exercised by Lok Adalat and hence the order of Lok Adalat was not sustainable in the eyes of law- Appeal allowed and order of Lok Adalat quashed and set aside. [Paras 24 , 25 & 33]

Cases referred:
Mohd. Azeem vs. A. Venkatesh and another, (2002) 7 SCC 726;

For the appellant : Mr. Ashwani Kaundal, Advocate.

For the respondent : Mr. Sandeep Chauhan, Advocate.

(Through Video Conference)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

Cr.MP(M) No. 1433 of 2020

Leave to appeal granted. The application stands disposed of accordingly.

Criminal Appeal No. 200 of 2021

2. Be registered.

3. As agreed, the appeal is taken up for consideration today itself.

4. Admit.

5. Heard.

6. By way of this appeal filed under Section 378 of the Code of Criminal Procedure, the appellant/complainant has assailed the order passed by National Lok Adalat in criminal case No. 202-3 of 18/14, titled as SRTFC vs. Mukund Lal, wherein a complaint filed by the present appellant under Section 138 of the Negotiable Instruments Act, has been disposed of by ordering the stoppage of the proceedings and acquittal of the accused by invoking the provisions of Section 256 of the Code of Criminal Procedure.

7. Brief facts necessary for the adjudication of the present appeal are that appellant herein filed a complaint under Section 138 of the Negotiable Instruments Act against the respondent in the Court of learned Chief Judicial Magistrate, Shimla, *inter alia* on the ground that the respondent/accused had got a vehicle financed from the appellant/complainant vide loan agreement dated 20.05.2011 and a cheque amounting to `3.00 Lac in this regard was drawn by the respondent/accused in favour of the appellant/complainant for repayment and the same was dishonoured by the bank concerned.

8. During the pendency of the proceedings, the matter was referred by the learned Court below to the National Lok Adalat, which was scheduled for 14.12.2019, to explore the possibility of the matter being amicably settled by way of a compromise between the parties.

9. It appears from the record that on 14.12.2019, neither any authorized representative of the complainant nor the Counsel representing the complainant appeared before the Lok Adalat, which led to passing of the following order by the National Lok Adalat:-

> *"Case is taken up before the bench of National Lok Adalat, but none has appeared on behalf of the complainant. It appears that complainant is not interested to pursue the matter. In view of the unexplained absence of the complainant, proceeding with Section*

256 Cr.P.C. the proceedings are stopped and the accused is acquitted. File after due completion be consigned to the record room."

10. Feeling aggrieved, the appellant/complainant has filed this appeal.

11. Learned Counsel for the appellant has argued that the order passed by the National Lok Adalat is not sustainable in the eyes of law because Lok Adalat nowhere enjoys powers, as are contained in Section 256 of the Criminal Procedure Code, and as the complainant was not present before the National Lok Adalat on the date concerned, the only course available with it was to have recorded this fact of non-appearance and returned the case back to the Court from where it was sent to the Lok Adalat for exploring the possibilities of arriving at a compromise. According to learned Counsel for the appellant, the case could not have been disposed of under Section 256 of the Code of Criminal Procedure nor the accused could have been acquitted by the National Lok Adalat. Accordingly, a prayer has been made that the impugned order be set aside and the case be restored to the stage from where it was referred to the National Lok Adalat.

12. Learned Counsel for the respondent/accused while supporting the order of the National Lok Adalat has argued that as the impugned order has to be treated as a civil decree, therefore, this appeal, which has been filed by the appellant under Section 378 of the Code of Criminal Procedure is not maintainable. He has further submitted that there is nothing wrong with the impugned order because once the complainant failed to appear before the Lok Adalat, which is a Court for all intents and purposes and no cogent explanation came forth for the absence of the complainant, then the Lok Adalat has no option but to proceed with in accordance with law.

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

14. A Lok Adalat is organized under Chapter VI of the Legal Services Authorities Act, 1987. Section 22 of the Legal Services Authority Act, 1987 deals with powers of Lok Adalat or Permanent Lok Adalat. This section *inter alia* provides that Lok Adalat or Permanent Lok Adalat shall, for the purpose of holding any determination under this Act, have the same powers, as are vested in a civil Court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:-

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record or document or copy of such record or document from any court of office; and

(e) such other matter as may be prescribed.

15. This section further provides that without prejudice to the generality of the powers contained in sub-section (1) thereof, every Lok Adalat or Permanent Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

16. Sub-Section (3) provides that all proceedings before a Lok Adalat or a Permanent Lok Adalat shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code and every Lok Adalat or Permanent Lok Adalat shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

17. Section 20 of the said Act deals with cognizance of cases by Lok Adalats and sub-section (1) of the same provides as under:-

> *"(1) Where in any case referred to in clause (i) of sub-section (5) of section 19- (i) (a) the parties thereof agree; or (b) one of the parties*

thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; of (ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat."

18. Sub-section (4) of Section 20 provides that every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

19. Sub-Section (5) thereof further provides that where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

20. Sub-section (7) thereof provides that where the record of the case is returned under sub-section (5) to the Court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1).

21. In the considered view of this Court, the rationale of referring a matter to the Lok Adalat is to explore the possibility of amicable settlement of the dispute between the parties beyond the rigors that apply to regular Court. However, Lok Adalat/National Lok Adalat is not a substitute for a regular Court. The provisions of Section 20 and sub-sections thereof, are expressly clear that in the absence of the matter which stands referred to the Lok Adalat, being settled between the parties by way of a compromise or settlement, the Lok Adalat has to refer back the matter to the Court from which it was sent to the Lok Adalat for the purpose of amicable settlement

and the Court has to proceed with the matter from the same stage from which it was sent to the Lok Adalat.

22. Coming to the facts of the present case, after the matter stood referred to the National Lok Adalat by the Court concerned, the endeavour which was to be made by the National Lok Adalat was to have the matter compromised or settled between the parties. But, of course, the compromise could have been arrived at between the parties, if there was meeting of minds.

23. A compromise or settlement cannot be forced upon the parties. In other words, in case one of the parties does not appears before the Lok Adalat where their case stands referred for compromise or settlement, the only inference which can be prudently drawn is that the party is not interested in having the matter compromised. That being the situation, the Lok Adalat has to thereafter proceed by ordering that as the matter could not be settled between the parties, the same is referred back to the court from which it was sent for the purpose of compromise or settlement. However, by no stretch of imagination, the Lok Adalat can confer upon itself the powers of a regular criminal Court and proceed as per the provisions of Section 256 of the Code of Criminal Procedure, as has been done in the present case by the Lok Adalat.

24. It is reiterated that Lok Adalat is not a substitute for a regular Court and in the absence of the powers enshrined under Section 256 of the Criminal Procedure Code being expressly conferred upon the Lok Adalat by the provisions of Legal Services Authorities Act, 1987, the same, by no stretch of imagination, can be exercised by the Lok Adalat.

25. In the present case, exercise of such power by the National Lok Adalat, resulting in the passing of the impugned order is an act where the National Lok Adalat has overreached the jurisdiction conferred upon it by the parent Act, and therefore, in the considered view of the Court, the impugned order passed by it is not sustainable in the eyes of law.

26. The contention of learned Counsel for the respondent that the order passed by the Lok Adalat is not assailable before this Court as the same is to be treated as a decree of a civil Court is also without any merit. The provisions of Section 21 of the 1987 Act demonstrate that in terms thereof, every Award of the Lok Adalat shall be deemed to be a decree of a civil Court or, as the case may be, an order of any other Court. Sub-section (5) of Section 20 thereof contemplates that where no Award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case is to be returned to the Court from which the reference was originally received. This demonstrates that Lok Adalat can pass an Award only when there is a compromise or settlement arrived at between the parties before it. Admittedly, in the present case, no compromise or settlement was arrived at between the parties. That being the case, no Award indeed was announced by the Lok Adalat in terms of 1987 Act. Therefore, the contention of learned Counsel for the respondent that the impugned order has to be treated as an Award is completely mis-conceived.

27. There is yet another important aspect of the matter, which this Court shall dwell at this stage.

28. Section 256 of the Code of Criminal Procedure provides that if the summon has been issued on the complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. Proviso to this Section further provides that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

29. Hon'ble Supreme Court of India in **Associated Cement Co. Ltd. vs. Keshvanand**, (1998) 1 Supreme Court Cases 687, has been pleased to hold that the purpose of including a provision like Section 256 is that it affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The Hon'ble Court was further pleased to observe that the same does not mean that if the complainant is absent, the Court "has a duty to acquit the accused in *invitum*".

30. Hon'ble Supreme Court of India in **Mohd. Azeem vs. A. Venkatesh and another**, (2002) 7 Supreme Court Cases 726, has been pleased to held as under:-

> *"2. The petitioner filed a criminal complaint under Section 200 of the Criminal Procedure Code (for short "CrPC") against Respondent 1 in the Court of Metropolitan Magistrate, Secunderabad for an alleged offence under provision of Section 138 of the Negotiable Instruments Act. The petitioner was prosecuting the complaint diligently and had been attending the Court of Magistrate on all dates excepting one because according to him he wrongly noted the date for hearing. Due to his absence on one day fixed for trial, the Magistrate by order dated 22-6-2001 dismissed his complaint and acquitted the accused. Aggrieved by the order of the Magistrate, the petitioner preferred an appeal under Section 378(4) CrPC to the High Court and the High Court by the impugned order dated 24-7-2001 dismissed his appeal against which the petitioner has approached this Court.*
>
> *3. From the contents of the impugned order of the High Court, we have noticed that there was one singular default in*

appearance on the part of the complainant. The learned Judge of the High Court observes that even on earlier dates in the course of trial, the complainant failed to examine the witnesses. But that could not be a ground to dismiss his complaint for his appearance (sic absence) on one single day. The cause shown by the complainant of his absence that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint.

4. In our opinion, the learned Magistrate and the High Court have adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned Magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant."

31. This Court in Bal Krishan Rawat vs. Pyare Lal Nepta, Latest HLJ 2018 (HP) 516, after placing reliance on the judgments passed by Hon'ble Supreme Court of India as well as judgment of this Court has been pleased to hold that single absence of the complainant in proceedings under Section 138 of the Negotiable Instruments Act, does not justify the act of the learned Magistrate of dismissing the complainant in default, more so, if the presence of the complainant on the relevant date was unnecessary. This Court has been further pleased to hold that instead of dismissing the complaint in default, the Magistrate should have adjudicated upon the complaint on merit, and for that purpose, he might have adjourned the case for a future date. It has also been held that acquittal of the accused, without adjudicating upon merits, due to non-appearance of the complainant on the date of defense evidence, who was sincerely pursuing his remedy, was improper.

32. Coming to the facts of the present case, as I have already mentioned hereinabove, the provisions of Section 256 of the Code of Criminal

Procedure cannot be exercised by the Lok Adalat. Not only this, the 1987 Act does not confer any power upon the Lok Adalat to dismiss the case in default on account of non-appearance of a complainant or proceed against the respondent side *ex parte* on the failure of the respondent to appear before the Court. When the case was referred to the Lok Adalat in order to explore the possibility of a compromise between the parties, dismissal of the complaint by the Lok Adalat for want of attendance of the complainant is, but obvious, an act beyond the jurisdiction of the Lok Adalat. As the respondent stands acquitted by way of the impugned order, therefore, the order passed by the Lok Adalat could have been assailed by the present appellant only under the provisions of Section 378(4) of the Code of Criminal Procedure in terms of the law laid down by this Court in H.P. Agro Industries Corporation Ltd. vesus M.P.S. Chawla, 1997 (2) Crimes 591.

33. In view of the discussion held hereinabove, this appeal is allowed and order dated 14.12.2019, passed by National Lok Adalat, Bench No. 7, District Court, Shimla, H.P. in criminal Case No. 202-3 of 18/14, titled as SRTFC vs Mukund Lal, vide which, the National Lok Adalat, on account of the absence of the complainant, proceeded to stop the proceedings under Section 256 of the Code of Criminal Procedure and to acquit the accused, is quashed and set aside and the matter is remanded back to the appropriate Court from which it stood referred to the National Lok Adalat with the direction that the Court shall proceed with the matter, from the stage, from which it was referred to the National Lok Adalat and proceeding with in accordance with law. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

RAKESH KALYAN SON OF
SH. SHARWAN DASS, RESIDENT OF
VILLAGE THALI, PO JANGLA,
TEHSIL CHIRGAON,
DISTRICT SHIMLA, H.P.

...PETITIONER-ACCUSED

(BY SH.NITIN THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

..RESPONDENT

(BY SH.ANIL JASWAL, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL REVISION NO.18 OF 2020
DECIDED ON : 09.08.2021

Code of Criminal Procedure, 1973 – Sections 397 & 401 – Petitioner convicted by Ld. Appellate Court, although acquitted by Ld. Trial Court - Application filed by petitioner for conversion of criminal revision into Criminal appeal under section 374 Cr. P.C. - Held – the revision petition has been filed with the period of limitation so criminal revision can be converted into criminal revision – Petition allowed. [Para 5]

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

J U D G M E N T

Cr.M.P. No.1286 of 2020

Petitioner, an accused in criminal trial in Criminal Case No.47-2 of 2016/15, titled as State of H.P. vs. Rakesh Kalyan, was acquitted by the trial Court vide judgment dated 16.07.2018.

2. The State had preferred an appeal being Cr.Appeal No.48-S/10 of 2018 against acquittal of the accused-petitioner and in that appeal petitioner stands convicted under Sections 354 and 354A of the Indian Penal Code (IPC).

3. Being aggrieved by his conviction by the First Appellate Court, for the first time, petitioner has preferred criminal revision in this Court.

4. During hearing for admission, in the aforesaid facts and circumstances, it has been found that petitioner, who was not convicted by the trial Court, but for the first time by the First Appellate Court, is entitled to file appeal against his conviction. In these circumstances, the word 'trial' used in Section 374 of Cr.P.C., is to be considered covering the conviction in the appeal as the appeal is in continuation of trial for the purpose of considering the issue involved in present case.

5. Faced with aforesaid situation, this application has been filed for conversion of criminal revision filed by the petitioner into criminal appeal under Section 374 of Cr.P.C. Revision petition was filed within time. Therefore, after conversion into appeal it is to be considered within limitation.

6. In aforesaid circumstances, application is allowed. Criminal revision is ordered to be converted into criminal appeal by assigning new number as appeal considering the revision petition as closed.

7. Application is disposed of in aforesaid terms.

Cr. Revision No.18 of 2020

8. In view of order passed in Cr.M.P. No. 1286 of 2020, this petition be converted into criminal appeal and numbered as such by considering this revision petition as closed and disposed of.

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

Narcotics Control Bureau .....Petitioner

Versus

Sangeeta Bhardwaj ..... Respondent

Criminal Revision No.249 of 2020
Date of Decision: 29.7.2021

Code of Criminal Procedure, 1973 – Section 397 – Release of vehicle impounded under Section 18, 25, 28, 29 & 60 of Narcotic Drugs & Psychotropic Substances Act, 1985 – Scope – Held – In Sunderbhai Ambalal Desai vs. State of Gujrat, AIR 2003 S.C. 638, Hon'ble Apex Court and in case titled Ashok Kumar vs. State of H.P., 2008 (2) Shimla L.C. 452, Hon'ble High Court of H.P. has held that the procedure under Section 451 Cr. P.C. should be followed by recording evidence and disposal – No useful purpose will be served by keeping seized vehicle at Police station for long period so, Magistrate shall pass/ immediately appropriate orders by taking personal bonds & guarantee as well as security for return of vehicle, if required at any point of time – Ld. Special Judge, Nalagarh, District Solan rightly released the vehicle. – Petition disposed of accordingly. [Paras 15 & 17]

Cases referred:

Ashok Kumar versus State of Himachal Pradesh, 2008(2) Shim. LC.452;
Rajendera Prasad vs. State of Bihar and another, (2001)10 SCC 88;
Sunderbhai Ambalal Desai vs. State of Gujarat, AIR 2003 SC 638;

For the Petitioner: Mr. Ashwani Pathak, Senior Advocate with Mr. Sandeep Sharma, Advocate.

For the Respondent : Mr. Y.P.S Dhaulta, Advocate.

Through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral):*

Instant Criminal Revision Petition filed under Section 397 of the Code of Criminal Procedure, lays challenge to order dated 28.02.2020 passed by learned Special Judge, Nalagarh, District Solan, Himachal Pradesh, in Cr.MA. No.66-NL/4 of 2020, whereby an application having been filed by the respondent for release of the vehicle in case FIR No.66 of 2019, dated 7.11.2019, registered at NCB, Chandigarh, under Sections 18, 25,28, 29 and 60 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (***For short 'Act'),*** came to be allowed.

2. Precisely, the facts of the case as emerge from the record are that the application for release of the vehicle, as detailed hereinabove, came to be filed in the Court of learned Special Judge, Nalagarh, District Solan, H.P., on behalf of the respondent. Learned Special Judge vide order dated 28.08.2020 allowed the application and ordered that the custody of the vehicle be given to its rightful claimant i.e. respondent alongwith the documents after furnishing supardari in the sum of Rs. 10,00,000/- with one surety of the like amount to the satisfaction of Additional Chief Judicial Magistrate/JMIC, Nalagarh. While passing aforesaid order of release of vehicle, court below also put conditions that the respondent will produce the vehicle before this Court or police as and when required and she will not change the nature and character of the vehicle, especially the cavity made in the said vehicle during the pendency of the criminal case before this Court.

3. Being aggrieved and dissatisfied with the aforesaid order of release of vehicle made in favour of the respondent, petitioner-NCB, at whose instance FIR, as detailed hereinabove, came to be lodged has approached this

Court in the instant proceedings, praying therein to set-aside the aforesaid impugned order.

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

5. Mr. Ashwani Pathak, learned Senior Counsel representing the petitioner-NCB vehemently argued that impugned order in the instant proceedings is totally contrary to the provisions contained under Section 60 of the Act, which specifically provides for confiscation of conveyance used in carrying/transporting any narcotic drugs and psychotropic substance. He further submits that since owner of the conveyance sought to be released failed to prove that vehicle so used was without her knowledge, there was no occasion for the court below to order release of the vehicle allegedly used for transportation of the contraband, which is subject matter of the case.

6. Mr. Y.P.S.Dhaulta, learned counsel representing the respondent while supporting the impugned order of release made in favour of the respondent, contends that till the time factum with regard to involvement of the vehicle in the alleged incident is not proved in accordance with law, vehicle allegedly used for transportation of contraband cannot be confiscated, rather same is liable to be released in favour of its rightful owner after completion of necessary codal formalities.

7. Having heard learned counsel for the parties and perused the material available on record, this Court finds that vehicle bearing registration No.HP-12-J-4403(Mahindra Pick up) was apprehended by the police allegedly transporting the contraband prohibited under NDPS Act. Aforesaid vehicle though was owned by the respondent namely, Sangeeta Bhardwaj, but she had handed over the same to accused Kuldeep by way of higher purchase agreement. As per own case of the petitioner, sum of Rs. 16, 200/- per month was being paid by main accused Kuldeep against loan installments. Since, the case stands registered against the main accused Kuldeep and trial

is under process, respondent being lawful owner of the vehicle, as detailed hereinabove, made an application for release of the vehicle, which prayer of her came to be resisted on behalf of the petitioner on the ground that vehicle in question can be again used by the accused for similar like offence. Court below before passing order on the application, called for the report and found that vehicle belongs to the respondent namely, Sangeeta Bhardwaj and she had given the same to the main accused Kuldeep on hire purchase agreement. Since, challan is yet to be filed and as such, Court below while placing reliance upon the judgment rendered by Hon'ble Apex Court in ***Sunderbhai Ambalal Desai versus State of Gujarat***, AIR 2003 SC 638 and judgment rendered by this Court in case titled ***Ashok Kumar vs. State of H.P.,*** 2008(2) Shim. LC 452, proceeded to allow the application and ordered for release of the vehicle.

8. Before ascertaining the correctness of the submissions made by learned counsel representing the petitioner-NCB, it would be apt to take note of the provisions contained under Section 60 of the Act, herein below:-

> **"60. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation**.—2(1) Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.
>
> (2) Any narcotic drug or psychotropic substance 3 [or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance 3 [or controlled substances] which is liable to confiscation under sub-section (1) and there receptacles, packages and coverings in which any narcotic drug or psychotropic substance 3 [or controlled substances], materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other

> contents, if any, of such receptacles or packages shall likewise be liable to confiscation.
> (3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance 3 [or controlled substances], or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

9. Perusal of aforesaid provisions of law though clearly reveals that conveyance used in carrying any narcotic drug or psychotropic substance is liable to confiscation in terms of provisions contained in sub-section (1) or sub section (2) of Section 60, unless the owner of the animal or conveyance proves that it was so used without his/her knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance had taken all reasonable precautions against such use. Though, in the case at hand, this Court finds that court below while ordering for release of the vehicle has not bothered to record the reasons, if any, assigned by the petitioner qua the involvement of her vehicle in the offence but yet same can be gathered from the pleadings adduced on record by the petitioner- NCB. Petitioner-NCB in the petition at hand itself has stated that the vehicle was though owned by respondent Sangeeta Bhardwaj, but had handed over the same to main accused Kuldeep on the basis higher purchase agreement. It has been averred that as per higher purchase agreement, sum of Rs. 16,200/- per month was being paid by main accused Kuldeep against the loan installment. Since it stood established on record that vehicle allegedly used by main accused for transporting the prohibited drugs of the narcotic substance was given by respondent Sangeeta Bhardwaj on higher purchase agreement, it can be safely inferred/concluded that original owner

of the vehicle involved in the alleged in the incident had no intimation that vehicle given by her on higher purchase agreement is/was being used for transporting prohibited narcotic substance. Once vehicle in question on account of higher purchase agreement was in possession and control of main accused Kuldeep, it cannot be said that original owner i.e. respondent had not taken reasonable precautions against unauthorized use of the vehicle.

10. Leaving everything aside, this court after having carefully perused the provisions contained under NDPS Act with regard to confiscation of illicit drugs ,substances, plants, articles and conveyances finds that though the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plaint, materials, apparatus and utensils in respect of which or by means of which such offence has been committed are liable to be confiscated alongwith any animals or conveyance used in carrying/transporting any narcotic drugs or psychotropic substance or any article in terms of provisions of sub section (1)or sub-section (2), but questions remains that at what stage order with regard to confiscation, which ultimately required to be passed by trial Court under Section 63 of the Act, shall be passed. Though, in terms of section 60 of the Act any psychotropic substance, as detailed in sub-section (i) and (ii) of section 60 is liable to be confiscated alongwith conveyance used for transportation immediately after its recovery, but order of confiscation, if any, can only be passed when Court arrives at a definite conclusion that article seized under the Act is liable to be confiscated under Sections 60, or section 61 and section 62 and, if it decides that the articles is so liable, it may order confiscation accordingly.

11. In the case at hand, learned senior counsel representing the petitioner was unable to point out order, if any, of confiscation as provided under Section 63 of the Act passed by the competent court of law. Sub-clause 2 of Section 63 further provides that no order of confiscation of an article or

thing shall be made until the expiry of one month from the date of seizure, or without hearing any person, who may claim any right thereto and the evidence, if any, which he produces in respect of his claim. It has been further provided in the aforesaid provision of law that if any such article or thing, other than a narcotic drugs, psychotropic substances,(controlled substance), the opium poppy, coca plant or cannabis plaint is liable to speedy and natural decay or if the court is of opinion that its sale would be for the benefit of its owner, it can direct it to be sold.

12. Since in the case at hand respondent specifically set up a case before the court below that she had handed over the vehicle involved in the incident being lawful owner to main accused Kuldeep on higher purchase agreement and same was being misused by Kuldeep without her knowledge, it would be too premature to conclude complicity, if any, of the vehicle in the alleged incident. Otherwise also, if it is presumed at this stage that vehicle owned by respondent was misused by main accused Kuldeep, by transporting prohibited narcotic substance, even then opportunity is required to be provided to rightful owner to prove that unauthorized use of the vehicle by the main accused was not in her knowledge. Since aforesaid question/issue can only be raised/decided in the trial, confiscation of the vehicle in terms of Section 60 of the Act prior to conclusion of the trial, cannot be ordered at this stage when charges are yet to be framed.

13. Hon'ble Apex Court in case titled **Sunderbhai Ambalal Desai vs. State of Gujarat, AIR 2003 Supreme Court 638**, which have been otherwise taken note by learned court below has specifically dealt with the power under Section 451 Cr.P.C exercised by the Court while dealing with the issue of disposal of seized articles. In the aforesaid judgment, Hon'ble Apex Court has categorically held that power under Section 451 Cr.P.C. should be exercised expeditiously and judiciously since it would serve the various purposes.

14. At this stage, it would be profitable to take note of para No. 7 to 20 of aforesaid judgment herein:-

> "7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-
>
> 1. Owner of the article would not suffer because of its remaining unused or by its misappropriation.
>
> 2. Court or the police would not be required to keep the article in safe custody;
>
> 3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the properly in detail; and
>
> 4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.
>
> 8. The question of proper custody of the seized article is raised in number of matters. In Smt. Basawa Kom Dyanmangouda Patil v. State of Mysore and Anr., [1977] 4 SCC 358, this Court dealt with a case where the seized articles were not available for being returned to the complainant. In that case, the recovered ornaments were kept in a trunk in the police station and later it was found missing, the question was with regard to payment of those articles. In that context, the Court observed as under-
>
> "4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original

owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance."

9. The Court further observed that where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

10. To avoid such a situation, in our view, powers under Section 451 Cr.P.C. should be exercised promptly and at the earliest.

Valuable Articles and Currency Notes

11. With regard to valuable articles, such as golden or sliver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, Magistrate should pass appropriate orders as contemplated under Section 451 Cr.P.C. at the earliest.

12. For this purposes, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:-

(1) preparing detailed proper panchanama of such articles:

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security.

13. For this purpose, the Court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 Cr.P.C. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The Court should see that photographs or such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451 Cr.P.C. to impose any other appropriate condition.

14. In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the Court may direct that such articles be kept in bank lockers. Similarly, if articles are required to kept in police custody, it would be open to the SIIO after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the Court may direct that such articles be handed over back to the Investigating Officer for further investigation and identification, However, in no set of circumstances, the Investigating Officer should keep such articles in custody for a longer period for the purpose of investigation and identification. For currency notes, similar procedure can be followed.

Vehicles

15. Learned senior counsel Mr. Dholakia, appearing for the State of Gujarat further submitted that at present in the police station premises, number of vehicles are kept unattended and vehicles become junk day by day. It is his contention that appropriate directions should be given to the Magistrates who are dealing with such questions to hand over such vehicles to its owner or to the person from whom the said vehicles are seized by taking appropriate bond and the guarantee for the return of the said vehicles if required by the Court at any point of time.

16. However, the learned counsel appearing for the petitioners submitted that this question of handing over vehicles to the person from whom it is seized or to its true owner is always a matter of litigation and a lot of arguments are advanced by the concerned persons.

17. In our view, whatever be the situation, it is of no use to keep such-seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.

19. For articles such as seized liquor also, prompt action should be taken in disposing it of after preparing necessary panchnama. If sample is required to be taken, sample may kept properly after sending it to the chemical analyser, if

> required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing.
>
> 20. Similarly for the Narcotic drugs also, for its identification, procedure under Section 451 Cr.P.C. should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser so that subsequently, a contention may not be raised that the article which was seized was not the same."

15. In para-20 of aforesaid judgment, which is reproduced hereinabove, Hon'ble Apex Court has specifically held that for Narcotic drugs also procedure under Section 451 Cr.P.C, should be followed by recording evidence and disposal. It has been further held in the aforesaid judgment that no useful purpose would be served by keeping seized vehicle at the police station for a long period. It is for the Magistrate to pass appropriate order immediately by taking personal bond and guarantee as well as security for return of the said vehicle, if required at any point of time.

16. Co-ordinate Bench of this Court in case titled **Ashok Kumar versus State of Himachal Pradesh,** 2008(2) Shim. LC.452 while placing reliance upon the aforesaid judgment held that once petitioner undertakes to produce the vehicle before the Court as and when required, prayer for release of vehicle should be allowed. Hon' ble Apex Court in **Rajendera Prasad vs. State of Bihar and another, (**2001)10 SCC 88, has held that custody of vehicle should be entrusted temporarily to its registered owner during the pendency of the trial. Their Lordships have held as under:-

> ***"We are not deciding the question as to the title of the vehicle in dispute nor the correctness of the rival versions regarding the transactions relating to the vehicle. We do not want the vehicle to remain in the compound of the police station exposed to heat and cold because the automobile is likely to be lost to all in such situation. To avert this situation, we are inclined to entrust it***

temporarily to the appellant who is the ostensible name-holder in the registration certificate. The custody of the vehicle with the appellant will be on behalf of the court and this arrangement is only till the stage when the court passes the order regarding disposal of the property on conclusion of the trial".

17. Consequently, in view of the observations made herein above, this Court finds no illegality and infirmity in the impugned order dated 28.8.2020, passed by learned Special Judge, Nalagarh, District Solan, H.P., and accordingly same is upheld.

The present petition stands disposed of in the aforesaid terms alongwith pending applications, if any.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, ACTING CHIEF JUSTICE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Jaswant Singh ....Appellant

Versus

State of Himachal Pradesh ....Respondent

Cr. Appeal No.370 of 2017
Decided on: 28th July, 2021

Narcotic Drugs & Psychotropic Substance, Act, 1985- Section 20 – Commercial quantity – Recovery of 1 Kg 250 grams of cannabis – Held - Possession of contraband has to be proved by the prosecution – The evidence of I.O. does not corroborate the evidence of PW-3 in view of which the prosecution has failed to prove the possession of the contraband leading to acquittal of accused. [Paras 17-20]

Narcotic Drugs & Psychotropic Substance, Act, 1985- Section 54 read with Section 101 of Evidence Act – The prosecution is required to prove the possession of the contraband by the accused – Held – Prosecution failed to

prove the possession of contraband by the accused, so other evidence is not sufficient to prove guilt of accused [Para 19]

For the appellant: Mr. N.S. Chandel, Senior Advocate with Mr. Vinod Kumar Gupta, Advocate.

For the respondent: Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Vikas Rathore and Ms. Ritta Goswami, Additional Advocate Generals.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ravi Malimath, Acting Chief Justice *(Oral)*

The brief facts of the prosecution case, are as follows:-

2. That on 10.12.2014, PW-7 HC Raj Pal, alongwith Head Constable Vinay Kumar, PW-3 LHC Manoj Negi and constable Anu were patrolling in the official vehicle of the Police Department, bearing No.HP-34A-9987, which was being driven by HHG Jagdish Chand. It was with reference to a theft case of Raghunath Temple. They were present at a place called 'Rahtar'on Shiah Bihali Road, on a path towards Nagwain. At about 6.30 p.m., the accused was coming from Bhuntar side. He was carrying a bag in his right hand.It had two strings of green colour. While he was coming, he was stopped by the Investigating Officer (PW-7). He disclosed his name as Jaswant Singh, son of Shri Revati Ram, resident of Village Najan, District Kullu, (H.P.). It is a further case of the prosecution that the accused got scared and frightened. It was dark. The accused was searched in the presence of HC Vinay Kumar and LHC Manoj Negi (PW-3), in terms of the seizure memo. Ext. PW3/B. On checking and opening the zip of the bag Ext.P-2, one bag of pink colour, vide Ext.P-3, was found inside. On further checking of the said bag, one polythene bag was found. It contained a black

colour substance in the shape of sticks and bowls, wrapped in transparent poly wrappers, in terms of Ext.P-4. On the basis of experience and smelling, the Investigating Officer found that the sealed substance was cannabis. It weighed about 1 Kg. 250 grams. The cannabis was seized. The bag was sealed in a cloth cover. The samples were taken, out of which, one was Ext.PW3/A. Seals were put on the same. Thereafter, a case was registered against the accused with the Police Station, Bhuntar, District Kullu, in FIR No.197 of 2014, dated 10.12.2014, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. The accused was taken into custody. The investigation was taken up. Thereafter, a charge-sheet was filed against the accused for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. The accused pleaded not guilty and claimed to be tried.

3. In support of its case, the prosecution, in all, examined PW-1 to PW-7 and marked Exts.PW-1/A to PW-7/E. Neither any witness was examined on behalf of the defence nor any exhibits were marked.

4. By the impugned judgment, the accused was convicted for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. He was sentenced to undergo rigorous imprisonment for a period of ten years, alongwith fine of Rs.1,00,000/-. In default of payment of fine, the accused-convict was ordered to further undergo rigorous imprisonment for a period of one year. Aggrieved by the same, the instant appeal is filed.

5. Mr. N.S. Chandel, the learned Senior Advocate, assisted by Mr. Vinod Kumar Gupta, Advocate, appearing for the appellant, contends that the trial Court has committed an error in convicting the

accused. That there is no material even to frame charges against the accused. That the appreciation of evidence by the trial Court, leads much to be desired. The key witness in the case being PW-3, has turned hostile. The only other witness that can support the case of the prosecution so far as the seizure is concerned, is the Investigating Officer (PW-7). The entire case of the prosecution cannot rest solely on the evidence of the Investigating Officer. Under these circumstances, the trial Court has misread the evidence on record and has wrongly convicted the accused. He further pleads that there are various discrepancies with regard to the movement of the official vehicle of the police when the seizure took place, the doubt about the accused walking in the said area and various other factors. Hence, he pleads that the appeal may be allowed by setting aside the judgment of conviction and sentence passed by the trial Court and acquitting the accused.

6. The same is disputed by Ms. Ritta Goswami, learned Additional Advocate General, appearing for the prosecution. She submits that the trial Court has rightly convicted the accused. That a huge quantity of cannabis, weighing 1 Kg. 250 grams. was seized from the accused. This is not within the permissible limit. That the accused is a person, who is habitually involved in the commission of this offence. That he has been caught red-handed by the police. Only because there are certain minor discrepancies in the prosecution case, does not entail the Court to take a view that the prosecution has failed to prove its case. Substantial material having been led in. The trial Court has passed a well reasoned and justified order. Hence, no interference is called for.

7. Heard learned counsels and examined the records.

8. PW-1 is HHC Neel Chand. He has stated that he was posted on general duty at Police Station, Bhuntar, District Kullu. He has

stated that on 11.12.2014, MHC Gian Chand gave him the case property of FIR No.197 of 2014, to be taken to SFSL, Junga. His evidence is of no avail to the prosecution case.

9. PW-2 is HC Nirat Singh. He has stated that he was posted as Reader to Dy. S.P. (Hqrs), Kullu. On 11.12.2014, Shri Sanjay Kumar, Dy. S.P., handed over to him special report Ext.PW2/A after making his endorsement. His evidence is also of no avail to the prosecution case.

10. PW-3 is LHC Manoj Negi. He has stated that he was present when the incident took place. That he alongwith HC Vinay Kumar and others were proceedings towards 'Rahtar' in connection with the patrolling after the theft had taken place in RaghunathTemple. At about 6.30 p.m., one person was coming from Bhuntar side. He further stated that they when stopped the said person, he became afraid. He disclosed his name as Jaswant Singh. He alongwith HC Vinay Kumar were associated as witnesses by the Investigating Officer. The search of the bag was done. On opening the bag, one pink colour bag was found inside and on checking the same, one transparent pack was found and in the said transparent pack, sticks with black colour substance was found. The Investigating Officer, on the basis of experience and smelling, found that to be Charas. It weighed 1 Kg. 250 grams. Thereafter, it was parceled in a cloth bag and sent to the Police Station. In the cross- examination, he has stated that the personal search of the accused was not taken in his presence. However, he has once again deniedit by saying that it is incorrect that he was not present at that time nor the accused was apprehended at that spot.

11. PW-4 LC Urmila is another official witness, who has entered the Rapat Nos. 36(A) & 48 (A) and also Rapat No. 4(A), dated 11.12.2014.

12. PW-5 is the statement of HC Gian Chand, who has stated about the deposit of one sealed parcel, containing various items.

13. PW-6 is a statement of SI/SHO Bhag Singh, who has registered the FIR in terms of Ext.PW6/A. He has also received onesealed parcel with nine seals, said to contain 1 Kg.250 grams of cannabis and various other material.

14. PW-7 is the Investigating Officer HC Raj Pal. He has narrated the evidence as stated by PW-3. He has also stated that in their presence, the bag was checked. One zip was on the bag, which was opened and on opening the said zip, one carry bag of pink colour was found inside. On checking the said bag, one polythene bag was found, which was containing black colour substance in the shape of sticks, wrapped in transparent poly wrappers. On the basis of experience and smelling, it was found to be cannabis. He has also narrated the manner in which the investigation was carried out thereafter. He has reiterated even in the cross-examination that both the police officials, namely, PW-3 and HC Vinay Kumar were associated as witnesses regarding the recovery of Charas.

15. On considering the contentions and evidence on record, we are of the considered view that appropriate interference is called for.

16. In order to prove the charges against the accused, primarily the prosecution would have to prove that the seizure of the contraband was in a manner in accordance with law. To this effect is the evidence of the Investigating Officer (PW-7) and that of LHC Manoj Negi (PW-3). Even though, another police official HC Vinay Kumar was present at the spot, but the prosecution has chosen not to examine him. He has been given up as a witness, even though, he was narrated as charge-sheet witness No.1. The entire case of the prosecution rests on the seizure. The

Investigating Officer has stated in categorical terms that he, PW-3 LHC Manoj Negi and Vinay Kumar were present at the scene of offence. That when the accused came there, he became frightened. He was a suspect. He was carrying a bag. When the bag was opened, charas was found. Therefore, the statements of each one of the three witnesses should have been a part and parcel of the prosecution case. However, for the reasons best known to the prosecution, the evidence of HC Vinay Kumar, namely, charge-sheet witness No.1, was given up. Therefore, we are left with the evidence of PW-3 LHC Manoj Negi and that of the Investigating Officer (PW-7). PW-3 has turned hostile. In his examination-in-chief, he has stated that he, alongwith HC Vinay Kumar, were associated as witnesses by the Investigating Officer. That the search of the bag was done. On opening of the bag, 1 Kg. 250 grams of charas was recovered. In the course of his cross-examination by the accused, he has stated that the "*personal search of the accused was not taken in my presence*". Thereafter, on being further cross-examined, he has stated that it is incorrect that "*we were not present at the spot nor accused was apprehended at the spot*". Therefore, PW-3 having turned hostile to the case of prosecution, his evidence cannot be relied upon. He has not supported the examination-in-chief. He has made a contrary statement in his cross-examination. Therefore, we are left only with the evidence of the Investigating Officer (PW-7). The Investigating Officer is the one who has conducted the investigation and was also present at the scene of offence.

17. In a catena of judgments, as narrated by the Hon'ble Supreme Court, it would not be prudent to rely solely on the evidence of the sole witness in every case to bring home the guilt of the accused. It is also trite that if there is one trustworthy witness, it is sufficient to bring home the guilt of the accused. However, in the instant case, the evidence by the Investigating Officer, runs contrary to the evidence

of PW-3. Therefore, we do not find it prudent to accept the evidence of the Investigating Officer for more reasons than one.

18. In the examination-in-chief as well as in the cross-examination, the Investigating Officer has very categorically stated that the search and seizure of the cannabis in question was done in the presence of HC Vinay Kumar as well as PW-3. HC Vinay Kumarhas not been examined. PW-3 has turned hostile. Therefore, on this basis, it will be difficult to accept the evidence of PW-7 as a trustworthy witness. The statement made by PW-7 that PW-3 was present at the scene of offence, runs contrary to the evidence of PW-3 himself, who has stated that he was not present when the seizure took place. Therefore, we do not find it safe to accept the evidence of PW-7. The rest of the witnesses are official witnesses, which do not go to the aid of the prosecution case. The crucial witnesses are PW-3 and PW-7. The evidence of both these witnesses cannot be relied upon. Firstly, because PW-3 has turned hostile and secondly, that the evidence of PW-7 does not corroborate the evidence of PW-3.

19. The appellant has been charged for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. Therefore, the prosecution will have to prove thathe was in possession of the contraband articles. Possession with the accused has to be proved beyond all reasonable doubt. It is only thereafter, the prosecution case can proceed further. In the absence of proving possession, no amount of other evidence is sufficient to bring home the guilt of the accused. Until and unless, the prosecution proves the possession of the articles with the appellant, the other evidence collected by the prosecution, will not come to its aid. Since the prosecution has miserably failed to prove the possession of the articles by the appellant, the entire prosecution case fails.

20. For all these reasons, the appeal is allowed. The

judgment of conviction and order of sentence, dated 5th July, 2017, passed by the Special Judge, Kullu, H.P., in Sessions Trial No.21 of 2015, titled *State of Himachal Pradesh* Versus *Jaswant Singh*, is setaside. The appellant is acquitted of the charge leveled against him under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. The concerned Jail authorities are directed to release the appellant, forthwith, if he is not required in any other case. The Registry is directed to communicate the operative portion of this judgment to the concerned Jail authorities, forthwith.

21. Pending miscellaneous applications are disposed off.

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

BETWEEN

THE MANGAL LAND LOOSERS AND
EFFECTED TRANSPORT COOPERATIVE
SOCIETY LIMITED THROUGH ITS
NOMINATED MEMBER

...PETITIONER

(BY SHRI VIJAY CHAUDHARY, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
   SECRETARY (COOPERATION) TO THE
   GOVERNMENT OF HIMACHAL PRADESH,
   SHIMLA-2.

2. ADDITIONAL REGISTRAR (MONITORING)
   COOPERATIVE SOCIETIES,
   HIMACHAL PRADESH,
   SHIMLA-9.

3. ASSISTANT REGISTRAR
COOPERATIVE SOCIETIES,
SOLAN,
DISTRICT SOLAN,
HIMACHAL PRADESH.

4. SHRI SURINDER KUMAR
S/O SHRI PARAS RAM,
R/O VILLAGE PATHER,
POST OFFICE PIPLUGHAT,
TEHSIL ARKI,
DISTRICT SOLAN,
HIMACHAL PRADESH.

5. HIRA LAL CHANDEL
S/O SHRI SITA RAM,
R/O VILLAGE MOHAL,
POST OFFICE BAKHLAG,
TEHSIL ARKI,
DISTRICT SOLAN,
HIMACHAL PRADESH.

...RESPONDENTS

(BY SHRI ASHOK SHARMA, ADVOCATE GENERAL,
WITH SHRI YUDHVIR SINGH THAKUR,
ADVOCATE GENERAL, FOR R-1 TO 3.

SHRI RAJIV RAI, ADVOCATE, FOR R-4 & 5)

(SHRI NIMISH GUPTA, ADVOCATE,
FOR PROPOSED RESPONDENTS IN CMP NO.9553/2021)

CIVIL WRIT PETITION NO.488 OF 2020
DECIDED ON 23.08.2021

Constitution of India, 1950 – Article 226 read with Sections 35-A and 94 (2), of Himachal Pradesh Cooperative Society Act, 1968 – Petitioner was aggrieved

by the order passed by Additional Registrar Cooperative Society, Solan, whereby Additional Registrar while disposing of Revision Petition directed Deputy Registrar, Cooperative Societies / Assistant Registrar, Cooperative Societies, Solan that they may consider names of respondents No. 4 & 5 for nomination as members of the managing committee if vacancy is caused in committee alleging that the revision petition filed by the respondents No. 4 & 5 had become infructuous – Held – Registrar / Competent Authority has been conferred with power to constitute a committee and such power includes power to alter, modify and reconstitute the committee, which includes power to remove any member of the committee – the authority found to be competent to consider the names of all persons , who are eligible to be nominated as members of the committee – the direction issued by Additional Registrar, Cooperative Societies with respect to respondents No. 4 & 5 set aside – Respondents allowed reconstitute the committee for two years shall not be construed that approval for committee is for indefinite period – Petition disposed of accordingly. [Paras 14,15 & 19]

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

O R D E R

Petitioner, in present petition, is Mangal Land Loosers and Effected Transport Cooperative Society Limited (hereinafter referred to as Society), and petition has been filed through its Nominated Member, without naming the Nominated Member in the Memo of Parties. However, petition is supported by affidavit of one Ajeet Singh son of Shri Inder Singh, claiming authorization for filing present petition, on behalf of the Society, on the basis of Resolution No.4, dated 23.12.2020, stated to have been approved and passed by the Society with Quorum of 6/11. In the Resolution, Committee Members of the Society, but without naming specifically, have been authorized to engage an Advocate and file an appeal against the order passed by Additional Registrar, Cooperative Societies, Shimla.

2. It is undisputed that Ajeet Singh is a Nominated Member of the Committee, constituted under Section 35A of the Himachal Pradesh Cooperative Societies Act, 1968 (hereinafter referred to as the Act), vide Notification dated 26.6.2019.

3. Present petition has been preferred against the order dated 21.10.2019, passed by Additional Registrar (Monitoring) Cooperative Societies, Himachal Pradesh in a Revision Petition preferred by respondents No.4 & 5, under Section 94(2) of the Act, against the order dated 19.3.2019 passed by Assistant Registrar, Cooperative Societies, Solan, whereby the Assistant Registrar had ousted respondents No.4 & 5 from the Committee, constituted under Section 35A of the Act, by withdrawing his earlier order dated 8.3.2019.

4. In Revision Petition, the Additional Registrar has held that in view of reconstitution of the Committee, vide Notification dated 26.6.2019, under Section 35A of the Act, earlier notifications, including Notifications/Orders dated 8.3.2019 and 19.6.2019, stand superseded, rendering the Revision Petition infructuous, but, in addition, while disposing of the Revision Petition, the Additional Registrar has directed the Deputy Registrar, Cooperative Societies (Eastern Division)/ Assistant Registrar, Cooperative Societies, Solan, that they, after verifying credentials/eligibility, as per requirement of law, may consider the names of respondents No.4 & 5 herein (appellants No.1 & 2 therein) for nomination as Members of the Managing Committee, if vacancy, if any, caused in the committee constituted vide Notification dated 26.6.2019.

5. Ground taken in the present petition is that if the Revision Petition filed by respondents No.4 & 5 (petitioners in Revision Petition) had become infructuous, then direction given by respondent No.2 therein, at the time of disposing of the petition, for considering the names of these respondents for nomination as Members of the Managing Committee was beyond jurisdiction and scope of power of respondent No.2. The impugned

order has been assailed only to the extent that aforesaid direction to concerned authority with respect to respondents No.4 & 5 be set aside and struck down.

6. The Committee of the Society was constituted vide Notification dated 26.6.2019, after expiry of tenure of two years of the similar previous Committee constituted invoking provisions of Section 35A of the Act. Present petition has been preferred by the Committee, constituted on 26.6.2019, and, admittedly, tenure of this Committee has expired on 25.6.2019. However, during the intervening period, present petition was preferred, wherein, on 27.1.2020, interim order was passed by learned Vacation Judge that Notification dated 26.6.2019 issued under Section 35A of the Act shall not be altered or modified, without leave of the Court. This interim order was continued by the Division Bench vide order dated 12.3.2020.

7. On expiry of tenure of the Committee, constituted vide Notification dated 26.6.2019, the Assistant Registrar, Cooperative Societies, Solan, had reconstituted the Committee, vide Notification dated 7.7.2021, but without leave of the Court, for mistaken belief that after expiry of statutory tenure of the Committee constituted vide Notification dated 26.6.2019, no leave of the Court was necessary, considering that interim order was in force only during the statutory tenure of the previous Committee constituted on 26.6.2019.

8. On reconstitution of the Committee, vide Notification dated 7.7.2021, a Contempt Petition No.221 of 2021, titled as *Manohar Lal &another v. Rajesh Sharma & another* had been preferred for violation of interim order passed by the Court, referred supra.

9. On realizing the mistake, after filing of the aforesaid Contempt Petition by the petitioner, concerned Authority had decided to keep the Notification dated 7.7.2021 in abeyance, pending adjudication of the present Writ Petition.

10. Considering the aforesaid facts and circumstances, the Contempt Petition (COPC No.221/2021) was closed and disposed of by a Coordinate Bench of this Court, vide order dated 9.8.2021.

11. Learned Advocate General has submitted that the power to appoint also includes power to remove, in accordance with law. It is further submitted by learned Advocate General that he has instructions to communicate no opposition to the prayer of petitioner for setting aside the direction issued by the Additional Registrar, Cooperative Societies, with respect to respondents No.4 & 5.

12. Learned counsel for respondents No.4 and 5 has submitted that these respondents cannot be debarred from becoming members of the Committee, by way of nomination or otherwise, only for opposition of other members, including the Society, if they are otherwise eligible for such membership. It is further submitted by the learned counsel for these respondents that he has no objection for setting aside direction issued by the Additional Registrar to consider these respondents for nomination as members of the Society, but the same should not be considered a disqualification of these respondents for becoming members of the Committee or for consideration for such membership.

13. The direction issued by the Additional Registrar, impugned herein, is superfluous and unwarranted as on arising a vacancy in the Society, concerned Authority has to consider the names of all persons, eligible to be nominated as members of the Society, in accordance with bye-laws, rules and provisions of the Act, as applicable to the case, and there was no necessity to give special preference to respondents No.4 and 5 by giving impugned direction. In case they are otherwise eligible and fall under the zone of consideration, their names would be naturally considered in accordance with law and if there is any legal impediment for such consideration, then their names would not be considered.

14. Registrar/Competent Authority has been conferred with power to constitute a Committee, under Section 35A of the Act and it is well settled that power to constitute a Committee also includes power to alter, modify and reconstitute the Committee, in accordance with law, which includes power to remove any member of the Committee, who is not entitled to continue or liable to the ousted for just and valid reasons for securing interest of the Society and, therefore, the concerned authority is competent to consider the names of all persons, who are eligible to be nominated as members of the Committee, in consonance with bye-laws, rules and provisions of the Act, as applicable to the case.

15. In the aforesaid facts and circumstances, considering submissions made by the learned counsel for the parties, direction issued by the Additional Registrar, Cooperative Societies, with respect to respondents No.4 & 5, referred supra, is set aside, with observation that the competent authority is empowered to nominate any eligible Member to the Managing Committee, exercising the power as provided under the Act, in accordance with bye-laws, rules and provisions of the Act, as applicable, without being influenced by the direction passed by the Additional Registrar, Cooperative Societies, or this Court in present decision, but the said power shall be exercised by giving paramount consideration for safeguarding the interest and proper management of the Society.

16. Needless to say that respondents No.4 & 5 (in present petition), if otherwise eligible to be appointed/ nominated, shall not be excluded from considering their names for nomination, in accordance with law, alongwith others.

17. Learned counsel for the petitioner submits that a time bound direction be given to the concerned authority to notify the Managing Committee, under Section 35A of the Act, immediately, so as to make the Committee functional.

18. Keeping in view the fact that the Committee has already been constituted vide Notification/Order dated 7.7.2021 and the said Notification/Order has been kept in abeyance during currency of the interim order, passed in this petition, no fresh direction is required to be issued for constituting the Committee afresh. The competent authority is always at liberty to constitute and re-constitute the Managing Committee, in accordance with bye-law, rules and provisions of the Act, as applicable.

19. The issue that how long and how many times the Committee can be constituted and re-constituted, under Section 35A of the Act, is not an issue in this petition and, thus, has not been adjudicated. Similarly, validity and legality of constitution of Committee, vide Order dated 7.7.2021, has also not been assailed and adjudicated in the present petition. However, notice of the said Notification/Order has been taken for limited purpose that after expiry of statutory tenure of previous Committee constituted on 26.6.2019, new Committee has been constituted vide aforesaid Notification/ Order dated 7.7.2021. Therefore, allowing the respondents-Authority to re-constitute the Committee, on expiry of statutory tenure of two years of previous Committee constituted on 26.6.2019, shall not be construed that this Court has approved the constitution and re-constitution of the Committee, under Section 35A of the Act, for indefinite period.

20. Petition is disposed of in aforesaid terms alongwith pending applications, except CMP No.9553/2021.

CMP No.9553/2021

21. Some Members of the Society have preferred this application for impleading them as party for redressal of their grievances.

22. This application is also disposed of alongwith the main petition, with observation that the applicants may take recourse of law available to them for redressal of their grievances, if any, still survive.

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

Ankita ...Petitioner

Versus

Himachal Pradesh Staff Selection Commission and another ...Respondents

CWP No. 3677 of 2021
Reserved on 27.07.2021
Decided on: 04.08.2021.

Constitution of India, 1950 – Article 226 – The petitioner having all the qualifications for the post of Medical Laboratory Technician Grade-II applied for the post within/ stipulated period which was advertised – Petitioner required registration certificate which was applied for by her – She submitted all requisite certificates with provisional registration certificate, however her candidature was rejected on the ground that she did not possess provisional certificate prior to 10.03.2021 – Held – Respondent No. 2 had registered petitioner provisionally on 21.01.2017, but the provisional registration certificate on the necessary format was not issued, for which petitioner cannot be faulted – The petitioner had made substantial compliance with the requirements of advertisement , so the rejection of the candidature of the petitioner by respondent No. 1 illegal, arbitrary, irrational & violative of Articles 14 & 16 of Constitution of India – Petition allowed. [Paras 18, 20 & 21]

For the petitioner : Mr. B.C. Negi Sr. Advocate with Mr. Nitin Thakur, Advocate

For the respondents: Mr. Sanjeev Kumar, Advocate, for respondent No.1.

Mr. Dalip K. Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner has filed instant petition seeking following substantive reliefs: -

"(i) *Issue a writ of mandamus directing Respondent Commission to consider the candidature of the petitioner to the post of Medical Laboratory Technician Grade-II; and/or*

(ii) Issue a writ of mandamus directing respondent No.2 to issue a provisional registration certificate of November 2017; and /or

(iii) Issue a writ of mandamus directing Respondent No.1 to issue fresh-revised result of Medical Laboratory Technician Grade-II."

CASE OF PETITIONER:

2. The facts as alleged in the petition are that respondent No.1 issued Advertisement No.36-1/2020 on 02.03.2020, for selection to different categories of posts. One of such being the post of Medical Laboratory Technician Grade-II in the Health and Family Welfare Department, Government of Himachal Pradesh. Total 154 numbers of posts in this category were advertised out of which 31 posts were for Scheduled Castes (Unreserved Category). Minimum qualification prescribed for the said post are as under: -

"i) 10+2 in science from a recognized board of school education.

ii. B.Sc Medical Laboratory Technology/B.Sc Medical Technology Laboratory/ B.Sc Medical Techology (Laboratory)/B.Sc Medial Laboratory Sciences/B.Sc in Medical Laboratory Technology (Lateral) from a recognized University or an institution affiliated to a recognized University.

iii) Should be registered with the Himachal Pradesh Para Medical Council for the above qualification."

3. As per petitioner, she was having all the qualifications for the post of Medical Laboratory Technician Grade-II. Petitioner passed her matriculation with 91% marks from CBSE in 2011 and 10+2 in medical stream with 79% marks in 2013. She also passed B.Sc in Medical Technology Laboratory from Post Graduate Institute of Medical Education and Research (PGIMER), Chandigarh with 1st division in August, 2017. Petitioner further claimed to have registered herself with H.P. Para Medical Council provisionally on 21.11.2017, after having obtained provisional degree from Post Graduate Institute of Medical Education and Research Chandigarh (PGIMER) Chandigarh on 18.09.2017.

4. Petitioner in response to above noted advertisement, applied for the post of Medical Laboratory Technician Grade-II within stipulated time period. Extended last date for submission of the application was dated 05.06.2020. Petitioner appeared in the written examination conducted on dated 29.11.2020 under Roll No.776000769. She scored 54 marks in the written examination and was amongst toppers. On 04.03.2021, petitioner received communication from respondent No.1 informing her that she had found place in the list of short-listed candidates for undertaking the evaluation process to be held on 15.03.2021. Petitioner was required to bring original documents with attested copies.

5. Before the date of evaluation, petitioner approached respondent No.2 for registration certificate. Though, petitioner had been provisionally registered by respondent No.2 on dated 21.11.2017 but she could not submit her degree to respondent No.2 on account of delay in its receipt. On 10.03.2021, respondent No.2 again issued provisional registration certificate in favour of petitioner.

6. Petitioner appeared with all requisite certificates also with provisional registration certificate on dated 10.03.2021 issued by respondent No.2 on the date of evaluation and submitted all the documents.

7. On dated 20.05.2021, respondent No.1 declared a list of 86 successful candidates, however, the name of petitioner was not included therein. Respondent No.1 had afforded an opportunity to candidates to submit requisite documents within seven days. Petitioner again submitted the documents through e-mail on dated 27.05.2021.

8. On dated 18.06.2021, respondent No.1 issued final list of 91 successful candidates. 71 posts, including 24 posts of scheduled castes (unreserved) category, remained vacant due to non-availability of candidates. Petitioner did not find her name in the list of successful candidates and from the aforesaid communication she found that her candidature was rejected on the ground that she did not possess provisional registration certificate prior to dated 10.03.2021.

CASE OF RESPONDENTS:

9. Respondent No.1 in its reply has submitted that the candidature of petitioner was rightly rejected as condition of the advertisement were not fulfilled by her. As per advertisement, eligibility of the candidates was to be seen on the closing date fixed for receipt of online application i.e., 05.06.2020. It was categorically prescribed that the candidates must ensure their eligibility in respect of category, experience, age, essential qualification etc. as mentioned against each post in the advertisement to avoid rejection at the

later stage. Respondent No.1 further mentioned that since the petitioner did not possess registration certificate of date prior to 05.06.2020, therefore, her candidature was liable to be rejected.

10. Though respondent No.2 did not file reply, but during the course of hearing learned counsel representing said respondent placed certain documents on record which included one office note sheet, copy of affidavit dated 21.11.2017 of petitioner and copy of application dated 10.3.2021 scribed by father of the petitioner.

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

ANALYSIS

12. Before adverting to the discussion on the contentious issue involved in the case, we deem it proper to notice relevant terms of the advertisement dated 02.03.2020 as under: -

"**5**. **IMPORTANT INSTRUCTIONS FOR FILLING UP ONLINE APPLICATIONS:**

1. to 3. Xxx xxx xxx

4. The candidates must ensure their eligibility in respect of category, experience, age and essential qualification(s), etc., as mentioned against each post in the advertisement to avoid rejection at later stage.

5. & 6. Xxx xxx xxx

7. The candidate should possess requisite essential qualification(s) prescribed for the post(s) for which he/she wants to apply as on closing date fixed for submission of Online Recruitment Applications (ORA)."

11. SUBMISSION OF CERTIFICATES/DOCUMENTS.

The download/printed copy of the online application form alongwith necessary original certificates and self attested photocopies will have to be produced at the time of evaluation. No offline application form will be accepted by the office.

13. ELIGBILITY CONDITIONS: -

i. The date of determining the eligibility of all candidates in terms of Essential Qualifications, experience etc., shall be reckoned as on the closing date for submitting the Online Recruitment Applications (ORA).

ii. xxx xxx xxx

(iii) Onus of proving that a candidate has acquired requisite degree/essential qualifications by the stipulated date is on the candidate and in the absence of proof the date as mentioned on the face of certificate/degree or the date of issue of certificate/degree shall be taken as date of acquiring essential qualification.**"**

13. Respondent No.1 in its reply has categorically admitted that at the time of 15 marks evaluation/counseling, petitioner had submitted fee receipt of dated 21.11.2017 (Annexure P-1) along with provisional registration certificate with H.P. Para Medical Council dated 10.03.2021. This being so, question that arises for determination is whether the submission of aforesaid document on the date of evaluation was sufficient compliance with the terms of advertisement?

14. Perusal of the receipt dated 21.11.2017 Annexure P-1, reveals that this document was issued by respondent No.2 on 21.11.2017 as a receipt of Rs.1,000/- issued in the name of petitioner in lieu of registration fees. An endorsement was appended on the top of the documents to this effect as under: -

"Provisional subject to the condition to deposit degree".

15. Respondent No.2, who is author of the document Annexure P-1, has not come forward to controvert its contents. It appears that instead of issuing registration certificate on any specified format, respondent No.2 made an endorsement to this effect in Annexure P-1 as noted above. The authenticity of Annexure P-1 cannot be doubted also for the reason that the petitioner has placed on record a copy of provisional degree issued in her favour by PGIMER Chandigarh certifying therein that on 06.09.2019 petitioner had passed B.Sc. in Medical Laboratory Technology Laboratory Examination. The provisional degree was issued on 18.09.2017 with endorsement that the degree would be awarded to the petitioner at the next convocation to be held by the institute. Petitioner finally received her degree after 09.02.2019, which is on record as Annexure P-2.

16. At this stage we deem it necessary to gainfully notice the contents of office note-sheet placed on record by respondent No.2, which reads as under: -

> *" It is submitted that the Government of Himachal Pradesh recruits the various post of Paramedicals in the State of Himachal Pradesh through HPSSC, Hamirpur, H.P. The large numbers of candidates are pressing hard for the registration under the HP Para Medical Council, due to the condition that candidates must be enrolled with the Council for applying the posts. It is further stated that due to dire need of the registration with the council, it is the condition that candidates shall be enrolled after submission of original degree of the course. It is pertinent to mention here that original degrees of the course are provided by the University/Institution after a long period. As per the past practice, Council was provisionally registered the candidates on the provisional degree & fees receipt issued accordingly.*
>
> *It is proposed that if approved, we may provisionally enrolled the candidates on the analogy of HP State Medical Council & issue Provisional Registration Certificate, so that most of the student apply for the various examination till the degree is not submitted to*

the council. The condition is also laid down in the provisional certificate that it is valid only for one year from the date of issue or the original degree not submitted by the candidate within one year which is earlier. After submission of degree, the provision certificate will be cancelled automatically and candidate shall be issued permanent registration certificate. The following proposal is submitted for approval please:-

1. *Provisional certificate Fess of Rs.500/- (Rupees Five hundred only).*
2. *Printing Provisional Certificate (500 No.) after getting quotations and lowest rate shall be approved in due course of time.*
3. *After expiry of provisional certificate i.e. One year, permanent registration certificate shall issue by the Council as per the prescribed fees structure.*

Submitted for approval please.

Sd/-
Accountant
30/7/2018

Sd/- *HPPMC*
Registrar
HPPMC *Sd/-*
DME-cum-President
HPPMC."

17. In addition, perusal of documents affidavit dated 21.11.2017 sworn in by petitioner and application dated 10.3.2021 written by father of petitioner (both documents placed on record by learned counsel for respondent No.2) clearly reveal that there was some discrepancy in the name of father of petitioner in her certificates. The fact that above noted documents, affidavit dated 21.11.2017 and application dated 10.3.2021 have been produced by respondent No.2 from its custody, leave no matter of doubt to infer that non issuance of formatted provisional certificate in favour of

petitioner was for the reason of discrepancy in the name of father of petitioner. At the bottom of application dated 10.3.2021, there is an endorsement "Provide ***provisional certificate***" by the office of respondent No.2 and the record further reveals that provisional certificate of registration on a format was issued to petitioner on 10.3.2021 itself.

CONCLUSION

18. From the above discussion, we have no hesitation to conclude that respondent No.2 though had registered petitioner provisionally on 21.11.2017 and had issued Annexure P-1, but the provisional registration certificate on necessary format was not issued till 10.3.2021 for the reasons detailed above. In this entire process, the petitioner cannot be faulted. Thus, the issue with respect to registration of petitioner with respondent No.2 before the last date of submission of online applications, remained more of form than substance. It is not the case of respondents that provisional certificate issued by respondent No.2 did not meet the requirements of condition of advertisement.

19. While dealing with substantive rights of parties courts cannot remain oblivious towards its duties to impart substantial justice. What is material is that the person had qualified basic eligibility criteria and despite having taken requisite steps was prevented from obtaining the recognition in the form of requisite certificate etc. for one or the other bonafide reason. Merely because the form of particular transaction was not proper cannot be used to deny the person rights otherwise emanating from such deal.

20. In light of above discussion, it is held that petitioner had made substantial compliance with the requirements of advertisement. She was qualified as B.Sc. Medical Technology (Laboratory) and was also provisionally registered with respondent No.2 i.e. Himachal Pradesh Para Medical Council w.e.f. 21.11.2017. In view of this matter, the stand of respondent No.1 that

petitioner did not hold requisite qualification before 06.05.2020 i.e., the last date for submission of online application is not justified.

21. The rejection of the candidature of petitioner by respondent No.1, thus, is clearly illegal, arbitrary, irrational and violative of Articles 14 and 16 of Constitution of India. Respondent No.1 is directed to consider and recommend the name of petitioner for the post of Medical Technician Laboratory, Grade-II advertised vide advertisement No. 36-1/2020 dated 02.03.2020 within a period of two weeks from the date of this judgment. The petition is accordingly disposed of with no orders as to costs, so also the pending miscellaneous application(s), if any.

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

Vinod Kumar .....Petitioner.

Versus

Union of India and others .....Respondents.

CWP No.1879 of 2019.
Reserved on : 28.07.2021.
Date of decision: 02.08.2021.

Constitution of India, 1950 – Article 226 read with order 2 Rule 2 of Civil Procedure Code, 1908 – The petitioner felt aggrieved by the order dated 06.08.2019 whereby he was directed by the respondent No. 4 not to report for his duty as Lab. Assistant in ECHS Poly clinic, Solan - Held – Avoiding the multiplicity of legal proceedings should be the aim of all courts, so, litigant shall not be allowed to split up his claim and file writ in piece meal fashion – The provision of order 2 Rule 2 C.P.C. are applicable in this case - The petitioner was appointed purely against temporary post and it is liable to be abolished at any time – The services of the temporary employee can be terminated without notice whenever there is no vacancy against which it was retained – The respondents have replied that they have already abolished the

vacancy of Lab. Assistant against which petitioner was working – Petition dismissed. [Paras 13, 20 & 23]

Cases referred:
Avinash Nagra vs. Navodaya Vidyalaya Samiti and others, (1997) 2 SCC 534;
Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot, AIR 1974 SC 2105;
Commissioner of Income Tax, Bombay vs. T.P. Kumaran, (1996) 10 SCC 561;
Gulabchand Chhotalal Parikh vs. State of Gujarat, AIR 1965 SC 1153;
Kundlu Devi and another vs. State of H.P. and others, Latest HLJ 2011 (HP) 579;
M/s. D. Cawasji and Co., etc vs. State of Mysore and another, AIR 1975 SC 813;
Sarguja Transport Service vs. STAT, AIR 1987 SC 88;
State of Haryana and others versus Navneet Verma (2008) 2 SCC 65;

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

For the Respondents: Mr. Shashi Shirshoo, Central Government Standing Counsel.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

> "(i) That the impugned oral order dated 06.08.2019 whereby respondent No.4 has directed the petitioner not to report for his duty as Lab. Assistant in ECHS Polyclinic, Solan, District Solan, H.P. after 18.08.2019 may kindly be set aside and quashed.
>
> (ii) That a writ in the nature of certiorari may kindly be issued thereby quashing and setting aside the impugned letter dated 04.02.2019 **Annexure P-8** and by way of writ of mandamus the respondent may kindly be directed to allow the petitioner to hold the post of Lab. Assistant at Ex-Servicemen

Contributory Health Scheme (ECHS) Polyclinic Solan, District Solan, H.P. till the disposal of issue raised in SLP No. 36359/2016 in the Hon'ble Apex Court against the judgment passed by this Hon'ble Court in CWP No. 9093/2014 decided on 02.12.2016.

(iii) That in alternate the respondent may be directed to utilize the services of the petitioner as X-Ray Technician in case the post of Lab Assistant by all means is not required at all at Poly Clinic Solan as the respondents themselves have registered the name of the petitioner as Radiation Professional with respect to ECHS Polyclinic Solan and he has issued BARC Accredited TLD certificate by Defence Laboratory Jodhpur."

2. On 16.02.2008, the respondents issued the employment notice for the direct recruitment to the different posts on different Polyclinic under Ex-Servicemen Contributory Health Scheme in ECHS Polyclinic Solan and other places. In this notice, the applications from desirous eligible candidates for the post of Lab. Assistant at Polyclinic, Solan were invited within fifteen days. The petitioner being eligible submitted his candidature within the stipulated period.

3. On 05.03.2008, the respondents conducted interview and out of five other candidates, the petitioner was selected for the above post. On 28.03.2008, the ECHS Station Headquarter, Kasauli, issued the appointment letter of MED Staff (Lab Assistant) in favour of the petitioner, who was directed to report for duty at ECHS, Polyclinic Solan by 01.04.2008.

4. The petitioner joined as Lab Assistant at ECHS, Polyclinic Solan, on 01.04.2008 and on the said date an agreement of employment was executed wherein the contractual period of 12 months was mentioned as initial period and the same was made renewal for 12 months at a time and subject to attaining the maximum age as prescribed in Appendix A to Government of India, Ministry of Defence Letter No. 24(6)/03/US/WE/D

(RES) dated 22.09.2003 or as amended from time to time upto the age of 58 years.

5. The respondents after the completion of contractual period of 12 months entered upon the renewal contract of employment on the same terms and conditions on yearly basis and last agreement was made on 22.09.2018 and 29.10.2018 wherein the contract of employment was further renewal upto 18.08.2019.

6. However, the respondents on 04.02.2019 issued notice to the petitioner that his services will be terminated with effect from 31.03.2019 constraining him to approach this Court by filing CWP No. 401/2019. This petition was disposed of on the basis of the instructions imparted by the respondents that the services of the petitioner shall be retained till the expiry of the contract period i.e. November, 2019.

7. On 06.08.2019, respondent No.4 orally directed the petitioner not to report for duty after 18.08.2019, hence, the petition.

8. The respondents contested the petition by filing reply wherein in preliminary submissions, it has been averred that the petitioner has suppressed material and important facts from this Court while filing the present petition. It is claimed that the petitioner had earlier filed CWP No. 401/2019 on the same and similar facts for the same relief and the same was decided by this Court on 29.03.2019 by observing as under:-

> "Learned Assistant Solicitor General of India informs that as per the instructions received by him, contract of the petitioner is valid till November, 2019 and he shall be retained in service till the expiry of the contract period i.e. November, 2019 and at this stage, instant writ petition has been rendered infructuous. Ordered accordingly. Pending applications, if any, also stand disposed of."

9. In the other preliminary submissions, it is averred that the petitioner has suppressed another vital fact from this Court that the vacancy of the Lab Assistant on which the petitioner was employed has since been abolished vide letter dated 10.01.2019.

10. On merits, it is contended that the petitioner had accepted the terms of his appointment on contractual basis with his eyes wide open and, therefore, he is estopped from filing the instant petition.

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

12. At the outset, it needs to be noticed that it is the specific case of the petitioner that he had right to hold the post in question till his superannuation or atleast till the matter was not decided by the Hon'ble Supreme Court in SLP. However, in case, the order dated 29.03.2019 passed in CWP No. 401/2019 (supra) is now adverted to, the petitioner did not object to the petition being disposed of with the limited relief permitting him to continue till November, 2019. Nowhere, the petitioner impressed upon the Court at that time to claim that he had right to continue till his superannuation or till the disposal of the appeal.

13. In such circumstances, the principles contained under Order 2 Rule 2 of the Civil Procedure Code are clearly applicable to the facts of the instant case.

14. It is more than settled that avoiding the multiplicity of legal proceedings should be the aim of all courts and, therefore, a litigant cannot be allowed to split up his claim and file writ petition in piecemeal fashion. If the litigant could have, but did not without any legal justification claim a relief which was available to him at the time of filing earlier writ petition, the same claim cannot be allowed to be subsequently agitated by filing another writ petition.

15. In this context, it shall be apt to refer to the judgment of the Hon'ble Supreme Court in ***M/s. D. Cawasji and Co.***, ***etc*** vs. ***State of Mysore and another***, AIR 1975 SC 813 wherein it was held as under:

> "[18] But, that however, is not the end of the matter. In the earlier writ petitions which culminated m the decision in (1968) 2 Mys LJ 78 = (AIR 1969 Mys 23) the appellants did pray for refund of the amounts paid by them under the Act and the High Court considered the prayer for refund in each of the writ petitions and allowed the prayer in some petitions and rejected it in the others on the ground of delay. The Court observed that those writ petitioners whose prayers had been rejected would be at liberty to institute suits or other proceedings. We are not sure that, in the context, the High Court, meant by 'other proceedings', applications in the nature of proceedings under Article 226, when it is seen that the Court refused to entertain the relief for refund on the ground of delay in the proceedings under Article 226 and that in some cases the Court directed the parties to file representations before Government. Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of unnecessary legal proceedings should be an aim of all courts. Therefore, the appellants could not be allowed to split up their claim for refund and file writ petitions on this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund and directing them to resort to the remedy of suits."

16. In ***Commissioner of Income Tax, Bombay*** vs. ***T.P. Kumaran***, (1996) 10 SCC 561, the Hon'ble Supreme Court observed as under:

> "[4] The tribunal has committed a gross error of law in directing the payment. The claim is barred by constructive res judicata under Section 11, Explanation IV, Civil Procedure Code which envisages that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit. Hence when the claim was made on earlier occasion, he should have or might have sought and secured decree for interest. He did not seek so and, therefore, it operates as res judicata. Even otherwise, when he filed a suit and specifically did not claim the same, Order 2 Rule 2 Civil Procedure Code prohibits the petitioner to seek the remedy separately. In either event, the OA is not sustainable."

17. Where the principle of constructive *res judicata* would apply to writ petition was subject matter of consideration before the Hon'ble Supreme Court in ***Avinash Nagra*** vs. ***Navodaya Vidyalaya Samiti and others***, (1997) 2 SCC 534 wherein it was held as under:

> "[13] The High court also was right in its conclusion that the second writ petition is not maintainable as the principle of constructive res judicata would apply. He filed the writ petition in first instance but withdrew the same without permission of the court with liberty to file the second writ petition which was dismissed. Therefore, the second writ petition is not maintainable as held by the High court in applying the correct principle of law. Thus considered we find no merit in the appeal for interference."

18. Apart from above, the provisions of Code of Civil Procedure are not applicable in writ jurisdiction by virtue of the provision of section 141 but the principles enshrined therein are applicable. (vide ***Gulabchand Chhotalal Parikh*** vs. ***State of Gujarat***, AIR 1965 SC 1153, ***Babubhai***

Muljibhai Patel vs. ***Nandlal Khodidas Barot***, AIR 1974 SC 2105 and ***Sarguja Transport Service*** vs. ***STAT***, AIR 1987 SC 88)

19. The question posed before this Court otherwise stands directly answered by this Court in ***Kundlu Devi and another*** vs. ***State of H.P. and others***, Latest HLJ 2011 (HP) 579 wherein it was held as under:

> "4. The contention of the learned counsel for the petitioners is that though the grievance with regard to quantum was dealt with, the grievance with regard to the claim for rent and occupation charges during the period the property was in possession of the Government has not been dealt with. According to the petitioners, they are entitled to the same in view of the decision of the Apex Court in R.L. Jain Versus DDA, (2004) 4 Supreme Court Cases 79. We do not think that it will be proper for this Court at this stage in proceeding under Article 226 of the Constitution of India to go into the question as to whether the petitioners are entitled to that component of compensation. That grievance the petitioners have pursued in accordance with the procedure prescribed under the Land Acquisition Act, 1894 initially before the Collector, thereafter before the Civil Court and finally in appeal before the High Court. According to the petitioners, though this grievance was raised, the same has not been adverted to. If that be so, a civil writ petition or for that matter any other collateral proceeding is not the remedy. All contentions, which a party might and ought to have taken, should be taken in the original proceedings and not thereafter. That is the well settled principle under Order II Rule 2 CPC. Order II Rule 2 reads as follows:
>
> > "2.Suit to include the whole claim. –
> >
> > (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
> >
> > (2) Relinquishment of part of claim. – Where a plaintiff omits to sue in respect of, or intentionally relinquishes,

any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. – A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

5. This Rule is based on the principle that the defendant shall not be vexed twice for one and the same cause. The Rule also seeks to prevent two evils, one the splitting of claims and the other splitting of remedies. If a plaintiff omits any portion of the claim or omits any of the remedies in respect of the cause, he shall not be permitted to pursue the omitted claim or the omitted remedy. The requirement of the Rule is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause which gives occasion for and forms foundation of the suit. If that cause of action enables a person to ask for a larger and broader relief than to which he had limited his claim, he cannot thereafter seek the recovery of the balance of the cause of action by independent proceedings. This principle has been also settled by the Apex Court in Sidramappa versus Rajashetty, AIR 1970 SC 1059.

6. Order II Rule 2 applies also to writ proceedings. The left out portion of a cause of action cannot be pursued in a subsequent writ proceedings. All claims which a petitioner might and ought to have taken, should be taken in one proceedings and only in one proceedings. {See the decision of the Supreme Court in Commissioner of Income-tax vs. T.P. Kumaran, 1996(1) SCC 561}.

7. Equally, a person who has filed the suit seeking certain relief in respect of a cause of action is precluded from instituting another suit for seeking other reliefs in respect of the same cause of action. He shall not be entitled to invoke the writ jurisdiction of the High Court for obtaining the very same relief. In other words, if a second suit is barred, a writ petition would

> also be barred. What is directly prohibited cannot be indirectly permitted. That is the principle underlying under Order II Rule 2 CPC."

20. Apart from the above, it has specifically come in the reply filed by the respondents that they have already abolished the vacancy of Lab. Assistant against which the petitioner had been working vide letter dated 10.01.2019. The petitioner has not assailed this action of the respondents by amending the petition or even filing rejoinder.

21. It is more than settled that power to abolish a post is inherent in the right to create it. The Government has always the power, subject, of course, to the constitutional provisions to reorganize a department to provide efficiency and to bring about economy that it can abolish an office or post in good faith. However, the action to abolish a post should not be just a pretence taken to get rid of an inconvenient incumbent which is not a fact situation obtaining in the instant case.

22. Lastly and more importantly, the appointment of the petitioner was purely on contract basis and on a consolidated pay for a fixed period. The period of contract was extended from time to time and thereafter the post was abolished. Since, the contractual period had expired, the petitioner has no right to continue.

23. The power of the Government in abolishing a post and the role of the Court for interference has succinctly been summarized by the Hon'ble Supreme Court after taking into consideration the majority of the earlier judgments in ***State of Haryana and others*** *versus* ***Navneet Verma (2008) 2 SCC 65*** wherein it was observed as under:-

> "11. Before proceedings to ascertain the answer for the above question, it is useful to refer to the appointment order of the Government of Haryana dated 13-7-1993 whereby the respondent herein was appointed as Accounts Executive in

HBPE. Among the other terms, Clause-2 of the said order is relevant which reads as under:

> "This offer of appointment is purely against temporary post which is liable to be abolished at any time and carries no promise of subsequent permanent employment. No offer of permanent vacancy can be made to him at present. Consequently his services can be terminated without notice whenever there is no vacancy against which he can be retained."

It is clear that the respondent herein was appointed purely against temporary post and it is liable to be abolished at any time. The said clause makes it clear that the post has no assurance or promise for a permanent employment. It also makes it clear that his services can be terminated without notice whenever there is no vacancy against which he can be retained. Now, with this background, let us consider the law laid down by this Court with regard to power of the Government in abolishing temporary/permanent post."

24. In view of the aforesaid discussion, we find no merit in this writ petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Parahlad Kumar alias Raj Kumar .....Petitioner

Versus

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

CWP No. 1993 of 2019
Reserved on: 28.07.2021

Decided on: 04.08.2021

Constitution of India, 1950 – Article 226 read with Section 427 (1) of Code of Criminal Procedure, 1973 – Petitioner is aggrieved by the certificate of imprisonment dated 27.10.2017 whereby the petitioner has been ordered to undergo sentence of second case after the expiry of sentence of first case – Held – the petitioner has committed offences of distinct & serious nature, in the cases in which he has been convicted – The petitioner whenever was granted the parole, misused the liberty and indulged in serious offences under the NDPS Act – In such circumstances the petitioner cannot be granted relief under Article 226 of Indian Constitution, which he failed to get from the Courts in exercise of their jurisdiction under Section 427 (1) Cr. P.C. – Petition dismissed. [Para 14]

Cases referred:

Benson vs. State of Kerala (2016) 10 SCC 307;
Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, 2014(1) SCC 603;
M.R. Kudva vs. State of A.P. (2007) 2 SCC 772;
Sushil Kumar alias Shashi vs. State of Himachal Pradesh, 2014 (1) Shim. LC 214;
V.K. Bansal vs. State of Haryana, (2013) 7 SCC 211;
Vicky @ Vikas vs. State (NCT of Delhi), (2020) 11 SCC 540;

For the petitioner: Mr. R.L. Chaudhary, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. A.Gs., Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. A.Gs.

(Through video conferencing)

The following judgment of the Court was delivered:

Satyen Vaidya, J.

Petitioner by way of instant petition, has prayed for the following substantive reliefs:

"(i) That writ of certiorari may kindly be issued, quashing and setting aside the certificate of imprisonment dated 27.10.2017 (Annexure P-5) whereby finding recorded by the Jail Authorities i.e. Respondent No.3 that the sentence of second case will commence after the expiry of sentence of first case. In case the sentences of the petitioner are ordered to run concurrently, w.e.f. 21.11.2008, in that event, the imprisonment of the petitioner will be over on 21.11.2018, but till date, he is in imprisonment of the respondent authorities."

(ii) That writ of mandamus may kindly be issued, directing the respondent authorities to run the sentences qua the petitioner concurrently w.e.f. 2011.2008, since w.e.f. 11.03.2003, the petitioner was undergoing the sentence of 10 years rigorous imprisonment in the jail of the respondent authorities imposed by Learned Additional Sessions Judge, Gurdaspur (Punjab) and for the second time, during imprisonment, the petitioner was convicted by Learned Special Judge, Fast Track Court Chamba, District Chamba, H.P. on 20.11.2008 in Sessions Case No. 37/2008 for 10 years rigorous imprisonment and to pay fine of Rs.1,00,000/- and thereafter, the petitioner was convicted on 21.02.2012 by Learned Special Judge, Mandi, H.P. in Session Case No. 39/2018 to undergo 2 years rigorous imprisonment and to pay fine of Rs.20,000/-, in view of the fact that fourth sentence dated 26.02.2013 passed by Learned Chief Judicial Magistrate, Kangra at Dharamshala in Criminal Case No. 49-III/2011, the sentence was ordered to run concurrently, but in Sessions Case No. 37/2008 as well as Sessions Case No.39/2008, there is no such order to run the sentence concurrently."

2. Undisputedly, petitioner has been convicted and sentenced in four cases, details whereof are as under:-

Sr.	Case No.	Date of	Sentencing	Sentence	Sentence	Sentence

No.		Judgment	order	awarded	served (including remission)	remaining including default sentence
1.	FIR No.45/2000 Sessions Case No.25/2000, P.S. Div. No.01, Pathankot	10/03/2003	11/03/2003	10 years, Fine Rs.01 Lakh I/D 01 year	10 years	Imprisonment I/d of payment of fine shall be kept in abeyance till the expiration of all the substantive sentences of imprisonment
2.	FIR No.07/2008, S.T. No.37/2008, P.S. Tissa	20/11/2008	21/11/2008	10 years, Fine Rs.01 Lakh I/D 01 years	08 years	03 years, including fine sentence, I/D 01 years
3.	FIR No. 43/2008, S.T No.39/2008, P.S. Sadar Mandi	21/02/2012	21/02/2012	02 years RI, Fine Rs.20,000/- I/D 03 months	Yet to be executed	02 years RI and 03 months I/D of fine
4.	FIR No. 163/2011, Case No.49-III/2011, P.S. Dharamshala	26/02/2013	28/02/2013	06 months RI, Fine Rs.1000/- I/D-01 month	Sentence undergone.	Undergone

3. As regards the cases at Serial No. 1 and 2 of the above tabulated form (for short “table”), petitioner remained unsuccessful in both the cases in appeals filed before the High Courts and also Special Leave Petitions filed

before the Apex Court. No appeal is stated to have been filed by petitioner in cases at serial numbers 3 and 4 of the table.

4. Presently, petitioner is undergoing sentence in case FIR No. 07/2008, Sessions trial No. 37 of 2008, in which conviction and sentence has been recorded/imposed by learned Special Judge, Chamba vide judgment dated 21.11.2008.Petitioner has already undergone the sentence imposed in case detailed at Serial No. 4 of the table, whereas the sentence in case at serial number 3 of the table is yet to commence. The fact of the matter is that in all the above noted cases, except case at Serial No. 4 of the table, the substantive sentences passed against the petitioner were to run consecutively.

5. Petitioner has now sought the reliefs as detailed above from this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. In short, his prayer is that the remaining part of his sentences be set off by issuing directions to the effect that the sentence in case at Serial No.2 of the table be treated to run concurrently with the sentence passed in case at Serial No. 1 of the table. Similarly, the sentence passed in case at Serial No.3 of the table be ordered to run concurrently with the sentence passed against him in case at Serial No. 2 of the table.

6. From the perusal of the details of table, it is evident that the petitioner is yet to serve the remaining substantive sentence in case at Serial No. 2 of the table and thereafter two years rigorous imprisonment in case at Serial No. 3 of the table. In addition, the petitioner is yet to undergo the default sentence in all the cases detailed at Serial Nos. 1 to 3 of the table.

7. The provision with respect to sentencing of an offender already sentenced for another offence is contained in Section 427 of the Code of Criminal Procedure, 1973, which reads as under:-

> *"**427. Sentence on offender already sentenced for another offence.**.—(1)When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or*

imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where a person who has been sentenced to imprisonment by an order under Section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

8. The case in hand falls under sub-section (1) of Section 427, which mandates that when a personal ready undergoing sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, however, the only exception that has been carved out is that the subsequent sentence shall run concurrently with previous sentence if Court so directs.

9. On facts, there is no dispute that Courts having convicted/sentenced the petitioner in cases at Serial No. 2 and 3 of the table did not exercise such jurisdiction in favour of the petitioner as there was no order for the sentence passed in such cases to run concurrently with the sentence passed in previous case. Needless to say, that the Court under Section 427 would include the Appellate as well as Revisional Courts. As noted above, petitioner had assailed the conviction and sentence in case at Serial No. 2 of the table in appeal before the High Court and in Special Leave Petitions before the Apex Court with the same result. In case at Serial No.3,

the petitioner did not choose to assail the judgment passed by learned trial Court either in appeal or in any other proceedings.

10. In the given situation, the question arises as to whether the petitioner can be granted the same relief in exercise of jurisdiction under Article 226 of the Constitution, which he had failed to get from the Courts in exercise of their jurisdiction under Section 427(I) of the Code. We have no hesitation to answer this question in negative. This is a case where the petitioner has unsuccessfully availed the remedy in accordance with law or has waived his right to avail such remedy. It is trite that when the statutory remedy is available to a person, having availed such remedy, he cannot approach the Constitutional Court successfully without proving that the available remedy was not effective or the statutory had not acted in accordance with the provisions of enactment or there was defiance of fundamental right or judicial procedure and natural justice. Reference may be made to ***Commissioner of Income Tax and others*** vs. ***Chhabil Dass Agarwal, 2014(1) SCC 603*** in this behalf.

11. The proposition akin to the one in hand was dealt by the Apex Court in ***M.R. Kudva*** vs. ***State of A.P. (2007) 2 SCC 772***, with the only difference that the petitioner in that case had approached the High Court under Section 482 Cr.P.C. Paragraph 12 of the judgment reads as under:-

> *"**12**. However, in this case the provision of* Section 427 *of the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgments in appeal.* Section 482 *of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the*

> *appellant in both the cases shall run concurrently or* Section 427 *would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed.*

12. A Co-ordinate Bench of this Court in ***Sushil Kumar alias Shashi*** vs. ***State of Himachal Pradesh, 2014 (1) Shim. LC 214*** was also confronted with the same proposition, *albeit* in exercise of powers under Section 482 Cr.P.C of the Code. Placing reliance upon ***M.R. Kudva's*** case supra, while dismissing the petition, the Court held as under:-

> *"**14**. In the instant case, petitioner Suhsil Kumar was convicted for two offences in separate trials for attempted murder on a person and murdering another person at two different times. Both these transactions were different in time and separate and were also not interconnected with each other. Therefore, we are of the opinion that this Court cannot interfere with the sentences passed in two separate cases, tried and decided separately under its inherent jurisdiction, therefore, the petition is dismissed."*

13. Learned counsel for the petitioner has placed reliance on judgment passed by the Apex Court in ***Vicky @ Vikas*** vs. ***State (NCT of Delhi), (2020) 11 SCC 540***. With all deference to the above referred judgment, the same cannot benefit the cause of the petitioner. The Hon'ble Apex Court in that case has exercised jurisdiction while hearing the appeal against the judgment passed by the High Court of Judicature at Delhi, whereby while dismissing the appeal of the appellant, the High Court had also dismissed the application to direct the sentences awarded to him to run concurrently.

14. In ***V.K. Bansal*** vs. ***State of Haryana, (2013) 7 SCC 211***, subsequently followed in ***Benson*** vs. ***State of Kerala (2016) 10 SCC 307***, it has been held that the discretion to be exercised in directing the sentence to run concurrently would depend upon the nature of the offence/offences and

facts and circumstances of each case. The Hon'ble Supreme Court in these cases had exercised the jurisdiction in favour of convict in the given facts and circumstances of each case by holding that the offences therein were having close proximity or relationship in terms of their nature and transaction etc. The above said discretion cannot be allowed in present case as the offences in all the cases are distinct and of serious nature. It appears that the petitioner, whenever granted parole, misused the liberty and indulged in serious offences under the NDPS Act. Not only this, petitioner was convicted and sentenced to undergo 8 months and 6 months rigorous imprisonment respectively by learned Chief Judicial Magistrate, Gurdaspur (Punjab) under the Punjab Good Conduct Prisoners Act. There is no manner of doubt that the petitioner is a habitual offender, that too, of serious offences under the NDPS Act.

15. The hazard of drug abuse is one of the most perilous problems presently being faced by the society. A large number of students and adolescents have succumbed to the addiction of drugs. We feel it necessary to express that the persons like petitioner are responsible for hysterical following of young generation towards drug addiction. Petitioner cannot command any discretion much less any sympathy.

16. In view of the discussion made above, there is no merit in the instant petition and the same is accordingly dismissed. Pending application(s), if any, shall also stand dismissed.

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

Between:-

SURJEET SINGH,
S/O SH. ROSHAN LAL,
R/O HOUSE No. 27,
TYPE 2, BLOCK M2,

HOUSING BOARD
COLONY,MEHLI,
SHIMLA-13, HP.

.....APPLICANT.
(BY SH. RAJIV JIWAN, SENIOR ADVOCATE WITHSH. PRASHANT SHARMA, 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. ADDITIONAL DIRECTOR GENERAL OF POLICE (CID),HIMACHAL PRADESH, SHIMLA-9.

4. SH. MANESH KUMAR, S/O (NOT KNOWN TO THE APPLICANT),

   PRESENTLY POSTED AS SENIOR ASSISTANT, STATE VIGILANCE & ANTI CORRUPTION BUREAU,SHIMLA-2.

5. RAJAN KUMAR, S/O (NOT KNOWN TO THE APPLICANT) PRESENTLY POSTED AS SENIOR ASSISTANT, POLICE HEADQUARTERS, HIMACHAL PRADESH,SHIMLA-2.

6. RAM PRASAD S/O (NOT KNOWN TO THE APPLICANT)PRESENTLY POSTED AS SENIOR

ASSISTANT AP&T, HIMACHAL PRADESH,
SHIMLA.

7. GULJAR MOHD.,
S/O (NOT KNOWN TO THE APPLICANT)
PRESENTLY POSTED AS SENIOR
ASSISTANT,AP&T , TEMPORARILY
ATTACHED WITH
1 INDIA RESERVE
BATTALION,BANGARH,
DISTRICT UNA,
HIMACHAL
PRADESH.

8. RAMESH KUMAR,
S/O (NOT KNOWN TO THE APPLICANT)
PRESENTLY POSTED AS SENIOR ASSISTANT,
POLICE HEADQUARTERS,
HIMACHAL
PRADESH,SHIMLA-
2.

9. KISHORI LAL,
S/O (NOT KNOWN TO THE APPLICANT)
PRESENTLY POSTED AS JUNIOR
ASSISTANT,CID, SHIMLA-9.

10. YUGAL KISHORE,
S/O (NOT KNOWN TO THE APPLICANT)
PRESENTLY POSTED AS SENIOR ASSISTANT,
POLICE HEADQUARTERS,
HIMACHAL
PRADESH,SHIMLA-
2.

11. NASHEEM AKHTAR,
S/O (NOT KNOWN TO THE APPLICANT)
PRESENTLY POSTED AS SENIOR ASSISTANT,

POLICE
HEADQUARTERS,
HIMACHAL PRADESH,
SHIMLA-2.

12. SMT. SHARDA DEVI,
W/O (NOT KNOWN TO THE APPLICANT)
PRESENTLY POSTED AS SENIOR
ASSISTANT,IN POLICE HEADQUARTERS,
HIMACHAL
PRADESH,SHIMLA-
2.

……RESPONDENTS.

(SH.ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, SH. HEMANSHU MISRA, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALS AND SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO. 1 TO 3.

CIVIL WRIT PETITION (ORIGINAL APPLICATION)NO. 7944 OF 2019.
ON THE 9th DAY OF AUGUST, 2021

Constitution of India, 1950 – Articles 14, 16 and 226 read with The persons with Disabilities (Equal opportunities, Protection of Rights and full participation) Act, 1995 – The petitioner was aggrieved by the impugned order dated 04.07.2015 denying the seniority to the petitioner from the date of his initial appointment – Held – Employee who has suffered disability during service cannot be deprived of the benefits which would otherwise accrue to him merely on account of disability – The respondents have not disputed the applicability of the Section 47 of the person with disabilities (Equal opportunities, Protection of Rights and full participation) Act, 1995 on the petitioner, however service benefits are not provided to him – Petition allowed. [Paras 11 & 12]

Cases referred:
Kunal Singh vs. Union of India andanother (2003) 4 SCC 524;

The following judgment of the Court was delivered:

This petition coming on for orders this day, ***Hon'bleMr. Justice Tarlok Singh Chauhan,*** *passed the following:*

O R D E R

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

> "(a) That, impugned order dated 4.7.2015 annexure A-10 may kindly be quashed and set aside.
>
> (b) That the seniority of the clerks/Junior Assistants, as it stood on 1.11.2013, showing the applicant at Sr. No. 41 may kindly be ordered to be corrected by showing the applicant at Sr. 34 by correcting date of appointment as 2.4.1998 in place of 5.2.2000. Further, consequently, the applicant be deemed to have been promoted on the basis such corrected seniority list of Clerks/Junior Assistants, to the post of Senior Assistant, by determining due date from which he would have been promoted as Senior Assistant, in case he is granted seniority as Clerk/Junior Assistant from 2.4.1998, in place of 5.2.2000.
>
> (c) That in pursuance to above relief, the seniority list of the Senior Assistants may also be modified showing applicant at appropriate place in the seniority list of Senior Assistants, with all consequential benefits."

2. The undisputed facts are that the petitioner was enlisted as Constable on 02.04.1998 in 3rd IRBn. Pandoh and was sent for basic recruit training at PTC, Daroh, on 06.04.1998. During training, the petitioner met with an accident in November, 1998 and received injury in his right leg which incapacitated him for the job of police Constable. The petitioner could not complete his training due to the accident and the Board of Director, Zonal Hospital, Mandi, declared him fit only for desk duty. Since, there was no provision in R&P Rules for conversion of a Constable to the post of Clerk, therefore, taking compassionate view of the matter, the case of the petitioner was referred to the Government for giving necessary relaxation in the R&P Rules for the adjustment of the petitioner to the post of Clerk vide letter dated 29.06.1999. The Government, in turn, vide its letter dated 30.11.1999 agreed to adjust/appoint the petitioner as Clerk against next available vacancy in the department in light of instructions issued by the Department of Personnel vide letter dated 02.08.1999.

3. Accordingly, office order dated 11.01.2000 for adjustment/appointment of the petitioner from the post of Constable to the post of Clerk was issued. As per the terms and conditions, it was specifically mentioned in the orders that the seniority of the petitioner would be reckoned from the date of joining as Clerk. The petitioner accordingly joined. Thereafter provisional seniority of Clerks was issued on 01.11.2013 whereby the petitioner was shown at Sr. No. 41, however, the petitioner did not choose to make any representation.

4. However, thereafter, the petitioner submitted a representation dated 27.02.2015 which was sent to

the Government for necessary clarification vide letter dated 18.04.2015 and the Government, in turn, clarified as follows:-

"No. Home (A) B(14)-1/2009-Loose Government of Himachal Pradesh "Home Department"

To

The Director General of Police,
Himachal Pradesh, Shimla-171002.

Dated Shimla-171002-the 4-7-2015

Subject:- Representation of Sh. Surjeet Singh,
Jr. Asstt. State CID, Shimla
withregard to seniority.

Sir,

I am directed to your office letter No. P-III (1) SL Cik./07-II-9489 dated 18-04-2015 on the subject cited above and to say that matter has been examined in consultation with Department of Personnel, who have clarified that objective ofSection 47 of "THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) Act, 1995 is related to non-discrimination of disabled persons in government employment who acquire a disability during service. Provisions of this Section have been adopted by the Government in toto. The Department of Personnel has further observed that the incumbent has been provided employment against other post with same pay scale in terms with provision of Section 47 of the Act ibid and seniority will be assigned to him from the date of joining in that cadre.

You are, therefore, requested to take necessaryaction in the matter accordingly.

Yours

faithfully,

sd/-
Under Secretary
(Home)to the
Government of
Himachal Pradesh."

5. In terms of the aforesaid clarification, thepetitioner was provided employment against the post ofClerk with the same pay scale, but has not been assigned seniority, constraining him to file the instant petition.

6. We have heard the learned counsel for the parties and have gone through the material placed on record as also the provisions of "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'Act').

7. At the outset, it needs to be observed that this Court in ***CWP No. 192/2004*** titled ***Ankush Dass Sood*** *vs.* ***State of H.P. and others***, decided on 22.06.2007 while dealing with the scope and ambit of the Act held as follows:-

> "India made its tryst with destiny almost 60 years back. As the country awoke to freedom at midnight on 15th August, 1947, the people had high hopes that they would all be treated equally. More than 57 years back we gave unto ourselves a Constitution promising equality to all citizens. The framers of Constitution were well aware of the fact that certain persons suffered from social and economical

inequalities and, therefore, in the process of providing true equality some benefits had to be given to them. Articles 14, 15 and 16 of the Constitution of India clearly recognized this concept.

It is a well known fact that persons suffering with disabilities are unable to live a complete life not only due to their own limitations, but also due to barriers created by society. Such persons face discrimination right from the time of their birth. Disabilities, both mental and physical, can be of various types and of varying degrees. The persons who face such disabilities have difficulty in getting admission to good schools and colleges. They face problems in getting access to public places, transportation etc. They are treated with pity, but society does nothing to improve their lot. There has been little attempt to assimilate them in the mainstream of the nation'slife. Even proper research has not been done to identify the disabled, ascertain their problems and to take appropriate steps to relieve them of their difficulties.

In the last fifteen years some efforts have been made in this regard. The Asian and Pacific countries decided that the decade starting from 1993 and ending in 2002 would be treated as the decade of disabled persons. A meeting of various countries, including India, was held in Beijing in December, 1992. It was called the “Meeting to Launch the Asian and Pacific Decade of Disabled Persons”. In this meeting, the participating countries, including India, adopted the Proclamation on the “Full Participation and Equality of People with Disabilities in the Asian and Pacific Region” India was a signatory to the said proclamation and, therefore, it was obligatory upon our country to enact a suitable legislation so that the rights of the disabled were protected.

The Parliament of the country with a view to fulfill the promise held out in the meeting at Beijing enacted The Persons with Disabilities (Equal

Opportunities, Protection of Rights and Full Participation) Act, 1995. The avowed objects and reasons of the Act are as follows:-

i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

ii) to create barrier free environment for persons with disabilities;

iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non-disabled persons'

iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

vi) to make special provision of the integration of persons with disabilities into the social mainstream."

8. Section 47 of the Act reads as under:-

"**47. Non-discrimination in Government employments.—**

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whicheveris earlier.
> (2) No promotion shall be denied to a person merely on the ground of his disability:
> Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

9. A bare perusal of Section 47 of the Act makes it abundantly clear that if any employee acquires disability during service and due to this disability is not suited to hold the post which he was previously manning, he should be shifted to another post with the same pay scale and service benefits which obviously would include seniority.

10. In ***Kunal Singh*** *vs.* ***Union of India and another (2003) 4 SCC 524***, the Hon'ble Supreme Court while interpreting Section 47 of the Act held that noDepartment can dispense with or reduce in rank an employee, who acquires disability during his service. It shall be apposite to refer to relevant observations made in para-9 of the judgment which read as under:-

> "9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of

"disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The Section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section
47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act.

> Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service."

11. The aforementioned observation of their Lordships do not leave any manner of doubt that an employee who has suffered disability during service cannot be deprived of the benefits which would otherwise accrue to him merely on account of disability.

12. As observed above, the respondents themselves have not disputed the applicability of the Act and have rather conferred a part of the benefit granting the same pay scale by resorting to Section 47 of the Act, but then what has been conveniently ignored is the service benefits to which the petitioner is entitled which would necessarily and essentially include the benefit of seniority.

13. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed. The impugned order dated 04.07.2015 (Annexure A-10) denying the seniority to the petitioner from the date of his initial appointment is accordingly quashed and set aside. As a consequence thereof, the seniority list as it stood on 01.11.2013 showing the petitioner at Sr. No. 41 is ordered to be corrected by showing the petitioner at Sr. No.34 by correcting his date of appointment as 02.04.1998 in place of 05.02.2000. Consequently, the petitioner shall be deemed to have been promoted on the basis of such seniority list of Clerks/Junior Assistants to the post of Senior Assistant by determining the due date from which he would have been promoted as Senior Assistant in case he had been granted seniority as Clerk/Junior Assistant from 02.04.1998 in place of

05.02.2000.

14. As a further consequence, the respondents are directed to place the petitioner at the appropriate place in the seniority list of Senior Assistants along with consequential benefits and in case further promotions have been carried out by the respondents, then the case of the petitioner shall also be considered for such promotion by treating him as a appointee from 02.04.1998 in place of 05.02.2000 with all consequential benefits. However, actual monetary benefits shall be confined to three years prior tofiling of this petition i.e. from 15.07.2013 as this petition was filed on 16.07.2016.

15. For compliance, to come up on **10.11.2021.**

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

Solan Vyapar Mandal .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No. 4774 of 2020.
Reserved on: 27.07.2021.
Date of decision: 2.08.2021.

Constitution of India, 1950- Article-226 -Section 39 of vide order dated 12.1.2020 the respondent No.3 declared the election null and void- The petition alleged that opportunity of being heard was violated by respondent No.3- Held- When action of quasi Judicial authority results in an adverse Civil consequences against a person or body, then unless the statute by either expressly or by necessary implication excludes the principle of natural justice, hearing must be given to those persons or bodies before passing such orders and respondent No.3 being passing the harsh decision must had given

opportunity of fair hearing to the affected parties- Petition allowed. (Paras 20 & 21)

Cases referred:
M/s Granules India Ltd. vs. Union of India and others, AIR 2020 SC 594;
Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851;

For the Petitioner : Mr. Ajay Sharma, Senior Advocate with Mr. Amit Jamwal, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Rajinder Dogra, Senior Additional Advocate General, Mr. Vinod Thakur, Mr. Hemanshu Misra, Mr. Shiv Pal Manhans, Additional Advocate Generals and Mr. Bhupinder Thakur, Deputy Advocate General, for respondents No. 1 and 2/State.

Mr. Sudhir Thakur, Senior Advocate with Mr. Karun Negi, Advocate, for respondent No.4.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

"i) That the impugned notice dated 12.10.2020, Annexure P-11, may very kindly be quashed and set aside;

ii) That directions may kindly be issued to respondent No.1 or in the alternative, to learned Chief Secretary of the State of H.P. to hold inquiry or get it conducted against respondent No.3 with respect to the facts of the present case as impugned

> acts of respondent No.3 come under the definition of misconduct as per provisions of the service jurisprudence and to take action against him in accordance with law and Action Taken Report may very kindly be ordered to be placed on the records of this case as the same will be an eye-opener for others not to overstep the jurisdiction vested in them."

2. The petitioner-Society was registered on 23.05.2016 under the provisions of the Himachal Pradesh Societies Registration Act, 2006 (for short 'Act'). It is averred by the petitioner that vide resolution passed in the meeting of the Society held on 27.06.2020, it was resolved that the term of three years of the Managing Committee was already over and, therefore, elections are required to be conducted and as such Shri Sanjeev Sharma was nominated as Returning Officer and Shri Pankaj Verma was authorized to communicate with the Deputy Registrar Societies, Solan (3rd respondent) for taking steps for conducting elections of the Managing Committee. On the said date, it was also decided that the elections of the Society will be held on 29.08.2020 and for this purpose an information will be sent to the members of the Society, so that whosoever is interested in the elections may submit his name on or before 27.07.2020 before the Returning Officer and the last date for withdrawing the names was fixed as 03.08.2020.

3. On 20.08.2020, a letter was issued by 3rd respondent to the petitioner-Society vide which reference was made to the letter dated 01.08.2020 and directions were issued that the Society may fix the term of the Governing Body to three years in sequel to the provisions of the Act and get fresh elections conducted by calling a General House of the members of the Society in accordance with law.

4. It is then averred that the meeting of the Society was held on 29.08.2020 and vide resolution No.1, the term of the Managing Committee was fixed to three years and vide resolution No.2, the elections were

conducted and held unanimously in the presence of 872 members as recorded in Annexure P-10. An information regarding conducting of elections and office bearers was submitted by the Returning Officer to 3rd respondent vide communication dated 31.08.2020. On 02.09.2020, a communication was issued by 3rd respondent to the General Secretary of the petitioner-Society informing him that certain complaints regarding elections of new body held on 31.08.2020 have been received in his office which were duly replied to by the petitioner.

5. Thereafter, 3rd respondent appointed the District Inspector Cooperative Societies, Solan, to look into the complaints against the petitioner-Society, who submitted his inquiry report on 16.09.2020.

6. It is further averred that on 11.10.2020, 3rd respondent came in his official vehicle using hooter and misbehaved with the businessmen in the Ganj Bazaar, Solan. On this, a complaint came to be filed with the Superintendent of Police, Solan, for registering an FIR against 3rd respondent as per the provisions of the Indian Penal Code as also the provisions of the Code of Criminal Procedure. It is then averred that respondent No.3 by that time had now become inimical against the petitioner-Society and its members and vide order dated 12.10.2020 declared the elections conducted on 29.08.2020 as null and void under Section 39 of the Act. This led to the filing of the instant petition.

7. The respondents have contested the petition by filing reply wherein it is averred that a general meeting of the petitioner-Society was held on 29.08.2020 and thereafter a letter dated 02.09.2020 was received in the office of 3rd respondent from one Pankaj Verma, who claimed himself to be the General Secretary of the petitioner-Society informing therein that a new governing body was elected on 29.08.2020. In the meantime, the office of 3rd respondent received many complaints and applications from the members of the petitioner-Society alleging therein that some miscreant members of the

petitioner-Society have illegally conducted the elections on 29.08.2020 in violation of the provisions of the Act, Rules and Bye-laws. It was then that 3rd respondent after taking cognizance of these complaints ordered an inquiry under Section 39 of the Act and appointed the District Inspector Cooperative Societies as an Inquiry Officer, who submitted his report on 16.09.2020 (Annexure P-10). Respondent No.3 considered the inquiry report and found that the elections of the government body of the petitioner-society was conducted in haste by bypassing the bye-laws and showing utmost disregard to the provisions of the Act and Rules made thereunder. Accordingly, 3rd respondent passed the impugned order dated 12.10.2020 and declared the elections as null and void under Section 39 of the Act.

8. At this stage, it will be worthwhile to mention here that during the pendency of this petition, an application came to be filed by one Mukesh Gupta, who claimed himself still to be President of the Solan Vyapar Mandal on the ground that the elections held on 29.08.2020 were not in accordance with law. The application was allowed and he was impleaded as respondent No.4.

9. In the reply filed by respondent No.4, a number of preliminary objections regarding maintainability, estoppel and locus-standi have been raised. It is then averred that the replying respondent has been elected as per Rules, Law and Bye-laws of the Solan Vyapar Mandal for a period of five years i.e. upto the year 2022 as Bye-laws No.10 of the Society clearly provides for the term of the Governing Body to be five years because Bye-laws of the Society have not been amended till date. As such, fresh elections cannot be conducted without amending the Bye-laws and, therefore, the claim of the petitioner to be elected as President of the Solan Vyapar Mandal is legally invalid and false. It is further averred that an equally efficacious remedy of appeal under Section 51 of the Act was available to the petitioner which has not been availed by it and moreover Section 42 of the Act provides to refer the

dispute regarding Management to the Registrar. In reply on merits, these objections have been reiterated.

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

11. At the outset, it needs to be noticed that we are at a complete loss to understand how respondent No.4 can claim himself to still be the President of the Society that too on the basis of the Bye-laws No.10 which provision is contrary to Section 15(2) of the Act which clearly provides for the term of the Governing Body or its members so elected to be as may be specified in the regulations, but not exceeding three years. Here, it shall be apt to refer to Section 15(2) of the Act which reads as under:-

> "(2) the term of the Governing Body or of its members so elected shall be as may be specified in the regulations but not exceeding three years:
> Provided that a member of the Governing Body of a Society shall be eligible for re-election as such, if the bye-laws so permit:
> Provided further that a member of the Governing Body may be removed by the General body in a meeting specially convened for such purpose by simple majority of votes of the members present after affording such member an opportunity of being heard."

12. It is settled law that an Act will prevail over the Rules, Bye-laws and Regulations.

13. According to the "pure theory of law" of the eminent jurist Kelsen, in every legal system there is a hierarchy of laws, and the general principle is that if there is a conflict between a norm in a higher layer of the hierarchy and a norm in a lower level of the hierarchy, then the norm in the higher level prevails, and the norm in the lower layer becomes ultra vires.

14. In our Country this hierarchy is as follows:-

(1) The Constitution of India.

(2) Statutory law, which may be either law made by the Parliament or law made by the State Legislature.

(3)Delegated legislation which may be in the form of rules, regulations etc. made under the Act.

(4) Administrative instructions which may be in the form of GOs, Circulars etc.

15. It is rather unfortunate that the official respondents have tried to behave like private litigants and took no steps to get the elections conducted despite the term of the Governing Body having expired on 07.05.2020. No doubt, because of Covid-19, the successive meetings were adjourned, but then as per the admitted case of the parties the elections did take place on 31.08.2020. If anyone was aggrieved by holding of such elections, then it was open to the aggrieved person(s) to have filed an election petition as normally a complaint under Section 39 of the Act in such circumstances would ordinarily be not maintainable. If at all the authority, more particularly, 3rd respondent was to act on the basis of the complaint, then the said respondent ought to have atleast followed the basic principles of natural justice and fair play.

16. The fundamental principle of natural justice is "*audi alteram partem",* meaning "listen to the other side" "let the other-side be heard as well". It is a principle that no person should be judged without a fair hearing in which each party is given an opportunity to respond to the evidence against him.

17. "*Audi alteram partem"* is considered to be a principle of fundamental justice or equity or the principle of natural justice. This maxim includes two elements; (1) notice, (2) hearing. Any order passed without giving notice would be against the principles of natural justice and may be declared *void ab-initio*. In such cases if the order is passed by authority without

providing reasonable opportunity of being heard to the person effected adversely by it, it will be invalid and would be set aside.

18. A reasonable opportunity of hearing which is well known as fair hearing is an important ingredient of the "*audi alteram partem"* rule. This condition may be complied by the authority while conducting written or oral hearing depending on the circumstances of the each case. Unless the Statute under which the action is being taken by the authority provides otherwise, it is the duty of the authority to ensure that the affected party may get an opportunity of hearing.

19. A general duty is cast on the competent authority to act judicially and it is bound to follow the aforesaid principles. As regards the instant case, this was mandatory for the reasons that an established institution under the Act has indirectly been ordered to be superseded by resorting to Section 39 of the Act.

20. It is more than settled that when action of quasi judicial authority results in an adverse civil consequences against a person or body, then unless the Statute by either expressly or by necessary implication excludes the principle of natural justice, hearing must be given to those person (s) or bodies before passing such orders.

21. Since the society has been visited by even civil consequences, therefore, it was mandatory for the 3rd respondent to have afforded an opportunity of fair hearing to the affected party(ies) before taking such harsh and far-reaching decision. To say the least, decision taken in this case is in haste, that too, by showing scant regard and respect to the society.

22. Here, it shall be apposite to refer to the celebrated decision of the Hon'ble Supreme Court in ***Mohinder Singh Gill & Anr***. vs. ***The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851***, wherein the Hon'ble Supreme Court observed as under:

"75. Fair hearing is thus a postulate of decision-making

> *cancelling a poll, although fair abridgment of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.*
>
> *76. We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequatur. The silence of statue has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation.*"

23. It cannot be denied that the instant order has resulted in adverse consequences and therefore, could not have been passed without adherence to the minimum requirements of the principal of natural justice, more particularly, the rule of "*audi alteram partem*".

24. The State is the largest litigant and stands in a category apart having a solemn and constitutional duty to assist the Court in dispensation of justice. The State cannot behave like a private respondent and cannot betray the trust reposed on it.

25. This Court is absolutely clear that it is the State and its Officers that are responsible for the entire mess that has been created in the instant case. As observed by the Hon'ble Supreme Court in ***M/s Granules India Ltd.*** *vs.* ***Union of India and others, AIR* 2020 SC 594**, the State cannot behave like a private litigant. The State acts through its Officers, who are given powers in trust and if that be so, then that trust cannot be betrayed either by casualness or negligence.

26. In view of the aforesaid discussion, we find merit in this writ petition and the same is accordingly allowed. The impugned order/notice

dated 12.10.2020 (Annexure P-11) is set aside. However, that does not mean that we have in any manner upheld or given our approval or recognition to the so-called elections held on 31.08.2020 which question shall, if necessary, be decided by the competent authority in appropriate proceedings if at all brought before it.

27. The writ petition stands disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

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

Gheem Chand .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWPOA No.1749 of 2019.
Reserved on : 30.07.2021.
Date of decision: 02.08.2021.

Constitution of India, 1950 – Articles 14 and 226 – The petitioner is aggrieved by the act of the respondents whereby he has not been given the scale of the tailor since date of appointment with further revised pay scale from time to time alongwith interest as he discharged his duties as tailor – Held – In the communications from the year 1989 to 2009 by the respondent department, the petitioner has been shown to be tailor, which fact reveals that petitioner was appointed as peon but he infact worked as a tailor – The person having been allowed to serve on a higher post is entitled to get salary of such post – Petition allowed and the respondents are directed to grant the pay scale of tailor since date of his appointment with revisions & consequential benefits. [Paras 7, 8 & 16]

Cases referred:

Dwarika Prasad Tiwari vs. M.P. State Road Transport Corporation and another (2001) 8 SCC 322;

Dwarika Prasad Tiwari vs. M.P. State Road Transport Corporation and another AIR 2001 SC 2871;
Jaswant Singh vs. Punjab Poultry Field Staff Association and others AIR 2002 SC 231;
M.P. SRTC and another vs. Narain Singh Rathore, 1994 MP Law Journal 959 (FB);
Selvaraj vs. Lt. Governor of Island, Port Blair and others AIR 1999 SC 838;
State of Punjab and others etc. vs. Rafiq Masih AIR 2015 SC 696;

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

For the Respondents: Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

> "a) That Writ of Mandamus may be issued directing the respondents to grant the pay scale of tailor since the date of appointment to the petitioner, with further revised pay scale from time to time along with interest.
> b) That the petitioner may be held entitled to arrears of pay and all consequential benefits with further revised pay scale from time to time along with interest."

2. It is averred that the petitioner was appointed as a Class-IV employee vide order dated 19.08.1985 and was asked to perform the duties of a tailor. Thereafter vide Office Order dated 03.05.1989, the petitioner was ordered to be transferred to CHC, Kotkhai where he joined on 03.05.1989. But, shortly

thereafter the petitioner was relieved from Kotkhai and directed to report for duty at Ripon Hospital vide order dated 18.07.1989.

3. All throughout this period, the petitioner discharged his duties as a tailor and acknowledging the performance of duties as tailor by the petitioner, the CMO issued a certificate on 18.04.1990. The petitioner has thereafter annexed certain documents collectively as Annexure P-3 to support his contention that he has been continuously working as a tailor.

4. It is further averred that on 29.08.2005, the petitioner requested respondent No.2 to promote him to the post of tailor against vacant post as he was discharging the duties of a higher post eversince his appointment. However, the request of the petitioner was not acceded to constraining him to file the instant petition.

5. The respondents have contested the petition by filing reply wherein it is averred that the petitioner was appointed as a Class-IV and continued as such till his superannuation on 30.04.2012. The petitioner was neither a trained tailor nor he was ever appointed as tailor which is a skillful job in a different cadre. It is claimed that the post of tailor is Class-III post in different cadre which post was/is required to be filled up in accordance with the provisions of the existing and prevailing Recruitment and Promotion Rules and since the petitioner was not possessed any certificate/diploma of tailoring from a recognized training institute, therefore, the petition deserves to be dismissed.

6. I have heard the learned counsel for the parties and gone through the records of the case which was ordered to be summoned vide order dated 23.07.2021.

7. At the outset, it needs to be noticed that in the documents annexed by the petitioner from Annexures P-1 to P-3, the petitioner all throughout has been shown to be a tailor. These communications range from the year 1989 to 2009.

8. That apart, the records though show the appointment of the petitioner to be that of Class-IV, however, there is an overwhelming records to establish that the petitioner had in fact been working as a tailor.

9. What would be the right of an employee working on a higher post has been dealt with by a Full Bench of the Madhya Pradesh High Court in ***M.P. SRTC and another*** *vs.* ***Narain Singh Rathore, 1994 MP Law Journal 959 (FB)*** wherein it was observed as under:-

> "17..... To say that an employee who was asked to work on a higher post for a period on account of exigencies of situation is not asking for promotion and he is asking only for appropriate classification on the post on which he is working is to ignore both the scheme underlying the rules relating to classification and the promotion rules. An employee may be asked to work in a higher post for some time on account of administrative exigencies. He does not thereby acquire a right to the higher post, as long as he has not been promoted by the Competent Authority in accordance with the regulations or rules and on a consideration of all employees in the feeder categories who are in the field of choice. An employee who is not entitled to be considered for promotion or who is yet to be considered for promotion and therefore, cannot be deemed to have been promoted, cannot secure the same end by stating that what he is seeking is classification and not promotion. What cannot be achieved directly cannot be permitted to be achieved in an indirect manner. It is one thing to say that an employee who has been asked to work in a higher post temporarily must get the emoluments attached to the higher post; it is quite a different thing to say that he must be regarded as a permanent incumbent of the higher past by being classified as such. The question of exploitation and unfair labour practice does not arise since it will be the duty of the employer to pay him the emoluments attached to the higher post as long as he discharges the duties attached to the higher post and on the failure of the employer, it will be open to the employee to enforce his claim....."

10. Notably, the aforesaid judgment has been upheld by the Hon'ble Supreme Court in ***Dwarika Prasad Tiwari*** *vs.* ***M.P. State Road Transport Corporation and another (2001) 8 SCC 322*** (Infra).

11. Whether the persons, who are given higher responsibility and allowed to work continuously over a long period of time can claim salary for the higher post was considered by the Hon'ble Supreme Court in the following decisions.

12. In ***Selvaraj*** *vs.* ***Lt. Governor of Island, Port Blair and others AIR 1999 SC 838***, the Hon'ble Supreme Court considered the very issued and held as under:-

> "3. It is not in dispute that the appellant looked after the duties of Secretary (Scouts) from the date of the order and his salary was to be drawn against the post of Secretary (Scouts) under GFR 77. Still he was not paid the said salary for the work done by him as Secretary (Scouts). It is of course true that the appellant was not regularly promoted to the said post. It is also true as stated in the counter-affidavit of Deputy Resident Commissioner, Andaman & Nicobar Administration that the appellant was regularly posted in the pay scale of Rs 1200-2040 and he was asked to look after the duties of Secretary (Scouts) as per the order aforesaid. It is also true that had this arrangement not been done, he would have to be transferred to the interior islands where the post of PST was available, but the appellant was keen to stay in Port Blair as averred in the said counter. However, in our view, these averments in the counter will not change the real position. Fact remains that the appellant has worked on the higher post though temporarily and in an officiating capacity pursuant to the aforesaid order and his salary was to be drawn during that time against the post of Secretary (Scouts). It is also not in dispute that the salary attached to the post of Secretary (Scouts) was in the pay scale of 1640-2900. Consequently, on the principle of quantum meruit the respondents authorities should have paid the appellant as per the emoluments available in the aforesaid higher pay scale during the time he actually worked on the said post of Secretary (Scouts) though in an officiating capacity and not as a regular promotee. This limited relief is required to be given to the appellant only on this ground."

13. In ***Dwarika Prasad Tiwari*** *vs.* ***M.P. State Road Transport Corporation and another AIR 2001 SC 2871***, the Hon'ble Supreme Court held that period for which the appellants discharged the duties or discharging the duties attached to a higher post, they should be paid emoluments as attached to that post.

14. In ***Jaswant Singh*** *vs.* ***Punjab Poultry Field Staff Association and others AIR 2002 SC 231,*** the Hon'ble Supreme Court held as under:-

> "11. The High Courts decision in Gobind Singh's case did not direct the promotion of Gobind Singh. What was directed was the payment of salary and allowances of the post of chick sexer since Gobind Singh had been discharging the duties of that post. Therefore, while the appellants promotion to the post of chick sexer cannot be upheld, given the fact that the appellant had discharged the duties of a chick sexer, he was at least entitled to the pay and other allowances attributable to that post during the period he carried out such duties.
>
> 12.We accordingly allow the appeal in part. While upholding the order of the High Court, setting aside the order of the appellants promotion, we direct the respondent authorities to pay the appellant for the period he rendered service as a chick sexer at the scales of pay together with all allowances to which chick sexers were entitled at the relevant time."

15. In ***State of Punjab and others etc.*** *vs.* ***Rafiq Masih AIR 2015 SC 696***, the Hon'ble Supreme Court stayed the recovery by applying the principle that the person having been allowed to serve on a higher post is entitled to get salary for the post and in paragraph-11, it was held as under:-

> "11……that the employees were entitled to wages, fort the post against which they had discharged their duties. In the above view of the matter, we are of the opinion, that it would be iniquitous and arbitrary for an employer to require an employee

to refund the wages of a higher post, against which he had wrongfully been permitted to work, though he should have rightfully been required to work against an inferior post."

16. In view of the aforesaid discussion, the writ petition is allowed and the respondents are directed to grant the pay-scale of tailor to the petitioner since the date of his appointment along with revisions that have been carried out from time to time along with consequential benefits.

17. However, the actual monetary benefits shall be limited to a period of three years prior to the date of filing of the Original Application i.e. since 1st March, 2010, as the same came to be filed on 27th February, 2013.

18. These directions be complied with within 90 days, failing which, the petitioner shall be entitled to interest at the rate of 6% per annum.

19. For compliance, to come up on **12.11.2021.**

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

Rambhaj and others ..Petitioners

Versus

Kashmir Singh and others ...Respondents

CMPMO No. 19 of 2021
Reserved on 29.07.2021
Decided on : 06.08.2021

Code of Civil Procedure, 1908- Order 39 Rules 1 & 2- Interim injunction- Suit to restore the vacant possession of suit property by demolition of existing structure and permanent prohibitory injunction- Ld. trial court rejected the prayer for raising construction of second storey over already existing structure and directed parties to maintain status quo on vacant part of suit land- Appellate court reversed the findings- Challenged- Held- Ld. Trial Court has properly evaluated the essential ingredients for the grant of temporary injunction- Ld. Appeallate court order set aside and the order of Ld. trial court affirmed to the extend of rejection of prayer in the application and set aside the status quo as not the subject matter of the suit- Petition allowed. (Paras 13, 14 & 15)

Cases referred:
Ramesh Kumar vs. Smt. Sheetal and others 2021 (1) Shim.L.C. 377;

For the petitioner : Mr. Ashok K. Tyagi, Advocate.

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

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioners, by way of instant petition, have challenged order dated 30.12.2020 passed by learned District Judge, Mandi, District Mandi in Civil Miscellaneous Appeal No.15 of 2020, whereby the order dated 10.12.2020 passed by learned Civil Judge, Court No. II, Mandi in CMA No.205-VI/2020 in application under order 39 Rules 1 and 2 of the Code of Civil Procedure (for short "Code") has been reversed.

2. Respondents herein are the plaintiffs before Trial Court and petitioners are defendants, therefore, for clarity the parties herein shall be referred by the same status as they held before learned Trial Court.

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

3.1 Civil Suit bearing No.132/18/14, filed by plaintiffs, is pending before learned Civil Judge (Court No.2) Mandi with prayer to pass a decree to the following effect:-

a) *A decree of mandatory injunction directing the defendants to restore the vacant possession of the suit property by demolishing the construction, which they have raised during the pendency of the earlier suit/review petition, as is marked A-1, A-1, A-1, A-1 in the rough site plan may kindly be passed.*

b) *A decree for permanent prohibitory injunction for restraining the defendants not to interfere and place debris and stones upon the suit land pertaining to portion B-1, B-1, B-1, B-1 may kindly be passed and a decree for mandatory injunction for removing the said debris and stones.*

c) *A decree for permanent prohibitory injunction directing the defendants not to throw the kitchen and bathroom waters on the suit land and to make arrangements of kitchen and bathroom water of their own land.*

3.2 Plaintiffs have described suit property comprised in Khewat No.73/71, Khatauni No.79/77, Khasra No.130 measuring 5-0-05 Bighas, situated in Muhal Hart, Patwar Circle Samrahan/72, Illaqua Tungal, Tehsil Kotli, Distt. Mandi H.P, which undisputedly is 'Abadi Deh' land. Plaintiffs claim possession of more than 0-15-0 bighas out of the suit land, on which ancestral house of plaintiffs is stated to exist. In addition to the house, plaintiffs also claim to be in possession of vacant land measure 20 feet in width and 60 feet in length towards the back side of their house.

3.3 Suit land was subject matter of earlier suit also filed by plaintiffs against defendants which was subsequently withdrawn by plaintiffs on 01.08.2014 from the Court of Learned Civil Judge, Senior Division, Court No. I, Mandi with liberty to file fresh on the same cause of action.

3.4 Specific case of plaintiffs is that during the pendency of the earlier suit, defendants raised construction of a single storey building measuring 10 feet in width and

40 feet in length identified as "A-1, A-1, A-1, A-1" in the rough plan filed with plaint. This structure is said to have been raised by defendants on part of land measuring 20 feet in width and 60 feet in length, claimed by plaintiffs to be in their possession.

3.5 The plaintiffs have accordingly sought a decree of mandatory injunction against defendants directing them to restore the vacant spossession of suit property by demolition of structure. In addition, a decree of permanent prohibitory injunction has also been claimed restraining defendants not to interfere in the remaining portion of above noted vacant land denoted by "B-1, B-1, B-1, B-1" in the rough site plan prepared by plaintiffs and also restraining the defendants from throwing kitchen and bathroom water on the suit land.

3.6. The plaintiffs on 02.12.2020 instituted CMA No.205-VI/2020 in the above noted suit with following prayer:-

> "*It is therefore, prayed that in view of the facts and circumstances stated above, this application may kindly be allowed and the respondents, their agents and servants, kith & kins, labour and relatives may*
>
> *kindly be restrained through an ad-interim injunction order not to raise forcible construction of their second storey on the land measuring about 10 ft. in width and 40 ft. in length as is shown "A-1, A-1, A-1, A-1" rough drawing plan duly admitted by the respondent No.1 in his deposition in the Court till the final disposal of the suit in the interest of justice and justice be done."*

3.7 As per plaintiffs, they were constrained to file the aforesaid application as the defendants in the month of November, 2020 started raising construction of second storey over and above the single storey structure on the suit land, which was the subject matter of the suit. According to plaintiffs, the defendants were taking benefit of non-working of Courts due to conditions created by Covid-19, Pandemic. Plaintiffs contended that they tried to resist the acts of plaintiffs but without success. Skeleton pleadings regarding existence of prima facie case, balance of convenience and irreparable loss have also been made.

4. Defendants, on the other hand are contesting the suit primarily on the ground that the suit property was coming in their exclusive possession since the time of their predecessor. The defendants had their old ancestral house

on the suit land. Besides parties to the suit various other residents of the Village were having their houses and specific possession on different portions of suit land. The possession of plaintiffs over 0-15-0 bighas in the suit land has been specifically denied. As per defendants, they had constructed their house after demolishing the old ancestral house even before filing the previous suit by the plaintiffs.

4.1 CMA No.205-VI/2020 has also been contested by defendants on the same grounds as taken in defense in written statement.

5. While deciding CMA No.205-VI/2020, learned trial court rejected the prayer of plaintiffs to restrain defendants from raising construction of second storey over already existing structure. The learned Trial Court, however, directed the parties to maintain status quo over the remaining vacant part of suit land till final disposal of the case.

6. The order dated 10.12.2020 was assailed by plaintiffs in appeal under order 43 Rule 1 (R) of the Code before learned District Judge, Mandi, which was registered as Civil Miscellaneous Appeal No.15/2020. Learned

District Judge, Mandi allowed the appeal of plaintiffs and order dated 10.12.2020 passed in CMA No.205-VI/2020 by learned Trial Court was set aside. This order of learned District Judge, Mandi is under challenge before this Court by way of instant petition.

7. I have heard learned counsel for the parties and have also gone through the copies of pleadings placed on record and also the orders passed by learned Trial Court as well as learned District Judge, Mandi.

8. Perusal of impugned order passed by learned District Judge, Mandi, reveals that the same has been passed merely on surmises. The facts of the case as well as the basic principles of law required for adjudicating upon the application under Order 39 Rules 1 and 2 of the Code have been omitted from consideration.

9. As per admitted case of plaintiffs a portion of suit land measuring 10 feet X 40 feet was utilised by defendants during the pendency of previous suit by raising single storyed structure thereon. Thus, the possession of defendants on such piece of land was not disputed even by the plaintiffs, but learned District Judge, Mandi, has

observed that there was no specific proof of the fact that defendants were having exclusive possession of portion of the suit land over which they were seeking to raise construction. According to learned District Judge, an error had thus been committed by learned trial court in allowing the defendants to raise constructions of the second storey of the house. This only evidences the slip shod manner in which the matter came to be decided by learned District Judge, Mandi.

10. The legal position, as far as the applicability of principles to be applied at the time of deciding application under Order 39 Rules 1 & 2 of the Code, is well settled. For adjudication of this petition, it shall be apt and sufficient to have reference to a recent judgment passed by a co-ordinate Bench of this Court in **Ramesh Kumar** vs**. Smt. Sheetal and others 2021 (1) Shim.L.C. 377**, wherein it has been held as under:

> *"7. It is well settled that before grant of injunction and considering prayer for discretionary relief, court must be satisfied that the party praying for relief has a prima facie case and balance of convenience is also in its*

favour. While granting injunction, if any, court is also required to ascertain whether refusal to grant injunction would cause irreparable loss to such party. Apart from aforesaid well established parameters/ ingredients, conduct of a party seeking injunction is also of utmost importance. Reliance in this regard is placed upon judgment rendered by Hon'ble Apex Court in case M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., 1995 AIR(SC) 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction. Phrases, "prima facie case", "balance of convenience" and "irreparable loss", have been beautifully interpreted/defined by Hon'ble Apex Court in case Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., 1995 2 JT 504 (S.C.) relying upon its earlier judgment in Dalpat Kumar v. Prahlad Singh, 1992 1 SCC 719 has held as under:

> *"...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the*
>
> *ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy*

available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one

that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

[8] Careful perusal of aforesaid judgment rendered by Hon'ble Apex Court clearly suggests that existence of three basic ingredients i.e. prima facie case, balance of convenience and irreparable loss or injury is mandatory for passing an order of injunction under Order XXXIX, rules 1 and 2 CPC. It is also well settled by now that aforesaid three ingredients are not only to exist but must

coexist. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in Best Sellers Retail (India) Private Ltd. vs. Aditya Birla Nuvo Ld. and others, (2012) 6 SCC 792, wherein, it has been held as under:

"29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the

plaintiff on account of refusal of temporary injunction was not irreparable.

30. In Dalpat Kumar & Anr. v. Prahlad Singh & Ors., 1992 1 SCC 719 this Court held:

> *"Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only*
>
> *that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages."*

36. To quote the words of Alderson, B. in The Attorney-General vs. Hallett,1857 16 M&W 569 : 153 ER 1316:

> *"I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause."*

[9] Hon'ble Apex Court in Dalpat Kumar and another vs. Prahlad Singh and others, (1992) 1 SCC 719, has categorically held that prima facie case is not to be confused with prima facie title, which requires to be established on evidence at the trial. Mere satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing

> *the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages. Since purpose of temporary injunction is to maintain status quo, court, while granting such relief, should be satisfied that prima facie case has been made out and balance of convenience is in favour of the plaintiff and refusal of injunction would cause irreparable loss and injury to him."*

11. By applying above noted exposition of law, impugned order cannot be sustained. Learned District Judge, Mandi has erred in allowing the appeal without appreciating the material on record on the touch stone of well settled principles of law.

12. As a consequence of the impugned order passed by learned District Judge, Mandi, order passed by learned trial court stood set aside. Meaning thereby the effect of order passed by learned trial court lost its efficacy and relevance. That being so, what was the fate of prayer made by plaintiff in their application under order 39 Rules 1 and 2? Does it mean that such prayer stood granted by necessary implication? In the facts of the case, such an inference will be too farfetched for the reasons that *firstly*

the impugned order is bereft of any reasoning and *secondly* the issue raised by the parties required a definite answer after adjudication. The parties could not be left in limbo.

13. Now, coming to the order passed by learned trial Court, it cannot be said that learned trial court had not considered the factual position of the case by assessing the same against the above noted settled principles of law. The fact remains that on the date of filing of CMA No.205-VI/2020, undisputedly the defendants had already raised construction of a single storey structure and it was this structure which was sought to be got demolished by plaintiffs by a decree of mandatory injunction. Learned Trial Court had also taken into consideration thet fact that the rights of the parties were still to be

finally adjudicated and in case the defendants succeeded in raising even the second storey that would also be subject to the final outcome of the suit and in case the suit for mandatory injunction was decreed the same would include the entire structure on the suit land raised by defendants. On such assessment the learned Trial Court evaluated comparative balance of convenience and irreparable loss qua the parties

and thereafter came to the conclusion as recorded in the order.

14. The findings recorded by learned trial Court appears to be reasonable in the facts and circumstances of the case. Learned trial Court while dealing with the prayer of the plaintiffs in CMA No.205-VI/2020 had considered all the *pros* and *cons* of the case in the given set of facts on the risk and responsibility of the defendants and in case they remain unsuccessful in the case, they cannot take any advantage of the same.

15. The order passed by learned Trial Court is in two parts. In one part, the prayer of plaintiffs in the application under order 39 Rules 1 and 2 of the Code has been impliedly rejected by allowing defendants to raise construction of second storey on the already existing first storey, and in second part, an overreaching order directing the parties to maintain status quo over the remaining vacant land, which was not even the subject matter of CMA No.205-VI/2020, has been passed.

16. The petition is accordingly allowed. Order dated 30.12.2020 passed by learned District Judge, Mandi in

Civil Miscellaneous Appeal No.15 of 2020 is set aside and the order passed by learned trial Court is affirmed only to the extent it impliedly rejected the prayer made by plaintiffs in CMA No.205-VI/2020. Remaining part of the order passed by learned Trial Court cannot be legally sustained, being beyond the scope of issue involved in CMA 205-VI/2020, hence is set aside. The

petition is accordingly disposed of with no orders as to costs. Pending Miscellaneous application(s), if any, are also disposed of.

17. It is made clear that expression of opinion, if any, rendered hereinabove shall only be construed for the disposal of this petition and shall in no manner have bearing on the merits of the suit pending trial before learned trial Court.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Krishan Chand ...Petitioner

Versus

State of HP and Anr. Respondents.

CWPOA No.3535 of 2020
Decided on: 22.04.2021

Constitution of India, 1950- Article 226 – Service matter - R & P Rules of 2010- Petitioner felt aggreived by the act of the respondents whereby he was not given the benefits of R & P Rules, 1992- Held- The patwaries are to be engaged or deployed in Muhal concerned on a contractual basis and not on regular basis as they are appointed in pursuance to the R & P Rules, 2010 and not on the basis of R & P Rules, 1992- Petition dismissed. (Para 5)

For the petitioner: Mr. Bhuvnesh Sharma, Advocate.

For the respondents: Mr. Sudhir Bhatnagar, Mr. Hemant Vaid and Mr. Ashwani Sharma, Additional Advocate Generals with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.(Oral)

Respondent No.2 vide Annexure A-1 issued on 13.9.2005, invited applications from the aspirants concerned for filling up 63 posts of Patwaris. One amongst 63 posts, as become notified in Annexure A-1, as, appertaining to General Physically Handicapped candidate (General), became applied for, by the writ petitioner.

2. In the R&P Rules, as were existing in contemporaneity to the issuance of Annexure A-1, no contemplations hence exist qua the aspirants concerned, being appointed on a contractual basis. Moreover, the afore factum is also evident from a perusal of Annexure A-1.

3. Consequently, though the learned counsel for the writ petitioner, makes a contention before this Court, that any deviation therefrom, inasmuch as from Annexure A-1, by the respondents, through, rather theirs appointing the writ petitioner, on a contractual basis, does flout, the mandate of the R & P Rules prevalent in 2005, as also breaches the afore stated enunciation, borne in Annexure A-1. Hence, he strives for granting of the writ relief.

4. However, the afore submission made before this Court, cannot be accepted by this Court, as the writ petitioner, did not immediately subsequent to his appearing, in the relevant written or viva-voce tests, as, became conducted, by the respondents, in pursuance to Annexure A-1, institute a writ petition before this Court, seeking therethrough the making of a mandamus, upon, the respondents, to if not already completed, to forthwith complete the relevant process and upon the selection list becoming prepared, to, ensure that the selection list is forthwith implemented. Be that as it may, all the

afore aspirants after completion of training(s) were appointed on a contractual basis in the year 2011, and, the thereat in vogue, rules, did postulate the afore stand. Moreover, in the R&P Rules, as become promulgated in the year, 2010, there rather occurs contemplations qua the selected candidates concerned being engaged on a contractual basis/tenure basis, for one year. The aforesaid engagement for one year, on a tenure basis of the Patwaris, in the muhal concerned, was extendable for a further period, and, on an year to year basis.

5. In pursuance to the aforesaid R&P Rules, as became formulated in the year, 2010, the writ petitioner was offered appointment, on a contractual basis hence as a Patwari in the muhal concerned. The delay (supra) estopps the writ petitioner, to claim the benefit, of the Rules of 1992. Therefore, the dismissal of the representation of the writ petitioner for his appointment, on a substantive basis, as a Muhal Patwari, is valid, as his contractual appointment, is validly anvilled, upon, the R & P Rules of 2010, rules whereof were in vogue thereat. Moreover, since they further provide that Patwaris are to be engaged or deployed in the muhal concerned on a contractual basis, and, not on a regular basis. Consequently, there is no merit in the present petition and the same is dismissed. All pending applications, stand disposed of.

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

CIVIL WRIT PETITION NO. 4239 OF 2020

Between:-

M/S ADITYA H.P. CENTRE THROUGH
ITS SOLE PROPRIETOR,
SMT. AMAN PARMAR,
W/O SHRI RAKESH PARMAR,
R/O HOUSE NO.398, SECTOR 30A,
CHANDIGARH

……PETITIONER

(BY SH. AJAY SHARMA, SR. ADVOCATE WITH MS. AANANDITA SHARMA, ADVOCATE)

AND

1. UNION OF INDIA THROUGH ITS SECRETARY, MINISTRY OF PETROLEUM AND NATURAL GASES, GOVERNMENT OF INDIA, NEW DELHI.

2. INDIAN OIL CORPORATION LIMITED, 30779/3, JOSEPH BROS TITO MARG, SECTOR 3, SADIQ NAGAR, NEW DELHI, THROUGH ITS CHAIRMAN

3. AREA OFFICER, INDIAN OIL CORPORATION LIMITED BLOCK NO.21, SDA COMPLEX, KASUMPTI, SHIMLA-9, THROUGH ITS REGIONAL MANAGER.

4. HIMACHAL PRADESH AGRO INDUSTRIES CORPORATION LIMITED, GROUND FLOOR, NIGAM VIHAR COMPLEX, SHIMLA

THROUGH ITS MANAGING DIRECTOR.

5. REGIONAL MANAGER, HIMACHAL PRADESH
AGRO INDUSTRIES CORPORATION LIMITED
DRDA COMPLEX, DHARAMSHALA, DISTRICT
KANGRA, HIMACHAL PRADESH.

……RESPONDENTS

(SH. LOKENDER PAL THAKUR, SR. PANEL COUNSEL, FOR RESPONDENT NO.1

SH. K.D. SOOD & SH. SHRAWAN DOGRA, SENIOR ADVOCATES, WITH SH. MUKUL SOOD, ADVOCATE, FOR RESPONDENTS NO.2 & 3.

(SH. NEERAJ SHARMA AND SH. SUSHANT VIR SINGH THAKUR, ADVOCATES, FOR RESPONDENTS NO.4 & 5)

CIVIL WRIT PETITION NO. 3338 OF 2020

Between:-

SH. HARDEEP SINGH
S/O SH. KULDEEP SINGH,
R/O VPO BELA, TEHSIL
NADAUN, DISTRICT HAMIRPUR
177033 HIMACHAL PRADESH

……PETITIONER

(BY SH ARVIND SHARMA, ADVOCATE)

AND

1. UNION OF INDIA THROUGH SECRETARY,
PETROLEUM AND NATURAL GAS,
SHASTRI BHAWAN, A- WING, SHASTRI
RAJINDER PRASAD ROAD, NEW DELHI.

2. INDIAN OIL CORPORATION LIMITED,
30779/3, JOSIP BROz TITO MARG,

SECTOR 3, SADIQ NAGAR, NEW DELHI,
THROUGH ITS CHAIRMAN

3. INDIAN OIL CORPORATION
LIMITED, SHIMLA AREA OFFICE,
IOCL, BLOCK NO.21,
SDA COMPLEX, KASUMPTI, SHIMLA,
HIMACHAL PRADESH THROUGH ITS
REGIONAL MANGER.

4. HIMACHAL PRADESH AGRO
INDUSTRIES CORPORATION
LIMITED, GROUND FLOOR,
NIGAM VIHAR COMPLEX, SHIMLA
THROUGH ITS MANAGING DIRECTOR.

5. HIMACHAL PRADESH AGRO INDUSTRIES
CORPORATION LTD, COLLEGE ROAD,
DRDA COMPLEX, FIRST FLOOR,
DHARAMSHALA, HIMACHAL PRADESH,
THROUGH ITS REGIONAL MANAGER.

.....RESPONDENTS

(SH. LOKINDER PAL THAKUR, SR. PANEL COUNSEL FOR RESPONDENT NO.1

SH. K.D. SOOD & SH. SHRAWAN DOGRA, SENIOR ADVOCATES WITH SH. MUKUL SOOD, ADVOCATE, FOR RESPONDENTS NO.2 AND 3).

SH. SUSHANT VIR SINGH THAKUR, ADVOCATE, FOR RESPONDENTS NO.4 AND 5.)

<u>CIVIL WRIT PETITION NO. 2703 OF 2020</u>

SH. JITENDER KUMAR S/O SH. MOHAN SINGH,
VILLAGE THAMANI, P.O. SAUR, TEHSIL BARSAR,

DISTRICT HAMIRPUR, HIMACHAL PRADESH, PRESENTLY PROPRIETOR M/S JITENDERA H.P. CENTRE LALUWAL,
P.O. DULEHAR, DISTRICT UNA, H.P. DEALER
HINDUSTAN PETROLEUM CORPORATION LTD.

...PETITIONER

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

AND

1. UNION OF INDIA THROUGH ITS SECRETARY,
MINISTRY OF PETROLEUM, GOVT. OF INDIA,
NEW DELHI.

2. INDIAN OIL CORPORATION LIMITED,
INDIAN OIL BHAVAN, G-9,
ALI YAVAR JUNG MARG,
BANDRA (EAST), MUMBAI,
THROUGH ITS CHAIRMAN.

3. SENIOR DIVISION MANAGER,
INDIAN OIL CORPORATION LTD.,
INDANE AREA OFFICE, SHIMLA,
BLOCK NO. 21,
SDA COMPLEX, KASUMPTI, SHIMLA-171009.

4. SH. SATWANT SINGH, S/O SH. FAUZA SINGH,
R/O VILLAGE LALLUWAL, P.O. BIDERWAL,
TEHSIL HAROLI, DISTT. UNA,
PIN CODE NO. 176601. ...RESPONDENTS

(SH. LOKINDER PAL THAKUR, SR. PANEL COUNSEL FOR RESPONDENT NO.1

SH. K.D. SOOD & SH. SHRAWAN DOGRA, SENIOR ADVOCATES WITH SH. MUKUL SOOD, ADVOCATE, FOR RESPONDENTS NO.2 AND 3).

SH. VISHAL PANWAR, ADVOCATE, FOR RESPONDENT NO. 4)

CIVIL WRIT PETITION No. 4239 OF 2020
CIVIL WRIT PETITION No.3338 OF 2020
CIVIL WRIT PETITION No.2703 OF 2020
RESERVED ON : 09.08.2021
DECIDED ON: 17.08.2021

Constitution of India, 1950- Article 226- Petitioner are aggrieved by the allotment of outlets by I0C in favour of Agro Industries and Sh. Satwant Singh alleging that the allotments are in violation of guidelines framed by Indian Roads Congress (IRC) and Ministry of Road Transport & Highways (MoRTH)- Held- The guidelines issued by IRC & MoRTH are not in conflict with each other and they operate in the same realm- Public works Department of Government of Himachal Pradesh has been following IRC & also the MoRTH guidelines- By non-compliance of the guidelines of IRC & MoRTH the rights of the petitioner who are existing fuel dealer are going to be affected- The respondents directed to make allotment in same villages/ places/ location after strict adherence to prescribed rules- Petition allowed. (Paras 15, 21 & 33)

Cases referred:

Indian Oil Corporation Limited and others vs. Aarti Devi Dangi and another (2016) 15 SCC 480;

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

O R D E R

All these writ petitions have been filed with prayer to quash allotments, of following retail sale outlets for petroleum products (for short "outlet"), made by respondents No. 2 and 3 (for short "IOC"):

(i) in favour of respondents No.4 and 5 (for short "Agro Industries") at Village Bohan, Tehsil Jawalamukhi, District, Kangra Himachal Pradesh in CWP No. 3338 of 2020 and CWP No. 4239 of 2020.

(ii) In favour of Shri. Satwant Singh (Respondent No. 4) in CWP 2703 of 2020 in Mohal Thara, Sub Tehsil Dulehar, District Una,

Himachal Pradesh

2. Petitioners in CWP No.4239 of 2020 and CWP. 2703 of 2020 themselves are retail outlet dealers of Hindustan Petroleum Corporation Limited (HPCL), whereas petitioner in CWP No.3338 of 2020 has filed the petition as *pro bono publico*.

3. Since common questions of facts and law are involved in all the petitions, therefore, these were heard together and are being disposed of by a common judgment.

4. The common case of the petitioners in all the petitions is that the allotment of outlets by IOC in favour of Agro Industries and Shri Satwant Singh are in violation of the guidelines framed by Indian Roads Congress (IRC) and Ministry of Road Transport and Highways (MoRTH).

5. It is not in dispute that the outlet, in CWP No. 3338 of 2020 and CWP No. 4239 of 2020, is being established on a plot of land adjacent to road leading from Jawalamukhi to Dehra in District Kangra and outlet in CWP No.2703 of 2020 is being established adjacent to Ajoli Mod to Pohlian via Tahliwal road in District Una. Both these roads are Major District Roads (MDRs) declared by Government of Himachal Pradesh.

6. Petitioners contend that IRC has framed guidelines for access, location and layout of road side fuel stations and service stations (third revision) 2009. Similarly, MoRTH has also formulated and issued guidelines for grant of permissions for construction of access to fuel stations, way side amenities, private properties, rest area complexes, connecting roads and such other facilitates/establishments. The latest of such guidelines have been circulated on 26th June, 2020 and prior thereto were the guidelines framed in 2013, which were almost the same in material particulars. Petitioners have maintained that IOC while making allotment in question has not adhered to the requirements of these guidelines and in absence thereof the allotment is vitiated.

7. In CWP No.3338 of 2020, petitioner has taken exception to allotment of outlet in favour of Agro Industries on the grounds:

(i) As per above guidelines issued by IRC and MoRTH the distance between 1000 meters to 300 meters is required to be maintained from the intersection of NHs/SHs/ MDRs, whereas in the present case it is about 70 meters approximately.

(ii) The requisite distances from the intersections of National Highway and also from a Village Road have not been considered and applied.

(iii) The allotment has been made without issuing advertisement of proposed allotment,

(iv) In addition, the petitioners in CWP No.4239 of 2020 and CWP No. 2703 of 2020 have raised the contention that the requisite distance between the two retail sale outlets i.e., one of the petitioners and the others allotted by IOC to Agro Industries and Shri Satwant Singh has not been maintained.

8. In replies submitted by IOC in all the petitions, the allegations with respect to non-maintenance of requisite distances from intersections, National Highways, other approach roads and also between two retail sale outlets have not been specifically denied. Thus, the averments with respect to violation of IRC and MoRTH guidelines remain unrebutted in pleadings.

9. IOC, however, has taken a specific stand that IRC guidelines are non-statutory hence, these are neither applicable nor enforceable and the MoRTH guidelines are applicable only to the National Highways. In this manner respondents have denied relevance of said guidelines in the facts of the case and have sought the dismissal of the petitions.

10. Respondents have also confronted the locus and bona fides of petitioners to challenge the allotments.

11. We have heard learned counsel for the parties and have also gone through the records.

12. In light of respective stands of parties, the question that arises for determination is, whether the guidelines issued by IRC and/or MoRTH are applicable to the cases in hand and if the answer is in affirmative, then are the allotments vitiated for non-adherence to the guidelines?

13. Coming to the first question, it goes without saying that infrastructural development is an important aspect in the development of any Nation. Construction of new roads/highways and upgradation of old ones in our country is the need of the hour to cope up with ever growing human population and resultant traffic needs. Constantly developing road/ traffic control technologies require the roads/highways to be as less congested as can be. The laudable purpose is public safety.

14. The Ministry of Road Transport and Highways (MoRTH) is a ministry of the Government of India, that is the apex body for formulation and administration of the rules, regulations and laws relating to road transport, transport research and in also to increase the mobility and efficiency of the road transport system in India. The Indian Roads Congress (IRC) is the Apex Body of Highway Engineers in the Country. It influences the pace, structure and pattern of development. Hence, development of this sector is of paramount importance for India and accounts for a significant part in the budget.

15. Perusal of guidelines issued by IRC as well as MoRTH reveal that both have been issued with the above noted purpose and object. Noticeably, no substantial conflict exists between both the guidelines as far as prescribed parameters are concerned. Their conceptual origin may differ, but these operate in the same realm. The IRC guidelines are applicable to National

Highways, State Highways and MDRs. The MoRTH guidelines, though, have been framed for National Highways, but various states have adopted these guidelines as guiding factor. These guidelines, however, are not area specific and are applicable throughout India.

16. At the hearing of the matter also entire thrust of arguments on behalf of IOC was on non-applicability of the IRC and MoRTH guidelines to the cases in hand. It was urged with much vehemence that IRC guidelines has no statutory recognition and MoRTH guidelines were applicable only to National Highways. In support of its contention, IOC has placed reliance upon a judgment passed by a Division Bench of the High Court of Judicature for Orissa at Cuttack in DB writ petition (Civil) (PIL) No.12434 and 1869 of 2020 and also on a judgment passed by Hon'ble Madras High Court in writ petition Nos. 19218, 2661, 3678 and 705 of 2019. In addition, reliance has been placed on a judgment passed by learned Single Judge of this Court in CWP No. 5719 of 2010.

17. With due deference to all these judgments relied upon by IOC, we do not concur with respondents on their applicability to the facts of the cases in hand. All the above referred judgments have been passed keeping in view their own facts and circumstances. Hon'ble Orissa High Court while dealing with the facts of the case before it has held as under: -

> ***"In view of such position, the No Objection Certificate (NOC) granted by the Collector and District Magistrate, Jagatsinghpur, is well within its domain and, as such, the same was issued after making proper inquiry and by following due procedure established by law. Accordingly, issue No. (i) is answered in affirmative and against the petitioners.***

Hon'ble Madras High Court in para 47 of the Judgment has held as under: -

> ***"it is no doubt true that sufficient though process has gone into before framing 2009 guidelines. However, we***

are not express to State that the guidelines are far superior then the statutory provisions or the statutory provisions are far superior then the guidelines. Admittedly, 10 years have passed by, after guidelines were published. There have been various developments in the country in so far as road infrastructure is concerned. Several methodologies have been adopted by both State Highways and National Highways Authority of India. Therefore, we are of the clear view that no direction can be issued to the respondents by compelling them to follow the guidelines of the Indian Road Congress (IRC) published in the year 2009."

18. The perusal of judgment passed by learned Single Judge of this Court in CWP No. 5719 of 2010 reveals that, the observation made by learned Single Judge was mere *obiter* as was not preceded by any discussion on the point. Moreover, applicability of MoRTH guidelines was not considered in that case.

19. The petitioners on the other hand have placed reliance on judgment passed by the Hon'ble Supreme Court in ***Indian Oil Corporation Limited and others*** vs. ***Aarti Devi Dangi and another*** (2016) 15 SCC 480. In our considered view the issue germane in the present petitions finds answer in the above noted judgment. It has been held by their Lordships as under: -

7. "If the clauses in the advertisement required a tenderer to fulfil all requirements under the rules and sub-rules of PWD and if what was suggested/recommended by IRC has been adopted by the State PWD and the said norms are in the interest of public safety and would facilitate smooth movement of traffic, it will be difficult to hold that the rules and sub-rules of PWD contemplated in the advertisement do not embrace the IRC Guidelines either because there was no specific mention thereof in the tender

documents or the same do not have a statutory flavour. We, therefore, hold that the fulfillment of the requirements spelt out by the IRC Guidelines relevant to the present cases to be a mandatory requirement of the tender conditions. Coupled with the above what we find is that the action of the appellant Corporation cannot be said to be either arbitrary or unreasonable inasmuch as a uniform standard has been applied to all the applicants and in the present two appeals in question no candidate has been found to be eligible upon application of the said uniform standard i.e. the IRC norms. The action of the appellant Corporation, therefore, not being in any manner arbitrary or unreasonable the power of judicial review vested in the High Court ought to have been exercised with due circumspection.

8. A perusal of the orders of the High Court indicates that the only basis on which the decision of the appellant Corporation has been faulted with is that the IRC Guidelines are not mandatory. We fail to see how such a view can be sustained keeping in mind the provisions of the advertisement quoted above; the purport and object of the said norms; the uniform application of the same to all the tenderers by the appellant Corporation and above all the requirements of public interest.

9. In view of the above conclusion reached, it is not necessary for us to consider the arguments advanced on the question of permissibility of deviations from tender conditions, on the touchstone of public interest or the issue of understanding the requirement of the IRC Guidelines as implied terms of the tender document".

20. The aforesaid decision by Hon'ble Supreme Court was in the context of adoption of IRC guidelines by State of Madhya Pradesh. The respondents in the present case have not placed on record any material to

suggest that the State of Himachal Pradesh has excluded the applicability of Indian Roads Congress (IRC) guidelines. As noted above, we have already observed that the Indian Roads Congress (IRC) guidelines by themselves do not restrict the area of operation.

21. There is sufficient material on record to suggest that the Public Works Department in the State of Himachal Pradesh has even adopted the MoRTH guidelines for the purpose in question. The petitioners have placed on record a document issued by Assistant Engineer, Nurpur Sub Division, HPPWD, which reads as under:-

> *"Date-24/09/2020*
> *Mr. Lakshay Mahajan*
> *Nurpur, Himachal*
>
> *TO WHOMSOEVER IT MAY CONCERN*
>
> *The guidelines/norms for Major District road (MDR) for access permission to Fuel Station in the State of Himachal Pradesh are followed same as the 'guidelines/norms for access permission to Fuel Station along National Highway' as issued by Ministry of 'Road Transport and Highways, Government of India.*
>
> *Sd/-*
> *Assistant Engineer*
> *Nurpur Sub Division*
> *H.P.PWD Nurpur".*

22. In addition, Learned Senior Advocate representing IOC, at the time of addressing arguments, has also placed on record a letter received by IOC from Executive Engineer, Dehra HPPWD Dehra which reads as under: -

> *"HIMACHAL PRADESH*
> *PUBLIC WORKS DEPARTMENT*
> *NO.:PWD/CB/WA/NOC/2021-22:-3581 DATED:- 05/08/2021*
> *To*

The Divisional Retail Sales Head
L.O.C. Shimla, Divisional Office,
Shimla (H.P.)

Subject:- No objection certificate.
Reference:- Your office letter No. Shimla DO/RO-NOC/HPAICL-BOHAN Dated 04/08/2021.

With reference to letter referred above on the subject cited above it is submitted that No Objection Certificate has already been issued to Addl. District Magistrate, Kangra at Dharamshala, vide this office letter No.20715-16 dated 02/01/2020 as per rules. ***The MoRTH Guidelines followed for layout purpose of Retail outlet/Fuel Station.***

DA/Nil

Executive Engineer
Dehra Division HP.PWD.
Dehra."

23. From above noted material, it becomes clear that the Public Works Department of the Government of Himachal Pradesh has been following IRC and also the MoRTH guidelines. Thus, we have no hesitation to answer the first question in affirmative as in our considered view IRC and MoRTH guidelines are applicable to the case in hand.

24. We have another reason to hold so. The absence of the applicability of any of such guidelines shall lead to chaotic condition. The State Highways and MDRs or for that matter any other road(s) are the lifelines of State and by allowing the establishment of fuel stations or any other structure at the whims and fancies of individuals will result catastrophically. Most of the National Highways available in the State of Himachal Pradesh today, were either State Highways or MDRs during yesteryears.

25. Respondents IOC being instrumentality of the State is under legal obligation to act with reasonableness to avoid arbitrary rule which cannot be countenanced in any developed legal system.

26. To support the stand of IOC, Shri Shrawan Dogra Learned Senior Advocate has also made endeavor to persuade us by making reference to judgments passed in **AIR 1951 SC 69, 1972 (3) SCC 684, 1973 (1) SCC 726, 1977(1)SCC 750, 2010(1) SCC 756.** These judgments deal with principles of interpretation of statutes, which in our considered opinion, will not help the cause of respondents in present cases.

27. As far as the second ancillary question is concerned, we must observe that the violations of IRC and MoRTH guidelines, as alleged by the petitioners, have neither been specifically denied nor refuted or controverted by placing on record relevant documents.

28. Interestingly, however, a copy of letter dated 2.1.2020 issued by the Executive Engineer, HPPWD, Dehra Division to the Additional District Magistrate at Dharamshala purporting to be the No Objection Certificate, has been placed on record on behalf of IOC. The contents of this letter reveal that the purported NOC was issued in compliance only of H.P. Road Side Control Act and H.P. Road Infrastructure Protection Act. There was no reference in the said letter with respect to adherence, if any, either to IRC or MoRTH guidelines. A reading of the contents of letter dated 2.1.2020 issued by Executive Engineer; Dehra HPPWD Dehra will be relevant here. The letter read as under: -

HIMACHAL PRADESH
PUBLIC WORKS DEPARTMENT

NO.:PWD/CB/WA/NOC/2019-20:- 20715-16 Dated:- 2/1/2020

To

The Addl. District Magistrate,
Kangra at Dharamshala

Subject:- *No objection certificate.*

Reference *Your office letter No.609-14 dated 10/12/2019.*

As per the report of Assistant Engineer Sub Division HPPWD Jawalamukhi it is submitted that the proposed land for construction of retail outlet falls in Khasra No.723/2/3 at location village Bohan Tehsil Dehra Distt. Kangra on Jawalamukhi Dehra Jawali Raja Ka Talab road (MDR-80) and at RD 0/706. This department has not objection if the construction work is done at a distance of 5 mtrs. away from the acquired width of PWD road/in accordance with the provisions of road side control Act and H.P. road infrastructure Protection Act.
DA/Nil.

Executive Engineer
Dehra Division HP.PWD.
Dehra

Copy to the Assistant Engineer, Sub –Division HPPWD Jawalamukhi w.r.t. his office letter No.4903 dated 18/12/2019 for information.

Executive Engineer,
Dehra Division HP. PWD
Dehra

29. Thus, It can be inferred from the conduct of respondents as well as material on record especially letter dated 2.1.2020 written by the Executive Engineer, HPPWD, Dehra, District Kangra to Additional District Magistrate, Kangra, that while allotting the outlets in question, aforesaid guidelines were not followed.

30. Learned Senior Advocate representing IOC, at the hearing of the case, has submitted with vehemence that IOC was bound only by the brochure brought out for selection of dealers which was the only *magna carta*

for them. A copy of such brochure has also been placed on record at the time of hearing. Perusal of the contents of this document we have not found anything pertinent to the issues raised in present petition. The brochure relied upon by IOC is the internal document of the Nationalized Oil Companies i.e., Indian Oil, Bharat Petroleum and Hindustan Petroleum which deals only with the process for selection of dealers of these companies. It nowhere deals with any requirement to follow the laws/rules, if any, with respect to the maintenance of safe traffic and other allied issues including the rules applicable for development of infrastructure. To the contrary, we found the requirement of filing affidavits by non-individual applicant at the appendix X-B of this document and in this affidavit one of the requirements to be mentioned is in following terms: -

> "*4. That on behalf of the Registered Society*/Company*/Charitable Trust* undertake that we will observe all the relevant guidelines with regard to award/operation of the said dealership issued by Indian Oil Corporation*/Bharat Petroleum Corporation*/Hindustan Petroleum Corporation* /Government of India or any other statutory body from time to time."*

In light of above discussion, the second question is also answered in affirmative.

31. The petitioners have also alleged that the allotment is bad as the same has been made without publishing it for the notice of the General Public. The contention of petitioners in this behalf deserves to be rejected. The IOC has specifically maintained that vide its policy circulars issued from time to time the criteria for allotment of retail outlet dealership to Government Body/Organization is permissible without resorting to advertisement route.

The stand of the respondents in this behalf is substantiated by the documents placed by them on record.

32. As regards the contention of respondents that the petitions are not bona fide and the petitioners have no locus to file the petitions. In our view, if in exercise of jurisdiction under Article 226 of the Constitution of India, material abrasion of rules and serious dereliction in discharge of its public duties by public authority are discovered, the objections as to locus etc. pales into insignificance. Even otherwise, nothing has been brought on record to show that petitioner in CWP No.4239 of 2020 had any vested interest in filing and prosecuting the petition. Similarly, the cause of petitioners in CWP No.3338 of 2020 and CWP No.2703 of 2020 cannot be said to be without any substance as these are existing fuel dealer in the vicinity and its rights are definitely going to be affected by non-adherence to rules by respondents.

33. All the petitions are therefore allowed. The allotments of retail sale outlets of petroleum products by IOC in favour of H.P .Agro Industries at Village Bohan, Tehsil Jwalamukhi, District Kangra, Himachal Pradesh and in favour of Shri Satwant Singh at Mohal Thara, Sub Tehsil Dulehar, District Una, Himachal Pradesh are quashed. Respondent IOC is directed to make allotment, if any, in the same villages/places/location or at any other place after strict adherence to the prescribed rules viz., the rules/ guidelines framed by Indian Roads Congress (IRC) and/or Ministry of Road Transport and Highways (MoRTH) and all other statutory/legal applicable requirements. The petitions are accordingly disposed of so also the miscellaneous applications, if any, with no orders as to costs.

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

Chhabile Ram ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1913 of 2020
Decided on February 24, 2021

Criminal Procedure Code, 1973 – Section 439 – Narcotic Drugs & Psychotropic Substances Act, 1985 – Sections 20 & 29 – Bail - Recovery of charas - The accused namely Diwan Chand got perplexed after seeing the police and after throwing the bag in the grass - He tried to flee – The accused was apprehended and during his interrogation he told that he purchased the contraband from Chuni Lal – Chuni Lal was also arrested and he disclosed the police that he arranged the contraband from the petitioner – Held – the contraband has not been received from the conscious possession of the petitioner and the main accused has no where mentioned the name of bail petitioner – bail petitioner has been implicated in the case on the basis of statement of co-accused, that too without there being any concrete evidence - Bail granted. (Paras 6 & 8)

Cases referred:

Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218;

Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496;

Sanjay Chandra versus Central Bureau of Investigation (2012)1 SCC 49;

For the petitioner	Mr. Yashveer Singh Rathore, Advocate.
For the respondent	Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General. ASI Hem Chand, Police Station Patlikuhal, District Kullu, Himachal Pradesh

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, namely Chhabile Ram, who is behind the bars since 9.7.2020, has approached this Court in the instant proceedings filed under S.439 CrPC, for grant of regular bail in FIR No. 105, dated 25.6.2020

under Ss. 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act registered at Police Station Patlikuhal, District Kullu, Himachal Pradesh.

2. Respondent-State, besides filing status report, has also produced complete record, perusal whereof reveals that on 25.6.2020, at 6.30 am, patrolling party present at Dobhi Fojal saw person namely Diwan Chand coming from Village Bihal. Since above named person having seen the police got perplexed and made an attempt to flee from the spot after throwing carry bag in the nearby grass, police stopped him for interrogation. Since conduct of the above named person was suspicious and he was unable to answer the queries of the Police, Police deemed it necessary to conduct his search. Though, at the first instance, police made an attempt to associate independent witnesses, but since none was available, police officials conducted search of carry bag allegedly thrown by the accused Diwan Chand in nearby grass and allegedly recovered 1.484 kg charas. After completion of necessary codal formalities, police registered a case under S.20 of the Act ibid against aforesaid accused, Diwan Chand, who, during investigation revealed to the police that he purchased aforesaid commercial quantity of contraband from the person namely Chuni Lal for a total consideration of Rs.1,85,000/-. On the basis of aforesaid revelation made by Diwan Chand, Police apprehended accused Chuni Lal, who further disclosed to the Police that on the askance of Diwan Chand, he had arranged the aforesaid contraband from present bail petitioner, Chhabile Ram. Chuni Lal in his statement given to the Police disclosed that on 24.6.2020, accused Diwan Chand had approached him with the request to arrange for charas. Chuni Lal disclosed to the police that since he knew Chhabile Ram for the last two years, he assured Diwan Chand that within a day or two, he will arrange charas for him. Chuni Lal disclosed to the Police that Diwan Chand gave Rs.1,85,000/- for purchase of charas. As per disclosure made by Chuni Lal to the Police, in the evening of 24.6.2020, bail Diwan Chand had delivered 1.484 kg charas near the house of Chuni Lal for a

sum of Rs.1,75,000/-, whereas, he gave Rs.5,000/-as commission to Chuni Lal. As per compliance report filed in the case at hand, Chuni Lal, after having received charas from Chhabile Ram, hid the same near his house and thereafter gave it to Diwan Chad. In the aforesaid background, case under S. 29 of the Act came to be registered against the bail petitioner and since 9.7.2020, he is behind the bars. Challan stands filed in the competent Court of law but still the charges have not been framed.

3. Prior to filing the present petition, bail petitioner had approached this Court by way of CrMP(M) No. 1029 of 2020, for grant of anticipatory bail, which was dismissed as withdrawn. Now, since Challan stands filed in the competent Court of law and investigation is complete, present petition has been filed under the changed circumstances, praying therein for grant of regular bail.

4. Mr. Kunal Thakur, learned Deputy Advocate General, while fairly admitting the 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 the offence alleged to have been committed by him, prayer made on his behalf for grant of bail deserves outright rejection. While making this court peruse the status report as well as evidence collected on record by the investigating agency, Mr. Thakur vehemently argued that there is overwhelming evidence available on record suggestive of the fact that present petitioner was the main supplier and for a sum of Rs.1,80,000/- sold commercial quantity of charas to the person namely Chuni Lal, who further sold the same to Diwan Chand, from whose conscious possession, commercial quantity of contraband came to be recovered on the date of alleged incident. Mr. Thakur contends that on account of overwhelming evidence available on record suggestive of the involvement of the bail petitioner, bail petition having been filed by him deserves outright rejection.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds that commercial quantity of contraband was recovered from the carry bag allegedly thrown by accused Diwan Chad and not from the conscious possession of the bail petitioner. As per own story of the prosecution, Diwan Chand, after having seen the police threw carry bag containing commercial quantity of contraband in the nearby grass, but at this juncture, this Court cannot lose site of the fact that recovery of aforesaid commercial quantity of contraband from carry bag allegedly thrown by Diwan Chand, was not effected in the presence of any independent witness. The main accused, Diwan Chand, who allegedly threw carry bag in the nearby grass, has nowhere stated that the bail petitioner Chhabile Ram sold him the commercial quantity of charas, rather, he disclosed to the police that he approached Chuni Lal for purchase of charas and gave him Rs.1,80,000/-. Chuni Lal though in his statement given to the police admitted that he received Rs.1,80,000/- from Diwan Chand, but, at the first instance, he never told Diwan Chand that he would purchase charas from present bail petitioner, Chhabile Ram. Chuni Lal in his initial statement given to the Police reveals that he knew present bail petitioner for two years and he approached him for the purchase of charas. As per initial statement of Chuni Lal, present bail petitioner gave Rs.5,000/- to Chuni Lal, as commission and subsequently delivered around 1.5 kg charas at Dobhi to Chuni Lal, however, in the subsequent statement given to the police, Chuni Lal, claimed that he after having received charas from the present bail petitioner, hid the same in bushes near his house, but there is nothing in his statement that at what time, he received contraband from bail petitioner and delivered the same to Diwan Chand. As per Chuni Lal, 1.5 kg charas was received by him in the evening of 24.6.2020 and thereafter, he hid the same in bushes near his house but, as per prosecution story, Diwan Chand came to be apprehended with commercial quantity of charas at 6.30 am on 25.6.2020. There is nothing

on record to show that Chuni Lal, after having received charas from bail petitioner, delivered the same to Diwan Chand in the intervening night of 24/25.6.2020, as such, it is difficult to conclude at this stage that charas allegedly recovered from carry bag allegedly thrown by Diwan Chand, was the charas given to him by Chuni Lal, which he had purchased from bail petitioner, Chhabile Ram. There is nothing in the statement of Chuni Lal, that on 24.6.2020, or in the intervening night of 24/25.6.2020, Diwan Chand came to his house to collect charas purchased by him from present bail petitioner, Chhabile Ram. As per prosecution story, sum of Rs.1,75,000/- was retained by Chhabile Ram, which he had spent in repaying loan allegedly taken by him from his near and dear ones but the Bank statement adduced on record reveals that on 25.6.2020, Chhabile Ram had only deposited Rs. 10,000/- in his bank account and at the same time no effort, if any, has been made by investigating agency to ascertain the names of the persons to whom Chhabile Ram allegedly repaid the loan.

6. Leaving everything aside, this Court finds from the record that commercial quantity of charas never came to be recovered from the conscious possession of the present bail petitioner, rather same was recovered from co-accused Diwan Chand, who otherwise at no point of time named present bail petitioner rather, alleged that person namely Chuni Lal had arranged charas for him. Though, investigating agency by setting up a case that Chuni Lal had purchased charas from bail petitioner, has made an attempt to connect the present bail petitioner with the alleged offence but, for the reasons discussed herein above, this Court, at this juncture finds no concrete evidence to conclude complicity of the present bail petitioner in the case at hand.

7. Though, Mr. Kunal Thakur, Learned Deputy Advocate General vehemently argued that there is complete bar under S.37 of the Act to grant bail in cases, where commercial quantity of contraband is involved but, bare perusal of provisions of S.37 of the Act nowhere suggests that there is

complete bar to grant bail in cases, where commercial quantity is involved, rather, in such like cases, court after having afforded opportunity to the Public Prosecutor can grant bail in cases involving commercial quantity of contraband, if it has reasons to believe that the person seeking bail is not guilty of such offence and is not likely to commit offence while on bail.

8. In the case at hand, since bail petitioner has been implicated in the case on the basis of statement of co-accused, that too without there being any concrete evidence, this Court finds sufficient reasons to consider prayer for grant of bail.

9. Hon'ble Apex Court and this Court in a catena of cases have repeatedly held that one is deemed to be innocent, till the time, he/she is proved guilty in accordance with law. In the case at hand, complicity, if any, of the bail petitioner is yet to be established on record by the investigating agency, as such, this Court sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial, especially when nothing remains to be recovered from him. Apprehension expressed by learned Deputy Advocate General, that in the event of being enlarged on bail, bail petitioner may flee from justice or indulge in such offences again, can be best met by putting the bail petitioner to stringent conditions.

10. Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty.

11. Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49 has held that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been

repeatedly held by the Hon'ble Apex Court that 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.

12. In **Manoranjana Sinh alias Gupta** versus **CBI**, (2017) 5 SCC 218, Hon'ble Apex Court has held that the 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 also, normal rule is of bail and not jail. Apart from above, 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 Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down various principles to be kept in mind, while deciding petition for bail viz. prima facie case, nature and gravity of accusation, punishment involved, apprehension of repetition of offence and witnesses being influenced.

14. In view of above, bail petitioner has carved out a case for himself. Consequently, present petition is allowed. Petitioner is ordered to be enlarged on bail, subject to furnishing fresh bail bonds in the sum of Rs.5,00,000/- with one local surety in the like amount, to the satisfaction of the learned trial Court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

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

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 petition alone.

The petition stands accordingly disposed of.

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

Neelam Kumari and others .....Appellants

Versus

The National Insurance Company .....Respondent

F.A.O. No.42 of 2013
Judgment reserved on:22.07.2021
Decided on: 06.08.2021

Motor Vehicle Act, 1988, Section 166 & 149(2) read with Section 102 of Indian Evidence Act, 1872 – Onus of proof regarding breach of policy – Claim repudiated on the ground that driving licence is fake – Held – Onus to prove the breach of the conditions of policy is on insurer. [Para 17-19]

Motor Vehicle Act, 1988, Section 166 – Maintainability of claim petition by LR's of deceased who himself was owner –cum- driver of the vehicle for indemnification from Insurance Company – Held – the LR of the deceased who

himself was owner of the vehicle was not competent to file the claim of indemnification against Insurance Company – Petition not maintainable [Para 22]

Motor Vehicle Act, 1988, Section 166/147(1) **–** Claim petition – Special contract of personal accident coverage – Insurance company failed to prove breach of condition, hence claimants held legally entitled for compensation for Rs. 2,00000 on personal accidental cover . [Paras 28 & 31]

Cases referred:

Anita Abrol and others vs. Rishi Co-operative Societies Limited and others Latest HLJ 2009 (HP) 1342;
Dhan Raj vs. New India Assurance Company Ltd. 2004 (8) SCC 553;
Dhanraj vs. New India Assurance Company Ltd. and another AIR 2004 SC 4767;
ICICI Lombard General Insurance Company Ltd. Vs. Parul Sharma and others 2018 ACJ 635;
Narchinva V. Kamat and Anr. v. Alfredo Antonio Doe Martins and Ors., 1985 AIR(SC) 1281;
National Insurance Company Ltd. Vs. Ashalata Bhowmik and others (2018) 9 SCC 801;
New India Assurance Company Ltd. Vs. Asha Rani, 2003, ACJ (1) (para 27);
Oriental Insurance Company Ltd. Vs. Premlata Shukla, 2007 (13) SCC 476 (Paras 12-15);
Oriental Insurance Company Ltd. Vs. Smt. Kamlo and others 2005, SLC 134 (HP);
Ramkhiladi and another vs. United India Insurance Co. Ltd. and another 2020 ACJ, 627;
Ramkhiladi and another vs. United India Insurance Company Ltd. 2020 (1) ACJ 627;
Surender Singh vs. Smt. Jai Manti Devi and others 2008 (2) Shim.L.C. 533;

For the appellants: Mr. Vijay Chaudhary, Advocate.
For the respondent: Mr. Jagdish Thakur, Advocate.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

This appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the award dated 19.12.2012 passed by learned Motor Accident Claims Tribunal, Fast TrackCourt, Chamba, H.P. (for short 'Tribunal') in M.A.C. No. 72/12/11 whereby the claim petition filed by the appellants/claimants, was dismissed.

2. Brief facts of the case are that the appellants filed claim petition No.72/12/11 seeking compensation to the tune of Rs.8,00,000/- under Section 166 of the Motor Vehicles Act, 1988 (for short 'Act') on account of death of Sh. Sunil Kumar S/o Sh. Dharam Pal in the capacity of his legal representatives.

3. It was stated in the claim petition that the deceased was the owner of the vehicle involved in the accident and he himself was driving the vehicle. The vehicle was insured with the respondent.

4. Respondent contested the petition on the grounds that the petition was not maintainable. Insured had intentionally made breaches of the terms and conditions of the policy. The petition under Section 166 of the Act was not maintainable in view of the provisions of Section 147 of the Act. The driver-cum-owner i.e. the deceased Sunil Kumar was not possessing valid and effective driving license to drive the vehicle at the time of the accident and in case some license was produced, the same was bogus and fake having not been issued by the competent authority. The vehicle at the time of the accident was being plied in violation of the Act and Rules framed thereunder besides other grounds. It was, however, averred in alternative without admitting the liability that the petitioners were entitled for a limited amount of Rs.2,00,000/- only as per the terms, limits and conditions of the insurance policy and that also before the special forum.

5. In rejoinder, the petitioners controverted the objections raised by the respondent in generality.

6. The learned Motor Accident Claims Tribunal below framed the following issues:

1. *Whether deceased Sunil Kumar had died on 10.11.2020 on account of use of vehicle No.HP-01C-0116 (Taxi Alto) at about 9.15 P.M. near Lakar Mandi, Dalhousie? OPP*
2. *If issue No.1 is proved in affirmative, whether the petitioners are entitled for the grant of compensation, if so, to what amount? OPP*
3. *Whether the petition is not maintainable as alleged?OPR*
4. *Whether the offending vehicle was being driven in violation of the provisions of Motor Vehicle Act and terms and conditions of Insurance Policy as alleged? OPR*
5. *Whether the liability of the Insurance Company was restricted to Rs. Two Lacs in terms of Insurance Policy, as alleged? OPR*
6. *Whether the driver was not holding valid and effective driving licence to drive the offending vehicle as alleged? OPR*
7. *Whether four persons were traveling in vehicle as an unauthorized occupants or gratuitous passengers as alleged? OPR*
8. *Relief.*

7. Issues Nos. 1, 2, 5 and 7 were answered in negative, whereas the issues Nos. 3, 4 and 6 were answered in affirmative. The claim petition was accordingly, dismissed.

8. The appellants/claimantsexamined five witnesses. Appellant No.1 appeared as PW-1 and reiterated the contents of the petition in her examination-in-chief by way of affidavit Ext.PW-1/A. In her cross-examination, nothing material could be elicited. PW-2 Tilak Raj submitted his examination-in-chief by way of affidavit Ext. PW-2/A. He stated, on oath, that he was one of the occupants of ill-fated vehicleat the time of the accident. He corroborated the version of PW-1. In cross-examination, he stated that in accident he received minor injuries, but he was not medically examined by the doctor. He had not got registered the FIR. He denied that the accident occurred on account of negligence of the deceased. PW-4 Sonu Kumar, through his examination-in-chief by way of affidavit Ext.PW-4/A reiterated the version of PW-1 and PW-2. In cross-examination, he stated that he had also received injuries in the accident

and was medically examined. He admitted that he has not placed on record of the case any document in this regard. He denied that the accident occurred due to negligence of deceased Sunil Kumar.

9. PW-3 Dr. Vipan Thakur proved the copy of postmortem report Ext. PW-3/A and he was not cross-examined. PW-5 MHC Arun Kumar, Police Station, Dalhousie, District Chamba proved the factum of registration of FIR, a copy of which was exhibited as Ext.PW-5/A.

10. Respondent did not choose to lead any oral evidence. Learned counsel for the respondent placed on record documents i.e. copy of Insurance Policy Ext. R-1 and copy of Registration Certificate Ext. R-2. No further evidence was led on behalf of the respondent.

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

12. It has been submitted by the learned counsel for the appellants that the claim petition has been wrongly dismissed. It has been argued with vehemence that the findings recorded by the learned Tribunal below on issue No.6, were perverse as the respondent had failed to discharge the burden of proving the said issue. It has further been argued that the petition was maintainable under Section 166 of the Act and in alternative, award of Rs.2,00,000/- could not have been denied to the appellants in view of the specific admission made by the respondent and also the law applicable in the facts of the case.

13. Per contra, learned counsel for the respondent has submitted that the claim petition under Section 166 of the Motor Vehicles Act was not maintainable in view of the provisions of Sections 147, 149 and 165 of the Act. According to him, a petition under Section 166 of the Act could be maintained only in respect of the claim of third party and since, in the instant case, deceased himself was insured, he did not qualify to be termed as third party. It has further been argued on behalf of the respondent that the award passed by

the learned Tribunal did not suffer from any legal infirmity and hence, deserves to be upheld.

14. In addition, it has also been contended on behalf of respondent that the Tribunal was not competent to grantrelief, if any, arising out of personal accident risk of insured as the same was justiciable only under the Consumer Protection Act before appropriate forum.

15. The record reveals that the respondent had taken a specific objection in the reply filed by it before the Tribunal, which reads as under:

> *"4. That the driver-cum-owner of the vehicle bearing registration No. HP-01C-0116 (Taxi) alleged to be involved in the accident was not holding valid and effective driving licence to drive such vehicle at the time of alleged accident and in case any licence is produced the same bogus and fake license and having not been issued by any competent authority."*

In rejoinder, the contents of para-4 of the preliminary objections were denied being incorrect. Issue No.6 was framed and the onus to prove the said issue was rightly placed on the respondent.

16. Despite having raised a specific defence under Section 149 (2) of the Act, respondent did not lead any evidence to prove such issue in order to avoid its liability. During the entire trial, no steps were taken by the respondent to seek information about the driving license, if any, possessed by the deceased Sunil Kumar.

17. It is settled that the onus to prove breach of condition(s) off the policy of insurance is always on the insurer. Reference can be made to the judgment passed by this Court in ***Surender Singh vs. Smt. Jai Manti Devi and others 2008 (2) Shim.L.C. 533,*** in which it was held as under:

> *"12. The onus to prove the issue whether the Insurance Company was not liable to pay the awarded compensation for the reason that the driver of the truck was not holding a valid driving license was heavy on the Insurance Company and rightly so fixed by the Tribunal.*

[13] In ***Narcinva v. Kamat v. Alfredo Antonio Doe Martins, 1985 3 SCR 951****, the Apex Court has held that the insured is under no obligation to furnish evidence so as to enable the insurance company to wriggle out of its liability under the contract of insurance. Mere failure on the part of the owner to produce the driving licence, when called upon to do so in the cross-examination would not discharge the burden and no adverse inference to the effect that the driver did not have a valid licence can be drawn. The insurance company should have got evidence to substantiate its allegation. Applying the test who would fail if no evidence is led, the Court held that it would be the insurance company.*

[14] ***In National Insurance Co. Ltd. v. Swaran Singh and Ors., 2004 AIR(SC) 1531****, the Apex Court has held that once the assured proves that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within its exception. The Insurance Company, which alleges the breach must prove the same and is required to establish the said breach by cogent evidence. Failure to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. The Insurance Company with a view to avoid the liability must not only establish the available defences raised in the proceedings but must also establish the breach on the part of the owner of the vehicle."*

18. Similar view has been taken by this Court in ***Anita Abrol and others*** vs**. *Rishi Co-operative Societies Limited and others Latest HLJ 2009 (HP) 1342***, wherein it was held as under:

"9. *The learned Motor Accident Claims Tribunal has erred in law by shifting the burden to prove whether there was breach of terms of the policy or not upon the owner. It is settled law that it is for the Insurance Company to prove that there was breach of terms of the policy and the driver did not have valid licence. In the present case the Insurance Company has not produced any evidence to prove the breach. The Counsel appearing for respondent No. 3 had not produced any evidence. Respondent No. 3 has not filed any application seeking details of the driving licence issued in favour of respondent No. 2.*

10.Their Lordships of the Hon'ble Supreme Court in ***Narchinva V. Kamat and Anr. v. Alfredo Antonio Doe Martins and Ors., 1985 AIR(SC) 1281*** *have held as under:*

> *"15. To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance."*

> *[11] It was necessary for the Insurance Company to give notice to the owner or the driver to give the details of the driving licence. The Insurance Company has also not moved any application under Order 11 Rule 12 of the Code of Civil Procedure for production of document. The onus of proving that the driver of the bus did not have the valid licence to drive the vehicle lied on the Insurance Company, because it was the Insurance Company which sought to avoid its liability under the policy on the ground that the terms of the policy had been violated.*
>
> *It was not sufficient for respondent No.3-company to make assertion that the driver was not holding driving licence without adducing necessary proof and escape its liability under the policy. In the present case the driver was already arrayed as respondent No. 2. The requirement for holding the owner vicariously liable is that the driver was in the employment of the owner. This fact has not been denied by the owner."*

19. In view of the aforesaid legal position, the findings returned by the learned Tribunal below on issue No.6 cannot be sustained and are accordingly reversed. It is held that respondent had failed to prove the breach of policy on the ground that the insured-cum-driver was not having valid and effective driving license at the time of the accident.

20. On the question of non-maintainability of petition, learned counsel for respondent has placed reliance on the judgments ***Ramkhiladi and another*** vs***. United India Insurance Company Ltd. 2020 (1) ACJ 627, CMA No. 1848/2017, NIC Ltd.*** Vs***. Rani and others, decided on 12.3.2020, New***

India Assurance Company Ltd. Vs***. Asha Rani, 2003, ACJ (1) (para 27), Oriental Insurance Company Ltd.*** Vs. ***Premlata Shukla, 2007 (13) SCC 476 (Paras 12-15), Oriental Insurance Company Ltd.*** Vs***. Smt. Kamlo and others 2005, SLC 134 (HP) and Dhan Raj vs. New India Assurance Company Ltd. 2004 (8) SCC 553.***

21. Insofar as the claim under Section 166 of the Act raised by the appellants/claimants is concerned, the same has been rightly denied by the learned Tribunal. The conjoint reading of Sections 147, 149 and 165 of the Act, leads to inescapable conclusion that the claim under Section 166 of the Act on behalf of the legal representatives of the deceased, who himself was owner of the vehicle was not maintainable. The Act provides for the right of insured to be indemnified by the insurer against the third party risk. The only exception being in respect of the claims which arise out of the special contract between the insured and insurer beyond the coverage of third-party risk.

22. There is no hesitation in holding that the claim of the appellants/claimants on account of death of Sunil Kumar was not maintainable as the deceased Sunil Kumar was himself the owner-cum-driver of the vehicle involved in the accident and hence his legal representatives had stepped into his shoes, therefore, were not entitled to seek indemnification from the insurer.

23. Now the question that remains to be decided is whether the Tribunal could have awarded a sum of Rs 2,00,000/- to the appellants/claimants on account of special contract existing between the parties? It is not in dispute that respondent had received premium for insuring the owner's personal risk to the maximum limit of Rs. 2,00,000/-.

24. The Act mandates the policy coverage ofthird-party risks but at the same time does not prohibit the insurer to enter into a special contract of insurance with insured to cover risks of the persons and property over and above the statutory coverage as provided under Sections 146 and 147 of the Act. The expression used in proviso (ii) to Section 147 (1) "Provided that the policy

shall not be required to cover any contractual liability", does not mean that the insurer is prohibited by the Act to enter into a special contract of insurance with the insured beyond the statutory limit prescribed under the Act. In other words, Sections 146 and 147 of the Act,prescribe the minimum statutory requirement of the insurance policy covering third party risks subject to the limits provided under sub section (2) of Section 147. In addition, sub section (5) of Section 147 of the Act, reads as under:

> *"(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons".*

25. Section 165 of the Act enables the constitution of Tribunals. Sub section (1) of Section 165 of the Act cannot be said to be exhaustive for the reasons that in explanation appended thereto, the claims under Sections 140 and 163A of the Act have also been included.

26. Sections 140 and 163A of the Act have their applicability even without proof of negligence, which otherwise is opposed to the very principle of strict liability and vicarious liability under law of torts, on which rests the entire edifice of jurisdiction of Tribunals to award damages/compensation.

27. This Court is thus unable to concur with the contention raised on behalf of the respondent that even the claim of Rs.2,00,000/- on account of personal accidental risk of the deceased covered under the policy Ext. R-1 was not maintainable before the Tribunal.Reference can be made to the judgment rendered in ***Dhanraj vs. New India Assurance Company Ltd. and another AIR 2004 SC 4767*** wherein Hon'ble Apex Court has held as under:

> *"8…In the case of Oriental Insurance Co. Ltd. v. Sunita Rathi and Ors. [1998 ACJ 121] it has been held that the liability of an Insurance Company is only for the purpose of indemnifying the insured against liabilities incurred towards third person or in*

respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the Insurance Company has no liability also.
[9] In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4,989/- paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. ***An owner of a vehicle can only claim provided a personal accident insurance has been taken out.*** *In this case, there is no such insurance."*

28. Similarly, the Hon'ble Supreme Court in ***National Insurance Company Ltd. Vs. Ashalata Bhowmik and others (2018) 9 SCC 801*** in para-9, has held as under:

"9…Therefore, the High Court was not justified in directing the appellant/insurer to pay the compensation determined by the Tribunal. Since the indemnification extended to personal accident of the deceased is limited toRs.2,00,000/-under the contract of insurance, the respondents are entitled for the said amount towards compensation. Hence, the appellant is directed to deposit the said sum of Rs. 2,00,000/- with interest @ 9 per cent per annum from the date of the Claim Petition till the date of deposit with the Tribunal within a period of four weeks from today."

29. Even the judgment relied upon on behalf of the respondent in ***Ramkhiladi and another vs. United India Insurance Co. Ltd. and another 2020 ACJ, 627,*** the Hon'ble Supreme Court has held in paras 5.9 and 6 as under:

"*5.9. Now, so far as the submission made on behalf of the claimants that in a claim under Section 163A of the Act mere use of the vehicle is enough and despite the compensation claimed by the heirs of the owner of the motorcycle which was involved in the accident resulting in his death, the claim under Section 163A of the Act would be maintainable is concerned, in view of the decision of this Court in Rajni Devi (supra), the aforesaid cannot be accepted. In Rajni Devi (supra), it has been specifically observed and held*

that the provisions of Section 163A of the Act cannot be said to have any application with regard to an accident wherein the owner of the motor vehicle himself is involved. After considering the decisions of this Court in the cases of Oriental Insurance Co. Ltd. V. Jhuma Saha, 2007 9 SCC 263; Dhanraj (supra); National Insurance Co. Ltd. V. Laxmi Narain Dhut, 2007 3 SCC 700 and Premkumari v. Prahlad Dev, 2008 3 SCC 193, it is ultimately concluded by this Court that the liability under Section 163A of the Act is on the owner of the vehicle as a person cannot be both, a claimant as also a recipient and, therefore, the heirs of the owner could not have maintained the claim in terms of Section 163A of the Act. It is further observed that, for the said purpose, only the terms of the contract of insurance could be taken recourse to. In the recent decision of this Court in the case of Ashalata Bhowmik (supra), it is specifically held by this Court that the parties shall be governed by the terms and conditions of the contract of insurance. Therefore, as per the contract of insurance, the insurance company shall be liable to pay the compensation to a third party and not to the owner, except to the extent of Rs.1 lakh as observed hereinabove.

[6] In view of the above and for the reasons stated above, the present appeal is partly allowed to the aforesaid extent and it is observed and held that the original claimants shall be entitled to a sum of Rs.1 lakh only with interest @ 7.5 per cent per annum from the date of the claim petition till realization. In the facts and circumstance of the present case, there shall be no order as to costs."

30. Even this Court in ***ICICI Lombard General Insurance Company Ltd. Vs. Parul Sharma and others 2018 ACJ 635*** has held as under:

"21.The Apex Court in the case titled as ***Oriental Insurance Co. Ltd****. versus* ***Rajni Devi and others, 2008 ACJ 1441,*** *held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the claim of the insurance company would depend upon the terms of the insurance policy. It is worthwhile to reproduce paras 6 and 11 of the judgment herein:*

> *"6. It is now a well settled principle of law that in a case where third party is involved, the liability of the insurance company would be unlimited. Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of*

the insurance company would depend upon the terms thereof.

7 to 10.Xx xxx xxx

11. According to the terms of contract of insurance, the liability of the insurance company was confined to Rs. 1,00,000 (rupees one lakh). It was liable to the said extent and not any sum exceeding the said amount."

[22] Applying the test to the instant case, the insurance policy of the offending vehicle is on the record as Ext. R1E, the perusal of which does disclose that the ownerinsured has paid extra premium covering the insurance of the owner to the extent of Rs. 2,00,000/. As discussed hereinabove, deceasedVijay Sharma had stepped into the shoes of the owner, thus, his risk was covered to the extent of Rs. 2,00,000/ and the claimants, being the legal representatives of the owner, are entitled to compensation only in terms of the conditions contained in the insurance policy.
[23] Viewed thus, it is held that the claimants are entitled to compensation to the tune of Rs. 2,00,000/ with interest @ 7.5% per annum from the date of the claim petition till its finalization."

31. Since the insurer had failed to prove the breach of conditions of the policy, as noted above, the claim of Rs.2,00,000/- on account of coverage of personal risk under the policy in question should have been allowed in favour of the appellants/claimants. The impugned award dated 19.12.2012 is thus modified to the extent that the respondent –National Insurance Company is liable to pay a sum of Rs.2,00,000/- to the claimants/appellants on account of personal accidental coverage along with interest at the rate of 7.5% per annum from the date of filing of the petition. It is further held that the amount so payable by the respondent to the appellants/claimants shall be apportioned in the following ratio:

(i) Appellants/claimants No.1 to 3 each shall be paid 25% of the award amount and ;

(ii) the remaining 25% shall be apportioned equally between the appellants/claimants No.4 and 5

32. The appeal is accordingly disposed of in the aforesaid terms with no order as to costs. Pending miscellaneous application(s) if any, also stand disposed of.

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

Between:-

NATIONAL INSURANCE COMPANY LTD.
THROUGH ITS ADMINISTRATIVE
OFFICER (LEGAL),
DIVISIONAL OFFICE,
HIMALAND HOTEL, SHIMLA. .....APPELLANT

(BY SH. ASHWANI SHARMA, SENIOR ADVOCATE
WITH MR. ISHAN SHARMA, ADVOCATE)

AND

1. SH. MUKHTIAR KHAN
SON OF SH. HABIBULLA KHAN

2. SMT. MASSARI
WIFE OF SH. MUKHTIAR KHAN
BOTH RESIDENTS OF
VILLAGE HARAINGHPUR,
P.O. MURA BUJURG,
DISTRICT LAKHIMPUR KHIRI
(UTTER PRADESH)

3. SH. HEMANT KUMAR
SON OF SH. YASH PAL SHARMA
(OWNER OF MAHINDRA PICK UP
No. HP-17B-6788)

4. SH. YASH PAL SHARMA
SON OF SH. JAGIRI PRASAD
(DRIVER OF MAHINDRA PICK UP
No. HP-17B-6788)
BOTH RESIDENTS OF VILLAGE TOKIYON,
P.O. SAINWALA,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR (H.P.)

.....RESPONDENTS

(SHRI VINOD CHAUHAN, ADVOCATE,
FOR R-1 AND R-2
SHRI HAMENDER CHANDEL,
ADVOCATE, FOR R-3 & R-4)

FIRST APPEAL FROM ORDER No. 131 of 2021
DECIDED ON: 27.08.2021

Motor Vehicle Act, 1988- Section 147 read with section 4 & 4-A of the Workmen Compensation Act, 1923- Assessment of Insurance liability- Criteria- A sum of Rupees 3,39,000/- awarded in favour of claimants as compensation- Held- The proviso to Section 147 states that policy shall not cover liability in respect of death, arising out of and in course of employment- Compensation amount not assesed in consonance with sections 4 & 4-A of Workmen's Compensation Act- Award modified. [Para 4 (ii) (b)]

Cases referred:

Anita Sharma and Others Vs. New India Assurance Company Limited and Another, 2021 (1) SCC 171;

National Insurance Company Limited vs. Rattani and Others, (2009) 2 SCC 75;

National Insurance Company Ltd. vs. Smt. Asha Devi and others 2009(3) Shim. LC 211;

Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Anr. (2020) 13 SCC 486;

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

J U D G M E N T

A sum of Rupees 3,39,000/- has been awarded in favour of the claimants as compensation on account of death of their son in a motor accident. The liability to pay the compensation amount has been fastened upon the Insurance Company. Aggrieved, the Insurance Company has preferred the instant appeal.

2(i) Mathin Khan was son of respondents No. 1 and 2. On 29.9.2014 he was travelling in vehicle No. HP-17B-6788 from Paonta Sahib to Majra, District Sirmour. The vehicle was being driven by respondent No. 4. It met with an accident causing Mathin Khan's death. His parents filed claim petition under Section 166 of the Motor Vehicles Act for grant of compensation of Rupees 8,00,000/-. The claimants stated that their son was aged about 21 years at the time of accident. He was the sole bread earner of the family, bringing home Rupees 12,000/- per month from his labour/catering work etc. He was in the employment of respondent No. 3-the owner of the ill fated vehicle.

2(ii) The owner of the vehicle/respondent No. 3 submitted in his reply that the deceased was employed by him for loading and unloading of water campers, tent material and catering articles from the vehicle in question. Deceased was travelling in the vehicle in that capacity. The income of the deceased was not more than Rupees 3,000/- per month. Though FIR No. 341 dated 29.9.2014 was registered at Police Station, Majra regarding this accident against respondent No. 4 but the accident was caused because of rash and negligent driving of a truck coming from the opposite direction. Respondent No. 4 i.e. the driver of HP-17B-6788 was not driving the vehicle in a rash and negligent manner. This reply was jointly filed by the owner and driver of the vehicle.

2(iii) The Insurer also resisted the claim petition. Its stand was that the deceased was travelling in the goods carriage vehicle as a gratuitous passenger. It was further pleaded that the deceased was himself negligent as he was standing along with 7-8 persons in the rear of the vehicle.

3. After considering the respective pleadings, evidence and contentions of the parties, learned Tribunal held that the accident occurred due to negligent driving of the vehicle by respondent No. 4. The deceased was held to be travelling in the vehicle as a labourer employed by respondent No. 3 for loading and unloading and not as a gratuitous passenger. His age on the date of accident was determined as 24 years. His income was assessed at Rs. 3,000/- per month. The dependency of the claimants was worked out at Rs. 1500/- per month. Keeping in view the age of the deceased, multiplier of 18 was applied and the totally dependency was worked out as Rs. 1500X12x18=3,24,000/-. An amount of Rs. 15000/- was awarded to the claimants on account of funeral expenses. In all the claimants were held entitled to a compensation of Rs. 3,39,000/- along with interest @9% per annum from the date of filing of the petition till its realization.

4. Learned Senior Counsel for the appellant raised two main contentions for assailing the award. Firstly, that the deceased was travelling in the vehicle as a gratuitous passenger. He was himself negligent as he was standing in the rear portion of the goods carriage vehicle alongwith 7-8 persons, therefore, Insurance Company is not liable to pay any compensation. The second contention raised is that the Insurance Policy for the vehicle in question does not cover the risk of passengers travelling in the goods carriage vehicle. Therefore, the appellant cannot be fastened with liability to pay compensation on account of death of Mathin Khan. Learned counsel for the respondents supported the award. They submitted that deceased was travelling in the vehicle not as a gratuitous passenger but as a labourer in employment of the owner of the vehicle. The accident was caused due to rash and negligent driving of the vehicle by respondent No. 4. I have heard

learned counsel for the parties and with their assistance gone through the case record.

4(i) **First contention.**

4(i)(a) The claimants had pleaded that the deceased was travelling in the vehicle in question as a labourer and earning Rs. 12,000/- per month. Respondent No. 3 was his employer. The vehicle in question was Mahindra & Mahindra bearing registration No. HP-17B-6788 owned by respondent No. 3.

The owner and driver of the vehicle i.e. respondents No. 3 and 4 filed a common reply and admitted that the deceased was employed by the owner of the vehicle for the purpose of loading and unloading of water campers, tent material and catering articles from the vehicle. It was also admitted that on 29.9.2014 the deceased was travelling in the vehicle in that capacity. Their stand was that the income of the deceased was not more than Rs. 3000/- per month. It was also pleaded by them that the accident had not occurred on account of negligence of respondent No. 4 but because of negligence of driver of another vehicle coming from the opposite side.

4(i)(b) The Insurance Company in its reply took a stand that the vehicle was carrying 7-8 passengers at the time of the accident. This stand was taken only on the basis of the contents of FIR No. 341 dated 29.9.2014. Learned Senior Counsel for the appellant submits that the FIR Ext. PW1/C has been relied upon by the claimants themselves, therefore, the contents of the FIR have to be read and accepted in entirety. The FIR states that 7-8 persons including the deceased were standing in the rear of the goods carriage vehicle. This leads to an inference that the accident occurred because of negligence on part of the deceased himself. Mathin Khan died due to his own negligence. Learned Senior Counsel for the appellant placed reliance upon following para from ***(2009) 2 SCC 75***, titled ***National Insurance Company Limited*** versus ***Rattani and Others*** :-

> "8. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be

> admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same. However, in their depositions, the claimants raised a new plea, namely that the deceased and the other injured persons were travelling in the said truck as representatives of the owner of the goods."

4(i)(c) It is well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubts which is followed in criminal cases ***[Re: (2020) 13 SCC 486,*** titled ***Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Anr.]***

In ***2021 (1) SCC 171,*** titled ***Anita Sharma and Others*** Vs. ***New India Assurance Company Limited and Another***, Hon'ble Supreme Court reiterated well established principle that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in Motor accident claim cases. The standard of proof in such like matters is one of pre-ponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of courts while examining evidence and material placed on record in accident claim cases is to analyse to ascertain whether claimant's version is more likely than not true. Relevant paras of the judgment are extracted hereunder:-

> "17. Unfortunately, the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellant claimants' hardship in

tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in Parmeshwari v. Amir Chand, viewed that: (SCC p.638, para 12).

> "12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.
>
> 15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."
>
> (emphasis supplied)

22. A somewhat similar situation arose in Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646, wherein this Court reiterated that: (SCC p.650, para 7)

> "7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pickup van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi v. Himachal RTC" (2009) 13 SCC 530. "(emphasis supplied)"

4(i)(d) In the instant case, entire stand of the appellant with respect to alleged negligence of the deceased in standing in the rear of the vehicle is based upon contents of the FIR. The best person to prove these specific averments in the FIR was the complainant/informant-Ali Mohd. He has not been examined by the Insurance Company. No suggestion has been given to PW1 Mukhtiyar Khan/claimant during his cross-examination on behalf of the appellant that deceased was standing in the vehicle. PW1 has denied that 7-8 persons were travelling in the vehicle as gratuitous passengers. There is no affirmative evidence on record to prove that 7-8 persons including the deceased were standing in the rear of the vehicle. In their joint reply filed to the claim petition, the driver and the owner of the vehicle (respondent No. 3) did not state that the deceased was standing in the rear portion of the vehicle. The owner of vehicle though admitted a suggestion given to him by the Insurance Company about the deceased's standing in the vehicle, however, his admission is of no significance as he was not present at the spot. The driver of the vehicle did not step into the witness box. There is also nothing to indicate who were the other 7-8 persons alleged to be standing in the vehicle and what happened to them in the accident. It is even otherwise the pleaded case of respondent No. 4 that the accident was caused because of his driving the vehicle to the extreme side of the road for avoiding a collusion with an over speeding truck. The FIR has to read conjointly with the statements of claimant, owner of the vehicle and other evidence on record.

Therefore, the findings recorded by the learned Tribunal that the accident had occurred because of rash and negligent driving of the vehicle by respondent No. 4, are in order. The finding of the learned Tribunal that the deceased was travelling as a labourer in the goods carriage vehicle and that he was employed by respondent No. 3 also do not call for any interference. It is not only the case of claimants but also of the owner of vehicle that the deceased was in employment of respondent No. 3 (owner of vehicle) and that he was travelling in the vehicle in that capacity as a labourer.

4(ii) **Second contention**.

4(ii)(a) Learned Senior Counsel for the appellant next contended that insurance policy for the vehicle in question does not cover the risk of gratuitous passenger travelling in the vehicle. In support of such submission, learned Senior Counsel placed reliance upon a judgment passed by a coordinate Bench of this Court in FAO (MVA) No. 488 of 2012, decided on 24.9.2019, titled ***United India Insurance Company Ltd.*** Versus ***Nirmla Devi and others.*** The contention of the Insurance Company in that case was that if the vehicle was a goods carriage vehicle and the deceased at the time of accident was travelling in the rear open luggage space of vehicle then he was travelling as an unauthorised gratuitous passenger. In such circumstances, the liability cannot be fastened upon the Insurance Company. The contention of the Insurance Company, as noticed in the aforesaid judgment is as under:

> "5. It is vehemently argued by Shri Ashwani K. Sharma, Senior Advocate, assisted by Shri Ishan Sharma, Advocate, for the appellant that the vehicle in question was admittedly a goods carriage vehicle and the deceased at the time of accident was admittedly travelling in the rear open luggage space of the vehicle as is pleaded by the petitioner in her claim petition and since the deceased was travelling as an unauthorized gratuitous passenger, therefore, the liability could not have been fastened upon the Insurance Company."

After considering plethora of precedents, it was held by the Hon'ble Court as under:

> "10. Admittedly, the offending vehicle in the instant case is Mahindra Jeep which is primarily a goods carriage vehicle and not meant for carrying passengers other than the one specified in the policy of the insurance. In the case of a gratuitous passenger, the Insurance Company is not liable to make any payment of compensation as the same contravenes the terms of the policy."

It has already been observed earlier that in the case in hand the deceased was travelling in the vehicle as a labourer employed by respondent No. 3- the owner of the vehicle and further that there is no evidence to suggest about his travelling in the rear of the vehicle or that the accident occurred because of his negligence. The accident was caused due to rash and negligent driving of respondent No. 4. In fact it is the pleaded case of respondent No. 4 that accident occurred because of his driving the vehicle to the extreme side of the road to avoid a collusion with an overspeeding truck.

4(ii)(b) In the instant case, the insurance policy has been placed on record as Ex.RW1/B. As per this policy, premium under Workmen's Compensation for two employees has been charged by the insurer and paid by the Insured/respondent No. 3. It will be appropriate at this stage to refer to Section 147 of the Motor Vehicle Act, which reads as under:

"147. Requirements of policies and limits of liability.

In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

2. is issued by a person who is an authorised insurer; and

3. insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

i. Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

ii. Against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

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 a 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

To cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

The proviso to Section 147 states that policy shall not be required to cover liability in respect of the death, arising out of and in the course of 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 in respect of death of, or bodily injury to any such employee.

In the instant case the appellant has contracted with respondent No. 3 for covering the liability arising under the Workmen's Compensation Act with respect to his two employees. It will be appropriate at this stage to refer to ***2009(3) Shim. LC 211***, titled ***National Insurance Company Ltd.*** versus ***Smt. Asha Devi and others.*** It was a case of a labourer travelling in a goods carriage as an employee of the owner of the vehicle. The Insurance Policy covered the risk under Workmen Compensation. Following observations made in the judgment are relevant in the context of present case:

> "21. As far as the liability of the Insurance Company in the present case is concerned, the same is governed by the terms of the insurance policy which is Ext.R/1. The heading of the policy reads as follows:-
> "Goods carrying Commercial Vehicle (Open) Policy and Liability only."
> 22. In the table of premium, basic third party premium of Rs.3580/- has been charged and WC for 6 employees amounting to Rs.150/- has been charged. WC obviously means workmen compensation. There is no other premium which has been charged. This clearly shows that the policy in question covers only 'Act Liability' under Section 147 of the Act. In respect of the employees, the Insurance Company is only required to cover liability confined to the amount payable under the Workmen Compensation Act, 1993. Reference in this regard may be made to the judgment of the Apex Court in National Insurance Co. Ltd. v. Prembai Patel and others 2005-06 (6) SCC 172 wherein the Apex Court held as follows:-

"12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 146(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both 'any person' or 'passenger'. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words 'any person' occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-Section (1) of Section 147 says that a policy shall not be required to cover liability in respect of 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 Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i)

to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third party risks. The expression "such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy)" occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind

> of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy."
>
> 23. In view of the law laid down by the Apex Court, there can be no escape from the conclusion that the liability of the Insurance Company is limited to the amount payable under the Workmen Compensation Act. In this case, the deceased was 27 years at the time of the accident. His income has been assessed at Rs. 3000/- per month and if the compensation is assessed in consonance with the provisions of Section 4 of the Workmen Compensation Act, the amount payable by the Insurance Company has to be calculated by multiplying 50% of the income by the relevant factor. 50% of the income of the deceased is Rs.1500/-. The relevant factor by taking into consideration the age of the deceased is 213.57. Therefore, the compensation payable under the Workmen Compensation Act works out to Rs.3,20,355/."

Therefore, when a specific Policy has been taken by respondent No. 3-owner of the vehicle, then the liability of the Insurance Company will be confined to that arising under the Workmen's Compensation Act in terms of the Policy. The award passed by the learned Tribunal assessing the liability is, therefore, not in consonance with the provisions of Policy. Deceased was 24 years at the time of accident. His income has been assessed at Rs. 3000/- per month. If compensation is assessed in consonance with Section 4 and 4A of the Workmen's Compensation Act, the payable compensation becomes:-50% of Rs. 3000X218.47 (relevant factor)=Rs.3,27,705/-. Insurance Company, therefore, is held liable to pay to the claimants a compensation amount of Rs. 3,27,705/- along with interest @ 12% per annum w.e.f. 29.10.2014 till the date of deposit of the awarded amount.

The impugned award is modified in the above terms. The appeal shall stand disposed of, so also the pending application(s), if any.

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

Between:-

NATIONAL INSURANCE COMPANY LTD.
THROUGH ITS ADMINISTRATIVE
OFFICER (LEGAL),
DIVISIONAL OFFICE,
HIMALAND HOTEL, SHIMLA.

.....APPELLANT

(BY SH. ASHWANI SHARMA, SENIOR ADVOCATE
WITH MR. ISHAN SHARMA, ADVOCATE)

AND

1. SH. BABU
SON OF SH. KALLU

2. SMT. KESHKALI
SINCE DECEASED THROUGH LRS:

(A) DEEPU
(B) LAVKUSH
(C) MONU
ALL SONS OF BABU
(D) NEELAM
(E) RAMDEVI
(F) SHALU
ALL DAUGHTERS OF BABU
ALL RESIDENTS OF HOUSE NO. 368,
RAMIYA BEHAR,
TEHSIL DHAURHARA
DISTRICT LAKHIMPUR KHIRI
(UTTAR PRADESH)

3. SH. HEMANT KUMAR
SON OF SH. YASH PAL SHARMA
(OWNER OF MAHINDRA PICK UP
No. HP-17B-6788)

4. SH. YASH PAL SHARMA
SON OF SH. JAGIRI PRASAD
(DRIVER OF MAHINDRA PICK UP
No. HP-17B-6788)
BOTH RESIDENTS OF VILLAGE TOKIYON,
P.O. SAINWALA,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR (H.P.)

.....RESPONDENTS

(Mr. VINOD CHAUHAN,
ADVOCATE, FOR R-1 AND R-2(A) TO 2(F),
SHRI HAMENDER CHANDEL,
ADVOCATE, FOR R-3 & R-4)

FIRST APPEAL FROM ORDER No. 489 of 2019
DECIDED ON: 27.08.2021

Motor Vehicle Act, 1988 - Section 166 – Determination of compensation – Principles of evidence applicability- Held – Standard of proof as in a criminal trial are not applicable in Motor accident claim cases – The applicant has to prove that preponderance of probabilities lies in his favour. [Para 4 (i)(c)]

Motor Vehicle Act, 1988 - Section 147 read with Section 4 & 4-A of the Workmen's Compensation Act, 1923 – Assessment of insurance liability – At the time of accident, the deceased was 18 years old & his monthly income was Rs. 3000/- Tribunal granted compensation in sum of Rs. 3,39,000/- Held – Compensation amount not assessed in consonance with Section 4 & 4-A of the Workmen's Compensation Act – Award modified. [Para 4(ii)(b)]

Motor Vehicle Act, 1988 - Compensation Contention of Insurance Company that deceased was standing in the rear position of goods carriage

vehicle is based upon the contents of the FIR – Contention was rejected – Held – Complainant was best person to prove the specific averments in the FIR who has not been examined by insurance company – Lack of evidence on record to prove that 7 or 8 persons including deceased were standing in rear position of vehicle as gratuitous passengers – Award rightly awarded. [Para 4 (i)(b) & (d)]

Cases referred:

Anita Sharma and Others Vs. New India Assurance Company Limited and Another 2021 (1) SCC 171;
National Insurance Company Limited versus Rattani and Others (2009) 2 SCC 75;
National Insurance Company Ltd. versus Smt. Asha Devi and others 2009(3) Shim. LC 211;
Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Anr. (2020) 13 SCC 486;

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

J U D G M E N T

A sum of Rupees 3,39,000/- has been awarded in favour of the claimants as compensation on account of death of their son in a motor accident. Liability to pay the compensation amount has been fastened upon the Insurance Company. Aggrieved, the Insurance Company has preferred the instant appeal.

2(i) Sanjay was son of respondents No. 1 and 2. On 29.9.2014 he was travelling in vehicle No. HP-17B-6788 from Paonta Sahib to Majra, District Sirmour. The vehicle was being driven by respondent No. 4. It met with an accident causing Sanjay's death. His parents filed claim petition under Section 166 of the Motor Vehicles Act for grant of compensation of Rupees 8,00,000/-. The claimants stated that their son was aged about 19

years at the time of accident. He was the sole bread earner of the family, bringing home Rupees 12,000/- per month from his labour work etc. He was in the employment of respondent No. 3-the owner of the ill fated vehicle.

2(ii) The owner of the vehicle/respondent No. 3 submitted in his reply that the deceased was employed by him for loading and unloading of water campers, tent material and catering articles from the vehicle in question. Deceased was travelling in the vehicle in that capacity. The income of the deceased was not more than Rupees 3,000/- per month. Though FIR No. 341 dated 29.9.2014 was registered at Police Station, Majra regarding this accident against respondent No. 4 but the accident was caused because of rash and negligent driving of a truck coming from the opposite direction. Respondent No. 4 i.e. the driver of HP-17B-6788 was not driving the vehicle in a rash and negligent manner. This reply was jointly filed by the owner and driver of the vehicle.

2(iii) The Insurer also resisted the claim petition. Its stand was that the deceased was travelling in the goods carriage vehicle as a gratuitous passenger. It was further pleaded that the deceased was himself negligent as he was standing along with 7-8 persons in the rear of the vehicle.

3. After considering the respective pleadings, evidence and contentions of the parties, learned Tribunal held that the accident occurred due to negligent driving of the vehicle by respondent No. 4. The deceased was held to be travelling in the vehicle as a labourer employed by respondent No. 3 for loading and unloading and not as a gratuitous passenger. His age on the date of accident was determined as 18 years. His income was assessed at Rs. 3,000/- per month. The dependency of the claimants was worked out at Rs. 1500/- per month. Keeping in view the age of the deceased, multiplier of 18 was applied and the totally

dependency was worked out as Rs. 1500X12x18=3,24,000/-. An amount of Rs. 15000/- was awarded to the claimants on account of funeral expenses. In all the claimants were held entitled to a compensation of Rs. 3,39,000/- along with interest @9% per annum from the date of filing of the petition till its realization.

4. Learned Senior Counsel for the appellant raised two main contentions for assailing the award. Firstly, that the deceased was travelling in the vehicle as a gratuitous passenger. He was himself negligent as he was standing in the rear portion of the goods carriage vehicle alongwith 7-8 persons, therefore, Insurance Company is not liable to pay any compensation. The second contention raised is that the Insurance Policy for the vehicle in question does not cover the risk of passengers travelling in the goods carriage vehicle. Therefore, the appellant cannot be fastened with liability to pay compensation on account of death of Sanjay. Learned counsel for the respondents supported the award. They submitted that deceased was travelling in the vehicle not as a gratuitous passenger but as a labourer in employment of the owner of the vehicle. The accident was caused due to rash and negligent driving of the vehicle by respondent No. 4. I have heard learned counsel for the parties and with their assistance gone through the case record.

4(i) **First contention.**

4(i)(a) The claimants had pleaded that the deceased was travelling in the vehicle in question as a labourer and earning Rs. 12,000/- per month. Respondent No. 3 was his employer. The vehicle in question was Mahindra & Mahindra bearing registration No. HP-17B-6788 owned by respondent No. 3.

The owner and driver of the vehicle i.e. respondents No. 3 and 4 filed a common reply and admitted that the deceased was employed by the owner of the vehicle for the purpose of loading and unloading of water

campers, tent material and catering articles from the vehicle. It was also admitted that on 29.9.2014 the deceased was travelling in the vehicle in that capacity. Their stand was that the income of the deceased was not more than Rs. 3000/- per month. It was also pleaded by them that the accident had not occurred on account of negligence of respondent No. 4 but because of negligence of driver of another vehicle coming from the opposite side.

4(i)(b) The Insurance Company in its reply took a stand that the vehicle was carrying 7-8 passengers at the time of the accident. This stand was taken only on the basis of the contents of FIR No. 341 dated 29.9.2014. Learned Senior Counsel for the appellant submits that the FIR Ext. PW1/A has been relied upon by the claimants themselves, therefore, the contents of the FIR have to be read and accepted in entirety. The FIR states that 7-8 persons including the deceased were standing in the rear of the goods carriage vehicle. This leads to an inference that the accident occurred because of negligence on part of the deceased himself. Sanjay died due to his own negligence. Learned Senior Counsel for the appellant placed reliance upon following para from ***(2009) 2 SCC 75***, titled ***National Insurance Company Limited*** versus ***Rattani and Others*** :-

> "8. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same. However, in their depositions, the claimants raised a new plea, namely that the deceased and the other injured persons were travelling in the said truck as representatives of the owner of the goods."

4(i)(c) It is well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been

established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubts which is followed in criminal cases***[Re: (2020) 13 SCC 486,*** titled ***Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Anr.]***

In ***2021 (1) SCC 171,*** titled ***Anita Sharma and Others*** Vs. ***New India Assurance Company Limited and Another***, Hon'ble Supreme Court reiterated well established principle that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in Motor accident claim cases. The standard of proof in such like matters is one of pre-ponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of courts while examining evidence and material placed on record in accident claim cases is to analyse to ascertain whether claimant's version is more likely than not true. Relevant paras of the judgment are extracted hereunder:-

> "17. Unfortunately, the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellant claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in Parmeshwari v. Amir Chand, viewed that: (SCC p.638, para 12).
>
> > "12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed

> Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.
>
> 15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."
>
> (emphasis supplied)
>
> 22. A somewhat similar situation arose in Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646, wherein this Court reiterated that: (SCC p.650, para 7)
>
> "7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pickup van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi v. Himachal RTC" (2009) 13 SCC 530. "(emphasis supplied)"

4(i)(d) In the instant case, entire stand of the appellant with respect to alleged negligence of the deceased in standing in the rear of the vehicle is based upon contents of the FIR. The best person to prove these specific averments in the FIR was the complainant/informant-Ali Mohd. He has not been examined by the Insurance Company. Suggestion given to PW1

Babu/claimant during his cross-examination on behalf of the appellant that deceased was standing in the vehicle has been denied by him. PW1 has denied that 7-8 persons including the deceased were travelling in the vehicle as gratuitous passengers. There is no affirmative evidence on record to prove that 7-8 persons including the deceased were standing in the rear of the vehicle. In their joint reply filed to the claim petition, the driver and the owner of the vehicle (respondent No. 3) did not state that the deceased was standing in the rear portion of the vehicle. The owner of vehicle though admitted a suggestion given to him by the Insurance Company about the deceased's standing in the vehicle, however, his admission is of no significance as he was not present at the spot. The driver of the vehicle did not step into the witness box. them in the accident. It is even otherwise the pleaded case of respondent No. 4 that the accident was caused because of his driving the vehicle to the extreme side of the road for avoiding a collusion with an over speeding truck. The FIR has to read conjointly with the statements of claimant, owner of the vehicle and other evidence on record.

Therefore, the findings recorded by the learned Tribunal that the accident had occurred because of rash and negligent driving of the vehicle by respondent No. 4, are in order. The finding of the learned Tribunal that the deceased was travelling as a labourer in the goods carriage vehicle and that he was employed by respondent No. 3 also do not call for any interference. It is not only the case of claimants but also of the owner of vehicle that the deceased was in employment of respondent No. 3 (owner of vehicle) and that he was travelling in the vehicle in that capacity as a labourer.

4(ii) **Second contention**.

4(ii)(a) Learned Senior Counsel for the appellant next contended that insurance policy for the vehicle in question does not cover the risk of

gratuitous passenger travelling in the vehicle. In support of such submission, learned Senior Counsel placed reliance upon a judgment passed by a coordinate Bench of this Court in FAO (MVA) No. 488 of 2012, decided on 24.9.2019, titled ***United India Insurance Company Ltd.*** Versus ***Nirmla Devi and others.*** The contention of the Insurance Company in that case was that if the vehicle was a goods carriage vehicle and the deceased at the time of accident was travelling in the rear open luggage space of vehicle then he was travelling as an unauthorised gratuitous passenger. In such circumstances, the liability cannot be fastened upon the Insurance Company. The contention of the Insurance Company, as noticed in the aforesaid judgment is as under:

> "5. It is vehemently argued by Shri Ashwani K. Sharma, Senior Advocate, assisted by Shri Ishan Sharma, Advocate, for the appellant that the vehicle in question was admittedly a goods carriage vehicle and the deceased at the time of accident was admittedly travelling in the rear open luggage space of the vehicle as is pleaded by the petitioner in her claim petition and since the deceased was travelling as an unauthorized gratuitous passenger, therefore, the liability could not have been fastened upon the Insurance Company."

After considering plethora of precedents, it was held by the Hon'ble Court as under:

> "10. Admittedly, the offending vehicle in the instant case is Mahindra Jeep which is primarily a goods carriage vehicle and not meant for carrying passengers other than the one specified in the policy of the insurance. In the case of a gratuitous passenger, the Insurance Company is not liable to make any payment of compensation as the same contravenes the terms of the policy."

It has already been observed earlier that in the case in hand the deceased was travelling in the vehicle as a labourer employed by respondent No. 3-the owner of the vehicle and further that there is no evidence to suggest about his travelling in the rear of the vehicle or that the accident occurred because of his negligence. The accident was caused due to rash and negligent driving of respondent No. 4. In fact it is the pleaded case of respondent No. 4 that accident occurred because of his driving the vehicle to the extreme side of the road to avoid a collusion with an overspeeding truck.

4(ii)(b) In the instant case, the insurance policy has been placed on record as Ex.RW1/B. As per this policy, premium under Workmen's Compensation for two employees has been charged by the insurer and paid by the Insured/respondent No. 3. It will be appropriate at this stage to refer to Section 147 of the Motor Vehicle Act, which reads as under:

"147. Requirements of policies and limits of liability.

In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

4. is issued by a person who is an authorised insurer; and

5. insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

   ııı. Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

   ıѡ. Against the death of or bodily injury to any passenger of a public service vehicle caused by

or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required-

ıı. 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 a 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

To cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

The proviso to Section 147 states that policy shall not be required to cover liability in respect of the death, arising out of and in the course of 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 in respect of death of, or bodily injury to any such employee.

In the instant case the appellant has contracted with respondent No. 3 for covering the liability arising under the Workmen's Compensation Act with respect to his two employees. It will be appropriate at this stage to refer to ***2009(3) Shim. LC 211***, titled ***National Insurance Company Ltd.*** versus ***Smt. Asha Devi and others.*** It was a case of a labourer travelling in a goods carriage as an employee of the owner of the vehicle. The Insurance Policy covered the risk under Workmen Compensation. Following observations made in the judgment are relevant in the context of present case:

> "21. As far as the liability of the Insurance Company in the present case is concerned, the same is governed by the terms of the insurance policy which is Ext.R/1. The heading of the policy reads as follows:-
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Section 147 of the Act. In respect of the employees, the Insurance Company is only required to cover liability confined to the amount payable under the Workmen Compensation Act, 1993. Reference in this regard may be made to the judgment of the Apex Court in National Insurance Co. Ltd. v. Prembai Patel and others 2005-06 (6) SCC 172 wherein the Apex Court held as follows:-

> "12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 146(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both 'any person' or 'passenger'. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words 'any person'

occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-Section (1) of Section 147 says that a policy shall not be required to cover liability in respect of 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 Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third party risks. The expression "such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy)" occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the

Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy."

23. In view of the law laid down by the Apex Court, there can be no escape from the conclusion that the liability of the Insurance Company is limited to the amount payable

> under the Workmen Compensation Act. In this case, the deceased was 27 years at the time of the accident. His income has been assessed at Rs. 3000/- per month and if the compensation is assessed in consonance with the provisions of Section 4 of the Workmen Compensation Act, the amount payable by the Insurance Company has to be calculated by multiplying 50% of the income by the relevant factor. 50% of the income of the deceased is Rs.1500/-. The relevant factor by taking into consideration the age of the deceased is 213.57. Therefore, the compensation payable under the Workmen Compensation Act works out to Rs.3,20,355/."

Therefore, when a specific Policy has been taken by respondent No. 3-owner of the vehicle, then the liability of the Insurance Company will be confined to that arising under the Workmen's Compensation Act in terms of the Policy. The award passed by the learned Tribunal assessing the liability is, therefore, not in consonance with the provisions of Policy. Deceased was 18 years at the time of accident. His income has been assessed at Rs. 3000/- per month. If compensation is assessed in consonance with Section 4 and 4A of the Workmen's Compensation Act, the payable compensation becomes:-50% of Rs. 3000X226.38 (relevant factor)=Rs. 3,39,570/-. Insurance Company, therefore, is held liable to pay to the claimants a compensation amount of Rs. 3,27,705/- along with interest @ 12% per annum w.e.f. 29.10.2014 till the date of deposit of the awarded amount.

The impugned award is modified in the above terms. The appeal shall stand disposed of, so also the pending application(s), if any.

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

BETWEEN:-

SH. SAMEER SINGH,
S/O LATE SH. KRISHAN KUMAR,
R/O PINE HOUSE, CHOTTA
SHIMLA, SHIMLA-2 ....PETITIONER

(BY SH. CHANDER NARAYAN SINGH,
ADVOCATE)

AND

1. DINESH BINDAL,
S/O LATE SH. RATTAN LAL, 10/10,
OLD BUTAIL BUILDING, MIDDLE
BAZAR, SHIMLA.

2. SH. RAJ KANWAR,
S/O LATE KANWAR LAL CHAND,
R/O PARI MAHAL ENCLAVE,
KASUMPATTI, SHIMLA.

3. SMT. NIRMAL DEVI,
W/O LATE SH. BHAG SINGH, R/O
PINE HOUSE, CHOTTA SHIMLA,
SHIMLA-2.

4. SMT. SAVITRI DEVI,
W/O LATE SH. RATTAN SINGH
THAKUR, R/O PINE HOUSE
CHOTTA, SHIMLA, SHIMLA-2.

5. SMT. SHANKUNTLA DEVI,
W/O LATE SH. DHIAN SINGH, R/O

FLAT NO. 67, BLOCK 4, SECTOR 1,
LANE V, NEW SHIMLA, SHIMLA-9.

6. SMT. SANTOSH CHAUHAN, W/O
SH. MEGH SINGH CHAUHAN R/O
GOVERNMENT QUARTERS, NEAR
PETROL PUMP, VIKAS NAGAR,
SHIMLA-9.

7(a-2) PONAM KANWAR,
D/O SH. KRISHAN KUMAR, R/O 20
HOUSING BOARD COLONY
KANGRA, DISTRICT KANGRA,

7(a-3) RITU CHANDEL,
D/O SH. KRISHAN KUMAR, W/O
JOGINDER CHANDEL, R/O
CHATROKNDI CHOWAK,
SUNDERNAGARM, MANDI,
DISTRICT MANDI, H.P.

7(a-4) BHANU,
D/O SH. KRISHAN KUMAR, WIFE
OF MURARI SHARMA, R/O
HOUSING BOARD COLONY, 68,
VIKAS NAGAR, SHIMLA.

7(a-5) DEEPA,
D/O SH. KRISHAN KUMAR, C/O
RAJESHWARI DEVI, R/O VILLAGE
ANNI, DHALASSH, KULLU, H.P.

7(a-6) CHETNA,
D/O SH. KRISHAN KUMAR C/O
RAJESHWARI DEVI, R/O VILLAGE
ANNI, DHALASSH, KULLU, H.P.

7(a-7) RAJESHWARI DEVI,
WIFE OF SH. KRISHAN KUMAR,
R/O VILLAGE ANNI, DHALASSH,
KULLU, H.P. ....RESPONDENTS

(BY SH. VIVEK SHARMA, ADVOCATE
FOR RESPODNENT No. 1.)

(NONE FOR RESPONDENT NO. 2,
THOUGH REPRESENTED THROUGH
GAUTAM SOOD, ADVOCATE.)

(SH. VIVEKA NAND, ADVOCATE, FOR
RESPONENTS No. 3, 5, 7(a-2) to 7(a-7).

(RESPONDENT NO. 4 STANDS DELETED VIDE
ORDER DATED 24.3.2021.)

(NONE FOR RESPONDENT NO. 6)

RESPONDENT NO. 7(A-1) IS NONE ELSE, BUT
PETITIONER.)

CIVIL REVISION No. 11 OF 2017
DECIDED ON:27.08.2021

Code of Civil Procedure, 1908- Order 9 Rule 7 - It is settled that a party who has been proceeded ex-parte has a right to join proceedings at later stage anytime if the said party does not press for restoring of the proceedings to its original position when such party was proceeded exparte- in case of prayer to restore the stage of date of proceeding exparte such party has to establish sufficient cause with satisfactory explanation for absence and exercise of due diligence and caution on its part in pursuing the cause- joining at later stage at any point does not revive the right of such party which stands extinguished for absence without good cause.

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

O R D E R

In sequel to order dated 24.8.2021, learned counsel for the petitioner submits that he has instructions to communicate that petitioner would be contended if he is permitted to join the proceedings before the Rent Controller henceforth, after setting aside the impugned ex parte order passed against him without restoring the proceedings to the stage when he was proceeded *ex parte.*

2. Learned counsel for respondent No. 1 has no objection for allowing the petitioner to join the proceeding henceforth, however, he has submitted that direction be given to learned Rent Controller to decide the rent petition in a time bound manner as it is at final stage of arguments.

3. It is settled that a party, who has been proceeded *ex parte,* has a right to join proceedings at later stage any time if the said party does not press for restoring of the proceedings to its original position/stage when such party was proceeded *ex parte.* In case of prayer to restore the stage of date of proceeding *ex parte,* such party has to establish sufficient cause with satisfactory explanation for absence and exercise of due diligence and caution on its part in pursuing the cause which is missing in present case. Joining at later stage at any point does not revive the right of such party which stands extinguished for absence without good cause.

4. In view of above, petition is disposed of by allowing the petitioner to join the proceeding before Rent Controller in Rent Petition No. 22/2 of 2014, titled Dinesh Bindal Vs. Raj Kumar and others henceforth from the stage where it is. It is informed that petition is at arguments stage.

5. Needless to say that keeping in view the fact that petition is pending since 2014 and it is at the stage of arguments, it is expected from the Rent Controller to make all endeavours to decide it as expeditiously as possible, preferably by 30.11.2021, for seniority of the petition.

6. Parties are directed to appear before learned Rent Controller, Shimla (Senior Civil Judge Shimla) on 15th September, 2021, the date already fixed by the said Court. No fresh notice shall be issued to the parties by the learned Rent controller and for absence of party(ies), matter shall not be adjourned.

Petition stands disposed of in aforesaid terms, so also pending applications, if any. Interim shall stand vacated.

Record be sent back immediately.

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

Between:-

SUSHIL KUMAR SON OF SH. JAGDISH CHAND,
RESIDENT OF VILLAGE TUKHANI, P.O. BANI,
TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P.
TEHSIL AND DISTRICT, SHIMLA, H.P.

…PETITIONER

(BY SH. ADARSH K. VASHISTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH ITS PRINCIPAL SECRETARY (EDUCATION)
TO THE GOVERNMENT OF H.P. SHIMLA-171002.

2. THE DIRECTOR, HIGHER EDUCATION, HIMACHAL PRADESH, SHIMLA, H.P.

….RESPONDENTS.

SH. ASHOK SHARMA, ADVOCATE GENERAL, WITH SH. VINOD THAKUR, SH. HEMANSHU MSRA, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALS AND SH. BHUPINDER THAKKUR, DEPUTY ADVOCATE GENERAL, FOR THE RESPONDENTS.)

CIVIL WRIT PETITION ORIGINAL APPLICATION No. 5698 of 2019
DECIDED ON: 21.08.2021

Constitution of India, 1950 – Article 226 - The petition for direction to allow benefit of counting of service rendered by petitioner as Lecture (school cadre) till his joining as Assistant Professor College cadre and protection of pay last drawn by him as Lectures (school cadre) on joining new post of Assistant Professor (college cadre) and for all service benefits- petitioner appointed as lecture in school cadre- Petitioner applied and participated in selection process conducted by HP Public Service Commission- declared successful for post of Assistant Prof. (College Cadre) Petitioner was offered appointment requiring him to join in government college Seraj within 7 days of notification. Petitioner after declaration of result made a representation to the Secretary Education for protection of his salary which remained undecided- in meantime offer of appointment was made to him petitioner instead of accepting appointment approached H P Administrative Tribunal along with prayer for interim relief and tribunal passed the order to the effect that competent authority may consider to extend the time for joining by the applicant and further to consider prayer for pay protection within a reasonable time frame after affording opportunity of being heard. The order was though extended till 31.3. 2016. Thereafter no order came to be passed on the interim application. Ld. Tribunal had not issued any positive command directing the respondents to extend the time for joining- on 23.2.2016- Addl. Chief Secretary vide notification has withdrawn the offer of appointment to petitioner on account of his failure to join within stipulated time –Held- Once the petitioner did not accept the offer of appointment made to him, he lost whatever cause of action he had, to agitate his claim by way of present petition. The relief of protection of pay and entitlement to post service benefits have lost relevance with the decision of petitioner not to accept the offer of appointment - The challenge to the withdrawal of offer of appointment laid by petitioner is also without any merit

- Petitioner consciously had opted to participate in the selection process for post of Assistant Prof. (College Cadre) after having gone through the terms of advertisement inviting applications - No promise was held out in the advertisement to persons already in employment as regard any benefit being available to him in lieu of their past employment in order to claim benefit of F. R 22 (1) (a) (1) petitioner was required to at least to accept the appointment and to claim benefit of Rule 26 of CCS (Pension Rules, he had to tender resignation as minimum requirement. had he accepted the offer of appointment, he may have continued to have cause of action. The respondents could not have waited for the petitioner in perpetuity. More over Ld Tribunal had not considered it to be proper case to grant interim relief to petitioner - The plea of petitioner of non consideration of his representation cannot be ground to set aside the notification whereby respondents had withdrawn the offer of appointment. Petitioner could not have put precondition for his appointment to employer - The respondents were under no obligation to have decided the representation of petitioner before withdrawal of offer of appointment - Petition dismissed.

This petition coming on for admission this day,

***Hon'ble Mr. Justice Satyen Vaidya**, passed the following:*

O R D E R

CMP-T No. 2521 of 2019

The amendment sought by way of the instant application has been necessitated as a result of development that has taken place during the pendency of the petition. Thus, the amendment as prayed, is allowed.

CWPOA No. 5698 of 2019

2. By way of instant petition, petitioner has prayed for the following substantive relief:

i) That the respondents may kindly be directed to allow the benefit of counting of service rendered by the applicant as Lecturer, Sociology, (School Cadre) w.e.f. 12.11.1999 upto the date of his joining as Assistant Professor, Sociology (College Cadre) and he may also be allowed protection of pay last

drawn by him as Lecturer ((SchoolCadre) on the joining the new post of Assistant Professor, Sociology (College Cadre), Class-I, (Gazetted) for all service benefits.

3. Petitioner was appointed as Lecturer in Sociology (School Cadre) on 12.11.1999. Petitioner accepted the appointment and worked in the said capacity. On 22.7.2014, Himachal Pradesh Public Service Commission invited applications for the post of Assistant Professor (College Cadre), Class-I (Gazetted)(on contract basis), in the subject of Sociology. Petitioner applied and participated in the selection process. On 22.6.2015, result of successful candidates was declared. Petitioner was also selected for the post of Assistant Professor, Sociology (College Cadre).

4. Petitioner was offered appointment to the post of Assistant Professor, Sociology (College Cadre), vide notification dated 15.9.2015, requiring him to join at Govt. College, Seraj at Lambathach within seven days from the date of notification.

5. Petitioner after declaration of the list of successful candidates on 22.6.2015 by the Himachal Pradesh Public Service Commission, had made a representation to the Secretary (Education), Government of Himachal Pradesh for protection of his salary. The representation of petitioner remained undecided and in the meantime, the offer of appointment dated 15.9.2015, as noted above, was made to him.

6. Petitioner, instead of accepting the appointment, approached the H.P. Administrative Tribunal by way of Original Application No. 3551 of 2015 by presentation of the petition on 21.9.2015. In the Original Application, petitioner had made prayer for interim relief in the following terms:

"**8. Interim Relief, if prayed for:**

> *That during the pendency of the present Original Application, the respondents may kindly be directed to extend the joining time of the applicant which is going to expire on 22.9.2015, or in the alternative the respondents may be ordered to keep one post vacant for the applicant during the pendency of the Original Application."*

7. On 22.9.2015, while considering the prayer for interim relief, learned Tribunal passed the following order:

> *"4. Prayer for interimrelief can be considered only to the extent that the respondents/competent authority may consider to extend the time for joining by the applicant as Assistant Professor (College Cadre) on contract, for which deadline is expiring as on today (22.9.2015), by another week, or say upto 30th September, 2015. Ordered accordingly. The prayer of the applicant for pay protection as embodied in representation dated 6.7.2015 submitted by him to the Secretary (in fact Additional Chief Secretary) (Education) to the Govt. of Himachal Pradesh may also be considered by the competent authority in accordance with rules/law within a reasonable timeframe, after affording an opportunity of being heard to the applicant, if so desired."*

8. This order came to be extended from time to time. In this sequence, on 02.03.2016 order was again extended till next date of hearing i.e. 31.3.2016. Thereafter, no order came to be passed on the interim application of petitioner. Be that as it may, learned Tribunal had not issued any positive command directing the respondents to extend the time for joining.

9. On 23.02.2016, the Additional Chief Secretary (Education) to the Govt. of Himachal Pradesh, issued notification whereby the offer of appointment made to the petitioner was withdrawn on account of his failure to join within stipulated time. Petitioner, by way of amendment in the petition, has sought additional relief in following terms:

"(i) (a) The impugned notification dated 23.2.2016 issued by the respondent No.1, Annexure A-9 may kindly be quashed and set-aside, qua the applicant."

10. We have heard learned counsel for petitioner and learned Additional Advocate General for the respondents/State.

11. It has been argued on behalf of the petitioner that he is entitled for the benefit of Fundamental Rule 22 (I) (a) (1) with respect to protection of his pay and also Rule 26 of the CCS (Pension Rules), 1972 for counting of past service as Lecturer (School Cadre). It has further been submitted that without deciding his representation, the order of withdrawal of appointment dated 23.2.2016 is wrong, illegal and needs to be set-aside.

12. Once the petitioner did not accept the offer of appointment made to him, he lost whatever cause of action he had to agitate his claim by way of present petition. The relief of protection of pay and entitlement to past service benefits have lost relevance with the decision of petitioner not to accept the offer of appointment.

13. The challenge to the withdrawal of offer of appointment laid by petitioner is also without merit. Petitioner consciously had opted to participate in the selection process for the post of Assistant Professor (College Cadre) in the subject of Sociology after having gone through the terms of advertisement inviting applications. No promise was held out in the advertisement to the persons already in employment as regards any benefits being available to them in lieu of their past employment.

14. In order to claim benefit of Fundamental Rule 22 (I) (a) (1), petitioner was required to atleast accept the appointment. Further, to claim benefit of Rule 26 of the CCS (Pension Rules), 1972, he had to tender resignation as

minimum requirement. Had he accepted the offer of appointment, he may have continued to have the cause of action.

15. The respondents could not have waited for the petitioner in perpetuity. Despite petitioner having claimed interim relief, he had failed to achieve the desired result, meaning thereby, that even the learned Tribunal had not considered it to be a proper case to grant interim relief to petitioner. As regards, the plea of petitioner with respect to non-consideration of his representation, in our considered view, it cannot be a ground to quash and set-aside the notification dated 23.2.2016 whereby the respondents had withdrawn the offer of appointment. Petitioner could not have put pre-conditions for his appointment to the employer. The respondents were under no legal obligation to have decided the representation of petitioner before withdrawal of the offer of appointment. As a matter of fact, the representation was made by petitioner even prior to the offer of appointment was extended to him and in such representation, he had only sought consideration for the protection of his pay in the previous cadre. There was no mention of the entitlement of petitioner to the benefit, if any, under Rule 26 of the CCS (Pension Rules), 1972, therefore, petitioner cannot be allowed to have this grievance by way of instant petition.

16. Accordingly, we find no merit in the instant petition and the same is dismissed, so also the pending miscellaneous application(s), if any, with no orders as to cost.

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

Between:-

HEM SINGH S/O SH. CHUNI LAL,
R/O VILLAGE KHANDLA, P.O. KUMMI,

TEHSIL BALH, DISTRICT MANDI, H.P.

.....PETITIONER

(BY SH. ABHIMANYU RATHOR,
MS. POONAM GEHLOT AND
SH. AJIT SHARMA, ADVOCATES)

AND

3. STATE OF HIMACHAL PRADESH,
THROUGH PRINCIPAL SECRETARY (FOOD,
CIVIL SUPPLIES & CONSUMER AFFAIRS)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA -2.

4. THE DIRECTOR, DIRECTORATE OF FOOD,
CIVIL SUPPLIES & CONSUMER AFFAIRS,
SDA COMPLEX, KASUMPTI,
SHIMLA – 9., H.P.
5. PUBLIC DISTRIBUTION COMMITTEE MANDI,
THROUGH ITS CHAIRMAN.
DEPUTY COMMISSIONER, DISTRICT MANDI, H.P.

DEPUTY COMMISSIONER, DISTRICT MANDI,H.P.
6. DISTRICT CONTROLLER, FOOD, CIVIL SUPPLIES
& CONSUMER SUPPLIES, DISTRICT MANDI,H.P.

7. MR. MANOJ KUMAR, THE THEN INSPECTOR,
FOOD, CIVIL SUPPLIES & CONSUMER AFFAIRS,
BLOCK BALH, TEHSIL BALH,
DISTRICT MANDI, H.P.
8. SMT. MANORAMA DEVI, W/O SH. LEKH RAM,
VILLAGE SATOH, P.O. RAJGARH,
TEHSIL BALH, DISTRICT MANDI, H.P.

....RESPONDENTS.

(SH.VINOD THAKUR, MR. SHIV PAL MANHANS,
ADDITIONAL ADVOCATE GENERALS AND

SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO. 1 TO 4.

SH. H.S. RANGRA, ADVOCATE, FOR RESPONDENT NO.6.)

CIVIL WRIT PETITION No. 3451 OF 2021
RESERVED ON :18.08.2021.
DECIDED ON :24.08. 2021.

Constitution of India, 1950 – Article 226 - Petitioner, a fair price shop holder in Khandla Panchyat and Respondent No.3 allotted another fair price shop to respondent No.6 in same Panchyat- Petitioner objected to above allotment being in violation of 2014 guidelines as neither the population nor distance criteria was adhered- Petitioner assailed allotment before respondent No.2 by preferring appeal, approached respondent no.1 under clause 17(1) (c) H.P specified articles (Regulation of distribution) Order, but were dismissed - Respondent No.1 dismissed the appeal on ground of limitation - Petitioner approached Hon'ble High Court in CWP and judgment of respondent No 1 was set aside after condoning the delay in filing appeal and the matter was remanded back- respondent No.1 again dismissed the appeal and petitioner again approached the Hon'ble High Court- Held- The order passed by respondent No.1 being bereft of any reasoning and nonspeaking on material issues is not sustainable - The order reflects complete non-application of mind by 2nd appellate Authority to the facts of case, violation of 2014 guidelines which appellate authority could have easily ascertain - The order is set aside with direction to decide the appeal afresh by passing reasoned order. Title: Hem Singh vs. State of Himachal Pradesh **(D.B.)** Page - 654

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

O R D E R

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

i) Issue a writ of certiorari to quash and set-aside the impugned orders/letters dated 14.10.2016 (AnnexureP-8), 05.10.2018 (Annexure P-15) and 19.02.2020 (Annexure P-18) thereof.
ii) Issue a writ of certiorari to quash and set-aside the impugned order dated 29.04.2021 thereof.
iii) *Issue directions for an independent authority to inquire into the allegations as described in the letter dated 18.8.2016 (Annexure P-7) for ascertaining responsibility among respondent and fixing liability thereupon.*

2. Petitioner is a Fair Price Shop holder in KhandlaPanchyat, Tehsil Balh, District Mandi, H.P.

3. The Government of Himachal Pradesh, Food, Civil Supplies and Consumer Affairs Department, vide notification dated 02.08.2014 has notified guidelines for opening of new Fair Price Shops, in supersession of all previous orders, instructions and guidelines, in compliance to Section 12 (2) (e), Section 24 (5) (c), Section 40 (2) (i) of the National Food Security Act, 2013 and also in compliance to H.P. Specified Articles (Regulation of Distribution) Order, 2003 (for short "2014 Guidelines").

4. Respondent No.3 allotted another Fair Price Shop to respondent No.6 at village Satoh in Gram Panchayat, Khandla, Tehsil Balh, District Mandi, H,P. on 19.12.2016 in pursuance to the decision taken to this effect in the meeting of respondent No.3 held on 27.10.2016.

5. Petitioner objected to the above noted allotment of Fair Price Shop at Village Satoh in favour of respondent No.6 on the grounds that the allotment was in violation of 2014 Guidelines. According to petitioner, neither the population nor distance criteria fixed in 2014 Guidelines was adhered. As contended by petitioner, respondent No.5 had inimical relations towards petitioner and numerous complaints filed by petitioner against respondent No.5 were pending. Respondent No.5, in order to settle the scores had

manipulated false reports and had provided incorrect data on the basis of which the case of allotment of Fair Price Shop in favour of respondent No.6 was wrongly processed. Respondent No.3 had wrongly sought relaxation in respect of distance norms from respondent No.2, which was also accorded in a mechanical manner without application of mind.

6. Petitioner assailed the allotment of Fair Price Shop at village Satoh, Tehsil Balh, District Mandi in favour of respondent No.6 before respondent No.2 by preferring an appeal under Clause 17 of the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2003. Respondent No.2 dismissed the appeal of petitioner vide order dated 5.10.2018. Petitioner further approached respondent No.1 under Clause 17 (1) (c) of the Himachal Pradesh Specified Articles (Regulations of Distribution) Order, 2003 and assailed before him order dated 5.10.2018 passed by respondent No.2. The Principal Secretary, (FCS&CA) to the Government of Himachal Pradesh (Respondent No.1) without touching the merits of the case, dismissed the appeal of petitioner merely on the ground that it was time barred.

7. Petitioner approached this Court by way of CWP No. 584 of 2019 and thereby assailed the order dated 16.1.2019 passed by respondent No.1. Learned Single Judge of this Court vide judgment dated 7.1.2020 allowed the petition filed by petitioner. Order dated 16.1.2019 passed by respondent No.1 was set-aside after condoning the delay in filing the appeal. The matter was remanded back to respondent No.1 for decision afresh in accordance with law.

8. Respondent No.1 again dismissed the appeal of petitioner vide order dated 19.2.2020 by holding as under:

"6. I have considered the arguments of both the parties and found that the Government vide letter dated 04.10.2016 had granted relaxation for

opening a fair price shop at Satoh. A careful reading of the order dated 5.10.2018 passed by the Appellate Authority-cum- Director, Food, Civil Supplies and Consumer Affairs, Himachal reveals very clearly that the approval was in fact necessitated by distance and for the ration card attached/registered with the present functioning adjacent Fair Price Shop. Hence, after completing all the codal formalities, the District Level Public Distribution Committee meeting was held on 19.12.2016 and on the basis of merit the District Level Public Distribution Committee has rightly approved the Fair Price Shop in favour of Respondent No.4.

7. In view of the above facts and circumstances of the case, I do not find any merit in the appeal and accordingly the same is dismissed."

9. Aggrieved against the order dated 19.02.2020 passed by respondent No.1, petitioner has approached this Court by way of instant petition.

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

11. Without touching the respective contentions of the parties, we propose to dispose of this petition only on the ground that the order dated 19.2.2020, passed by respondent No.1, being bereft of any reasoning and non-speaking on material issues is not sustainable. The impugned order dated 19.2.2020 reflects complete non-application of mind, by the 2nd Appellate Authority, to the facts of the case. There is nothing in the impugned order dated 19.2.2020 which may suggest that the 2nd Appellate Authority had applied its mind to the issues relating to violation of 2014 Guidelines while allotting Fair Price Shop to respondent No.6 in the same Panchayat area where petitioner had already existing Fair Price Shop. In our considered view, the violation, if any, of 2014 Guidelines could have been easily ascertained by the 2nd Appellate Authority from the respective assertions of the parties as well as the official records of the Department. Perusal of the impugned order

reveals that no such exercise was undertaken by the 2nd Appellate Authority and thus the impugned order is vitiated.

12. It is well settled that any order/decision, be it of administrative, quasi-judicial or judicial authority, needs to be supported by reasons. An order/decision without reasons is unacceptable in a legal system based on rule of law. In absence of reasons, it cannot be ascertained as to on what basis the order was passed.

13. A co-ordinate Bench of this Court vide judgment dated 3.3.2021 passed in ***CWP No. 1119 of 2021*** titled ***Babu Ram*** Vs. ***Himachal Pradesh University***, after discussing the legal position on the issue, has held as under:

> *"**7**. Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform the appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system.*
>
> ***11**. Arbitrariness in making of an order by an authority can manifest itself in different forms.* ***Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. Application of mind is best demonstrated by disclosure of mind by the authority making the order and disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority is clearly suggestive of the order being arbitrary hence legally unsustainable.***
>
> ***13. It is well settled that the orders made by the appellate authority must contain reasons for the conclusions reached.***

Reference in this regard can conveniently be made to the judgments rendered by the Hon'ble Supreme Court in R.P. Bhat vs. Union of India,AIR 1986 SC 1040 and Ram Chander vs. Union of India, AIR 1986 SC 1173."

14. Judging the impugned order dated 19.2.2020 at the touch-stone of above noted exposition of law, we have no hesitation in holding that the impugned order dated 19.2.2020 passed by the Appellate Authority-cum-Secretary, (FCS&CA) (respondent No.1) is wrong, illegal and arbitrary.

15. The writ petition is thus allowed. Consequently, the order dated 19.2.2020 passed by respondent No.1 is set-aside with direction to decide the appeal afresh by passing reasoned order in accordance with law.

16. The petition is disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

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

Between:-

SHRI CHETAN
SON OF SHRI PRITTAM CHAND,
RESIDENT OF VILLAGE GAGWAL,
POST OFFICE BHADROYA,
TEHSIL NURPUR,
DISTRICT KANGRA, HIMACHAL PRADESH

....PETITIONER/CLAIMANT

(BY MS DEVYANI SHARMA,
ADVOCATE)

AND

1. JAGROOP SINGH
SON OF SHRI DILER SINGH,
RESIDENT OF VILLAGE BABOWAL,
JAIL ROAD GURDASPUR,
DISTRICT GURDASPUR, PUNJAB
(DRIVER/CAR NO. PB-06F-0888)

(BY SH. ROOP LAL CHAUDHARY, ADVOCATE)

2. SHRI DALIP SINGH
SON OF SHRI PUNJAB SINGH,
RESIDENT OF VILLAGE CHHURIAN
BET, POST OFFICE JAGOWAL,
TEHSIL AND DISTRICT GURDASPUR,
(PUNJAB) (OWNER OF VEHICLE/CAR
NO.PB-06F-0888)

(BY SH. AJAY SHARMA, SENIOR ADVOCATE, ALONGWITH SH.RAKESH CHAUDHARY, ADVOCATE) ....RESPONDENTS

CIVIL REVISION NO. 87 OF 2019
Reserved on: 11.08.2021
Decided on: 26.08.2021

Code of Civil Procedure, 1908- Section 115 read with Order 9 Rule 8 - The Civil Revision against the order passed by Motor Accident Claims Tribunal where by Civil Misc application preferred by petitioner under section 5 of limitations Act for condonation for delay in filing application under order 9 Rule 8 CPC read with section 115 CPC for restoration of MACP Chetan vs. Jagroop has been dismissed- Held- finding returned by the MACT that there is nothing on record that application for

receiving copies of Zimni orders was filed on 19/12/2014 is perverse as is evident from stamp of copying agency affixed on back of order sheet that copy was applied on 19.12.2014 and proposed date of delivery of copy was not given as in stamp of copying against column it is mentioned as NA therefore plea of petitioner to this effect is substantiated by stamp of the copying agency. In order dated 25.4.2014, it is not clearly mentioned that where the case shall be taken on next date of hearing. Therefore by extending benefit of doubt in favour of the petitioner, balance of interest lies in his favour particularly keeping in view that claim petition has been filed under the beneficial provisions of legislation and therefore no benefit to the petitioner in getting his petition dismissed in default. Delay in filing the petition stands satisfactory explained by giving plausible satisfactory explanation, the finding of MACT are contrary to record and not sustainable. Order of MACT is set aside and to decide the application under order 9 rule 4 & 8 CPC in light of observations.

Cases referred:

B.S. Sheshagiri Setty and others vs. state of Karnataka and others, (2016) 2 SCC 123;

Dhiraj Singh (Dead) through Legal Representatives and others vs. State of Haryana and others, (2014) 14 SCC 127;

Land Acquisition, Anantnag v. Mst. Katiji, (1987) 2 SCC 107;

Mahendra Rathore vs. Omkar Singh and others, (2002) 10 SCC 673;

Oriental Aroma Chemical Industries Limited vs. Gujarat Industrial Development Corporation and another, (2010) 5 SCC 459;

S. Ganesharaju (Dead) through LRs. Vs. Narasamma (Dead) through LRs. And others, (2013) 11 SCC 341;

State of Nagaland vs. Lipok AO and others, (2005) 3 SCC 752;

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

J U D G M E N T

Petitioner has approached this Court against order dated 10.04.2019, passed by the Motor Accident Claim Tribunal-II, (in short 'MACT') Kangra at Dharamshala, Circuit at Nurpur, H.P., in Civil Misc. Application No.13-N/IV/2015, titled as *Chetan vs. Jagroop Singh & another,* whereby application preferred by the petitioner under Section 5 of the Limitation Act (in short 'Limitation Act'), for condonation of delay in filing application under Order 9 Rules 4 and 8 of Civil Procedure Code (CPC), read with Section 151 of CPC, for restoration of MACP No.12-N/13/09, titled as *Chetan vs. Jagroop Singh etc.,* has been dismissed.

2. On 26.11.2009, petitioner had filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act') for compensation against respondents and Insurance Company, name whereof was to be disclosed by respondents, for suffering multiple injuries in a road accident caused by car being driven by respondent No.1, which was owned by respondent No.2. Petition remained pending adjudication before MACT-II at Dharamshala till 22.08.2013. Thereafter, it was transferred to Circuit Court of MACT-II at Nurpur and before Circuit Court, at Nurpur on 25.04.2014, it was adjourned for 09.05.2014 in presence of learned counsel for parties. Order dated 25.04.2014 reads as under:-

> "25.04.2014
> Present:- Sh.Sachit Sharma Ld.Advocate vice for the petitioner.
>
> Sh.Pankaj Chauhan Ld. Advocate for respondent.
>
> Reply to the application under order 6 Rule 17 CPC read with order 1 Rule 10 CPC and section 151 not filed. Time prayed. Considered and allowed. Now for reply and consideration file be listed on 9.5.2014."

3. Record reveals that on 09.05.2014, it was taken up by the MACT-II at Dharamshala and for non representation of and on behalf of the petitioner, it was dismissed in default.

4. It is case of the petitioner that petitioner belongs to Village falling in jurisdiction of Nurpur and, therefore, case was transferred to Circuit Court at Nurpur and was pending adjudication at Nurpur till 25.04.2014 on which date it was adjourned for 09.05.2014 and in the order dated 25.04.2014 it was nowhere mentioned that on 09.05.2014 case would be listed at Dharamshala and, therefore, petitioner and his learned counsel were under the impression that case was to be listed at Nurpur in Circuit Court. However, on 09.05.2014, petitioner on reaching Court at Nurpur had found that there was no Circuit Court at Nurpur and on inquiry from the Advocate, he was informed that now as and when Circuit Court would be available at Nurpur, the case would be taken and notice of next date of hearing would be issued and, therefore, petitioner was advised to wait and as such kept on waiting, but ultimately when no notice was received till December 2014, petitioner approached learned counsel again, whereupon, on inquiry, it transpired that petition had been taken up for hearing at Dharamshala on 09.05.2014 and was dismissed in default for non appearance of and on behalf of the petitioner and on the very same day i.e. 19.12.2014 when it came in notice copy of order sheet was applied which was attested and ready on 23.02.2015, but no proposed date of delivery of copy was given by the Copying Agency as also evident from the stamp of Copying Agency, the copy was received on 23.03.2015 and thereafter applications under Order 9 Rules 4 and 8 CPC and under Section 5 of Limitation Act were prepared on 31.03.2015 and filed on 02.04.2015.

5. Points for determination were framed on 08.06.2017 and after examination of witnesses by the parties, application under Section 5 of

Limitation Act was dismissed on 10.04.2019 which has been assailed in present petition.

6. Learned counsel for the petitioner has submitted that petitioner, after filing claim petition on 26.11.2009, was continuously pursuing the same for five years, till the time when it was dismissed in default. Petitioner had received injuries, for treatment whereof he had also incurred expenditure and suffered losses, and for recovery whereof, claim petition was preferred by him and, therefore, there was no reason for the petitioner for not appearing or to remain absent deliberately or intentionally as he was not going to be benefited in any manner by getting his petition dismissed in default.

7. It is also submitted by learned counsel for the petitioner that even if it is considered that learned counsel for the petitioner was well versed about the fact that when there was no Circuit on 09.05.2014 at Nurpur, petition would be taken up at Dharamshala, then also, no negligence or dereliction of duties can be attributed on the part of the petitioner, who is agitating for just and fair compensation since 2009 and for any fault on the part of the Advocate, petitioner should not suffer particularly keeping in view the provisions of Section 166 in beneficiary legislation M.V. Act and for the reason that on receipt of information of accident and details of victims by the MACT, a notice is sent to the victims by the MACT informing and calling them to pursue their claim under the M.V. Act, if any.

8. It is submitted by learned counsel for the petitioner that the MACT has misappreciated and misread the evidence, including statements of the petitioner and RW-1 Jagroop Singh and further that findings returned by the MACT, that there is nothing on record to infer the actual date of submission of application for copies of zimini orders, are also perverse as from the stamp of the Copying Agency the date of application as 19.12.2014 is very much evident.

9. Learned counsel for the petitioner has submitted that procedural Rules are handmaid and they should be applied for doing substantial justice by adopting pragmatic justiceable approach particularly in proceeding under beneficial legislation like M.V. Act.

10. To substantiate her plea, learned counsel for the petitioner has relied upon various pronouncements in ***State of Nagaland vs. Lipok AO and others, (2005) 3 SCC 752; Oriental Aroma Chemical Industries Limited vs. Gujarat Industrial Development Corporation and another, (2010) 5 SCC 459; S. Ganesharaju (Dead) through LRs. Vs. Narasamma (Dead) through LRs. And others, (2013) 11 SCC 341; Dhiraj Singh (Dead) through Legal Representatives and others vs. State of Haryana and others, (2014) 14 SCC 127; B.S. Sheshagiri Setty and others vs. state of Karnataka and others, (2016) 2 SCC 123;*** and ***Mahendra Rathore vs. Omkar Singh and others, (2002) 10 SCC 673.***

11. Mr.Ajay Sharma, learned Senior Counsel, under instructions, has vehemently opposed the petition and has submitted that on 25.04.2014, next date of hearing 09.05.2014 was fixed in presence of the petitioner and his learned counsel and dates of Circuit of the Court are circulated well in advance a month earlier to the Circuit and, thus, it was within the knowledge of the Advocate of the petitioner that on 09.05.2014 there was no Circuit at Nurpur implying that the next date of hearing as 09.05.2014 was fixed for taking up the matter at Dharamshala. He has further submitted that there is unambiguous admission on the part of the petitioner that he was present in the Court on 09.05.2014 at Dharamshala, but he had not opted to appear in the Court and, therefore, he is not entitled for revival of claim petition. It has further been submitted that even if it is considered that it was not in the knowledge of the petitioner that case was fixed at Dharamshala, then also petitioner remained sleeping till December 2014 and even after having knowledge of dismissal of petition in December 2014, application for

restoration was filed in April 2015 and there is nothing on record to explain the inordinate delay in filing the application for restoration of claim petition. It has further been submitted, in the facts and circumstances of the case, that the law cited on behalf of the petitioner is of no help to the petitioner.

12. It is further submitted on behalf of respondent No.2 that substantive law is that application made after prescribed period shall be dismissed as provided under Section 3 of the Limitation Act. Whereas, Section 5 is a discretion conferred upon the Courts to condone the delay for sufficient cause and in present case, no sufficient cause has been proved on record. Therefore, there is no scope of interference in the impugned order.

13. Mr.Roop Lal Chaudhary, learned counsel, for respondent No.1, adopting arguments advanced on behalf of respondent No.2, has justified the findings returned by the MACT-II by referring reasons assigned for that in the impugned order.

14. In the pronouncement of Supreme Court referred by the petitioner in ***Lipok AO's case*** supra, it has been held that pragmatic approach has to be adopted, and when substantial justice and technical approach are pitted against each other former has to be preferred. The proof of sufficient cause is a condition precedent for exercise of extra ordinary discretion vested in the Court and it is not the length of the delay which counts but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using discretion and Section 5 of the Limitation Act is to be construed liberally so as to do substantial justice to the parties which contemplates that Court has to consider the reasons adduced for causing delay are plausible and sufficient.

15. In ***Oriental Aroma Chemical Industries Limited's case*** supra, it has been held as under:-

> "14. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not

> prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.
>
> 15. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate - *Collector, Land Acquisition, Anantnag v. Mst. Katiji, (1987) 2 SCC 107, N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123 and 9 Vedabai v. Shantaram Baburao Patil, (2001) 9 SCC 106*."

16. In ***S. Ganesharaju's case*** supra, the Supreme Court has observed as under:-

> "The expression "sufficient cause" as appearing in Section 5 of the Limitation Act, 1963, has to be given a liberal construction so as to advance substantial justice. Unless the respondents are able to show mala fides in not approaching the court within the period of limitation, generally as a normal rule, delay should be condoned. It has also been observed that the rules of limitation are not meant to destroy or foreclose the right of parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly."

17. In ***Dhiraj Singh's case*** supra, the Supreme Court while referring ***Land Acquisition, Anantnag v. Mst. Katiji, (1987) 2 SCC 107,***

has held that substantive rights should not be allowed to be defeated on technical grounds by taking hypertechnical view of self-imposed limitations, rather approach of the Court has to be pragmatic and not pedantic. The Supreme court has reiterated the same by referring another pronouncement as under:-

> "16. The principles regarding condonation of delay particularly in land acquisition matters, have been enuncitiated in *Collector, Land Acquisition, Anantnag v. Mst. Katiji, (1987) 2 SCC 107,* wherein it is stated in para 3 as under: (SCC p. 108)
>
> > "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on *'merits'.* The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice— that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:
> >
> > (1) Ordinarily a litigant does not stand to benefit of lodging an appeal late.]
> >
> > (2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
> >
> > (3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

> (4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
>
> (5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
>
> (6) It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.""
>
> (emphasis in original)

18. In ***B.S. Sheshagiri Setty and others' case*** supra, it has been observed that when justice is at stake, then a technical or pedantic approach should not be adopted by the Courts to do justice when there is miscarriage of justice caused to a public litigant.

19. In ***Mahendra Rathore's case*** supra, it has been observed by the Supreme Court that in matters of claim petitions under MACT, justice-oriented and not too technical or pedantic approach is expected to be adopted by the Courts particularly when the application sought to be restored is in a claim case arising out of a motor accident, as refusal to restore the claim petition, occasions failure of justice particularly when reasons for delay moving applications for restoration are there.

20. A Coordinate Bench of this Court in CMPMO No.14 of 2015, decided on 19.06.2015, titled as *Neelam Kumari vs. Jogender Singh and others,* after referring various pronouncements of Supreme Court, has concluded that it is error on the part of Court to dismiss the application solely on the ground of delay without taking into consideration the humanist rule

that procedure should be the handmaid, not the mistress of legal justice and it always vested with the residuary power to act ex debito justitiae where otherwise it would be wholly inequitable.

21. Findings returned by the MACT that there is nothing on record that application for receiving copies of zimini orders was filed on 19.12.2014 is perverse as it is evident from the stamp of Copying Agency affixed on the copy of order sheet Ex.AW.1/B that copy was applied on 19.12.2014 and proposed date of delivery for the copy was not given as in the stamp of Copying Agency against clause (g) it is mentioned as NA. Therefore, plea of the petitioner that application was filed on 19.12.2014 and no date of delivery was given by the Copying Agency is substantiated by stamp of the Copying Agency. Perusal of statement and cross-examination of petitioner (AW-1) reflects that MACT (II) has picked a sentence in isolation and has used it against the petitioner. Whereas, it was in continuation of earlier sentence wherein petitioner had accepted the suggestion put to him that it was correct that his Advocate had been giving him a slip of next date of hearing with further statement that after 25.04.2014 he had to appear on 09.05.2014 at Nurpur and on 09.05.2014 he had come to the Court. Therefore, his deposition that he had come to the Court on 09.05.2014 is with reference to his presence in the Nurpur Court as in the previous lines he has clearly stated that he had appeared in Court at Nurpur on 09.05.2014. Though, in his statement RW-1 Jagroop Singh has stated that petitioner was present in the Court at Dharamshala on 09.05.2014 but had not appeared deliberately and intentionally in the Court is also an afterthought and deserves not to be taken into consideration as in the reply filed by and on behalf of the said witness, no such plea was ever taken even remotely and, therefore, statement in absence of pleadings deserves to be discarded particularly in the light of statement of petitioner.

22. In order dated 25.04.2014, it is not clearly mentioned that where the case shall be taken on next date of hearing. Therefore, by extending

benefit of doubt in favour of the petitioner, balance of interest of justice lies in his favour particularly keeping in view that claim petition has been filed under the beneficial provisions of legislation and there was no benefit to the petitioner in getting his petition dismissed in default and in not filing application for restoration thereof even after having knowledge thereof.

23. In the light of pronouncements of the Supreme Court and Coordinate Bench of this Court and considering facts and circumstances of the case, I am of the considered opinion that delay in filing the petition stands satisfactorily explained by giving plausible and satisfactory explanation and, findings returned by the MACT–II, Kangra at Dharamshala, Circuit at Nurpur, H.P., are contrary to record and not sustainable. Accordingly, order dated 10.04.2019 is set aside and application filed under Section 5 of the Limitation Act alongwith application filed under Order 9 Rules 4 and 8 CPC are directed to be registered in the MACT-II with direction to the MACT to adjudicate the same in the light of observations made hereinabove as expeditiously as possible on or before 30.11.2021.

24. Parties are directed to appear before the MACT-II on 10.09.2021 at Nurpur.

25. Records be returned.

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

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

1. CRIMINAL MISC. PETITION (MAIN) No.811 of 2021

Between

JITENDER KUMAR
S/O SHRI DAULAT RAM VERMA,
R/O VILLAGE GULOO,
POST OFFICE JAIS,

TEHSIL THEOG,
DISTRICT SHIMLA,
HIMACHAL PRADESH.

……PETITIONER

(BY SHRI MOHAN SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

……RESPONDENT

(BY SHRI DINESH THAKUR,
ADDITIONAL ADVOCATE GENERAL)

2. CRIMINAL MISC. PETITION (MAIN) No.812 of 2021

Between

SANJEEV KUMAR
S/O SHRI DAULAT RAM VERMA,
R/O VILLAGE GULOO,
POST OFFICE JAIS,
TEHSIL THEOG,
DISTRICT SHIMLA,
HIMACHAL PRADESH.

……PETITIONER

(BY SHRI MOHAN SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

……RESPONDENT

(BY SHRI DINESH THAKUR,
ADDITIONAL ADVOCATE GENERAL)

3. CRIMINAL MISC. PETITION (MAIN) No.813 of 2021

Between

PANKAJ
S/O SHRI RAMLAL,
R/O VILLAGE BAGANAL,
POST OFFICE PARALA,
TEHSIL THEOG,
DISTRICT SHIMLA,
HIMACHAL PRADESH.

……PETITIONER

(BY SHRI MOHAN SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

……RESPONDENT

(BY SHRI DINESH THAKUR,
ADDITIONAL ADVOCATE GENERAL)

4. CRIMINAL MISC. PETITION (MAIN) No.814 of 2021

Between

SANJAY
S/O HEM PRAKASH SHARMA,
R/O VILLAGE & POST OFFICE BHARANA,
TEHSIL THEOG,
DISTRICT SHIMLA,
HIMACHAL PRADESH.

……PETITIONER

(BY SHRI MOHAN SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

……RESPONDENT

(BY SHRI DINESH THAKUR,
ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) No.811 of 2021
DATED: 19.08.2021

Code of Criminal Procedure, 1973 – Section 438 - The petition under section 438 Cr. P.C. in case FIR- 23/2021 under section 420, 467, 468, and 471 IPC with the allegations that petitioners Jitender, Sanjeev approached bank for grant of home loan of Rs. 15,00000/- for purchase of property - Bank agreed to grant home loan in order to secure loan, they mortgaged their property and deposited sale deed - When bank official visited the property, it was found that the borrowers had sold all flats confirmed by Bank's Advocate that said sale deed was not found registered with Registrar. They also approached bank for grant home loan to the tune of Rs. 20,00,000/- for completing semi furnished house by depositing mortgaged deed which was found forged - Petitioner Sanjay in Connivance with petitioner Jitender, Sanjeev approached Bank for Rs. 20,00,000/- for purchase for entire RCC floor on depositing sale and mortgage deed but property in the deeds are not in names of borrower. Petitioner Pankaj in connivance with Petitioner Jitender and Sanjeev approached bank for loan of Rs. 20,00,000/- for purchase of semi furnished flat on deposit of sale deed, but same was not found neither sale deed belonging to petitioner Pankaj nor the mortgage deed was in existence - The petitioners in order to cheat the bank of its public money prepared false documents - Held - Considering the facts and parameters necessary to be considered for adjudication of anticipatory bail under section 438 Cr.P.C , in view of evidence, it is not a fit case for continuation of bail under section 438 Cr.P.C- Petition dismissed.

Cases referred:

Bhadresh Bipinbhai Sheth v. State of Gujarat and another, (2016) 1 SCC 152;
Dataram Singh v. State of Uttar Pradesh and another, (2018) 3 SCC 22;
Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others, (2017) 16 SCC 775;
Freed and other connected matters v. State, 2020(4) Shim.LC 1614;

Gurbaksh Singh Sibbia & others v. State of Punjab, (1980) 2 SCC 565;
Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565;
Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim.LC 860;
P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;
Prem Giri v. State of Rajasthan, (2018) 12 SCC 20;
Prem Giri v. State of Rajasthan, (2018) 6 SCC 571;
Savitri Agarwal and others v. State of Maharashtra and another, (2009) 8 SCC 325;
Siddharam Satlingappa Mhetre v. State of Maharashtra and others, (2011) 1 SCC 694;
State of Sandeep v. State of Himachal Pradesh, 2019(1) Shim.LC 263;
Sushila Aggarwal & Others v. State (NCT of Delhi) & another, (2020) 5 SCC 1;

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

J U D G M E N T

Petitioners, in all the aforesaid petitions, have approached this Court for grant of anticipatory bail, under Section 438 of the Code of Criminal Procedure (for short 'Cr.PC), in case FIR No.23 of 2021, dated 3.3.2021, registered under Sections 420, 467, 468 & 471 of the Indian Penal Code (for short 'IPC'), in Police Station East, Shimla.

23. Status Report stands filed, wherein it is stated that Shri Navin Kumar Patial, Branch Manager of State Bank of India, Panthaghati (Shimla), presented an application/ to the police, stating therein that on 8.12.2015, petitioners Jitender Verma and Sanjeev Kumar approached State Bank of Bikaner and Jaipur (now after merger, State Bank of India) and made a request for grant of Home Loan of `15,00,000/- for purchase of property, and that request of these petitioners was considered by the Bank and the Bank agreed to grant Home Loan on the terms and conditions as stipulated in the Sanction Letter. Thereafter, in order to secure the loan, these petitioners mortgaged their property and deposited original title document, i.e. Sale Deed,

registered vide registration No.2698, vide which equitable mortgage has been created, and the bank sanctioned the land and asked these two petitioners to execute registered mortgage deed also, on which they deposited mortgage deed registered vide registration No.8890. When bank official visited the property, he found that the borrowers had sold all the flats in the property and same was confirmed by the Bank's Empanelled Advocate in his title investigation report that said sale deed was not found registered with sub Registrar, Shimla.

24. It is stated in the Status Report that the aforesaid two petitioners had also approached the aforesaid Bank, on 15.6.2015, and made a request/applied for grant of Home Loan of `20,00,000/- for completion/finishing of semi-finished house, which was sanctioned on the terms and conditions mentioned in the Sanction Letter, and for the purpose supplied and deposited mortgage deed registered in the office of Sub Registrar Theog, vide Registration No.479, but, on inquiry, the said mortgage deed was found to be forged and fabricated document.

25. It has been stated that petitioner Sanjay, in connivance with petitioners Jitender Verma and Sanjeev Kumar, on 28.12.2016, approached the aforesaid bank for grant of loan of `20,00,000/- for purchase of entire RCC frame structure of Ground Floor and Parking Floor of under construction building, which was sanctioned on the terms and conditions mentioned in the Sanction Letter, and for the purpose petitioner Sanjay deposited original sale deed with the bank, i.e. Sale Deed registered in the Office of Sub Registrar Shimla, vide registration No.2580 and also deposited Mortgage Deed registered in the Office of Sub Registrar Shimla vide Registration No.1625, but, on inquiry, it was found that the property mentioned in the deeds was not in the name of the borrower and it was also confirmed on inquiry from office of Patwari.

26. It is further stated in the Status Report that petitioner Pankaj also, in connivance with petitioners Jitender Verma and Sanjeev Kumar,

approached the aforesaid Bank on 23.2.2017 and applied for grant of loan of `20,00,000/- for purchase of semi-finished flat, which was sanctioned on the terms and conditions mentioned in the Sanction Letter, and for the purpose petitioner Pankaj deposited original Sale Deed, i.e. Sale Deed registered in the office of Sub Registrar Shimla, vide registration No.146 and thereafter also deposited Mortgage Deed, registered in the office of Sub Registrar Shimla, vide registration No.1676, but, on inquiry by the Empanelled Advocate of the Bank, it was found that neither the Sale Deed belonged to petitioner Pankaj nor the Mortgage Deed was in existence.

27. It is also in the Status Report that petitioner Sanjeev Kumar had also approached the aforesaid Bank on 20.9.2016, for grant of Home Loan of `20,00,000/-, which was sanctioned on the terms and conditions mentioned in the Sanction Letter, and for the purpose deposited original title deed with the Bank, i.e. Sale Deed registered in the Office of Sub Registrar Solan, vide registration on 2341, and, on inquiry, it was found that the property mentioned in the deed was not in the name of petitioner Sanjeev Kumar and that the document was found to have been false, fabricated and forged, prepared to cheat the Bank.

28. It is stated in the Status Report that the petitioners, in order to cheat the bank of its public money, prepared false and fabricated documents.

29. On the basis of the aforesaid application/complaint of the Branch Manager of the State Bank of India, Panthaghati (Shimla), FIR in question has been registered.

30. Petitioners had also applied for anticipatory bail before the Additional Sessions Judge (1), Shimla, and after obtaining interim bail, they had joined investigation, but said bail application was dismissed on 20.4.2021. Thereafter, the present applications have been filed and the petitioners have again joined the investigation.

31. As per Status Report, during interrogation, the petitioners disclosed that they are relatives of each other and are doing business of construction and selling of buildings and they were procuring loans on the basis of fabricated documents and such documents were got prepared by them through one Amit Kumar, but they did not disclose the permanent address of Amit Kumar but disclosed his mobile number only.

32. As per Status Report, on the basis of information collected, search of Amit Kumar was made in Tutu (Shimla) and during that search it came in the light that Amit Kumar had expired on 7.2.2019 at Zirakpur. According to Status Report, petitioners have concocted a false story to save themselves and necessity for their custodial interrogation has been pressed, in order to elucidate information with respect to fabrication of documents and Revenue Stamps and other persons involved in commission of crime.

33. Learned counsel for the petitioners has submitted that the investigation in the matter is almost complete and the petitioners are not required for interrogation, and, therefore, keeping in view that bail is rule and jail is exception, the petitioners may be enlarged on bail. Learned counsel has also submitted that the petitioners are the residents of State of Himachal Pradesh, there is no likelihood of their fleeing from justice, and in case they are released on bail, they undertake to abide by all the conditions that may be imposed upon them.

34. Learned Deputy Advocate General has submitted that the petitioners are involved in the case of cheating a Bank, by submitting documents to the Bank, which, on inquiry were found to be forged and fabricated, and thereby they have cheated the Bank of huge public money. He has also submitted that in case the petitioners are released on bail, there is every possibility of their fleeing from justice and it would be very difficult to apprehend them. So, the learned Additional Advocate General has prayed for dismissal of the bail application

35. Undoubtedly, as pleaded by learned counsel for the petitioner, bail is rule and jail is exception. But, at the same time, this rule does not mean that in every case bail is to be granted in all eventualities. The Supreme Court, in its various pronouncements, as also referred by this Court in ***State of Sandeep v. State of Himachal Pradesh,*** reported in **2019(1) Shim.LC 263**, has culled out various factors and parameters to be taken into consideration at the time of deciding the bail applications, which also include denial of bail based on those factors and principles. The general rule 'bail but not jail' cannot be used as a weapon to render the provisions, empowering the Court to reject the bail redundant, and/or as a guiding factor to enlarge an accused on bail, in every case.

36. The Supreme Court has considered the right to pre-arrest bail, provided under Section 438 Cr.PC, and factors and parameters to be taken into consideration by the Courts, while accepting or rejecting a bail petition under Section 438 Cr.PC, in numerous cases, including ***Gurbaksh Singh Sibbia & others v. State of Punjab,*** **(1980) 2 SCC 565;** ***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;** ***Bhadresh Bipinbhai Sheth v. State of Gujarat and another,*** **(2016) 1 SCC 152;** ***Special Leave Petition (Criminal) Nos.7281 of 2017 and 7282 of 2017*****, decided on 19.1.2020,** titled a**s** ***Sushila Aggarwal & Others v. State (NCT of Delhi) & another,*** **(2020) 5 SCC 1 ;** ***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}****,** which have been referred in ***Freed and other connected matters v. State,*** reported in **2020(4) Shim.LC 1614.**

37. This Court in ***Freed's*** case supra has observed as under:

"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 considering 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.

.....

21. Dealing *with* the provisions of Section 438 Cr.PC, the Supreme Court in ***P. Chidambaram v. Directorate of Enforcement*, (2019) 9 SCC 24,** 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.)"**”**

38. In ***Mangal Singh Negi v. Central Bureau of Investigation,*** reported in **2021(2) Shim.LC 860,** this Court observed as under:

“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,*** **(2020) 5 SCC 1** cases and also in other pronouncements referred by learned counsel for CBI."

39. Considering the factors and parameters, necessary to be considered for adjudication of anticipatory bail under Section 438 Cr.PC, as propounded by the Supreme Court as referred by this Court in ***Freed's*** case (supra) and various other pronouncements of the Supreme Court, referred supra, but without commenting on merits of evidence produced before me, I find that it is not a fit case for continuation of bail under Section 438 Cr.PC.

40. Needless to say that petitioners have a right to approach the Court, under Section 439 Cr.PC, seeking regular bail. In such eventuality, such application shall be considered on the basis of its own merits, within parameters relevant for adjudication of that.

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

Petition is dismissed and disposed of.

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

CRIMINAL MISC. PETITION (MAIN) NO.1363 OF 2021

BETWEEN

KARAN KUMAR
S/O SHRI SURESH KUMAR,
VILLAGE KARIAN,
POST OFFICE BHADIAN-KOTHI,
TEHSIL & DISTRICT CHAMBA,
HIMACHAL PRADESH. ...PETITIONER

(BY SHRI ASHWANI KAUNDAL & SHRI RAHUL THAKUR, ADVOCATES)

AND

STATE OF H.P. ...RESPONDENT

(BY SHRI YUDHVIR SINGH, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) NO.1363 OF 2021
DATED: 19.08.2021

Code of Criminal Procedure, 1973 – Section 438 - The petition under section 438 Cr.P.C for Anticipatory bail in case FIR No. 25 of 2021 under section 6 POCSO Act, Section 363, 376 (2) IPC, with allegations that father of victim made a complaint that his daughter (victim) a student of Shastri College on 31.3.2021 at 11:30 am left the home with permission to bring personal articles but did not return back, suspecting that someone had kidnapped his daughter- prayer for action- on 14.7.2021. victim was recovered from the house of co-accused Sagar in Saharanpur -Victim alleged in her statement under section 164 Cr.P.C. that petitioner Karan who had come in contact with her on face book, had been blackmailing her and threatening her family- Karan also violated her person, had also photographed, video graphed her obscene and vulgar picture/video forcibly - Held - material placed before the court is sufficient to infer that accusation does not seem to have been made in present case with the object to injuring or humiliating the petitioner having him arrested. The affidavits being claimed by petitioner of victim and her mother exonerating the petitioner are matter of consideration by the I.O. or the trial court but not at the stage when investigation is pending - Investigation is in initial stage- Investigative agency for non-cooperation of petitioner has not been able to access to the face book which is necessary for completion of investigation- considering the factors and parameters necessary to be considered for adjudication of anticipatory bail under section 438 Cr.P.C. - this is not fit case for continuation of bail under section 438 Cr.P.C. - The petition dismissed.

Cases referred:

Bhadresh Bipinbhai Sheth v. State of Gujarat and another, (2016) 1 SCC 152;
Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others, (2017) 16 SCC 775;
Gurbaksh Singh Sibbia & others v. State of Punjab, (1980) 2 SCC 565;

Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565;
Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim. LC 860;
P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;
Prem Giri v. State of Rajasthan, (2018) 12 SCC 20;
Prem Giri v. State of Rajasthan, (2018) 6 SCC 571;
Savitri Agarwal and others v. State of Maharashtra and another, (2009) 8 SCC 325;
Siddharam Satlingappa Mhetre v. State of Maharashtra and others, (2011) 1 SCC 694;
State of Sandeep v. State of Himachal Pradesh, 2019(1) Shim.LC 263;
Sushila Aggarwal & Others v. State (NCT of Delhi) & another, (2020) 5 SCC 1;

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

J U D G M E N T

Petitioner has approached this Court, seeking anticipatory bail, under Section 438 of the Code of Criminal Procedure (for short 'Cr.PC'), in case FIR No.25 of 2021, dated 1.4.2021, registered under Sections 363, 376(2) of the Indian Penal Code (for short 'IPC') and Section 6 of Prevention of Children from Sexual Offences Act (for short 'POCSO Act') in Police Station Gohar, District Mandi, Himachal Pradesh.

42. Status Report stands filed. Record alongwith Call Detail Record (CDR) of petitioner was also produced, which was perused on 27.7.2021. Learned Deputy Advocate General was directed to retain photocopies of the relevant record, which have been made available to the Court.

43. As per Status Report, father of victim had approached Police Station Gohar, District Mandi, Himachal Pradesh, submitting a complaint, stating therein that his daughter (victim), a student of Shastri College Sundernagar (1st year), had been at home for holidays in her college. On 31.3.2021, at about 11.30 a.m., she left the home, after taking permission

from him, to bring some personal articles, but she did not come back. Search for her did not yield any result till 1.4.2021 nor any information could be received about her. Date of Birth of victim was disclosed as 31.5.2003. Suspecting that someone had kidnapped his daughter, prayer for action was made.

44. On the basis of aforesaid complaint, FIR was registered and on the basis CCTV Camera footage and CDR, persons in touch with the victim were also interrogated. During investigation, a post was received in the home of family of victim from Hansi (Haryana) and police had also searched for the victim at that place. Ultimately, after receiving a call from victim made to her family members on 13.7.2021, on 14.7.2021, the victim was recovered from the house of co-accused Sagar in Saharanpur and handed over to her mother.

45. As per Status Report, co-accused Sagar was brought to Mandi on 15.7.2021 and on the basis of evidence available against him, he was arrested on that day.

46. On 16.7.2021, statement of victim was recorded before Judicial Magistrate 1st Class, Gohar, District Mandi, Himachal Pradesh, under Section 164 Cr.PC, wherein the victim had disclosed that since the year 2020, she had been talking with one boy namely Karan (petitioner), belonging to Chamba but serving at Solan, who had come in her contact through FACEBOOK message sent by him. Though she had been refusing to meet him, but Karan had forced her. Thereafter, she had started meeting Karan Kumar occasionally. In January 2021, they had met at Sundernagar Bus Stand and thereafter had gone to a hotel, where Karan had violated her person so many times and had also photographed and videographed her obscene and vulgar pictures/videos forcibly. He had also taken password of her FACEBOOK account and had been threatening all her friends to not to call her and had been black-mailing her also by asking her not to talk with anybody, with threat otherwise to viral her photos and videos. She had asked Karan to marry her but Karan had

replied that she was characterless and, therefore, he could not marry her. At that time, she was not knowing that Karan was already married. He was black-mailing her continuously. On 29.3.2021, petitioner Karan was mounting pressure on her to visit Solan to meet him, failing which he was threatening to send the photographs and videos to her family members. She was frightened too much and, therefore, on 31.3.2021, she had left home by telling her father that she was going to Chail-chowk. By the time she reached Mandi, Karan had communicated her that he would not like to meet her and asked her to go back. It caused mental tension to her and she boarded a Bus for Haridwar. She was not having enough money. When she reached Chandigarh, she was weeping bitterly. By taking advantage of her state of mind, co-accused Sagar approached her in the Bus and asked what had happened, but despite inquiry by Sagar repeatedly she had stated that nothing had happened. She was short of money and out of anger she had also broken the SIM of her mobile and Sagar was asking her to accompany him. In such a situation, she, under fear, was not able to take decision and, thus, she accompanied Sagar, who had taken her to his home at Saharanpur and locked her. In the house, mother and brother of Sagar were there. Sagar had taken her phone and violated her forcibly. Once she had tried to run away, whereupon Sagar had beaten her and performed marriage with her forcibly. After marriage, one day on 13.7.2021, when there was no one at home, she had contacted her mother through mobile phone of Sagar and had disclosed about her whereabouts. Thereafter, police had reached there on 14.7.2021 and she was brought back. Lastly, she has stated that Karan had been black-mailing her and extending threats to her family members continuously and Sagar has also done wrong to her.

47. On 15.7.2021, victim was sent for medical examination to the hospital, but she had refused to undergo medical check-up and had given in writing to that effect on the Medico-Legal Certificate (MLC) in the presence of

Medical Officer. However, on 16.7.2021, victim had extended her consent for her medical check-up and, accordingly, she was medically examined in Civil Hospital Gohar.

48. During investigation, police has also taken in possession extract of register from River View Guest House, Sundernagar, which indicates that on 9.2.2021, petitioner Karan had stayed in that hotel from 9.2.2021 (2.30 p.m.) to 10.2.2021 (10.30 a.m.) with occupancy of two persons.

49. CDR of petitioner has also been produced on record, which indicates that during the period of 1.3.2021 to 31.3.2021, the petitioner had contacted the victim as many as 221 times through phone calls and messages. The timing of calls/messages is ranging from 1.26 am (midnight) to 11.47 (midnight).

50. Learned counsel for the petitioner has submitted that the victim and her mother have sworn-in affidavits before Magistrate 1st Class, stating therein that mental state of the victim was not in order since last one year and during this period she used to talk with people on social media and frequency of her talks with Karan was slightly more than others which caused some attraction between them, and on 9.2.2021 when Karan Kumar had stayed in a hotel at Sunderngar, she had gone there to meet him at about 2/3 O'clock and had returned at about 4 O'clock, and during this period no physical relation had developed. It has further been stated in the affidavits that after some time mental state of the victim deteriorated, due to which she left the home and during this, in the bus, she met with a person, who took her to Saharanpur, and when her mental state became somewhat normal she called her mother from the mobile phone of that boy and the police brought her from there and produced her in the Court. In the affidavits, it is further stated that victim was upset too much, due to which she had made a statement against Karan in the Court that he had violated her person, but nothing had happened between

them, only friendship talks were there and thereafter they neither met nor any talks had taken place.

51. It is further submitted by the learned counsel for the petitioner that the victim and her mother have themselves

stated in the affidavits that the petitioner had done nothing with the victim and the victim had made the statement because of her ill mental state. He has further submitted that since the 25 years old petitioner, serving the Police Department, is a married person having children, and resident of State of Himachal Pradesh, is not likely to flee away from justice, and that in case he is ordered to be released on bail he is ready to abide by any condition, which may be imposed upon him.

52. Learned Deputy Advocate General has submitted that petitioner Karan had first allured the minor victim, developed intimate relations and then compelled her to leave her home and, thereafter, refused to meet her, leaving no option to her, except to board a Bus for Haridwar, whereafter she became prey of co-accused Sagar and landed at Saharanpur and suffered at the hands of Sagar and episode suffered by victim is the result of omission and commission of the petitioner. He further submits that the prosecution has not been able to obtain the FACEBOOK account and contents thereof, for non-cooperation of the petitioner by not disclosing the same to the Investigating Officer. He has also submitted that the petitioner and, therefore, does not deserve any leniency or benefit of provisions of Section 438 Cr.PC, as it is not a case where ex-facie no case is made out against the petitioner or the material placed on record indicates that the petitioner has been falsely implicated in the case and further that the affidavits obtained from the victim and her mother, during investigation and during the period when petitioner is on interim bail, are not relevant at this stage as investigation is going on and it

indicates that the petitioner is able to mount pressure on the victim and her family to tamper with the evidence.

53. Undoubtedly, as pleaded by learned counsel for the petitioner, bail is rule and jail is exception. But, at the same time, this rule does not mean that in every case bail is to be granted in all eventualities. The Supreme Court, in its various pronouncements, as also referred by this Court in ***State of Sandeep v. State of Himachal Pradesh,*** reported in **2019(1) Shim.LC 263**, has culled out various factors and parameters to be taken into consideration at the time of deciding the bail applications, which also include denial of bail based on those factors and principles. The general rule 'bail but not jail' cannot be used as a weapon to render the provisions, empowering the Court to reject the bail, redundant, and/or as a guiding factor to enlarge an accused on bail, in every case.

54. The Supreme Court has considered the right to pre-arrest bail, provided under Section 438 Cr.PC, and factors and parameters to be taken into consideration by the Courts, while accepting or rejecting a bail petition under Section 438 Cr.PC, in numerous cases, including ***Gurbaksh Singh Sibbia & others v. State of Punjab,*** **(1980) 2 SCC 565;** ***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;** ***Bhadresh Bipinbhai Sheth v. State of Gujarat and another,*** **(2016) 1 SCC 152;** ***Special Leave Petition (Criminal) Nos.7281 of 2017 and 7282 of 2017*****, decided on 19.1.2020,** titled a**s** ***Sushila Aggarwal & Others v. State (NCT of Delhi) & another,*** **(2020) 5 SCC 1 ;** ***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}****,** which have been referred in ***Freed and other connected matters v. State,*** reported in **2020(4) Shim. LC 1614.**

55. This Court in ***Freed's*** case supra has observed as under:

"18. While considering 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.

.....

21. Dealing *with* the provisions of Section 438 Cr.PC, the Supreme Court in ***P. Chidambaram v. Directorate of Enforcement***, **(2019) 9 SCC 24,** 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.)"**”**

56. In ***Mangal Singh Negi v. Central Bureau of Investigation,*** reported in **2021(2) Shim. LC 860,** this Court observed as under:

> “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,*** **(2020) 5 SCC 1** cases and also in other pronouncements referred by learned counsel for CBI."

57. Material, placed before me, is sufficient to infer that accusation does not seem to have been made, in present case, with object to injuring or humiliating the petitioner having him arrested.

58. So far as affidavits sworn-in by the victim and her mother are concerned, these are matter of consideration by the Investigating Officer or the trial Court or at the time of considering bail petition, if any, preferred by the

petitioner, but not at this stage when investigation is pending and the present petition has been filed for anticipatory bail.

59. Investigation, in present case, is at initial stage. Investigating Agency, for non-cooperation of petitioner, has not been able to have access to the FACEBOOK account, which is necessary for completion of investigation.

60. Considering the factors and parameters, necessary to be considered for adjudication of anticipatory bail under Section 438 Cr.PC, as propounded by the Supreme Court as referred by this Court in ***Freed's*** case (supra) and various other pronouncements of the Supreme Court, referred supra, but without commenting on merits of evidence produced before me, I find that it is not a fit case for continuation of bail under Section 438 Cr.PC.

61. Needless to say that petitioner has a right to approach the Court, under Section 439 Cr.PC, seeking regular bail. In such eventuality, such application shall be considered on the basis of its own merits, within parameters relevant for adjudicating that.

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

Petition is dismissed and disposed of.

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

CRIMINAL REVISION NO.142 OF 2020

Between:-

SH.SURENDER SINGH
S/O SH. JARPU RAM,
R/O VILLAGE DAMTADI,
P.O. DHARARA, SUB-TEHSIL TIKKAR,
DISTRICT SHIMLA, H.P. 171 203
AGED ABOUT 44 YEARS.

…PETITIONER

(BY SH.ASHWANI DHIMAN, ADVOCATE)

AND

STATE OF H.P.

..RESPONDENT

(BY SH.DIVYA SOOD, DEPUTY ADVOCATE GENERAL)

CRIMINAL REVISION NO.142 OF 2020
DATED: 20.08.2021

Code of Criminal Procedure, 1973 – Section 397 - The petition challenging cancellation of his driving licence by R.L.A in pursuance of order passed by Ld. ACJM in summary proceedings in crime titled as State of H.P. v/s HP 10B 0547, the petitioner was challaned under section 181,185 M.V. Act having found driving in drunken condition - Petitioner tendered DL before Ld. ACJM as such proceedings under section 181 M. V. Act were dropped - DL was sent to concerned authority for its cancellation and fine of Rs. 2000/- under section 185 M. V. Act was imposed for driving in drunken condition referring direction of Hon'ble Supreme Court on Road Safety – Held - on perusal of directions of committee it is evident that it is not mandate of directions of committee that for driving a vehicle under the influence of drinks or drugs, licence cannot be cancelled - It is directed that offender can be disqualified for holding a driving licence for specified period, specified period may also include period of rest of life of the offender- in addition offender is also to be prosecuted seeking punishment even for the first offence in case of drunken driving- no illegality or irregularity or infirmity in order passed by Ld ACJM or RLA - However, considering direction of committee at S.No. 3 & 4, taking lenient view, disqualification of the petitioner from holding a driving licence till 31.10.2021 and further keeping in view lapse of time from commission of crime, proceeding before Ld. Magistrate are not being ordered to be revived to

prosecute the petitioner for his imprisonment under section 185 of the M. V. Act - The petition disposed on above terms.

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

J U D G M E N T

Petitioner has assailed cancellation of his Driving Licence, vide order dated 10.10.2019, by Registering and Licensing Authority, Rohru, District Shimla, H.P., in pursuance to order dated 06.07.2019, passed by learned Additional Chief Judicial Magistrate, Court No.(II), Shimla, H.P., in summary proceedings, in Crime No.HP13300190604212359, titled as *State of H.P. vs. HP10B0547.*

9. The petitioner was challaned under Sections 181 and 185 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'M.V. Act'), as he was found driving vehicle without licence in drunken condition. On 06.07.2019, petitioner had tendered his driving licence before the Court of learned Additional Chief Judicial Magistrate, Court No.(II), Shimla, H.P., and, therefore, proceedings against him, under Section 181 of the M.V. Act, were dropped by learned Magistrate. However, referring direction of Hon'ble Supreme Court Committee on Road Safety (in short the 'Committee') bearing No.05/2014/CORS, Part-3, dated 18.08.2015, driving licence of the petitioner bearing No.HP-10-20050014758 was ordered to be sent to the concerned authority for its cancellation and fine of `2000/- under Section 185 of the M.V. Act, was also imposed upon the petitioner for driving in drunken condition.

10. In compliance of order passed by learned Magistrate, Registering and Licensing Authority, Rohru, District Shimla, H.P., had passed impugned order dated 10.10.2019, whereby driving licence of the petitioner was

cancelled w.e.f. 10.10.2019 under Section 185 of the M.V. Act read with Rule 21 of the Central Motor Vehicle Act, 1988 by referring direction of the Committee.

11. Learned counsel for the petitioner has placed on record relevant directions dated 18.08.2015, issued by the Committee, referring which driving licence of the petitioner has been cancelled. Learned counsel has pointed out that in these directions, at Sl.No.4, the Committee has directed the States/UTs and their concerned Departments to take certain actions, which include suspension of the licence for a period of not less than 3 months under Section 19 of the M.V. Act read with Rule 21 of the Central Motor Vehicles Rules, 1989 in the following situations:-

(i) Driving at a speed exceeding the specified limit which in the Committee's view would also include red light jumping;
(ii) Carrying overload in goods carriages and carrying persons in goods carriages;
(iii) Driving vehicles under the influence of drink and drugs;
(iv) Using mobile phone while driving a vehicle.

12. Learned Deputy Advocate General has invited attention of the Court to the directions contained at Sl.Nos.3 and 5, wherein at Sl. No.3 it has been communicated by the Committee that stern action against the violators of law should be taken exercising discretion under Section 19 of the M.V. Act read with Rule 21 of the Central Motor Vehicle Act by passing an order disqualifying the offender from holding a driving licence for a specified period or also imprisonment wherever it is provided under the law, and in directions contained at Sl.No.5 the Committee has directed that in case of driving a vehicle under the influence of drinks or drugs, the police should prosecute the offender and seek imprisonment as prescribed under Section 185 of the M.V. Act, even for the first offence.

13. On perusal of directions of the Committee, it is evident that it is not mandate of the directions of the Committee that for driving a vehicle under the influence of drinks or drugs, licence cannot be cancelled. In direction No.3 it is directed that offender can be disqualified for holding a driving licence for a specified period. Specified period may also include period of rest life of the offender. In addition, offender is also to be prosecuted seeking his imprisonment even for the first offence in case of drunken driving. I do not find any illegality, irregularity or infirmity in the order passed by learned Additional Chief Judicial Magistrate, Court No.(II) Shimla, H.P., or Registering and Licensing Authority, Rohru, District Shimla, H.P.

14. Learned counsel for the petitioner submits that petitioner is first time offender and incident had taken place on 04.06.2019 at 9.23 p.m. and thereafter licence of the petitioner has been cancelled on 10.10.2019. Degree of intoxication is also not on record and now period of about 2 years has passed and petitioner has remorse for his act and conduct and he undertakes to not to repeat such mistake again.

15. Considering persuasive submissions of learned counsel for the petitioner, taking lenient view and relevant directions of the Committee contained at Sl.Nos. 3 and 4, disqualification of the petitioner to hold a driving licence instead forever is converted into disqualification of the petitioner from holding a driving licence till 31.10.2021.

16. After 31.10.2021, licence of the petitioner may be revived with endorsement in his record regarding his disqualification on account of drunken driving with complete details but on making application by the petitioner to the concerned Registering and Licensing Authority with undertaking therein that in future he shall not drive the vehicle under the influence of drinks or drugs and in case he is found repeating the same offence again, his licence shall be cancelled forever disqualifying him from holding driving licence for throughout life.

17. It is also apt to record that by taking a lenient view and keeping in view lapse of time till date from the date of commission of crime, proceedings before learned Magistrate are not being ordered to be revived to prosecute the petitioner for his imprisonment under Section 185 of the M.V. Act.

18. In view of above, present petition stands disposed of in aforesaid terms, so also pending application(s), if any.

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

Ravinder Nath Rattan .....Appellant

Versus

Kanta Devi .....Respondent

FAO(HMA) No. 98 of 2011
Reserved on: 29.07.2021
Decided on: 06.08.2021

Hindu Marriage Act, 1955 - Section 13 (1) (a) - The appeal against judgment and decree passed by Ld. District Judge whereby petition filed by the appellant filed under section 13 (1) (a) Hindu Marriage Act for dissolution of marriage has been dismissed - Held - the petition of dissolution of marriage was filed by appellant on 6.5.2008 where as marriage had been solemnized on 27.9.1984- the allegations which as per appellant constitutes cruelty was alleged to be initially of year 1990 and secondly after 2002 meaning thereby that as per appellant, the relation between parties remained cordial between 1990 to 2002 - Though there is no convincing evidence on record to prove allegation of appellant w.r.t the acts constituting cruelty prior to1990 yet as per him he had condoned such acts alleged to constitute cruelty and thereafter parties lived peacefully till 2002 - standard of proof required in the petition for dissolution of marriage under Hindu marriage act is preponderance of probability but that does not mean that party alleging act of cruelty can succeed without satisfying the court as to existence of alleged facts in accordance with law-from material, It can be said with certainty that appellant has failed to discharge the burden of proof required - The appellant

is disentitled from claiming divorce on the ground of cruelty in view of section 23 (ii) HM Acts in the present case, there is sufficient material which disentitle the appellant from claiming divorce. The issue of desertion framed is misconceived as there was no such pleadings / the appellant cannot derive benefit by his plea that marriage between parties has been broken irretrievably as no such ground is envisaged under the Act and the court lacks jurisdiction to pass decree of divorce on any such ground not mentioned in Act. Appeal dismissed.

For the appellant: Mr. B.C. Verma, Advocate.
For the respondent: Mr. Vijay Chaudhary, Advocate.

(Through video conferencing)

The following judgment of the Court was delivered:

Satyen Vaidya, J.

By way of instant appeal, the appellant has assailed the judgment and decree dated 22nd February, 2011 passed by learned District Judge, Mandi in HMA petition No. 12 of 2008, whereby the petition filed by the appellant under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 (in short 'the Act') for dissolution of marriage has been dismissed.

2. Facts necessary for adjudication of this appeal are as under: -

3. On 06.05.2008, appellant filed the above noted petition with the averments that the parties were Hindu and were married on 27.09.1984 at Village Panoh Tehsil Bangana, District Una, H.P. Out of wedlock, two sons and one daughter were born.

3. As per appellant, the respondent from the very beginning of married life had the habit of creating scene on petty matters. The appellant tolerated, but behaviour of respondent become bad to worse. After birth of youngest child, respondent forced the appellant to live separately from his parents and on his refusal, she along-with her minor girl child aged about 11

months went to her parental house in the year 1990. The matter was got compromised with the intervention of family members of the appellant. Respondent never provided moral education to children, whereas appellant discharged all the responsibilities of being father.

4. In 2002, appellant took respondent to District Mandi at his place of posting, where she got job of Drawing Teacher in Government school. After getting the Government job, respondent become more adamant. Her behaviour became more cruel towards the appellant. She started insulting the appellant in front of his family members and even used abusive language. She never left any opportunity of insulting the appellant. He suffered mental agony and had to spend sleepless nights. He became laughing stock in the society.

5. Appellant and respondent though shared the same house in District Mandi but were separate in mess since 2005 and were not continuing marital relations with each other. Appellant was forced to take food outside as she would not cook food for him. Respondent willfully refused to perform marital obligations towards the appellant.

6. On 25.12.2007, at the time of death of the father of appellant, respondent created scene. She forced the appellant to get the land transferred in her name which appellant had purchased in the name of his mother. Respondent threatened the appellant of dire consequences in case he failed to transfer such land in her favour. She inflicted bite injury to the appellant on his wrist, which caused deep bleeding wound. Respondent caught hold of petitioner by collar and pushed him down.

7. Respondent contested and denied the allegations, raised in the petition by the appellant, by filing written reply. She raised the objection as to maintainability of petition and estoppel etc. It was submitted by the respondent that appellant was separated by his parents in 1997. He remained posted at Kaza from 2002 to 2007.

8. As per respondent, she was appointed as Drawing Teacher in District Mandi in September, 2002 and was posted at Surari under complex of Kotli School. Appellant also got himself transferred to District Mandi in July, 2003 and joined the company of respondent.

9. Respondent specifically contended that the behaviour of appellant towards her changed drastically when he was transferred to Kaza. He started scolding the respondent on every petty matter. Appellant, in fact, wanted to marry another lady and, therefore, wanted to get rid of respondent. It was further submitted that the respondent was residing with appellant and both were maintaining marital relations as husband and wife. The parties had jointly constructed the house at village Jhiri in District Mandi and the respondent had also made substantial financial contribution besides providing guarantee for the house loan.

10. The respondent further stated that she had found some objectionable SMS in the mobile phone of appellant and when confronted, he got annoyed and made false police reports against the respondent.

11. In his rejoinder, appellant controverted the contents of reply filed by the respondent with reiteration of the contents of the petition.

12. Learned trial Court framed following issues from the pleadings of the parties:-

1. Whether the respondent has treated the petitioner with cruelty as alleged? OPP.

2. Whether the respondent has deserted the petitioner as alleged? OPP

3. Relief.

13. Appellant examined himself as PW-5 by submission of his affidavit in examination-in-chief as PW-5/A. He also tendered photocopies of

documents Ext.P-1 to P-24. In cross-examination he admitted that in 1992-93, the family of his elder brother had separated, but feigned ignorance about the factum of litigation of his brother and his wife in matrimonial court. He also admitted that during his posting at Kaza, respondent remained at his native village. He denied that he had cordial relations with respondent at the time of her joining the job in District Mandi. It was also admitted by the appellant that in 2003, he was posted in Panarsa in District Mandi. He denied that respondent contributed towards the construction of house at village Jhiri and that respondent had issued cheque in the sum of Rs.50,000/-. It was, however, admitted that the respondent was guarantor for repayment of loan taken by the appellant for construction of house at Jhiri. It was also admitted that the respondent had lodged an FIR under Sections 323, 325, 451 and 506 IPC at police station, Aut, District Mandi against the appellant, besides this, she had also made a complaint against the appellant before the Superintendent of Police, Mandi. Though he denied that the children used to visit their mother only but further qualified that they visited him as well as their mother. He denied that he had relations with lady named Sonam Norjee at Kaza. He denied that on 29.10.2004, he signed an agreement with the said lady at Kullu. He further denied that he paid Rs.85,000/- to Sonam Norjam, besides purchasing an insurance policy in the sum of Rs.1,00,000/- in the name of her child. He denied that he maltreated the respondent.

14. PW-1 Head Constable Bhim Singh from police station, Aut produced daily diary report No. 12 dated 26.04.2008 and proved its copy as Ext.PW-1/A. Similarly, he proved copy of DDR No. 9 dated 11.06.2008 as Ext.PW-1/B. In cross-examination, he admitted that no FIR was registered on the basis of either of the daily diary reports Ext.PW-1/A and Ext.PW-1/B.

15. PW-3 and PW-4 S/Sh. Jagdish Ram and Kishan Singh also appeared as witnesses for the appellant and echoed the version of appellant. PW-2 Ram Dayal claimed himself to be a neighbour of appellant and PW-3 is

the real brother of appellant. In cross-examination, PW-2 has categorically admitted that till 2004, he was residing at Kanpur along-with his family. When confronted with certain dates and events, he could not answer satisfactorily. He fairly admitted that dispute with respect to transfer of land did not occur in his presence and appellant had not received injury in his presence. PW-3 being brother of appellant tried to corroborate his version. He stated that before 2002, no report was lodged against the respondent. Report of the incident of 25.12.2007 was also not made. He denied that he was party to maltreatment of respondent. He, however, admitted that a compromise was effected and further volunteered that compromise was made in Police Station. PW-4 Sh. Kishan Singh also echoed the version of appellant in his examination-in-chief. He maintained in cross-examination that he visited the house of appellant only once or twice and feigned ignorance about material facts put to him in cross-examination.

16. On the other hand, respondent examined herself as RW-2 and reiterated her case as set-up in the defence by way of submission of affidavit in examination-in-chief. She specifically stated that the appellant used to receive phone calls and messages on his mobile from some lady and whenever he was confronted, he used to fight with the respondent. She, however, maintained that the appellant used to threaten her of divorce. Respondent in her examination-in-chief categorically stated that the appellant had relations with another lady and when this fact came to her knowledge, the appellant entered into an agreement with said lady at Kullu, in which appellant and that lady had also made mention of their daughter. In cross-examination, nothing material could be elicited on behalf of the appellant.

17. RW-1 Sh. Subhash Chand appeared on behalf of respondent. He stated that he was a document writer at Kullu and had brought his register. This witness proved a copy of extract from his register dated 29.10.2004 Ext.RW-1/A, which was an agreement got written by one Devinder Nath. As

per version of this witness, other party to the agreement was Sonam Norjam. In cross-examination, RW-1 clarified that the appellant present in the Court was the same person who got the agreement scribed from him. He maintained that he obtained signatures of the parties on the register. He further maintained that he personally knew appellant as he was posted as Junior Engineer in HP PWD at Kullu. RW-3 is Sh. Abhinandan Rattan, who is son of the parties. He stated in his examination-in-chief that he came to know that his father had illicit relations with some lady and this was a cause of dispute between his parents. RW-4 is Smt. Pini Devi, but her statement is not of much relevance. RW-5 is Sonam Norjee, who specifically stated that appellant had married her by suppressing the factum of his marital status. She stated that the appellant lived with her for about 1½ years and they had one daughter from this relationship. When she came to know about the already existing marriage of the appellant, she was asked to divorce the appellant. The divorce was effected and Ext RW-1/A was executed at Kullu, in which she as well as appellant had appended their signatures. She specifically stated that the appellant gave her Rs.85,000/- in lieu of divorce and also purchased an insurance policy in the sum of Rs.1,00,000/- in the name of their daughter. In cross-examination again nothing material could be elicited on behalf of the appellant.

18. Learned District Judge, Una after holding the trial, proceeded to dismiss the petition filed by the appellant.

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

20. The petition for dissolution of marriage was filed by the appellant on 06.05.2008 whereas their marriage had been solemnized on 27.09.1984. The allegations, which according to appellant constitute cruelty, were alleged to be initially of the period before 1990 and secondly, after 2002. Meaning thereby that as per appellant also, the relations between the parties remained

cordial between 1990 to 2002. Though there is no convincing evidence on record to prove the allegations of appellant with respect to commission of acts constituting cruelty prior to 1990, yet as per his own saying, appellant had condoned such alleged acts of cruelty and thereafter the parties lived peacefully till 2002.

21. Coming to the allegations of cruelty after 2002, raised in the petition, the same are also very vague and general in nature. The Hindu Marriage and Divorce (Himachal Pradesh) Rules, 1982 framed by Himachal Pradesh High Court specifically requires the allegations of cruelty to be specified in the petition with sufficient particularity with time and place of the act alleged and other facts relied upon. The contents of the petition are completely non-compliant to above referred rules.

22. Appellant has tried to get his version corroborated through the statements of PW-2 Ram Dayal and PW-3 Jagdish Ram. As far as the statement of PW-2 is concerned, that does not inspire confidence, in view of specific admission on his part that till 2004, he resided at Kanpur. He has not given specific instances as to when and where was he present to witness the alleged mis-behaviour of respondent towards the appellant. In fact, in cross-examination he has denied happening of any such incident in his presence, which makes his testimony hearsay. Moreover, the parties after 2002, resided in District Mandi. The statement of PW-3, who is real brother of appellant, as such, his statement has to be seen with circumspection as he definitely had interest in the success of the case of the appellant. Much reliance cannot be placed on the testimony of this witness especially when the appellant himself had not been able to plead and prove the allegations of cruelty against the respondent in accordance with law. The documents tendered by the appellant in his statement Ext.P-1 to P-24 are merely photocopies, which have not been proved in accordance with law. In any case, the making of unilateral complaints by the appellant against the respondent repeatedly will not prove

his case as no action was taken on such complaints. Most of these complaints were made by the appellant after filing of the petition, which can be a ploy of the appellant to create evidence in his favour. The fact that respondent was guarantor for repayment of loan taken by appellant for construction of house, also makes the version of appellant doubtful. Had the relations between the parties been as bad as projected by appellant, respondent would not have prudently provided guarantee for the loan taken by appellant or seen from another angle appellant would not have asked respondent to stand guarantee for his loan.

23. It is well settled that onus to prove the allegations of cruelty is on the person who alleges it. In Dr. N.G. Dastane vs. Mrs. S. Dastane (1975) 2 SCC 326, Hon'ble Supreme Court has held as under:-

> *"23. But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order to judge whether the burden has been discharged?*
>
> *24. The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act,section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular*

> *case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man,so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2). But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."*

24. From the material, as discussed above, it can be said with certainty that appellant has failed to discharge the burden of proof placed upon him. No doubt, the standard of proof required in the petition for dissolution of marriage under Hindu Marriage Act is that of preponderance of probabilities, but that does not mean the party alleging acts of cruelty can succeed without satisfying the Court as to existence of alleged facts in accordance with law.

25. Judging the case of the appellant on the touch stone of aforesaid legal principles, this Court has no hesitation to hold that the appellant has failed to prove that respondent treated him with such cruelty which made it impossible for him to live with respondent without being in constant fear of danger to his health and life.

26. Learned District Judge, Una while passing the impugned judgment has arrived at the conclusions after detailed and thorough consideration of the evidence coupled with all attending and material facts and circumstances of the case. The judgment passed by learned District Judge, Una does not suffer from illegality.

27. There is another factor which dis-entitles the appellant from claiming divorce from the respondent on the ground of cruelty. Section 23 (1) (a) of Hindu Marriage Act reads as under: -

> "**23**. *(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that*
>
> *(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and in such case and not otherwise, the court shall decree such relief accordingly."*

28. In the present case, there is sufficient material which dis-entitles the appellant from obtaining the decree of divorce as prayed by him. Respondent raised a specific plea against the appellant that he had maintained illicit relations with another lady. This fact stands duly proved on record. RW-5 Sonam Norjam on oath verified this fact by stating that the appellant had married her by suppressing the fact his earlier marriage. She specifically maintained that they had a daughter from this relationship. According to this witness, a document was executed between her and the appellant as an evidence of divorce *inter-se* them. She further stated that the

appellant had given her Rs.85,000/- in lieu of divorce and had also purchased a policy of insurance in the name of their daughter. PW-1 has proved document Ext.RW-1/A, which is the agreement executed between the appellant and the respondent evidencing the factum of divorce. He specifically identified the appellant to be the person having signed the said document in his presence. This witness thereby clarified the fact that name of the executant in Ext.RW-1/A in fact was wrongly recorded whereas person at whose instance the said document was scribed was the appellant himself.

29. In the light of the above noted proved fact, the appellant is definitely guilty of conduct which was immoral vis-a-vis his married life. The allegations of respondent that it was on account of his illicit relations with another lady that appellant had started ill-treating her and also wanted her to give him divorce, cannot be brushed aside. This fact has been corroborated by none else but the son of the parties, who has stated that the relations between his parents were disturbed after his father indulged in extra marital relationship.

30. Learned counsel for the appellant has argued with vehemence that the marriage between the parties has broken irretrievably and hence the same deserves to be dissolved by a decree of divorce. Reliance has been placed on the judgments reported in 2007 (4) SCC 511, 2017(2) Civil Court Cases, 223, 2018(2) Civil Court Cases 649 and 2018(1) Civil Court Cases 328. With due reverence to the ratio laid down in all the above cases, the appellant cannot derive any benefit therefrom for the reason that no such ground is envisaged under the Act and this Court lacks jurisdiction to pass a decree of divorce on any such grounds which does not find mention in the Act. The appellant otherwise cannot be allowed to raise this argument on account of the fact that he has been proved to be guilty of commission of matrimonial wrong towards respondent.

31. As far as the issue of desertion, framed by learned District Judge, Una, is concerned, it appears to be totally mis-conceived. There were no pleadings on record to warrant framing of Issue No.2.

32. In view of the discussion made above, the appeal being devoid of any merits is dismissed with no orders as to costs. Pending application(s), if any, shall also stand dismissed.

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

Kamini Ahluwalia & another ...Applicants-plaintiffs.

Versus

Devi Saran ...Non-applicant/defendant.

OMP No.174 of 2020
in Civil Suit No.41 of 2020
Date of Decision: August 6, 2021.

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2 read with Section 151 - The application under order 39 rule 1 & 2 read with section 151 CPC seeking interim stay against defendant has been preferred by plaintiff along with main suit for specific performance of agreement to sell dated 15.6.2013 attested on 22.6.2013 executed between parties for selling suit land by defendant to plaintiff for consideration of Rs.13000000/- at the time of execution of agreement Rs. 1500000/- had been received by defendant and balance amount of consideration was to be paid at the time of execution of sale deed fixed for 15.7.2018. Defendant also received Rs. 2500000/- as part of sale of consideration. The defendant threatened to transfer the property to third party for escalation of price of property & defendant had not denied execution of agreement - sale deed was to be executed after partition and last date was fixed for 15.7.2018, land was partitioned in the year 2015-16 and defendant approached plaintiff for execution of sale deed being in dire need of money but plaintiff refused and in 2018, plaintiff again was not ready and conveyed no objection for selling land to third person - Defendant admits receipt of earnest

money but denied further payment- Held, as per plaintiff, plaintiff remained present in office of Registrar with sale consideration on 16.7.2018 for execution of sale deed but they surreptitiously remained silent for 2 years which cast doubt about their claim that they were ready with sale consideration for execution of sale deed in 2018 - No reason has been assigned for remaining silent for 2 years- during these two years, defendants, had changed their position by selling land, further agreement to sell was executed in year 2013 and thereafter title of land after partition was clear in year 2015-16 and last date for execution of sale deed was 15.7.2018 - Thereafter plaintiff waited for 2 years for filing suit for specific performance which tilts balance of convenience in favour of defendant by creating doubt about claim of plaintiff undoubted there is price escalation in the value of land, though plaintiffs have claimed that they are having sufficient means for making payment of balance amount of consideration but no documentary proof thereof or any other material has been placed on record to substantiate the plea - plaintiffs were not entitled for interim stay.

For the Applicants/ Plaintiffs:	Mr.Rakesh Kumar Thakur, Advocate, through Video Conferencing.
For the Non-applicant/ Defendant:	Mr.Lalit Kumar Sehgal, Advocate, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

This application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (in short 'CPC') seeking interim stay against the non-applicant/defendant has been preferred by the applicants-plaintiffs alongwith main suit for Specific Performance of agreement to sell dated 15.06.2013 attested on 22.06.2013 executed between applicants-plaintiffs (vendees) and non-applicant/defendant (vendor), for selling the suit land by non-applicant/defendant to applicants-plaintiffs for consideration of

`1,30,00,000/-. As per agreement, `15,00,000/- had been received by the non-applicant/defendant at the time of execution of agreement and balance amount of consideration was to be paid at the time of execution of sale deed for which last date was fixed as 15.07.2018.

2. It is case of the applicants-plaintiffs that apart from `15,00,000/- as earnest money, non-applicant/defendant has also received a sum of `2,00,000/- on 20.06.2013, `5,00,000/- on 30.09.2013 as a part of the sale consideration, and non-applicant/defendant, in total, has received a sum of `25,00,000/- from the applicants-plaintiffs with assurance that sale deed would be executed well before the appointed date i.e. 15.07.2018.

3. It is case of the applicants-plaintiffs that before expiry of appointed date i.e. 15.07.2018, applicants-plaintiffs had requested the non-applicant/defendant orally as well as through registered letter with acknowledgement for executing the sale deed, but non-applicant/defendant has expressed his inability to execute and register the sale deed before 15.07.2018 and lastly had refused to receive the letter/notice dated 10.07.2018 issued to him (non-applicant/defendant) to execute the sale deed. In addition, applicant-plaintiff No.1 had talked with non-applicant/defendant telephonically for execution of sale deed and non-applicant/defendant had finally agreed to execute and register the sale deed on 16.07.2018 as 15.07.2018 was Sunday. Accordingly, as per applicants-plaintiffs, applicant-plaintiff No.1 alongwith balance sale consideration visited the office of Sub-Registrar (Rural) at Shimla and remained in the Complex of Sub-Registrar from 10.30 a.m. to 4.45 p.m. on 16.07.2018 and she had also sworn in affidavit to this effect which was duly attested by the Executive Magistrate, Shimla (Rural), who was also exercising powers of Sub-Registrar. But on that day, non-applicant/defendant did not turn up. Thereafter, on 17.07.2018, applicant-plaintiff No.1 personally met non-applicant/defendant to execute the sale deed, but non-applicant/defendant flatly refused and ask for money as

the value of the property, according to non-applicant/defendant, had increased manifold since execution of agreement in the year 2013. Thereafter, applicants-plaintiffs had again requested non-applicant/ defendant personally as well as telephonically on 18.07.2018 to execute and register the sale deed, but non-applicant/defendant despite having received a sum of `25,00,000/- from the applicants-plaintiffs avoided execution and registration of sale deed on one pretext or the other and had threatened to transfer the property to third party for escalation of price of the property.

4. It is claim of the applicants-plaintiffs that they are ready and willing to perform their part of contract, but non-applicant/defendant is not willing to perform his part and on account of omission and commission on the part of non-applicant/defendant, causing delay to execute and register the sale deed, applicants-plaintiffs have suffered loss.

5. It is also submitted on behalf of the applicants-plaintiffs that with ulterior motive and malafide intention, to defeat lawful right of the applicants-plaintiffs, non-applicant/defendant has threatened to sell property to third party at higher price and to create complication to the applicants-plaintiffs, he is mounting pressure on them to give effect to his nefarious and ill designs to extort extra amount from the applicants-plaintiffs than the amount agreed between the parties and, therefore, applicants-plaintiffs are entitled for specific performance of agreement of sale and in case sale deed is not executed in favour of the applicants-plaintiffs, they would suffer irreparable loss and grave hardship, and further that there is every possibility of decree of suit in favour of the applicants-plaintiffs and, therefore, suit property deserves to be preserved and protected during pendency of the suit land by restraining the non-applicant/defendant from alienating, selling, disposing, encumbering or changing the nature or interfering in any manner in the suit land i.e 1/3 share measuring 1-27-79 hectares out of Khata/Khatoni No.3/3 to 5 kita 55 total measuring 3-83-79 hectares and 1/8 share

measuring 00-57-70 hectares out of land comprised in Khata/Khatoni NO.15/26 to 34 kitas 40 measuring 4-61-62 hectares, situated at Up Mohal Majhar, Tehsil and District Shimla (Rural) H.P.

6. For continuation and confirmation of interim stay during pendency of the suit, learned counsel for the applicants-plaintiffs has placed reliance upon judgments passed by the Supreme Court in Civil Appeal Nos. 3523-3526 of 2010, titled as *A.R. Madana Gopal Etc. Etc. vs. M/s Ramnath Publications Pvt. Ltd. And Another,* decided on 09.04.2021; Civil Appeal Nos. 3574 and 3575-3577 of 2009, titled as *B. Santoshamma and Others vs. D. Sarala and Others,* decided on 18.09.2020; CS(OS) 1284/2011 & I.As. 8529/2011, 15754/2011, 15755/2011, 11621/2018, 12884/2018, titled as *Om Prakash Aggarwal vs. Raj Kumar Mittal,* decided on 28.02.2019.

7. Grant of interim stay and continuation thereof, has been opposed by the non-applicant/defendant. It is submitted on behalf of the non-applicant/defendant that suit has been filed to pressurize and blackmail the non-applicant/defendant with deliberate and intentional misstatement of facts and concealment of material facts with malafide intention to avail undue advantage by misusing machinery of law to extort money from the non-applicant/defendant for which applicants-plaintiffs are not legally entitled. Execution of agreement dated 15.06.2013 and attested on 22.06.2013 are not in dispute, however, it is case of the non-applicant/defendant that as per agreement, non-applicant/defendant had to get land partitioned and thereafter sale deed was to be executed and last date for which was fixed as 15.07.2018 and as a matter fact land was partitioned in the year 2015-16 and immediately thereafter, non-applicant/defendant had approached and contacted the applicants-plaintiffs first of all with a request to come forward for execution of sale deed as non-applicant/defendant was in dire need of money, but in the year 2016, applicants-plaintiffs had refused to perform their part for execution of sale deed by saying that there was time to execute the same and in 2018 for

the reason that applicant-plaintiff No.1 had resiled from the deal and applicant-plaintiff No.2 was not in a position to pay entire sale consideration and during this year i.e. 2018 applicant-plaintiff No.2 had conveyed to non-applicant/defendant that applicants-plaintiffs had no objection for selling suit land by non-applicant/ defendant to any third party and non-applicant/defendant was given free hand to do so. At that time, applicants-plaintiffs had also requested for refund of earnest money of `8,00,000/- after selling suit land by the non-applicant/defendant.

8. It is further case of non-applicant/defendant that though for default on the part of the applicants-plaintiffs earnest money was to be forfeited, but taking into consideration the relation with husband of applicant-plaintiff No.2, non-applicant/defendant had agreed to refund the said amount and thereafter non-applicant/defendant had sold the portion of land to Budhi Singh on 22.06.2018 and to Vikas on 03.09.2019 and thereafter, had also entered into a sale agreement dated 06.08.2020 with third party namely Yogendra Kumar Neena for consideration of `1,74,00,000/- and has received earnest money of `2,00,000/- from him and further that as per agreement entered into with third party, non-applicant/defendant had also initiated process of exchange of some portion of land, as agreed, with adjoining land owners and the third party was and is ready and willing to get sale deed registered in their favour, but same could not be executed and registered due to interim order passed by this Court in present suit.

9. It is submitted on behalf of non-applicant/defendant that though it is stated in the agreement to sell that an amount of `15,00,000/- was received by the non-applicant/defendant from applicants-plaintiffs as earnest money against total consideration of `1,30,00,000/-, but as a matter of fact, non-applicant/defendant has received only `8,00,000/- i.e. `5,00,000/- through Cheque No.55643 which was credited to the non-applicant/defendant's bank account on 17.06.2013 and remaining amount of

`3,00,000/- was transferred through two Cheques bearing numbers 712101 dated 20.06.2013 amounting to `2,00,000/- and 024578 dated 02.07.2013 amounting to `1,00,000/- of Punjab National Bank and Bank of India respectively and the said amount was credited in the account of non-applicant/defendant on 02.07.2013 and 13.07.2013 respectively.

10. It is further case of the non-applicant/defendant that applicants-plaintiffs had also issued two more cheques i.e. Cheque No.024576 dated 26.06.2013 for a sum of `1,00,000/- of Bank of India, The Mall, Shimla and Cheque No.710479 dated 09.07.2013 amounting to `1,00,000/- of Punjab National Bank, SAD Complex, Kasumpati, Shimla, but these cheques could not be encashed as Cheque No.024578 was returned by the Bank for overwriting thereon, whereas, Cheque No.710479 was dishonoured for insufficient funds. Whereupon, non-applicant/defendant had brought the aforesaid facts about dishonouring of these two cheques in the notice of applicants-plaintiffs with a request to make payment of balance amount of `7,00,000/- of earnest money. Applicants-plaintiffs, despite assuring payment of balance earnest money at the earliest, did not pay it ignoring repeated requests and visits of non-applicant/defendant to applicants-plaintiffs and, as such, applicants-plaintiffs have paid only `8,00,000/- to the non-applicant/defendant despite the fact that an amount of `15,00,000/- has been shown in the agreement to sell to have been paid to the non-applicant/defendant. Receipt of `25,00,000/-, in total, as earnest money, has been denied categorically.

11. It is submitted on behalf of the non-applicant/defendant that applicant-plaintiff No.2 had expressed her inability to make payment of balance amount of consideration for backing out of applicant-plaintiff No.1 from the deal, and thus non-applicant/defendant, for dire need of money, had sold portion of land to Budhi Singh in June 2018 and another portion of land has been sold by the non-applicant/defendant after fourteen months

thereafter to one Vikas vide sale deed dated 03.09.2019. Applicants-plaintiffs did not come forward at any point of time as they were not ready and willing to purchase the land possibly for want of sufficient funds and ultimately they had given freedom to non-applicant/defendant to sell land to anybody and in this background, some portion of land has been sold by the non-applicant/defendant and further that after lapse of more than two years after the last date for execution of sale deed, non-applicant/defendant has entered into sale agreement dated 06.08.2020 with third party for selling remaining portion of suit land and in furtherance thereto, he has initiated process for exchange of some portion of land with adjoining land owners, including Geeta Ram and Jeet Ram.

12. It is further submitted on behalf of the non-applicant/defendant that applicants-plaintiffs were neither ready and willing nor having capability and capacity to purchase the suit land on or before 15.07.2018 and even thereafter, applicants-plaintiffs keep on sleeping for a period of about two years. Even if, it is considered that first sale deed dated 22.06.2018 is prior in time to the last date of execution of sale deed fixed in the agreement to sell entered between the applicants-plaintiffs and non-applicant/defendant, remaining portion of suit land has been sold or agreed to be sold by the non-applicant/defendant to third parties after lapse of more than one and two years respectively and, therefore, there is change in circumstances and possession of the non-applicant/defendant and availability of the suit land and in case applicants-plaintiffs were ready and willing to purchase the suit land, they would have come immediately after expiry of date fixed for execution of sale deed in their favour. It is submitted that for delay in filing suit, at this stage, for considerable change in the status of the suit land, applicants-plaintiffs are not entitled for interim relief and as incorporated in the agreement to sell in question the earnest money paid by the applicants-plaintiffs is liable to be forfeited.

13. It is also submitted on behalf of the non-applicant/defendant that subsequent purchasers have not been arrayed as party to the suit in whose favour right in the property has approved, on account of sale deeds and agreements to sell.

14. Learned counsel for the non-applicant/defendant has placed reliance upon judgment passed by the Supreme Court in Civil Appeal No(s). 9346 of 2019, titled as *Ambalal Sarabhai Enterprise vs. KS Infraspace LLP Limited and another;* decided on 06.01.2020. He has also relied upon judgment dated 16.10.2020 passed by this High Court in CMPMO No.544 of 2017, titled as *Sumit Kumar vs. Avneet Patyal and others;* judgment passed by the Punjab and Haryana High Court in *Malkiat Singh (deceased by L.Rs.) vs. Om Prakash (deceased by L.Rs.) and another,* reported in AIR 2004 Punjab and Haryana 253; and judgment dated 28.02.2019 passed by High Court of Delhi in CS(OS) 1284/2011 & I.As. 8529/2011, 15754/2011, 15755/2011, 11621/2018, 12884/2018, titled as *Om Prakash Aggarwal vs. Raj Kumar Mittal.*

15. From the facts on record, it is evident that though applicants-plaintiffs have claimed that applicant-plaintiff No.1 remained present alongwith sale consideration in the office of Registrar (Rural) at Shimla on 16.07.2018 and contacted defendant on 17.07.2018 and 18.07.2018 for execution of sale deed, but thereafter they surreptitiously remained silent for about more than two years which cast doubt about their claim that they were ready alongwith sale consideration for execution of sale deed in July 2018. No reason has been assigned for remaining silent for about two years. During these two years, non-applicant/defendant has changed his position by selling the portion of land to one Vikas on 03.09.2019 and thereafter, has also entered into a sale agreement dated 06.08.2020 with third party for a consideration of `1,74,00,000/- for remaining portion of the land with further agreement to have some portion of his land exchanged with other villagers for which he has also initiated the process. Agreement to sell, subject matter of

present suit, was executed in the year 2013 and thereafter title of the land, after partition, was clear in the year 2015-16 and the last date for execution of sale deed was 15.07.2018. Thereafter, applicants-plaintiffs waited for two years for filing suit for specific performance which tilts balance of convenience in favour of the non-applicant/defendant by creating doubt about claim of applicants-plaintiffs.

16. Undoubtedly, there is price escalation in the value of the land in question as evident from agreement to sell dated 06.08.2020 entered between non-applicant/defendant Yogendra Kumar Neena for a consideration of `1,74,00,000/- for remaining portion of the land. Though applicants-plaintiffs have claimed that they are having sufficient means for making payment of balance amount of consideration, but no documentary proof thereof or any other material has been placed on record to substantiate the said plea.

17. Considering entire facts and circumstances of the case placed before me and ratio of law laid down in the judgments referred by learned counsel for the parties, I am of the considered opinion that applicants-plaintiffs are not entitled for interim stay as prayed. Accordingly interim stay granted vide order dated 13.08.2020 is vacated. As purchasers and prospective purchasers of the suit land have also been arrayed as defendants in the main suit, it is needless to say that all parties including them shall abide by final outcome of the suit.

18. Application is disposed of in aforesaid terms.

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

Sumitra Devi ...Appellant

Versus

Krishan Lal & others .... Respondents

FAO No. 4010 of 2013
Date of Decision: 1st April, 2021

Motor Vehicle Act, 1988 – The appeal under section 173 M.V. Act with prayer to enhance amount awarded by M.A.C.T whereby Tribunal while allowing the claim petition under section 166 of Act awarded a sum of Rs. 1,11000/- along with interest at 6.1% p.a from date of filing the petition till deposit of amount in favour of claimant- Held, it is well settled that where claimant is not able to prove the actual income of deceased/ injured by way of documentary evidence of income of deceased/ injured court can proceed to assess the income on the basis of minimum wages prevalent that time - The salary certificate placed on record by claimant to prove salary of deceased son was neither proved in accordance with law nor was exhibited rather same was marked as 'Y"- Since deceased was well educated Tribunal considering him unskilled person ought to have assessed his income on the basis of minimum wages payable at that time i.e, Rs. 3300 p.m.- Tribunal further fell in error by applying multiplier on the basis of age of claimant whereas multiplier is/was to be applied on the basis of age of deceased (N.I.C vs. Praney Sethi AIR 2017 SC 5157) keeping in view of age of deceased 28 years at the time of accident the multiplier of 17 was required to be applied- since deceased was bachelor at the time of death 50% of his income is liable to be deducted towards personal expenses taking monthly income of deceased as Rs. 3300/- p.m, total loss of dependency is Rs. 471240/-. Appeal is partly allowed - Award passed by tribunal is modified to this extent.

Cases referred:

Amrit Bhanu Shali and others versus National Insurance Company and others 2012 ACJ 2002;

Govind Yadav versus New India Assurance Company Limited,2012(1) ACJ 28;

Joseph Philip C.J. and another vs. Judies and others, 2018 ACJ 672;

Munna Lal Jain and other versus Vipin Kumar Sharma and others, 2015 AIR SCW 3105;

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017, SC 5157;

Sarla Verma V. Delhi Transport Corporation 2009 ACJ 1298(SC);

Smt. Pappi Devi and others versus Kali Ram and others, Latest HLJ2008 (HP) 1440;

For the Appellant : Mr. Maan Singh, Advocate.

For the Respondents : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate, for respondent No.1.
Mr. Jagdish Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral):*

By way of present appeal filed under Section 173 of the Motor Vehicles Act ***(for short 'Act'***), prayer has been made on behalf of the appellant ***(hereinafter 'claimant')*** to enhance the amount awarded by Motor Accident Claims Tribunal (II), Kullu, District Kullu, Himachal Pradesh, in Claim petition No.31 of 2011, whereby learned Tribunal below while allowing the claim petition having been filed by the claimant under Section 166 of the Act, awarded sum of Rs.1,11000/- alongwith interest at the rate of 6% per annum from the date of filing the petition till the date of deposit of amount in favour of the claimant.

2. Precisely, the facts as emerge from the record are that the claimant Smt. Sumitra Devi, who happened to be mother of deceased Sandeep Kumar, preferred petition under Section 166 of the Act, claiming therein compensation to the tune of Rs.15,00,000/- on account of death of her son namely, Sandeep Kumar. On 20.7.2011, deceased Sandeep Kumar, aged 28 years while coming from Bhuntar to Kullu side riding his own motorcycle bearing registration No. HP-34-B-0518 came to be hit by bus bearing registration No. HP-34-B-2151 being driven by respondent No.2, Hari Singh in rash and negligent manner, as a consequence of which, above named Sandeep Kumar sustained multiple injuries on his head and other parts of the body.

Unfortunately, after one day of the accident, above named Sandeep Kumar succumbed to his injuries at PGI Chandigarh. FIR No.177 of 2011, dated 20.7.2011 under Sections 279,337 and 304-A of IPC came to be registered against respondent No.2 at police Station, Bhuntar. Claimant named hereinabove claimed before the Tribunal below that her deceased son was serving as Territory Sales Manager (TSM) with Adecco Flexione Workforce Solutions Private Limited and his monthly salary was Rs.10, 999/- Claimant submitted before the Tribunal below that death of her deceased son has resulted in great financial loss to her and she is also deprived of love and affection of her son and as such, she be adequately compensated. Claimant claimed that her other son is living separately with his family and there is none to look after her. Claimant also claimed before the Tribunal below that she has spent sum of Rs.50, 000/- on performing last rites and rituals of the deceased.

3. Respondents No.1 and 2 while fairly admitting the factum with regard to accident resisted the claim on the ground that accident took place on account of negligence of deceased Sandeep Kumar. Respondent No.3, i.e. Insurance Company claimed that it is not liable to pay any sort of compensation because at the time of the alleged accident, driver of the vehicle was not possessing valid and effective driving licence. Respondent No.3 also claimed that since vehicle in question was being plied in violation of the terms and conditions of the insurance policy, it cannot be burdened with liability to indemnify the insured.

4. On the basis of pleadings adduced on record by the respective parties, Tribunal below vide order dated 8.9.2008 framed following issues:-

1. Whether deceased Sandeep Kumar died in a motor vehicular accident on account of rash and negligent driving of respondent No.2? OPP.

2. If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.

3. Whether respondent No.3 being indemnifier is liable to make payment of compensation? OPP.

4. Whether the vehicle in question was being plied in breach of terms and conditions of the insurance policy, if so, its effect? OPR-3

5. Whether the driver of the offending vehicle was not having valid and effective driving licence at the time of accident? OPR-3

6. Whether the petition is bad for non-joinder of necessary parties? OPD.

7. Relief:-

5. Subsequently, learned Tribunal below vide impugned award dated 29.4.2013 held claimant entitled to compensation to the tune of Rs. Rs.1,11000/- alongwith interest at the rate of 6% per annum from the date of filing the petition till the date of deposit of amount. Being aggrieved and dissatisfied with the quantum of compensation awarded by learned Tribunal below, claimant has approached this Court in the instant proceedings, praying therein for enhancement of compensation awarded by learned Tribunal below.

6. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned by learned Tribunal below while passing the impugned award, this Court finds that primarily challenge to the award in the case at hand has been laid on following grounds:-

(i). Tribunal below despite being evidence available on record that at the time of alleged accident, deceased was earning Rs. 10,999/- per month erred in determining the loss of dependency only to the tune of Rs.1000/-.

(ii). Tribunal below wrongly having taken note of the age of claimant i.e. mother of the deceased applied multiplier of '8',whereas multiplier of '17' is required to be applied keeping in view the age of deceased, who at the relevant time was 28 years old.

(iii) Tribunal below has awarded interest on the lower side i.e. 6% because at the time of filing of the claim petition prevalent rate of interest was 9%.

7. Careful perusal of pleadings as well as evidence led on record reveals that though claimant made an endeavour to prove before the Tribunal below that at the time of accident her deceased son was getting salary to the tune of Rs. 10,999/- per month, but since she was not able to prove salary, in accordance with law, learned Tribunal below without determining the actual income, if any, of deceased, of its own proceeded to conclude that deceased was spending Rs.1000/- per month to maintain his mother i.e. claimant. By now it is well settled that where claimant is not able to prove the actual income of deceased/injured by way of documentary evidence or there is no documentary evidence, if any, with regard to income of deceased/claimant, Court can proceed to assess the income on the basis of minimum wages prevalent at the relevant time.

8. Though, record reveals that claimant with a view to prove salary of her deceased son has placed on record salary certificate, but same was neither proved in accordance with law nor was exhibited, rather same was marked as 'Y'. Since, deceased was well educated, Tribunal below considering him to be unskilled person ought to have assessed his income on the basis of minimum wages payable at the relevant time. It is not in dispute interse parties that in the year 2011, minimum wages as provided under the

Minimum Wages Act, were Rs.3300/- per month. Hence, in view of aforesaid discussion, award made by learned Tribunal below needs to be modified. In this regard reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Govind Yadav versus New India Assurance Company Limited***,2012(1) ACJ 28, wherein it has been held as under:-

> "17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as helper and was getting salary of Rs. 4,000/- per month. The Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. Learned Tribunal then proceeded to determine the amount of compensation in lieu of loss of earnings by assuming the appellant's income to be Rs. 15,000/- per annum. On his part, the learned single Judge of the High Court assumed that while working as a cleaner, appellant may have been earning Rs. 2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earnings by taking the appellant's notional annual income as Rs. 36,000/- and the loss of earnings on account of 70 percent permanent disability as Rs.25,200/- per annum.
>
> The application of multiplier of 17 by the Tribunal, which was approved by the High Court, will have to be treated as erroneous in view of the judgment in ***Sarla Verma V. Delhi Transport Corporation 2009 ACJ 1298(SC).*** In para 21 of that judgment, the court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying that multiplier, we hold that the compensation payable to the

appellant in lieu of the loss of earnings would be Rs.4,53,600/-".

9. Reliance is also placed upon the judgment passed by this Court in ***Smt. Pappi Devi and others versus Kali Ram and others***, Latest HLJ2008 (Himachal Pradesh) 1440, relevant paras of which are reproduced as under:-

> "6. It has come in the statement of claimant Smt. Kala Devi (PW-1) that the deceased while working as a labourer and also selling milk was having an income of Rs. 4000/- per month. Importantly, there is no cross-examination on this point at all. But the fact of the matter, is that no documentary evidence has been placed on record to prove the income. This is the only evidence with regard to income of the deceased on record.
>
> 7. It has come on record that the deceased was illiterate and working as a labourer. In my view, his income determined by the Tribunal i.e. Rs.50/- per day, is on the lower side. Taking the deceased to be employed as a daily wager, the minimum wages paid by the government in the year, 2001 to the labourers was more than Rs.70/- per day. This is not disputed at the Bar. Therefore, the same can be made the basis for determining the income of the deceased. Thus, the monthly income of the deceased is determined as Rs.70x30 Rs.2100/- and after deducting 1/3rd of the amount i.e. Rs.700/- for the purpose of dependency is determined as Rs.1400/-."

10. Similarly, this Court finds that learned Tribunal below has fallen in grave error while applying multiplier of '8' that too on the basis of age of claimant, Smt. Sumitra Devi, whereas multiplier is/was to be applied on the basis of the age of deceased, as has been held by Hon'ble Apex Court in **National Insurance Company Limited vs. Pranay Sethi and others,** AIR 2017, SC 5157, wherein Hon'ble Apex Court has upheld its earlier judgment

rendered in ***Sarla Verma V. Delhi Transport Corporation 2009 ACJ 1298(SC).***

11. In the case at hand, deceased was 28 years old at the time of the accident and as such, multiplier of '17' was required to be applied and as such, on the aforesaid count award also needs to be modified. In this regard reliance is placed upon the judgment rendered by Hon'ble Apex Court **in Munna Lal Jain and other versus Vipin Kumar Sharma and others,** 2015 AIR SCW 3105, wherein it has been held as under:-

> "12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (AIR 2013 SC (supp) 474)(supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:
>
> > "36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

> 14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

12. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in **Amrit Bhanu Shali and others versus National Insurance Company and others** 2012 ACJ 2002, wherein it has been held as under:-

> "17. The selection of multiplier is based on the age of the deceased and not on the basis of the age of dependent. There may be a number of dependents of the deceased whose age may be different and, therefore, the age of dependents has no nexus with the computation of compensation.
>
> 18. In the case of Sarla Verma (supra) this Court held that the multiplier to be used should be as mentioned in Column (4) of the table of the said judgment which starts with an operative multiplier of 18. As the age of the deceased at the time of the death was 26 years, the multiplier of 17 ought to have been applied. The Tribunal taking into consideration the age of the deceased rightly applied the multiplier of 17 but the ` High Court committed a serious error by not giving the benefit of multiplier of 17 and bringing it down to the multiplier of 13".

13. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in J**oseph Philip C.J. and another vs. Judies and others,** 2018 ACJ 672, wherein it has been held as under:-

> "8. In Amrit Bhanu Shali & Ors. v. National Insurance Co. Ltd.& Ors. 2012 ACJ 2002(SC) and in Munna Lal Jain & Anr. v. Vipin Kumar Sharma & Ors. 201 ACJ 1985 (SC), this Court has held that even if the deceased is a bachelor, his age has to be taken into account for adopting a multiplier. In the instant case, the High Court has taken the age of

> the mother of the deceased into consideration while applying the multiplier. Since the age of the deceased was 24 years, the High Court should have given the benefit of multiplier of 18.
>
> 9. Since the deceased was a bachelor, 50 per cent of the income should be deducted towards his personal expenses. Thus, the compensation payable towards loss of dependency comes to Rs. 16,20,000/- (Rs.15000 ÷ 2 x 12 x 18). The High Court has awarded a compensation of Rs. 5,28,000/- towards loss of dependency, which has to be deducted from the said amount. The balance of compensation payable to the claimants is Rs. 10,92,000/- towards loss of dependency.
>
> 10. The deceased was the only son of the appellants. The High Court has awarded a sum of Rs. 20,000/- towards loss of love and affection. We are of the view that it is just and proper to award a sum of Rs. 50,000/- under this head. The balance of compensation payable towards loss of love and affection is Rs. 30,000/-. Thus, the additional compensation payable to the claimants comes to Rs. 11,22,000/- (Rupees 10,92,000 + 30,000)."

14. Learned counsel representing the appellant while referring to judgment passed by Hon'ble Apex Court in **Pranay Sethi case (supra),** argued that claimant is also entitled to certain amount under conventional heads i.e. funeral charges to the tune of Rs.15,000/-, loss of estate Rs.15000/- and Rs.40,000/- on account of filial consortium. Besides above, this Court finds that claimant is entitled to an addition of 40% on account of future prospect in terms of the judgment passed in **Pranay Sethi case (supra),** wherein it has been held as under:-

"59. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(ix) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

15. At this stage, Learned Counsel appearing for the claimant, while inviting attention to judgment rendered by Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018, argued that claimant being mother of deceased is entitled to amount on account of filial consortia, which as per aforesaid judgment ought to have been Rs.40,000/- each. Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** (supra) has held as under:

> "8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.
>
> In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.
>
> The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.
>
> Spousal consortium is generally defined as rights pertaining to the relationship of a husband wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."
>
> 4 Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection,

society, discipline, guidance and training." Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and 3 Rajesh and Ors. vs. Rajbir Singh and Ors. (2013) 9 SCC 54 4 BLACK'S LAW DICTIONARY (5th ed. 1979) family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count5. However, there was no clarity with 5 Rajasthan High Court in Jagmala Ram @ Jagmal Singh & Ors. v. Sohi Ram & Ors 2017 (4) RLW 3368 (Raj); Uttarakhand High Court in Smt. Rita Rana & Anr. v. Pradeep Kumar & 6 Ors. respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs. 40,000 each for loss of Filial Consortium."

16. Since, deceased was bachelor at the time of the death, 50% of his income is liable to be deducted towards his personal expenses and as such, while taking monthly income of the deceased as Rs.3300/- per month, total loss of dependency qua claimant can be assessed as under:-

	Amount (Rs.)
Established monthly income of deceased	**3300**
Income after deducting 50% towards self expenses	**1650**
Addition of 40% i.e. 1650 x 40 /100	**660**
Net monthly income	**2310**
Total loss of dependency = 2310x12x17	**4,71,240**

17. In view of detailed discussion made hereinabove, award passed by Tribunal below is modified in the following manners:-

Head	**Amount (Rs.)**
Loss of dependency	**4,71,240**
Loss of estate	15000
Funeral charges	15000
Filial consortium payable to the claimant	40,000
Total compensation	**5,41,240**

18. The learned Tribunal below has rightly awarded interest at the rate of 6% per annum on the amount of compensation as such, there appears

to be no justification to further increase the rate of interest. Mr. Maan Singh, learned Counsel representing the appellant/claimant while placing reliance upon certain judgments contended that claimant is entitled to interest at the rate of 9% per annum, but such prayer of him cannot be accepted for the reason that there is no provision under Motor Vehicles Act to award interest, save and except Section 171 of M.V. Act, which only speaks about simple interest, however, courts while awarding interest on the compensation have been awarding interest on the basis of prevalent market rate of interest. Since, there is no specific provision under Motor Vehicles Act with regard to rate of interest, court while awarding interest can definitely resort to Section 34 of CPC, which provides that court while passing money decree can award interest at such rate, which is deemed to be reasonable. It is not in dispute that in the year, 2013 prevalent rate of interest was 6% and even as of today it is less than 6% and as such, prayer for increase in rate of interest deserves outright rejection being wholly untenable.

19. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned Award passed by learned Tribunal below is modified to the aforesaid extent only.

20. All pending miscellaneous applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Between:-

JASWANT RAI,
S/o SHRI DEV RAJ,
R/o SURAJ MAJRA LAVANA
WARD No.3, P.O. & TEHSIL BADDI,

DISTRICT SOLAN, H.P.

……PETITIONER

(BY SH. VIRENDER THAKUR, ADVOCATE)

AND

5. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (INDUSTRIES)
TO THE GOVERNMENT OF HIMAHCAL
PRADESH, SHIMLA 171 002.

2. THE DIRECTOR OF INDUSTRIES,
HIMACHAL PRADESH, UDYOG
BHAWAN, SHIMLA 71001.

3. H.P. STATE INDUSTRIAL DEVELOPMENT
CORPORATION LTD., NEAR HIMLAND
HOTEL, CIRCULAR ROAD, SHIMLA
171001, THROUGH ITS MANAGING
DIRECTOR.

4. THE DEPUTY COMMISSIONER, SOLAN,
DISTRICT SOLAN, H.P.

5. SHRI DINESH KUMAR KAUSHAL,
S/o SHRI RAM PRAKASH,
R/o WARD No.2, NEAR NEELAM
HOTEL, BADDI, DISTRICT SOLAN, H.P.

…..RESPONDENTS

(SH. RAJENDER DOGRA, SR. ADDL. A.G. WITH SH. VINOD THAKUR, SH. SHIV PAL MANHANS, SH. HEMANSHU MISRA, ADDITIONAL ADVOCATES GENERAL AND SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS No.1, 2 and 4.)

(SH. MEHAR CHAND, ADVOCATE, FOR RESPONDENT No.3.)

(MS. DEVYANI, SHARMA, ADVOCATE, FOR RESPONDENT No.5.

CIVIL WRIT PETITION No. 1580 OF 2019
RESERVED ON : 23.08.2021
DECIDED ON: 27.08.2021

Land Acquisition Act, 1894 – Section - The petition for direction to respondents 1 to 4 to cancel sanction letter dated 29.9.2010 alongwith mutation no. 389 attested on 30.9.2010 whereby exchange of land has been granted in favour of respondent No.5 and said land was vested in state of HP to be used in future for the public purpose only - Respondent No.5 agreed to transfer his said land in favour of industries department in lieu of govt land in some village proposed to be transferred by the said department in his favour - The exchange was attested on 6.9.2012 which was challenged by petitioner - Held - The exchange of land between respondents No.5 and department of industries was made in the year 2010 - Mutation of exchange was attested on 6.9.2012 - There is no explanation as to why petitioner remained silent till July 2019 when he for the first time approached the court by way and this petition thus petition clearly suffers from delay. No reason for the transaction are either visible or proved the contention of petitioner about his first right to be considered for transfer of govt land given in exchange to respondent No.5 leaves no manner of doubt about his mother in filing the petition. The petitioner clearly appears to have abused process of law for his vested reasons - petition dismissed.

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

ORDER

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

> "That the respondents No.1 to 4 may kindly be directed to cancel sanction letter dated 29.09.2010 along with mutation No.389

attested on 30.09.2010, whereby exchange of land has been granted in favour of respondent No.5 i.e. land measuring 1.5 bighas comprised in Khasra No.378/307/241/1/2/1 situated in Village Juddi Khurd, Tehsil Baddi, District Solan, H.P. and the said land may kindly be ordered to be vested in the State of Himachal Pradesh and be ordered to be used in future for the public purpose only".

2. Respondent No.5 was having land comprised in Khasra No.306/241/1 at Village Juddi Khurd, Tehsil Baddi, District Solan, which was required by Department of Industries, Himachal Pradesh for construction of a road. On negotiations, respondent No.5 agreed to transfer land comprised in Khasra No.306/241/1 to the extent of 1.5 bighas, in favour of department of Industries, Himachal Pradesh, in lieu of land comprised in Khasra No.378/307/241/1/2/1 measuring 1.5 bighas in the same Village proposed to be transferred by the said department in his favour.

3. Deputy Director of Industries, Single Window Clearance Agency, Baddi District Solan, on 09.09.2009 communicated a proposal for transfer of above noted pieces of land by way of exchange, to the Commissioner of Industries Himachal Pradesh. On 3rd February, 2010, the Commissioner Industries Himachal Pradesh forwarded the said proposal to Deputy Commissioner, Solan for grant of no objection in that behalf. The Deputy Commissioner-cum-Collector, Solan vide order dated 29th September, 2010 approved transfer of land comprised in Khasra No.307/241/1/2/1 measuring 1.5 bighas in Village Juddi Khurd, Tehsil Baddi, in favour of Department of Industries subject however to the condition that the transfer would abide by the result of SLP No.1077/2006 pending before Hon'ble Supreme Court. It was further specified that in case the Department of Industries failed to utilize the land for the purpose, it was being transferred, the same shall revert back to the Department of Revenue free from all encumbrances.

4. The exchange was accordingly affected. Mutation of above noted exchange was attested on 06.09.2012.

5. Petitioner has taken exception to transfer of land comprised in Khasra No.378/307/241/1/2/1 in Village Juddi Khurd, Tehsil Baddi in favour of respondent No.5 on the following grounds:

(i) The transfer of government land in favour of respondent No.5 is in violation of law;

(ii) Respondent No.5 is an influential person and he got the land transferred in his favour by use of his clout;

(iii) The land could not be transferred in favour of respondent No.5 as it was part of a large chunk of land earmarked for development of industrial hub;

(iv) The land transferred in favour of respondent No.5 abuts the land owned by petitioner and by such transfer the front opening of his land has been obstructed/reduced;

(v) The land comprised in Khasra No.306/241/1 was allotted to predecessor-in-interest of respondent No.5 under Nautor Scheme, therefore, the respondent No.5 was not entitled to transfer it in favour of Department of Industries;

(vi) The land transferred in favour of respondent No.5 was not utilized for prescribed purpose within stipulated period of two years.

(vii) As per petitioner, other persons including one Smt. Narender Kaur, had also applied for exchange of their lands with Department of Industries, but the same was not allowed and thus such persons were discriminated vis-à-vis respondent No.5.

(viii) Petitioner being adjoining owner had first right to be offered the land transferred in favour of respondent No.5 and;

(ix) Lastly, petitioner alleged that respondent No.5 had started construction on the land without proper sanction.

6. Respondents No.1 and 2 in their reply have contested the stand of petitioner. It is stated on behalf of said respondents that the land of respondent No.5 in Khasra No.306/241/1 was urgently required for completion of road being constructed by Department of Industries to connect NH 21A with the Baddi-Barotiwala road with a view to reduce the traffic on the main roads. According to respondents No.1 and 2, the negotiation between the parties for exchange of land was necessitated at the stage when the work of completion of above-mentioned patch of road was stranded for want of permission from respondent No.5 to use his land. The mutation of exchange was attested within two years from the date of approval. It has also been averred that by such exchange the Department of Industries saved more than about Rs.50,000,00/- (Fifty Lakhs), besides the time which would have been consumed for completion of acquisition proceedings. It has been stated that the exchange of land made with respondent No.5 for not for any extraneous consideration. The location of exchanged land is stated to be on a link road and not on the highway. Specific stand of respondents No.1 and 2 is that except for the land of respondent No.5, no other land was either required or exchanged and the case of Smt. Narender Kaur, was not for exchange of land.

7. Respondent No.4, Deputy Commissioner, Solan filed his separate reply. The stand taken by said respondent is identical to the stand taken by respondents No.1 and 2. In addition, it has been submitted that the land given to respondent No.5 in exchange does not abut any land of the petitioner and is surrounded by land belonging to Government of Himachal Pradesh. It has also been clarified that the land comprised in Khasra No.306/241/1 was allotted to predecessor-in-interest of respondent No.5 in the year 1975 and there was no subsisting embargo or impediment to transfer said land.

8. Respondent No.5 has also filed his separate reply. He has challenged the existence of locus standi and cause of action in favour of petitioner to file this petition. According to respondent No.5, the entire

transaction of exchange was bona fide. He was neither influential nor any influence as alleged was used in the deal in question. Respondent No.5 has objected to the prayer in the petition being barred by delay and latches. On merits, the defence of respondent No.5 is akin to that of respondents No.1, 2 & 4.

9. We have heard learned counsel for the parties and have also gone through the records made available to us.

10. The exchange of land between Respondent No.5 and department of Industries was made in the year 2010. The mutation of exchange was attested on 06.09.2012. There is no explanation as to why petitioner remained silent till 18th July, 2019, when he, for the first time, approached this Court by way of instant petition. In our considered view, the petition clearly suffers from delay and laches.

11. Petitioner has raised all sorts of objections, as noted above, but without any attempt to substantiate even a single allegation.

12. It has not been proved that the transaction of exchange was influenced by the alleged status of respondent No.5. Petitioner has also failed to bring on record any material to justify or support his allegation with respect to land in question having been earmarked for Industrial hub. It has also been falsified that petitioner owned land adjacent to the land given to respondent No.5 in exchange, which even makes alleged cause of action and locus standi of the petitioner questionable. The allegation with respect to alleged discrimination by official respondents meted to Smt. Narender Kaur and others has also not been substantiated on record.

13. On the other hand, it has been found from the material on record that the transaction with respect to exchange of lands between respondent No.5 and Department of Industries, Himachal Pradesh was *bona fide* in the given circumstances. There is nothing on record to infer that the land given to respondent No.5 in exchange was higher in value than the land of said

respondent taken in exchange by Department of Industries, Himachal Pradesh. No extraneous reasons for the impugned transaction are either visible or proved. The documents produced by parties, rather, reveal that no other person including Smt. Narender Kaur had ever applied for exchange of land with Department of Industries, in similar circumstances. Deputy Commissioner-cum-Collector, Solan had approved the transfer of land in favour of Department of Industries on the condition that the same would be utilized for the prescribed purpose within two years. The prescribed purpose was the exchange of lands, which was accomplished within stipulated period.

14. Above all, the contention of petitioner about his first right to be considered for transfer of Government land given in exchange to respondent No.5, leaves no manner of doubt about his motive in filing the petition. Thus, the petitioner clearly appears to have used the process of law for his vested reasons.

15. In light of above discussion, we do not find any merit in the petition and the same is dismissed, so also the pending miscellaneous application(s), if any, with no orders as to costs.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, ACTING CHIEF JUSTICE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Narender Kumar

...Petitioner

Versus

The Vice President (Works),
M/s Himachal Exicom Communications Ltd ....Respondents

C.W.P. No. 675 of 2019
Date of decision: 05.08.2021

Constitution of India, 1950 – Article 226 - The petitioner was senior operator in respondent Co-after issuing chargesheet, holding inquiry and concluding disciplinary proceedings his services were terminated by respondent - The reference sent by appropriate govt to Labour court whether punishment of termination of petitioner service was communicate with the charges leveled against him was answered against petitioner, so the petitioner filed writ petition after three years challenging the award - Held- it is settled legal position that while exercising power of judicial review, the court will not act as an appellate court for reappriciating the evidence led in the departmental inquiry. Inquiry report also shows that inquiry was conducted in accordance with law the principal of natural justice was followed - The sexual harassment of a woman at workplace has been held to be a violation of fundamental right to gender equality and right to life liberty - Petitioner having been held guilty of outraging the modesty of a female co-worker and physically assaulting a male co-worker had made himself liable for stringent punishment. Petitioner was guilty of gross misconduct - Punishment of termination of service in the proved facts of case can not be said to be unduly harsh or disproportionate to the charges proved against him - The writ petition is dismissed.

Cases referred:

Apparel Export Promotion Council Vs. A.K. Chopra (1999) 1 SCC 759;
M.P. Electricity Board Vs. Jagdish Chandra Sharma, (2005) 3 SCC 401;
State of Karnataka and another vs. N. Gangaraj (2020) 3 Supreme Court Cases 423;

For the Petitioner(s): Mr. Neel Kamal Sharma,

AdvocateFor the Respondents: Mr. Rahul Mahajan, Advocate

Through Video Conference

The following judgment of the Court was delivered:

Jyotsna Rewal Dua,J.

Petitioner was a Senior Operator in the respondent- Company. After issuing charge sheet, holding inquiry and concluding the disciplinary proceedings, his services were terminated by the respondent on 12.08.2004.

Whether punishment of termination of petitioner's services was commensurate with the charges levelled against him was the reference sent by the appropriate Government for adjudication to the learned Labour Court. The reference was answered against the petitioner on 07.10.2015. Three years later, he invoked jurisdiction of this Court by way of instant writ petition challenging the award.

2. The petitioner was working as Senior Operator with the respondent-Company. On 08.05.2004, respondent issued charge sheet to the petitioner. The charges levelled against him in the charge sheet were on the basis of complaints of physical assault made by Hardev Thakur and of outrage of modesty, made by Sushma Sharma co-workers of the petitioner. The petitioner responded to the charge sheet. Inquiry was conducted against him. The inquiry officer held that charges were proved against the petitioner. After conclusion of the inquiry, show cause notice alongwith inquiry report was issued to the petitioner on 31.07.2004. After considering the relevant documents, petitioner's services were terminated vide order dated 12.08.2004.

The petitioner's case before the learned Labour Court was that the inquiry was not conducted fairly. Principles of natural justice were not complied with. The penalty imposed upon the petitioner was not commensurate to the charges levelled against him. The respondent pleaded that petitioner's serviceswere terminated on the basis of a proper inquiry held in accordance with law and in a fair manner. After appreciating the respective contentions, learned Labour Court held that there was overwhelming evidence to conclude that the inquiry was conducted in a fair and proper manner. It was also held that the punishment imposed upon the petitioner was commensurate to the charges levelled against him. The award passed by the learned Labour Court has been challenged in this petition.

3. Learned counsel for the petitioner reiterated the

stand taken by the petitioner before the learned Labour Court. Learned counsel submitted that inquiry was not conducted in a fair manner and that penalty was not proportionate to the charges levelled against the petitioner. Learned counsel for the respondent supported the order passed by the learned LabourCourt.

4(i) Conduct of inquiry

It is settled legal position that while exercising the power of judicial review, the Court will not act as an appellate Court for re-appreciating the evidence led in the departmental inquiry. The findings of fact recorded in the departmental inquiry are not to be interfered with except when the same were based on no evidence or are absolutely perverse.

Considering plethora of previous judgments on theissue, Hon'ble Apex Court in **(2020) 3 Supreme Court Cases 423**, titled **State of Karnataka and another** versus **N. Gangaraj** after noticing the facts of the case wherein Disciplinary Authority agreed with inquiry officer's findings about delinquent police official being guilty of misconduct and imposed penalty of dismissal, which was affirmed in appeal, observed that the Tribunal and the High Court could not have interfered with findings of facts recorded by re-appreciating the evidence as if they were the Appellate Authority. It was also observed that power of judicial review is confined to the decision making process and is not akin to the power of Appellate Authority. Power of Judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in eyes of law. The Court in its power of Judicial review does not act as an appellate authority to re-appreciate evidence and to arrive at its own independent findings. It is only where the conclusion reached by disciplinary authority is perverse or suffers from patent error on face of record or based on no evidence at all that interference will be

called for. Question of adequacy of evidence is not required to be gone into. Interference with decision of Departmental Authority is permitted if such Authority had held the proceedings in violation of prescribed procedure or in violation of the principles of natural justice. The Hon'ble apex Court further held as under :-

"14. On the other hand learned counsel for the respondent relies upon the judgment reported as Allahabad Bank v. Krishna Narayan Tewari (2017) 2 SCC 308, wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the Writ Court could interfere with the finding of the disciplinary proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the findings recorded by the disciplinary authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not make it a case of no evidence. The Inquiry Officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.

15. The disciplinary authority agreed with the findings of the enquiry officer and had passed an order of punishment. An appeal before the State Government was also dismissed. Once the evidence has been accepted by the departmental authority, in exercise of power of judicial review, the Tribunal or the High Court could not interfere with the findings of facts recorded by reappreciating evidence as if the Courts are the Appellate Authority. We may notice that the said judgment has not noticed larger bench judgments in State of A.P. Vs. S. Sree Rama Rao, AIR 1963 SC 1723 and B.C. Chaturvedi Vs. Union of India, (1995) 6 SCC 749 as mentioned above. Therefore, the orders passed by the Tribunal and the High Court suffer from patent illegality and thus cannot be sustained in law.

16. Accordingly, appeal is allowed and orders passed by

the Tribunal and the High Court are set aside and the order of punishment imposed is restored."

In the instant case, the petitioner's plea that inquiry was not conducted in accordance with law or that the principles of natural justice were infringed, is not supported by the evidence. The petitioner while appearing in the witness box as PW-1 admitted that he was issued mis-conduct letter and suspension letter on 12.04.2004 with respect to a complaint of assault alleged against him by his co-worker Hardev Thakur. He has also admitted that on 08.05.2004, a charge sheet was issued to him levelling charges of assault on co-worker Hardev Thakur and charges of outraging modesty on co-worker Sushma Sharma. Petitioner admitted joining the inquiry proceedings. He has also admitted that the inquiry procedure was explained to him by the inquiry officer. He has also admitted that he was told by the management of his entitlement to be assisted by any co-worker as per standing order. He has cross examined the management witnesses. He has also signed the inquiry proceedings. He has admitted having not made any complaint that inquiry officer was biased or conducting inquiry in violation of principles of natural justice. He has also admitted that copy of inquiry report was supplied to him. Petitioner has admitted having received a second show cause notice issued on 31.07.2004 after conclusion of the inquiry.

With the assistance of learned counsel for the parties, we have gone through the inquiry report. A perusal of this report makes it evident that the petitioner was allowed to cross examine the management witnesses and that inquiry was conducted in a fair manner. The inquiry officer (IO) has also stepped into the witness box as RW-2 before the learned Labour Court. The I.O. deposed that the inquiry was conducted in accordance with law after associating the petitioner. The entire mode and manner of conducting the inquiry was elaborated by this witness. He also stated that inquiry

proceedings were duly signed by the petitioner. Copies of statements of witnesses were supplied to the petitioner. Inquiry was conducted as per procedure and law. The Personnel Officer of the respondent also stepped into the witness box as RW-1 and stated that the charge sheet issued by the respondent was duly received by the petitioner wherein charges of intimidation and threatening the co- worker, indulging in riotous, disordering behavior and indulging in eve-teasing and outraging the modesty of a female employee were leveled against the petitioner.

In view of the evidence produced by the parties, it can be safely concluded that the inquiry against the petitioner was conducted in accordance with law. The principles of natural justice were followed while conducting the inquiry. The petitioner was associated with the inquiry proceedings. He was given due opportunity to lead evidence and to cross examine the witnesses of the management. Learned counsel for the petitioner could not point out infraction of any rule or procedure or law in conduct of the inquiry. Therefore, we concur with the award passed by the learned Labour Court that the inquiry conducted against the petitioner was held in accordance with law.

4(ii) Punishment imposed upon the petitioner.

Learned counsel for the petitioner next contended that even assuming the petitioner to be guilty of the charges leveled against him, then also, the punishment of termination from service imposed upon him is not proportionate to the charges.

The sexual harassment of a woman at workplace has been held to be a violation of fundamental right to gender equality and right of life and liberty. Elucidating it, the apex Court held that there can be no compromise with such violation. Reference in this regard can be made to **(1999) 1 SCC**

759 Apparel Export Promotion Council Vs. **A.K. Chopra,** wherein it was held as under :-

"26. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of gender discrimination against woman. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate x x x x x x x x x x x x x x x x x x."

In **M.P. Electricity Board** Vs. **Jagdish Chandra Sharma, (2005) 3 SCC 401,** it has been held by the apex Court that where an employee assaulted and injured his superior officer at the work place, in the presence of other employees, the act amounted to breach of indiscipline in the organization and in such case the punishment of dismissal cannot be termed unduly harsh or disproportionate. The relevant para of the judgment reads as follows :-

"9. x x x x x x x x x Obviously this idea is more relevant in considering the working of an organization like the employer herein or an industrial undertaking. Obedience to authority in a workplace is not slavery. It is not violative of one's natural rights. It is essential for the prosperity of the organization as well as that of its employees. When in such a situation, a punishment of termination is awarded for hitting and injuring a superior officer supervising the work of the employee, with no extenuating circumstance established, it cannot be said to be not justified. It cannot certainly be termed unduly harsh or disproportionate. The Labour Court and the High Court in this case totally misdirected themselves while exercising their jurisdiction. The Industrial Court made the correct approach and came to the right conclusion."

5. No procedural infirmity or irregularity in the conduct of disciplinary proceedings has been brought to our notice. The inquiry

proceedings held against the petitioner proved him to be guilty of assaulting his male co-worker. He was also proved to have outraged the modesty of a woman co-worker. The FIR in this regard though was not lodged, presumably due to reluctance on part of the female victim. Petitioner having been held guilty of outraging the modesty of a female co-worker and physically assaulting a male co-worker had made himself liable for stringent punishment. Petitioner was guilty of gross mis-conduct. He had also breached discipline. Punishment of termination of services in the proved facts of the case cannot be said to be unduly harsh or disproportionate to the charges proved against him. The award passed by the learned Labour Court is well reasoned and doesnot call for any interference.

Finding no merit in this writ petition, the same is dismissed alongwith pending applications, if any.

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

Banwari Lal .....Petitioner/Plaintiff

Versus

Balak Ram and others .....Respondents/Defendants

CMPMO No. 126 of 2021
Reserved on: 29.07.2021
Decided on: 06.08.2021

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2 - The petition assailing the order dated 5.3.2021 passed by Ld. DJ (Forest) whereby order dated 20.12.2019 passed by Ld. Civil Judge in an application under order 39 Rule 1 & 2 CPC has been affirmed- Held, petitioner/plaintiff has sought relief of permanent prohibitory injunction to restrain the defendant No.1 from putting decree in execution for possession of suit property & in the prayer in application under order 39 rule 1 & 2 introduction by seeking as injunction. The tenure of the plaint filed by plaintiff does not prime facie level as to on what harsh the plaintiff is seeking better title to the suit property. As per plaintiff suit property is still joint between the parties, if that we so the plaintiff can not be held to have a

prime facie case to obstruct a lawful decree of possession passed against him by a court of competent jurisdiction - The petition dismissed.

Cases referred:

Ramesh Kumar vs. Smt. Sheetal and others 2021 (1) Shim.L.C. 377

For the Petitioner : Mr. V.D. Khidtta, Advocate.

For the Respondents : Mr. Neeraj Gupta, Senior Advocate,
with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner, who is plaintiff, before this Court by way of instant petition, has assailed the order dated 05.03.2021 passed by learned District Judge (Forest), Shimla in C.M.A. No.1-R/14 of 2020, whereby order dated 20.12.2019 passed by learned Civil Judge, Court No.2, Rohru in an application under Order 39 Rules 1 & 2 read with Section 151 of the Code of Civil Procedure (for short 'Code') has been affirmed.

2. The parties herein, shall be referred by same status as they held before the learned trial Court.

3. The facts necessary for adjudication of this petition are as under:

3.(i) Plaintiff has filed a suit being Civil Suit No. 94/1 of 2019 against the defendants that the suit of the plaintiff may kindly be decreed to the following effects:

a) *That the three storeyed house situated upon Khasra No.594/2 measuring 15x10 = 210 feet in Abadi Deh Jakhnoti, Tehsil Chirgaon is the joint property of the parties to the suit, still subject matter of partition.*

b) *That the possession upon the said house is intact with the plaintiff and the defendants No.4 to 6 from the time of their father Shiv Sukh and are enjoying the possession. The defendant No.1 never remained in possession at any point of time over the suit house.*

c) *That the document alleged fird dated 20.11.1999 is act of fraud not binding upon the plaintiff and proforma defendants*

since the same is unregistered and un-stamped documents not tenable in the eyes of law.

d) *That the status of parties under law is still joint and no regular partition by meets and bounds ever took place between the parties.*

e) *That the defendant No.1 be restrained from putting the decree in execution for possession of the said house vide case No.126 of 2008/95 dated 24.10.2008 till the disposal of the case in any manner."*

3.(ii). The above noted suit has been filed on the premise that the suit property i.e. old house situated on Khasra No. 594/2 (new), Khasra No. 538 min (old) situated in Village Jakhnoti, Tehsil Chirgaon, District Shimla is joint and un-partitioned between the parties to the suit since the time of their ancestors. The plaintiff alongwith proforma defendants No. 2 to 6 claim exclusive possession on the suit property.

3.(iii). It is stated in the plaint that earlier defendant No.1 had instituted a Civil Suit under Section 6 of the Specific Relief Act against plaintiff and proforma defendants No.2 to 6 in the year 1996, seeking possession of the suit property. The suit was decreed by learned Sub Judge, 1st Class, Court No.2, Rohru on 24.10.2008 as Civil Suit No. 126 of 2008/95. Plaintiff assailed the aforesaid decree in revision before High Court, which was also dismissed on 28.05.2019 as Civil Revision No. 206 of 2008.

3.(iv). It has further been submitted that High Court while deciding Civil Revision No. 206 of 2008, observed that the dismissal of revision petition would not prevent either party from filing a regular suit establishing his right, title or interest over the suit property.

3.(v). The document in the shape of "Fird" dated 20.11.1999, on which defendant No.1, is stated to have based his claim is alleged to be null and void. In this background of pleadings, the reliefs as noted above, have been sought by the plaintiff.

3.(vi). Defendant No.1 has resisted and contested the suit by raising various legal objections. On merits, it has been stated that the suit property alongwith other joint properties left behind by common ancestors of the parties, stood legally partitioned between the parties. The suit property had fallen to the share of defendant No.1, who holds its exclusive possession in his own right. It has specifically been averred that the entitlement of parties to independently claim right, title or interest in the suit property, as observed by High Court while deciding Civil Revision No. 206 of 2008, does not imply that plaintiff can retain the possession of suit property during the pendency of the suit by obstructing execution of decree passed in favour of defendant No.1.

3.(vii). Alongwith the suit, plaintiff also filed an application for interim injunction under Order 39 Rules 1 & 2 read with Section 151 of the Code with a prayer that respondent(defendant No.1) be restrained from putting the judgment and decree passed by the trial Court in Case No.126 of 2008/95 dated 24.10.2008 in execution till the disposal of the main suit.

3.(viii). In reply to this application, respondent (defendant No.1) has relied upon the same defence as raised in written statement and prayer has been made to dismiss the application with costs.

4. The learned trial Court vide order dated 20.12.2019 passed in C.M.A. No. 32/6 of 2019, dismissed the application of the plaintiff under Order 39 Rules 1 & 2 read with Section 151 of the Code. The order of learned trial Court has been affirmed in appeal by the learned District Judge (Forest), Shimla, by way of order impugned in this petition.

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

6. The legal position, as far as the applicability of principles to be applied at the time of deciding application under Order 39 Rules 1 & 2 of the Code, is well settled. For adjudication of this petition, it shall be apt and

sufficient to have reference to a recent judgment passed by a co-ordinate Bench of this Court in **Ramesh Kumar** vs**. Smt. Sheetal and others 2021 (1) Shim.L.C. 377**, wherein it has been held as under:

> *"7. It is well settled that before grant of injunction and considering prayer for discretionary relief, court must be satisfied that the party praying for relief has a prima facie case and balance of convenience is also in its favour. While granting injunction, if any, court is also required to ascertain whether refusal to grant injunction would cause irreparable loss to such party. Apart from aforesaid well established parameters/ ingredients, conduct of a party seeking injunction is also of utmost importance. Reliance in this regard is placed upon judgment rendered by Hon'ble Apex Court in case M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., 1995 AIR(SC) 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction. Phrases, "prima facie case", "balance of convenience" and "irreparable loss", have been beautifully interpreted/defined by Hon'ble Apex Court in case Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., 1995 2 JT 504 (S.C.) relying upon its earlier judgment in Dalpat Kumar v. Prahlad Singh, 1992 1 SCC 719 has held as under:*
>
> > *"...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury"*

to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

[8] Careful perusal of aforesaid judgment rendered by Hon'ble Apex Court clearly suggests that existence of three basic ingredients i.e. prima facie case, balance of convenience and irreparable loss or injury is mandatory for passing an order of injunction under Order XXXIX, rules 1 and 2 CPC. It is also well settled by now that aforesaid thre ingredients are not only to exist but must coexist. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in Best Sellers Retail (India) Private Ltd. vs. Aditya Birla Nuvo Ld. and others, (2012) 6 SCC 792, wherein, it has been held as under:

"29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

30. In Dalpat Kumar & Anr. v. Prahlad Singh & Ors., 1992 1 SCC 719 this Court held:

"Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief

and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages."

36. To quote the words of Alderson, B. in The Attorney-General vs. Hallett,1857 16 M&W 569 : 153 ER 1316:

"I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause."

[9] Hon'ble Apex Court in Dalpat Kumar and another vs. Prahlad Singh and others, (1992) 1 SCC 719, has categorically held that prima facie case is not to be confused with prima facie title, which requires to be established on evidence at the trial. Mere satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages. Since purpose of temporary injunction is to maintain status quo, court, while granting such relief, should be satisfied that prima facie case has been made out and balance of convenience is in favour of the plaintiff and refusal of injunction would cause irreparable loss and injury to him."

7. Applying the aforesaid settled principles of law to the facts in hand, there is no difficulty in holding that no interference in the order dated 5.3.2021 passed by the learned District Judge (Forest), Shimla in C.M.A. No.1-R/14 of 2020 is warranted. The impugned order has been passed after thorough consideration of the facts of the case on the touch-stone of the

principles viz. existence of prima-facie case, balance of convenience, irreparable loss and multiplicity of litigation.

8. The power of this Court under Article 227 of the Constitution of India is exercisable for keeping the subordinate Courts within the bounds of their jurisdiction, when a subordinate Court has assumed jurisdiction which it does not have or has failed to exercise its jurisdiction which it does have, or the jurisdiction though is available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. By applying the aforesaid principle to the facts of the case, it cannot be said that the impugned order passed by the learned District Judge (Forests), Shimla is either without jurisdiction or is passed in excess of the jurisdiction vested in it.

9. Undisputedly, Civil Suit No. 126 of 2008/95 was decreed in favour of defendant No.1 by the learned Civil Judge (Junior Division), Court No.2, Rohru, District Shimla on 24.10.2008 after holding a complete trial under Section 6 of the Specific Relief Act. While deciding issue No.1 in the said suit, learned Civil Judge (Junior Division), Court No.2, Rohru, recorded specific conclusion as under:

> *"43. Similarly, it appears that with disbelieving of partition Memo (Ex. PW-6/A) I am of the view that plaintiff also has failed to prove as to whether the disputed house is owned by him or not. But, to my mind, as referred to above, plaintiff was in possession of the same and so long as he was not dispossessed in accordance with law, he was having right to possess the same and he has every right to recover his possession within the meaning of Section 6 of Specific Relief Act. Therefore, plaintiff is very much entitled to the relief of possession of the disputed house from the defendants. Thus, issue No.1 is answered in favour of the plaintiff."*

On such findings a decree of possession of the suit property was passed in favour of defendant No.1 and against the plaintiff and proforma defendants. This decree has attained finality.

10. Plaintiff has sought relief of permanent prohibitory injunction to restrain defendant No.1 from putting decree in execution for possession of the suit property vide case No.126 of 2008/95 dated 24.10.2008. To similar effect is the prayer made in C.M.A. No. 32/6 of 2019 i.e. application under Order 39 Rules 1 & 2 read with Section 151 of the Code. Plaintiff is trying to obstruct a decree passed by a Court of competent jurisdiction by seeking an injunction to the above effect. Such relief is specifically barred under Section 41 (a) (b) of the Specific Relief Act, which reads, as under:

> ***"41. Injunction when refused.—An injunction cannot be granted***—
>
> *(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;*
>
> *(b) to restrain any person from instituting or prosecuting any proceeding in a court not sub-ordinate to that from which the injunction is sought."*

Needless to say the trial Court in present case is the court of co-ordinate jurisdiction that passed decree in Civil Suit No.126 of 2008/95.

11. The fact of the matter remains that the tone and tenor of the plaint filed by the plaintiff does not prima-facie reveal as to on what basis the plaintiff is seeking a better title to the suit property. As per the case of plaintiff himself, the suit property is still joint between the parties, if that be so, the plaintiff cannot be held to have a prima-facie case to obstruct a lawful decree of possession passed against him by the Court of competent and co-ordinate

jurisdiction. Such relief shall not be permissible even under the inherent powers of the Court under Section 151 of the Code.

12. The petition, therefore, is devoid of any merit and is accordingly dismissed, so also the pending miscellaneous application(s), if any.

13. It is made clear that expression of opinion, if any, rendered hereinabove shall only be construed for the disposal of this petition and shall in no manner have bearing on the merits of the suit pending trial before learned trial Court.

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

Between:-

SH. NAMINDER SINGH, SON OF SH. GURDIAL SINGH, SON OF SH. LABH SINGH, RESIDENT OF KHURWAIN, MAUJA MOMNIAR, TEHSIL BANGANA, DISTRICT UNA, H.P.

....PETITIONER

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

AND

SH. ATMA SINGH, SON OF SH. BARFI RAM, SON OF SH. NATHU, RESIDENT OF DARARLI UPERLI, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P. AT PRESENT RESIDING IN VILLAGE KHURWAIN, MAUJA MOMNIAR, TEHSIL BANGANA, DISTRICT UNA, H.P.

...RESPONDENT

(BY M/S DHEERAJ KUMAR VASHISHT & PAWAN SHARMA, ADVOCATES)

Civil Misc. Petition Main (Original) No. 313 of 2020
Date of Decision: 11.08.2021

Constitution of India, 1950 – Article 227 - The petition under article 227 constitution of India, against the order passed by Ld. Senior Civil

Judge vide which the suit filed by petitioner has been dismissed on account of non payment of costs imposed upon the petitioner by Hon'ble High Court in proceedings under article 227 constitution of India. Held- The earlier petition filed by petitioner under article 227 constitution of India stood dismissed by Hon'ble High Court imposing cost upon the petitioner. The reference of date in judgment imposing cost was only a time limit set by the court so that the petitioner subsequently could not take a plea that there was no time limit fixed by the court for payment of costs - The court works in continuity and change in presiding officer per se does not mean that the order passed by the earlier presiding officer loses efficacy, until or unless the some is assailed by way of appropriate proceedings and altered modified or set aside. The petition is allowed & order passed by trial court is set aside.

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 herein challenges order dated 23.09.2019, passed by the Court of learned Senior Civil Judge, Court No. 1, Una, H.P. in Case Registration No. 310/2010, titled as *Naminder Singh Vs. Atma Singh*, vide which, the suit filed by the present petitioner has been dismissed by the learned Court below on account of non-payment of costs imposed upon the present petitioner by the High Court in proceedings initiated under Article 227 of the Constitution of India and also for setting aside order, dated 18.02.2020, passed by the said Court, vide which, an application filed for recalling/review of order, dated 23.09.2019, has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that the petitioner herein had earlier approached this Court under Article

227 of the Constitution of India against orders, dated 19.08.2015 and 28.08.2015, passed in the Civil Suit, which suit now stands dismissed by way of impugned order. CMPMO No. 394 of 2015, titled as *Naminder Singh Vs. Atma Singh* was dismissed by this Court vide judgment dated 18th May, 2016 (Annexure P-1) in the following terms:

> *"22. Having said so, this Court is of the firm view that the endeavour on the part of the petitioner clearly appears to be to delay the outcome of the decisions or else the petitioner would not have filed such frivolous application which has unnecessarily consumed valuable time of this Court. Not only there is no merit in this petition, but the same otherwise amounts to abuse of the process of the Court and is accordingly dismissed with costs of Rs.30,000/- to be paid by the petitioner to the opposite side on or before the next date of hearing."*

3. It appears that the costs so imposed upon the petitioner by this Court in the said judgment has not been paid in terms thereof. It further appears that when learned Trial Court resumed the hearing of the Civil Suit, an objection was taken by the defendant therein that on account of non-payment of the said costs, proceedings cannot be heard any further and the suit be dismissed. Learned Trial Court on 26.08.2017, on the said issue passed the following order:

> *"The point formulated by this Court on previous date of hearing came to be considered and after hearing the parties it does not lead to dismissal of suit for want of payment of cost of Rs.30,000/- imposed by Hon'ble High Court of H.P., although defendant has separate remedy to apply for recovery of such amount by appropriate proceedings. Thus, it be listed for consideration on all pending applications on 11.09.2017"*

However, thereafter again on a similar objection taken by the defendant, the impugned order has been passed by the learned Trial Court on 23.09.2019, vide which, the suit itself has been dismissed by the learned Court below on count of non-payment of costs imposed by this Court in CMPMO No. 394 of 2015. Thereafter, a Review Petition filed for recalling of the said order has also been dismissed by the learned Court below on 18.2.2020.

4. Learned Senior Counsel for the petitioner has argued that the impugned orders are not sustainable in the eyes of law, as while dismissing the suit, learned Trial Court has erred in not appreciating that there was no order passed by this Court while dismissing the earlier CMPMO No. 394 of 2015 that in the event of non-payment of the cost to the defendant, the suit shall not proceed. He further submitted that the defendant was having remedy with regard to the implementation of the order passed by this Court qua payment of costs and it was not as if the Trial Court was to act as an Executing Court of the order passed by the High Court under Article 227 of the Constitution of India. Learned Senior Counsel further submitted that in fact learned Court below has exercised powers not vested in it while dismissing the suit vide impugned orders and, therefore, the petition be allowed by quashing the impugned orders and directing the hearing of the suit on merit.

5. Opposing the petition, learned counsel for the respondent submits that the petitioner on one pretext or the other has been delaying the hearing of the suit and it was in this background that the costs stood imposed upon the petitioner by this Court in the earlier proceedings. While referring to paragraph No. 22 of the judgment passed by this Court in the earlier *lis*, learned counsel further submits that it was categorically mentioned therein by the Court that the costs so imposed, be paid to the opposite party on or before the next date of hearing. According to him, the next date of hearing was referred to in the proceedings before the learned Trial Court and in the

absence of this part of the order being not complied with, learned Trial Court was bound to dismiss the suit and, therefore, the impugned orders do not call for any interference.

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

7. It is not in dispute that the earlier petition filed by the present petitioner under Article 227 of the Constitution of India stood dismissed by this Court vide judgment, dated 18th May, 2016, in which, the cost was also imposed upon the petitioner. However, in the considered view of this Court, it was not within the domain of the learned Trial Court to have had dismissed the Civil Suit so filed by the petitioner for non-payment of costs, so imposed by the High Court. I say so for the following reasons:-

8. The petition which was filed by the petitioner under Article 227 of the Constitution of India did not find merit with the High Court and the same was dismissed on merit. It was while dismissing the said petition on merit that the Court imposed costs of Rs.30,000/-upon the petitioner. In other words, it is not as if some relief was granted to the petitioner in lieu of payment of costs and on account of non-deposition of the costs, so imposed by the Court, the petitioner was not entitled to have that relief enforced by the learned Trial Court. In case the petitioner was not abiding by the order passed by this Court with regard to non-deposition/non-payment of costs so imposed, the respondent/defendant was having remedy to have had the order executed, in accordance with law, but in the considered view of this Court, that could not have been a ground for the learned Trial Court to have had dismissed the

Civil Suit itself, especially when there was no such order passed in the judgment by this Court that in the event of non-payment of the costs, the suit shall be dismissed by the learned Trial Court.

9. As far as the reference of the date in paragraph No. 22 of the judgment, dated 18th May, 2016 is concerned, in the considered view of this Court, that was only a time limit set by the Court as to within what period the amount was to be paid by the petitioner, so that the petitioner subsequently could not take a plea that there was no time limit fixed by the Court for payment of the costs.

10. There is one more aspect of the matter, upon which the Court would like to dwell. After dismissal of the earlier petition filed by the petitioner under Article 227 of the Constitution of India, when initially an objection was taken by the defendant before the learned Trial Court praying for dismissal of the suit on account of non-payment of the costs, learned Trial Court on 26.08.2017, passed an order, vide which, it was observed by the Court that non-deposition of costs does not leads to dismissal of the suit and the defendant was having a separate remedy for recovery of such amount by way of appropriate proceedings. It is not in dispute that said order passed by the leaned Trial Court on 26.08.2017 was not challenged by the defendant. In other words, said order attained finality. That being the case, it is not understood as to how the same Court itself could have sat upon its earlier order, though by another Presiding Officer and entertained similar request of

the respondent, which earlier stood rejected by the same Court. This Court deprecates this kind of practice, because the Court works in continuity and change in Presiding Officer *per se* does not means that the order passed by the earlier Presiding Officer looses efficacy, until and unless the same is assailed by way of appropriate proceedings and altered, modified or set aside.

11. In view of the discussions held hereinabove, the petition is allowed. Order dated 23.09.2019, passed by the Court of learned Senior Civil Judge, Court No. 1, Una, H.P. in Case Registration No. 310/2010, titled as *Naminder Singh Vs. Atma Singh*, vide which, the suit filed by the present petitioner has been dismissed by the learned Court below on account of non-payment of costs imposed upon the present petitioner by the High Court in proceedings initiated under Article 227 of the Constitution of India and order dated 18.02.2020, passed by the said Court, vide which, an application filed for recalling of order, dated 23.09.2019, has been dismissed, are quashed and set aside. Miscellaneous applications, if any, also stand disposed of.

12. At this stage, learned counsel for the parties submit that this Court may make an observation that the Civil Suit be decided by the learned Trial Court within a time bound period. It is observed that subject to Roster, an endeavour shall be made by the learned Court below to decide the Civil Suit by 31st March, 2022.

Parties through their learned counsel are directed to appear before the learned Court below on 6th September, 2021.

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

Between:-

SH. RAKESH KUMAR, S/O SH. NIKKA RAM GARG, R/O VILLAGE SEO, P.O. NASWAL, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

....PETITIONER

(BY SH. JEEVESH SHARMA, ADVOCATE)
AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (AYURVEDA) TO THE GOVT. OF HIMACAL PRADESH, SHIMLA-2.
2. THE DIRECTOR, DEPARTMENT OF AYURVEDA, H.P. GOVT., BLOCK NO. 26, SDA COMPLEX, KASUMPTI, SHIMLA-9, H.P.
3. THE SECRETARY, H.P. STAFF SELECTION COMMISSION, HAMIRPUR, H.P.
4. JYOTI DEVI, AGED ABOUT 35 YEARS, W/O CHAMAN LAL, RESIDENT OF VILLAGE & P.O. SAMOH, TEHSIL JHANDUTTA, DISTRICT BILASPUR, H.P.

...RESPONDENTS

(SH. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR. SUMESH RAJ & ADARSH SHARMA, ADDITIONAL ADVOCATE GENERALS & MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR R-1 & 2.
SH. ANGREZ KAPOOR, ADVOCATE, FOR R-3.
SH. NAVLESH VERMA, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION No. 781 of 2020
DATE OF DECISION: 12.08.2021

Constitution of India, 1950 – Article 226 - The petition for directions to respondent, Secretary H.P. Staff Selection Commission to consider certificate Annexure P-5 in evaluation process and award one mark to petitioner and thereafter redraw the merit list accordingly. The perusal of document alongwith Bio data and form filled by the petitioner while applying for part demonstrate that indeed annexure P-5 was not made available by the petitioner to respondent No.3 - The sheet dealing with evaluation part of 15 marks which contains the signature of the petitioner also at Sr. No.x refers to framing of atleast of six month duration related to the post applied for from a

recognized university institution against which under the Head submitted/ not submitted - there is a cross meaning thereby the same was not submitted and therefore no marks were allotted to the petitioner for the same – Held - In view of record submitted by commission, training certificate was not submitted by petitioner to commission for which no fault can be attributed to the commission for not granting one mark to the petitioner**.** The petition dismissed.

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

J U D G M E N T

By way of this writ petition, the petitioner has, *inter alia*, prayed for the following reliefs:

> *"A. The respondent No. 3, Secretary H.P. Staff Selection Commission, Hamirpur, H.P. may kindly be directed to consider the certificate Annexure P-5 in evaluation process/test and award one mark to the petitioner and further redraw the merit list accordingly."*

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

Respondent No. 3, vide Advertisement dated 26.06.2018 advertised the posts of Ayurvedic Pharmacist on contract basis in respondent No. 2-Department. A copy of the said Advertisement is appended with the petition as Annexure P-1. According to the petitioner, as he was eligible to apply for the post in issue, he did so. He participated in the written objective type screening test held on 24.03.2019 and secured 41.50 marks out of 85 marks. Thereafter, he was called for the Evaluation Test on 16.08.2019. In terms of Annexure P-1, there was a fixed criteria for allotting marks in the Evaluation Process. Out of 15 marks, which were to be awarded under the Evaluation Process, the petitioner was granted 5.26 marks. In terms of

Annexure P-2, i.e., a Press Note, issued by respondent No. 3-Commission, the total marks secured by the petitioner were 46.76 out of 100 marks. The last candidate, who has been selected under the General Category has secured 47.32 marks.

3. The grievance of the petitioner is that the respondents have denied him appointment wrongly as one mark for which he was entitled to in terms of Advertisement Annexure A-1, for having training of at least 6 months duration related to the post applied for from a recognized University/Institution, has been denied to him, though he was having the requisite training from Patanjali Chikitsalaya, which is duly borne out from Certificate, dated 09.04.2020, issued to the petitioner by the Patanjali Chikitsalaya, Chandigarh (Annexure P-5). It is in this background that the petition has been filed praying for the relief mentioned hereinabove.

4. The petition is resisted by the respondents, *inter alia,* on the ground that the allotment of marks to the petitioner was strictly in consonance with his performance and his academic qualifications etc. It is further the stand of the respondent-Commission that as no certificate was submitted by the petitioner from a recognized University or Institution, demonstrating that he was possessing 6 months training, relatable to the post applied for, from a recognized University/Institution, therefore, he was rightly not granted any mark under this particular Head. It is further the stand of respondent No. 3 that Annexure P-5 was never submitted by the petitioner to the respondent-Commission. This is evident from the averments contained in paragraphs No. 5 to 7 of the reply so filed by respondent No. 3 to the writ petition.

5. In this background, when the matter was list on 05.08.2021, the following order was passed:

> *"The only grievance of the petitioner is that in terms of the advertisement, one mark which the*

petitioner was entitled to on account of the experience, has been arbitrarily denied to him while assessing his candidature despite the fact that the copy of the certificate issued by the authorized signatory of the Patanjali Chikitsalaya, stood produced by the petitioner, copy of which is appended herewith as Annexure P5.

In the reply, which has been filed to the petition, the stand of respondent No.3, is to the effect that in terms of the record, the petitioner at the time of the evaluation of marks, did not submit any certificate of training as alleged in para-7 of the petition.

In the considered view of the Court, before any further observations is made by the Court, in this regard, it will be in the interest of justice, in case, respondent No.3 is directed to produce the relevant record which was submitted by the petitioner alongwith his application, because in case petitioner alleges that he produced the certificate and respondent denies it, then it becomes disputed question of fact which cannot not be gone into by this Court under Article 226 of constitution of India.

Accordingly, the matter is ordered to be listed on 12.8.2021, on which date learned counsel for the respondent No.3 shall produce the documents submitted by the petitioner before it."

6. In compliance thereof, the respondent-Commission has produced the original of the documents alongwith Bio Data and Form, which was filled in by the petitioner while applying for the post in issue. A perusal of the same demonstrates that indeed Annexure P-5 was not made available by the petitioner to respondent No. 3. The Sheet dealing with evaluation part of 15 marks, which contains the signature of the petitioner also at Sr. No. -X, refers to “training of at least 6 months duration related to the post applied for from a recognized University/Institution”, against which, under the Head ‘Submitted/Not submitted’, there is a cross, meaning thereby that the same

was not submitted and therefore, no mark was allotted to the petitioner for the same. In this view of fact, as it is evident from the record produced by the Commission that the training certificate was not submitted by the petitioner to the respondent-Commission, no fault can attributed to the respondent-Commission for not granting one mark to the petitioner.

7. Accordingly, this petition being devoid of any merit, is dismissed, so also pending miscellaneous applications, if any. Interim order stands vacated.

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

Between:

1. SH. RAJINDER PAUL,
2. SH. RAJESH PAUL,

   BOTH SONS OF LATE SH. FANDHI RAM,

3. SMT. NIRUBALA D/O LATE SH. FANDI RAM
4. DELTED VIDE ORDER DATED 16.12.2016.
5. SH. MOHINDER SINGH SON OF LATE SH. FANDHI RAM,

   ALL RESIDENTS OF VILLAGE GHANAL-KALAN, TAPPA BAJURI, TEHSIL AND DISTRICT HAMIRPUR, H.P.

….APPELLANTS

(BY SH. ROMES VERMA, ADVOCATE)

AND

1. SH. KASHMIR SINGH,
2. SH. KISHAN CHAND,
3. SH. SUKH DEV,
4. SH. RANGIL SINGH,

ALL SONS OF LATE SH. SALIG RAM,

ALL RESIDENTS OF VILLAGE GHANAL-KALAN,
TAPPA BAJURI, TEHSIL AND DISTRICT
HAMIRPUR, H.P.

....RESPONDENTS

(BY SH.K.D.SOOD, SENIOR ADVOCATE WITH
MR. HET RAM THAKUR, ADVOCATE)

REGULAR SECOND APPEAL No. 435 of 2007
DATED: 17.08.2021

Code of Civil Procedure, 1908 – Section 100 - The appeal under section 100 CPC against judgment and decree passed by Ld. Additional District Judge Civil appeal against judgment and decree passed by Ld. Civil Judge in Civil Suit titled as Rajender Paul vs. Salig Ram whereby suit for prohibitory and mandatory injunction as well as demarcation filled by appellate /plaintiffs was dismissed and the judgment was upheld by Ld. First Appellate Court - Held, plaintiffs have claimed that defendant have encroached upon some portion of Khasra No. 803 - Plaintiff also failed to place on record any document to prove alleged encroachment by the defendant - The suit is based upon the encroachment made by the defendant and the demarcation report of Tehsildar conducted on 13.11.1984, has been placed on record. In appeal before AC 1st Grade the demarcation was set aside- Exercise of power by Court under order 26 Rule of CPC and appointment of Local Commissioner to ascertain boundary dispute – Local Commissioner cannot be appointed to collect the evidence which can best be taken in the Court, otherwise also, local investigation by a commissioner is merely to assist the Court and his report is not binding on the Court. [Para 18]

Code of Civil Procedure, 1908 – Order 41 – Rule 27 – Scope of – Plaintiffs intended to place on record order passed by AC 1st Grade and Mutation No. 394 dated 25-03-2002 – Documents were in the knowledge and possession of the plaintiffs at the time of filing the suit – Application dismissed – Findings of the Courts found to be based upon proper appreciation of evidence – Appeal dismissed

Cases referred:
Beli Ram versus Mela Ram and another, AIR 2003 Himachal Pradesh 87;
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264;
Ram Lal & Sons versus Salig Ram and others, 2019(2) Him.L.R.(SC) 852;
See. Jeet Ram alias Meet Ram vs. Sita Ram and others, latest HLJ 2002(HP)1173 and Shri Gulaba vs. Shri Hari Ram, 1998 Sim. L.C.85;

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

J U D G M E N T

By way of instant appeal filed under Section 100 of CPC, challenge has been laid to judgment and decree dated 28.5.2007, passed by learned Additional District Judge (Fast Track Court) Hamirpur, District Hamirpur, H.P., in Civil Appeal No.49 of 2000, affirming the judgment and decree dated 5.2.2000, passed by learned Sub Judge, 1st Class (I), Hamirpur, District Hamirpur, H.P., in Civil Suit No.29 of 1995, titled as ***Rajinder Paul and others versus Salig Ram***, whereby suit for permanent prohibitory and mandatory injunction as well as demarcation, having been filed by the appellants ***(hereinafter referred to as the plaintiffs),*** came to be dismissed.

2. Precisely, the facts of the case as emerge from the record are that plaintiff filed a suit against original defendant, Salig Ram for permanent prohibitory injunction, averring therein that land compromised in Khata No.75min, Khatauni No.89min, Khasra Nos. 1106/810, 1114/813, kita-2, measuring 2 kanals 15 marlas, as per jamabandi for the year 1992-93, situate in Tika Ghanal Kalan, Tappa Bajuri, Tehsil and District Hamirpur, Himachal

Pradesh ***(hereinafter referred to as the suit land),*** is owned and possessed by the plaintiffs and some portion thereof was encroached upon by the defendant by raising illegal and unauthorized construction of a house in the first week of January, 1989 despite his being stranger to the suit land. Plaintiffs further averred in the plaint that defendant undertook to remove the illegal and unauthorized construction, but fact remains that he again started illegal construction over the suit land in the first week of January, 1993 and since despite repeated requests, he failed to stop the work, plaintiffs had no option, but to file the suit.

3. Original defendant, Salig Ram, who is now being represented by his legal representatives, as detailed in the memo of parties, resisted the aforesaid claim of the plaintiffs on the ground that at no point of time, he raised any construction over the suit land nor he was interfering with the possession of the plaintiffs over the suit land. Defendant submitted that land of the defendant comprised of Khasra Nos.815 and 920 is adjoining to the suit land and the boundaries between the suit land and his land were affixed a number of times and he has raised construction of his house in the year 1982-83, in the year 1984-85 and also in the year 1986. Besides above, defendant also claimed that the entire construction had been raised by him over his own land and at no point of time plaintiff raised objection, if any, and as such, suit having been filed by the plaintiffs deserves outright rejection.

4. On the basis of the pleadings adduced on record by the respective parties, learned court below famed framed following issues:-

1. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction as prayed? OPP.
2. Whether in the alternative, the defendant entitled to the relief of mandatory injunction? OPP.
3. Whether the plaintiff has no cause of action and locus-standi to file the suit? OPD.

4. Whether the defendant is entitled to special costs under Section 35-A CPC? OPD.
5. Whether the plaintiffs are estopped by their own act and conduct from filing the suit? OPD.

6. Relief.

5. Learned trial Court on the basis of the evidence adduced on record by the respective parties, dismissed the suit of the plaintiffs vide judgment and decree dated 5.2.2000.

6. Being aggrieved and dissatisfied with the dismissal of the suit, plaintiffs filed Civil appeal under Section 96 CPC in the court of learned Additional District Judge (Fast Track Court) Hamirpur, District Hamirpur, Himachal Pradesh, however fact remains that same was also dismissed vide judgment and decree dated 28.5.2007. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings, praying therein to decree their suit after setting aside the judgments and decrees passed by learned Courts below.

7. On 14.5.2008, this Court admitted the appeal at hand on the following substantial questions of law:-

"1. Whether the learned lower Appellate Court was required to allow the application under Order 26 Rule 9 CPC, once it has rejected the earlier demarcation reports on record?.
2. Whether the application under Order 41 Rule 27 CPC was rejected wrongly by the learned appellate Court?".

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

SUBSTANTIAL QUSTION OF LAW No.1

9. Perusal of the pleadings adduced on record by the plaintiffs, reveal that the plaintiffs have claimed that defendants have encroached upon some portion of Khasra No.813, but plaint clearly reveals that no specific

details with regard to land encroached by the defendants ever came to be pleaded in the plaint. Similarly, plaintiffs also failed to file any tatima to demonstrate the extent of land allegedly encroached by the defendants. The entire case of the plaintiffs qua the encroachment made by the defendants, is based upon the demarcation report of Tehsildar conducted on 13.11.1994 i.e. prior to filing of the suit. Though, aforesaid report came to be exhibited as DW2/C, but it is not in dispute that aforesaid report was set-aside in the appeal by A.C.1st Grade vide order dated 16.11.2002, copy whereof stands exhibited as Ex.PC. Careful perusal of aforesaid report clearly reveals that A.C.1st Grade has relied upon that demarcation report Ex. R-1, which was carried out by the Tehsildar on 6.6.2000 and was made a part of the order. Report further reveals that during the pendency of the suit person namely, Dila Ram, Tehsildar, came to be appointed as Local Commissioner, who after having demarcated the land in question, submitted the report Ex.DW2/C. Plaintiffs claimed before the Court below that demarcation report Ex.DW2/C submitted by Local Commissioner appointed by the Court below, clearly reveals that defendants have encroached upon the suit land comprised of Khasra No.1114/813/1 to the extent of 5 marlas and from Khasra No.1114/813/2 to the extent of 01 Sarsahi and as such, suit having been filed by the plaintiffs needs to be decreed.

10. Defendants while disputing aforesaid report claimed before the Court below that since Local Commissioner appointed by the court below failed to demarcate the land as per the instructions issued by the Financial Commissioner, same cannot be taken into consideration while determining the issue with regard to encroachment, if any, done by the defendants on the land of the plaintiffs. Local Commissioner, Sh. Dila Ram, with a view to prove his report Ex.DW2/C, appeared as DW-2 and stated that before conducting the demarcation, he fixed three points ABC, but he is not aware on which Khasra number points ABC were fixed and as such, has not mentioned the same in

his report. He also stated that suit land did not fall within the fixed points ABC. DW-2 also stated that he did not measure the adjoining land of the defendants comprised in Khasra No.815, nor he fixed any boundary of the adjoining Khasra numbers. DW-2 deposed that southern boundaries of the suit land have been not measured nor shown in the report. If the statement of this witness is read in its entirety, it clearly reveals that he did not demarcate the land as per the instructions issued by the Financial Commissioner and as such, Court below refused to place reliance upon the same. It also emerge from the statement of this witness that he failed to measure adjoining land of the defendants and as such, it is not understood that how it arrived a conclusion that defendants have encroached upon the land of the plaintiffs to the extent of 5 marlas in Khasra No.1114/813/1 and 01 Sarsahi in Khasra No.1114/813/2. Once, this witness categorically admitted that suit land was not demarcated in terms of the instructions issued by Finance Commissioner, no fault, if any, can be found with the action of the courts below while not accepting the report Ex.DW2/C.

11. It is not in dispute that on 6.6.2000, during the pendency of the first appeal having been filed by the plaintiffs, another Tehsildar conducted the demarcation of the spot, which came to be placed on record as Ex.R-1. As per report (Ex.R-1), dated 6.6.2000, lands of the parties were measured in their presence and no part of the suit land was found under the possession of the defendants. Interestingly, in this report Tehsildar reported that there is a road, which is over the land owned and possessed by the plaintiff Rajinder Paul and adjoining to the road his land is lying vacant. In this report, house of the defendant Salig Ram was found to be constructed over his own land. This report was admitted to be correct by both the parties, as is evident from their statements recorded by the Tehsildar. Interestingly, no mention, if any, of road ever came to be made in the report of Tehsildar, Sh. Dila Ram (DW-2), who was appointed by the trial Court in his report Ex.DW2/C and as such, learned

Court below rightly not accepted his report. Subsequently, demarcation report Ex.R-1 was accepted by the parties to the *lis* as correct and SDO (Civil) also accepted the same as correct, as is evident from order dated 2.7.2021 and same was ordered to be made part of the order of the SDO (Civil).

12. Record reveals that during the pendency of the appeal, plaintiffs filed another application under Order 26 Rule 9 CPC, praying therein for appointment of fresh Local Commissioner, but such prayer of them was not accepted by the court below.

13. Mr. Romesh Verma, learned counsel representing the appellants-plaintiffs while placing reliance upon the judgment rendered by Hon'ble Apex Court in case titled **Ram Lal & Sons versus Salig Ram and others,** 2019(2) Him.L.R.(SC) 852 (Civil Appeal No.8285 of 2009), contended that when courts below had arrived at a definite conclusion that Local Commissioner appointed by the trial court did not conduct the demarcation as per the instructions, it instead of dismissing the suit of the plaintiff, ought to have appointed fresh Local Commissioner, so that he could conduct fresh demarcation in terms of the instructions issued by the Financial Commissioner. It would be profitable to take note of paras No. 15 to 17 of the aforesaid judgment herein:-

> "15. It appears from the observations made by the High Court in the present case that the Local Commissioner omitted to scrupulously follow the applicable instructions for carrying out such demarcation and particularly omitted to fix three reference points on different sides of the land in question. However, the report made by the Local Commissioner was accepted by the Trial Court as also by the First Appellate Court. The question is: If the Local Commissioner's report was suffering from want of compliance of the applicable instructions, what course was to be adopted by the High Court?
>
> 16. An appropriate answer to the question aforesaid is not far to seek. In the course of a civil suit, by way of incidental

proceedings, the Court could issue a Commission, inter alia, for making local investigation, as per Section 75 of the Code of Civil Procedure ("the Code" hereafter). The procedure in relation to such Commission for local investigation is specified in Rules 9 and 10 of Order XXVI of the Code. Suffice it to notice for the present purpose that, as per clause (3) of Rule 10 of Order XXVI, where the Court is disssatisfied with the proceedings of such a Local Commissioner, it could direct such further inquiry to be made as considered fit. This clause (3) of Rule 10 of Order XXVI of the Code reads as under:-

> "Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

17. The fact that the Local Commissioner's report, and for that matter a properly drawn up report, is requisite in the present case for the purpose of elucidating the matter in dispute is not of any debate, for the order dated 24.01.1991 passed by the First Appellate Court having attained finality whereby, additional issues were remitted for finding on the basis of Local Commissioner's report. In the given set of facts and circumstances, we are clearly of the view that if the report of the Local Commissioner was suffering from an irregularity i.e., want of following the applicable instructions, the proper course for the High Court was either to issue a fresh commission or to remand the matter for reconsideration but the entire suit could not have been dismissed for any irregularity on the part of Local Commissioner. To put it differently, we are clearly of the view that if the Local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw, by itself, could have neither resulted in nullifying the order requiring appointment of Local Commissioner and for recording a finding after taking his report nor in dismissal of the suit. Hence, we are unable to

> approve the approach of High Court, where after rejecting the Commissioner's report, the High Court straightway proceeded to dismiss the suit. The plaintiffs have been asserting encroachment by the defendants on their land and have also adduced oral and documentary evidence in that regard. As noticed, the First Appellate Court had allowed the appeal and decreed the suit filed by the plaintiff not only with reference to the Commissioner's report but also with reference to the other evidence of the parties. Unfortunately, the High Court appears to have overlooked the other evidence on record".

14. There cannot be any quarrel with the aforesaid proposition of law laid down by the Hon'ble Apex Court that if Local Commissioner omits to scrupulously follow the applicable instructions for carrying out demarcation and particularly omits to fix three reference points on the different sides of the land in question, courts should call for fresh demarcation report, but now the question arises for consideration in the instant case is whether there was any requirement, if any, for appointment of fresh Local Commissioner in the light of the demarcation report dated 6.6.2000 Ex.R-1, conducted during the pendency of the first appeal preferred by the plaintiffs. It is not in dispute that demarcation report Ex.DW2/C furnished by Sh. Dila Ram (DW-2) was not in accordance with law and as such, Court ought to have called for fresh demarcation report, as has been held by the Hon'ble Apex Court in the aforesaid case, but since after dismissal of the suit by trial court, suit land again came to be demarcated by another Tehsildar and he in his report dated 6.6.2000 Ex.R-1, categorically stated that no part of the suit land falls under the possession of the defendants, there was no question for accepting the fresh prayer made on behalf of the plaintiffs for appointment of fresh Local Commissioner. DW-2, Dila Ram had submitted the demarcation report Ex.DW2/C during the pendency of the trial and was admittedly was not found to have been carried out in accordance with law and as such, court below had

two option either to dismiss the suit of the plaintiff or to have appointed fresh Local Commissioner, as has been held by Hon'ble Apex Court. Learned trial court dismissed the suit on the ground that plaintiffs have not been able to prove encroachment, if any, made by the defendants over the suit land. However, fact remains that during the pendency of the first appeal having been filed by the plaintiffs, fresh demarcation came to be conducted on 6.6.2000, which subsequently, came to be placed on record as Ex.R-1. Perusal of aforesaid report clearly reveals that both the parties accepted the report to be correct and in that report person responsible for carrying out demarcation categorically reported that no part of the suit land falls under the possession of the defendants. In the aforesaid report, it also came to be reported that there is a road near the land owned and possessed by plaintiff Rajinder Paul and adjoining to the road the land is laying vacant. No house of defendant Salig Ram was found to be constructed on the land of the plaintiffs.

15. Statements made by plaintiffs before the Tehsildar concerned at the time of demarcation, dated 6.6.2000, clearly reveal that they admitted the same to be correct. Aforesaid report Ex.R-1 was accepted as correct by S.D.O.(Civil), as is evident from order dated 2.7.2001 and same was also ordered to be made part of the order of the SDO(Civil). Since, fresh demarcation report, dated 6.6.2000 was already on record of First Appellate Court, there was no occasion, if any, for First Appellate Court to accept the prayer made on behalf of the plaintiffs for appointment of fresh Local Commissioner and as such, he rightly dismissed the second application having been filed by the plaintiffs under Order 26 Rule 9 CPC for appointment of fresh Local Commissioner.

16. Rule 9 of Order 26 CPC provides for the appointment of Local Commissioner for the purpose of local investigation or for elucidating any matter in dispute or for other allied purposes. The object of the local investigation is not to collect the evidence which can best be taken in the

court, but to obtain evidence, which from its very nature can only be gathered on the spot. Otherwise also, local investigation by a Commissioner is merely to assist the court and as such, report is not binding on the court, which can arrive at its own conclusion on the basis of evidence on record even in a variance to such a report. **See. Jeet Ram alias Meet Ram vs. Sita Ram and others, latest HLJ 2002(HP)1173 and Shri Gulaba vs. Shri Hari Ram, 1998 Sim. L.C.85.**

17. Mr. Romesh Verma, learned counsel representing the appellants while placing reliance upon the judgment rendered by this Court in **Beli Ram versus Mela Ram and another, AIR 2003 Himachal Pradesh 87,** contended that Court can exercise power *suo motu* and remand the case with the direction to appoint Local Commissioner. It would be apt to take note of para-13 of the judgment herein below:-

> "13. Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case".

18. There cannot be any dispute qua aforesaid proposition of law that Court while exercising power under order 26 Rule 9 of the Code of Civil Procedure of its own can order to appoint Local Commissioner to ascertain boundary dispute, but it can be only done if the court deems it necessary to appoint local investigation for the purpose of elucidating any matter in dispute. Though, aforesaid judgment has no application in the instant case, but since First Appellate Court while discarding the demarcation report Ex.DW2/C, submitted by DW-2 took into consideration subsequent demarcation report Ex.R-1 conducted on 6.6.2000, which was admitted by both the parties to be correct, there was otherwise no occasion for the learned First Appellate Court to allow the second application under Order 26 Rule 9 CPC for appointment of fresh Local Commissioner and to remand the case for trial court for this purpose. Substantial question of law No.1 is answered accordingly.

SUBSTANTIAL QUESTION OF LAW No.2

19. Record reveals that during the pendency of first appeal plaintiffs filed an application under Order 41 Rule 27 CPC, seeking therein permission of the Court to tender in evidence certified copy of order dated 16.1.2002, passed by A.C.1st Grade/Tehsildar Hamirpur in case No.37 of 1995, titled as *Rajinder Paul versus Salig Ram* and copy of mutation No.394, dated 25.3.2002 as an additional evidence. In the aforesaid application, plaintiffs claimed before the Court below that they had filed civil suit for permanent prohibitory and mandatory injunction as well as demarcation with regard to Khasra Nos. 1106/ 810 and 1114/813, kita 2, measuring 2 kanals 15 marlas before the Sub Judge, 1st Class (I), Hamirpur, H.P. on 31.1.1995. During the pendency of aforesaid suit, Sh. Dila Ram, retired Tehsildar (DW-2) was appointed as Local Commissioner vide order date 24.2.1998 i.e. Ex. DW2/A. As per the plaintiffs,

Sh. Dila Ram (DW-2) carried out the demarcation and found defendants to have encroached upon the land of the plaintiffs, but same was not relied upon by the learned lower court as the Local Commissioner did not carry out demarcation as per the reference of lower court and suit of the plaintiff was dismissed.

20. Plaintiffs also averred in the application that when the demarcation was carried out by the Local Commissioner on 6.4.1998, the southern sides of Khasra Nos. 1106/810 and 114/813 were taken as 12 karams each because these were mentioned wrongly. Besides above, plaintiffs averred in the application that at the time of partition of Khasra Nos. 810 and 813, the southern sides of Khasra Nos. 1106/810 and 1114/813 were mentioned wrongly as 12 karams each and a correction application was made by the plaintiffs before the A.C.1st Grade/Tehsildar, Hamirpur, H.P., on 22.9.1995 vide case No.37/95, titled Rajinder Paul versus Salig Ram and same was allowed on 16.1.2002. Revenue Officer ordered to correct the southern sides of Khasra No.1106/810 from 12 karams to 15 karams and Khasra No. 1114/813 from 12 karams to 13 karams, Khasra No.1107/810 from 18 karams to 22 karams and Khasra No.1115/813 from 8 karams to 10 karams. Plaintiff claimed that there is boundary dispute between the parties and as such, order dated 16.1.2002 passed by A.C.1st Grade and mutation No.394, dated 25.3.2002 are very material for the just decision of the case.

21. This Court finds from the record that all the documents intended to the placed on record by way of additional evidence were very much in the knowledge/possession of the plaintiffs at the time of filing of the suit, but yet they without there being any plausible reasons failed to place the same on record. Very purpose and intent of filing the application at hand is to bring on record certified copy of order dated 16.1.2002, passed by A.C.1st Grade in case No.37 of 1995, titled as Rajinder Paul versus Salig Ram and copy of mutation No.394, dated 25.3.2002, but no fruitful purpose would be served by taking

aforesaid documents on record for adjudication of the case at hand. By way of aforesaid documents, plaintiffs intend to prove that since certain correction came to be made at the time of partition of Khasra No. 810 and 813 and southern sides of Khasra Nos. 1106/810 and 1114/813, fresh demarcation can be ordered with the direction to Local Commissioner to take into consideration corrections made by the revenue authorities, but once plaintiffs themselves have accepted the latest demarcation report dated 6.6.2000 Ex. R-1 carried out by the Tehsildar during the pendency of the appeal, it is not understood that how order dated 16.1.2002, passed by A.C.1st Grade, Tehsildar Hamirpur, is of any help to the plaintiffs. It is not in dispute that demarcation report dated 6.6.2000, Ex.R-1 was not only accepted by the parties, but the same was also accepted as corrected by the SDO (Civil) vide order dated 2.7.2001 and same has also been ordered to form part of the order. Till the time, aforesaid report is not set-aside by the competent authority, same could not be ignored and as such, court below rightly took the same into consideration while holding that the defendants have not encroached upon the suit land. It clearly emerge from the evidence, be it ocular of documentary, led on record that plaintiffs have miserably failed to prove the factum with regard to encroachment made by the defendants over the suit land.

22. Having perused the material available on record, this Court is fully satisfied and convinced 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. Substantial questions of law No.2 is answered accordingly.

23. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, wherein it has been held as under:

> *"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."*
>
> ***(p.269)***

24. Aforesaid exposition of law clearly suggests that High Court, while excising power under Section 100 CPC, cannot upset concurrent findings of fact unless the same are shown to be perverse. But, in the case at hand, this Court while examining the correctness and genuineness of submissions having been made by the parties, has carefully perused evidence led on record by the respective parties, perusal whereof certainly suggests that the Courts below have appreciated the evidence in its right perspective and there is no perversity, as such, in the impugned judgments and decrees passed by both the Courts below. Moreover, learned representing the appellants- plaintiffs was unable to point out perversity, if any, in the impugned judgments and decrees passed by both the Courts below and as such, same do not call for any interference.

25. Consequently, in view of the discussion made hereinabove, this Court is of the view that the judgments and decrees passed by both the Courts

below are based on correct appreciation of the evidence, be it ocular or documentary on the record and, as such, present appeal fails and same is accordingly dismissed.

26. Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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

Between :-

1. ROSHAN LAL S/O SH. MOHAN

2. RAM DASS S/O SH. MOHAN

3. PARMA NAND S/O SH MOHAN

4. HARI SINGH (DECEASED THROUGH L.Rs)4(a)
KOURU DEVI W/O SH HARI SINGH
4(b) HANS RAJ S/O SH HARI SINGH S/O SH MOHAN
4(c) SURENDER KUMAR S/O SH. HARI SINGH S/O SH MOHANALL
R/O VILL, CHHAJWAR P.O. MALOH,
TEHSIL SUNDER NAGAR, DISTT. MANDI H.P.

.....PETITIONERS

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

AND

1. THE LAND ACQUISITION COLLECTOR,
COLLECTOR, HPPWD MANDI DISTT. MANDI H.P.

2. THE EXECUTIVE ENGINEER HPPWD
DIVISION SUNDER NAGAR, DISTT MANDI, H.P.

.....RESPONDENTS

(Mr. R.P. Singh and Ms. Seema Sharma,Deputy
Advocates General)

CIVIL MISC. PETITION MAIN (ORIGINAL No. 152 OF 2021)
DECIDED ON: 27.08.2021

Lok Adalat - Petitioner in the year 2021 seek to set aside an award passed by National Lok Adalat on 9.12.2017 on the ground that they had not authorized the ld counsel who had appeared on their behalf before the Lok Adalat- Held- The award was passed by Lok Adalat on 9.12.2017 whereby not only the appeal, but the cross objection was dismissed as withdrawn on the strength of statement made by perspective appearing on behalf of appellant as well as statement made by Sh. Surinder Verma, Advocate on behalf of present petitioner subsequent to the award, petitioner moved CWP under section 151 CPC for release of award amount in their favour, with averment that appeal had been finally disposed off vide order dated 9.12.2017 and they are in need of money - The application was supported by affidavit of petitioner and application was disposed off - Application and order would indicate that the petitioner were very well aware of the order dated 9.12.2017 passed by National Lok Adalat and order clearly records the fact that not only the appeal but cross objection was also dismissed and withdrawn. There cannot be the case of petitioner that there were two separate order passed on 9.12.2017 one dismissed the appeal and the other dismissed their cross objection, therefore there is no escape from the conclusion that the petitioner were very well aware of the order dated 9.12.2017. The moving of application for release of awarded amount after being aware of order dated 9.12.2017 clearly indicate that petitioner had accepted and acquired in the award dated 9.12.2017. so they cannot be permitted to set up a plea three years later that Sh. Surinder Verma, Advocate was not authorized by them to appear and make statement on their behalf before Lok Adalat and for their reason award be set aside having accepted the award, having acted upon it, the present petitioner are now stopped from challenging it - The petition dismissed.

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

O R D E R

Petitioners in the year 2021 seek to set aside an award passed by National Lok Adalat on 09.12.2017, on the ground that they had not authorized the learned counsel, who had appeared on their behalf before the Lok Adalat.

2(i) A bunch of regular first appeals was listed before the National Lok Adalat on 09.12.2017. This bunch included *RFA No.168 of 2015 with CO No.126 of 2016* titled *the Land Acquisition Collector Vs Roshal Lal* alongwith other connected regular first appeals.

2(ii) The bunch matters alongwith RFA No.168 of 2015 and CO No. 126/2016 was taken up by the National Lok Adalat. Shri Purinder Sharma, Joint Director, Prosecution (PWD)-cum Member Secretary (Litigation) Monitoring, appeared on behalf of the appellants. His statement recorded by the Lok Adalat on 09.12.2017 was as under:-

> *"Stated that I have been authorized by the State of Himachal Pradesh-Appellant(s) to withdraw the present appeal(s) in the interest of general public. The appeal(s) are accordingly dismissed as withdrawn as the award passed by the learned District Judge is within the permissible limit. Court fee be refunded to the appellant(s) strictly in accordance with law. The award be passed accordingly. The awarded amount, if not be deposited will be deposited in a month."*

Shri Surinder Verma, Advocate, appeared on behalf of the respondents/cross-objectors (present petitioners). His statement was recorded on oath as under:-

> *"I have heard and understood the statement given by Shri Purinder Sharma, Joint Director, Prosecution (PWD)-cum Member Secretary (Litigation) Monitoring, Nirman Bhawan, Shimla, H.P. and the same is correct. As per the instruction given by my clients, the present appeal(s) filed by the State may kindly be dismissed as withdrawn and similarly Cross Objection(s) filed by respondent(s) in some of the case also stand dismissed as withdrawn. I am giving aforesaid statement on behalf of my client(s)."*

2(iii) Lok Adalat thereafter proceeded to pass following award on 09.12.2017:-

> *"Shri Purinder Sharma, Joint Director, Prosecution (PWD)-cum-Member Secretary (Litigation) Monitoring alongwith Shri Vidya Sagar Sharma, Assistant Engineer, SNP Shahnahar Project, Sub Division Thakurdwara under Division SNP Sansarpur Terrace*

appeared before us and submitted vide separate statement that the present appeal(s) be dismissed as withdrawn as the award passed by the learned District Judge is within the permissible limit and State has no objection if the appeal(s) be dismissed withdrawn.

2. Learned Advocate appearing on behalf of the respondent(s) submitted the Cross Objection(s) filed by the respondent(s) be also dismissed as withdrawn and he has no objection if the present Cross Objection(s) is dismissed as withdrawn. Statement(s) of parties have been recorded separately and placed on record.

3. In view of the above submissions, the present appeal(s) and Cross Objection(s) are dismissed as withdrawn. Statements of the parties will form part and parcel of the award. The amount awarded by the learned District Judge will be deposited by the appellant(s) if already not deposited, within a month in the Registry of High Court of Himachal Pradesh and the same shall be released in favour of the respondent(s) alongwith up-to-date interest in the Payee Account Numbers to be furnished by the respondent(s) within fortnight. The Court fee shall be refunded in favour of the appellant(s) strictly as per rules.

The award is passed accordingly and the appeal(s) alongwith application(s), if any, and Cross Objection(s) stand disposed of.

(Anand Sharma) (D.K. Khenal) (P.S. Rana)
Member Member Chairman"

2(iv) In the instant petition filed by the original respondents-cross objectors, a prayer has been made for setting aside the award dated 09.12.2017 passed by the Lok Adalat and for restoration of cross-objection No.126/2016 to its original number and for its decision on merits by the Court.

3. Sh. H.S. Rangra, learned counsel for the petitioners submitted that the petitioners had not authorized Shri Surinder Verma, Advocate, to appear and make statement on their behalf before the Lok Adalat on 09.12.2017. The authorizedcounsel in the RFA No.168/2015 and its connected cross- objection was Sh. H.S. Rangra, Advocate (counsel in the

present petition). Neither Sh. H.S. Rangra, Advocate, nor the present petitioners had authorized Sh. Surinder Verma, Advocate, to appear and make statement on their behalf before the Lok Adalat in the case in question. It is also contended that the present petitioners were under the bonafide impression that only the appeal filed by the appellants i.e. the Land Acquisition Collector, was dismissed as withdrawn under the award dated 09.12.2017 and that their cross-objection was still pending. It was only on 08.04.2021, when the record of the case was inspected by Sh. H.S Rangra, Advocate, that he became aware of the fact that not only the appeal but the cross-objection preferred by the present petitioners had also been dismissed by the Lok Adalat as withdrawn. On the basis of these assertions, prayer has been made for setting aside the award dated 09.12.2017 to the extent it dismissed as withdrawn the cross- objection filed by the present petitioners (original respondents in RFA No.168/2015).

Learned Deputy Advocate General defended the award and submitted that the present petitioners (original respondents) had engaged different learned counsels in different proceedings. She further submitted that it is incorrect on part of the petitioners to submit that they had not authorized Shri Surinder Verma, Advocate, to make statement on their behalf before the Lok Adalat.

4. Certain facts become relevant in order to appreciate the grievance projected by the petitioners.

4(i) The award was passed by the Lok Adalat on 09.12.2017 whereby not only the appeal but the cross-objection was also dismissed as withdrawn. The award was passed on the strength of statement made by the representative appearingon behalf of the appellants as well as on the basis of statement made by Shri Surinder Verma, Advocate, on behalf of the present petitioners. Learned counsel for the present petitioners contended that Sh. Surinder Verma, Advocate, was not authorized to appear & make

statement on behalf of the present petitioners in the Lok Adalat. Be that as it may.

4(ii) Significantly, subsequent to the award, present petitioners moved CMP No.697/2020 in RFA No.168/2015 under Section 151 of the Code of Civil Procedure. The prayer in the application was for release of the awarded amount in their favour. In this application, averments were made by the petitioners that the appeal had been finally disposed of vide order dated 09.12.2017 and that they are in the need of money.

Therefore, prayer was made for release of the awarded amount. Two paragraphs of the application being relevant are extracted hereinafter:-

> *"1. That the above titled first appeal against the award passed by the learned Addl. Distt. Judge Mandi, Distt. Mandi has been filed by the non- applicant/appellant before the Hon'ble Court which appeal has been finally disposed of by this Hon'ble High Court vide order dated 09.12.2017.*
>
> *2. That the non-applicant had preferred the appeal before this Hon'ble High Court and as per the direction of this Hon'ble Court had also deposited the entire amount of compensation in the registry of this Hon'ble Court."*

The application was supported with the affidavits of the present petitioners.

4(iii) CMP No.697/2020 was allowed by a Coordinate Bench of this Court on 24.02.2020 with following order:-

> *" By way of instant application, prayer has been made on behalf of respondents No.1 to 3 and 4(a) to 4(c) for the release of award amount lying deposited in the Registry of this Court. Learned Additional Advocate General appearing for the non-applicant/appellant fairly states that since no appeal whatsoever has been filed by them, against order dated 9.12.2017 passed by National Lok Adalat, there appears to be no impediment in accepting the prayer made in the instant application and accordingly same may be allowed.*
>
> *Averments contained in the application clearly reveal that the appeal having been filed by the non- applicant/appellant was finally disposed of as compromised vide order dated 9.12.2017*

passed by National Lok Adalat. Since no appeal, whatsoever, has been filed against aforesaid order by either of the parties, in the Hon'ble Supreme Court, same has attained finality, as such, there appears to be no impediment in accepting the prayer made in the instant application, which is accordingly allowed. Award amount lying deposited with the Registry of this Court is ordered to be released in favour of the applicants/respondents No No.1 to 3 and 4(a) and 4(c) as per their shares and remit the same into their saving bank accounts, details whereof is given in para-5 of the application, subject to verification by the Accounts Branch. Application stands disposed of."

5. Contents of the above extracted application and perusal of the above order would indicate that the present petitioners were very well aware of the order dated 09.12.2017 passed by the National Lok Adalat. The order dated 09.12.2017 clearly records the fact that not only the appeal but the cross-objection was also dismissed as withdrawn. It was only thereafter that the application for release of the awarded amount was moved by the petitioners on the ground that the matter was finally disposed of. It cannot be the case of the present petitioners that there were two separate orders passed on 09.12.2017, one dismissing the appeal and the other dismissing their cross-objection. Therefore there is no escape from the conclusion that the petitioners were very well aware of the order dated 09.12.2017 dismissing the appeal as well as their cross-objection as withdrawn. They accordingly moved the application before the Court for release of the awarded amount after disposal of the case by the Lok Adalat on 09.12.2017. In case the present petitioners were aggrieved by the dismissal of their cross-objection then they were required to take appropriate steps in that regard at the relevant time. The moving of application by the petitioners for release of the awarded amount after being aware of the order dated 09.12.2017 clearly indicates that the petitioners had accepted and acquiesced in the award dated 09.12.2017 dismissing not only the appeal but also their cross objection as withdrawn. They cannot be permitted to set up a plea three

years later that Shri Surinder Verma, learned counsel, was not authorized by them to appear and make statement on their behalf before the Lok Adalat and that for this reason the awardbe set aside. The order passed by the Coordinate Bench on 24.02.2020 specifically records that *"the appeal having been filed by the non-applicant/appellant was finally disposed of as compromised vide order dated 9.12.2017 passed by National Lok Adalat. Since no appeal, whatsoever, has been filed against aforesaid order by either of the parties, in the Hon'ble Supreme Court, same has attained finality, as such, there appears to be no impediment in accepting the prayer made in the instant application, which is accordingly allowed*". The order was passed in present of Sh. H.S. Rangra, Advocate, for the present petitioners. The petitioners who were applicants in CMP No.697/2020 were released awarded amount on the basis of the statement made on their behalf that the award dated 9.12.2017 had become final. Therefore, the plea being taken now that the present petitioners were not aware of dismissal of their cross-objection as withdrawn under order dated 09.12.2017 is not borne out from the record. Having accepted the award, having acted upon it, the present petitioners are now estopped from challenging it. Hence, the instant petition being totally misconceived and devoid of merit is dismissed. Pending miscellenous applications, if any, shall also stand disposed of.

RFA No.169 of 2015 title *the Land Acquisition Collector Vs Dharam Singh, RFA No.170 of 2015 with CO No.127 of 2016* titled *the Land Acquisition Collector Vs Roshal Lal Alia Lekh Ram*, *RFA No.171 of 2015 with CO No.128 of 2016* titled *the Land Acquisition Collector Vs Chand Ram, RFA No.172 of 2015 with CO No.129 of 2016* titled *the Land Acquisition Collector Vs Lachhmi Chand Alias Chandu, RFA No.173 of 2015 with CO No.130 of 2016* titled *the Land Acquisition Collector Vs Nanku Ram, RFA No.174 of 2015 in CO No.131 of 2016* titled *the Land Acquisition Collector Vs Muni Lal*, *RFA No.175 of 2015 with CO No.132 of 2016* titled *the Land Acquisition Collector Vs Brikam Ram*, *RFA*

No.176 of 2015 with CO No.133 of 2016 titled *the Land Acquisition Collector Vs Shanti Devi, RFA No.177 of 2015 in CO No.134 of 2016* titled *the Land Acquisition Collector Vs Gurdass, RFA No.178 of 2015 in CO No.135 of 2016* titled t*he Land Acquisition Collector Vs Durga, RFA No.180 of 2015* titled *the Land Acquisition Collector Vs Pritam, RFA No.181 of 2015 inCO No.130 of 2016* title *the Land Acquisition Collector Vs Chuni Lal, RFA No.182 of 2015, titled the Land Acquisition Collector Vs Dharam Singh, RFA No.183 of 2015* titled t*he Land Acquisition Collector Vs Nag Raj, RFA No.184 of 2015* titled *the Land Acquisition Collector Vs Balak Ram, RFA No.185 of 2015 titled the Land Acquisition Collecto*r *Vs Hem Singh and RFA No.186 of 2015* titled *the Land Acquisition Collector Vs Surender.*

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

Between:-

1. MUNI LAL S/O SH PARSU

2. DHARAM DUTT S/O SH PARSU

BOTH R/O VILL, CHHAJWAR P.O. MALOH, TEHSIL SUNDER NAGAR, DISTT. MANDI H.P.

.....PETITIONERS

(BY SH. H.S. RANGRA ADVOCATE)

AND

1. THE LAND ACQUISITION COLLECTOR, COLLECTOR, HPPWD MANDI DISTT. MANDI H.P.

2. THE EXECUTIVE ENGINEER HPPWD DIVISION SUNDER NAGAR, DISTT MANDI, H.P.

.....RESPONDENTS

(Mr. R.P. Singh and Ms. Seema Sharma,Deputy Advocates General)

CIVIL MISC. PETITION MAIN (ORIGINAL No. 170 OF 2021)
DECIDED ON : 27.08.2021

Lok Adalat - Petitioner in the year 2021 seek to set aside an award passed by National Lok Adalat on 9.12.2017 on the ground that they had not authorized the ld counsel who had appeared on their behalf before the Lok Adalat- Held- The award was passed by Lok Adalat on 9.12.2017 whereby not only the appeal, but the cross objection was dismissed as withdrawn on the strength of statement made by perspective appearing on behalf of appellant as well as statement made by Sh. Surinder Verma, Advocate on behalf of present petitioner subsequent to the award, petitioner moved CWP under section 151 CPC for release of award amount in their favour, with averment that appeal had been finally disposed off vide order dated 9.12.2017 and they are in need of money. The application was supported by affidavit of petitioner and application was disposed off - Application and order would indicate that the petitioner were very well aware of the order dated 9.12.2017 passed by National Lok Adalat. The order clearly records the fact that not only the appeal but cross objection was also dismissed and withdrawn. There cannot be the case of petitioner that there were two separate order passed on 9.12.2017 one dismissed the appeal and the other dismissed their cross objection, therefore there is no escape from the conclusion that the petitioner were very well aware of the order dated 9.12.2017. The moving of application for release of awarded amount after being aware of order dated 9.12.2017 clearly indicate that petitioner had accepted the award dated 9.12.2017. They cannot be permitted to set up a plea three years later that Sh. Surinder Verma, Advocate was not authorized by them to appear and make statement on their behalf before Lok Adalat and for their reason award be set aside having accepted the award, having acted upon it, the present petitioner are now stopped from challenging it petition dismissed.

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

O R D E R

Petitioners in the year 2021 seek to set aside anaward passed by National Lok Adalat on 09.12.2017, on the ground that they had not authorized the learned counsel, who had appeared on their behalf before the Lok Adalat.

2(i) A bunch of regular first appeals was listed before the National Lok Adalat on 09.12.2017. This bunch included*RFA No.174 of 2015 with CO No.131 of 2016* titled *the Land Acquisition Collector Vs Muni Lal* alongwith other connectedregular first appeals.

2(ii) The bunch matters alongwith RFA No.174 of 2015 and CO No.131/2016 was taken up by the National Lok Adalat. Shri Purinder Sharma, Joint Director, Prosecution (PWD)-cum Member Secretary (Litigation) Monitoring, appeared on behalf of the appellants. His statement recorded by the Lok Adalat on 09.12.2017 was as under:-

> *"Stated that I have been authorized by the State of Himachal Pradesh-Appellant(s) to withdraw the present appeal(s) in the interest of general public. The appeal(s) are accordingly dismissed as withdrawn as the award passed by the learned District Judge is within the permissible limit. Court fee be refunded tothe appellant(s) strictly in accordance with law. The award be passed accordingly. The awarded amount, if not be deposited will be deposited in a month."*

Shri Surinder Verma, Advocate, appeared on behalf of the respondents/cross-objectors (present petitioners). His statement was recorded on oath as under:-

> *"I have heard and understood the statement given by Shri Purinder Sharma, Joint Director, Prosecution (PWD)-cum Member Secretary (Litigation) Monitoring, Nirman Bhawan, Shimla, H.P. and the same is correct. As per the instruction given by my clients, the present appeal(s) filed by the State may kindly be dismissed as withdrawn and similarly Cross Objection(s) filed by respondent(s) in some of the case also stand dismissed as*

withdrawn. I am giving aforesaid statement on behalf of my client(s).”

2(iii) Lok Adalat thereafter proceeded to pass following award on 09.12.2017:-

“Shri Purinder Sharma, Joint Director, Prosecution (PWD)-cum-Member Secretary (Litigation) Monitoring alongwith Shri Vidya Sagar Sharma, Assistant Engineer, SNP Shahnahar Project, Sub Division Thakurdwara under Division SNP Sansarpur Terrace appeared before us and submitted vide separate statement that the present appeal(s) be dismissed as withdrawn as the award passed by the learned District Judge is within the permissible limit and State has no objection if the appeal(s) be dismissed withdrawn.

2. Learned Advocate appearing on behalf of the respondent(s) submitted the Cross Objection(s) filed by the respondent(s) be also dismissed as withdrawn and he has no objection if the present Cross Objection(s) is dismissed as withdrawn. Statement(s) of parties have been recorded separately and placed on record.

3. In view of the above submissions, the present appeal(s) and Cross Objection(s) are dismissed as withdrawn. Statements of the parties will form part and parcel of the award. The amount awarded by the learned District Judge will be deposited by the appellant(s) if already not deposited, within a month in the Registry of High Court of Himachal Pradesh and the same shall be released in favour of the respondent(s) alongwith up-to-date interest in the Payee Account Numbers to be furnished by the respondent(s) within fortnight. The Court fee shall be refunded in favour of the appellant(s) strictly as per rules.

The award is passed accordingly and the appeal(s) alongwith application(s), if any, and Cross Objection(s) stand disposed of.

(Anand Sharma) (D.K. Khenal) (P.S. Rana)
Member Member Chairman”

2(iv) In the instant petition filed by the original respondents-cross objectors, a prayer has been made for setting

aside the award dated 09.12.2017 passed by the Lok Adalat and for restoration of cross-objection No.131/2016 to its original number and for its decision on merits by the Court.

3. Sh. H.S. Rangra, learned counsel for the petitioners submitted that the petitioners had not authorized Shri Surinder Verma, Advocate, to appear and make statement on their behalf before the Lok Adalat on 09.12.2017. The authorized counsel in the RFA No.174/2015 and its connected cross- objection was Sh. H.S. Rangra, Advocate (counsel in the present petition). Neither Sh. H.S. Rangra, Advocate, nor the present petitioners had authorized Sh. Surinder Verma, Advocate, to appear and make statement on their behalf before the Lok Adalat in the case in question. It is also contended that the present petitioners were under the bonafide impression that only the appeal filed by the appellants i.e. the Land Acquisition Collector, was dismissed as withdrawn under the award dated 09.12.2017 and that their cross-objection was still pending. It was only on 08.04.2021, when the record of the case was inspected by Sh. H.S Rangra, Advocate, that he became aware of the fact that not only the appeal but the cross-objection preferred by the present petitioners had also been dismissed by the Lok Adalat as withdrawn. On the basis of these assertions, prayer has been made for setting aside the award dated 09.12.2017 to the extent it dismissed as withdrawn the cross- objection filed by the present petitioners (original respondents in RFA No.174/2015).

Learned Deputy Advocate General defended the award and submitted that the present petitioners (original respondents) had engaged different learned counsels in different proceedings. She further submitted that it is incorrect on part of the petitioners to submit that they had not authorized Shri Surinder Verma, Advocate, to make statement on their behalf before the Lok Adalat.

4. Certain facts become relevant in order to appreciate

the grievance projected by the petitioners.

4(i) The award was passed by the Lok Adalat on 09.12.2017 whereby not only the appeal but the cross-objection was also dismissed as withdrawn. The award was passed onthe strength of statement made by the representative appearingon behalf of the appellants as well as on the basis of statement made by Shri Surinder Verma, Advocate, on behalf of the present petitioners. Learned counsel for the present petitioners contended that Sh. Surinder Verma, Advocate, was notauthorized to appear & make statement on behalf of the presentpetitioners in the Lok Adalat. Be that as it may.

4(ii) Significantly, subsequent to the award, present petitioners moved CMP No.136/2020 in RFA No.174/2015 under Section 151 of the Code of Civil Procedure. The prayer in the application was for release of the awarded amount in their favour. In this application, averments were made by the petitioners that the appeal had been finally disposed of vide order dated 09.12.2017 and that they are in the need of money. Therefore, prayer was made for release of the awarded amount. Two paragraphs of the application being relevant are extracted hereinafter:-

> *"1. That the above titled first appeal against the award passed by the learned Addl. Distt. Judge Mandi, Distt. Mandi has been filed by the non- applicant/appellant before the Hon'ble Court which appeal has been finally disposed of by this Hon'ble High Court vide order dated 09.12.2017.*
> *2. That the non-applicant had preferred the appeal before this Hon'ble High Court and as per the direction of this Hon'ble Court had also deposited the entire amount of compensation in the registry of this Hon'ble Court."*
> The application was supported with the affidavitsof the

present petitioners.

4(iii) CMP No.136/2020 was allowed by a Coordinate Bench of this Court on 10.01.2020 with following order:-

" By way of instant application, a prayer has been made on behalf of the applicants/ respondents forrelease of the award amount lying deposited in the Registry of this Court. Learned Additional Advocate General, states on behalf of the non-applicants/appellants that since the award has attained finality, no reply is intended to be filed to the application and he has no objection in case prayer made in the application is accepted.

2. Averments contained in the application, which is duly supported by an affidavit, clearly reveal that appeal being RFA No.174 of 2015, having been filed by the non-applicant/appellant, laying therein challenge to award dated 27.06.2014, passed by the Additional District Judge-I, Mandi in Reference Petition No.71/2013/2008 alongwith connected matters stands compromised before the National Lok Adalat, whereby the appeals as well as applications filed by the parties have been disposed of. Since no appeal whatsoever has been preferred by the parties against the award dated 09.12.2017, passed by the National Lok Adalat, as such the same has attained finality.

3. Consequently, in view of the above, this Court sees no impediment in accepting the prayer having been made by the applicants/respondents for release of award amount lying deposited in the Registry of this Court and as such application is allowed and Registry is directed to release the award amount in favour of the applicant, by remitting the same in his saving bank account, details whereof is mentioned in Annexures A-1 and A-2 annexed with the application, subject to verification by the Accounts Branch. Application stands disposed of."

5. Contents of the above extracted application and perusal of the above order would indicate that the present petitioners were very well aware of the order dated 09.12.2017 passed by the National Lok Adalat. The order dated 09.12.2017 clearly records the fact that not only the appeal but the cross-objection was also dismissed as withdrawn. It was only thereafter that the application for release of the awarded amount was moved by the petitioners on the ground that the matter was finally disposed of.

It cannot be the case of the present petitioners that there were two separate orders passed on 09.12.2017, one dismissing the appeal and the other dismissing their cross-objection. Therefore there is no escape from the conclusion that the petitioners were very well aware of the order dated 09.12.2017 dismissing the appeal as well as their cross-objection as withdrawn. They accordingly moved the application before the Court for release of the awarded amount after disposal of the case by the Lok Adalat on 09.12.2017. In case the present petitioners were aggrieved by the dismissal of their cross-objection then they were required to take appropriate steps in that regard at the relevant time. The moving of application by the petitioners for release of the awarded amount after being aware of the order dated 09.12.2017 clearly indicates that the petitioners had accepted and acquiesced in the award dated 09.12.2017 dismissing not only the appeal but also their cross objection as withdrawn. They cannot be permitted to set up a plea three years later that Shri Surinder Verma, learned counsel, was not authorized by them to appear andmake statement on their behalf before the Lok Adalat and that for this reason the award be set aside. The order passed by the Coordinate Bench on 10.01.2020 specifically records that *".....challenge to award dated 27.06.2014, passed by the Additional District Judge-I, Mandi in Reference Petition No.71/2013/2008 alongwith connected matters stands compromised before the National Lok Adalat, whereby the appeals as well as applications filed by the parties have been disposed of. Since no appeal whatsoever has been preferred by the parties against the award dated 09.12.2017, passed by the National Lok Adalat, as such the same has attained finality. 3. Consequently, in view of the above, this Court sees no impediment in accepting the prayer having been made by the applicants/respondents for release of award amount lying deposited in the Registry of this Court....."*. The order was passed in presence of Sh. H.S. Rangra, Advocate, for the present petitioners. The petitioners who were

applicants in CMP No.136/2020 were released awarded amount on the basis of the statement made on their behalf that the award dated 9.12.2017 had become final. Therefore, the plea being taken now that the present petitioners were not aware of dismissal of their cross-objection as withdrawn under order dated 09.12.2017 is not borne out from the record. Having accepted the award, having acted upon it, the present petitioners are now estopped from challenging it. Hence, the instant petition being totally misconceived and devoid of merit is dismissed. Pending miscellenous applications, if any, shall also stand disposed of.

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

National Insurance Company Limited ...Appellant

Versus

Karan Bahadur and others .... Respondents

FAO No. 99 of 2007
Date of Decision: 12.07.2021

Workmen Compensation Act – Section 30 – Appeal **-** The Appeal u/s 30 of the Workmen Compensation Act against the order passed by Commissioner under Workmen Compensation Act directing appellant Insurance Co. to pay compensation Rs. 4,22,585/- in favour of respondents No: 1 & 2 on account of death of late Sh. Vinod Kumar who allegedly died on account of Injuries suffered by him at construction site of respondent No. 8 - Held - the careful perusal of Sec. 4A suggests that where any employer is in default in paying the compensation under the Act within one month from the date it fell due, the commissioner shall direct that the employer in addition to the amount of arrears shall pay simple interest thereon at 12% p.a. or such higher rate not exceeding the lending rate of any scheduled bank besides above, if court comes to a conclusion and forms an opinion that there is no justification qua the delay in making payment it can direct that employer to pay sum not exceeding 50% of such amount in addition to amount of arrears & interest

thereon as penalty However such an order for payment of penalty cannot be passed under clause(b) without giving a reasonable opportunity to employer to show cause why it should not be passed - Sec. 4-A(3)(b) clearly provides that penalty, if any on account of delay in payment can be imposed upon the employer not on the Insurer as such award holding appellant Insurance Co. liable to pay the amount of penalty is not sustainable the remaining amount of compensation excluding 50% penalty u/s 4A(3)(b) shall be paid by appellant Insurance Co. the Court below is directed to decide the issue with regard to penalty if any to pay 50% penalty u/s 4A(3)(b) of the Act.

Cases referred:

National Insurance Company versus Karnail Singh, II(2009) ACC 642;
Ved Praksh Garg vs. Premi Devi and others, AIR 1997 SC 3854;

For the Appellant : Mr. Deepak Bhasin, Advocate.

For the Respondents **:** Mr. Ajay Chandel, Advocate, for respondents No.1 and 2.

Ms. Svaneel Jaswal, Advocate, for respondent No.8.

Through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral):*

Instant appeal filed under Section 30 of the Workmen's Compensation Act, 1923, lays challenge to order dated 18.01.2005, passed by Commissioner under Workmen's Compensation Act, 1923 (***for short "Act")*** in case No.WCA-6/2002, whereby learned Court below while holding respondents/claimants No.1 and 2 entitled for compensation to the tune of Rs.4,22,585/- on account of death of late Sh. Vinod Kumar, who allegedly

died on account of the injuries suffered by him at the construction site of respondent No.8, held appellant-insurance company liable to pay the aforesaid amount of compensation.

21. Precisely, the facts of the case as emerge from the record are that on 8.7.2002, late Sh. Vinod Kumar, who was engaged as labourer on the construction site by the contractor Furpa Lama, suffered injuries after being hit by a stone. On account of aforesaid injury, deceased Vinod Kumar died on the spot. Respondents/claimants No.1 and 2 being legal representatives of aforesaid deceased labourer filed a claim petition under Workmen's Compensation Act in the Court of learned Commissioner, under Workmen's Compensation Act, 1923, which ultimately came to be allowed vide order dated 18.1.2005. Learned Court below while holding respondents/claimants No.1 and 2 entitled for compensation to the tune of Rs.4, 22, 585/- held appellant- insurance company liable to pay the aforesaid amount to the respondents/claimants being insurer of contractor Furpa Lama.

22. Appellant-Insurance Company has primarily laid challenge to aforesaid order passed by the court below on the ground that it could not have been saddled with liability to pay penalty at the rate of 50% under section 4-A (3)(b) of the Act on account of delay in making the payment. Since, there is no dispute interse parties qua the facts of the case as well as amount awarded by the court below under various heads save and except penalty under Section 4-A(3)(b) of the Act, there is no reasons for this Court to take note of the facts of the case as well as evidence led on record by the respective parties.

23. On 11.4.2007, this Court admitted the appeal at hand on the following substantial questions of law:-

1. ***Whether the learned Commissioner was justified in imposing the interest @ 12% per annum and penalty on award amount upon the insurance company in the absence of any statutory provision empowering him to do so?.***

2. ***Whether in the absence of any clause or terms of insurance policy, the insurance company can be held liable to make the payment of interest and penalty?.***

3. ***Whether the award of the Commissioner suffers from illegality and is unsustainable?.***

24. Careful perusal of order impugned in the instant proceedings clearly reveals that court below has proceeded to award sum of Rs.1,09,794/- on account of penalty under Section 4-A(3)(b) of the Act. Before ascertaining the genuineness of the claim put forth by the Insurance Company, it would be profitable to take note of Section 4(A) of the Act herein:-

> **[4A. Compensation to be paid when due and penalty for default.--**(1) Compensation under section 4 shall be paid as soon as it falls due.
>
> (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the[1][employee], as the case may be, without prejudice to the right of the [1][employee] to make any further claim.
>
> [(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher, rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty:
>
> Provided that an order for the payment of penalty shall not be passed under clause *(b)* without giving a reasonable opportunity to the employer to show cause why it should not be passed.

25. Careful perusal of aforesaid provisions of law suggests that where any employer is in default in paying the compensation due under the Act *ibid* within one month from the date it fell due, the Commissioner shall direct that the employer in addition to the amount of the arrears shall pay simple interest thereon at the rate of 12% per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government by notification in the Official Gazette. Besides above, if Court comes to a conclusion and forms an opinion that there is no justification available on record qua the delay in making the payment, it can direct that employer to pay sum not exceeding 50% of such amount in addition to the amount of the arrears and interest thereon as penalty. However, such an order for payment of penalty cannot be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

26. In the case at hand, there is no dispute interse parties that court below while awarding 50% penalty in favour of the claimants have completely ignored the provisions contained under Section 4-A(3)(b) of the Act, which clearly provides that penalty, if any, on account of delay in payment can be imposed upon the employer not on the insurer and as such, award made in this regard by the court below holding appellant-insurance company liable to pay the amount of penalty is not sustainable.

27. Hon'ble Apex Court in case titled ***Ved Praksh Garg vs. Premi Devi and others***, AIR 1997 Supreme Court 3854, has categorically held that once compensation falls due and within one month it is not paid by the employer then as per Section 4A(3)(a) interest at the rate permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the claimants. As far as interest is concerned it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. However, no element of penalty is involved therein. It is statutory liabilities of the employer to make good the principal amount of compensation within permissible time during which interest may not run but otherwise liability of payment interest on delayed compensation will ipso facto follows. Similarly, consequence, as has been taken note hereinabove, is not to follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned. So far as penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act, rather such penalty amount as imposed upon the insured employer would get out of the sweep of the term "liability incurred" by the insured employer as contemplated by the proviso to Section 147(1)(b) of the Motor Vehicles Act. If aforesaid provisions contained under Workmen's Compensation Act and Motor Vehicles Act are read in conjunction, it can be safely concluded that insurance company is liable to make good not only the principle amounts of compensation payable by insured employers but also interest therein, if ordered by the Commissioner, however penalty, if any, awarded by Court under Section 4-

A(3)(b) shall not be payable by the insurance company, rather it is to be paid by the employer. At this stage, it would be relevant to take note of para-14 of the aforesaid judgment herein:-

> "14.On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable by insured employers but also interest thereon, if ordered by the Commissioner to be paid by the insured employers. Reason for this conclusion is obvious. As we have noted earlier the liability to pay compensation under the Workmen's Compensation Act gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. such an accident is also covered by the statutory coverage contemplated by Section 147 of the Motor Vehicles Act read with the identical provisions under the very contracts of insurance reflected by the Policy which would made the insurance company liable to cover all such claims for compensation for which statutory liability is imposed on the employer under Section 3 read with Section 4A of the Compensation Act. All these provisions represent a well- knit scheme for computing the statutory liability of the employers in cases of such accidents to their workmen. As we have seen earlier while discussing the scheme of Section 4A of the Compensation Act the legislative intent is clearly discernible that once compensation falls due and within one month it is not paid by the employer then as per Section 4A(3)(a) interest at the permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the claimants whose bread-winner might have either been seriously injured or might have lost his life. Thus so far as interest is concerned it is almost automatic once default, on

the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. It is a statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time limit during which interest may not run but otherwise liability of paying interest on delayed compensation will ipso facto follows. Even though the Commissioner under these circumstances can impose a further liability on the employer under circumstances and within limits contemplated by Section 4A(3)(a) still the liability to pay interest on the principal amount under the said provision remains a part and parcel of the statutory liability which is legally liable to be discharged by the insured employer. Consequently such imposition of interest on the principal amount would certainly partake the character of the legal liability of the insured employer to pay the compensation amount with due interest as imposed upon him under the Compensation Act. Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not dehors it. It, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part f the insured liability of the employer. No question of justification by the insured employer for the delay in such circumstances would arise for consideration. It is of course true that one month's period as contemplated under section 4A(3) may start running for the purpose of attracting interest under sub-clause (a) thereof in case where provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier

then section 4A(2) would not get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award but also from the date of the accident concerned. Such an order passed by the Commissioner would remain perfectly justified on the scheme of Section 4A(3)(a) of the Compensation Act. But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay n payment of the compensation amount he is not liable for this penalty. However if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then the penalty would get imposed on him. That would add a further sum upto 50% on the principal amount by way of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act. To that extent such penalty amount as imposed upon the insured employer would get out of the sweep of the term 'liability incurred' by the insured employer as contemplated by the proviso to Section 147(1)(b) of the Motor Vehicle Act as well as by the terms of the Insurance Policy found in provisos (b) and (c) to sub-section (1) of section II thereof. On the aforesaid interpretation of these tow statutory schemes, therefore, the conclusion becomes inevitable that when an

> employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act along with interest thereon, if any, as imposed by the Commissioner Section 3 and 4A(3)(a) of the Compensation Act will have to be made good by the insurance company jointly with the insured employer. But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4A(3)(b) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereon if imposed by the Workmen's Commissioner.

28. Reliance is also placed upon the judgment passed by this Court in case titled ***National Insurance Company versus Karnail Singh,*** II(2009) ACC 642, wherein it has been held as under:-

> "6. The apex Court in L.R.Ferro Alloys Ltd. Vs. Mahavir Mahto and another (2002) 9 SCC 450, after referring to and relying upon the earlier decision rendered by the Apex Court in ***Ved Prakash Garg Vs. Premi Devi (1997) 8 SCC 1***, has held as under:
>
> > "5 The only contention put forth before us is that the entire liability including penalty and interest will have to be reimbursed by the insurance company and this aspect has not been examined by the learned Single Judge in the High Court and needs examination at our hands. In Ved Prakash Garg V. Premi Devi, this court after examining the entire scheme of the Act held that payment of interest and penalty are two distinct liabilities arising under the Act, while liability to pay interest is part and parcel of legal

liability to pay compensation upon default of payment of that amount within one month. Therefore, claim for compensation along with interest will have to be made good jointly by the insurance company with the insured employer. But, so far as the penalty imposed on the insured employer is on account of his personal fault the insurance company cannot be made liable to reimburse penalty imposed on the employer. Hence the compensation with interest is payable by the insurance company but not penalty. Following the said decision and for the reasons stated therein, we modify the order made by the High Court to that extent. The appeal is allowed in part accordingly." (Emphasis supplied)

7. Even this Court in ***Ram Dulari Kalia V H.P. State Electricity Board and another,*** ILR 1986 H.P.842 has held that the employer is liable to pay the amount and if it is not paid within one month from the date it fell due, the Commissioner shall if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, also pay a further sum of such penalty as may be imposed.

8. Ved Parkash Garg (supra) and L.R.Ferro Alloys Ltd. (supra) were later considered by the apex Court in New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and another (2006) 5 SCC 192 and the ratio of law laid down by the court holds good even now. Thus the amount of penalty shall be paid by the employer and not the Insurance Company. The question of law is answered accordingly.

9. Ms.Sunita Sharma learned counsel for the appellant, at the time of hearing further argued that the amount awarded towards reimbursement of medical expenses incurred by the claimant was not covered within the ambit and scope of the Workmen's Compensation Act, 1923. The issue which is now sought to be urged was neither raised nor pressed either at the time of the admission of the appeal or even subsequently thereafter till the matter came up for final hearing today. Keeping

in view the paltry sum involved, I am not inclined to consider the same at this stage."

29. Consequently, in view of the detailed discussion made hereinabove and law laid down by the Hon'ble Apex Court as well as this Court, the impugned order passed by Court below saddling appellant-Insurance Company with liability to pay 50% penalty under Section 4A(3)(b) of the Act, is not sustainable and accordingly same is quashed and set-aside, however, it is clarified that remaining amount of compensation excluding 50% penalty under Section 4A(3)(b) shall be paid by the appellant-insurance company to the claimants/respondents forthwith, if not already paid. Amount deposited by the appellant- Insurance Company in terms of order impugned in the instant proceedings is ordered to be released in favour of the claimants/respondents forthwith on their making formal application. Amount, if any, on account of penalty deposited by the insurance company at the time of appeal may be refunded to the appellant insurance company, by remitting the same in its saving bank account, details whereof shall be furnished by learned counsel for the appellant insurance company within a period of ten days.

30. Learned Court below is directed to decide the issue with regard to liability, if any, to pay 50% penalty under Section 4-A(3)(b) of the Act afresh after affording an opportunity of being heard to the parties.

31. Learned counsel representing the parties undertake to appear before the learned Court below on **29.7.2021,** enabling it to do the needful in terms of the instant judgment.

32. Needless to say, court below before making order of penalty under Section 4(A) of the Act, would issue show cause notice to the employer in terms of the provisions contained under Section 4(a)3(b) of the Act.

33. The present petition stands disposed of in the aforesaid terms alongwith pending applications, if any.

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

Rajesh Thakur .....Petitioner

Versus

State of Himachal Pradesh & others ... Respondents.

CWPOA No.2853 of 2019
Date of Decision: 16.07.2021

Constitution of India, 1950 – Article 226 – Service matter **–** Regularization **-** The Petitioner initially engaged as Clerk on contract basis on 31-03-2001. The contract of petitioner came to be renewed periodically- the Petitioner had become eligible for regularization in terms of policy of State Govt. dated 29-08-2009 but his case was not considered for regularization - the proceeding under Article 226 Constitution of India for writ of mandamus for direction to regularize the petitioner as per policy of government on completion of six year service on contract basis w.e.f 31-03-2001 - The claim of petitioner for regularization from due date has been rejected by respondents on the ground that petitioner was initially engaged on 31-03-2001 without essential qualifications now the petitioner has acquired essential qualification-he has been appointed clerk on 23-06-12 and pursuant to his fresh appointment he has joined services without registering any protest- Held it is settled law that educational qualification is to be seen at the time of engagement of workman & not at the time of regularization- the experience gained by the petitioner while working as a clerk is a substitute for the qualification - In view of above present petition is allowed - Respondents are directed to regularize the service of the petitioner as clerk in terms of policy of Govt. framed on 29-08-2009 with all consequential benefits.

Cases referred:

Bhagwati Prasad versus Delhi State Mineral Development Corporation, (1990) 1 SCC 361;

Gujarat Agriculture University versus Rathod Labhu Bechar and others, (2001) 3 SCC 574;

For the Petitioner: Ms. Ritta Hingmang, Advocate.

For the Respondents: Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocate Generals, with Mr. Kunal Thakur and Ms. Svaneel Jaswal, Deputy Advocate Generals, for the respondents-State.

Mr. Mukul Sood, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral):

Petitioner was initially engaged on 31st March, 2001 on contract basis in the respondent-Corporation, as is evident from the appointment letter (Annexure P-4). Pursuant to aforesaid appointment, petitioner gave his joining as Clerk on 31.3.2001, as is evident from joining report (Annexure P-5). Pleadings adduced on record by the parties to the *lis* clearly reveals that aforesaid contract of the petitioner came to be renewed periodically. The copies of the renewal of contract are attached collectively as Annexure P-6 with the petition. While petitioner was rendering his services as Clerk on contract basis, respondent-State repeatedly promulgated policy for regularization of contract employees in the Government Department. Though, petitioner, who had been rendering services of Clerk continuously since his appointment on 31.3.2001 had become eligible for regularization in terms of the policy dated 29.8.2009 framed by the State Government, but fact remains that his case was not considered for regularization. Again in the year 2009 and 2021 Government of Himachal Pradesh took policy decision (Annexures P-7 and P-

8) for regularization of contract employees working in various departments of the Government, but yet respondent No.3 failed to regularize the services of the petitioner and as such, he was compelled to approach this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein following reliefs:-

> "1. Writ of mandamus may kindly be issued be direct the respondents to regularize the services of the petitioner as clerks in terms of the policy of the State Government conveyed through on his completing six years of service on contract basis i.e. with effect from 31.3.2001 alongwith all consequential benefits, viz, fixation of pay, seniority etc.
>
> 2. Respondent may further be directed the respondents to grant all consequential benefits to the petitioner from the date petitioner completed six years of service including the pay scales of regular clerks from 19.2.2008 and 21.2.2010, respectively alongwith interest at the rate of 12% per annum."

2. Aforesaid claim of the petitioner for regularization from due date has been rejected by the respondents, especially respondent No.3 on the ground that since petitioner was initially engaged on 31.3.2001 without fulfilling the essential qualifications and also without following due process of selection and procedure prescribed, he could not be considered for regularization in terms of the policy framed by State of Himachal Pradesh for regularization of contract employees. It has been further averred in the reply filed by respondent No.2 that now since petitioner has acquired essential qualification, he has been appointed as Clerk on 23.6.2012 and pursuant to his fresh appointment he has joined the services without registering any protest and as such, present petition deserves dismissal without any merit.

3. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that there is no

dispute interse parties that respondent No.2, H.P. Ex-Servicemen Corporation, which is Government of Himachal Pradesh undertaking and is covered by the Government instructions issued from time to time, especially Annexure P-7 and P-8, is bound to follow the instructions and policies framed by the Government from time to time and as such, should have regularized the services of the petitioner as Clerk on 31.3.2001. It is not in dispute that there are eighteen posts of Clerks on regular basis and 18 posts of Clerks on contract basis with the H.P. Ex-servicemen Corporation. Out of the aforesaid 18 posts of clerks, only seven posts have been filled up on regular basis in terms of policy of regularization framed by the State of Himachal Pradesh from time to time. As per the instructions issued by the F.C-cum-Secretary (Finance) to the Government of Himachal Pradesh on 19.4.2002 and 20.01.2003 (Annexures R-2/A and R-2/B) annexed with the reply filed by respondent No.2, all proposals pertaining to sanction of staff and revision of pay scales etc. of the Public Sector Undertaking are to be examined by the Committee consisting of Secretary (Finance), Administrative Secretary, Commissioner-cum- Secretary (DIF) and Managing Director of the Corporation concerned, before placement of such proposal before the Board of Directors. Board of Directors in its meeting held on 27.4.2011 vide item No.102/2012 (Annexure R-2/C), decided that the Committee be constituted to conduct the typing test of the petitioner and accordingly, on his passing the typing test on 23.11.2011, matter was referred to the Government for conversion of posts from the Ex. Servicemen Cell, Hamirpur. In response to aforesaid proposal, Government informed to take the action as per the decision of the Service Committee. Meeting of Service Committee was held on 8.2.20212, wherein it approved six posts of Clerks, which were earlier permitted to be filled up through Ex. Servicemen Cell, subject to their fulfilling the essential qualifications as per R&P Rules. The Matter was again placed before the Board of Directors on 13.6.2021 (Annexure R-2/E), wherein

decision was taken to appoint the petitioner on regular basis vide letter dated 23.06.2012.

4. If the reply filed by the respondent, especially respondent No.2 is perused in its entirety, ground raised for not regularizing the services of the petitioner from the date he was initially appointed i.e. on 31.3.2001 is that at the time of his initial appointment petitioner did not possess the essential qualification prescribed in the R&P Rules. By now it is settled law that education qualification is to be seen at the time of engagement of workman and not at the time of regularization. The experience gained by the petitioner while working as a Clerk is a substitute for the qualification.

5. Their Lordships of the Hon'ble Supreme Court in **Bhagwati Prasad versus Delhi State Mineral Development Corporation**, (1990) 1 SCC 361 have held that practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability. Their Lordships have further held that the initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service and once the appointments are made as daily rated workers and they are allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualification. Their Lordships have held as under:

> "6. The main controversy centres round the question whether some. petitioners are possessed of the requisite qualifications to hold the posts so as to entitle them to be confirmed in the respective posts held by them. The indisputable facts are that the petitioners were appointed between the period 1983 and 1986 and ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duties and is a sure guide

> to assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial-entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications. In our view, three years' experience, ignoring artificial break in service for short periods created by the respondent. In the circumstances, would be sufficient for confirmation. If there is a gap of more than three months between the period of termination and re-appointment that period may be excluded in the computation of the three years period. Since the petitioners before us satisfy the requirement of three years, service as calculated above, we direct that 4 0 of the senior-most workmen should be regularised with immediate effect and the remaining 118 petitioners should be regularised in a phased manner, before April 1, 1991 and promoted to the next higher post according to the standing orders. All the petitioners are entitled to equal pay at par with the persons appointed on regular basis to the similar post or discharge similar duties, and are entitled to the scale of pay and all allowances revised from time to time for the said posts. We further direct that 16 of the petitioners who are ousted from the service pending the writ petition should be reinstated immediately. Suitable promotional avenues should be created and the respondent should consider the eligible candidates for being promoted to such posts. The respondent is directed to deposit a sum of Rupees 10,000/- in the Registry of this Court within four weeks to meet the remuneration of the Industrial Tribunal. The writ petitions are accordingly allowed, but without costs."

6. The same principle is reiterated by their Lordships of the Hon'ble Supreme Court in B.N. Saxena versus New Delhi Municipal Committee and others, (1990) 4 SCC 205. Their Lordships have held that a Seni or Draftsman not possessing any diploma but having six years experience, qualified under

the second alternative of the revised rules. Their Lordships have further held that the experience gained is itself a qualification. Their Lords hips have held as under:

> "7. The second limb of the rule was evidently, to benefit all those persons who have gained sufficient experience as Senior and Junior Draftsmen without possessing any qualification. Experience gained for a considerable length of time is itself a qualification (See the observation in State of U.P. v. J. P. Chaurasia, 1989 (1) SCC 121 : (AIR 1989 SC 19 . It would be unreasonable to hold that in addition to this considerable experience, one must also have the diploma qualification prescribed under the first part. It could not have been the intention of the rule making authority that persons who were designated as Senior Draftsmen without any Diploma qualification should acquire such diploma qualification for further promotion. Such. a view would not be consistent and coherent with the revised rule and its object. We have no doubt that the second limb of the revised rule is independent of the first. The High Court seems to have erred in this aspect of the matter."

7. In **Gujarat Agriculture University versus Rathod Labhu Bechar and others,** (2001) 3 SCC 574, their Lordships of the Hon'ble Supreme Court have held that the daily rated workers who had been working on the posts for a long number of years without complaint is a ground by itself for the relaxation of the eligibility condition. Their Lordships have held as under:

> "28. We feel that daily rate workers who have been working on the aforesaid posts for such a long number of years without complaint on these posts is a ground by itself for the relaxation of the aforesaid eligibility condition. It would not be appropriate to disqualify them on this ground for their absorption, hence Clause l(a) need modification to this effect. 30. Thus in view of their long experience on the fact of this case and for the concerned posts the prescribed qualification, if any, should not

come in the way of their regularisation. Clause l(b) provides for the regularisation of daily wagers in a phased manner to the extent of available sanctioned post."

8. Consequently, in view of the above, the present petition is allowed. Respondents are directed to regularize the service of the petitioner as Clerk in terms of the policy of regularization framed by the Government of Himachal Pradesh on 29.8.2009 with all consequential benefits, within four weeks from today.

Pending applications, if any, also stand disposed of.

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

Manohar Singh .....Petitioner

Versus

Smt. Dropti Devi ..... Respondent

Criminal Revision No.193 of 2020
Decided on: 19.7.2021

Code of Criminal Procedure, 1973 – Sections 397 and 401 - Criminal Revision petition u/s 397/401 Cr.P.C. against Judgment passed by Ld. Sessions Judge in Criminal Appeal modifying the order passed by Ld. Judicial Magistrate whereby application u/s 12 of Protection of Women from Domestic Violence Act filed by respondent / wife was partly allowed - Held - under Domestic Violence Act, maintenance can only be granted if person seeking maintenance is able to prove that victim was subjected to "Domestic Violence" defined in section 3 of the Act - respondent / wife has specifically admitted that for last 30-40 years, she along with her son is residing separately from petitioner/husband - Mere pleadings with regard to 2nd marriage of the petitioner without proof as same was not produced in accordance with law is / was not sufficient to prove factum with regard to cruelty rather to have maintenance under D. V. Act - It is incumbent upon the respondent/wife to specifically prove that she was compelled to leave her matrimonial house on

account on 2nd marriage of petitioner-husband- Evidence led on record by respondent/wife itself suggests that dispute inter se her and petitioner is purely on account of property and such dispute does not fall within the definition of "Domestic Violence" as defined under the Act - Maintenance under Domestic Violence can be granted on three counts i.e. physical abuse, mental abuse and economic abuse - Hence Petition is allowed the Judgments / order passed by Ld. courts below set aside.

Cases referred:

Anil Kumar versus Shashi Bala and others, 2017(2)Shim. L.C.900;

For the Petitioner : Mr. Y.P.Sood, Advocate.

For the Respondent: Mr. M.S.Thakur, Advocate.

Through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral):*

Instant Criminal Revision Petition filed under Section 397/401 of the Code of Criminal Procedure lays challenge to judgment dated 20.2.2020, passed by learned Sessions Judge, Shimla, District Shimla, H.P., in Criminal Appeal No. 32-S/10 of 2018, modifying the order dated 21.07.2018, passed by learned Judicial Magistrate 1st Class, Court No.III, Shimla, District Shimla, H.P., in Cr. Petition No.97-3 of 2017/2015, titled as Smt**. Dropti Devi versus Manohar Singh**, whereby an application under Section 12 of the Protection of Women from Domestic Violence Act, having been filed by the respondent-wife, came to be partly allowed.

2. Briefly stated facts, as emerge from the record are that the respondent-wife filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 **(for short 'Act')** against the petitioner-husband alleging therein that she is legally wedded wife of petitioner-husband and marriage interse her and petitioner-husband was

solemnized about 30 years back as per Hindu rites and customs and out of their wedlock, two children were born. Though, initially relations *interse* respondent-wife and petitioner-husband remained cordial, but since after some time certain differences cropped up *interse* them, respondent-wife left the matrimonial house and started residing at Village Karchoali, District Shimla, H.P. Besides above, respondent-wife also alleged that in the year 1992-93, petitioner-husband contracted second marriage with Smt. Anita Devi from whom, he is having two daughters and one son. Respondent-wife further claimed before the Court below that on account of the maltreatment given to her by the petitioner-husband, she was compelled to take shelter in the neighbour's house for some days and thereafter she with the assistance of relatives constructed a Kaccha one room shed and presently residing there alongwith her son. Respondent-wife claimed before the Court below that since she has been deprived from all economic and financial resources, she is finding it difficult to maintain herself as well as her children. Respondent-wife averred in the complaint made by her before the court below that petitioner-husband is owner in possession of 50 bighas of land situate at Mauja Shanal and Shaisear, from which at present he is earning more than 5 lakh. Besides above, respondent-wife also alleged that besides aforesaid property, petitioner also have two commercial vehicles, from which he is earning Rs.15, 000/- per month. Respondent-wife further alleged that petitioner-husband has constructed three storied house and is getting Rs.10,000/- per month as rent from the tenants. Respondent-wife also claimed that the total income of the petitioner-husband from all the sources is more than Rs. 50,000/- per month, as such, be directed to provide adequate maintenance to her as well as her children. Respondent-wife prayed that protection under Section 18(e)(g) of the Act may be provided to her by prohibiting the petitioner from causing any act of Domestic Violence and she may also be held entitled to separate residence under section 19(f) of the Act as she has been ousted from her residential

house. Besides above, respondent-wife prayed that petitioner-husband may also be directed to pay monetary relief under section 20(2) of the Act. She also claimed that since petitioner-husband caused physical abuse, mental abuse, emotional abuse and economic use, he may be directed to pay Rs. 50,000/- as compensation under Section 22 of the Act.

3. Aforesaid claim put forth by the respondent-wife came to be resisted on behalf of the petitioner-husband, who categorically stated before the court below that at no point of time respondent-wife was subjected to any kind of domestic violence, rather she of her own volition and without there being any sufficient reasons left her matrimonial house and started living separately. Petitioner-husband claimed that marriage *interse* him and the respondent-wife was solemnized 40 years back and during this period, respondent-wife never made any effort to reconcile. He also alleged that respondent-wife and his son Om Prakash alongwith his wife are enjoying and cultivating the land given by him in village Karochail. He also claimed before the court below that both respondent-wife and her son Om Prakash are residing separately in the house constructed by him for the last 14 years and at present are occupying about 8.10 bighas of land and as such, she is not entitled to any kind of compensation.

4. Learned court below on the basis of the evidence collected on record though arrived at a conclusion that respondent-wife has not been able to prove any kind of domestic violence, as defined under section 3 of the Act, but yet proceeded to award/grant maintenance in the sum of Rs.1000/- per month from the date of the application.

5. Being aggrieved and dissatisfied with the quantum of maintenance awarded by the Court below, respondent-wife approached learned Sessions Judge, Shimla by way of appeal filed under Section 29 of the Act, wherein amount of maintenance awarded by the Court below came to be enhanced from Rs.1000/- to Rs.3000/-. In the aforesaid background,

petitioner-husband has approached this Court in the instant proceedings, praying therein to set-aside the impugned judgment and order passed by learned Courts below granting maintenance in favour of the respondent-wife.

6. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned by the court below while granting maintenance in favour of the respondent-wife under Domestic Violence Act, this Court finds substantial force in the submission made by learned counsel representing the petitioner-husband that since respondent-wife failed to prove "domestic violence" of any kind, there was no occasion for the Court below to grant maintenance/compensation, if any, under Domestic Violence Act.

7. Learned counsel representing the respondent-wife while making this court to peruse the judgment and order passed by Courts below made serious attempt to persuade this Court that since factum with regard to second marriage of petitioner-husband with Smt. Anita has not been denied by the petitioner, respondent-wife deserves to be granted maintenance on account of cruelty. However, this Court is not inclined to accept the aforesaid submission made on behalf of learned counsel for the respondent-wife because under Domestic Violence Act, maintenance can only be granted if person seeking maintenance is able to prove that victim was subjected to "domestic violence" as defined under Section 3 of the Act. Domestic Violence has been specifically defined under Section 3 of the Act and as such, applicant seeking maintenance/compensation under Domestic violence necessarily required to prove "Domestic violence" as defined under the Act. In the case at hand, respondent-wife has specifically admitted that for the last 30-40 years she alongwith her son is residing separately from the petitioner-husband. Though, with a view to have maintenance on account of domestic violence, respondent- wife attempted to carve out a case that she was repeatedly subjected to physical abuse, mental abuse and economic abuse, but if

evidence led on record by the respondent- wife is perused in its entirety, it can be nowhere concluded that she was ousted from matrimonial house, rather as per her own statement she left her house out of her free will and started living with his son Om Prakash in separate accommodation.

8. Though, learned court below after having scanned entire evidence have returned concurrent finding of the fact that the respondent-wife has been not able to prove any kind of physical abuse, mental abuse and economic abuse and as such, she is not entitled to any kind of maintenance under Domestic Violence Act, but yet proceeded to award some amount on account of maintenance on the pretext that petitioner being husband of the respondent is otherwise liable to maintain her. Though, in the case at hand respondent-wife also attempted to prove that she was subjected to cruelty by the petitioner-husband on account of second marriage of petitioner with Smt. Anita Devi, but such fact never came to be proved in accordance with law and as such, no maintenance could be granted on the basis of the same. Mere pleadings with regard to second marriage of the petitioner is /was not sufficient to prove factum with regard to cruelty, rather to have maintenance under Domestic violence, it is/ was incumbent upon the respondent- wife to specifically prove that she was compelled to leave her matrimonial house on account of 2nd marriage of the petitioner husband. Evidence led on record by the respondent-wife itself suggests that now dispute i*nterse* her and petitioner is purely on account of property and such dispute does not fall within the definition of "Domestic Violence Act" as defined under the Act.

9. Evidence led on record by the respondent-wife nowhere proves any kind of domestic violence and as such, courts below have erred in granting maintenance in favour of the respondent-wife. Since there was no evidence of maltreatment of respondent-wife, courts below ought not have granted any amount of maintenance/compensation. If the entire scheme of DV Act is perused, it clearly suggests that very object and purpose of provisions

contained under the Act is to give relief to respondent-wife on account of Domestic violence, as defined under the Act, allegedly meted to her by husband and other family members. Maintenance under Domestic violence can be granted on three counts i.e. physical abuse, mental abuse and economic abuse, which otherwise have been specifically defined in the definition of "Domestic Violence" as provided under section 3 o the Act.

10. Reliance is placed upon the judgment rendered by this Court in ***Anil Kumar versus Shashi Bala and others***, 2017(2)Shim. L.C.900, wherein it has been held as under:-

> "15. This Court, after having bestowed its thoughtful consideration to the pleadings available on record, has no hesitation to conclude that appellate court below, while granting maintenance of Rs.1,000/- to the complainant got swayed by emotions and completely ignored overwhelming evidence available on record suggestive of the fact that complainant herself had left the house. Since there was no evidence with regard to maltreatment or violence, learned appellate Court below ought not have granted any amount on account of maintenance. Moreover, as has been noticed above, marriage between the parties has been dissolved vide judgment dated 3.3.2011, which has been further upheld by his Court and as such, this Court sees no force, much less substantial, in the complaint of the complainant, which was rightly rejected by the learned trial Court"

11. Consequently, in view of the above, the preset petition is allowed and judgment/ order passed by learned Courts below are quashed and set-aside. Needless to say, respondent-wife on account of her marriage with the petitioner can always seek maintenance, if any, under Section 125 of Cr.P.C, if so advised, in accordance with law. Pending applications, if any, also stand disposed of.

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

Brijesh Sood .....Petitioner

Versus

State of Himachal Pradesh and others ... Respondents.

CWPOA No.1671 of 2019
Date of Decision: 23.7.2021

Constitution of India, 1950 – Article 226 – Service matter **–** The Petition for quashing letter dated 18-09-2010 and 20-09-2012, for directions to review D.P.C. proceedings and to assign the appropriate / correct place to petitioner in merit list keeping in view entries made in his ACR, to promote him earlier in point of time before all respondents No: 4 to 9 after comparing the entries made in their ACR & to redraw annexure P-3 & to grant all the consequential benefits. Held- the claim of the petitioner along with other eligible candidates came to be considered by D.P.C. in its meeting on 30-09-2008 for promotion to post of Dy.S.P - DPC recommended the name of petitioner along with other 18 Inspectors of police to H.P. Police service in the year 2008 but his name was placed at serial No. 14 in view of his overall assessment - The careful perusal of ACR shows that the Reporting officer had graded the petitioner Good & Very Good in majority of columns then there was no occasion, if any, for reviewing officer to grade the officer as 'outstanding' and as such DPC being otherwise competent to upgrade / downgrade the ACRs on the basis of overall record rightly downgraded the entries of the petitioner from "Outstanding" to very good - As per clause 19.8.5 of Hand book on personal matters Reporting / reviewing officer shall exercise great restraint while making an entry of an officer as 'outstanding' - However, if such entry is to be made, details of specific performances & achievements justifying the entry should be recorded in the ACR of officer - The bare reading of ACRs shows that Reviewing officer though have accepted the overall grading given by the reporting officer but in remarks column, without applying his or her mind has proceeded to grade the officer as an outstanding officer. Entries made in ACRs, if read in entirety nowhere commensurate with final grading given by reviewing officer - As per Hand book on personnel matters (Chapter 16), the

DPC is well within its right to upgrade / downgrade the ACR of person to be considered for promotion and it is not mechanically bound to follow the grading given by Reporting /reviewing officer clause 16.25 of chapter 16 of Hand book on personnel matters does not make it incumbent upon DPC to assign reasons before upgrading / downgrading of ACRs of a person to be considered for promotion to higher post - Scope of judicial review is very limited as for as gradation of ACRs by DPC is concerned. - Thus there is no illegality and infirmity in order dated 20-09-2012 passed by respondent No. 1 & is upheld - The Petition dismissed.

Cases referred:

Anil Katiyar versus Union of India (1997) 1 SCC 280;
Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851;
UPSC versus K. Rajaiah and others (2005) 10 SCC;
UPSC vs. K. Rajaiah and others, (2005)10 SCC 15;

For the Petitioner: Mr. B.C.Negi, Senior Advocate with Mr. Dushyant Dadwal, Advocate.

For the Respondents: Mr. Sudhir Bhatnagar and Mr. Desh Raj Thakur, Additional Advocate Generals, with Mr. Narender Thakur, Deputy Advocate General.

Sandeep Sharma, Judge(oral):

Being aggrieved and dissatisfied with the order dated 20.9.2012, passed by Principal Secretary (Home) to the Government of Himachal Pradesh, whereby representation, having been filed by the petitioner in terms of judgment dated 21.5.2012 passed by Co-ordinate Bench of this Court in CWP No.8138 of 2010-J, came to be rejected, petitioner has approached this Court in the instant proceedings, praying therein for following relief:-

> ***"It is therefore respectfully prayed that keeping in view the averments made in the petition, the preset petition may kindly be allowed and impugned annexures P-5 & P-9,***

letters dated 18.09.2010 & 20.9.2012 may please be ordered to be quashed and set-aside by issuing a writ of certiorari, with the directions to the respondents to review the DPC proceedings as prayed for in the representation with the further directions to the respondents to assign the appropriate/correct place to the petitioner in the merit list keeping in view the entries made in his ACR's & promote him earlier in point of time before all the respondents 4-9, after comparing the entries made in their ACR's & to redraw annexure P-3 & to grant all the consequential benefits including the arrears of pay to the petitioner with interest @ 18% per annum in the interest of justice & keeping in view the submissions made here in above."

2. For having bird's eye view, certain undisputed facts as emerge from the record are that the petitioner initially was recruited as Sub-Inspector of Police in the respondent Department on 9th July, 1996. In the year 2001, the petitioner was promoted to the post of Inspector, whereafter in that capacity he remained posted at various Police stations in the State and headed the police stations in the capacity of Station House Officer. On 7.4.2007, the petitioner was confirmed as Inspector in the respondent department. On 30.09.2008, the Departmental Promotion Committee ***(for short 'DPC')*** in its meeting also considered the name of the petitioner alongwith other eligible candidates against 18 general vacancies of Dy.S.P. After assessing ACRs of all the eligible candidates, DPC recommended the name of the petitioner and other eligible candidates for being promoted to the post of Dy.S.P, in order of merit, to the H.P. Police Service (Class-I-Gazetted), in the Department of police, Himachal Pradesh, where the name of petitioner finds mention at Sr.No.14. Since, the petitioner was expecting his placement higher in the merit list drawn by DPC in its meeting held on 30.9.2008, he applied for information under Right to Information Act, 2005 with regard to his entries made in the Annual Confidential Reports (ACR's). Since petitioner was graded

as "Outstanding" officer for the relevant years, which were to be taken into consideration while considering his case for promotion to the post of Dy.S.P and DPC of its own without affording him an opportunity of being heard proceeded to downgrade his entries, petitioner preferred a detailed representation dated 22.7.2010 ***(Annexure P-4),*** requesting therein to review the proceedings of DPC held on 30.9.2008 with further prayer to place him at appropriate place in the promotion list of DSP of 2008. However, fact remains that representation of the petitioner was rejected vide order dated 18.9.2010 ***(Annexure P-5).*** Petitioner with a view to know the reasons for rejection of the representation again applied under Right to Information Act, 2005, wherein he was informed that DPC might have considered the gradations of ACR's of the petitioner as "Very Good" instead of "Outstanding" and as such, he approached this Court by way of CWP No.8138 of 2010-J.

3. Since grounds/pleas taken by the petitioner in the representation were not considered and decided by the competent authority and no specific reason was assigned, Co- ordinate bench of this Court vide judgment dated 21.5.2012 allowed the writ petition bearing CWP No.8138 of 2010-J having been filed by the petitioner and remanded the case back to the Principal Secretary (Home) to the Government of Himachal Pradesh with the direction to decide the representation made by the petitioner afresh by assigning reasons. Vide aforesaid judgment Co-ordinate Bench of this Court also ordered that in case the representation made by the petitioner is considered favourably, the necessary consequential steps, i.e. convening of DPC shall be taken within 10 weeks.

4. Pursuant to aforesaid direction issued by Co-ordinate Bench of this Court in earlier civil writ petition having been filed by the petitioner, representation having been filed by the petitioner again came to be considered by Principal Secretary (Home) to the Government of Himachal Pradesh, who vide order dated 20.9.2012 rejected the representation and observed that the

assessment has been independently done by the DPC headed by the members of the Constitutional Authority i.e. Member of the H.P. Public Service Commission keeping in view the overall grading in various columns. Authority, as referred above, further observed in the order that merely grading the Officer as "Outstanding" in his ACRs without reasons is not a ground to consider him as "Outstanding" and it is for the DPC to make his own independent assessment on the basis of overall grading in the ACRs. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for the relief, as have been reproduced hereinabove.

5. I have heard learned counsel representing the parties and perused the record.

6. Mr. B.C.Negi, learned Senior counsel duly assisted by Mr. Dushyant Dadwal, learned counsel representing the petitioner vehemently argued that since in all the ACRs, which were relevant for consideration of the name of the petitioner for promotion of Dy. S.P., petitioner was assessed to be "Outstanding" (Annexure P-2 colly), there was no occasion for DPC to downgrade the same to "Very Good" while considering him for promotion to the post of Dy.S.P. alongwith other eligible candidates. While referring to Annexure P-2(Colly) wherein ACR's pertaining to relevant period have been placed on record, Mr. Negi, argued that since petitioner was assessed or graded to be "Outstanding" in the relevant ACR's, DPC without assigning any reason could not have proceeded to downgrade the entry of "Outstanding" to "Very Good" while considering the case of the petitioner for promotion to the post of Dy.S.P., alongwith other eligible candidates. While referring to the Minutes of Meeting of the DPC held on 30.9.2008, Mr. Negi, contended that DPC while assessing the petitioner to be "Very Good" despite there being "Outstanding" entries in his ACRs, nowhere assigned reasons for downgrading him and as such, recommendation of DPC meeting held on 30.9.2008 cannot

be said to be fair and based upon proper appreciation of the record and as such, same cannot be allowed to sustain.

7. Mr. Negi, further argued that Principal Secretary (Home) to the Government of Himachal Pradesh while passing order dated 20.9.2012 on the representation filed by the petitioner has given altogether new reasons, which otherwise never came to be recorded by the DPC held on 30.9.2008. While referring to the judgment passed by Hon'ble Apex Court in most celebrated case i.e. **Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others,** AIR 1978 Supreme Court 851, Mr. Negi, strenuously argued that whenever 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 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. Mr. Negi, also placed reliance upon the judgment rendered by Hon'ble Apex Court in **UPSC vs. K. Rajaiah and others,** (2005)10 Supreme Court Cases 15, to argue that though Selection Committee can evolve its own classification, which may be at variance with the gradation given in the ACRs, but Hon'ble Apex Court has categorically held in the aforesaid judgment that in a case of gradation at variance with that of State Government, it would be desirable to record reasons.

8. Mr. Desh Raj Thakur, learned Additional Advocate General representing the respondents-State and Mr. Onkar Jairath, learned counsel representing respondents No. 5 to 9 while refuting the aforesaid submissions made by learned Senior Counsel representing the petitioner, contended that there is no illegality and infirmity in the impugned order dated 20.9.2012 passed by Principal Secretary (Home) to the Government of Himachal Pradesh. All the above named counsel contended that since independent assessment has been done by DPC taking into consideration overall service record of the

petitioner, no fault, if any, can be found in the same. Learned counsel representing the respondents further argued that otherwise bare perusal of ACRs placed on record itself suggest that grading given by Reporting Officer against various columns do not commensurate with the final grading given by the Reviewing Officer. Learned Additional Advocate General while inviting attention of this Court to Chapter-19 and Chapter-16 of the Handbook on Personnel Matters, argued that DPC is well within its right to evolve its own classification, which may be at variance with the gradation given in the ACRs and as such, no judicial interference, if any, is called for.

9. Lastly, learned Additional Advocate General while referring to Clause 19.8.5 of Chapter-19, which deals with Annual Confidential Report argued that the Reporting/Reviewing Officers shall exercise great restraint while making an entry of an officer/official as "Outstanding". If such an entry is to be made, details of specific performance and achievements justifying the entry should be recorded in the A.C.Rs of the officers/officials. He argued that since no such specific reasons/ details have been given by the Reporting/Reviewing Officer while recording 'Outstanding" in the case of the petitioner, DPC rightly considered the grading of the petitioner to be "Very Good" on the basis of overall grading in the ACRs.

10. It is not in dispute that claim of the petitioner alongwith other eligible candidates came to be considered by the DPC in its meeting held on 30.9.2008 for promotion to the post of Dy.S.P. It is also not in dispute that DPC recommended the name of petitioner alongwith other 18 Inspectors of police for promotion to the H.P. Police Service (Class-I Gazetted) in the year 2008, but his name came to be placed at Sr. No.14 keeping in view his overall assessment.

11. Precisely, the case of the petitioner is that since petitioner was assessed "Outstanding" by the Reviewing Officer for the year 2003-04, 2004-05 and 2005-06, DPC while considering him for promotion to the post of

Dy.S.P could not have downgraded his entries from "Outstanding" to "Very Good". However, having carefully perused the record of ACRs placed on record (Annexure P-2 colly), this Court finds substantial force in the arguments made by learned Additional Advocate General that once Reporting Officer had graded the petitioner "Good" and "Very Good" in majority of columns, there was no occasion, if any, for Reviewing Officer to grade the officer as "Outstanding" and as such, DPC being otherwise competent to upgrade/downgrade the ACRs on the basis of overall record, rightly downgraded the entries of the petitioner from "Outstanding" to "Very Good".

12. Careful perusal of ACR's, as contained in Annexure P-2, clearly reveals that Reporting Officer has given "Good/Very Good" to the petitioner against all the columns, but Reviewing Officer while accepting overall grading of petitioner given by Reporting Officer has graded him to be "Outstanding". Clause 19.8.5 of Handbook on Personnel Matters, Vol.-II, Chapter 19, which deals with the Annual Confidential Report clearly prescribes the procedure for recording the "Outstanding" in the ACRs, which is reproduced as under:-

> "**19.8.5 "Outstanding" entry in A.C.Rs**
> As per above decision, the column for grading has been dispensed with. It has been decided by the Government that the Reporting/Reviewing Officers will exercise great restraint while making an entry of an officer/officials as ""Outstanding"". If such an entry is to be made, details of specific performance and achievement justifying the entry should be recorded in the A.C.Rs of the officers/officials."

13. It is quite apparent from the aforesaid provisions contained in the Hand Book on Personal Matters that Reporting/Reviewing Officers shall exercise great restraint while making an entry of an officer/official as "Outstanding". However, if such entry is to be made, details of specific performance and achievements justifying the entry should be recorded in the ACRs of the officers/ officials. In the instant case, learned counsel

representing the petitioner was unable to point out specific details, if any, of specific performance/achievements justifying the entry of "Outstanding" in the ACRs of the petitioner. Otherwise also, this Court finds from the bare reading of ACRs placed on record that Reviewing Officer though have accepted the overall grading given by the Reporting Officer, but in remarks column without applying his/her mind has proceeded to grade the officer concerned as an "Outstanding" officer. Entries made in the ACRs, if read in its entirety, nowhere commensurate with the final grading given by the Reviewing Officer and as such, DPC after having carefully perused the entire service record of petitioner rightly proceeded to downgrade the entry of "Outstanding" recorded in favour of the petitioner to "Very Good". Entries of "Very Good" given by DPC while considering the petitioner for promotion to the post of Dy.S.P, if examined in the light of overall grading given by the Reporting Officer, no fault, if any, can be found with the findings recorded by the DPC, rather same appears to have been recorded on the basis of proper appreciation of record, especially ACR's recorded by the Reporting Officer.

14. As far as competence of DPC to downgrade the entries recorded in the ACRs by the Reporting/Reviewing Officers, it would be profitable to take note of Clause 16.25 of Handbook on Personnel Matters(Chapter 16) i.e. principles for promotion to selection posts. Clause 16.25(e) empowers DPC to assess the confidential reports of the eligible officers for five years and classify them separately for each year as "Outstanding", "Very Good", "Good", and "Fair". The assessment and classification will be made by the Departmental Promotion Committee after considering the whole of a particular confidential report. Clause 16.25 (f) further provides the procedures to be adopted by the DPC for assessing the overall classification. Clause 16.25(e) and (f) are reproduced herein below:-

> "(e). The procedure evolved from 13.2.1978 was not comprehensive and was stated to be in supersession of all

previous instructions/orders. Accordingly, the Govt. issued comprehensive instructions prescribing the procedure for preparing select list etc. on 27.7.1978, which provides that the Departmental Promotion Committee will assess the confidential repots of the eligible officers for five years and classify them separately for each year as ""Outstanding"", ""Very Good"", "Good", and "Fair". This assessment and classification will be made by the Departmental Promotion Committee after considering the whole of a particular confidential report.

Each type of assessment shall carry marks as under:-

"Outstanding"	5 marks
"Very Good"	4 marks
Good	3 marks
Fair	2 marks.

Classification for each year shall be evaluated in the form of marks in the above manner and total marks worked out for five years, whereafter average marks shall be worked out by diving the total marks by the same member as the number of years for which confidential reports have been considered. An officer who gets marks 4.5 or above in this manner shall be considered to be of exceptional merit. One getting marks of 3.5 or above but below 4.5 shall be classified as ""Very Good"" and one getting in average of 2.5 or above but below 3.5 marks shall be classified as "Good". Officers who earn less than 2.5 average marks shall be classified as unfit for promotion. Those categorized as unfit will be excluded from the eligibility for promotion.

In a particular slab of three, an officer classified as "Outstanding"(i.e. possessing exceptional merit) will supersede an officer classified as ""Very Good"" and officer classified as ""Very Good"" will supersede an officer classified as "Good". However, if in a slab of three more than one officer have the same classification, the selection will be made on the basis of seniority.

Where the select list includes persons to whom proforma promotion is to be given, then the select list should further be extended to the extent of number of such persons.

(H.P.Govt. Deptt. Of personnel) O.M. No.PER(AP-II)A(3)-9/76 DATED 27-7-1978 Annexure-16.7).

(f) From 16-3-1981 to 3-11-1981

In partial modification of the. O.M. dated 27.7.1978 (sub para "g" above) the principles for promotion to selection posts were slightly revised from 16.3.1981. According to revised procedure the field of choice, subject to availability or eligible candidates, should extend to five time the number of vacancies within the year. From amongst the officers within the field of choice, those who are considered unfit for promotion should be excluded. The remaining officers should be classified "outstanding", "very Good", and "Good" on the basis of merit as determined from their record of service. For this purpose, Annual Confidential Reports for three to five years should be considered. After the above grading, the select list should be prepared by placing the names in order of these three categories, without disturbing the seniority interse within each category."

The procedure for assessing the overall classification shall be as under:-

i). The Department Promotion Committee will assess the confidential reports of the eligible officers for five years and classify them separately for each year, as "Outstanding", "Very Good" and "Fair". The assessment of classification will be made by the Departmental Promotion Committee after considering the whole of a particular confidential report.

15. It is quite apparent from the aforesaid provisions contained in Hand Book on personnel matters (Chapter 16) that DPC is well within its right to upgrade/downgrade the ACRs of person to be considered for promotion and it is not bound to mechanically follow the grading given by Reporting/Reviewing Officer. Otherwise also, if the judgment passed by Hon'ble Apex Court in ***UPSC versus K. Rajaiah and others (2005) 10***

Supreme Court Cases, is read in entirety, it nowhere suggests that DPC cannot tinker with the entries recorded by Reporting/Reviewing Officer, rather aforesaid judgment clearly lays down that classification given by the State Government is not binding on the committee and committee can evolve its own classification which may be at variance with the gradation given in the ACRs. At this stage, it would be profitable to reproduce para-9 of the aforesaid judgment herein:-

> "9. We cannot also endorse the view taken by the High Court that consistent with the principle of fair play, the Selection Committee ought to have recorded reasons while giving a lesser grading to the 1st respondent. The High Court relied on the decision of this Court in National Institute of Mental Health & Neuro Sciences Vs. Dr. K. Kalyana Raman & Ors. [AIR 1992 SC 1806]. Far from supporting the view taken by the High Court, the said decision laid down the proposition that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons. This Court then observed: (SCC p.485, para 7).
>
> "Even the principles of natural justice do not require an administrative authority or a Selection Committee or an Examiner to record reasons for the selection or non selection of the person in the absence of statutory requirement. This principle has been stated by this Court in R.S. Das Vs. Union of India [1986 (Suppl.) SCC 617] at Page 633.
>
> " In the next paragraph, the learned Judges indicated as to what is expected of the Selection Committee, in the following words:
>
> "we may state at the outset that giving of reasons for decision is different from, and in principle distinct from the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administration action ought to be observed.

> The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration. But there is nothing on record to suggest that the Selection Committee did anything to the contrary"
>
> That being the legal position, the Court should not have faulted the so called down gradation of the 1st respondent for one of the years. Legally speaking, the term 'down gradation' is an inappropriate expression. The power to classify as '"Outstanding"', '"Very Good"', 'good' and 'unfit' is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government but, for good reasons, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs. That is what has been done in the instant case in respect of the year 1993-94. Such classification is within the prerogative of the Selection Committee and no reasons need be recorded, though it is desirable that in a case of gradation at variance with that of the State Government, it would be desirable to record reasons. But having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government's decision".

16. It is quite apparent from the bare reading of aforesaid law laid down by the Hon'ble Apex Court that Selection Committee while evolving its own classification may upgrade/downgrade the ACRs given by the State Government authorities in the ACRs of a particular officer. It has been further held in the aforesaid judgment that classification is within the prerogative of the Selection Committee and no reasons needs to be recorded. However, Hon'ble Apex Court has observed that it is desirable that in case of gradation

at variance with that of the State Government, DPC for Selection Committee may record reasons. In the aforesaid judgment, it has been further held by the Hon'ble Apex Court that having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government's decision. If the aforesaid observations made by Hon'ble Apex Court is read juxtaposing provisions contained in Chapter-16 (promotions and Selection Grade), especially clause 16.25, (Principles for promotion to selection posts), there was no occasion, if any, for the DPC to assign reason while downgrading the ACRs of the petitioner for a relevant year while considering him for promotion to the higher post and as such, no interference, if any, is called for on that count.

17. Mr. B.C.Negi, learned Senior Counsel representing the petitioner while referring to the minutes of meeting of DPC held on 30.9.2008, contended that since no reason much less substantial came to be recorded by the DPC while downgrading the ACRs of the petitioner, reasons recorded by Principal Secretary (Home) to the Government of Himachal Pradesh while passing impugned order dated 20.9.2012 for rejecting the case of the petitioner cannot be read in support of decision of DPC downgrading the ACRs of the petitioner from "Outstanding" to "Very Good". There cannot be any quarrel with the proposition of law laid down by Hon'ble Apex Court in most celebrated case Mohinder ***Singh Gill*** (supra) that a statutory functionary makes an order passed on certain grounds, its validity must be judged by the reasons so mentioned in the shape of affidavits of otherwise. However, aforesaid proposition of law cannot be pressed into the service by the petitioner for the reasons that the decision of DPC downgrading the ACRs of the petitioner from "Outstanding" to "Very Good" has merged into the order dated 20.9.2012 passed by Principal Secretary(Home) to the Government of Himachal Pradesh in purported compliance of judgment dated 21.5.2012

passed by Co-ordinate Bench of this Court in CWP No.8138 of 2012-J, whereby Co-ordinate Bench of this Court having taken note of all the issues, which have been raised in the present petition reserved liberty to the petitioner to file representation and directed the respondents to decide the same in accordance with law. It is not in dispute that prior to filing of the petition at hand petitioner by way of CWP No. 8138 of 2012-J had already laid challenge to the minutes of meeting of DPC held on 30.9.2008, whereby entries in the ACRs of the petitioner were ordered to be downgraded from "Outstanding" to "Very Good". Since petitioner had already laid challenge to minutes of meeting of DPC held on 30.9.2008, whereby his ACRs were downgraded from "Outstanding" to "Very Good" and in that petition, Co-ordinate Bench of this Court having taken note of the fact that earlier representation having been filed by the petitioner has been decided by assigning no reasons, proceeded to remand the case back for deciding afresh, it cannot be said that competent authority while passing order afresh have given new reasons while rejecting the case which cannot be read in continuation of findings recorded by the DPC in its meeting held on 30.9.2008. Otherwise also, this Court having carefully perused the Minutes of Meeting held on 30.9.2008 finds that DPC after having carefully perused the Annual Confidential Repots for the last five years i.e. from 2002-03 to 2006-07 assessed all the candidates including the petitioner in order of merit and as such, it cannot be said that DPC proceeded to downgrade the entry of "Outstanding" to "Very Good" without having assessed the record. Since Clause 16.25 of Chapter 16 of Hand Book on Personnel Matters does not make it incumbent upon DPC to assign reasons before upgrading/downgrading the ACRs of a person to be considered for promotion to the higher post, no fault, if any, otherwise can be found in the decision of DPC held on 30.9.2008. Since petitioner in his earlier petition had laid challenge to the Minutes of Meeting held on 30.9.2008 and in that case had

acceded to the directions issued by Co-ordinate Bench of this Court to respondent to consider representation afresh, order of DPC held on 30.9.2008 can be safely held to be merged with the order dated 20.9.2012. Careful perusal of order dated 20.9.2012 clearly suggests that Reporting Officer in the ACRs of each year have graded the petitioner differently against 16 column and in most of columns he has been assessed to "Very Good", but suddenly Reviewing Officer without assigning reasons proceeded to grant the petitioner as "outstanding" "which is otherwise not permissible under Clause 19.8.5 of Chapter 19 of the Handbook on Personnel Matters Vol-II.

18. By now it is well settled that scope of judicial review is very limited as far as gradation of ACRs by DPC is concerned. Hon'ble Apex Court in **Anil Katiyar versus Union of India (1997) 1 Supreme Court Cases 280,** has held that the correctness of the grading given in the ACRs was not subject to judicial review. It would be profitable to take note of para-4 of the aforesaid judgment herein below:-

> ***"4. Having regard to the limited scope of judicial review of the merits of a selection made for appointment to a service or a civil post, the Tribunal has rightly proceeded on the basis that it is not expected to play the role of an appellate authority or an umpire in the acts and proceedings of the DPC and that it would not sit in judgment over the selection made by the DPC unless the selection is assailed as being vitiated by male fides or on the ground of it being arbitrary. It is not the case of the appellant that the selection by the DPC was vitiated by mala fides."***

19. Consequently, in view of the above, this Court finds no illegality and infirmity in the order dated 20.9.2012 passed by respondent No.1 and the same is upheld, in result whereof, the present petition is dismissed alongwith pending applications, if any.

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

Pallavi Sharma ...Petitioner

Versus

Himachal Pradesh Staff Selection Commission and others

...Respondents

CWP No. 3468 of 2021
Reserved on 27.07.2021
Decided on: 04.08.2021.

Constitution of India, 1950 – Articles 14, 16 & 226 - The petition for quashing notice for information keeping on hold recommendation of petitioner by commission to give her appointment – Held – respondent no. 3 had provisionally registered petitioner on 21.10.2019 and issued provisional certificate valid for one year - Respondent no.3 had issued another provisional certificate in favour of petitioner before date of evaluation/counseling - issue of registration of petitioner with respondent no.3 before the last date of submission of on line application remained more of form than substance and while dealing with substantive rights of parties courts cannot remain oblivious towards its duties to impart substantial justice - The form of particular transaction was not proper cannot be used to deny the person rights otherwise emanating from such deal-petitioner had made substantial compliance with requirement of advertisement so the stand of respondent no.1 that petitioner did not hold requisite qualification before last date of submission of on line application is not justified –thus rejection of candidature of petitioner is illegal being in violation of article 14 and 16 of constitution of India - The respondent no.1 is directed to consider and recommend the name of petitioner - The petition accordingly disposed of.

For the petitioner : Mr.Vivek Singh Attri, Advocate.

For the respondents: : Mr. Sanjeev Kumar Motta, Advocate, for respondent No.1.

Mr. Ajay Vaidya, Senior Additional Advocate General, for respondent No.2.

Mr. Dalip K. Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner has filed the instant petition seeking following substantive reliefs: -

"(i) *To quash and set-aside Annexure P-VI i.e. notice for information dated 01.06.2021 qua petitioner whereby the recommendation of the petitioner has been kept on hold by the commission.*

(ii) To direct the respondents to give appointment to the petitioner for the post of Medical Laboratory Technician Grade-II (post code 776) in the facts and circumstances of the case.

(iv) To direct the respondents to keep Annexure P-VII dated 18.06.2021 in abeyance till the final outcome of present Civil Writ Petition and further not to give appointment to any candidate as per Annexure P-VII."

CASE OF PETITIONER:

2. The facts as alleged in the petition are that respondent No.1 issued Advertisement No.36-1/2020 on 02.03.2020, for selection to different categories of posts. One of such post being of Medical Laboratory Technician Grade-II in the Health and Family Welfare Department, Government of Himachal Pradesh. Total 154 numbers of posts in this category were

advertised, out of which, 56 posts were for General (UR) Category. Minimum qualification prescribed for the said post was as under: -

> *"i) 10+2 in Science from arecognized Board of School Education.*
>
> *ii. B.Sc. Medical Laboratory Technology/B.Sc. Medical Technology Laboratory/ B.Sc. Medical Technology (Laboratory)/B.Sc. Medial Laboratory Sciences/B.Sc. in Medical Laboratory Technology (Lateral) from a recognized University or an Institute affiliated to a recognized University.*
>
> *iii) Should be registered with the Himachal Pradesh Para Medical Council for the above qualification."*

3. As per petitioner, she was having all the qualifications for the post of Medical Laboratory Technician Grade-II. Petitioner had passed her 10+2 examination in 2014. She had also passed B.Sc. in Medical Technology from Himachal Pradesh University in November, 2018. Petitioner further claimed to have registered herself with H.P. Para Medical Council ("Council" for brevity) on 21.01.2019.

4. In response to above noted advertisement, petitioner applied for the post of Medical Laboratory Technician Grade-II within stipulated time period. Extended last date for submission of the application was dated 05.06.2020. Petitioner appeared in the written examination conducted on dated 29.11.2020 under Roll No.776001263. She scored 44.50 marks in the written examination.On04.03.2021, petitioner receivedcommunication from respondent No.1 informing her that she had found place in the list of short-listed candidates for undertaking the evaluation process to be held on 15.03.2021. Petitioner was required to bring original documents with attested copies.

5. Before the date of evaluation, petitioner approached respondent No.2 for registration certificate. On 08.03.2021,respondent No.2 again issued provisional registration certificate in favour of the petitioner.

6. Petitioner appeared with all requisite certificates alongwith registration certificate issued by respondent No.3 on the date of evaluation and submitted all the documents.

7. On dated 20.05.2021, respondent No.1 declared a list of 86 successful candidates, however, the name of petitioner was not included therein. Since certain representations were received by respondent No.1 raising issues of registration with respondent No.1, result was kept on hold and was finally published on 18.6.2021. Total 91 candidates were declared successful. Petitioner did not find her name in the list of successful candidates and after enquiryshe found that her candidature was rejected on the ground that she did not possess valid registration certificate from respondent No.3 prior todated05.06.2020.

CASE OF RESPONDENTS:

8. Respondent No.1 in its reply has submitted that the candidature of petitioner was rightly rejected as conditionof the advertisement was not fulfilled by her. As per advertisement, eligibility of the candidates was to be seen on the closing date fixed for receipt of online application i.e.05.06.2020. It was categorically prescribed that the candidates must ensure their eligibility in respect of category, experience, age, and essential qualification etc. as mentioned against each post in the advertisement to avoid rejection at the later stage. Respondent No.1 further mentioned that since the petitioner did not possess valid registration certificate of date prior to 05.06.2020, therefore, her candidature was liable to be rejected.

9. Respondent No.2 filed its formal reply. No reply was filed by respondent No.3.

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

ANALYSIS

11. Before adverting to the discussion on the contentious issue involved in the case, we deem it proper to notice relevant terms of the advertisement dated 02.03.2020, which are,as under: -

> *"**5. IMPORTANT INSTRUCTIONS FOR FILLING UP ONLINE APPLICATIONS:***
>
> *1 to 3. Xxx xxx xxx*
>
> *4. The candidates must ensure their eligibility in respect of category, experience, age and essential qualification(s), etc., as mentioned against each post in the advertisement to avoid rejection at later stage.*
>
> *5. & 6. Xxx xxx xxx*
>
> *7. The candidate should possess requisite essential qualification(s) prescribed for the post(s) for which he/she wants to apply as on closing date fixed for submission of Online Recruitment Applications (ORA).*
>
> ***11. SUBMISSION OF CERTIFICATES/ DOCUMENTS**.*
>
> *The download/printed copy of the Online Application Form alongwith necessary original certificates and self attested photocopies will have to be produced at the time of evaluation. No offline Application Form will be accepted by the office.*
>
> ***13. ELIGBILITY CONDITIONS: -***
>
> *i. The date of determining the eligibility of all candidates in terms of Essential Qualifications, experience etc., shall be reckoned as on closing date for submitting the Online Recruitment Applications (ORA).*
>
> *ii. xxx xxx xxx*

(iii) Onus of proving that a candidate has acquired requisite degree/essential qualifications by the stipulated date is on the candidate and in the absence of proof the date as mentioned on the face of certificate/degree or the date of issue of certificate/degree shall be taken as date of acquiring essential qualification."

12. As per petitioner she had submitted provisional registration certificate dated 21.1.2019 issued by respondent No.3 (Annexure P-1). This being so, question that arises for determination is whether the submission of aforesaid document on the date of evaluation was sufficient compliance with the terms of advertisement?

13. Perusal of the provisional certificate dated 21.1.2019 Annexure P-1, reveals that this document was issued by respondent No.3showing its validity to be one year.

14. Respondent No.3 has not denied the genuineness and authenticity of provisional registration certificate, Annexure P-1, issued in favour of petitioner. However, respondent No.1, during selection process, in pursuance to advertisement No. 36-1/2020 dated 2.3.2020, has not considered document Annexure P-1 on the ground that it was valid only for one year.

15. As per, Section 38 of theH.P. Para Medical Council Act ("Act" for brevity),a person once registered by the Council has to renew his/her registration after three years. Respondents have not brought any material on recordto justify the exclusion of Annexure P-1 while considering the candidature of petitioner. It has not come forth as to under which provision of the Act or Rules/ Regulations framed there under, the certificate of registration was issued on provisional basis that too only for a period of one year. It is also not the case of respondents that petitioner was not qualified to be registered under the Act.

CONCLUSION

16. From the above discussion, we have no hesitation to conclude that though respondent No.3 had provisionally registered petitioner on 21.01.2019 and had issued Annexure P-1 valid only for one year, but in absence of any legal backing the validity of Annexure P-1 as on 6.5.2020 could not have been questioned. It is worth noticing that respondent No.3 had issued yet another provisional certificate in favour of petitioner on 8.3.2021 i.e., before the date of evaluation/counselling on 15.3.2021.

17. In the given facts and circumstances of the case, the issue with respect to registration of petitioner with respondent No.3 before the last date of submission of online applications, remained more of form than substance.

18. While dealing with substantive rights of parties courts cannot remain oblivious towards its duties to impart substantial justice. What material is that candidate should have qualified basic eligibility criteria and then should have been prevented from obtaining the registration in the form of requisite certificate etc. for one or the other bonafide reason. Merely because the form of particular transaction was not proper cannot be used to deny the person rights otherwise emanating from such deal.

19. In light of above discussion, it is held that petitioner had made substantial compliance with the requirements of advertisement. She was qualified as B.Sc. Medical Technology (Laboratory) and was alsoregistered with respondent No.3 i.e. Himachal Pradesh Para Medical Council w.e.f. 21.1.2019. In view of this matter, the stand of respondent No.1 that petitioner did not hold requisite qualification before 06.05.2020 i.e., the last date for submission of online application is not justified.

20. The rejection of the candidature of petitioner by respondent No.1, thus, is clearly illegal, arbitrary, irrational and violative of Articles 14 and 16 of Constitution of India. Respondent No.1 is directed to consider and recommend the name of petitioner for the post of Medical Technician

Laboratory, Grade-II advertised vide advertisement No. 36-1/2020 dated 02.03.2020 in case she figures in merit of the General (UR) Category within a period of two weeks from the date of this judgment. The petition is accordingly disposed of with no order as to costs, so also the pending miscellaneous application(s), if any.

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

Gulshan Kumar ..Petitioner

Versus

Himachal Pradesh Staff Selection Commission and others

…Respondents

CWP No. 3842 of 2021
Reserved on 27.07.2021
Decided on:04.08.2021.

Constitution of India, 1950 – Article 226 –The petitioner filed the petition for quashing notice, whereby his candidature was kept on hold for producing registration certificate ignoring the fact that same has been already submitted by the petitioner at the time of evaluation process – Held - as per petitioner, he had submitted registration certificate dated 2.11.2020 - it is not the case of the petitioner that he was registered before the last date of submission of on-line application - The essential condition of advertisement leaves no room for doubt that the date of determining eligibility of all candidates in terms of essential qualification i. e experience was to be reckoned as closing date for submitting on line application-petitioner did not possess the requisite minimum qualification of registration with H.P para medical council on last date of submission of on line recruitment application- it is no more res-integra that non submission of requisite certificate by a candidate in accordance with requirement of advertisement is sufficient ground to reject his candidature- The rejection of candidature of petitioner cannot be faulted - Petition dismissed.

For the petitioner : Mr, Aditya Kaushal, Advocate

For the respondents : Mr. Angrez Kapoor, Advocate, for respondent No.1.

Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Mr. Hemanshu Misra, Addl. A.Gs., Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. A.Gs., for respondent No.2.

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner has filed the instant petition seeking following substantive reliefs: -

> *"(i) To quash and set aside Annexure P-9 i.e. notice for information dated 01.06.2021 qua petitioner whereby the candidature of the petitioner was kept on hold for producing registration certificate, ignoring the fact that the same has already been submitted by the petitioner at the time of the evaluation process.*
>
> *(ii) To direct the respondents to give appointment to the petitioner for the post of Medical Laboratory Technician Grade-II (post code 776) in the facts and circumstances of the case*
>
> *(iii) To direct the respondents to keep Annexure P-10 dated 18.06.2021 in abeyance till the final outcome of the present writ petition and further not give appointment to any candidate as per Annexure P-10."*

CASE OF PETITIONER:

2. The facts as alleged in the petition are that respondent No.1 issued Advertisement No.36-1/2020 on 02.03.2020, for selection to different

categories of posts. One of such post being of Medical Laboratory Technician Grade-II in the Health and Family Welfare Department, Government of Himachal Pradesh. Total 154 numbers of posts in this category were advertised, out of which,31 posts were for Scheduled Caste (UR) Category. Minimum qualification prescribed for the said post was as under: -

> *"i) 10+2 in Science from a recognized board of School Education.*
>
> *ii. B.Sc. Medical Laboratory Technology/ B.Sc. Medical Technology Laboratory/B.Sc. Medical Technology (Laboratory)/B.Sc. Medical Laboratory Sciences/B.Sc. in Medical Laboratory Technology (Lateral) from a recognized University or an Institution affiliated to a recognized University.*
>
> *iii) Should be registered with the Himachal Pradesh Para Medical Council for the above qualification."*

3. As per petitioner, he was having all the qualifications for the post of Medical Laboratory Technician Grade-II. Petitioner had passed his 10+2 examination in 2015. He had also passed B.Sc. in Medical Technology (Laboratory) from Chandigarh University in May, 2018. Petitioner further claimed to have registered himself with H.P. Para Medical Council ("Council" for brevity) on 02.11.2020.

4. In response to above noted advertisement, petitioner applied for the post of Medical Laboratory Technician Grade-II within stipulated time period. Extended last date for submission of the application was dated 05.06.2020. Petitioner appeared in the written examination conducted on dated 29.11.2020 under Roll No.776000349. He scored 33 marks in the written examination. On 03.03.2021, petitioner received communication from respondent No.1 informing him that he had found place in the list of short-listed candidates for undertaking the evaluation process to be held on

12.03.2021. Petitioner was required to bring original documents with attested copies.

5. Petitioner appeared with all requisite certificates along with registration certificate issued by respondent No.3 on the date of evaluation and submitted all the documents.

6. On dated 20.05.2021, respondent No.1 declared a list of 86 successful candidates, however, the name of petitioner was not included therein. Since certain representations were received by respondent No.1 raising issues of registration with respondent No.1, result was kept on hold and was finally published on 18.6.2021. Total 91 candidates were declared successful. Petitioner did not find his name in the list of successful candidates. In response to his application under Right to Information Act, he received communication dated 25.06.2021, Annexure P-11, from respondent No.3 with following remarks:

> *"You have failed to produce the certificates of essential qualification as prescribed in the R & P rules for the post i.e. registration with H.P. Para Medical Council valid as on the last date fixed for receipt of online application i.e. 05.06.2020 as mentioned in the advertisement".*

CASE OF RESPONDENTS:

7. Learned Counsel for respondent No.1 at the time of hearing has reiterated the stand of said respondent as taken in letter dated 25.06.2021, Annexure P-11.

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

ANALYSIS:

9. As per petitioner he had submitted registration certificate dated 02.11.2020(Annexure P-2), issued by respondent No.3. This being so, question that arises for determination is whether the submission of aforesaid document on the date of evaluation was sufficient compliance with the terms of advertisement?

10. It is not the case of petitioner that he was registered with respondent No.3 before the last date of submission of online applications as provided in advertisement No.36-1/2020 dated 02.03.2020 issued by respondent No.1. His registration with respondent No.3, undisputedly, is dated 02.11.2020.

11. At this juncture, we deem it proper to notice relevant terms of the advertisement dated 02.03.2020, which are as under: -

> "**5.IMPORTANT INSTRUCTIONS FOR FILLING UP <u>ONLINE APPLICATIONS</u>:**
>
> *1. to 3. Xxx xxx xxx*
>
> *4. The candidates must ensure their eligibility in respect of category, experience, age and essential qualification(s), etc., as mentioned against each post in the advertisement to avoid rejection at later stage.*
>
> *5. & 6. Xxx xxx xxx*
>
> *7. The candidate should possess requisite essential qualification(s) prescribed for the post(s) for which he/she wants to apply as on closing date fixed for submission of Online Recruitment Applications (ORA).*

11. SUBMISSION OF CERTIFICATES/ DOCUMENTS.

The download/printed copy of the Online Application Form alongwith necessary original certificates and self attested photocopies will have to be produced at the time of evaluation. No offline Application Form will be accepted by the office.

13. ELIGBILITY CONDITIONS: -

(i). The date of determining the eligibility of all candidates in terms of Essential Qualifications, experience etc., shall be reckoned as on the closing date for submitting the Online Recruitment Applications (ORA).

(ii) xxx xxx xxx

(iii) Onus of proving that a candidate has acquired requisite degree/essential qualifications by the stipulated date is on the candidate and in the absence of proof the date as mentioned on the face of certificate/degree or the date of issue of certificate/degree shall be taken as date of acquiring essential qualification."

12. The essential conditions of advertisement, as noted above, leaves no roomfor doubtthat the date of determining the eligibility of all candidates in terms of Essential Qualification, experience, was to be reckoned as on closing date for submitting the Online Recruitment Applications (ORA) i.e. 05.06.2020. Admittedly, registration with H.P. Para Medical Council was one of the prescribed minimum essential qualifications.

CONCLUSION:

13. From the above discussion, we have no hesitation to conclude that petitioner did not possess the requisite minimum qualification of

registration with H.P. Para Medical Council on 05.06.2021 i.e. the last date of submission of online recruitment applications.

14. Petitioner, though, has made a cursory reference to lockdown employed in the Country in March, 2020 and his inability to visit Shimla for the purposes of

registration with respondent No.3, but the same cannot be held sufficient to serve the cause of petitioner for the reason that firstly there is no explanation as to why petitioner had not registered himself since May 2018, when he had passed his B.Sc. examination in Medical Technology (laboratory), secondly it has further not been explained, once unlock process was initiated, why petitioner did not take any step to represent his case before respondent No.1 and lastly petitioner did not submit any representation before respondent No.1, when opportunity was afforded by said respondent as evident from communication dated 01.06.2021, Annexure P-9.In such situation, petitioner cannot be held entitled to any relief in this petition.

15. It is no more res-integra that non-submission of requisite certificates by a candidate in accordance with requirement of Advertisement is sufficient ground to reject his candidature. Reference can be made to the judgment dated 08.10.2020 passed by a Co-ordinate Bench of this Court in CWP No. 4276 of 2020, titled Monika Koti vs. H.P. Public Service Commission, wherein identical proposition has been dealt with by placing reliance on the judgments

passed by Hon'ble Apex Court in Bedanga Talukdar vs. Saifudaullah Khan and others (2011) 12 SCC 85 and Karnataka State Seeds Development Corporation Ltd. and Another vs. H.L. Kaveri and others, 2020(3) SCC 108. 6. Recently, in writ petition (C) No. 571 of 2021, titled Deepak Yadav and others

vs. Union Public Service Commission and Another, the Hon'ble Supreme Court has again reiterated the aforesaid legal position.

16. The rejection of the candidature of the petitioner by respondent No.1, thus, cannot be faulted.The petition is accordingly dismissed, so also the pending miscellaneous application(s), if any.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, A.C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

BUDHI RAM
S/O LATE SH. RAM DASS,
R/O VILLAGE KOTHADI,
P.O. GHUND,
TEHSIL THEOG,
DISTT. SHIMLA, H.P.
AGE ABOUT 50 YEARS. .....APPELLANT

(BY SH. MANOJ PATHAK, ADVOCATE)

AND

STATE OF H.P .....RESPONDENT

(BY SHRI ASHOK SHARMA,
ADVOCATE GENERAL WITH
SHRI RANJAN SHARMA,
SHRI VIKAS RATHORE,
SMT. RITTA GOSWAMI,
ADDL. ADVOCATES GENERAL
AND SMT. SEEMA SHARMA,
DY. ADVOCATE GENERAL)

CRIMINAL APPEAL No. 51 of 2018

DATED: 16.08.2021

Narcotic Drugs & Psychotropic Substances Act - Section 20 - The Appeal against judgment of conviction & sentence order for offence u/s 20 NDPS Act with allegation of appellant carrying 2.512 kgs Charas when intercepted by police party at Hulli at 6:00 P.M. - Held - PW 1, a police official, driver of police vehicle. He narrated the prosecution version of recovery of chars from bag being carried by appellant. His evidence is consistent & no worthwhile cross examination that would affect case of the prosecution. The evidence of DW1 is not to such an extent that would support the contention of ld. Counsel for appellant- it only indicates towards quarrel between accused & police without specifying the quarrel & intensity of enmity between accused & police. The enmity or hatred should be to such an extent which would push the police into wrongful framing of accused but intensity of evidence is not of such an extent to lead such conclusion. The rapats Ex PW6/A & Ex PW6/B indicates that on the date of offence, PW1 & other police officials left the police station to do their duties. The name of PW1 is mentioned in Ex PW6 thus presence of PW1 is not doubtful. More over there was no suggestion to PW1 that he was not present at the spot of seizure. Therefore only because log book does not contain name of PW1, does not by itself indicates his absence - It is not a hard & fast rule that the evidence of official witnesses is required to be discarded only because they are official witnesses ultimately the statement of the witnesses would have to be given due weightage for what they are worth- Even evidence of sole witness is sufficient to bring home the guilt provided such evidence is honest, trustworthy & capable of being accepted. The discrepancies pointed by ld. Counsel do not stretch themselves to such an extent that would render entire case of prosecution doubtful. The recovery having been proved by prosecution beyond reasonable doubt, appreciation of evidence by trial Court is just and correct. The appeal being devoid of merit, dismissed.

This appeal coming on for final hearing this day, ***Hon'ble Mr. Justice Ravi Malimath****, delivered the following:*

J U D G M E N T

The case of the prosecution is that on 24.02.2016, a police party headed by SI/SHO Dharam Sain Negi alongwith Head Constable Ram

Lal and Constables Ajay and Suresh left the Police Station, Kotkhai around 6.00 P.M. for regular patrol and traffic work. At about 7.50 P.M., the police party was at Hulli. They found a person carrying a bag in his right hand, coming from Hulli-Ghund-Dasana road. On seeing the police, he turned back and started running. On suspicion, he was apprehended. On inquiry, he stated his name as Budhi Ram S/o late Shri Ram Dass Sharma. That he was a resident of village Kothadi. He was carrying a bag on which was printed the name 'Mohsen'. The bag was checked. It contained sticks and round shape black substances. The smell was that of *charas*. Independent witnesses, namely, Shri Rakesh Kumar, salesmen in the country liquor vend at Hulli and Shri Mohamad Akhter of village Ghunda, were joined in the investigation. The carry bag was taken to a nearby shop M/s Kimta General Store, which belonged to one Mohd. Iqbal. The substance was weighed. It was 2.522 kgs. The same was put into the carry bag and parceled in separate cloth with 12 different seals on it. All other formalities were completed.

2. An FIR was lodged against the accused for the offence punishable under Section 20 of the NDPS Act. Investigation was taken up. Thereafter the case was committed for trial. Charges were framed against the accused. He pleaded innocence and claimed to be tried. In order to prove its case, the prosecution in all examined nine witnesses and the defence examined one witness. The prosecution relied on Ext.PW1/A to Ext. PW7/G. On trial, the accused was convicted for the offence punishable under Section 20 of the NDPS Act. He was sentenced to undergo rigorous imprisonment for a period of 10 years alongwith fine of Rs. 1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year. Aggrieved by the same, the accused has filed this appeal.

3. Mr. Manoj Pathak, the learned counsel for the appellant contends that the order passed by the trial Court is erroneous. That the trial Court failed to consider the discrepancies in the case of the prosecution. That

the prosecution has miserably failed to bring home the guilt of the accused. That the witnesses of the prosecution have turned hostile. That the trial court cannot rely solely on the evidence of the prosecution witnesses to bring home the guilt of the accused. That independent witnesses are required to be examined. The seizure has not been proved. That there is a discrepancy with regard to the status of PW-1. The claim of the prosecution is that PW-1 is a driver of the jeep is not supported by any evidence on record. It is further pleaded that in terms of the evidence of DW-1, the accused is innocent of the offence alleged against him. There was an altercation that took place in the beer bar. That the altercation was between the police and the accused. That as a consequence whereof, the police have wreaked vengeance on him and have falsely implicated the accused. That the accused is innocent of the offences alleged against him. Hence, it is pleaded that the appeal be allowed by acquitting the accused.

4. The same is disputed by Ms. Seema Sharma, the learned Deputy Advocate General appearing for the respondent/State. She contends that the prosecution has proved its case beyond all reasonable doubt. That sufficient evidence has been led in to establish the recovery of the contraband from the accused. That the discrepancies sought to be made out by the appellant with regard to the status of PW-1, is belittled by the evidence of PW-6. PW-6 is the constable Dimple Chankrola, who maintained the police diary at the police station. Based on her evidence, Ext.PW6/A and Ext.PW6/B would indicate the presence of PW-1. Therefore, the contention of the appellant cannot be accepted. That so far as the evidence of DW-1 (Shyam Lal) is concerned, the same does not lend any credence to the case of the accused. That even if the evidence of DW-1 is to be accepted, that still does not indicate the innocence of the accused. Hence, she pleads that the appeal be dismissed by upholding the judgment of sentence and conviction passed by the trial Court.

5. Heard learned counsels and examined the records.

6. PW-1 is the Honorary Head Constable posted at Police Station, Kotkhai. He drives the official vehicle of the police station. He has stated in his evidence that on 24.02.2016, he alongwith SI/SHO Dharam Sain i.e. PW-7, Ram Lal, Constables Suresh Kumar and Ajay Kumar went for a routine patrol duty in the official vehicle. At abount 7.50 P.M., when they were present at Hulli and checking the vehicles, a person was coming from Dasana-Ghoond road towards Hulli. He was carrying a bag in his right hand. On seeing the police officials, he ran away. He was chased and caught. On inquiry, he disclosed his name as Budhi Ram, namely the accused. The carry bag that he was carrying was searched. It contained a black coloured substance in the shape of balls and sticks. The same were seized by the escort. Thereafter alongwith the accused they went to Kimta General Store. Charas was taken out from the bag and weighed. It weighed about 2.522 kgs. The charas was put in a parcel and sealed and affixed with twelve seals. Samples were sent to Forensic. Photographs were taken. An FIR was lodged in Police Station, Kotkhai for the offence under Section 20 of the NDPS Act. The witness was cross-examined by the accused. The appellant counsel seeks to rely on the statement of a suggestion being made to PW-1 that he was not the driver of the said vehicle. The same was denied by the witness. However, except the said suggestion made by the accused, we do not find any reason to disbelieve the evidence of PW-1. The evidence of PW-1 is consistent. We do not find any worthwhile cross-examination that would affect the case of the prosecution.

7. PW-2, PW-8 and PW-9 have turned hostile.

8. PW-3 was posted as a Reader to Dy.SP/SDPO Shri Rattan Singh Negi at the relevant time. On 25.02.2016, Dy.SP Shri Rattan Singh Negi handed over a special report relating to the case to this witness for making entries in the relevant register. Entry was made by the witness at serial No.13 in the register. Nothing worthwhile is elicited in the cross-examination.

9. PW-4 Shri Tulsi Ram was posted as MHC, Police Station, Kotkhai since the month of July 2015. On 24.02.2016, rukka Ext.PW-4/A was received in the police station through Constable Suresh Kumar No. 706. The witness registered FIR Ext.PW-4/B on its basis. The FIR contains the signatures of the witness. Endorsement Ext.PW-4/C was issued. After registering the FIR, the case was handed over by the witness to Constable Suresh Kumar to be delivered to the SHO. The witness is an official witness. Nothing worthwhile has been brought out from the cross examination to disbelieve the same.

10. PW-5 is constable Shri Naveen Kumar, who was posted in the said police station since the month of September 2014. He has stated that on 25.02.2016, MHC Tulsi Ram handed over a parcel sealed with 12 seals of the impression 'H', NCB form, sample seal, copy of the FIR and copy of the seizure memo to him vide RC No.19/16 for being deposited in FSL, Junga. That he deposited the same in the laboratory on the same day. Nothing worthwhile has been elicited in the cross-examination.

11. PW-6 is a Head Constable. She was posted in February 2016 in the said police station. On 24.02.2016, she was working as MHC in the police station. Rapat No.19 was entered by her. The copy is Ext.PW6/A. On the same day, Rapat No.27 was entered by her, which is Ext.PW-6/B. Nothing worthwhile has been elicited in the cross-examination.

12. PW-7 is the Investigating Officer. He is the one who conducted the investigation. He has narrated the manner in which investigation took place right from the seizure to filing of the charge-sheet. It is suggested in the cross-examination that PW-1 was not visible in the photographs Ext.PW-1/C to Ext.PW-1/H. Except the said suggestion, nothing else has been asked to the witness that would render the evidence to be doubtful.

13. Based on the evidence, the learned trial Court was of the view that the prosecution has proved its case beyond all reasonable doubts. The

primary contention of the learned counsel for the appellant is based on the doubt on PW-1. He has stated that the case of the prosecution is that PW-1 was the official driver of the police jeep. However, there is no material to indicate the same. He, therefore, places reliance on Ext.PW-1/I, which is the copy of the log-book. We have considered the same. Placing reliance on the same, he indicates that the name of PW-1 is not reflected in the said log-book. That when the witness himself has stated that he was present at the scene of occurrence, the same should be corroborated by appropriate material. That Ext.PW-1/I does not indicate the presence of PW-1. Therefore, his very presence is doubtful. That when the presence of PW-1 is doubtful, then the prosecution has failed to establish its case.

14. The defence has also led in the evidence of DW-1. He has stated in the evidence that there was a beer bar in Hulli. The same was closed on the direction of the Hon'ble Supreme Court in the year 2017. It was owned by one S.K. Munna. It was a leased property. That the witness used to work in the beer bar as its Manager from the year 2002 to 2017. He used to deal with cash etc. He knew the accused. The accused would come to the beer bar to consume beer. In February 2016, the accused was sitting in the cabin of the beer bar. Police officials came for checking. He does not remember as to what was said by the accused to the police officials. A quarrel took place between the accused and the police officials. Two police officials had come to check the beer bar. He knew one of those police officials, who used to drive the official vehicle of the police station. Thereafter the accused was taken by the police officials. There were no cameras which were fitted in the beer bar.

15. The accused seeks to rely on the evidence of DW-1 to indicate that it is only out of vengeance that he has been falsely indicated in this case. That an altercation took place between the accused and the police in the beer bar. It is only because of the same, that the police have wrongly framed him. That the accused is innocent.

16. We have considered the contentions as well as the evidence of DW-1. The evidence of DW-1 is not to such an extent that would support the contentions of the learned counsel for the appellant. The evidence of DW-1 only indicates that a quarrel took place between the accused and the police. What was the quarrel and what was the intensity of the enmity between the accused and the police has not been stated. The enmity or hatred between the appellant and the police should be to such an extent which would push the police into wrongly framing the accused. The incident should have hurt the police to such an extent that they had no other option but to falsely implicate the accused. We do not find that the intensity of the evidence is to such an extent as to lead to such a conclusion. The evidence only indicates that there was an altercation between the accused and the police. It may not be possible for us to conclude that this particular quarrel between the accused and the police has led to the wrong implication of the accused. We do not find that there is any nexus between the contention of a false implication of the accused with the evidence of DW-1. Therefore we are unable to accept the evidence of DW-1 to the extent which is sought to be argued.

17. Ms. Seema Sharma, learned Deputy Advocate General, relies on the evidence of PW-6 namely the head-constable. The witness has stated that she is the one who has profiled Ext.PW-6/A and Ext.-PW6/B. We have considered the same. Ext.PW-6/A is Rapat dated 24.02.2016 and Ext.PW-6/B also is Rapat dated 24.02.2016. We have considered the same. The same indicates that as on the date the offence was committed, PW-1 and other officials left the police station to do their official duties. The name of PW-1 finds a place in PW6/A, therefore, the same indicates the presence of PW-1. Therefore, the contention of the appellant that the presence of PW-1 is doubtful, cannot be accepted. Even assuming that PW-1 may not be the driver, there is no suggestion made to PW-1 that he was not present at the spot of seizure. A specific question had to be asked to him that he was not

present when the actual seizure took place. However, we do not find that such a suggestion was put to PW-7. The thrust of the cross-examination appears to be to show that PW-1 was not the driver of the vehicle. Repeated questioning has been made to PW-1 that he is not the driver of the vehicle. Even assuming that he is not the driver of the vehicle that does not affect the case of the prosecution. Even assuming he is not the driver, he was the one who was present when the seizure of the articles took place. The seizure was effected from the accused. At the time of seizure PW-1 was present. The same is evident from Ext.PW-6/A and Ext.PW-6/B. Therefore, only because the logbook does not contain the name of PW-1, it does not by itself indicate his absence. Hence, we are of the view that such a contention cannot be accepted.

18. His further contention is that no independent witnesses have been examined. That even though independent witnesses were available, they were not examined. The witnesses that have been examined have turned hostile namely PW-2 Rakesh Kumar, PW-8 Mohammad Iqbal and PW-9 Mohammad Akhtar.

19. It is not a hard and fast rule that the evidence of the official witnesses is required to be discarded only because they are official witnesses. Ultimately, the statements of the witnesses would have to be given due weightage for what they are worth. The evidence of the witnesses requires to be tested by appropriate cross examination. That in the instant case neither PW-2 nor PW-7 and PW-8 have been subjected to any cross-examination that would render the prosecution case to be doubtful.

20. The Hon'ble Supreme Court has held in number of decisions that even the evidence of a sole witness is sufficient to bring home the guilt of the accused, provided such an evidence is honest, trustworthy and capable of being accepted. It should withstand the cross-examination. On considering the evidence of PW-2, which is corroborated by the evidence to PW-8, we do

not find any reason to disbelieve their evidence. We find that the evidence as narrated by PW-2, PW-8 and PW-9 are honest and require to be accepted.

21. We found certain discrepancies in the prosecution case but the discrepancies as pointed out by the learned counsel for the appellant does not stretch itself to such an extent that would render the entire case of the prosecution to be doubtful. In a matter pertaining to seizure of contraband under the NDPS Act, the most crucial element is the question of seizure. The seizure has to be proved by the State beyond all reasonable doubt. In the instant case, the seizure has been proved through the evidence of PW-1. The evidence is strong and has not been disturbed in the cross-examination. Once the seizure has been proved, the rest of the evidence becomes supportive. The rest of the evidence is only relatable to the investigation in the matter. The recovery having been proved by the prosecution beyond all reasonable doubt, we are of the considered view that the appreciation of the evidence by the trial Court is just and appropriate. We do not find any perversity in the appreciation of the evidence or the material placed before the learned trial Court. The same is just and appropriate. We do not find that the cross-examination is to such an extent that would persuade us to disbelieve the evidence led in by the prosecution.

22. The prosecution, therefore, having established its case beyond all reasonable doubt, the findings recorded by the learned trial Court do not call for any interference.

23. For all the aforesaid reasons, the appeal being devoid of merit, is dismissed. The judgment of conviction and sentence, dated 20.01.2018, passed by the Special Judge (Forests), Shimla in Sessions Trial RBT No. 10-S/7 of 2016 is affirmed.

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

Between
SANDEEP KUMAR S/O SH. PURSHOTAM CHAND,
R/O VILLAGE NAGARADA, POST OFFICE AND
TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P.

...PETITIONER

(BY SH.ANUP RATTAN, ADVOCATE)
AND

9. STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (HOME) TO THE
GOVERNMENT OF HIMACHAL PRADESH,SHIMLA-2.
10. DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA.
11. DIRECTOR URBAN DEVELOPMENT,
HIMACHAL PRADESH, SHIMLA.
4. SELECTION COMMITTEE FOR SELECTION OF
POLICE CONSTABLES, DISTRICT HAMIRPUR,
THROUGH ITS CHAIRMAN SHRI N. VENUGOPAL,
INSPECTOR GENERAL OF POLICE,
CENTRAL RANGE, MANDI-CUM-CHAIRMAN
DRC DISTRICT HAMIRPUR, HIMACHAL PRADESH.
5. SECRETARY, NAGAR PANCHAYAT, NADAUN,
DISTRICT HAMIRPUR, H.P.
6. ANSHUL S/O SHRI ASHWANI KUMAR
THROUGH SELECTION COMMITTEE FOR
SELECTION OF POLICE CONSTABLES
DISTRICT HAMIRPUR, THROUGH ITS
CHAIRMAN SHRI N. VENUGOPAL,

INSPECTOR GENERAL OF POLICE,
CENTRAL RANGE MANDI-CUM-CHAIRMAN,
DRC DISTRICT HAMIRPUR,
HIMACHAL PRADESH. ....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH SH. RAJINDER DOGRA, SR. ADDL. A.G.,
SH. VINOD THAKUR, SH. HEMANSHU MISRA,
SH. SHIV PAL MANHANS, ADDL. A.GS., AND
SH. BHUPINDER THAKUR, DY. A.G. FOR
RESPONDENTS No. 1 TO 4.
SH. PANKAJ SHARMA, ADVOCATE FOR
RESPONDENT NO. 5.
MS. MEERA DEVI AND SH. HEMAND THAKUR,
ADVOCATES, FOR RESPONDENT NO. 6.)

CIVIL WRIT PETITION No. 3305 OF 2019
RESERVED ON: 13.08.2021.
DECIDED ON: 17.08.2021.

Constitution of India, 1950 – Article 226 – Service matter **–** The petition for quashing rejection of candidature of petitioner & directing selection committee to inter-view the petitioner - Respondent No. 2 issued recruitment notice inviting applications on online format for post of constable - The petitioner applied under OBC category with sub category IRDP & uploaded copy of OBC certificate among other documents along with application form as required - after qualifying written test & physical test was called for suitability cum personality test along with all documents in original uploaded while submitting online application - BPL certificate produced before the authorities as demanded, but the authorities refused to admit the certificate provided by him to be valid certificate & issued rejection slip rejecting his candidature on the ground that he could not produce the valid IRDP certificate for the relevant period - Held - the Document uploaded by petitioner at the time of submission of online application was Identity card for poor under signature of secretary Nagar Panchayat & bore the date 16-06-2017 but pertained to year 2004-05 as per reply of respondents 3 & 5 - Requirement of Recruitment notice was that the certificate of category under which candidate was to apply should be valid on the date of submission of online application - The Petitioner produced another BPL certificate dated 31-10-2019 before the authorities at the time of appearance for suitability cum personality test and the BPL certificate dt. 31-10-2019 relied upon by petitioner was valid for six months – Held - The onus

lies on the petitioner to show that the BPL/IRDP certificate downloaded by him at the time of submission of online application was valid on said date - The document downloaded was not a BPL certificate, it was issued on 16-06-2017 on the basis of survey conducted in 2004/05 it shows age of petitioner as 14 year, which cannot be petitioner's age in 2017 - petitioner was not in possession of a valid BPL/IRDP certificate on the date of submission of his online application - Non-submission of requisite certificate by a candidate in accordance with the requirement of advertisement / recruitment notice is sufficient ground to reject the candidature - Petition dismissed.

Cases referred:

Bedanga Talukdar vs. Saifudaullah Khan and others (2011) 12 SCC 85;
Karnataka State Seeds Development Corporation Ltd. and another vs. H.L. Kaveri and others, 2020 (3) SCC 108;

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

O R D E R

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

iv) That rejection of candidature of the petitioner vide letter dated 31.10.2019 (Annexure P-10) may be quashed and set-aside.

v) *That respondent No.4 Selection Committee be directed to interview the petitioner and take further action to complete the selection process.*

vi) *That provisional selection of private respondent No.6 may be quashed and set-aside.*

vii) *That the petitioner be declared as selected candidate as total marks of petitioner is more than the grand total marks of respondent No.6 including marks of interview.*

viii) *That discrimination on the basis of place of residence with respect to IRDP/BPL be declared ultra vires to Constitution of India.*

2. Respondent No.2 issued recruitment notice dated 3.3.2019 for the post of Constables. Applications were invited from eligible candidates in prescribed online format. The last date for submission of application was 30.4.2019.

3. The recruitment notice specifically prescribed that the candidate should be possessed of requisite certificates valid as on the date of submission of application form. It was further provided that all necessary and relevant documents (in original) copies of which were uploaded by the candidates while submitting online application should be produced alongwith a set of photocopies by the candidates before admission to the personality test. Failure to submit original documents or any documents not found in order, as per requirement, would result in immediate disqualification of the candidate.

4. The case of the petitioner is that in response to recruitment notice dated 3.3.2019, he applied under OBC category

with sub-category of IRDP. His application was within time. As per specific averment of petitioner, he uploaded the copies of matriculation certificate, copy of 10+2 certificate and copy of OBC certificate alongwith application form. According to petitioner, he had submitted the BPL certificate dated 16.6.2017 issued by the Secretary, Nagar Panchayat, Nadaun, District Hamirpur, H.P. by uploading the same. Petitioner has placed on record a copy of said document as Annexure P-1.

5. It is also the case of petitioner that he qualified written test by securing 52 marks and also qualified physical test in which he was awarded two marks. Petitioner received call letter dated 21.10.2019 for appearance on 31.10.2019 at 7.00 a.m. at Police Line, Hamirpur for suitability-cum-personality test alongwith all the documents (in original) with one attested photocopy each, which were uploaded by the candidate while submitting online application form.

6. As contended by petitioner, he appeared for suitability-cum-personality test on 31.10.2019 and was asked to produce the valid BPL certificate. He alleges to have procured the requisite

certificate on the same day and produced before the authorities concerned. The document so produced by the petitioner on the day of suitability-cum-personality test is Annexure P-2 with petition.

7. The grievance of petitioner is that the authorities refused to admit the certificate, provided by him, to be a valid certificate and consequently issued rejection slip rejecting his candidature on 31.10.2019. The rejection was on the ground that he could not produce the valid IRDP certificate for the relevant period. According to petitioner, his rejection is wrong and illegal.

8. Respondents No.1, 2 and 4 in their replies have specifically submitted that petitioner did not produce valid and relevant IRDP certificate pertaining to the year 2018-19 and, as such, his candidature was rightly rejected. It has also been stated that the certificate uploaded by petitioner alongwith his online application was not valid during the relevant period as the same was dated 16.6.2017. According to respondents No.1, 2 and 4, the said certificate was not fulfilling the requirements of recruitment notice, therefore, the rejection of the candidature of petitioner was justified.

9. Reply submitted by other respondents stated that petitioner belonged to BPL/IRDP category even on the date when he submitted his online application Evidently such statement has been made only on the basis that the family of petitioner was found to be eligible for BPL certificate in a survey conducted in 2004-2005.

10. We have heard learned counsel for the parties and have also gone through the records of the case.

11. It is not in dispute that at the time of submission of online application, petitioner uploaded a document to support his claim under BPL/IRDP category. This document was issued by the Urban Development Department, Government of Himachal Pradesh as identity card for Urban poor under the signatures of Secretary, Nagar Panchayat, Nadaun. Though this certificate bore the date "16.6.2017" under the signatures of Secretary, Nagar Panchayat, Nadaun, but the same pertained to the year 2004-2005 as suggested by the replies filed by respondents No. 3 and 5. Requirement of recruitment notice was that the certificate of category under which candidate was to apply should be valid on the date of submission of online application. It is also not in dispute that the petitioner produced another BPL certificate dated 31.10.2019 before the authorities at the time of appearance for suitability-cum-personality test.

12. The precise question that arises for determination is whether the document Annexure P-1 dated 16.6.2017 was valid compliance of the recruitment notice. It goes without saying that in present petition this Court has not to decide the general status of the petitioner as BPL/IRDP member, what is to be decided is whether the petitioner had complied with the requirement of recruitment notice or not?

13. The BPL certificate dated 31.10.2019 relied upon by the petitioner itself shows that the validity of such certificate is only six months. It being so, the onus lies on the petitioner to show that the BPL/IRDP certificate down-loaded by him at the time of submission of online application was valid on the said date. Firstly, the document down-loaded by the petitioner with his online application to prove his BPL status was not a BPL certificate and secondly, thesame was issued on 16.6.2017 on the basis of the survey conducted in 2004/2005. It is worth noticing that in Annexure P-1, age of the petitioner is written as 14 years, which cannot be said to be petitioner's age in the year 2017 when this document was allegedly issued. In 2019, the

petitioner was 20 years old, so by no stretch of imagination, he could be only 14 years in 2017. On the basis of material on record, we have no hesitation to say that petitioner was not in possession of a valid BPL/IRDP certificate on the date of submission of his online application in response to the recruitment notice dated 16.6.2017.

14. It is no more res integra that non-submission of requisite certificate by a candidate in accordance with the requirement of advertisement/recruitment notice is sufficient ground to reject the candidature. Reference can be made to judgment dated 8.10.2020 passed by a co-ordinate Bench of this Court in ***CWP No. 4276 of 2020***, titled ***Monika Koti****vs.****H.P.Public Service Commission,*** wherein identical proposition has been dealt with by placing reliance on the judgments passed by Hon'ble Supreme Court in ***BedangaTalukdar*** vs. ***Saifudaullah Khan and others (2011) 12 SCC 85*** and ***Karnataka State Seeds Development Corporation Ltd. and another*** vs***. H.L. Kaveri and others, 2020 (3) SCC 108.*** Recently in ***Deepak Yadav and others vs. Union Public Service Commission and another****,* the Hon'ble Supreme Court has again reiterated the aforesaid legal position.

15. Petitioner in support of his case has placed reliance upon the judgment passed by learned Single Judge of this Court in ***CWP No. 126 of 2009*** titled **Anjana Kumari vs. Manorma Devi and others,** decided on 09.03.2011, judgment passed by a Division Bench of this Court in***LPA No. 55 of 2011****,*titled ***Nand Lal Bhardwaj*** vs***. State of H.P. and others***, decided on 22.12.2015, judgment passed by Hon'ble Supreme Court in ***Civil Appeal Nos. 14531-32 of 1996*** titled ***SeemaKumari Sharma*** vs***. State of H.P. and another****,* judgment passed by a co-ordinate Bench of this Court in***CWP No. 2927 of 2019****, titled* ***Anjali vs. State of H.P. and others****,* decided on 18.11.2019 and judgment passed by a co-ordinate Bench of this Court in***CWP***

No. 3370 of 2020, titled ***Sukhvinder Singh*** vs**. *State of H.P. and others***, decided on 22.2.2021.

16. With due deference to all these judgments, in our considered view, these do not help the cause of petitioner. The judgment passed by learned Single Judge of this Court in CWP No.

126 of 2009, is against the case of the petitioner. Considering the judgment passed by Hon'ble Supreme Court in ***Seema Kumari Sharma's*** case, learned Single Judge held as under:

> *"8. The Apex Court in this judgment has not laid down any hard and past preposition of law. In the case before the Apex Court, there were no private competing parties. Here the petitioner has been selected and is working against the post of Anganwari Worker and her rights will be directly affected if such document is relief upon. It was the duty of Manorma Devi, respondent No.1 to have placed the proper documents before the Selection Committee at the time of selection and if she failed to produce such documents at that stage, she cannot be permitted to fill up the lacunae at a later stage."*

Judgment in LPA No. 55 of 2011 titled ***Nand Lal Bhardwaj's*** case, was altogether different preposition where IRDP certificate, on the basis of which petitioner therein had obtained employment, was discovered to be not genuine and the issue was whether the writ Court in holding the IRDP certificate to be false was within its competence without pleadings to that effect. As regards the reliance on ***Seema Kumari Sharma's*** case, placed on behalf of petitioner, as noticed above, learned Single Judge of this Court in AnjanaKumari's case had already observed that the judgment in said case did not lay down any hard and fast preposition of law. It was also noticed that there was no private competing parties in the case of SeemaKumari Sharma.

17. Learned counsel for the petitioner has also placed reliance on the judgment passed by a co-ordinate Bench of this Court inCWP No. 2927 of

2019, titled ***Anjali***vs***. State of H.P. and others***. Perusal of this judgment reveals that the same is clearly distinguishable from the case in hand. In that case again there was no private competing parties. The BPL certificate of the petitioner therein had expired only during the period when the date for submission of online application was not over and the petitioner therein had submitted his application for renewal of BPL certificate even prior to the expiry of the date for submission of online form. Lastly, another judgment of a co-ordinate Bench of this Court in CWP No. 3370 of 2020, titled ***Sukhvinder Singh*** vs***. State of H.P. and others***,has been pressed into service on behalf of the petitioner, however, the same also does not have application in the facts of the case. In that case, the issue was with respect to validity of Other Backward Classes certificate produced by petitioner therein before authorities. In that context, it was held that since petitioner undisputedly belonged to "Labana" community which was recognized as "Other Backward Classes" in the State of Himachal Pradesh, therefore, the status of petitioner therein would not change in absence of a certificate.

18. In view of above discussion, we do not find any merit in the instant petition and the same is accordingly dismissed with no order as to costs. Pending application(s), if any, also stands disposed of.

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

Between:

SMT. PHOOL MATI,
WIFE OF SH. PREM BAHADUR,
R/O KHARAPATHAR,
TEHSIL JUBBAL,
DISTT. SHIMLA, H.P.,
PRESENTLY SERVING AS A BELDAR IN
AGRICULTURE FARM KHARAPATHAR,
TEHSIL JUBBAL,
DISTRICT SHIMLA, H.P.

….PETITIONER

(BY MR. A.K. GUPTA, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH THE PRINCIPAL SECRETARY (AGRICULTURE) WITH HEADQUARTER AT SHIMLA, SHIMLA, H.P.
2. THE DIRECTOR OF AGRICULTURE WITH HEADQUARTER AT BOILEAUGANJ, SHIMLA-5.

….RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATES GENERAL WITH MR. NAREDER THAKUR, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 1961 OF 2019

DECIDED ON: 24.08.2021

Constitution of India, 1950 – Article 226 –Petitioner engaged on daily wage basis in the year 1989 and since then regularly working without any interruption in department of agriculture and despite her having completed 8 years of service as daily wager, she was not granted work charge status so her services were not regularized in terms of policy of government - The petition for direction to respondents to consider her case in light of judgment Man singh vs state of H.P - Held since petitioner had rendered 240 days service in a calendar year as daily wager uninterruptedly w.e.f 1999 till 2007 she ought to have been granted work charge status w.e.f 1.1.2007 and her services should have been also regularized w.e.f. that date. Since now respondents have regularized the service of petitioner w.e.f. 2018 meaning

thereby that petitioner must have handed over eligibility certificate to department and if it is so ,she is entitled to such benefit w.e.f the date when she completed 8 years daily wage service with 240 days in each calendar year - The petition is allowed.

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

O R D E R

Petitioner, herein was engaged on daily wage basis in the year 1989 and since then, she has been regularly, without there being any interruption, rendering her services in the Department of Agriculture, State of Himachal Pradesh. Since despite having her completed regular eight years' service as daily wager in the Department she was not granted work charge status and her services were not regularized in terms of policies framed by the Government for regularization from time to time, she approached this Court by way of CWP No. 3260 of 2011, which was disposed of by this Court on 5.9.2012, with direction to the respondents to consider and decide her case in light of judgment dated 27.7.2009, passed by this Court in ***CWP No. 1594 of 2008***, titled as "***Man Singh v. the State of HP and Ors***."

2. Though pursuant to aforesaid order, petitioner herein filed representation to the Department concerned for granting benefit in terms of judgment dated 5.9.2012, passed by this Court in CWP No. 3260 of 2011, but her such prayer was rejected on the ground that she has not submitted any document in support of her claim. Vide order dated 20.12.2012 (Annexure P-2), Director of Agriculture, Himachal Pradesh, while rejecting representation of the petitioner observed in the order that petitioner does not know her date of birth and as per regularization policy of the State Government, she does not fulfill the criteria of eight years and as such, cannot claim any parity with the case of Man Singh in *CWP No. 1594 of 2008*. In the aforesaid order, respondent No.2, recorded that Smt. Phoolmati, who is having nationality of

Nepal has not submitted any document as per policy and R&P rules. Besides above, Director, Agriculture, Himachal Pradesh in order observed that R&P Rules for the post of Beldar Class-IV, in the Department of Agriculture, provide that candidate must be a citizen of India and since applicant is neither a citizen of India nor the eligibility certificate has been issued by the competent authority in her favour, she cannot be considered for regularization as her case is not similar to the case of ***"Man Singh"***. In the aforesaid background, petitioner has approached this court in the instant proceedings, praying therein for following main relief:

> ***"i) That Annexure P-2 may be quashed and the respondents may be ordered to regularize the services of the petitioner from the date from which the services of other similarly situated persons were regularized who were appointed w.e.f 1.1.1998 on daily wage basis with all the benefits incidental thereof."***

3. Aforesaid claim of the petitioner has been refuted by the respondents by way of filing reply, wherein though they have admitted that the petitioner was engaged as casual laborer at Potato Development Station Kharapathar under the control of Deputy Director of Agriculture, Shimla, but have contended that since she did not complete 240 days in each calendar year till 1998, her prayer for grant of work charge status cannot be considered prior to the year 1998. Details of mandays chart placed on record alongwith reply clearly reveal that till the year, 1998, petitioner though worked in the department w.e.f. 1985, but not completed 240 days in a calendar year, however, after 1998, till her regularization, in the year, 2018, she continuously worked for 240 days in each calendar year.

4. As per statement made by Mr. Narender Thakur, learned Deputy Advocate General, on the basis of instructions imparted to him by the Director

(Agriculture) Himachal Pradesh, vide order dated 5.5.2021, which is taken on record, petitioner stands regularized in the department vide order dated 20.3.2018 and pursuant to the aforesaid order, petitioner joined the department on regular basis on 13.3.2018 and now, she after having attained age of superannuation i.e. 60 years, has retired from service on 31.8.2020. Since there is no dispute *inter-se* parties that daily wage labourer is entitled to be granted work charge status after completion of eight years regular service from the date of initial appointment, petitioner, who, though had joined in the year, 1985, but rendered service of 240 days in each calendar year w.e.f. 1999, ought to have been granted work charge status w.e.f. 31.12.2007, when she had completed eight years uninterrupted service w.e.f. 1999 with 240 days in each calendar year. However fact remains that in the case at hand, aforesaid benefit never came to be accorded in favour of the petitioner, rather she, without there being any fault of her, was provided the benefit of regularization after an inordinate delay of 19 years. As per policy framed by State from time to time, services of the daily wage employee are required to be regularized on completion of eight years daily wage service with 240 days in each calendar year. Since in the case at hand, petitioner had rendered 240 days service in a calendar year as daily wager uninterruptedly w.e.f. 1999 till 2007, she ought to have been granted work charge status w.e.f. 1.1.2007 and her services should have been also regularized w.e.f. that date.

5. Another ground as has been raised by the respondents while rejecting the case of the petitioner is that since the petitioner failed to furnish requisite documents i.e. eligibility certificate, her claim could not be considered for regularization, however, such plea deserves outright rejection because as per judgment rendered by the Division Bench of this court in ***CWP No. 1594 of 2008***, titled ***Man Singh v. State of HP***, it is duty of the department to provide eligibility certificate. Moreover, eligibility certificate is required for regularization not for grant of work charge status, however, in the

case at hand, respondent department denied rightful claim of the petitioner for work charge status without there being any plausible reason. Now since respondents have themselves regularized service of the petitioner w.e.f. 2018, meaning thereby, petitioner must have handed over the eligibility certificate to the department and if it is so, she is entitled to such benefit w.e.f. the date when she had completed eight years regular service as daily wager with 240 days in each calendar year from the date of her initial appointment. Mere submission of eligibility certificate in the year, 2018 by the petitioner cannot be a ground to deny the benefit which had actually accrued to her in the year, 2007. Since respondent-department after being satisfied that the petitioner is eligible to be regularized, has already granted her regularization in the year, 2018, non-furnishing of eligibility certificate, if any, in the year, 2007 cannot be a ground to reject the claim of the petitioner to claim regularization w.e.f. 2007, when she had completed eight years daily wage service with 240 days in each calendar year. Leaving everything aside, there is/was no requirement, if any, for the petitioner to submit eligibility certificate as far as grant of work charge status is concerned, to which, she had definitely become entitled in the year, 2007.

6. Consequently, in view of the detailed discussion made herein above, present petition is allowed and respondents are directed to grant work charge status to the petitioner from the date she had completed eight years daily wage service with 240 days in each calendar year from the date of her initial appointment. Respondents shall also grant regularization to the petitioner from the date when she had completed eight years subject to availability of the vacancy, however petitioner shall be entitled to the consequential benefits from the date of filing of the petition in the year 2011 i.e. CWP No. 3260 of 2011. In the aforesaid terms, present petition stands disposed of. Pending application(s), if any, also stand(s), disposed of.

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

Between:-

ROSHAN LAL (SINCE DECESED)
SON OF SH. RAKHA ALIAS RAM
RAKHA S/O PRADHYAL THROUGH
HIS LEGAL HEIR SH. ANIL KUMAR
KAUSHAL R/O MOHALLA PULWALA
BAZAR UNA, TEHSIL & DISTRICT
UNA, H.P. AT PRESENT RESIDING
AT C-903 SECTOR-5 PLOT NO. 15,
DWARKA – 110075.

....PETITIONER

(BY SH. SUBHASH SHARMA, ADVOCATE)

AND

1. OM PRAKASH SON OF SHRI RAKHA ALIAS
RAM RAKHASON OF SH. PRADHDYA,
R/O MOHALLA PULWALA BAZAR, UNA,
TEHSIL AND DISTRICT UNA, H.P.

2. SMT. GAITRI DEVI DECEASED THROUGH
HER LRs:-

a) SMT. RAM KUMARI WON OF SHRI
VINOD KUMAR ANGRA, RESIDENT OF
MOHALLA KATRA, UNA,
DISTRICT UNA, H.P.

b) RAM GOPAL
SON OF SHRI MANGAT RAM
RESIDENT OF HOUSE NO. 20,
PHASE II, DURGA COLONY
PO RAKKAR, UNA

DISTRICT UNA, H.P.

c) VIJAY KUMARI
WIDOW OF SHRI NARDEV KAUSHAL
RESIDENT OF VILLAGE AND PO
SANTOKHGARH, DISTRICT UNA, H.P.

d) POONAM KUMARI
WIFE OF SH HARI DUTT KAPILA,
HOUSE NO. 30, NURSERY SQUARE,
NANGAL, OWNSHIP, DISTRICT
ROPAR PUNJAB.

e) RAKESH KUMARI
WIFE OF SHRI KEWAL KRISHAN SEHGAL
SHOP NO. 60, SANJAULI, SHIMLA, H.P.

f) USHA KUMARI
WIFE OF SHRI JOGINDER PAL KAPOOR,
RESIDENT OF HOUSE NO.B-27,
LAHORI GATE PATIALA PUNJAB.

g) RAJIV KUMAR
SON OF MANGAT RAM,
RESIDENT OF GAITRI BHAWAN,
NEAR D.C. COLONY UNA
DISTRICT UNA, H.P.

3. SHEELA DEVI
D/O RAKHA ALIAS RAM RAKHA
AT PRESENT WIFE OF RAM NATH CHAUDHARY
R/O VPO DAROLI, TEHSIL ANANDPUR
SAHIB, DISTRICT ROPAR PUNJAB.

4. SWARAN KANTA
D/O RAKHA ALIAS RAM RAKHA
AT PRESENT WIFE OF DES RAJ MEHTA,

R/O HOUSE NO. 203, RAKKAR COLONY
UNA, DISTRICT UNA, H.P.

5. RAM NATH DECEASED THROUGH LRs:

a) SHAYAM KUMARI
WIFE OF SURINDER
RESIDENT OF SHIV NAGAR,
LUDHIANA, PUNJAB.

b) ASHA KUMARI
WIFE OF RAJINDER KUMAR,
R/O NAYA NANGAL 401,
SHIVALIK AVENUE,
DISTRICT ROPAR, H.P.

c) VIPIN KUMAR
SON OF LATE SHRI RAM NATH
R/O VPO DAROLI, TEHSIL NANGAL
DISTRICT ROPAR PUNJAB

d) SANJIV KUMAR
SON OF LATE RAM NATH
R/O VILLAGE DAROLI,
TEHSIL NANGAL, DISTRICT
ROPAR PUNJAB.

..RESPONDENTS

*(*MR. RAJAN KOHAL, ADVOCATE FOR R-1,
R-3 & R-4.
RESPONDENTS NO. 2(a) to 2(c), 2(e) AND 2(g)
ALREADY *EX-PARTE)*

CIVIL MISC. PETITION MAIN (ORIGINAL) NO. 83 OF 2015
Reserved on: 20.08.2021
Decided on: 27.08.2021

Code of Civil Procedure, 1908 – Revision - The petitioner assailed order dated 06-02-2015 passed by Ld. Civil Judge in civil suit, vide which application under order 7 rule 14 CPC & application u/s 45A of I. E. Act were decided by Ld. Trial Court - Held - Order 7 rule 14 CPC contemplates different situations -1. Plaintiff is obligated to enter in a list and produce in the Court, at the time of presentation of plaint, all such documents on which plaintiff either sues or relies upon and which are in his possession or power 2. when such documents are not in his power or possession, he is required to detail the possession of such documents, 3. In case, plaintiff omits or fails to comply with the earlier two conditions, he is precluded from subsequently producing such documents for being received in evidence without leave of Court. Lastly, the rigor of aforesaid provision of Order 7 Rule 14 CPC does not apply to the document which are produced for cross- examination of plaintiff's witnesses or handed over to such witness to refresh his memory. The impugned order while rejecting the application under Order 7 Rule 14 CPC does not deal with any of above situations. The trial Court was to adjudicate on the question whether plaintiff was entitled for grant of leave to produce documents detailed in application. The trial Court appears to have swayed by the factors unconnected & irrelevant to decision of application under Order 7 Rule 14 CPC. No reason what so ever has been assigned by trial Court for not allowing the production of documents as prayed by plaintiff.
The impugned order to that extent deserves to be set aside. The documents sought to be produced by the plaintiff allegedly had come into existence only on 05.08.2012. It is trite that mere production of documents does not amount to proof of its existence or contents. Each & every document has to be proved in accordance with procedure prescribed under law. There is no reason that plaintiff should not have been allowed to produce on record documents annexed with application under Order 7 Rule 14 CPC.
Section 45A of the Evidence Act deals with a situation where expert opinion is required to be formed by the Court on any matter relating to any information transmitting or stated in any computer source or in any other electronic/digital form & further speaks about such opinion, if obtained to be a relevant fact. The Impugned order is deficient meeting with the legal requirement for adjudication of the prayer made by the plaintiff- the application of plaintiff under Section 45A of the Evidence Act was misconceived at the stage of filing. In facts of case, no case was made out to

seek an expert opinion as there was no requirement of such opinion at a stage when the information alleged to be stored in digital form was not even proved by way of evidence in the case. The petition is partly allowed. The application u/o 7 rule 14 CPC is allowed & application u/s 45A Evidence Act is dismissed

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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, order dated 06.02.2015 passed by learned Civil Judge (Junior Division), Court No.1, Una in Civil Suit No. 269/2001 has been assailed.

2. Petitioner herein is the plaintiff in civil suit No. 269 of 2001 before learned trial Court. He has filed a suit for declaration and permanent prohibitory injunction to the effect that will dated 26.06.1973 executed by his uncle Shri Hans Raj in favour of defendant No. 1 (respondent No.1 herein) is wrong, illegal and void and plaintiff as well as defendants No. 1 to 4 are owner in possession of the suit land in equal share. Sale of some portion of suit land by defendant No.1 in favour of defendant No.5 has also been challenged. Relief of permanent prohibitory injunction restraining defendants No. 1 and 5 from changing the nature of suit land by raising any sort of construction or alienation is also sought. In alternative, a decree of possession has been claimed.

3. The defendants are contesting the claim of plaintiff and the parties have been put to trial. Following issues have been framed in the suit on the pleadings of the parties:-

1. *Whether Sh. Hans Raj died intestate and leaving behind no class-I heir? OPP.*

2. *Whether the defendants No. 1 to 4 are owners in possession of equal share of the suit land? OPP.*

3. *Whether the plaintiff is entitled for the relief of declaration as prayed? OPP.*

4. *Whether the sale of Kh, No. 3141 in favour of the defendant no.5 is wrong and illegal? OPP.*

5. *Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP.*

6. *Whether the suit is not maintainable? OPD.*

7. *Whether the suit is within limitation? OPP.*

8. *Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD.*

9. *Whether the suit is bad for mis-joinder of parties and cause of action?*
OPD.

10. *Whether Sh. Hans Raj executed a legal and valid will dated 26.06.1973? OPD.*

11. *Whether the suit is barred under Order 2 Rule 2 CPC? OPD.*

12. *Whether the defendant no. 5 is bonafide purchaser of the suit land as claimed? OPD.*

13. *Relief.*

4. After amendment of the plaint, issues were again framed on 21.01.2006.

1. *Whether the plaintiff and defendants no. 1 to 4 are owners in possession in equal share qua the estate of the deceased Hans Raj as alleged? OPP.*

2. *Whether the will dated 26.6.1973 alleged to be executed by Hans Raj in favour of the defendant no. 1 is wrong, illegal, null and void being suspicious, fraud and mis-representation and not binding on the rights of the plaintiff and defendants no. 2 to 4 as alleged? OPP.*

3. *If issue No. 2 is proved in affirmative, whether the sale made by defendant no.1 in favour of the defendant no.5 is illegal, null and void? OPP.*

4. *Whether the plaintiff is entitled for the relief of injunction as prayed? OPP.*

5. *Whether the suit is not maintainable as alleged? OPD.*

6. *Whether the suit is barred by limitation? OPD.*

7. *Whether the plaintiff is estopped by his own act and conduct to file the present suit? OPD.*

8. *Whether the suit is bad for mis-joinder of parties and cause of action as alleged? OPD.*

9. *Relief.*

5. Without going into the question of overlapping of issues framed on different occasions in the same suit, it will suffice for the adjudication of this petition to notice issue No. 10 framed on 26.08.2003 and issue No.2 framed on 21.01.2006.

6. The onus to prove the valid execution of will is always on the propounder. In this case, defendant No.1 being the propounder of will was required to prove the same in affirmative.

7. Plaintiff and defendants led their respective evidence. On 29.08.2012, zimini order of the day recorded as under:-

> *"...This is an old case of the year 2001, yet no rebuttal evidence is present. Neither cost paid. However, in the interest of justice, as prayed, one final opportunity is granted for rebuttal evidence, if*

any, and final arguments, as prayed for the ld. Counsel for the plaintiff for 7.9.2012. No further opportunity shall be granted being a time bound matter."

8. On the adjourned date, i.e. 07.09.2012, the following order came to be passed by the learned trial Court:-

"As per the ld. Counsel for the plaintiff, the plaintiff has not got sufficient opportunities for rebuttal evidence from the Court, as such intends to get the case transferred by moving an application before the ld. District & Sessions Judge, Una. It appears that the ld. Counsel for the plaintiff has lost confidence of the Court. The Court, as such, has no recuse itself from further hearing the matter. As such, the case file be referred to and sent to the ld. District & Sessions Judge, Una, for either transferring the case to any other Court or any further directions in this regard. Concerned Ahlmad to comply with. As prayed by ld. Counsel for the plaintiff, the file be sent to the court of ld. District & Sessions Judge, Una, today itself. At this stage, applications under Order XL VII Rule 1, Under Section 45-A of Indian Evidence Act, Under order VII Rule 14 CPC along with two pulindas out of which one containing one spy pen camera and another pulinda containing one Micro SD Card 4GB, make Transcend bearing No. AO 6700/3736 and affidavit of Sh. Anil Kumar Kaushal filed. At the request of ld. Counsel for the plaintiff, both these pulindas are sealed and taken on record."

9. From the proceedings, noted above, it is clear that plaintiff had been afforded last opportunity to lead rebuttal evidence on 07.09.2012, on that date, apart from affidavit of one Shri Anil Kumar Kaushal, three separate applications under Order 47 Rule 1 CPC, under Order 7 rule 14 CPC and under Section 45A of Indian Evidence Act were filed on behalf of the plaintiff. In this case, order on application under Order 47 Rule 1 CPC is not in question.

10. By way of application under Order 7 Rule 14 CPC, it was averred that during the pendency of the case i.e. 05.08.2012, certain new events took place and following documents came into existence:-

a) *A Spy Pen Camera which is as compact audio-Video Recorder.*

b) *A-4GB, Micro S.D. Card which is a memory card storage device both are electronic record as contemplated in Section 65-B of the Indian Evidence Act to be treated as documents.*

c) *A certificate issued by the person occupying a reasonable official position namely Sh. V.K.Sharma, Deputy Manager (VAS 11) B.S.N.L. Corporate office H.C. Mathur Lane, Janpath, New Delhi – 110 001 in respect of the aforesaid electronic form evidence as required under Section 65-B of the Indian Evidence Act.*

d) *Retail Invoice dated 3 Aug 2012 issued by M/s Action India Home Products, 2162/29, Guru Arjun Nagar, Main Patel Road, New Delhi- 110008, in respect of the products mentioned in para (a) and (b) above.*

11. Plaintiff sought to place on record the above noted documents to be produced in evidence on the ground that aforesaid documents were not in existence at the time of filing of suit. It was specifically mentioned that the statement contained in electronic form was recorded by Shri Anil Kumar Kaushal on 05.08.2012 at the residence of DW-3 Shanti Lal with the aid of spy pen camera. The documents sought to be placed on record were in fact in support of the proceedings of recording of version of DW-3 Shanti Lal. Respondents filed reply to these applications and contested the claim of the plaintiff.

12. Another application under Section 45A was filed with a prayer to send the aforesaid documents in electronic form to an expert for his opinion. This application was also contested by the respondents by filing separate reply.

13. Both these applications came to be decided by learned trial Court vide order dated 06.02.2015, impugned in the present petition. The grievance of the petitioner herein is that the impugned order is wrong, illegal and is result of wrongful exercise of jurisdiction. It has been submitted on behalf of the petitioner that the applications filed by the plaintiff should have been allowed

as it would prove that DW-3 had deposed falsely before the learned trial Court. It has further been submitted that as per impugned order, learned trial Court had expressed its inclination to exercise jurisdiction under Section 165 of the Evidence Act which meant that learned trial Court was agreeing with the contentions of plaintiff. It has further been stated that the learned trial Court was not justified in rejecting the applications of plaintiff on the ground that since DW-3 had already been cross-examined the prayer of plaintiff could not be allowed.

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

15. Perusal of record of learned trial Court reveals that issue in respect of genuineness of validity of Will allegedly executed by late Shri Hans Raj is in question. Parties have already led their evidence. It was the stage of production of rebuttal evidence on behalf of the plaintiff that two applications, one under Order 7 Rule 14 CPC and another under Section 45A of the Evidence Act came to be filed before the learned trial Court. It has also been revealed that on 07.09.2012, when these applications were filed an affidavit of Shri Anil Kumar Kaushal was also submitted on record. Along-with application under Order 7 Rule 14 CPC, two packets including one spy pen camera and another with micro SD card 4GB and certain other documents were also placed on record.

16. This Court on 25.03.2015 stayed further proceedings in Civil Suit No. 269 of 2001 before the learned trial Court. In the meanwhile, on 25.02.2015, Shri Anil Kumar Kaushal was examined as a witness of plaintiff in rebuttal. His cross-examination was also conducted on the same day. Learned counsel for the plaintiff closed rebuttal evidence of plaintiff by reserving right to challenge the order dated 06.02.2015 passed by learned trial Court.

17. Order 7 Rule 14 CPC contemplates different situations, Firstly, plaintiff is obligated to enter in a list and produce in the Court, at the time of

presentation of plaint, all such documents on which the plaintiff either sues or relies upon and which are in his possession or power. Secondly, when such documents are not in possession or power, he is required to detail the possessor of such documents, thirdly, in case plaintiff, omits or fails to comply with the earlier two conditions, he is precluded from subsequently producing such documents for being received in evidence, without leave of the Court. Lastly, the rigors of aforesaid provision of Order 7 Rule 14 CPC does not apply to the documents which are produced for the cross-examination of plaintiff's witnesses or handed over to such witness to refresh his memory.

18. The impugned order, while rejecting application under Order 7 Rule 14 CPC of the plaintiff, does not deal with any of above noted situations. Learned trial Court was to adjudicate on the question whether plaintiff was entitled for grant of leave to produce the documents detailed in his application or not. Learned trial Court appears to have been swayed by the factors unconnected and irrelevant to the decision of application under Order 7 Rule 14 CPC. No reason whatsoever has been assigned by the learned trial Court for not allowing the production of documents as prayed by plaintiff. The impugned order to that extent deserves to be set aside. The documents sought to be produced by the plaintiff allegedly had come into existence only on 05.08.2012. It is trite that mere production of documents does not amount to proof of its existence or contents. Each and every document has to be proved in accordance with the procedure prescribed under law. There is no reason that plaintiff should not have been allowed to produce on record documents annexed with his application under Order 7 Rule 14 CPC.

19. As regards other application under Section 45A of the Evidence Act filed by the plaintiff, again the impugned order is deficient meeting with the legal requirement for adjudication of the prayer made by the plaintiff. However, in considered view of this Court, application of plaintiff under Section 45A of the Evidence Act was misconceived atleast at the stage of its filing. Section 45A of

the Evidence Act deals with a situation where expert opinion is required to be formed by the Court on any matter relating to any information transmitting or stored in any computer resource or in any other electronic/digital form and further speaks about such opinion, if obtained, to be a relevant fact. In the facts of the instant case, no case was made out to seek an expert opinion as there was no requirement of such opinion at a stage when the information alleged to be stored in digital form was not even proved by way of evidence in the case.

20. In the light of the above discussion, the petition is partly allowed. Order dated 06.02.2015 passed by learned Civil Judge (Junior Division), Court No.1, Una in Civil Suit No. 269/2001 is set aside to the extent application under Order 7 Rule 14 CPC was rejected thereby. The application of the plaintiff under Order 7 Rule 14 CPC is ordered to be allowed and he is allowed to produce on record the documents annexed with his application under Order 7 Rule 14 CPC. The application under Section 45A of the Evidence Act filed by the plaintiff is ordered to be rejected for the reasons stated hereinabove.

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

Records of learned trial Court be sent back forthwith and the parties through learned counsel representing them are directed to appear before the trial Court on 14th September, 2021.

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

Between:-

1. SH. HANS RAJ SON OF LATE SH. JAGDISH LAL, RESIDENT OF VILLAGE KULGAON, POST OFFICER JANGLA, TEHSIL CHIRGAON, DISTRICT SHIMLA, H.P. PRESENTLY POSTED AS INSPECTOR AT STATE VIGILANCE AND ANTI CORRUPTION

BUREAU, SOLAN, DISTRICT SOLAN, H.P.

2. SH. SURENDER SINGH, SON OF LATE SH. OM PAL, RESIDENT OF VILLAGE SARNATHALA POST OFFICE GHANGOLA TEHSIL SOHANA, DISTRICT GURUGRAM, HARYANA, PRESENTLY POSTED AT CONSTABLE FIRST BATTALION JUNGA, DISTRICT SHIMLA, H.P.

3. SH. VIKRAM SINGH, SON OF LATE SH. MAHINDER SINGH RESIDENT OF HOUSE NO. 73, POLICE LINE SOLAN, DISTRICT SOLAN, H.P. PRESENTLY POSTED AS CONSTABLE WITH THE OFFICE OF SUPERINTENDENT OF POLICE, SOLAN, H.P.

4. HEAD CONSTABLE VIDYA DUTT, SON OF SH. INDER DUTT SHARMA, RESIDENT OF VILLAGE SHEEL, PO DEOTHI TEHSIL AND DISTRICT SOLAN, PRESENTLY POSTED AS HONORARY HEAD CONSTABLE IN THE OFFICE OF SUPERINTENDENT OF POLICE SOLAN, DISTRICT SOLAN, H.P.

…PETITIONERS

(BY SH. CHANDRANARAYAN SINGH, ADVOCATE)

AND

SH. PREM SINGH TANGANIA, S/O LATE SH. KUSHAL SINGH, R/O C/O SH. HEERA LAL SHARMA, R/O VILLAGE RABON, P.O. SAPOOR, TEHSIL AND DISTRICT SOLAN, H.P.

…RESPONDENT

(BY MS.SHARMILA PATIAL, ADVOCATE, LEGAL AID COUNSEL)

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC NO. 454 OF 2021

SH. SUSHIL KUMAR, S/O SH. JAGAT PAL SHARMA, R/O HOUSE NO. 3, TYPE 5 POLICE COLONY, KASUMPTI, SHIMLA, H.P. PRESENTLY POSTED AS ADDITIONAL SUPREINTENDENT OF POLICE SECURITY, IN THE OFFICE OF CHIEF MINISTER, HIMACHAL PRADESH AT SHIMLA, H.P. …PETITIONER

(BY SH. CHANDRANARAYAN SINGH, ADVOCATE)

AND

SH. PREM SINGH TANGANIA, S/O LATE SH. KUSHAL SINGH, R/O C/O SH. HEERA LAL SHARMA, R/O VILLAGE RABON, P.O. SAPOOR, TEHSIL AND DISTRICT SOLAN, H.P.

…RESPONDENT

(BY MS.SHARMILA PATIAL, ADVOCATE, LEGAL AID COUNSEL)
(RESPONDENTS NO. 2 TO 5 STAND DELETED VIDE ORDER DATED 9.8.2019)

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC NO. 455 OF 2019
CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC NO. 454 OF 2019
DATED: 11.08.2021

Criminal Procedure Code, 1973 – Section 197 - Petitions against summoning order dated 3.11.2017 passed by trial court in private complaint - Held - Petitioners allegedly having committed offence while discharging official duty. Mrs. Anjum Ara and petitioners being Govt officials are on same footings -

The findings of Co-ordinate bench with respect to same incident which have not been assailed squarely covers present case, so Judicial Magistrate could not have taken cognizance against the petitioners except with previous sanction u/s 197 Cr. P.C. - petitions allowed and criminal proceedings instituted against petitioners vide private complaint are quashed.

Cases referred:

General Officer Commanding, Rashtriya Rifles Vs. Central Bureau of Investigation and another, (2012) 6 SCC 228;

Rakesh Kumar Mishra Vs. State of Bihar and others, (2006) 1 SCC 557;

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

J U D G M E N T

Both these petitions are being disposed of by this common judgment as common question of law and fact is involved therein.

2. Petitioners have approached this Court against summoning order dated 3.11.2017 issued against them by the trial Court in private complaint case No. 28-2 of 2017, titled Prem Singh Tangania Vs. Anjum Ara and others filed by respondent No. 1 in the Court of learned Chief Judicial Magistrate, Solan.

3. It is submitted on behalf of petitioners that petitioners were discharging their official functions and duties in the office of Superintendent of Police, Solan and for act and conduct of complainant/respondent, a report was registered against him in Police Post, Solan under Sections 186 and 189 of IPC and Chief Judicial Magistrate, Solan had accorded permission to investigate the same vide order dated 13.5.2016 and after investigation kalandra has been presented in the Court in respect of the complainant under Sections 186 and 189 of IPC. It has been further submitted that, as a matter of fact, private complaint against the petitioner(s) is a counterblast to the

action taken by the police for his acts and conduct leading to registration of case and presentation of Kalandra against him.

4. Cognizance taken by the Magistrate has been assailed mainly on the ground that petitioners were performing their official duty and the Magistrate could not have taken cognizance of the case against them, in view of provisions of Section 197 of Cr.P.C., without sanction. Learned counsel for the petitioner has also pointed out that co-accused Anjum Ara, Superintendent of Police had also filed a similar petition bearing Cr.MMO No. 468 of 2017, Anjum Ara Vs. Prem Singh Tangania, which was decided by co-ordinate Bench on 8.7.2019, whereby, after taking into consideration judgments passed by the Supreme Court in ***Rakesh Kumar Mishra Vs. State of Bihar and others, (2006) 1 SCC 557;*** and ***General Officer Commanding, Rashtriya Rifles Vs. Central Bureau of Investigation and another, (2012) 6 SCC 228*** coupled with provisions of Section 197 Cr.P.C., proceedings against Anjum Ara have been ordered to be quashed.

5. Learned counsel for the petitioners has also placed reliance upon judgment passed by Supreme Court in *D. Devaraja Vs. Owias Sabeer Hussain, Criminal Appeal No. 458 of 2020, decided on 18th June, 2020* to substantiate the plea raised on behalf of the petitioners.

6. Undisputedly, the aforesaid order passed by the Co-ordinate Bench of this Court in Cr.MMO No. 468 of 2017, has not been further assailed, rather has been accepted by respondent/complainant.

7. Petitioners allegedly having committed the offence while acting in discharge of their official duty. Mrs.Anjum Ara and present petitioners, being officials of the Government are at the same footings and thus findings returned by co-ordinate Bench with respect to the same incident, which have not been assailed, squarely cover present case also. Therefore, Judicial Magistrate could not have taken cognizance of the offence alleged against

them, except with previous sanction of competent authority under Section 197 of Cr.P.C.

8. In view of above observation, petition is allowed and criminal proceedings instituted against the petitioners vide private complaint case No. 28/2 of 2017, titled Prem Singh Tangania Vs. Anjum Ara, pending before Judicial Magistrate 1st Class, Solan, are quashed.

The petitions stand disposed of in aforesaid terms.

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

Between:-

1. AMOLAK RAM S/O SH. MAKHALI RAM
   R/O VILLAGE KEZERYU, POST OFFICE, DELGI,
   TEHSIL AND DISTRICT, SHIMLA, H.P.
2. KESHAV RAM S/O LATE SH. JAHANDHA RAM
   R/O VILLAGE AND POST OFFICE, DANEWALI,
   SUB TEHSIL, NANKHARI, DISTRICT SHIMLA, H.P.
3. RAMESH THAKUR S/O SH. LACHHI RAM.
   R/O VILLAGE JHARECH, POST OFFICE, BEOLIA,
   TEHSIL AND DISTRICT, SHIMLA, H.P.
4. SURINDER KUMAR S/O SH. MOOL CHAND,
   R/O LOWER KAITHU, TEHSIL AND DISTRICT,
   SHIMLA, H.P.
5. LEKH RAJ S/O SH. BHAGAT RAM,
   R/O VILLAGE THAROG, POST OFFICE, CHALAL,
   TEHSIL SUNNI, DISTRICT SHIMLA, H.P.
6. RAJEEV S/O SH. SANT RAM,
   R/O SURGA BHAWAN, RAM NAGAR,
   TEHSIL AND DISTRICT, SHIMLA, H.P.
7. PARAS RAM S/O SH. HARASU RAM,
   R/O VILLAGE KOTLA, P.O. THACHI,
   TEHSIL SUNNI, DISTRICT SHIMLA, H.P.
8. PRAKASH VIR S/O SH. BRAHMA NAND,
   R/O VILLAGE GANEOG, POST OFFICE, NEHRA,
   TEHSIL AND DISTRICT SHIMLA, H.P.

……PETITIONERS

(BY SH. BHUVNESH SHARMA & SH. RAMAKANT SHARMA, ADVOCATES)

AND

12. MUNICIPAL CORPORATION, SHIMLA,
THROUGH ITS COMMISSIONER, SHIMLA,
HIMACHAL PRADESH.

13. STATE OF HIMACHAL PRADESH, THROUGH ITS
PRINCIPAL SECRETARY (URBAN DEVELOPMENT)
TO THE GOVERNMENT OF H.P. SHIMLA-171002.

….RESPONDENTS.

(MS. REETA THAKUR, ADVOCATE, FOR RESPONDENT NO.1.

SH. ASHOK SHARMA, ADVOCATE GENERAL, WITH SH. VINOD THAKUR, SH. HEMANSHU MSRA, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALS AND SH. BHUPINDER THAKKUR, DEPUTY ADVOCATE GENERAL, FOR RESPONDENT NO.2.)

CWPOA No. 4952 of 2020
Dated: 12.08.2021

Constitution of India, 1950 – Articles 14,16 & 226 - The petition seeking the status of post of supervisor to petitioner from the date of completion of 10 years of daily wages service with all consequential benefits - Held - Sh. R. C Thakur and Ram Rattan etc who were similarly situated to the petitioner were granted the benefits of regularization as supervisor on completion of 8 years of service as daily wages petitioners cannot be singled out, discriminated in the same and similar set of circumstances (facts) - The respondent has not been able to carve out a case of placing petitioners on a separate pedestal than Sh. R. C Thakur - The petition allowed - However petitioners are entitled to arrear only for period of 3 years prior to filing of petition.

Cases referred:

Jai Dev Gupta vs. State of Himachal Pradesh and another, AIR 1998 SC 2819;

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

O R D E R

By way of instant petition, petitioners have prayed for the following substantive reliefs:

ix) That the impugned office order dated 30.06.2018 at ***Annexure P-9****, whereby the claim of the applicant has been rejected, may kindly be quashed and set-aside.*

x) *That the respondents may kindly be directed to confer the status of the post of Supervisor upon the applicants w.e.f. from the date of completion of 10 years of daily wages services with all consequential benefits towards fixation of pay, seniority and arrears of salary.*

2. Petitioners were engaged as daily waged Mates with effect from September, 1987, August 1984, August 1982, September 1987, June 1985, July 1986, May 1985 and September 1986 respectively. Their services were regularized with effect from 29.01.1998, 4.7.1996, 13.1.1994, 29.1.1998, 4.7.1996, 29.1.1998, 4.7.1996 and 29.1.1998 respectively. Petitioners after prolonged litigation were granted the benefit of the post of Supervisor w.e.f. 18.4.2007. This benefit was accorded to petitioners vide office order dated 9.9.2014.

3. On 18.9.2014, learned Single Judge of this Court passed judgment in ***CWP No.2521 of 2012***, titled ***Ramesh Chand Thakur*** vs**.** ***Municipal Corporation*** and thereby directed the grant of benefit of regularization to petitioner in that case on completion of 8 years of service. This judgment was assailed by Municipal Corporation, Shimla in LPA No. 55 of 2015 unsuccessfully. In LPA No.55 of 2015, a Co-ordinate Bench of this

Court while dismissing the appeal of Municipal Corporation, Shimla clarified that the payment of arrears would be restricted to three years prior to filing of the writ petition.

4. Consequent upon passing of aforesaid judgment in LPA No. 55 of 2015, Municipal Corporation, Shimla granted the benefit of regularization to Sh. Ramesh Chand Thakur, w.e.f. 16.4.2001 in the category of Supervisor. Petitioners have contended that on the basis of the benefits granted to Sh. Ramesh Chand Thakur, similar benefits were allowed by the Municipal Corporation, Shimla to other similarly situated persons including Ram Rattan etc. Petitioners being similarly situated also claimed the same and similar benefits but were not allowed by the respondent-Municipal Corporation, Shimla.

5. Petitioners approached the Himachal Pradesh Administrative Tribunal by way of O.A. No. 6048 of 2016, which came to be decided on 8.9.2017. The learned Tribunal was pleased to pass the following orders:

"4. The applicants claim the benefit of judgments rendered by the Hon'ble High Court of Himachal Pradesh in CWP No. 2521 of 2012, Shri Ramesh Chand Thakur versus Municipal Corporation, decided on 18.09.2014, Annexure A-5, as upheld in LPA No.55 of 2015, Municipal Corporation, Shimla versus Ramesh Chand Thakur, decided on 07.04.2016, Annexure A-6 and CWP No. 2415 of 2012, Mathu Ram versus Municipal Corporation and others, decided on 31.7.2014. Learned counsel for the applicants submits that the said judgments have become final and implemented also.

5. If that be so, the present original application is disposed of with a direction to the respondents to consider the respective cases of the applicants also, strictly in view of the principles laid down in the judgments cited hereinabove, within a period of two months from today. The applicants shall produce a certified copy of this order as well as copy of the judgments referred to above, before the respondents/competent authority within a week."

6. On 30.6.2018, respondent No.1 rejected the claims of the petitioners. Aggrieved against such rejection, petitioners again approached the learned Tribunal by way of O.A. No. 4622 of 2018. On closure of the learned Tribunal, the said O.A. stood transferred to this Court and has been registered as CWPOA No. 4952 of 2020.

7. Petitioners have alleged discrimination at the hands of the respondents. Their case is that initially also they were granted the benefit of the post of Supervisor w.e.f. 18.4.2007 on the basis of such benefit granted to Sh. Ramesh Chand Thakur and also Sh. Ram Rattan etc. Petitioners contended that since they were similarly situated to Sh. Ramesh Chand Thakur and Sh. Ram Rattan etc., the action of respondent No.1 in rejecting their claim vide office order dated 30.6.2018 (Annexure P-9) is wrong, illegal and discriminatory.

8. Respondent No.1 in its reply has stated that the petitioners were considered for regularization as Supervisor w.e.f. 18.4.2007 against the created posts of Supervisors as there was no post of Supervisor existing in Municipal Corporation, Shimla prior to 18.4.2007. It has also been averred by respondent No.1 that the petitioners cannot be allowed to re-agitate the issue of regularization from retrospective date as they had earlier also filed legal proceedings in which such claim was not raised.

9. We have heard learned counsel for the parties and have also gone through the records of the case.

10. The case of the petitioners is mainly based upon the assertion that since Sh. Ramesh Chand Thakur and Sh. Ram Rattan etc., who were similarly situated to the petitioners, were granted the benefits of regularization as Supervisor w.e.f. 16.4.2001, on completion of 8 years of daily waged

services, petitioners cannot be singled out and discriminated in the same and similar set of facts.

11. We find merit in the contention of petitioners as respondent No.1 has not been able to carve out a case of placing petitioners on a separate pedestal than Sh. Ramesh Chand Thakur and Sh. Ram Rattan etc. Once the benefit of regularization in service to the aforesaid Sh. Ramesh Chand Thakur and Sh. Ram Rattan etc. was granted w.e.f. 16.4.2001, the same could not be denied to the petitioners on the whims of respondent No.1. Petitioners were granted the benefit of regularization as Supervisors w.e.f. 18.4.2007, only on the same date on which dateSh. Ramesh Chand Thakur and subsequently to Sh. Ram Rattan etc. were initially regularized as Supervisors. That being so, respondent No.1 cannot be subsequently allowed to change its stand when it comes to grant of the regularization of petitioners from due date i.e. on completion of requisite period of daily waged services. The matter in this regard is no more *res integra* after the judgment passed by learned Single Judge of this Court in ***Mathu Ram*** *vs.* ***Municipal Corporation and others,*** CWP No. 2415 of 2012 dated 31.7.2014as the same has attained finality having been upheld even by the Hon'ble Supreme Court.As regards the plea of respondent No.1 with respect to non-existence of posts of Supervisor before 18.4.2007, that should have been applicable to Sh. Ramesh Chand Thakur and Sh. Ram Rattan etc. also. Once the said other persons were given the benefit from date prior to 18.4.2007, the petitioners are also entitled for same treatment.

12. The petition is accordingly allowed, office order dated 30.6.2018 (Annexure P-9) is quashed and set-aside being wrong, illegal, arbitrary and in violation of Article 14 of the Constitution of India. Respondent No.1-Municipal Corporation, Shimla is directed to confer the status of the post of Supervisor upon the petitioners with effect from the date they completed ten years of daily

waged services with all consequential benefits. It is, however, clarified that petitioners shall be entitled to the arrears only for a period of three years prior to filing of this petition following the decision of the Hon'ble Supreme Court in ***Jai Dev Gupta*** vs**. *State of Himachal Pradesh and another, AIR 1998 SC 2819.***

13. The petition is disposed of in the aforesaid terms, also the pending miscellaneous applications, if any, with no order as to costs.

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

Between:-

SH. GOPAL KRISHAN, S/O SH. HAZURA SINGH, R/O VILLAGE KALEHRA, P.O. KUNGHRAT, TEHSIL HAROLI, DISTRICT UNA, HIMACHAL PRADESH, PRESENTLY WORKING AS JBT AT GOVERNMENT PRIMARY SCHOOL, KALOH-BELI, P.O. KALOH, TEHSIL GHANARI, DISTRICT UNA, HIMACHAL PRADESH.

....PETITIONER

(BY M/S ONKAR JAIRATH & SHUBHAM SOOD, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION) TO GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. DIRECTOR OF ELEMENTARY EDUCATION, HIMACHAL PRADESH, LALPANI, SHIMLA- 171001, HIMACHAL PRADESH.
3. DEPUTY DIRECTOR OF ELEMENTARY EDUCATION UNA, DISTRICT UNA, HIMACHAL PRADESH.
4. SMT. SUSHMA KUMARI, D/O NOT KNOWN TO THE APPLICANT, THROUGH RESPONDENT NO. 3.

...RESPONDENTS

(SH. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR. SUMESH RAJ & ADARSH SHARMA, ADDITIONAL ADVOCATE GENERALS & MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR R-1 to 3.
R-4 Ex-parte.

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 5013 of 2020

DATED; 12TH AUGUST, 2021

Constitution of India, 1950 – Articles 14 & 226 - The petition seeking direction to take into consideration the initial date of appointment of petitioner as Voluntary Teacher for the purpose of seniority and other consequential benefits like promotion and correction of seniority list - Petitioner initially appointed as a voluntary teacher vide order dated 17.2.1992 and his appointment was set aside by Hon'ble High Court in CWP filed by Ms. Anju Bala- Hon'ble Supreme Court in SLP being not satisfied by approach of Hon'ble high court though did not interfere with order of Hon'ble High Court and directed the state to adjust the petitioner in some other school as per his entitlement as a result of which he was re-engaged vide order dated 25.8.1993 but the state has withdrawn the seniority granted to petitioner of the service rendered by him before termination of his service by Hon'ble High Court - Held - Hon'ble Supreme Court while deciding the SLP filed by petitioner had not set aside the judgment passed by Hon'ble High Court in Anju Bala writ petition and only protection was provided to petitioner by directing the state to adjust the petitioner in suitable post of identical nature - Withdrawing seniority assigned to the petitioner by department was erroroneously least that was expected was that a show cause notice ought to have been issued to him before passing the final order - The order of withdrawl of seniority could not have been passed at the back of petitioner - The petition is allowed by quashing order of withdrawl with a direction that a show cause notice be issued to petitioner by competent authority with regard to withdrawl of his seniority thereafter decision upon the issue be taken by competent authority after hearing the petitioner in person or through authorized agent.

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

J U D G M E N T

By way of this writ petition, the petitioner has, *inter alia,* prayed for the following reliefs:

"I. That the Impugned Communication dated 09.07.2018 (Annexure A-154), may kindly be quashed and set aside being illegal, arbitrary and discriminatory.

I(A) That the Impugned Corrigendum dated 15.12.2018 (Annexure A-14) may kindly be quashed and set aside being illegal, arbitrary and discriminatory.

II. That the respondents may be further commanded with the appropriate order or direction to take into consideration the initial date of appointment of the applicant as Voluntary Teacher for the purpose of seniority and other consequential benefits like promotion etc.

III. That the respondents may be further directed to correct the seniority list and the applicant may be appropriate placed in the JBT list and may be promoted to the next higher post."

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

The petitioner was initially appointed as a Voluntary Teacher in the Education Department vide Office Order dated 17.02.1992 (Annexure A-1). His appointment was assailed by one Ms. Anju Bala by way of CWP No. 355/1992 before this Court. Said writ petition was allowed by the Hon'ble Division Bench of this Court vide judgment dated 30.12.1992. The appointment of the petitioner was set aside and it was ordered that appointment be offered to Ms. Anju Bala.

3. Feeling aggrieved, the petitioner filed a Special Leave to Appeal (Civil) No. 8139/93 before the Hon'ble Supreme Court. The same was disposed of by the Hon'ble Supreme Court vide Annexure A-3 in the following terms:

"Though we are not satisfied with the approach of the High Court, we are still disinclined to interfere in its order. We feel that the High Court terming the petitioner as unqualified was not call for as apparently the petitioner was suitably qualified for the post.

> *Additionally, we feel that for the view it was taken a suitable direction to the State should have been issued by the High Court to have the petitioner adjusted in some other school according to his entitlement. Thus, we pass such a direction to the State for the petitioner's adjustment, even though ex parte, but subject to recall at the instance of the State. The petitioner be adjusted in a suitable post of an identical nature of which he has been deprived. SLP is disposed of accordingly."*

4. Thereafter, the petitioner was re-engaged by the Education Department, as is evident from office order, dated 25.08.1993 (Annexure A-4/T), which is quoted hereinbelow:

> *"Earlier appointed Voluntary Teacher Sh. Gopal Krishan in Government Primary School, Lalri (Lower) has been terminated from service in accordance with judgment of the Hon'ble High Court dated 30.12.1992 vide Office Order E.D.M. U(E-11)/203/86-7/93-97 dated 15.2.1993. Now, the Hon'ble Supreme Court of India in SLP No. 8139/93, Sh. Gopal Krishan, S/o Sh. Hazura Singh, Village Kalehra, Tehsil Haroli, P.O. Kangrat, Distt. Una is appointed at Government Primary School, Lalri (Lower) till further orders."*

5. For completion of record, it is pertinent to mention here that in the year 1997, the petitioner approached the erstwhile learned Himachal Pradesh State Administrative Tribunal by way of Original Application No. 546/1997 with the prayer that he be granted seniority and salary for the period between 16.01.1993 to 11.07.1993. The reliefs prayed for were not granted by the erstwhile learned Tribunal to the petitioner, but it was observed that the petitioner was having right to agitate said issue before the appropriate authority.

6. Before this, in the year 1994, the services of all the Voluntary Teachers were dispensed with by the Education Department, including the petitioner, but all of them were re-engaged, including the petitioner. Services of the petitioner were subsequently regularized vide Communication dated 09.04.1999 after granting him Special JBT Certificate. It appears that thereafter when seniority lists of JBT Teachers were issued by the Department, service rendered by the petitioner before his services were ordered to be terminated by the High Court in the writ petition filed by Ms. Anju Bala, was erroneously included for the purpose of seniority. The monetary benefits which said seniority entailed were also given to the petitioner. Later on, when the respondent-State realized its mistake, vide Corrigendum, dated 15th December, 2018 (Annexure A-15), the seniority so assigned to the petitioner was withdrawn.

7. Feeling aggrieved, the petitioner has filed this writ petition.

8. Corrigendum, dated 15th December, 2018 (Annexure A-15) reads as under:-

> *"The Office Order No. EDN-U (G-II)Ele/Court Case 3766-68 issued by this Office on dated 03.04.2012 (copy attached) is hereby withdrawn with immediate effect. Sh. Gopal Krishan shall be assigned seniority from the date of joining conseq*uently on his fresh appointment in compliance to the decision given by the Hon'ble Supreme Court of India/Union of India Vrs. Deep Chand Panday & others."

9. Learned counsel for the petitioner has argued that Corrigendum, dated 15th December, 2018 (Annexure A-15), *inter alia,* is liable to be set aside on the ground that the same has been passed at the back of the petitioner, without affording him an opportunity of being heard. He submits that the interest of justice will be served in case this Corrigendum is quashed and set aside and the competent authority is directed to give personal hearing to the petitioner before taking any decision on the issue.

10. Learned Additional Advocate General, on the other hand, has submitted that there is no infirmity in the issuance of Corrigendum, dated 15th December, 2018 (Annexure A-15), for the reason that this Corrigendum has been issued in compliance to the judgment passed by the Hon'ble Supreme Court, in an SLP, which was preferred by the petitioner himself. He submits that in the process of implementation of the judgment of the Hon'ble Supreme Court, there is no need to comply with the provisions of natural justice, especially when it is not a case where the petitioner was not aware of the judgment of the Hon'ble Supreme Court, as he himself was the Special Leave Petitioner, in whose case, the order stood passed. Accordingly, he has prayed for dismissal of the writ petition.

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

12. Though it is not in dispute that in the SLP, which was filed before the Hon'ble Supreme Court by the present petitioner, while deciding the same, the Hon'ble Supreme Court did not set aside the judgment passed by this Court in *Ms. Anju Bala's* writ petition and the only protection which was granted to the petitioner was that the State was directed to adjust the petitioner in a suitable post of identical nature, yet this Court is of the view that while withdrawing the seniority, which stood assigned to the petitioner by the respondent-Department, may be erroneously, the least that was expected, was that a Show Cause Notice ought to have been issued to the petitioner before passing the final order. The genesis of issuing the Show Cause Notice could have been the order of the Hon'ble Supreme Court passed in the SLP to justify as to why the Department was proposing to withdraw the seniority, which was erroneously granted to the petitioner, but as the order of withdrawal of seniority, but natural, was to have civil consequences as far as the petitioner was concerned, the same could not have been passed at the back of the petitioner.

13. Therefore, without dwelling on other aspects of the matter, this petition is disposed of by quashing Corrigendum, dated 15th December, 2018 (Annexure A-15), with a direction to the respondents that a Show Cause Notice be issued by the competent authority to the petitioner with regard to the withdrawal of his seniority and thereafter, decision upon the issue be taken by the competent authority, after hearing the petitioner in person or through authorized representative. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

GANGA SINGH, SON OF SH. SOBHA RAM, RESIDENT OF VILLAGE AND P.O. BHADANA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P. PRESENTLY POSTED AS TGT(A) AT GSSS KILLOUR, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

....PETITIONER

(BY M/S ASHOK K. TYAGI AND GAMBHIR SINGH CHAUHAN, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY, EDUCATION TO THE GOVERNMENT OF HIMACHAL PRADESH SHIMLA-02.
2. THE DIRECTOR OF HIGHER EDUCATION, SHIMLA, HIMACHAL PRADESH.
3. THE DEPUTY DIRECTOR OF ELEMENTARY EDUCATION DISTRICT SIRMOUR AT NAHAN, H.P.

.....RESPONDENTS

(M/S SUMESH RAJ AND ADARSH SHARMA, ADDITIONAL ADVOCATE GENERALS WITH M/S J.S. GULERIA AND KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERALS)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2931 OF 2019
DECIDED ON 16.08.2021

Constitution of India, 1950 – Article 226 - The petition for direction to respondent to promote the petitioner from the post of TGT (Arts) to the post of PGT (Arts) by including the name of petitioner in the list of promotees and maintaining his seniority- Held, the petitioner can not suffer for acts of omission intra branches of education department, because once the petitioner had exercised his option and the same was formally forwarded through proper channel by the principal of concerned school on 5.12.2013, the onus of the petitioner stood discharged - department to have had inquired from the schools through Deputy Directors of elementary education of concerned districts as to who all amongst TGT (Arts) had opted for promotion against the post of PGT (Arts) and omission on the part of department to do so ,cannot be used to the deterrent of the petitioner - The writ petition allowed by holding that denial of promotion to the petitioner against the post of PGT (Arts) purportedly on the ground that his option was not received by department before 3.2.2014, is not sustainable in eyes of law and petitioner entitled for promotion to the post of PGT (Arts) as per his entitlement.

This petition coming on for orders this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G M E N T

The petitioner joined the services of the respondent-State as TGT (Arts) w.e.f. 01.04.1994. Post of TGT (Arts) is the feeder post for two promotional posts, i.e. Head Master and PGT (Arts). Accordingly, an incumbent holding the post of TGT (Arts), is called upon to give his option as to whether he would like to be considered for promotion against the post of Head Master or to the post of PGT (Arts) subject to fulfillment of other eligibility criteria.

2. The grievance of the petitioner herein is that despite him having opted for being promoted against the post of PGT (Arts), i.e. against the post of Lecturer (School Cadre) English and despite his name being duly forwarded on

the prescribed proforma by the Principal of the school concerned vide Annexure P-1, dated 5th December, 2013, he was arbitrarily ignored for the purpose of promotion, whereas persons junior to him stood promoted. It is in this background that the writ petition stands filed praying for issuance of a direction to the respondent-department to promote the petitioner from the post of TGT (Arts) to the post of PGT (Arts) (English) by including the name of the petitioner in the list of promotees dated 22.02.2014 (Annexure P-3). Further, prayer has also been made to maintain the seniority of the petitioner after promoting him as PGT (Arts) (English) w.e.f. 22.02.2014.

3. The stand of the State is that in terms of the record, the petitioner did not opt for promotion to the post of Lecturer, as per department instructions dated 14.05.2013 (Annexure R-1) within the stipulated time. In other words, his option for promotion to the post of Lecturer (School Cadre) (English) was not received before the cut off date, i.e. 03.02.2014, on which date, the panel for promotion to the post in issue was finalized, and therefore, he could not be promoted vide office order dated 22.02.2014.

4. In view of the respective stands taken by the parties in their pleadings, on 17.08.2020, this Court passed the following order:-

> *"The controversy involved in the present writ petition is in a very narrow compass. The grievance of the petitioner is that despite being eligible and despite his opting for being considered for promotion to the post of PGT (Arts) from the post of TGT (Arts), for which post, there were two channels of promotion, the State has not considered him for promotion, though persons junior to him were promoted.*
>
> *The stand of the State is that eligible TGT (Arts) incumbents were called upon to submit their consent vide proforma appended with the reply as Annexure R-1. As no such consent was received from the petitioner in the prescribed proforma as on 03.02.2014, on which date, the panel for promotion was finalized, therefore, case of the petitioner could not be considered.*

As the petitioner has not placed on record the proforma, which purportedly was filled up by him, opting for promotion through the channel of PGT(Arts), on the request of learned counsel for the petitioner, two weeks' time is granted to do the needful. As prayed for, list on 8th September, 2020."

5. In compliance thereto, alongwith CMP No. 1774 of 2020, the petitioner has appended a copy of the proforma duly submitted by him, in terms of Annexure R-1, which was forwarded by the Principal of Government Senior Secondary School, Killour, District Sirmour, H.P. to the office of Deputy Director of Elementary Education, District Sirmour, on 5th December, 2013, on the subject "regarding case for the promotion of lecturer (School Cadre) English". This document has not been controverted by the department.

6. Be that as it may, even if the version of the State is to be believed that the option so given by the petitioner did not reach the office of respondent No. 2, prior to 03.02.2014, on which date, the panel for promotions to the post in issue was finalized, in the considered view of the Court, the petitioner can not suffer for the acts of omission intra branches of the Education Department, because once the petitioner had exercised his option and the same was formally forwarded through proper channel, by the Principal of the school concerned on 5th December, 2013, the onus of the petitioner stood discharged. In other words, it was the duty of respondent No. 2-department to have had inquired from the schools through the Deputy Directors of the Elementary Education of the concerned district as to who all amongst TGT(Arts) had opted for promotion against the post of PGT (Arts) and omission on the part of the department to do so, cannot be used to the deterrent of the petitioner.

7. A perusal of the documents appended with the petition clearly demonstrates that TGT (Arts) junior to the petitioner were promoted to the post of PGT (Arts) in the concerned subject. To make it more clear, the petitioner has placed on record as Annexure P-2, the final seniority list of TGTs appointed up to 22.12.2000. In the said seniority list, name of the petitioner is

reflected at serial number 4166 and his date of appointment as TGT as mentioned in the list is 01.04.1994. Annexure P-3 is the office order dated 22.02.2014, vide which, TGTs possessing Master's Degree in different subjects including English were promoted to the post of PGT. The candidate reflected at serial number 2, namely, Sh. Onkar Singh, has seniority number 4311, and Shri Roop Lal, whose name is mentioned at serial number 3 in the office order dated 22.02.2014, is having seniority number 4314 in Annexure P-3, i.e. lower than the petitioner. This fortifies the contention of the petitioner that incumbents junior to the petitioner were indeed promoted against the post of PGT (Arts) English over and above the petitioner.

8. It is pertinent to mention here that it is not in dispute that after joining as TGT (Arts), the petitioner had gained Master's Degree in English, rendering him eligible for promotion to the post of PGT (Arts) English. This writ petition incidentally was filed on 22nd December, 2014 and the petitioner has superannuated from service during the pendency of the petition. In in the considered view of the Court, as the denial of promotion to the petitioner to the post of PGT (Arts) (English) by the respondent-department, is on account of the omission of the respondent-department, the petitioner cannot be blamed for the same, therefore, it will be in the interest of justice, if this writ petition is disposed of with the direction that the petitioner shall be deemed to have been promoted to the post of PGT (Arts) (English), if not vide office order dated 22.02.2014, then at least vide order dated 4th March, 2014.

9. This writ petition is accordingly allowed by holding that denial of promotion to the petitioner against the post of PGT (Arts) (English) purportedly on the ground that his option was not received by the department before 03.02.2014 is not sustainable in the eyes of law and by further holding that the petitioner is entitled for promotion to the post of PGT (Arts) (English) notionally if not w.e.f. 22.02.2014, i.e. the date on which the incumbents junior to him, namely, Onkar Singh and Roop Lal, were promoted as PGT (Arts)

vide Annexure P-3, then from the date of passing of office order dated 4th March, 2014 (Annexure P-5). He shall be deemed to have been promoted below Ms. Bimla Devi and above Ms. Sunita Kumari bearing security number 4864.

10. Said promotion to the post in issue shall be notional till he superannuated and actual benefits thereof, shall only be for pensionary purposes. Arrears be paid to the petitioner within three months from today, failing which the petitioner shall be entitled to simple interest at the rate of 6% per annum on the amount due, from the date of pronouncement of the judgment.

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

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

Between:-

MRS. RUCHI KUMARI AGED ABOUT 32 YEARS
W/O SH. NARENDER KUMAR
R/O VILLAGE GHORI (RIHRI), P.O.
SMAILA, TEHSIL SARKAGHAT,
DISTRICT MANDI, H.P. 175034
OCCUPATION: UNEMPLOYED.

....PETITIONER

(BY SH. RAJESH K. PARMAR, ADVOCATE)

AND

1. THE HIGH COURT OF
HIMACHAL PRADESH THROUGH
REGISTRAR GENERAL,
THE MALL, REVENSWOOD,
SHIMLA (H.P.) PIN 171 001.

2. THE STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (HOME), H.P.
SECRETARIAT, SHIMLA (H.P.)
PIN 171001.

3. SH. HIMANSHU THAKUR
(SYSTEM OFFICER)
OFFICE OF THE DISTRICT &
SESSIONS JUDGE, SOLAN,
DISTRICT COURTS, SOLAN, H.P.

4. SH. SANT RAM
(SYSTEM OFFICER)
OFFICE OF THE DISTRICT &
SESSIONS JUDGE, MANDI
DISTRICT COURTS, MANDI, H.P.

5. SH. MANORANJAN VERMA
(SYSTEM OFFICER)
OFFICE OF THE DISTRICT &
SESSIONS JUDGE, SHIMLA
JCC AT CHAKKAR, SHIMLA, H.P.
PIN 171 005.

6. SH. MOHIT KUMAR
(SYSTEM OFFICER)
OFFICE OF THE DISTRICT &
SESSIONS JUDGE, KULLU
DISTRICT COURTS KULLU, H.P.

..RESPONDENTS

(MR. SURINDER VERMA, ADVOCATE FOR R-1
AND MR. VINOD THAKUR, MR. SHIV PAL
MANHANS, ADDITIONAL ADVOCATE GENERALS,
MR. J.S. GULERIA AND MR. BHUPINDER THAKUR,
DEPUTY ADVOCATE GENERALS FOR R-2)

CIVIL WRIT PETITION NO. 1706 OF 2020
RESERVED ON: 10.08.2021
DECIDED ON: 24.08.2021

Constitution of India, 1950 – Articles 14,16 and 226 - The petition for issuance of writ of certiorari for quashing amendment to 2014 Rules, prescribing preferential mode of appointment for the System Officers working under the e-courts project for the post of Assistant Programmer and Recruitment Process - Held - The amendment in the Rules cannot stand the scrutiny of law as it violates Article 14 and 16 of constitution of India as classification so made vide amendment cannot be said to be reasonable - No reason has come to justify such act - To consider that system officers working under e-courts had gained special experience will only be fallacy- once the persons working under a specific project were held to have no right of preferential treatment in the appointment to the post of Assistant Programmer it was highly unreasonable and arbitrary on part of High Court to have recognised such preferential right in their favour by carrying amendment in Rules as their claim for regularization and preferential right of consideration for post of Assistant Programmer were already rejected by a Judicial Pronouncement - Petition is allowed - Amendment carried out in rules and recruitment process is quashed and set aside.

Cases referred:

Indian Aluminium Co. and Others Vs State of Kerala and others (1996) 7 SCC 637;
State of BiharvsUpendara Narain Singh and others (2009) 5 SCC 65;
State of Jammu and Kashmir vs. Triloki Nath Khosa 1974 (1) SCC 19;
Union of India and others Vs. Exide Industries Ltd and another, (2020) 5 SCC 274;
Union Public Service CommissionvsGirish Jayanti Lal Vaghela (2006) 2 SCC 482;

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, the petitioner has prayed for the following substantive reliefs:-

a) *by way of issuance of writ of certiorari, "Notification No. HHC/Rules/Tech.Man.(Comp.)1/2014 dated 1st October, 2016 which is violative of the Constitution of India and clear disobedience of the judgments passed/law laid down by the Hon'ble Court and affirmed by Hon'ble Apex Court of India, may very kindly be quashed and set aside;*

b) *by way of issuance of writ of certiorari, Advertisement No.HHC/Estt.7(50)/2014-2978-81, dated 23.01.2019, and impugned recruitment process order based on the impugned Advertisement may very kindly be quashed and set aside because same is violative of the right of equality and an attempt to promote back door entry;*

c) *by way of writ of mandamus, respondents No. 1 and 2 may very kindly be directed to issue fresh Advertisement and initiate fresh recruitment process by availing the equal opportunity to the petitioner an similar situated people;"*

BRIEF FACTUAL MATRIX

3. Hon'ble Supreme Court, with a view to computerize the Indian Judiciary, constituted e-committee and on its recommendations framed the National Policy on 01.08.2005. *DOEACC* for short 'society' was made the nodal agency. As per policy decision, cadre of trouble shooters (Technical Manpower) for different Courts was to be created and in terms of National Policy, posts were to be created for conversion of Courts into e-Courts.

4. On account of non-availability of Society in the State of Himachal Pradesh, the Department of Information and Technology, *vide* communication dated 02.09.2008 empaneled M/s New Horizons India Limited as the agency for providing technical manpower in the High Court and District Courts in Himachal Pradesh. In pursuance to above noted process, certain persons

were selected as System Officers. Undisputedly, the persons so selected as System Officers were on the rolls of M/s New Horizons India Limited. They were not appointed by the High Court. The terms and conditions of the appointment of such persons were absolutely clear whereby their appointments were purely on temporary basis against the assigned project. Their services were liable to be terminated at 15 days' notice in the event of abandonment/dis-continuance of the project.

5, In the meanwhile, High Court had framed High Court of Himachal Pradesh Members of Technical Manpower (Computers) (Appointment, Conditions of Service and Conduct) Rules, 2014 (for short "2014 Rules") in exercise of powers under Article 229(2) of the Constitution of India. The 2014 rules prescribed mode of appointment and qualification etc. for the post of Assistant Programmer as under:

Sr. No.	**Nomenclature of the post**	**Pay scale and Grade pay**	**Mode of Appointment**	**Age for direct appointment**	**Qualification**
1.	2.	3.	4.	5.	6.
	Assistant Programmer	Rs.10300-34800+3800/- Grade pay	By direct recruitment from the eligible persons as per column Nos. 5 and 6.	22 to 45 years to be seen on the last date of receipt of applications.	a). B.E/B.Tech in Computers or I.T. or equivalent technical qualification at least in second division. **Or** b). B.Sc/B.A/B.Com in First Division with post Graduate Diploma in Computer application/I. T with two (2) years experience as System Assistant or Asstt. Programmer on higher or equivalent post. **Or**

					c). (xxxx) or d). Matriculation with 3 years Diploma in Computers from any recognized Polytechnic College or equivalent technical qualification from the recognized Institution/Board/University with four (4) years experience as at (b) above.

6. Some of the System Officers, working on rolls of New Horizons India Limited, approached this Court by way of CWP Nos. 745 and 1026 of 2015, with a prayer to grant them regularization of their services or in alternative to grant them preferential right of consideration for the post of Assistant Programmer by making suitable amendment in the recruitment Rules. High Court contested these petitions and the petitions came to be dismissed by a Co-ordinate Bench of this Court *vide* common judgment dated 06.05.2016. While dismissing the petitions, it was held as under:-

> *"27. The appointment of the petitioners was not made by the High Court or any of the Subordinate Court(s) and that apart, their conditions of appointment clearly envisaged cessation of employment at the end of fixed tenure. On the contrary, the appointment of the petitioners was made either by the Society or the Institute or M/s New Horizons India Ltd. and the High Court has simply decided to extend the services of the out sourced technical manpower till 31.3.2015.*
>
> *28. Moreover, it was in terms of the comprehensive guidelines framed on 6.6.2014 that the petitioners themselves gave undertakings to abide by the guidelines wherein in para 7 it was*

clearly stipulated that the selection was purely on contractual in nature and would not confer any right or permanent absorption.

Thus, there was no occasion whereby the petitioners could legitimately have expected that their services would be taken over or regularized or relaxation of any kind would be extended to them at the time when the posts would be filled up on regular basis by the High Court.

Right of regularisation:

29. Adverting to the second submission regarding right of regularisation of the services of the petitioners, as noticed earlier that the appointment of the petitioners has not been made by the Subordinate or the High Court, but has been made by the Society or the Institute or M/s New Horizons India Ltd. Apart from the above, it would also be noticed that the appointments of the petitioners were contrary to the provisions of Articles 14 and 16 of the Constitution. No doubt, the petitioners were appointed pursuant to advertisements issued in the newspaper but that in itself cannot be a sufficient compliance of Articles 14 and 16 of the Constitution of India.

31. It would be evident from the aforesaid advertisement that it was the Society and the Institute and not the Courts which had issued the advertisements and therefore the appointments that were to be made on contract basis were to be made by and for the authorities issuing advertisements themselves and not by or for the Court. It was only the staff appointed on contract basis by these authorities that in turn was to be deployed in the Court.

32. Further, the terms and conditions as stipulated in the advertisement whereby appointments that too on contract basis for being deployed in various Courts obviously dissociated the best talent from coming forward and applying for the post in question because the posts never pertained to the Courts but were for and on behalf of the Society or the Institute. In such circumstances, the mere continuance in service or extending the period of appointment of the petitioners, that too, by the service provider cannot in itself

confer any right upon them for regularisation or else this would amount to perpetuating an illegality.

7. The above noted judgment though attained finality, yet High Court carried 2nd amendment to the 2014 Rules on 1.10.2016. The mode and qualifications etc. for the post of Assistant Programmer, after amendment, read as under:

Sr. No.	**Nomenclature of the post**	**Pay scale and Grade pay**	**Mode of Appointment**	**Age for direct appointment**	**Qualification**
1.	2.	3.	4.	5.	6.
	Assistant Programmer	Rs.10300-34800+3800/- Grade pay	(a) By selection on the basis of limited competitive examination from amongst the System Officers working under the e-Courts Project and continued thereafter in High Court of H.P/Courts subordinate to the High Court of H.P. having minimum	22 to 45 years to be seen on the last date of receipt of applications.	a). B.E/B.Tech in Computers or I.T. or equivalent technical qualification at least in second division. **Or** b). B.Sc/B.A/B.Com in First Division with post Graduate Diploma in Computer application/I. T with two (2) years experience as System Assistant or Asstt. Programmer on higher or equivalent post. **Or** c). (xxxx) or d). Matriculation with 3 years Diploma in Computers from any recognized Polytechnic College or equivalent technical qualification from the recognized Institution/Board/Univ

			3 years experience as System Officers. (b) Failing which by direct recruitment from the eligible persons as per column Nos. 5 and 6.		ersity with four (4) years experience as at (b) above.

8. Perusal of amended Rules reveal that the first right of selection, for the post of Assistant Programmer, was provided to the persons having minimum three years experience as System Officers under the e-Courts project of the High Court. It was only in the event of failure to select a candidate for the post of Assistant Programmer through this process that the mode of direct recruitment from the eligible persons was to be adopted.

9. Based on 2nd amendment to 2014 Rules, High Court, invited applications for the post of Assistant Programmer *vide* circular Circular No. HHC/Estt.7(50)/2014-2978-81, dated 23.01.2019

PETITIONER'S GRIEVANCE

10. The grievance of the petitioner is that the 2nd amendment dated 1.10.2016 to the 2014 Rules is violative of Articles 14 and 16 of the Constitution of India and thus, based on such amendment, the selection process for the post of Assistant Programmer undertaken by the High Court in pursuance to Circular No. HHC/Estt.7(50)/2014-2978-81, dated 23.01.2019, denying her equal opportunity of participation, is wrong and illegal.

11. Petitioner has laid challenge to the aforesaid amendment and consequent recruitment process by alleging the same to be in violation of the

fundamental rights provided to her under Article 14 and 16 of the Constitution of India. According to the petitioner, the System Officers working under the e-courts project having three years' experience, as such, cannot form a special class. There is no justifiable object or rationale behind such classification. Persons with similar or higher qualifications and equipped with better experience have been ignored. There is no nexus between the formation of such classification and object sought to be achieved, therefore, the classification so made is unreasonable.

RESPONDENT'S RESPONSE

12. In response, High Court has contested the stand of the petitioner on the ground that the challenge laid by the petitioner to the 2nd amendment to 2014 Rules is highly belated. It has been submitted that the selection process was initiated strictly in accordance with the amended Rules. Details with respect to the procedure adopted for undertaking the selection process have been averred. What is missing in the reply of High Court is the explanation of the reasons for the classification so made by way of 2nd amendment to 2014 Rules. The silence of High Court is conspicuous on this aspect of the matter which goes to the root of issues involved in the present *lis*.

13. Respondent No.2 in its reply has simply stated that it has nothing substantive to state as the matter concerned High Court. Respondents No. 3 to 6 did not chose to contest the petition and have been proceeded against *ex-parte*.

ANALYSIS

14. Article 16 of the Constitution of India guarantees the fundamental right in favour of the citizens of India to have equality of opportunity in matters relating to employment or appointment to any office under the State. There is no scope to deviate save and except the inherent prescriptions of the provision itself. Additionally, any classification formed within the citizens of India for the purposes of any employment or appointment to any office under the State, the

same has to qualify the test of reasonableness and the classification so made must have a nexus with the object sought to be achieved.

15. In ***State of Jammu and Kashmir*** vs. ***Triloki Nath Khosa 1974 (1) SCC 19***, Constitutional Bench of the Supreme Court held as under:-

> *"29. his argument, as presented, is attractive but it assumes in the court a right of scrutiny somewhat wider than is generally recognized.* Article 16 *of the Constitution which ensures to all citizens equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in* article 14. *The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.*
>
> *31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."*

16. The amendment in the Rules, carried by High Court, vide 2nd amendment dated 01.10.2016 cannot stand the scrutiny of law as it violates Articles 14 and 16 of the Constitution of India. The classification so made *vide* amendment *supra* cannot be said to be reasonable and also cannot be said to

have been made to achieve any legally sustainable objective. No reason much less any plausible reason has come forth to justify such act. Not even a single word has been uttered on behalf of the High Court justifying any reason which might have weighed with it for creating a special class. Even otherwise also we have not been able to perceive any single reason for making such classification. To consider that the system officers working under e-courts had gained special experience will only be a fallacy, because firstly, there is nothing on record to suggest such hypothesis and secondly it cannot be assumed that except for these persons others would have lacked in such experience.

17. Once the persons working under a specific project were held to have no right of preferential treatment in the appointment to the post of Assistant Programmer, It was highly unreasonable and arbitrary on the part of the High Court to have recognized such preferential right in their favour by carrying impugned amendment to 2014 Rules. The claims of the System Officers working with the High Court under e-courts project, as noted above, for regularization and for preferential right of consideration for the post of Assistant Programmer were already rejected by a judicial pronouncement of this Court. Respondents No. 3 to 6 herein were also the petitioners in the above noted writ petitions decided by this Court. Still, the High Court volunteered to amend the 2014 Rules which has the effect of undoing the effect of the judicial pronouncement on the issue.

18. The scope to undo effect of judicial pronouncement by legislative action has been discussed by Hon'ble Apex Court as under in ***Indian Aluminium Co. and Others*** Vs ***State of Kerala and others (1996) 7 SCC 637***:-

> *"36. The validity of the validating Act is to be judged by the following tests: [i] whether the legislation enacting the validating Act has competence over the subject matter; [ii] whether by validation, the legislature has removed the-defect which the court had found in the previous law [iii] whether the validating law is inconsistent with*

the provisions of Chapter III of the Constitution. If tests are satisfied, the Act can confer jurisdiction upon the Court with retrospective effect and validate the past transactions which were declared to be unconstitutional. The legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a Court without properly removing the base on which the judgment is founded."

19. Hon'ble Supreme has reiterated the same view in ***Union of India and others*** Vs. ***Exide Industries Ltd and another, (2020) 5 SCC 274***:-

37. It is no doubt true that the legislature cannot sit over a judgment of this Court or so to speak overrule it. There cannot be any declaration of invalidating a judgment of the Court without altering the legal basis of the judgment as a judgment is delivered with strict regard to the enactment as applicable at the relevant time. However, once the enactment itself stands corrected, the basic cause of adjudication stands altered and necessary effect follows the same. A legislative body is not supposed to be in possession of a heavenly wisdom so as to contemplate all possible exigencies of their enactment. As and when the legislature decides to solve a problem, it has multiple solutions on the table. At this stage, the Parliament exercises its legislative wisdom to shortlist the most desirable solution and enacts a law to that effect. It is in the nature of a 'trial and error' exercise and we must note that a lawmaking body, particularly in statutes of fiscal nature, is duly empowered to undertake such an exercise as long as the concern of legislative competence does not come into doubt. Upon the law coming into force, it becomes operative in the public domain and opens itself to any review under Part III as and when it is found to be plagued with infirmities. Upon being invalidated by the Court, the legislature is free to diagnose such law and alter the invalid elements thereof. In doing so, the legislature is not declaring the opinion of the Court to be invalid."

20. Thus, It is well settled that the declaration made by a judgment of Constitutional Court can be undone by a legislative or executive action only in permissive circumstances. In the case in hand, no such special circumstances have been carved out and, therefore, the act of the High Court in amending the Rules in the manner as detailed above cannot be countenanced.

21. The objection of respondent No.1 to the effect that challenge laid by the petitioner to the amendment carried in 2016 and also to the recruitment process initiated in January, 2019 is highly belated and thus suffers from the *vice* of delay and laches, deserves to be rejected. It is clearly borne from the record, rather it is admitted by the High Court that there was no need to advertise the posts of Assistant Programmer as the preferential right of selection, as per amended Rules, was to the System Officers working with the High Court. It was not published even on the website of the High Court. In absence of such publication, it cannot be understood as to how the petitioner could have gained the knowledge of the recruitment process initiated in January, 2019 and also of the amended Rules on the basis of which such process was undertaken. There is nothing on record to discredit the version of the petitioner that it was only in the month of March, 2020 that the petitioner noticed result of written examination published by High Court on its website in pursuance to the selection process undertaken on the basis of Circular No. HHC/Estt.7(50)/2014-2978-81, dated 23.01.2019. That being so, we have no hesitation to hold that the petitioner acquired the cause of action to challenge the impugned amendment to the Rules as well as recruitment process only when it came to her knowledge.

22. It is also well settled that absence of proper publicity to the proposed recruitments to public posts itself amounts to violation of equal opportunity in public employment. Reference can be made to judgment passed in ***Union***

Public Service Commissionvs***Girish Jayanti Lal Vaghela (2006) 2 SCC 482,***wherein it has been held as under**:-**

> *"10. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment" or "appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the Inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution. (See B. S. Minhas vs. Indian Statistical Institute and others AIR 1984 SC 363).***"***

23. Similarly, in ***State of Bihar***vs***Upendara Narain Singh and others (2009) 5 SCC 65,*** Hon'ble Supreme Court has held as under**:-**

> *"13. The equality clause enshrined in Article 16 mandates that every appointment to public posts or office should be made by open*

advertisement so as to enable all eligible persons to compete for selection on merit Umesh Kumar Nagpal v. State of Haryana and Ors. ; Union Public Service Commission v. Girish Jayanti Lal Vaghela ; State of Manipur and Ors. v. Y. Token Singh and Ors. and Commissioner, Municipal Corporation, Hyderabad and Ors. v. P. Mary Manoranjani and Anr. . Although, the Courts have carved out some exceptions to this rule, for example, compassionate appointment of the dependent of deceased employees, for the purpose of this case it is not necessary to elaborate that aspect."

CONCLUSION

24. In the light of the above discussion, the petition is allowed. 2nd amendment dated 01.10.2016 carried to the High Court of Himachal Pradesh Members of Technical Manpower (Computers) (Appointment, Conditions of Service and Conduct) Rules, 2014 prescribing preferential mode of appointment for the System Officers working under the e-Courts project for the post of Assistant Programmer is quashed and set aside. Consequently, the recruitment process for the post of Assistant Programmer initiated by the High Court of Himachal Pradesh vide Circular No. HHC/Estt.7(50)/2014-2978-81, dated 23.01.2019 is also quashed and set aside.

25. The writ petition is accordingly disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Between:-

1. STATE OF HIMACHAL PRADESH
   THROUGH ITS SECRETARY (EDUCATION)
   TO THE GOVT. OF HIMACHAL PRADESH.

2. DIRECTOR OF HIGHER EDUCATION,
   HIMACHAL PRADESH, SHIMLA 01.

……PETITIONERS

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, SH. VINOD THAKUR, SH. HEMANSHU MISRA, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALS AND SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL)

AND

6. PUSHPA THAKUR
D/O SH. KUNDAN SINGH THAKUR
VILLAGE TALOTI PO KHATNOL
VIS MASHOBRA DISTT SHIMLA H.P.

7. INDER SINGH,
S/o SH. TILAK RAM VERMA,
VILLAGE NEEN P.O. DURGAPUR,
TEHSIL SUNNI DISTRICT SHIMLA
H.P.

3. PRIYAVRAT SHARMA,
S/o SH. TOTA RAM SHARMA,
VILLAGE CHAIVEN, P.O.
MASHOBRA, TEHSIL & DISTT. SHIMLA
H.P.

4. TILAK RAJ VERMA,
S/o SH. GIRDHARI LAL,
R/o VILLAGE NEEN
P.O. DURGAPUR, TEHSIL SUNNI,
SHIMLA, HP.

5. RITU RAJ,
S/o SH. KHUB RAM,
VILLAGE NEEN, PO DURGAPUR,

TEHSIL SUNNI, DISTRICT SHIMLA
H.P.

.....RESPONDENTS

(BY SH. SHRAWAN DOGRA, SR. ADVOCATE, WITH SH. DEEPAK SHARMA, ADVOCATE)

CIVIL WRIT PETITION No. 1008 OF 2019
RESERVED ON : 18.08.2021
DECIDED ON: 24.08.2021

Constitution of India, 1950 – Articles 14 & 226 - The petition for quashing and setting aside order/ Judgment dated 10.1.2018 in TA No. 6172/2019 by the HP Administrative Tribunal - Held – When the rights of respondents have been held to be at par with rights of the staff of Indira Gandhi High School, Sehrol and Public High School - they could not be discriminated at the whims and fences of the authorities The objections raised by petitioner appear to be fallacious being not substantiated - There was specific declaration by Ld Single Judge of Hon'ble High Court that respondents were similarly situated to employees of Indira Gandhi High School and Public High School. The petition being without merit, dismissed.

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

ORDER

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

> "*It is, therefore, respectfully prayed that keeping in view the facts and submissions made in the present writ petition may kindly be allowed, quashing and setting aside the impugned order/judgment dated 10.01.2018 in TA No.6172/2015 by the Himachal Pradesh Administrative Tribunal (Annexure P-1). Any other relief deemed fit may also be allowed in favour of the petitioners in the interest of justice and fair play.*

BRIEF FACTS OF THE CASE

2. Respondents herein were employees of Janta High School, Neen P.O. Durgapur, District Shimla (for short, Janta High School). Respondents No.1 to 3 were teachers, respondent No.4 was clerk and respondent No.5 was Peon in Janta High School which was a Government Aided School getting 95% Grant-in-Aid.

3. Petitioners herein, on 23.11.2005, decided to take over a number of Government Aided Schools with all their assets and services of the staff. In pursuance to such decision of petitioners, some schools alongwith staff were taken over. One of such school was Indira Gandhi High School Sehrol in District Solan, Himachal Pradesh. Its assets and services of teaching/non teaching staff were taken over vide Notification dated 06.08.2007. Another similar school was Public High School Manoh Sihal, District Kangra which was taken over alongwith staff w.e.f. 27.10.2008.

4. Though, the petitioners had been corresponding with Janta High School regarding its takeover but finally instead of taking over the said school, petitioners decided to upgrade Government Middle School, Neen to Government High School.

5. It is worth noticing here that Janta High School was being run by a society registered under Societies Registration Act (for short Society). Initially the society started running primary school at Village Neen in the year 1975-76. Government of Himachal Pradesh had taken over said primary school in the year 1979. The society started private middle school for classes 6th to 8th in the same campus in the year 1979, which was also taken over by Government of Himachal Pradesh in the year 1982. The society consequently started Janta High School for classes 9th and 10th in the same campus w.e.f. 03.07.1982. Every time new infrastructure for opening new classes, as a result

of Government's decision to take over its previous assets was created by the society.

6. Respondents herein made several representations to the petitioners seeking indulgence towards their grievance as they were seeking parity with similarly situated persons, whose services had been taken over by the petitioners. Having failed to get their grievance redressed from petitioners, respondents approached erstwhile Himachal Pradesh Administrative Tribunal by way of Original Application No.507 of 2008. Learned Tribunal decided the said original application on 14.03.2008 and directed the petitioners to decide the representation of respondents herein. The matter was considered by Himachal Pradesh Cabinet on 09.12.2008 and was rejected. The rejection was communicated to respondents vide communication dated 20.12.2008.

7. Aggrieved against rejection of their claims, respondents approached this Court by way of **Civil Writ Petition No.150 of 2009,** which came to be allowed by learned Single Judge of this Court in following terms:-

> ***"Accordingly, in view of the observations made hereinabove, the writ petition is allowed and Annexure P-18 dated 20.12.2008 is quashed and set aside. The respondents are directed to consider the case of the petitioners on the analogy of Public High School, Manoh Sihal, District Kangra and Indira Gandhi High School, Sehrol, District Solan within a period of six weeks from today".***

8. It is apt to refer at this stage to the discussion made by learned Single Judge on the basis of material before his Lordship in **CWP No.150 of 2009** which is as under:-

> ***"There is no explanation why the petitioners have been discriminated against. Petitioner No.6 school and the teachers are similarly situated vis-à-vis the teachers/staff who were working in Public High School, Manoh Sihal, District Kangra and the Indira Gandhi High School, Sehrol. The State Government has treated equals as unequals. It is***

true that to take over the school or the services of the teachers/staff is a policy matter. However, it is equally true that the policy decision should apply to all the similarly situated persons/institutions universally. There cannot be any pick and choose while implementing the policy. The case of the petitioners is to be treated at par with schools/teachers who were serving in Public High School, Manoh Sihal, District Kangra and Indira Gandhi High School, Sehrol. In fact the Department of Education has reco
mmended the case of the petitioners on the analogy of Public High School, Manoh Sihal, District Kangra but the decision has gone against the petitioners. The petitioners have been given assurances from time to time by the Education Department that needful will be done and the school will be taken over. However, despite the prolonged correspondence what has happened is that the Government Middle School, Neen has been upgraded to High School, Neen. The State Government as per Annexure P-8 has decided to take over the schools, which were functioning parallel to the Government institutions. As many as 13 institutions were taken over.

9. From the above noted material, there is no doubt that the learned Single Judge of this Court while allowing **CWP No.150 of 2009** vide judgment dated 08.01.2010 had specifically declared the right of respondents herein to be treated at par with teachers who were serving in Public High School Manoh Sihal, District Kangra and Indira Gandhi High School, Sehrol District Solan H.P. It was specifically held in the said judgment that Janta High School and its teachers were similarly situated vis-à-vis the teachers/staff who were working in Public High School Manoh Sihal, Distrct Kangra and Indira Gandhi High School, Sehrol. It was also held in unambiguous terms that the State Government had treated equals and

unequals and there was no explanation why the petitioners therein had been discriminated against.

10. Petitioners, after the judgment in **CWP No.150 of 2009,** vide Notification dated 28.09.2010, took over services of respondents w.e.f. 28.09.2010 on contract basis. Though, the respondents accepted the employment offered to them, yet they kept agitating their claim of not having meted with the same treatment as allowed to similarly situated persons i.e. the Staff of Indira Gandhi High School, Sehrol, District Solan And Public High School, Manoh Sihal, District Kangra.

11. Again having not received positive result from petitioners, the respondents again approached this Court by way of Civil Writ Petition, which was converted as TA No.6172 of 2015 before the Himachal Pradesh State Administrative Tribunal. Vide order dated 10.01.2018, the learned Tribunal decided the **TA No.6172 of 2015** in following terms:-

> ***3. "It is not in dispute that the service of the applicants were taken over in sequel to the directions of the Hon'ble High Court of H.P. in CWP No.150 of 2009, titled Pushpa Thakur and others Versus State of H.P. and another, decided on 08.01.2010, Annexure P-1. The final order of the judgment reads as under:-***
>
> ***According in view of the observations made hereinabove, the writ petition is allowed and Annexure P-18 dated 20.12.2008 is quashed and set aside. The respondents are directed to consider the case of the petitioners on the analogy of Public High School, Manoh Sihal, District Kangra and Indira Gandhi High School, Shehrol, District Solan within a period of six weeks from today.***
>
> ***4. The respondents were directed to consider the case of the applicants on the analogy of Indira Gandhi High School, Sehrol, District Solan and Public High School,***

Manoh Sihal, District Kangra. However, the respondents had taken over the services of the applicants on contract basis, vide notification dated 28.10.2010, Annexure P-5, whereas the services of the staff of Indira Gandhi High School, Sehrol, District Solan were taken over on regular basis vide notification dated 06.08.2007, Annexure P-3.

5. Consequently, the transferred application is allowed and the respondents are directed to consider the case of the applicants on the analogy of decision dated 08.01.2010 rendered in CWP No.150 of 2009 by giving similar treatment to the applicants herein as given to the staff of Sehrol School (supra), within three months from the date of production of certified copy of this order".

12. It is the order dated 10.01.2018 passed by learned Tribunal in **TA No.6172 of 2015** i.e under challenge in the instant petition.

13. We have heard learned Additional Advocate General for petitioners and Senior Advocate Sh. Shrawan Dogra with Sh. Deepak Sharma, Advocate for respondents.

14. The case set up by petitioners in the present petition is that the respondents cannot be said to be similarly situated to the teachers of Indira Gandhi High School, Sehrol, District Solan and Public High School, Manoh Sihal, District Kangra. The reason assigned by petitioners are that firstly the respondents were given appointments on the basis of policy applicable during the relevant period which was different then the policy applicable at the time when others were given appointments and secondly as per grant-in-aid Rules, in order to be eligible for grant-in-aid, a school was required to have a minimum strength of students and since Janta High School did not enroll students after 2007, it was not entitled for grant-in-aid.

15. Both the grounds raised by petitioners on their face appears to be fallacious. The contention that respondents were given employment on the

basis of prevalent policy does not hold good for the reasons that the petitioners have not substantiated its stand with any tangible evidence. On the other hand the respondents alongwith their reply have placed on record document Annexure R-1/4 which is the information provided by the office of petitioner No.2 under Right to Information Act to respondent No.1. As per this information, there was no specific guidelines or instructions adopted by petitioners prior to 2011 for taking over of 95% aided schools. That being so, it does not lie in the mouth of petitioners to raise such an absurd argument. Even otherwise, the petitioners had no option but to implement the judgment passed by this Court in **CWP No.150 of 2009** without taking any exception to it since the same had attained finality and the petitioners had not chosen to challenge it. As noted above, there was specific declaration by learned Single Judge of this Court and the respondents were held to be similarly situated to those who were employees of Indira Gandhi High School, Sehrol, District Solan and Public High School, Manoh Sihal, District Kangra.

16. As regards the other ground, we have no hesitation to hold that the same is also without any substance. Once the petitioners had upgraded the Government Middle School, Neen to High School in the same campus, for obvious reasons Janta High School could not have fetched students. In any case, when the rights of respondents have been held to be at par with rights of the staff of Indira Gandhi High School, Sehrol, District Solan and Public High School, Manoh Sihal, District Kangra, they could not be discriminated at the whims and fences of the authorities. The respondents cannot be faulted for the delay in taking over of their services by the petitioners. It is evident from the material on record that the respondents had been continuously agitating in respect of their claims before authorities but the authorities instead of doing justice, kept on forcing the respondents to approach the Courts repeatedly. The conduct of petitioners belies their claim to be the model employer.

17. The agonies of respondents are still unabated only due to the non-serious and casual approach of the petitioners. Despite a clear mandate in favour of respondents by virtue of judgment passed in **CWP No.150 of 2009**, they are being made to run from pillar to post to get their genuine claims settled. We feel it appropriate to observe that the preposterous conduct of petitioner is evident from perusal of order dated 29.11.2019 recorded by this Court in instant petition. On instructions, it was stated on behalf of the petitioners that the claim of respondents herein was not identical to that of the writ petitioners in **CWP No.150 of 2009**. Without realizing, that the respondents herein were the petitioners in **CWP No.150 of 2009**, above noted representation was made on behalf of the petitioners.

18. In light of above discussion, we find no merit in the present petition and the same is accordingly dismissed, so also the pending miscellaneous application(s), if any, with no orders as to cost.

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

Mohan and others ....Petitioners.

Versus

Sh. Man Singh and others ...Respondents.

CMPMO No.: 42 of 2020
Decided on: 02.08.2021

Constitution of India, 1950 – Article 227 read with Order 39 Rule, 1 & 2 C.P.C.- The petition under Article 227 of the Constitution of India, Challenging order passed by Ld. Civil Judge dismissing an application under order 39 rule 1 & 2 CPC affirmed by appellate Court- Suit along with application under order 39 rule 1 & 2 CPC seeking injunction with the plea that suit land is joint land and respondents started raising construction on best portion of land adjoining to road.- Held, it is a matter of record that there

is nothing on record to suggest that construction carried out by others co-sharers was ever objected by the plaintiff – Neither any civil suit nor any other proceedings was initiated to demonstrate that the act of others co-sharers was ever objected by plaintiff. This demonstrates that plaintiff selectively chose the act of respondents of carrying out construction on the joint land for approaching the court for first time- no explanation qua this during arguments. Hence, petitioner / plaintiffs have not been able to demonstrate either prima facie case or balance of convenience is in their favour and they would suffer irreparable loss if injunction is not granted- court does not find any perversity in the adjudication by Courts below -No merit- Petition dismissed.

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

For the respondents : Mr. Surender Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, the petitioners/plaintiffs have challenged the order passed by the Court of learned Civil Judge, Court No. 2, Sundernagar, District Mandi, in CMA No. 165-VI/2020, filed in Civil Suit No. 86-1 of 2020, vide which, an application under Order 39, Rules 1 and 2 of the Civil Procedure Code filed by the present petitioners stood dismissed by the said Court as well as the judgment dated 23.02.2021, passed by the Court of learned Additional District Judge, Sundernagar, District Mandi, in Civil Miscellaneous Appeal No. 38 of 2020, titled as Mohan and others vs. Shri Man Singh and others, vide which, the order passed by learned Trial Court stood affirmed by the learned Appellate Court by dismissing the appeal preferred by the present petitioners against the order of the learned Trial Court.

2. Brief facts necessary for the adjudication of the present petition are that the petitioners herein, have filed a suit for permanent prohibitory

injunction against the respondents with regard to the suit land on the ground that the entire land is joint between the parties and other co-sharers and no co-sharer has a right to construct upon the same. Yet, respondents started raising construction on best portion of the land adjoining to the Gawajal to Kandyah road, which led to filing of the suit as also the application under Order 39, Rules 1 and 2 of the Code of Civil Procedure, wherein a prayer was made that during the pendency of the civil suit, the respondents be injuncted from carrying out any construction over the best portion of the suit land till the same was partitioned.

3. This application has been dismissed by the learned Trial Court vide order dated 17.10.2020 by holding that it was a matter of record that other co-sharers had raised construction upon the suit land which was joint and which construction was never objected to by the plaintiffs. Learned Trial Court also held that the fact that no objection, at any stage, was raised by the plaintiffs at the time when other co-sharers were raising the construction also strengthened the pleadings of the defendants with regard to their family arrangement. Learned Court also held that there was enough suit land available and it was not the case of the plaintiffs that if the respondents are permitted to carry out the construction, then no land would be available to other co-shares. On these bases, learned Trial Court held that the plaintiffs had failed to prove any irreparable loss or injury in the event of denial of the interim relief to them.

4. These findings stand upheld by the learned Appellate Court which observed that there was no *prima facie* case in favour of the plaintiffs as no objection was raised by them when other co-shares carried out the construction of their houses and shops upon the suit land, who according to the defendants, were close relatives of the plaintiffs. Learned Appellate Court also held that learned Trial Court had rightly highlighted the conduct of the applicants/plaintiffs which was sufficient to decline the relief of temporary

injunction. It also held that even otherwise, the remedy available to the plaintiffs was to seek partition of the joint land and not the relief of injunction. On these bases, learned Appellate Court dismissed the appeal filed by the plaintiffs/appellants.

5. I have heard learned Counsel for the parties and also gone through the orders passed by the learned Courts below.

6. Herein both the learned Courts below have returned the findings to the effect that the plaintiffs had not objected to the construction of houses and shops on the joint land by other co-shares, namely, S/Sh. Nand Lal, Pyare Lal and Ashok Kumar.

7. During the course of arguments, learned Counsel for the petitioners could not seriously dispute the findings returned by learned Courts below, except by making a submission that the construction which was raised by other co-shares was without their consent.

8. Be that as it may, it is a matter of record that there is nothing on record to suggest that the construction carried out by other co-sharers was ever objected to by the plaintiffs. Neither any civil suit nor any other proceedings were initiated to demonstrate that the act of other co-shares was ever objected to by the plaintiffs. This demonstrates that the petitioners chose selectively the act of the present respondents of carrying out the construction on the joint land for the purpose of approaching the Court for the first time. No answer worth credence has come forth as to why they did not object to the constructions carried out by other co-shares on the joint land during the course of the arguments. In this view of the matter, this Court is of the view that the petitioners have not been able to demonstrate that either *prima facie* case or balance of convenience is in their favour or in the event of non grant of

interim relief, the petitioners could have stated to have suffered irreparable loss or injury.

9. Further in exercise of powers so conferred upon it under Article 227 of the Constitution of India, this Court is not to act as an appellate Court. If the Courts below take a view, which is possible on the basis of facts and material available before them, then ordinarily, this Court does not interferes with such just orders or decisions. The jurisdiction under Article 227 of the Constitution of India is only to be exercised in the cases where there is perversity in the order(s) impugned.

10. Coming to this case, this Court does not finds any perversity in the adjudications made by both the learned Courts below as the view which has been taken by learned Courts below is one of the possible views, which on the basis of material before them, could have been taken by them. Therefore, as this Court does not finds any merit in the present petition, the same is accordingly dismissed.

11. At this stage, Mr. G.R. Palsra, learned Counsel for the petitioners submits that it may be clarified that the construction, if any, raised by the respondents during the pendency of the suit, shall abide by the adjudication thereof and parties shall not claim any equity. Ordered accordingly.

12. It is clarified that the observations which have been made while disposing of this petition are only for the purpose of adjudication thereof only and learned trial Court shall decide with the civil suit in accordance with law, without being influenced by any of the observations made hereinabove by this Court.

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

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

Between:-

1. THE STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HP, SHIMLA-2, HP.

2. THE DIRECTOR,
HEALTH SERVICES
HP, SHIMLA-9. ....PETITIONERS

(BY SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. GAYATRI DEVI
D/O SH. UMA KANT,
R/O VILL. DHARJAROL,
P.O. JAROL, TEHSIL THUNAG,
DISTRICT MANDI, H.P.

2. ANKITA
D/O SH. KULDEEP CHAND
R/O NEAR DAV COLLEGE,
WARD NO.8
TEHSIL & DISTT. KANGRA, H.P.

3. DIPIKA CHAUHAN
D/O SH. SURESH KUMAR
R/O V.P.O. HANOH,
TEHSIL BHORANJ, DISTT. HAMIRPUR, H.P.

4. POONAM
D/O SH. HEM RAJ,
R/O VPO MAHADEV,
TEHSIL SUNDERNAGAR,
DISTT. MANDI, H.P.

5. RUPALI DOGRA
D/O SH. OMPAL DOGRA,
R/O VPO BEEHAN BIHAN UPARLI,
TEHSIL DEHRA, DISTT. KANGRA, H.P.

6. MEENA KUMARI
D/O SH. RAMESH CHAND,
R/O VILL. MIHARA, P.O. MARHANA,
TEHSIL GHUMARWIN,
DISTRICT BILASPUR, H.P. ..RESPONDENTS

(SH. YOGESH KUMAR CHANDEL, ADVOCATE FOR R-1 TO 5
SH. ANGREZ KAPOOR, ADVOCATE FOR R-7)

CIVIL WRIT PETITION NO. 3466 OF 2019

.1. THE STATE OF H.P. THROUGH ITS PRINCIPAL
SECRETARY (HEALTH) TO THE
GOVERNMENT OF HP, SHIMLA-2, H.P.

2. THE DIRECTOR,
HEALTH SERVICES, H.P. SHIMLA-9

…. PETITIONER

(BY SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

VERSUS

1. MEENAKSHI
D/O SH.VEER SINGH,
R/O VILL. BHERI, P.O. BANDI,
TEHSIL KANGRA, BHERI (320),
DISTRICT KANGRA, H.P.

2. ANJNA KUMAR
D/O SH. KIKAR SINGH,

RESIDENT OF VILL. ALHI,
P.O. NALOH, TEHSIL SIHUNTA,
DISTRICT CHAMBA, H.P.

…RESPONDENTS

.3. H.P. STAFF SELECTION COMMISSION,
.HAMIRPUR, THROUGH ITS SECRETARY.

…PROFORMA RESPONDENT

(SH. NARESH KAUL, ADVOCATE FOR R-1
MR. ANGREZ KAPOOR, ADVOCATE FOR R-3)

CIVIL WRIT PETITION NO. 3467 OF 2019

Between:-

1. THE STATE OF HP THROUGH ITS
PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HP, SHIMLA-2, HP.

2. THE DIRECTOR,
HEALTH SERVICES HP, SHIMLA-9. …….PETITIONERS

(BY SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. MANISHA PAL
W/O SH. JITENDER KUMAR
R/O VILL. & P.O. KAPAHRA,
TEHSIL GHUMARWIN DISTRICT BILASPUR, H.P.

……..RESPONDENTS

2. HP STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

..PROFORMA RESPONDENT

(MR. RAKESH KUMAR DOGRA, ADVOCATE FOR R-1
MR. ANGREZ KAPOOR, ADVOCATE FOR R-2)

CIVIL WRIT PETITION NO. 3468 OF 2019

.1. THE STATE OF H.P. THROUGH
.ITS PRINCIPAL SECRETARY (HEALTH)
.TO THE GOVERNMENT OF HP, SHIMLA-2, H.P.
.
.2 THE DIRECTOR,
.HEALTH SERVICES, H.P.
.SHIMLA-9

…. PETITIONERS

(BY SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. KAVITA SHARMA,
D/O SH. DARSHAN KUMAR,
R/O VILL. THER, P.O. KUKHER,
TEHSIL NURPUR, DISTRICT KANGRA, H.P.

…RESPONDENT

2. H.P. STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

…PROFORMA RESPONDENT

(SH. NARESH KAUL, ADVOCATE FOR R-1
MR. ANGREZ KAPOOR, ADVOCATE FOR R-2)

CIVIL WRIT PETITION NO. 3905 OF 2019

Between:-

1. THE STATE OF H.P. THROUGH
ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF H.P, SHIMLA HP

2. THE DIRECTOR,
HEALTH SERVICES HP, SHIMLA-9.

…..PETITIONERS

(BY MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. HEMA DEVI
D/O SH. AMAR CHAND
W/O SH. ARUN SEN,
R/O VILLAGE & PO GUTKAR,
TEHSIL SADAR, DISTRICT MANDI,
H.P.

2. NISHA DEVI
D/O SH. YOG RAJ,
R/O VILLAGE KARLWHAN,
PO BHARGAON, DISTRICT
MANDI, HP, PIN CODE
175003.

3. TRIPTI THAKUR
D/O SH. PREM SINGH,
R/O VILLAGE & PO DRAHAL,
TEHSIL JOGINDER NAGAR,
DISTRICT MANDI, H.P.

4. REETA DEVI
D/O SH. PRAKASH CHAND,
R/O VILLAGE & PO SAMRAHAN, TEHSIL KOTLI,
DISTRICT MANDI, H.P. PIN CODE
175 003.

5. JAI PREETI SHARMA
D/O SH. SHER CHAND SHARMA,
R/O VILLAGE & PO BALOH, TEHSIL SADAR,
DISTRICT MANDI, HP, PIN CODE 175002

....RESPONDENTS

(SH. SURINDER PRAKASH SHARMA, ADVOCATE FOR 1, 3 & 5 MR. ANGREZ KAPOOR, ADVOCATE FOR R-6)

CIVIL WRIT PETITION NO. 3908 OF 2012

Between :

.1. THE STATE OF H.P.
.THROUGH ITS PRINCIPAL
SECRETARY(HEALTH) TO THE
GOVERNMENT OF HP, SHIMLA-2, H.P.

2. THE DIRECTOR,
HEALTH SERVICES H.P. SHIMLA-9

…PETITIONERS

(BY MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. POONAM
D/O SH. MAN SINGH,
R/O VPO KALAHOD,
TEHSIL SUNDER NAGAR,
DISTRICT MANDI, H.P.

2. BHARTI THAKUR
D/O SH. ROOP LAL DADWAL,
R/O VPO MATOKHAR,
TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.

3. SEEMA KUMARI
D/O SH. JASPAL SINGH,
R/O VPO THANA, P.O. GOPALPUR,
TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.

…RESPONDENTS

.4. H.P. STAFF SELECTION COMMISSION,
.HAMIRPUR, THROUGH ITS SECRETARY.

…PROFORMA RESPONDENT

(SH. YOGESH KUMAR CHANDEL, ADVOCATE FOR R-1 TO R-3
MR. ANGREZ KAPOOR, ADVOCATE FOR R-4)

CIVIL WRIT PETITION No. 3911 of 2019

Between:

1. STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES, H.P. SHIMLA-9.

…..PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. DEEPIKA
D/O SH. SOHAN SINGH
R/O VILLAGE MARI, POST OFFICE, DHURKHARI,
TEHSIL BALDWARA, DISTRICT MANDI, H.P.

2. SHASHI KUMARI
D/O SH. PRATAP SINGH,
R/O VILLAGE LUHARD POST OFFICE, BHARGAON,
TEHSIL KOTLI, DISTRICT MANDI, H.P.

3. VARSHA KUMARI
D/O SH. INDER SINGH,
R/O VILLAGE BHOUR, POST OFFICE, KANAID,
TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.

….RESPONDENTS.

4. H.P. STAFF SELECTION COMMISSION, HAMIRPUR,
THROUGH ITS SECRETARY.

..PROFORMA RESPONDENT.

(SH. DEVENDER K. SHARMA, ADVOCATE FOR R-1 TO 3.
SH. ANGREZ KAPOOR, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION NO. 3913 OF 2019

Between:

1. THE STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES, H.P. SHIMLA-9.

…..PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. VARSHA BHANDARI
D/O SH. BELI RAM,
R/O VILL. BHALTHER,
P.O. PANARSA, TEHSIL AND DISTRICT MANDI, H.P.

2. RAKSHA DEVI
D/O SH. PARMA NAND, R/O TYPE-2
QTR. NO. 201, BSNL COLONY ROPA,
P.O. BHOJPUR, TEHSIL SUNDER NAGAR,
DISTRICT MANDI, H.P.

3. NIRMLA KUMARI
W/O SH. ANOOP,
R/O H. NO. 20/8 VILL. ROPA,

P.O. BHOJPUR, TEHSIL SUNDER NAGAR,
DISTRICT MANDI, H.P.

4. GUMATI DEVI
W/O SH. THAKUR DASS,
R/O VPO BLAT, TEHSIL BALH,
DISTRICT MANDI, H.P.

5. SEEMA DEVI
W/O SH. PRAVEEN,
R/O VILLAGE SILIKHAD, P.O. KUFRI,
TEHSIL PADHAR, DISTRICT MANDI, H.P.

6. PUJA DEVI
D/O SH. NAND LAL SAINI,
R/O HOUSE NO. 366/5, SAIN MUHALLA,
P.O. MANDI, TEHSIL SADAR, DISTRICT MANDI, H.P.

7. VANDANA
D/O SH. HARI OM, R/O WARD NO.7,
HOUSE NO. 38, VPO MEHATPUR,
TEHSIL AND DISTRICT UNA, H.P.

8. SHANTA KUMARI
W/O SH. RAHUL PATIAL,
R/O VPO NABAHI, (GORI GHULANU),
TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.

9. RENU CHANDEL
W/O SH. SURENDER KUMAR,
R/O VILL. BHATER, P.O. TARKWARI,
TEHSIL AND DISTRICT HAMIRPUR, H.P.

10. NISHA KUMARI
D/O SH. RANJEET SINGH,
R/O VPO DHIRWIN, PAINJWIN,
TEHSIL AND DISTRICT HAMIRPUR, H.P.

11. DEEPIKA
D/O SH. JAGDISH CHAND,
R/O VILLAGE BHOL KHAS, P.O. LARTH,
TEHSIL JAWALI, DISTRICT KANGRA, H.P.

12. CHANDNI KUMARI
D/O SH. SRI KANTH,
R/O VPO BALDHAR,
TEHSIL NAGROTA BAGWAN,
DISTRICT KANGRA, H.P.

13. JYOTI
D/O SH. SHANKAR DASS,
R/O VILLAGE PATTA, P.O. UPPERLI BAHLI,
TEHSIL SUNDER NAGAR, DISTRICT MANDI, H.P.

14. SUNITA DEVI
W/O SH. TARA CHAND,
R/O VPO BATH, TEHSIL BALH,
DISTRICT MANDI, H.P.

15. BIMLA DEVI
D/O SH. RAM NATH,
R/O VPO GOHAR, TEHSIL CHACHYOT,
DISTRICT MANDI, H.P.

16. ANJALI THAKUR
D/O SH. PARKASH THAKUR,
R/O VPO PANDOH, TEHSIL SADAR,
DISTRICT MANDI, H.P.

17. HIMANSHU
D/O SH. HEM CHAND,
R/O VILLAGE NASLOH, P.O. REHARDHAR,
TEHSIL SADAR, DISTRICT MANDI, H.P.

18. LATA DEVI
W/O SH. BHUMESH CHAND,
R/O VILLAGE MAGLANA, P.O.KUFRI,
TEHSIL PADHAR, DISTRICT MANDI, H.P.

…RESPONDENTS.

19. H.P.STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

..PROFORMA RESPONDENT.

(SH. YOGESH KUMAR CHANDEL, ADVOCATE FOR R 1 TO 18.
SH. ANGREZ KAPOOR, ADVOCATE FOR R-19.)

CIVIL WRIT PETITION. 3914 OF 2019

Between:

1. THE STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES, H.P.
SHIMLA-9.

…..PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. PRATIBHA THAKUR
D/O SH. BHAG CHAND THAKUR,
R/O WARD NO. 3, VILLAGE KAPRI,
P.O. DHARA, TEHSIL BHUNTER,
DISTRICT KULLU, H.P.

2. BHANU PRIYA
D/O SH. TARA CHAND
AND WIFE OF SH. PYARE LAL,
R/O VILLAGE RATOCHA, P.O. DHARA,
TEHSIL BHUNTER, DISTRICT KULLU, H.P.

....RESPONDENTS.

3. H.P.STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

...PROFORMA RESPONDENT.

(SH. SURENDER PRAKASH SHARMA, ADVOCATE FOR R 1 & 2.
SH. ANGREZ KAPOOR, ADVOCATE, FOR R-3.)

CIVIL WRIT PETITION NO. 3915 OF 2019

Between:

1. THE STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES, H.P. SHIMLA-9.

.....PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. RENU BALA
D/O SH. HANS RAJ,
R/O VILLAGE GHAMEERPUR,
P.O. NANDPUR, TEHSIL DEHRA,
DISTRICT KANGRA, H.P.

2. KIRNA DEVI
D/O SH. HARI RAM,
R/O VILL. BHON KATLI,
P.O. KALAHOD, TEHSIL SUNDER NAGAR,
DISTT. MANDI, H.P.

3. VEENA KUMARI
D/O SH. BHAGAT RAM,
R/O VPO MAHADEV, TEHSIL SUNDER NAGAR,
DISTRICT MANDI, H.P.

4. PRIYANKA KUMARI
D/O SH. MILKHI RAM,
R/O VILLAGE PUNDER, P.O. DAIN,
TEHSIL AND DISTRICT HAMIRPUR.

....RESPONDENTS.

5. H.P. STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

...PROFORMA RESPONDENT.

(SH. YOGESH KUMAR CHANDEL, ADVOCATE FOR R 1 TO 4.
SH. ANGREZ KAPOOR, ADVOCATE, FOR R-5.)

CIVIL WRIT PETITION NO. 3921 OF 2019

Between:

1. THE STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES, H.P.
SHIMLA-9.

.....PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. AMRITANJALI
   D/O SH. CHAMAN LAL SHARMA,
   R/O WARD NO.2, P.O. JOGINDER NAGAR,
   TEHSIL J. NAGAR, DISTT. MANDI, H.P.

2. SANTOSH KUMARI
   D/O SH. PURAN CHAND,
   R/O ADDRESS VILLAGE LAHAR BANSDEHRA,
   P.O. DUGHA, TEHSIL AND DISTT. HAMIRPUR, H.P.

3. KAMNA DEVI
   D/O SH. SWAROOP CHAND,
   R/O VILLAGE SAINTHAL, P.O. SAINTHAL,
   TEHSIL AND DISTT. MANDI, H.P.

4. MEENA DEVI
   D/O SH. PARAS RAM,
   R/O VILLAGE KUTNASS, P.O. KATWACHI,
   TEHSIL NIHRI, DISTT. MANDI, H.P.

5. TANUJA
   D/O SH. VIRENDER SINGH,
   R/O VILLAGE GARADE, P.O. AND
   TEHSIL NICHAR, DISTT. KINNAUR, H.P.

6. NISHA KUMARI
   D/O SH. CHET RAM,
   R/O VILLAGE SADEHARA, P.O. SIDHYANI,
   TEHSIL BALH, DISTT. MANDI, H.P.

7. GEETA DEVI
   W/O SH. GOPAL,

R/O VILLAGE SAMKAL, P.O. UPPER BEHLI,
TEHSIL SUNDERNAGAR, DISTT. MANDI, H.P.

8. RUPA,
D/O SH. SUNDER LAL
R/O VILLAGE DOUNDHI, P.O. NAGCHALA,
TEHSIL BALH, DISTT. MANDI, H.P.

9. PREETIKA
D/O SH. RAMESH KUMAR,
R/O VPO SLAPPER COLONY, TEHSIL SUNDER NAGAR,
DISTT. MANDI, H.P.

....RESPONDENTS

10. H.P. STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

...PROFORMA RESPONDENT

(SH. YOGESH KUMAR CHANDEL, ADVOCATE, FOR R-1,2, 4 TO 7,
SH. PAWAN K. SHARMA, ADVOCATE, FOR R-9 AND
SH. ANGREZ KAPOOR, ADVOCATE, FOR R-10)

CIVIL WRIT PETITION NO. 3922 OF 2019

Between:

1. THE STATE OF H.P.
THROUGH ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES, H.P.
SHIMLA-9.

.....PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

SHALINI THAKUR
D/O SH. SANOKH SINGH THAKUR,
R/O VILLAGE POLI, P.O. THURAN,
TEHSIL JHANDUTTA,
DISTRICT BILASPUR, H.P.

….RESPONDENT.

H.P.STAFF SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS SECRETARY.

…PROFORMA RESPONDENT.

(SH. RAKESH KUMAR DOGRA, ADVOCATE FOR R-1,
SH. ANGREZ KAPOOR, ADVOCATE, FOR R-2)

CIVIL WRIT PETITION NO. 3927 OF 2012

Between:

.1. THE STATE OF H.P. THROUGH ITS PRINCIPAL SECRETARY(HEALTH) TO THE GOVERNMENT OF HP, SHIMLA-2, H.P.

2. THE DIRECTOR,
HEALTH SERVICES H.P.
SHIMLA-9

…PETITIONERS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. SAPNA KUMARI

D/O SH. ROSHAN LAL,
R/O VILL. PANJAIL KALLAN, TEHSIL
SADAR PANJEL KALAN (2)),
DISTRICT BILASPUR, H.P.

2. NITIKA SHARMA
D/O SH. SHYAM LAL
R/O VILLAGE BALWAR, P.O. JUKHALA
TEHSIL SADAR, DISTT. BILASPUR, H.P.

3. SMRITI DEVI
D/O SH. SATYA PAL,
R/O VPO SAYAR DOBHA, TEHSIL SADAR
DISTRICT BILASPUR, H.P.

…RESPONDENTS

.4. H.P. STAFF SELECTION COMMISSION,
.HAMIRPUR, THROUGH ITS SECRETARY.

…PROFORMA RESPONDENT

(SH. SURENDER VERMA, ADVOCATE FOR R-1 TO R-3
MR. ANGREZ KAPOOR, ADVOCATE FOR R-4)

CIVIL WRIT PETITION NO.3932 OF 2019

Between:-

1. THE STATE OF H.P. THROUGH
ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF H.P-2 SHIMLA HP

2. THE DIRECTOR, HEALTH SERVICES HP,
SHIMLA-9.

…..PETITIONERS

(BY MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. SARITA KUMARI
D/O SH. JAI CHAND,
ADDRESS VILLAGE BHOUR,
PO KANAID, TEHSIL
SUNDERNAGAR, DISTRICT
MANDI H.P.

2. H.P. STATE STAFF
SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS
SECRETARY

....RESPONDENTS

(SH. YOGESH KUMAR CHANDEL, ADVOCATE FOR R-1
AND MR. ANGREZ KAPOOR, ADVOCATE FOR R-2)

CIVIL WRIT PETITION NO.3933 OF 2019

Between:-

1. THE STATE OF H.P. THROUGH
ITS PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF H.P-2 SHIMLA HP

2. THE DIRECTOR,
HEALTH SERVICES HP,
SHIMLA-9.

.....PETITIONERS

(BY MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

AND

1. NEHA SHARMA

D/O SH. HANS RAJ SHARMA,
R/O VILLAGE THAMBA,
PO DURGELLA, TEHSIL
SHAHPUR, DISTRICT KANGRA,
H.P.

2. PREETI MOGU
W/O SH. VIKRAM SINGH,
R/O VPO REHLU, TEHSIL
SHAHPUR, DISTRICT KANGRA, H.P.

3. NIDHI SHARMA
D/O SH. MADAN LAL SHARMA
R/O VPO NAGROTA SURIAN
TEHSIL JAWALI, DISTRICT KANGRA,
H.P.

4. PRIYA CHAUDHARY
D/O SH. RAJESH KUMAR
R/O VPO RAJIANA, TEHSIL
NAGROTA BHAGWAN,
DISTRICT KANGRA,
H.P.

5. NEHA CHAUDHARY
W/O SH. VIKAS BAHRI
(D/O BHAGWANT SINGH)
R/O VILL. SUNEHAR,
P.O. JAWALI, TEHSIL JAWALI, DISTRICT,
KANGRA, H.P.

6. NANDNI
W/O SH. VANEET KUMAR
(D/O SH. JARM SINGH)
R/O VPO CHARI,
TEHSIL SHAHPUR, DISTRICT
KANGRA, H.P.

7. AMRITA
W/O SH. RAVI KUMAR
R/O VILLAGE HATLI BALLA,
PO DRAMAN, TEHSIL SIHUNTA,
DISTRICT
CHAMBA, H.P.

8. ARTI DEVI
D/O SH. SHUBHASH CHAND
R/O VILL. KARDIAL, P.O.
PHARIAN, TEHSIL JAWLI, DISTRICT
KANGRA, H.P.

9. INDU BALA
D/O SH. KARAM CHAND
R/O VILL. THARU,
PO & TEHSIL NAGROTA BAGWAN,
DISTRICTKANGRA, HP.

10. SHALINI THAKUR
W/O SH. VINAY PARMAR
(D/O SH. BANBIR THAKUR)
R/O MANGHER, PO BODA VIA BHAWARNA,
SUB TEHSIL BHAWARNA TEHSIL PALAMPUR,
DISTRICT KANGRA, HP.

11. ARTI DEVI
D/O SH. DURGA PARSAD
R/O HOUSE NO.286
SESSION ROAD KOTWALI BAZAR DHARAMSHALA,
DISTRICT KANGRA, HP.

12. EKTA KAUNDAL
D/O SH. AJEET SINGH
R/O VILL. KHURD BANDI, P.O.
NAGANPATT, TEHSIL DHARAMSHALA

DISTRICT KANGRA, HP.

13. SNEH LATA
W/O SH. TILAK RAJ
R/O VILL. JHULLAR,
P.O. & TEHSIL SHAHPUR,
DISTRICT KANGRA, H.P.

14. POOJA DEVI
W/O SH. SACHIN KUMAR
(D/o Sh. RAMESH CHAND)
R/O VPO SUNANPUR,
TEHSIL SUJANPUR, DISTRICT HAMIRPUR, H.P.

....RESPONDENTS.

15. H.P. STATE STAFF
SELECTION COMMISSION,
HAMIRPUR, THROUGH ITS
SECRETARY

....PROFORMA RESPONDENT

(SH. NARESH KAUL, ADVOCATE FOR R-1 TO R-14
AND MR. ANGREZ KAPOOR, ADVOCATE FOR R-15)

CIVIL WRIT PETITION NO. 1423/2020

Between:-

MEENA KUMARI,
W/O RAVINDER KUMAR,
R/O WARD NO. 1, VILLAGE- HATHLOON,
POST OFFICE HATLI, TEHSIL- BANGANA,
DISTRICT- UNA, H.P.

.....PETITIONER
(BY MS. SUMAN THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS SECRETARY(HEALTH AND FAMILY WELFARE)
TO THE GOVERNMENT OF HEALTH, SHIMLA, H.P.

2. THE DIRECTOR,
HEALTH & FAMILY WELFARE DIRECTORATE,
SHIMLA-9 H.P.

3. HIMACHAL PRADESH STAFF SELECTION COMMISSION,
HAMIRPUR,THROUGH ITS SECRETARIAT, HAMIRPUR,
DISTT. HAMIRPUR (H.P.)

.....RESPONDENTS

(MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 5998 OF 2020

1. KASHAMTA SHARMA
W/O SH. ANIL AWASTHI,
R/O ARLA, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.

2. SITA DEVI
W/O SH. BIDHI CHAND
R/O VPO TOURKHOLA, TEHSIL SANDHOL,
DISTRICT MANDI, H.P.

3. NEELAM KUMARI
W/O SH. ANIL SHARMA,
R/O VILLAGE KRUST,

PO-CHOCKI JAMWALAN
TEHSIL & DISTT. HAMIRPUR, H.P.

4. NIDHI MISHRA
W/O SH. MUKESH SHARMA,
R/O VPO GHAROH,
TEHSIL DHARAMSHALA,
DISTRICT KANGRA, H.P.

5. BANTI DEVI
W/O SH. SUMAN KUMAR,
R/O VILL. BHALANA, P.O. REE
TEHSIL SUJANPUR,
DISTRICT HAMIRPUR, H.P.

6. KAMLESH KUMARI
D/O SH. BRIJ LAL
R/O VILL. JHINJKARI P.O. MAIR
TEHSIL & DISTT. HAMIRPUR, H.P.

7. ASHA KUMARI
W/O SH. NARENDER KUMAR,
R/O VILL. MAHRI, P.O. DHURKHRI
TEHSIL SARKAGHAT, DISTT. MANDI, H.P.

8. SANTOSH THAKUR
W/O SH. BHARAT KUMAR
R/O HOUSE NO. 385/5, SAIN MUHALLA
MANDI, SADAR, DISTT. MANDI, H.P.

9. SAVITRA DEVI
W/O SH. SURINDER JEET,
R/O VILL. THATTA, P.O. DEORI,
TEHSIL SADAR, DISTT. MANDI, H.P.

..PETITIONERS

(BY SH. MADAN THAKUR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH THE
PRINCIPAL SECRETARY (HEALTH)
TO THE GOVERNMENT OF H.P.
SHIMLA-2.

2. THE DIRECTOR,
HEALTH SERVICES,
H.P. SHIMLA.

3. H.P. STAFF COMMISSION-HAMIRPUR,
DISTT. HAMIRPUR, H.P. THROUGH
IT SECRETARY.

4. RAKSHA DEVI
D/O SH. PARMA NAND,
R/O TYPE-2, QTR NO. 201, BSNL
COLONY-ROPA, P.O. BHOJPUR,
TEHSIL SUNDERNAGAR, DISTT. MANDI, H.P.

5. NIRMLA KUMARI
W/O SH. ANOOP, H.NO. 20/08,
VILL. ROPA, P.O. BHOJPUR,
TEHSIL SUNDERNAGAR,
DISTRICT MANDI, H.P.

6. GUMATI DEVI
W/O SH. THAKAR DASS,
V.P.O. BALT, TEHSIL BALH
DISTRICT MANDI, H.P,

7. RENU CHANDEL
W/O SH. SURENDER KUMAR,
VILL. BHATER, P.O. TARKWARI
TEHSIL & DISTT, HAMIRPUR, H.P.
PIN CODE-176045.

8. LATA DEVI
W/O SH. BHUMESH CHAND,
VILL. MAGLANA, P.O. KUFRI
TEHSIL PADHAR, DISTT. MANDI, H.P.

...RESPONDENTS

(BY MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL FOR R-1 & 2, MR. ANGREZ KAPOOR, ADVOCATE FOR R-3 AND MR. YOGESH KUMAR CHANDEL, ADVOCATE FOR R-4 TO R-8)

CIVIL WRIT PETITION NO. 3476 OF 2021

Between:-

1. BIMLA DEVI
W/O SH. DINESH KUMAR
R/O VILLAGE TANOTA,
POST OFFICE CHOWAI,
TEHSIL ANI, DISTRICT KULLU,
HIMACHAL PRADESH.

2. PRIYANKA KUMARI
D/O OF VINOD KUMAR,
R/O VILLAGE BARGAON,
POST OFFICE BIR, TESHIL
AND DISTRICT MANDI
HIMACHAL PRADESH.

.....PETITIONERS

(BY MR. KULWANT SINGH GILL, ADVOCATE)

AND

1. STATE OF HIMACHAL
PRADESH THROUGH
SECRETARY (HEALTH) TO
THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2.

2. DIRECTOR HEALTH
SERVICES, HIMACHAL
PRADESH, SHIMLA-9.

3. HIMACHAL PRADESH
STAFF SELECTION COMMISSION,
HAMIRPUR, DISTRICT HAMIRPUR,
HIMACHAL PRADESH THROUGH
ITS SECRETARY.

....RESPONDENTS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL FOR R-1 AND R-2 AND MR. ANGREZ KAPOOR, ADVOCATE FOR R-3)

CWP No. 3238 of 2019
RESERVED ON: 02.08.2021
DECIDED ON: 13.08.2021

Constitution of India, 1950 – Articles 14,16 & 226 - The petition challenging the orders passed by tribunal- the candidates with B.Sc Nursing or GNM are eligible to be considered for appointment to post of Female Health Worker- Advertised by SSC in case they find place in merit list of candidates against their respective category- State is not justified in changing its stand in given facts of case – The proposition higher qualification will include lower qualification cannot be applied - universally as an indefeasible rule. Title: The State of H.P. vs. Gayatri Devi and others **(D.B.)** Page - 946

Cases referred:
Jyoti K.K. vs Kerala Public Service Commission (2015) 5 SCC 596;
Puneet Sharma and others vs. Himachal Pradesh State Electricity Board Limited and another etc. 2021(5) Scale 468;

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

O R D E R

All these writ petitions involve common question of law and facts, therefore, are being disposed of by this common judgment.

2. The Himachal Pradesh Staff Selection Commission (for short 'SSC') issued Advertisement No. 33-2/2017, (for short advertisement) dated 16.09.2017 inviting online applications from eligible candidates for the different category of posts including 205 posts of Female Health Worker (on contract basis) in the Department of Health and Family Welfare, Government of Himachal Pradesh against Post Code 651.

3. Prescribed minimum educational and other qualifications for the post of Female Health Worker was as under: -

i. Should be a Matric with Science/Higher Secondary Part-1 pass or its equivalent from a recognized Board/Institution.

ii. Should possess one and half years training certificate as Female Health Worker from a recognized Institute.

4. In response to the Advertisement, many such candidates applied for the post of Female Health Worker, who did not possess requisite one & half year training certificate as Female Health Worker. They instead were equipped either with a decree in B.Sc. Nursing or Diploma in General Nursing and Midwifery (in short 'GNM').

5. It is worth noticing at this stage that prior to issuance of advertisement, there were a large number of precedents by way of judgments passed by this Court whereby the courses of B.Sc. Nursing or GNM were held to be higher in qualification than one & half year certificate course for the Female Health Worker. In **CWP No. 7164 of 2012**, titled as **Kiran Gautam vs. State of H.P. and another**, decided on 6th December, 2012, this Court while deciding the identical issue held as under:-

> *".....There is no dispute that the petitioner has passed nursing and midwife course which contains those requirements required for the selection to the post of Female Health Worker and she is in fact better qualified to hold that post....."*

6. Similarly, in **CWP No. 4515 of 2014** titled as **Chandni Jaswal vs. State of H.P and others** decided on 30th June, 2014 while deciding the identical controversy it was held as under:-

> *".....It is not in dispute that the petitioner has obtained three years' diploma in GNM (General Nursing and Midwifery). GNM is higher qualification. Since the petitioner is in possession of higher qualification, she is fully eligible for the post of Female Health Worker....."*

These judgments were followed in number of subsequent cases and a few of these are **CWP No. 4628 of 2014** titled as **Kiran Bala vs. State of H.P and another**, decided on 03.07.2014, **CWP No. 4630 of 2014** titled as **Sunita Devi vs. State of H.P**, decided on 03.07.2014, **CWP No. 4440 of 2014** titled as **Pooja Sharma vs. State of H.P. and another**, decided on 31.07.2014 and **CWP No. 4445 of 2014** titled as **Apsara Kumari vs. State of H.P and another** decided on 31.07.2014.

7. It is equally worth noticing that in all these judgments, neither the employer department nor the recruiting agency (SSC), had disputed the fact that the courses in B.Sc Nursing or GNM were higher in qualification than one & half year certificate course for Female Health Worker. These judgments attained finality and the petitioners therein were appointed as Female Health Workers.

8. Understandably, in this background, candidate with B.Sc. Nursing or GNM submitted their applications in response to advertisement. Some of them qualified written test and also participated in evaluation process/counselling.

9. Number of the candidates with B.Sc Nursing or GNM, by way of different Original Applications, approached the erstwhile H.P. State Administrative Tribunal on the premise that they had qualified the written examination held by the SCC in pursuance to the advertisement and had also

participated in the subsequent evaluation process but were apprehensive that their candidature might be rejected on the ground that they were not possessing one-&-half year certificate course for the Female Health Worker. These petitions came to be registered as O.A.(M)Nos. 800, 840, 801, 2834, 411, 384, 457, 422, 500, 495, 434, 1142, 1145, 627, 526 of 2019. All these Original Applications were allowed by the erstwhile H.P. State Administrative Tribunal vide separate orders by holding as under: -

> *"**5**. However, the learned counsel for the applicants submits that the respective cases of the applicants are squarely covered under the judgments dated 6th December, 2012, Annexure A-5, in **CWP No. 7164 of 2012-G, Kiran Gautam Versus State of HP and another**, and 30.06.2014, Annexure A-6, in **CWP No. 4515 of 2014-A, Chandni Jaswal Versus State of H.P. & Anr.,** rendered by the Hon'ble High Court of Himachal Pradesh, and order dated 21st November, 2016 passed by this Tribunal in **O.A. No. 6089 of 2016, Ruchi Rani Versus State of Himachal Pradesh**.*
>
> ***6.** The learned Additional Advocate General/Standing Counsel state on behalf of the respondents that subject to verification of records, if it is found that the applicants are similarly situate as the petitioners/applicant in the aforesaid Writ Petitions/OA, their cases shall be considered accordingly.*
>
> ***7.** In view of the above, the original application is disposed of in terms of the aforementioned judgments/order with a direction to the respondents/competent authority(s) that subject to the above verification and on finding the applicants to be similarly situate as above, benefit of the said judgments/order, if the same have attained finality/implemented, shall also be extended to them as per law, within twenty days from today, **after affording an opportunity of being heard to them**."*

It goes without saying that in all these orders, the Ld. Tribunal specifically recorded the stand of the State to the effect that the candidature of the applicants in OAs, would be considered in accordance with judicial

precedents, noticed in the orders and in case it was found that the said applicants were similarly situated as the petitioners in cases noticed as the precedents, their cases would be considered accordingly.

10. In all the above noted judgments/orders either passed by this Court or the Ld. Tribunal, the State had categorically admitted that the qualification of B.Sc. Nursing or GNM was higher than the one & half year training certificate as Female Health Worker. In addition, it had also not refused to grant benefit of appointment to the post of Female Health Worker to those persons who had higher qualification of B.Sc. Nursing or GNM. The State, however, in its wisdom has subsequently assailed the above noted orders passed by the Ld. Tribunal by way of CWP Nos. 3238, 3466, 3467, 3468, 3905, 3908, 3911, 3913, 3914, 3915, 3921, 3922, 3927, 3932 and 3933 of 2019, which are presently being considered.

11. Another writ petition being **CWP No. 3476 of 2021** titled Bimla **Devi and another vs. State of H.P and others** also came to be filed before this Court on 18.10.2021 on the same grounds as raised by the petitioners in Original Applications, noted above, before the Ld. Tribunal.

12. Some of the candidates possessing one & half year training certificate as Female Health Worker, who had applied in pursuance to the advertisement, also filed separate Original Application (M) No. 800 of 2018 before the Ld. Tribunal, on the premise that only those candidates who possess essential qualification as per Advertisement were eligible to be considered for the post of Female Health Worker and not the candidates having B.Sc. Nursing or GNM as qualification. As a matter of fact, challenge was laid to the action of SSC whereby the applications of the candidates only with B.Sc. Nursing or GNM were accepted. Accordingly, the prayers were made in the said Original Application. After closure of the Tribunal, the Original Application (M) No. 800 of 2018 stood transferred to this Court and has been registered as **CWPOA No. 5598 of 2020**. Another **CWP No. 1423 of**

2020 came to be filed before this Court titled **Meena Kumari vs. State of H.P and others** with almost same cause of action and reliefs as in CWPOA No. 5598 of 2020. An additional challenge in this petition was to a Notification dated 10.04.2020 issued by the Director, Health and Family Welfare, Himachal Pradesh seeking to employ persons against the different cadres including that of Female Health Worker on outsource basis.

13. Now the questions that commonly arise for determination in all above noted petitions are as under: -

i) Whether the State, in the facts and circumstances of the case, is justified in changing its stand?

ii) Whether the candidates with B.Sc Nursing or GNM as qualification are entitled to be considered for the post of Female Health Worker in pursuance to the Advertisement ?

14. As noticed above, the State in the writ petitions filed against the orders of Ld. Tribunal has taken the stand that candidates possessing B.Sc. Nursing or GNM are eligible for the post of Staff Nurse. The categories of Female Health Worker and Staff Nurse are altogether different having separate Recruitment and Promotion Rules, seniority and different channels of promotion. Even the nature of duties performed by both the categories are different. The role of Multipurpose Health Worker (Female) is on the preventive side by providing preventive services at the grass root level of the Health Sub Centres, whereas the role of the Staff Nurses primarily is on treatment side having postings at the minimum level of Primary Health Centres.

15. State has also placed on record communication dated 04.9.2019 addressed by the Additional Chief Secretary Health, Government of Himachal Pradesh to the Director, Health Services conveying its decision to the effect that the judgment in **Kiran Gautam's** case was not examined in consultation with the Law Department. Since the judgment in **Kiran Gautam's** case had

already been implemented along with some other identical cases, therefore, those could not be agitated at a belated stage. The persons who had already been granted appointment by implementing the judgment in **Kiran Gautam's** case would have a strong case to agitate in the Court. However, the Department was of the opinion that other cases decided by Ld. Tribunal were liable to be agitated in view of law laid down in **Jyoti K.K**. vs. **Kerala Public Service Commission, (2010) 5 SCC 596** and in Civil Appeal Nos. 11853-11854 of 2018 titled as **Zahoor Ahmad Rather and others** etc. vs. **Sheikh Imtiyaz Ahmad and others etc**.

16. It appears that the decision of the State, to change its stand was based upon its understanding of the law laid down by the Hon'ble Apex Court in **Jyoti K.K**. vs. **Kerala Public Service Commission, (2010) 5 SCC 596** and in Civil Appeal Nos. 11853-11854 of 2018 titled as **Zahoor Ahmad Rather and others etc**. vs. **Sheikh Imtiyaz Ahmad and others etc**. It is, however, not coming forth either from the contents of the petitions filed by the State or communication dated 04.09.2019 relied upon by it as to whether there was any conscious consideration on the applicability of the ratio of aforesaid judgments to the facts of the cases in hand? Such an exercise, in our view, does not appear to have taken place. We are constrained to observe so because there is no utterance from State on the binding effect of various judgments passed by this Court on the same subject and in the identical fact situations. The State also appears to have not considered that as a model employer, should it have adopted different stances for different set of people in the similar circumstances and also the legal implication of its earlier concessions/ admissions made before the court/ tribunal.

17. In **Jyoti K.K**. vs **Kerala Public Service Commission (2015) 5 SCC 596,** Rule10(a) (ii) of the Kerala State and Subordinate Services Rules 1956 was considered which reads as under:-

*"**10**. **(a) (ii)** Notwithstanding anything contained in these Rules or in the Special Rules, the qualifications recognized by executive orders or standing orders of Government as equivalent to a qualification specified for a post in the Special Rules and **such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post**."*

(emphasis supplied)

18. Their Lordships in paras 7 and 8 of the judgment passed in **Jyoti K.K**. were pleased to hold as under: -

"7. It is no doubt true, as stated by the High Court that when a qualification has been set out under the relevant Rules, the same cannot be in any manner whittled down and a different qualification cannot be adopted. The High Court is also justified in stating that the higher qualification must clearly indicate or presuppose the acquisition of the lower qualification prescribed for that post in order to attract that part of the Rule to the effect that such of those higher qualifications which presuppose the acquisition of the lower qualifications prescribed for the post shall also be sufficient for the post. If a person has acquired higher qualifications in the same Faculty, such qualifications can certainly be stated to presuppose the acquisition of the lower qualifications prescribed for the post. In this case it may not be necessary to seek far."

"8. Under the relevant Rules, for the post of Assistant Engineer, degree in Electrical Engineering of Kerala University or other equivalent qualification recognised or equivalent thereto has been prescribed. For a higher post when a direct recruitment has to be held, the qualification that has to be obtained, obviously gives an indication that such qualification is definitely higher qualification than what is prescribed for the lower post, namely, the post of Sub-Engineer. In that view of the matter the qualification of degree in Electrical Engineering presupposes the acquisition of the lower qualification of diploma in that subject prescribed for the post, shall be considered to be sufficient for that post."

19. It was thus noted by their Lordships that there was no exclusion of candidates who possessed a higher qualification.

20. In **Zahoor Ahmad's** case, Hon'ble Supreme Court after taking into consideration the facts of that case and also the judgments passed on the issue has held that the higher qualification in the said case did not include the lower qualification and as such, the persons with higher qualification were held not eligible for the post to which the specific requirement or lower qualification was there.

21. In the facts of the present case, the State though has made submissions that nature of duties for the cadre of Nurses as well as Female Health Workers is different, but it has no-where been said that the nature of duties enjoined upon the Nurses does not include the nature of duties of Female Health Workers or in other words the curriculum of B.Sc Nursing or GNM did not include that of one & half years certificate course for the Female Health Worker. There is nothing on record to show that any special training is imparted to Female Health Workers. Even in **Jyoti K.K**, it was held that the higher qualification which pre-supposes the acquisition of lower qualification could not be excluded from consideration. Though the findings to this effect by the Hon'ble Supreme Court was based on a specific rule of Public Service Commission concerned, yet its application in the facts of present cases cannot be said to be untenable. We have also given our due consideration to the extracts of office manual prescribing duties of Female Health Worker as well as the Nurses and we have not been able to satisfy ourselves as to on what count, the State envisages that duties of Nurses will not include the duties of Female Health Workers.

22. Another important fact, which for the reasons best known to the State, has not been brought to our notice is that the Recruitment and Promotion Rules for the post of Staff Nurse (Class-III Non-Gazetted) framed by

the Department of Health and Family Welfare, Himachal Pradesh prescribes method of recruitment to the said post by different modes including 45% by direct recruitment, 45% by direct recruitment on batch-wise basis and 10% by promotion. The feeder cadre eligible for the promotion is of Female Health Worker subject to possessing of educational qualification as prescribed for direct recruitment against Column No. 7(a)(i) of R&P rules for staff nurses with five years regular service or regular combined with continuous ad-hoc service rendered, if any, in the grade. Notably, Column No. 7(a) (I) of above noted rules prescribes essential qualification as 10+2 preferably with Science from the recognized Board of School Education. Thus, a Female Health Worker having passed 10+2 examination from a recognized Board of School Education and having served as Female Health Worker for five years as regular employee or regular combined with continuous ad-hoc service is eligible to be promoted as Staff Nurse. Thus, it is clear that if a Female Health Worker without having undergone 1½ year certificate course and only with 10+2 and five years experience at her back, can be promoted as Staff Nurse, then how it lies in the mouth of the State to say that the nature of duties for both the cadres is different.

23. Almost an identical proposition has been considered and decided by the Hon'ble Supreme Court in **Puneet Sharma and others** vs. **Himachal Pradesh State Electricity Board Limited and another etc**. **2021(5) Scale 468**. In that case, the question was whether a degree in Electrical Engineering/Electrical and Electronics Engineering was technically higher qualification than a Diploma in that discipline and, whether the degree holder were eligible for appointment to the post of Junior Engineer (Electrical) under the relevant recruitment rules. By taking into consideration various judgments pronounced by the Apex Court on the issue or related thereto including in Jyoti K.K and Zahoor Ahmed's cases, their Lordships have been pleased to hold that the degree holder though had higher qualification, their

qualification included the lower prescribed qualification for the post of Junior Engineer (Electrical) and thus were entitled to participate and to be considered for appointment on the said post. In Puneet Sharma's case also, the Junior Engineer (Electrical) was entitled to be promoted as Assistant Engineer as one of the feeder categories to the quota of promotional post. In para 32 of the said judgment, it has been held as under: -

> *"32. The latter (2) conclusively establishes that what the rule making authority undoubtedly had in mind was that degree holders too could compete for the position of JEs as individuals holding equivalent or higher qualifications. If such interpretation were not given, there would be no meaning in the 5% sub-quota set apart for those who were degree holders before joining as Junior Engineers - in terms of the recruitment rules as existing."*

24. On analysis, we find that the facts involved in the bunch of cases under consideration before this Court substantially resembles the facts in *Puneet Sharma's* case, therefore, applying the ratio of said judgment, we have no hesitation to hold that the candidates with B.Sc Nursing or GNM have to succeed and are eligible to be considered for appointment to the post of Female Health Worker advertised vide Advertisement No. 33-2/2017 dated 16.9.2017 by the SSC, in case they find place in merit list of candidates against their respective category. It is also held that State is not justified in changing its stand in the given facts of the case. Questions i) and ii) framed herein above are answered accordingly.

25. We deem it necessary to observe that the proposition "higher qualification will include lower qualification" cannot be applied universally as an indefeasible rule, it will always depend upon the facts and circumstances of each individual case.

26. Accordingly, Civil Writ Petition Nos. 3238, 3466, 3467, 3468, 3905, 3908, 3911, 3913, 3914, 3915, 3921, 3922, 3927, 3932 and 3933 of 2019, 3476 of 2021 and CWPOA 5598 of 2020 are dismissed. In view of

dismissal of these petitions and also the directions, we propose to issue hereinafter; prayers made in CWP No. 1423 of 2020 and CWP No. 3476 of 2021 have been rendered infructuous.

27. We accordingly direct the Himachal Pradesh Staff Selection Commission to declare the result of successful candidates in pursuance to Advertisement No. 33-2/2017 by considering the candidates, with B.Sc. Nursing or GNM, as eligible for the post of Female Health Worker in the Department of Health and Family Welfare in addition to the candidates having essential qualifications as per advertisement. We further direct the SSC to make recommendations to the Government of Himachal Pradesh for appointment to the post of Female Health Workers in respect of successful candidates within a period of four weeks from today.

28. All the above noted petitions are disposed of in the aforesaid terms, so also the pending application(s), if any, with no orders as to costs.

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

Between:-

DR. DEVENDER NATH KASHYAP, SON OF SHRI RADHA KRISHAN SHARMA, RESIDENT OF VILLAGE & POST OFFICE KOSERIAN, TEHSIL JHANDUTTA, DISTRICT BILASPUR, H.P.

....PETITIONER

(BY M/S BHUVNESH SHARMA & RAMAKANT SHARMA, ADVOCATES)

AND

1. UNION OF INDIA, MINISTRY OF HUMAN RESOURCE DEVELOPMENT, DEPARTMENT OF HIGHER EDUCATION, NEW DELHI, THROUGH ITS SECRETARY.
2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (EDUCATION) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-171002, H.P.
3.COMMISSIONER TEMPLES-CUM-SECRETARY (LANGUAGE & CULTURE) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

4. PRINCIPAL, BABA BALAK NATH DEGREE COLLEGE CHAKMOH, TEHSIL BADSAR, DISTRICT HAMIRPUR, H.P.

...RESPONDENTS

(SH. RAJENDER THAKUR, ADVOCATE, FOR R-1-UNION OF INDIA.
M/S SUMESH RAJ, ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS & MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL FOR R-2.
SH. K.D. SOOD, SENIOR ADVOCATE, WITH SH. HET RAM THAKUR, ADVOCATE FOR R-3 & 4)

2. CIVIL WRIT PETITION No. 5404 of 2013

Between:

SHRI KAILASH CHAND SHARMA, SON OF SHRI PARMA NAND SHARMA, RESIDENT OF VILLAGE & POST OFFICE CHHATTARPUR, TEHSIL NURPUR, DISTRICT KANGRA, H.P., PRESENTLY WORKING AS PRINCIPAL, GOVT. DEGREE COLLEGE, INDORA, DISTRICT KANGRA, H.P.

.....PETITIONER

(BY M/S BHUVNESH SHARMA & RAMAKANT SHARMA, ADVOCATES)
AND

1. UNION OF INDIA, MINISTRY OF HUMAN RESOURCE DEVELOPMENT, DEPARTMENT OF HIGHER EDUCATION, NEW DELHI, THROUGH ITS SECRETARY.
2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (EDUCATION) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-171002, H.P.

.....RESPONDENTS.

(SH. RAJENDER THAKUR, ADVOCATE, FOR R-1-UNION OF INDIA.
M/S SUMESH RAJ, ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS & MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL FOR R-2.

CIVIL WRIT PETITION No. 1923 of 2013 a/w
CIVIL WRIT PETITION No. 5404 of 2013
Decided on: 10.08.2021

Constitution of India, 1950 – Articles 14 & 226 - The petition for issuance of writ that petitioners are entitled to continue in service till the attainment of age of 65 years in terms of scheme of GOI and respondents be restrained from

retiring petitioners at the age of 58/60 years, Held, It is settled law that the recommendation of University Grants Commission or Schemes of department of Higher education ministry of human resource development, where ever are recommendatory, ipso facto are not applicable on the universities/ colleges within the purview of the state legislature until or unless they are expressly adopted by incorporating necessary amendments qua the same in the statues or ordinance of the universities or R & P Rules of the college concerned . It is the prerogative of the state whether or not to adopt the recommendation of UGC keeping in view its financial resources as well as other aspects - petitioners have no right to seek declaration that respondents be directed to allow them to continue to serve till the age of 65 years. Petition dismissed. Title: Dr. Devender Nath Kashyap vs. Union of India & others Page – 982

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

J U D G M E N T

As similar issues of facts and law are involved in these petitions, they are being disposed of by a common judgment.

2. Petitioner in CWP No. 5404 of 2013 was initially appointed as a Lecturer (Economics) in W.R.S.M.P. Degree College, Dehri, Tehsil Nurpur, District Kangra, H.P., which at the relevant time was 95% added College. The same was taken over by the Government of Himachal Pradesh in April, 1984 alongwith the services of the petitioner. In the year, 2002, the petitioner was promoted to the College Cadre. Similarly, the petitioner in CWP No. 1923 of 2013 was initially appointed as a Lecturer in the subject of Hindi in Baba Balak Nath Degree College, Chakmoh, which College is being run by Baba Balak Nath Temple Trust, Deothsidh, District Hamirpur, H.P.

3. The petitions have been filed by the petitioners praying for issuance of a writ to the effect that the petitioners be held entitled to continue in service till the attainment of age of 65 years, in terms of the Scheme circulated by the Government of India, Ministry of Human Resource

Development, Department of Higher Education, dated 31st December, 2008 (Annexure P-1) in CWP No. 5404 of 2013. Further relief sought for, is for restraining the respondents from retiring the petitioners at the age of 58/60 years.

4. The contention of the petitioners is that vide Annexure P-1 in CWP No. 5404 of 2013, the Ministry of Human Resource Development, Department of Higher Education, Government of India has taken a Policy decision on the basis of the recommendations of the Sixth Central Pay Commission that the age of superannuation of Teachers like the petitioners, be increased to 65 years. This decision has been communicated to all the Education Secretaries of different States of the country. One of the conditions mentioned in the Scheme is that the Central Government will provide assistance to the State Governments, who opt for the revised Pay Scales, up to 80% of the additional expenditure, which the State has to bear on account of the implementation of the same. The Scheme categorically provides that the age of the Lecturers (College Cadre) will be 65 years, yet the respondents are going to retire the petitioners at the age of 58/60, i.e., the age which is mentioned in the Rules governing the services of the petitioners_ against the posts held by them. According to the petitioners, the Colleges, in which they are imparting education, are affiliated to the Himachal Pradesh University. The service conditions of the petitioners are governed by the Himachal Pradesh University Ordinances as well as Instructions issued from time to time by the University Grants Commission. Both Himachal Pradesh University as well as the respondent-State have adopted the Scheme floated by the Central Government vide Annexure P-1, in all respects, except the age of superannuation, which despite being a mandatory condition, has not been implemented till date. The act of the respondents of not enhancing the age of superannuation up to 65 years is an arbitrary, as the petitioners are being

discriminated against and shall be denied wages for 7/5 years, in case the respondents succeed in superannuating them at the age of 58/60 years. According to the petitioners, the Scheme of the Central Government cannot be implemented in piecemeal and has to be implemented as a composite Scheme, one mandatory component of which, was the age of superannuation. It is in this background that the petitions have been filed with the prayers mentioned hereinabove.

5. The Union of India as well as the respondent-State have not filed any reply to the petitions despite opportunity having been granted in this regard. However, in terms of the directions passed by the Court, the respondent-State has placed on record Instructions, dated 24th July, 2021, imparted to the office of learned Advocate General, which are ordered to be taken on record. It is mentioned therein that the respondent-State has issued Notification dated 15th October, 2009 in pursuance of the recommendations of the University Grants Commission and has revised the Pay Scales of Teachers and equivalent cadres in Himachal Pradesh University, Government Degree Colleges, Government Sanskrit Colleges and Directorate of Higher Education (Colleges) in the State w.e.f. 01.01.2006. It is also mentioned therein that vide said Notification, the State Government has decided that the age of superannuation of the teaching personnel and other equivalent cadres shall remain unchanged.

6. I have heard learned counsel for the parties and also gone through the pleadings as well as the Instructions referred to hereinabove.

7. It is not in dispute that the age of superannuation of a Lecturer, in terms of the Rules in vogue pertaining to the petitioners is 58/60 years, respectively. The relief prayed for by the petitioners is based on the recommendations contained in the Scheme introduced by the Department of

Higher Education of the Central Government, dated 31st December, 2008. A perusal thereof demonstrates that it stands mentioned in Clause-8(f) of the said Scheme, which deals with 'Age of Superannuation' that in order to meet the situation arising out of shortage of teachers in Universities and other teaching Institutions and the consequent vacant positions therein, the age of superannuation for teachers in Central Educational Institutions has already been enhanced to 65 years, for those involved in class room teaching in order to attract eligible persons to the teaching career and to retain teachers in service for a longer period and further the Central Government has authorized the Central Universities to enhance the age of superannuation of Vice-Chancellors of Central Universities from 65 years to 70 years, subject to amendments in the respective Statutes, with the approval of the competent authority. In Sub-clause (ii) of Clause (f), it is mentioned that subject to availability of vacant positions and fitness, teachers shall also be re-employed on contract appointment. Similarly, in Clause-8(p)(v), it stands mentioned that the claim may be extended to Universities, Colleges and other higher educational institutions coming under the purview of State legislatures, provided State Governments wish to adopt and implement the Scheme subject to the conditions mentioned therein.

8. *Prima facie*, the conclusions which can be drawn from the contents of the Scheme is that the Scheme is only recommendatory and not mandatory. In fact, the framers of the Scheme left the adoption of the Scheme up to the Universities, Colleges and other higher educational Institutions coming under the purview of the State legislatures of the State in issue. It is evident from the Instructions, which have been placed on record by the State that the Government has not adopted the Scheme, as far as the enhancement of the age of superannuation is concerned. Not only this, Annexure P-1 is dated 31st December, 2008, whereafter, a Notification has been issued by the

Higher Education Department of the Government of Himachal Pradesh, pursuant to the recommendations of the University Grants Commission, vide which, the pay scales of teachers and equivalent cadres in the Himachal Pradesh University, Government Degree Colleges, Government Sanskrit Colleges and Directorate of Higher Education (Colleges) etc. have been revised. It is unambiguously mentioned in Condition No. 13 of this Notification that the age of superannuation of teaching personnel and other equivalent cadres shall remain unchanged. Incidentally, this Notification has not been assailed by the petitioners by way of these writ petitions, though the same was in fact in force at the time when the petitions were filed.

9. Even otherwise, it is settled law that the recommendations of the University Grants Commission or the Schemes of the Department of Higher Education, Ministry of Human Resource Development, whereever are recommendatory, ipso facto, are not applicable on the Universities/Colleges etc. within the purview of the State Legislature until and unless they are expressly adopted by incorporating necessary amendments qua the same in the Statutes or Ordinances of the Universities or the Recruitment and Promotion Rules of the Colleges concerned.

10. In other words, it is the prerogative of the State whether or not to adopt the recommendations of the University Grants Commission, keeping in view its financial resources as well as other aspects. Therefore, in the considered view of this Court, the petitioners indeed have no right to seek a declaration that the respondents be directed to allow the petitioners to serve till the age of 65 years. The services of the petitioners being governed by the Rules of the relevant post, the petitioners have to abide by the same and the respondents have a right to superannuate them from service on attaining the age of superannuation.

11. In view of the discussions held hereinabove, as this Court finds no merit in the present petitions, the same are dismissed, so also pending miscellaneous applications, if any.

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

Sanjeev Kumar & others .....Petitioners

Versus

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

CWPOA No.226 of 2019
Date of Decision: 27.07.2021

Constitution of India, 1950 – Article 226 - The petition challenging order passed in departmental inquiry imposing penalty- Held, the courts will not act as an appellate court and reassess the evidence led in domestic inquiry nor interfere on the ground that another view is possible on the material on the record. If enquiry has been fairly and properly held and the findings are on evidence- the question of adequacy of the evidence or the reliable nature of evidence will not be ground for interfering with the findings in departmental inquires, however, courts can interfere with findings in disciplinary matter If principles of natural justice or statutory regulation have been violated or if order is found to be arbitrary capricious malafide or based on extraneous consideration.

Held- Preliminary inquiry is to do nothing with the inquiry conducted after issuance of charge sheet- very purpose of conducting preliminary enquiry is to find out whether disciplinary inquiry is had to be initiated or not- however once full fledged disciplinary inquiry is conducted, preliminary enquiry would lose its relevance -

Entire inquiry report furnished by enquiry officer in the departmental proceedings is based on preliminary inquiry report given by the inquiry officer responsible to conduct preliminary inquiry wherein he merely had suggested involvement of delinquent official in alleged crime however involvement of delinquent official against the alleged crime was to be proved in accordance

with law in full fledged disciplinary proceedings- as such inquiry report is totally contrary to the evidence led on record and cannot be sustained- petition allowed.

Cases referred:

Allahabad Bank v. Krishna Narayan Tewari (2017)2 SCC 308;
Corporation of City of Nagpur and Anr. Vs. Ramachandra, 1981 (3) SCR 22;
Indian Oil Corporation Limited and another versus Ashok Kumar Arora, (1997) 3 SCC 72;
Narayan Dattatraya Ramteerthakhar versus State of Maharashtra and others(1997) 1 SCC 299;
Nelson Motis Vs. Union of India and Anr., AIR 1992 SC 1981;
State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya (2011)4 SCC 584;
State of Andhra Pradesh Vs. Chitra Venkata Rao, 1976(1) SCR 521;
State of Andhra Pradesh Vs. S.Sree Rama Rao, 1963 (3) SCR 25;
Union of India v. P. Gunasekaran (2015)2 SCC 610;

For the Petitioner: Mr. Jagdish Thakur, Advocate.

For the Respondents: Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral):

SHO, police Station, Sadar, Shimla informed the Superintendent of Police, Shimla vide confidential letter dated 29.5.2005 that the Manager of the Hotel Chand, Shimla after having lost rupees 6- 6 ½ thousands while gambling with 4-5 persons intimated petitioner No.1 Sanjeev Kumar, who at that relevant time was posted as Head Constable at Inter-State Bus Terminal (ISBT), Shimla. Petitioner Head Constable, Sanjeev Kumar accompanied by other petitioners namely, MHC/HC Ashwani Kumar No.139 and Constable Manoj Kumar No.1390 visted the hotel at around 3 O'clock in the night and allegedly took into possession sum of Rs.21000/- from all the 5-6 persons, who were allegedly gambling inside the room. SHO Police station, Sadar,

Shimla in his aforesaid communication sent to Superintendent of Police, Shimla further informed that out of Rs.21000/- petitioners returned 6-6 ½ thousand to the Manager of the hotel and sum of Rs.200/- each to the other gamblers. Allegedly, all the three petitioners misappropriated sum of Rs. 14,500/-. SHO, Police station, Sadar, Shimla also informed that SHO, police Station, Dhalli informed him on the telephone that on 25.5.2005 he had nabbed a person accused of stealing a sum of Rs.60,000/- who, during investigation revealed that he had gambled in the Chand hotel with the stolen money and at that time three police personnel had visited the place in the intervening night of 23rd/24th.5.2005 and they had taken away sum of Rs.21,000/- from there. Though, SHO, Police station, Sadar questioned/inquired all the petitioners, who had allegedly visited the hotel after having received information, but since none of them admitted their guilt, matter came to the notice of Superintendent of Police, Shimla through confidential report submitted by the SHO, Sadar, Shimla. Superintendent of Police got preliminary inquiry conducted in the matter by Dy.S.P (City), Shimla, which revealed that all the petitioners named hereinabove raided the hotel Chand on the telephonic information given by its Manager Sh. Gabbar Singh with an intention to obtain wrongful gain. Officer responsible for conducting preliminary inquiry reported in its preliminary report that it appears that petitioners stood benefited by not conducting any proceedings against the accused persons as such, they neither reported the matter to the higher authorities nor made any entry in the daily diary report.

2. After having received aforesaid report of preliminary inquiry **(Annexure A-9**), Superintendent of Police, Shimla in terms of provisions contained under Rule 16.38 of Punjab Police Rules proceeded to initiate departmental inquiry against the petitioners after having obtained necessary permission from District Magistrate Shimla. Vide order dated 4.6.2005

(Annexure A-4), Superintendent of Police, Shimla suspended all the petitioners from service and thereafter vide order dated 17.6.2005 *(Annexure A-5),* appointed Sh. Virender Singh Kanwar, Additional Superintendent of Police City), Shimla as inquiry officer. Above named Inquiry Officer immediately after his being appointed as Inquiry Officer served the petitioners with a charge sheet **(Annexure A-6),** levelling therein following charges against them and called upon all the delinquent officials i.e. petitioners to submit their reply within seven days of the receipt of the charges as well as list of prosecution witnesses.

"**Charges Sheet"**

1. ***You namely HC Sanjeev Kumar No.4 were posted as such in P.S.Sadar, Shimla on 23/24.5.2005. On the said night, you were on JDO duty. You alongwith HC Ashwani Kumar No.139 and C. Manoj Kumar No.1390 had gone to hotel Chand, Ganj Bazar from the P.S. on receiving phone call from there. But you failed to enter a report to this effect in the Daily Diary which you should have done as per the requirement of the rules. By doing so, you have committed violation of the Police rules.***

2. ***You alongwith HC Ashwani Kumar No.139 and C. Manoj Kumar No.1390 went to hotel 'Chand' in Ganj Bazar, Shimla in the night intervening 23/24.5.2005 where the hotel manager Shri Gabbar Singh was gambling with 4/5 other persons. When at around 3 a.m., you conducted raid on the said hotel, the gamblers stopped gambling throwing around the money. You all the three police officials collected about Rs.20,000/- and handed over the same to hotel manager Shri Gabbar Singh besides handing over the belonging of the other gamblers to them without taking any legal proceedings against them. Such act on your part makes your conduct suspectful as you have acted in contravention of the rules.***

3. You, HC Sanjeev Kumar did not inform any of your superiors regarding the intimation qua gambling inside a closed place, neither obtained the warrants for conducting the raid as per the rules. You went to the place of occurrence at your own and did not conduct any proceedings there. It shows that you HC Sanjeev Kumar No.4 alongwith your co-officials raided the aforesaid hotel with an intent to draw wrongful benefit/advantage and appears to have actually taken wrongful/illegal advantage by not taking any action against the guilty. Such an act on your part shows that you have indulged in indiscipline and gross misconduct thereby indicating that you are in incapable and unworthy police officials.

4. During the course of preliminary inquiry, the Inquiry officer-cum-Dy. Superintendent of Police (City) Shimla, got conducted an identification parade on 31.52005 by the persons gambling in the hotel' Chand' during the night intervening 23/24.5.2005 in order to know about the police officials with certainty who had gone to hotel' Chand' for conducting the raid. In the said identification parade, your have been identified by one Sh. Vinod Kumar son of Sh. Ratti Ram Bhardwaj, R/o village Bijua, P.S.Jubri (Dhami), Tehsil and District Shimla before the witnesses."

3. Before reply to aforesaid charge sheet could be submitted by the Delinquent officials i.e. petitioners, Inquiry Officer, as named hereinabove, furnished charges in brief to the petitioners calling upon them to submit the reply within two days. All the delinquent officials i.e. petitioners filed reply to aforesaid charges served to them in brief. Copy of one reply is given by petitioner Sanjeev Kumar stands placed on record as Annexure A-8, perusal whereof reveals that petitioners specifically denied factum with regard to gambling, if any, played by the Manager of 'Chand' hotel with other occupants of the hotel in their presence, rather they stated in the reply that on 23rd/24th.5.2005, telephonic call was received from Sh. Gabbar Singh that some boys after having consumed liquor are making nuisance and as such,

they went to the hotel, but however, when they reached the reception of the hotel none was found there and as such, there was no question for them to initiate any proceedings. Inquiry Officer after having conducted detailed inquiry submitted the inquiry report dated 14.9.2005 **(Annexure A-9**), wherein he formulated following points for determination:-

> ***"1. Whether HC Ashwani Kumar No.139 and HC Sanjeev Kumar No.4 were posted respectively as MHC and Investigation Officer at P.S. Sadar on 23/24.5.2005, besides C. Manoj Kumar No.1390?***
>
> Statement of PW-5 and Ex.PW5/A, 5/B, 5/E and 5/F prove that these officials were posted at P.S. Sadar.
>
> **2. Whether MHC, P.S. Sadar Ashwani Kumar No.139, HC Sanjeev Kumar No.4 and C. Manoj Kumar No.1390 had gone at hotel 'Chand' Ganj Bazar, Shimla during the night intervening 23/24.5.2005 to conduct a raid over there?**
>
> Statement of Ex.PW1,2 and Ex.PW8/A and statement of the accused i.e. Mark-A, Mark-B and Mark-C prove that all the aforesaid police officials had gone at hotel 'Chand' during the night intervening 23/24.5.2005 on receiving telephonic information from the owner of the hotel.
>
> **3. Whether the aforesaid trio raided the aforesaid hotel to catch the gambles red handed?**
>
> During departmental inquiry, it has not been found from the statements of any of the witnesses that when the aforesaid police officials reached 'Chand' hotel, anybody was found gambling there. However, from the Ext.PW2/A which was recorded during the course of preliminary inquiry as also the information given to PW-6 and 7 by accused Vinod Kumar during investigation of Case No.101/05, besides the information given/provided by the hotel owner, it is evident that in the said hotel, the incident such as gambling had certainly taken place and

the aforesaid police officials had gone there on receiving information in this regard.

4. Whether the said police officials extorted money from the persons gambling in the hotel and rendered unlawful help to anyone?

During the course of departmental inquiry no such evidence came forth on the basis of which it could be conclusively proved that these officials extorted money from anyone, however it is proved from PW-1 and Ext.PW8/A and Ext.PW2/A that they had returned to the hotel manager a sum of Rs.20,000/- and the mobile phone, besides retaining some amount of money with them. But, this has not been confirmed by any independent witness. However, they certainly helped the hotel manager wrongfully.

5. Whether these police personnel took any cognizance of this entire occurrence for which they were legally and lawfully bound?

On the basis of evidence and documents collected in this regard, it can be conclusively and safely said that these officials were legally bound to conduct necessary/ required proceedings as per law with regard to the action taken by them, but they neither registered any case nor recorded any report in this behalf, which makes their conduct suspectful. Besides, it was incumbent upon them to intimate their superior officers and the SHO irrespective of the gravity of the offence."

4. On the basis of evidence led on record by the prosecution though Inquiry Officer concluded that during the course of Departmental Inquiry no such evidence came forth on the basis of which it could be conclusively proved that these officials extorted money from anyone. However, it is proved that they had returned to the hotel Manager sum of Rs. 20,000/- and mobile phone besides retaining some amount of money with them, but findings returned qua point No.4 clearly reveals that factum with regard to

money, if any, returned by the police officials to Manager of the hotel and retaining the some amount thereof was never confirmed by the independent witnesses.

5. Inquiry Officer concluded in his report that it was duty of the police officials/delinquent officials to register case lawfully, if the offences committed was cognizable and if it was non-cognizable then they should have made a report in the daily diary as per Rules regarding the proceedings taken. However, since delinquent officials failed to do so, suspicion may be raised that they might have acted in the said manner to cause wrongful gain to the Manager of the hotel as well as other persons involved in gambling. Inquiry Officer having found petitioners contravened the police Rules held them guilty of dereliction of duty, indiscipline and negligence in performing duties and submitted the report to the Superintendent of Police, Shimla.

6. After having received aforesaid inquiry report, Superintendent of Police, Shimla served show cause notice dated 24.9.2005 **(Annexure A-10**) upon the delinquent officials (petitioners) calling upon them to show cause as to why their three years of approved service should not be forfeited for annual increments with cumulative effect. Though, reply to the show cause notice was submitted within the stipulated time denying all the charges framed against them, but yet Superintendent of Police vide order dated 19.11.2005 (**Annexure A-12**) ordered for the forfeiture of three years of approved services of the petitioners permanently for the purpose of annual increments. Besides above, Superintendent of Police, Shimla also ordered that delinquent officicials shall not be entitled to anything else during the period 4.6.2005 to 21.6.2005, except the allowance they have already received.

7. Being aggrieved and dissatisfied on account of aforesaid order passed by Superintendent of Police, Shimla, all the petitioners preferred

appeal before the Deputy Inspector General of Police **(Annexure A-13)**, however, such appeal of them was also rejected vide order dated 2.12.2006 **(Annexure A-14)** passed by Deputy Inspector General of Police, Southern Range, Shimla. Petitioners laid further challenge to aforesaid order passed by Appellate authority by way of revision filed by them under Punjab Police Rules to the Director General of Police, Himachal Pradesh, who also vide order dated 19.6.2006 **(Annexure A-16**), dismissed the revision petition and upheld the order of punishment passed by Superintendent of Police, Shimla.

8. Being aggrieved and dissatisfied with the rejection of revision petition by Director General of Police, Himachal Pradesh, petitioners again preferred mercy petition to the Director General of Police, Himachal Pradesh, but such mercy petition filed by them was also came to be dismissed vide order dated 29.5.2007 (**Annexure A-18)**. In the aforesaid background, all the petitioners approached the erstwhile H.P. Administrative Tribunal by way of Original Application No.2236 of 2007, however on account of abolishment of erstwhile H.P. Administrative Tribunal, case came to be transferred to this Court and stands registered as CWPOA No.226 of 2019.

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

10. Before ascertaining the correctness and genuineness of the submissions made by learned counsel representing the parties vis-à-vis prayer made in the instant petition, it would be apt to elaborate upon the scope of judicial review in departmental inquires/proceedings while exercising power under Article 226 of the Constitution of India.

11. By now it is well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor

interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be ground for interfering with the findings in departmental enquiries. However, courts can interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala-fide or based on extraneous considerations. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya (2011)4 SCC 584,*** wherein it has been held as under:-

> "7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in 5 (2011) 4 SCC 584 8 the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide B. C. Chaturvedi vs. Union of India - 1995 (6) SCC 749, Union of India vs. G. Gunayuthan - 1997 (7) SCC 463, and Bank of India vs. Degala Suryanarayana - 1999 (5) SCC 762, High Court of

> Judicature at Bombay vs. Shahsi Kant S Patil - 2001 (1) SCC416).
>
> xx xx xx
>
> 12. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him."

12. Reliance is also placed upon the latest judgment rendered by Hon'ble Apex Court in ***The State of Karnataka and another versus N. Ganga Raj,*** Civil Appeal No.8071 of 2014, wherein Hon'ble Apex Court while taking into consideration aforesaid law laid in earlier judgments has held as under:-

> "13. In another judgment reported as ***Union of India v. P. Gunasekaran*** (2015)2 SCC 610 , this Court held that while reappreciating evidence the High Court cannot act as an appellate authority in the disciplinary proceedings. The Court held the parameters as to when the High Court shall not interfere in the disciplinary proceedings:

"13. Under Article 226/227 of the Constitution of India, the High Court shall not:

(i) re-appreciate the evidence;
(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
(iii) go into the adequacy of the evidence;
(iv) go into the reliability of the evidence;
(iv) interfere, if there be some legal evidence on which findings can be based.
(v) correct the error of fact however grave it may appear to be;
(vii) go into the proportionality of punishment unless it shocks its conscience."

14. On the other hand learned counsel for the respondent relies upon the judgment reported as ***Allahabad Bank v. Krishna Narayan Tewari (***2017)2 SCC 308 , wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the Writ Court could interfere with the finding of the disciplinary proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the findings recorded by the disciplinary 6 (2015) 2 SCC 610 7 2017 2 SCC 308 10 authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not make it a case of no evidence. The Inquiry Officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.

13. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Indian Oil Corporation Limited and another versus Ashok Kumar Arora,*** (1997) 3 Supreme Court Cases 72, wherein it has been held as under:-

> "20 At the outset, it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/Authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are base on no evidence, and or the punishment is totally disproportionate to the proved misconduct of an employee. There is catena of judgments of this Court which had settled the law on this topics and it is not necessary to refer to all these decisions. Suffice it to refer to few decisions of this Court on this topic viz., ***State of Andhra Pradesh Vs. S.Sree Rama Rao,*** 1963 (3) SCR 25, ***State of Andhra Pradesh Vs. Chitra Venkata Rao,*** 1976(1) SCR 521, ***Corporation of City of Nagpur and Anr. Vs. Ramachandra***, 1981 (3) SCR 22 and ***Nelson Motis Vs. Union of India and Anr.,*** AIR 1992 SC 1981."

14. Now being guided by aforesaid law laid down by Hon'ble Apex Court with regard to scope of interference in disciplinary proceedings, this Court proceeds to decide the controversy at hand.

15. Precisely, the challenge to aforesaid impugned orders awarding punishment to the petitioners is on following grounds:-

> ***i.) Charge sheet, if any, on the basis of preliminary inquiry conducted on the orders of Superintendent of Police, Shimla could have been/ought to have been issued by the appointing authority i.e. Superintendent of Police, Shimla, but since in the case at hand charge sheet came to be served/issued by the inquiry officer, consequent disciplinary proceedings stands vitiated, as a result of which, penalty imposed by appointing authority on the basis***

of final inquiry report submitted by inquiry officer cannot be allowed to sustain.

ii.) Since inquiry officer in his report had categorically concluded that no conclusive evidence has come on record on the basis of which it can be said that delinquent officials extorted money from anyone, there was no occasion, if any, to hold officials guilty of dereliction of their duties, indiscipline and negligence in performing duties.

iii.) Findings given in preliminary inquiry or statements recorded during preliminary inquiry could not have been made basis by the inquiry officer while concluding guilt, if any, of the delinquent officer in the department proceedings.

16. Having carefully perused the provisions contained under Rule 16.38 of the Punjab Police Rules1934, this Court finds that if very preliminary inquiry of investigation to the complaint alleging the commission of an offence by enrolled police officer with his official relations with the public, establishes a prima-facie case, a judicial prosecution shall normally follow, where however Superintendent of Police proposes to proceed in the case departmentally, the concurrence of District Magistrate shall be obtained. When investigation of such a complaint establishes a prima-facie case and when it is decided to proceed departmentally the procedure prescribed in the Rule 16.24 shall be followed. At this stage, it would be apt to take note of Rule 16.24 of the Punjab Police Rules, which reads as under:-

> **16.24 Procedure in departmental enquiries**. (1) The following procedure shall be followed in departmental enquiries:-
>
> (i) The police officer accused of misconduct shall be brought before an officer empowered to punish him, or such superior officer as the Superintendent may direct to conduct the enquiry. That officer shall record and read out to the accused officer a statement summarizing the alleged misconduct in

> such a way as to give full notice of the circumstances in regard to which evidence is to be recorded. A copy of the statement will also be supplied to the accused officer free of charge.
>
> (ii) If the accused police officer at this stage admits the misconduct alleged against him, the officer conducting the enquiry may proceed forthwith to frame a charge, record the accused officer's plea and any statement he may wish to make in extenuation and to record a final order, if it is within his power to do so, or a finding to be forwarded to an officer empowered to decide the case. When the allegations are such as can form the basis of a criminal charge, the Superintendent shall decide at this stage, whether the accused shall be tried departmentally first and judicially thereafter.
>
> (iii) If the accused police officer does not admit the misconduct, the officer conducting the enquiry shall proceed to record such evidence, oral and documentary, in proof of the accusation, as is available and necessary to support the charge. Whenever possible, witnesses shall be examined direct, and in the presence of the accused, who shall be given opportunity to take notes of their statements and cross-examine them. The officer conducting the enquiry is empowered, however, to bring on to the record the statement of any witness whose presence cannot, in the opinion of such officer, be procured without undue delay and expense or inconvenience, if he considers such statement necessary, and provided that it has been recorded and attested by a police officer superior in rank to the accused officer or by a magistrate, and is signed by the person making it. This statement shall also be read out to the accused officer and he shall be given an opportunity to take notes. The accused shall be bound to answer any questions which the enquiring officer may see fit to put to him with a view to elucidating the facts referred to in statements or documents brought on the record as herein provided."

17. Having carefully perused the provisions contained under aforesaid Rule 16.24, this Court finds substantial force in the submission made by learned Additional Advocate General that Superintendent of Police may direct to conduct inquiry against police official accused of misconduct and inquiry officer appointed by the Superintendent officer shall record and

readout to the accused officer a statement summarizing the alleged misconduct. Normally, as per service jurisprudence charge sheet is issued by appointing authority on the basis of preliminary inquiry conducted in a particular matter, but in the case at hand there is specific provisions made in the Punjab Police Rules to deal with the departmental inquiries of police officials charged of misconduct. Rules 16.24, as reproduced hereinabove, clearly suggests that police officer accused of misconduct would be brought before an officer empowered to punish him, who in turn would appoint an officer, who is competent to record and readout officer accused of a statement summarizing the alleged misconduct. In the case at hand no doubt, preliminary inquiry came to be instituted on the orders passed by Superintendent of Police, who subsequently after having received report of preliminary inquiry deemed it necessary to appoint inquiry officer. Inquiry officer appointed by Superintendent of Police served delinquent officials i.e petitioners with the charge sheet. Since Rule 16.24 empowers/authorized inquiry officer to serve charge sheet, no fault, if any, can be found with the action of Inquiry officer inasmuch as he after having received order from the Superintendent of Police proceeded to frame charge sheet.

18. If the inquiry report given by the Inquiry officer is read in its entirety vis-à-vis charges framed against delinquent officials, this Court is compelled to agree with Sh. Jagdish Thakur, learned counsel representing the petitioner that once Inquiry officer on the basis of totality of evidence led on record by the prosecution had come to the conclusion that no such evidence has come forth on the basis of which, it can be conclusively proved that these officials extorted money from anyone and they had raided the hotel, there was no occasion for him to hold delinquent officials, guilty of dereliction of duty, indiscipline and negligence in performing duties. If five points formulated by the Inquiry officer while conducting inquiry are perused vis-à-vis evidence led

on record by prosecution to prove the guilt of delinquent officials, it appears that on the date of alleged incident delinquent officials, after having received telephonic call from the Manager of Chand hotel visited the hotel, but by that time boys responsible for making nuisance had already gone to sleep. Though, case of the prosecution against the delinquent officials is that petitioner Sanjeev Kumar after having received telephonic call from the Manager of Chand hotel raided the hotel and confiscated sum of Rs. 21000/- but there is no such evidence available on record. As per prosecution, delinquent officials returned 6-6 ½ thousands rupees to the Manager of the hotel and rupees 200/-each to other 4-5 persons, whereas misappropriated remaining amount of Rs. 14,500/-. However, evidence adduced on record nowhere proves that any gambling took place in the presence of delinquent officials, rather evidence suggests that by the time petitioners reached there all the boys, who were allegedly making nuisance had gone to sleep. If the statement of PW-2, Gabbar Singh, who happened to be Manager of Chand hotel is perused and who had given intimation to the delinquent officials with regard to the alleged incident, has nowhere supported the case of the prosecution, rather he supported the version put forth by the delinquent officials that since some boys after having consumed liquor were making nuisance, he gave telephonic call to petitioner Sanjeev Kumar, but before police reached at the reception of the hotel, all the boys had gone to sleep.

19. There is no dispute that on the date of alleged incident all the delinquent officials had visited the hotel concerned after having received telephonic call from the Manager Sh. Gabbar Singh, but there is no evidence that delinquent officials raided the hotel after having received complaint of gambling, rather material available on record suggests that they had just gone to the hotel on the complaint of nuisance being created by some boys under the influence of liquor. Interestingly, if the evidence led on record by the

prosecution is perused in its entirety allegation of gambling cannot be said to have been proved, rather none of the prosecution witness have admitted the factum with regard to gambling, if any, at the time of alleged incident. All the prosecution witnesses, especially PW-2, Gabbar Singh, at whose instance police had reached the spot, has categorically stated that since some boys after having consumed liquor were making nuisance, he telephonically informed petitioner Head Constable Sanjeev Kumar, who thereafter reached the spot with three police officials, but by that time boys responsible for making nuisance had gone to sleep. Interestingly, in the case at hand prosecution with a view to prove gambling tried to introduce a story that SHO, Dhalli, informed SHO, Sadar that one person Vinod Kumar during investigation revealed that he has lost entire stolen money in the gambling, which took place in hotel Chand in the intervening night of 23rd/24th.5.2005. However, above named Vinod Kumar never came to be cited as prosecution witness. If the aforesaid information was shared by Vinod Kumar, it is not understood why prosecution failed to cite Vinod Kumar as prosecution witness. Though, SHO, Dhalli has been cited as prosecution witness, but his statement is of no relevance for the reasons that when accused Vinod Kumar was very much available attempt should have been made by the prosecution to cite him prosecution witness to prove the factum with regard to gambling or to corroborate the version of SHO, Dhalli.

20. Leaving everything aside, this Court finds from the entire evidence led on record by the prosecution that it miserably failed to prove factum with regard to gambling as well as raid, if any, conducted by delinquent officials on the complaint made by PW-2, Gabbar Singh. Similarly, there is no evidence, worth credence, available on record suggestive of the fact that delinquent officials misappropriated sum of rupees 14,500/-. Prosecution with a view to prove the return of sum of Rs. 20,000/- to Manager by

delinquent officials placed heavy reliance on the statement of PW-1, SHO, Sadar and PW-8, K.G. Kapoor, who had conducted preliminary inquiry. Ex. PW8/A is the report of preliminary inquiry, whereas Ex. PW2/A is the statement made of PW-2, Gabbar Singh during preliminary inquiry. On the basis of aforesaid preliminary inquiry as well as statement of Manager of Chand hotel given during preliminary inquiry Ex.PW2/A, Superintendent of Police deemed it necessary to constitute departmental inquiry and appointed Inquiry officer. Inquiry officer while conducting departmental inquiry could not have placed reliance, if any, on the report given in preliminary inquiry as well as statement, if any, recorded during preliminary inquiry. Once, it stands duly proved on record that when delinquent officials reached reception of the hotel, all the boys responsible for creating nuisance had gone to sleep and no one was found involved in gambling, there was no occasion, if any, for delinquent officials to make entry in daily diary report. Had the delinquent officials caught persons red handed indulging in gambling, they were under obligation to make entry in daily diary report and report the matter to superior authorities, so that case under gambling Act could have been registered against accused. Since, nothing was found on the spot, there was no reason for delinquent officials to either inform the superior authorities or to make entry in the daily diary and hence finding recorded by the investigating officer in this regard holding delinquent officials negligent in service is wholly untenable and cannot be allowed to sustain. If the inquiry report given by the Inquiry officer is read in its entirety, it clearly reveals that Inquiry officer while holding the delinquent officials guilty of dereliction of duty, indiscipline and negligence in performing duties relied heavily upon the findings returned in preliminary inquiry as well as statement made therein by Gabbar Singh, Manger of Chand hotel and SHO, Sadar. Even, if the preliminary inquiry placed on record is perused, it nowhere suggest that Inquiry officer responsible to give preliminary inquiry conducted in depth inquiry, rather he

on the basis of complaint furnished by the SHO to the Superintendent of Police as well as statement recorded by him of Manager of the hotel suggested involvement of delinquent officials in the alleged crime, whereafter Superintendent of Police deemed it necessary to conduct detailed departmental inquiry.

21. By now it is well settled that action, if any, taken prior to disciplinary inquiry shall have no relevance or bearing upon the final disciplinary proceedings. Preliminary inquiry is to do nothing with the inquiry conducted after issuance of charge sheet. Very purpose of conducting preliminary inquiry is to find out whether disciplinary inquiry should be initiated against the delinquent officials or not. However, once full-fledged disciplinary inquiry is conducted, preliminary inquiry would lost its relevance. However, in the case at hand, entire inquiry report furnished by Inquiry officer in the departmental proceedings is based upon the preliminary inquiry report given by the Inquiry officer responsible to conduct preliminary inquiry, wherein he merely had suggested involvement, if any, of delinquent officials in the alleged crime, however involvement, if any, of delinquent officials against the alleged crime was to be proved in accordance with law in full-fledged disciplinary proceedings. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in **Narayan Dattatraya Ramteerthakhar versus State of Maharashtra and others**(1997) 1 Supreme Court Cases 299, wherein it has been held as under:-

> ***"3.Learned counsel for the petitioner sought to contend that the petitioner has not committed any misappropriation and that he was forced to deposit the money. We cannot accept the contention in view of the fact that the petitioner himself had deposited the amount. It is then contended that the preliminary enquiry was not properly conducted and, therefore, the***

> ***enquiry is vitiated by principles of natural justice. We find no force in the contention. The preliminary enquiry has nothing to do with the enquiry conducted after the issue of the charge-sheet. The former action would be to find whether disciplinary enquiry should be initiated against the delinquent. After full-fledged enquiry was held, the preliminary enquiry had lost its importance.***
>
> ***4. Under these circumstances, we do not find any illegality in the order passed by the Tribunal warranting interference. The special leave petition is accordingly dismissed."***

22. Accordingly, in view of the detailed discussion made hereinabove, this Court has no hesitation to conclude that inquiry report furnished by the Inquiry officer is totally contrary to the evidence led on record by the prosecution and same merely being based upon preliminary inquiry cannot be held to be legal one and accordingly cannot be allowed to sustain. This Court finds from the record that appellate authority as well as revisional authority while considering appeal as well as revision petition filed by delinquent officials have dealt with matter in slip shod manner and have not bothered to look into the grounds raised by the petitioner vis-à-vis record of disciplinary proceedings. Had appellate authority as well as revisional authority applied its mind, probably petitioner would not have been compelled to approach this Court in the instant proceedings. Neither appellate authority nor revisional jurisdiction have specifically dealt with grounds raised in the appeal as well as revision petition and as such, orders being passed by them being totally non-speaking and bereft of any reasoning deserves to be quashed and set-aside.

23. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, instant petition is allowed and Charge Sheet (Annexure A-6), charges in brief (Annexure A-7), inquiry

report(Annexure A-9),order dated 19.11.2005 (Annexure A-12), order dated 2.12.2006(Annexure A-14), order dated 19.6.2006 (Annexure A-16) and order dated 29.5.2007(Annexure A-18) are quashed and set-aside and petitioners are held entitled to all the consequential benefits. Pending applications, if any, also stands disposed of.

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

Between:

RANBIR SINGH SON OF SH.KAMAL SINGH
V&PO GHO (FANGOTA) COLONY,
PATHANKOT, PUNJAB-145001.

....PETITIONER

(BY VIJAY VIR SINGH, ADVOCATE)

AND

1. THE STATE OF HP THORUGH PRINCIPLE SECRETARY (HIGHER EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. DIRECTOR, HIGHER EDUCAITN TO THE GOVT OF H.P.
3. THE SECREARY, HIMACHAL PRADESH SUBORDINATE SERVICE SELECTION BOARD, HAMIRPUR, H.P.

....RESPONDENTS

(BY SH. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL WITH SH. R.P. SINGH, SH. KAMAL SHARMA AND SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERALS.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 4446 of 2019
DATED: 10.08.2021

Constitution of India, 1950 – Article 226 - The petition of writ of certiorari for quashing letter asking the petitioner to produce bonafide Himachali certificate and writ of mandamus directing the respondents to give appointment letter to petitioner - Held- R & P Rules and advertisement inviting application from the eligible candidates for post PGT (IP) nowhere suggests that only candidates having bonafide Himachali Certificate are eligible for appointment to the post of PGT (IP)- No doubt as per desirable qualification candidate aspiring to be selected as PGT must have knowledge of customs, manner and dialects of HP but there is nothing that only bonafide Himachali can participate for selection for PGT- neither in advertisement, candidates aspiring to apply were made aware of condition with regard to bonafide Himachali certificate - Held - no citizen on ground of religion, race, caste, sex, descent and place of birth or residence can be declared ineligible or discriminated against state employment - Once respondent No.3 specialised agency found petitioner eligible and selected him in the interview- appointing authority has no right to reject his candidature that too on ground of residence - The action of respondent impressing upon petitioner to produce bonafide Himachali certificate cannot be sustained - Petition allowed.

Cases referred:

Chandrakala Trivedi versus State of Rajasthan and others reported in (2012) 3 SCC 129;

Dr. Pradeep Jain etc. versus Union of India, AIR 1984 Supreme Court 1420;

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

O R D E R

Being aggrieved and dissatisfied with the issuance of letter dated 10th June, 2014 ***(Annexure P-9),*** whereby Joint Directorate of Higher Education, Himachal Pradesh, informed the petitioner, whose name stood

recommended by Secretary, Himachal Pradesh Subordinate Selection Service Board, Hamirpur, District Hamirpur, Himachal Pradesh ***(for short 'Board'***) for appointment to the post of PGT (IP) that since his permanent address mentioned in the application form is outside of State of Himachal Pradesh, hence he may produce his Bona-fide Himachali Certificate on or before 20.06.2014, failing which, his candidature to the post of PGT (IP) shall be cancelled without any further notice, petitioner approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for following reliefs:-

> "(i) That writ in the nature of certiorari may kindly be issued, whereby directing the respondents to quash and set-aside the impugned letter dated 10.6.2014, Annexure P-9, issued by the respondent No.2.
>
> (ii) That writ in the nature of mandamus may kindly be issued, directing the respondents to give appointment letter to the petitioner for the post of PGT (Informatics Practices)."

2. Precisely, the facts of the case as emerge from the record are that vide advertisement dated 13.12.2011 ***(Annexure P-5),*** Board advertized 767 posts of PGT (Informatics Practices) in the Department of Education, Himachal Pradesh. Petitioner being eligible also applied against the post of PGT (IP), Code No.311 and he being fully qualified and eligible was called for interview by the Board. Vide press note issued by aforesaid Board, dated 24.12.2013, petitioner was declared to be successful in interview and his name was reflected in the merit list at Sr.No.287, as contained in Annexure P-8. Pursuant to aforesaid selection of the petitioner his name came to be recommended to the Department of the Education for offering appointment. However, Directorate of Higher Education of Himachal Pradesh vide impugned order dated 10th June, 2014, called upon the petitioner to submit Bona-fide Himachali Certificate, failing which, his candidature against the

post in question shall be cancelled. In the aforesaid background, petitioner approached this Court in the instant proceedings, praying therein reliefs, as have been reproduced hereinabove.

3. Having heard learned counsel representing the parties and perused the material available on record, this court finds that there is no dispute interse parties that petitioner being fully eligible was permitted to participate in the interview by respondent No.3, pursuant to advertisement dated 13.12.2011 issued for appointment against 767 posts of PGI (IP) in the Department of Education. It is also not in dispute that respondent No.3 after having found petitioner fully eligible declared him successful and his name finds mentioned at Sr. No.287 of the merit list issued by respondent No.3. It is also not in dispute that name of the petitioner for appointment to the post of PGT (IP) was recommended by respondent No.3 to respondent No.2, who instead of offering appointment to the petitioner against the post of PGT(IP), called upon him to furnish bona-fide Himachali certificate.

4. Precise grouse of the petitioner, as has been raised in the instant petition is that since there was no bar for the people hailing from other State to participate in selection process initiated by the respondents pursuant to advertisement dated 13.12.2011 ***(Annexure P-5)*** and there was no specific condition contained in the advertisement that only candidates having bona-fide Himachali certificate shall be eligible to participate in the interview, respondent-State could not have asked him to submit bona-fide Himachali certificate that too after his being selected in selection process.

5. Mr. R.P. Singh, learned Deputy Advocate General representing the respondents while referring to the reply filed on behalf of respondents No. 1 and 2, vehemently argued that since as per existing R&P Rules, post of PGT falls in Class-III (Non-Gazetted) and for every Non-Gazetted posts only bona-fide Himachali's having knowledge of customs, manner and dialects of Himachal Pradesh are eligible for appointment and as such, Directorate of

Higher Education rightly called upon the petitioner to produce the bona-fide Himachali certificate. However, this Court having carefully perused the R&P Rules i.e. Annexure P-10, framed by the Department of Higher Education Government of Himachal Pradesh for appointment of PGT (IP) Class-III, finds no force in the submissions made by learned Deputy Advocate General.

6. R &P Rules, if read in its entirety nowhere suggests that only candidates having bona-fide Himachali certificate are eligible to participate in the selection process, if any, initiated for the appointment to the post PGT (IP) in the Department of Education, Himachal Pradesh. No doubt, as per desirable qualification contained in clause 2(b) candidate aspiring to be selected as PGT must have knowledge of customs, manner and dialects of Himachal Pradesh, but definitely there is nothing in the R&P Rules suggestive of the fact that only bona-fide Himachali's can participate for selection against the post of PGT in the Department of Education, Himachal Pradesh.

7. Similarly, bare perusal of advertisement issued by respondent No.3, inviting applications from the eligible candidates for 767 posts of PGT (IP) in the Department of Education, Himachal Pradesh, nowhere suggest that candidates aspiring to apply were made aware of the conditions, if any, with regard to bona-fide Himachali certificate. Learned Deputy Advocate General after having carefully perused both R&P Rules and advertisement, dated 13.12.2011, was unable to point out provision, if any, contained in both the documents, as referred hereinabove, with regard to necessity of producing bona-fide Himachali certificate at the time of interview. Learned Deputy Advocate General was also unable to place on record administrative instructions, if any, issued by State of Himachal Pradesh with regard to requirement of bona-fide Himachali certificate while applying for the post of PGT in the Department of Education, Himachal Pradesh. Otherwise also, administrative instructions, if any, cannot supersede R&P Rules, which are

framed by the appropriate Government under Article 309 of the Constitution of India.

8. By now it is well settled that no citizen on the grounds of religion, race, caste, sex, descent, and place of birth, residence or any of them can be declared ineligible or discriminated against the state employment. So far as employment under the State or any local or other authority is concerned, no citizen can be given preference nor can any discrimination be practiced against him on the ground of residence. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Dr. Pradeep Jain etc. versus Union of India,*** AIR 1984 Supreme Court 1420, wherein it has been held as under:-

> "5. We may point out at this stage that though Article 15 (2) clauses (1) and (2) bars discrimination on grounds not only of religion, race, caste or sex but also of place of birth, Article 16 (2) goes further and provides that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for or discriminated against in state employment. So far as employment under the state, or any local or other authority is concerned, no citizen can be given preference nor can any discrimination be practised against him on the ground only of residence. It would thus appear that residential requirement would be unconstitutional as a condition of eligibility for employment or appointment to an office under the State and having regard to the expansive meaning given to the word `State' in Ramana Dayaram Shetty v. International Airport Authority of India & Ors., it is obvious that this constitutional prohibition would also cover an office under any local or other authority within the State or any corporation, such as a public sector corporation which is an instrumentality or agency of the State. But Article 16 (3) provides an exception to this rule by laying down that Parliament may make a law

"prescribing, in regard to a class or classes of employment or appointment to an office under the government of, or any local or other authority, in a state or union territory, any requirement as to residence within that state or union territory prior to such employment." or appointment Parliament alone is given the right to enact an exception to the ban on discrimination based on residence and that too only with respect to positions within the employment of a State Government. But even so, without any parliamentary enactment permitting them to do so, many of the State Governments have been pursuing policies of localism since long and these policies are now quite wide spread. Parliament has in fact exercised little control over these policies States. The only action which Parliament has taken under Article 16 (3) giving it the right to set residence requirements has been the enactment of the Public Employment (Requirement as to Residence) Act, 1957 aimed at abolishing all existing residence requirements in the States and enacting exceptions only in the case of the special instances of Andhra Pradesh, Manipur, Tripura and Himchal Pradesh. There is therefore at present no parliamentary enactment permitting preferential policies based on residence requirement except in the case of Andhra Pradesh, Manipur Tripura and Himachal Pradesh where the Central Government has been given the right to issue directions setting residence requirements in the subordinate services. Yet, in the face of Article 16 (2), some of the States are adopting `sons of the soil' policies prescribing reservation or preference based on domicile or residence requirement for employment or appointment to an office under the government of a State or any local or other authority or public sector corporation or any other corporation which is an instrumentality or agency of the State. Prima facie this would seem to be constitutionally impermissible though

> we do not wish to express any definite opinion upon it, since it does not directly arise for consideration in these writ petitions and civil appeal".

9. Co-ordinate Bench of this Court vide judgment dated 10th April, 2015 passed in CWP No.2007 of 2013, titled as ***Anshul Sharma versus State of H.P. and others***, has held that once Recruiting Agency has recommended the name of the candidate for particular post, appointing department in which candidates is to be offered appointment cannot reject the candidature of the selected candidate on any ground.

> "10. The apex Court in **Chandrakala Trivedi** versus **State of Rajasthan and others** reported in **(2012) 3 SCC 129**, held that the word "equivalent" must be given a reasonable meaning. If a person is provisionally selected, it is not within the powers of the department to refuse appointment when he has been found suitable by the Commission and recommendation has been made for his appointment. It has been further held that a recommendee has legitimate expectation which cannot be taken away on flimsy grounds. It apt to reproduce paras 7 to 10 of the said judgment herein.
>
> "7. In the impugned judgment, the High Court has given a finding that the higher qualification is not the substitute for the qualification of Senior Secondary or Intermediate. In the instant case, we fail to appreciate the reasoning of the High Court to the extent that it does not consider higher qualification as equivalent to the qualification of passing Senior Secondary examination even in respect of a candidate who was provisionally selected.
>
> 8. The word 'equivalent' must be given a reasonable meaning. By using the expression, 'equivalent' one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that after a person is provisionally

selected, a certain degree of reasonable expectation of the selection being continued also comes into existence.

9. Considering these aspects of the matter, we are of the view that the appellant should be considered reasonably and the provisional appointment which was given to her should not be cancelled. We order accordingly. However, we make it clear that we are passing this order taking in our view the special facts and circumstances of the case.

10.We hope and expect that the respondent Rajasthan Public Service Commission shall make a suitable recommendation in the light of the observation in this judgment within four weeks from today and the State, which is also a party, will make an appointment accordingly within four weeks thereafter. The appeal is disposed of. No costs."

11. The apex Court has also dealt with this issue in case **titled Dr. Basavaiah v. Dr. H.L. Ramesh and others with Dr. Manjunath v. H.L. Ramesh and others** reported in **2010 AIR SCW 5907**. It is apt to reproduce paras 32, 33, 35 and 44 of the said judgment herein.

"32. According to the experts of the Selection Board, both the appellants had requisite qualification and were eligible for appointment. If they were selected by the Commission and appointed by the Government, no fault can be found in the same. The High Court interfered and set aside the selections made by the experts committee. This Court while setting aside the judgment of the High Court reminded the High Court that it would normally be prudent and safe for the courts to leave the decision of academic matters to experts. The Court observed as under:

"7. ....When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegations of mala

> fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally can be..."
> 33. In Dr. J. P. Kulshrestha & Others v. Chancellor, Allahabad University & Others (1980) 3 SCC 418, the court observed that the court should not substitute its judgment for that of academicians:
> "17. Rulings of this Court were cited before us to hammer home the point that the court should not substitute its judgment for that of academicians when the dispute relates to educational affairs. While there is no absolute ban, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies.
> ... ..." 34..... .....
> 35. In Neelima Misra v. Harinder Kaur Paintal & Others (1990) 2 SCC 746, the court relied on the judgment in University of Mysore (AIR 1965 SC 491) and observed that in the matter of appointments in the academic field, the court generally does not interfere. The court further observed that the High Court should show due regard to the opinion expressed by the experts constituting the Selection Committee and its recommendation on which the Chancellor had acted.
> 36 to 43. ....
> 44. In All India Council for Technical Education v. Surinder Kumar Dhawan & Others (2009) 11 SCC 726, again the legal position has been reiterated that it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies."

10. Once respondent No.3 being specialized agency found petitioner to be eligible and selected him in the interview, appointing authority has no right, whatsoever to reject his candidature that too on the ground of residence. Since condition with regard to bona-fide Himachali certificate never came to be incorporated in the advertisement issued by respondent No.3 at the behest of

appointing department i.e. respondent No.2 and such, condition also does not exists in the R&P Rules, action of respondents in impressing upon the petitioner to produce the bona-fide Himachali certificate cannot be allowed to sustain.

11. Consequently, in view of the detailed discussion made hereinabove, the present petition is allowed and order dated 10th June, 2014 (Annexure P-9) is quashed and set-aside. Respondent No.2 is directed to offer appointment to the petitioner, if any, against the post of PGT (IP), as per the recommendation made by Recruiting Agency (respondent No.3) vide press note Annexure P-8, wherein name of the petitioner figures at Sr. No.287. Since pursuant to order dated 3.9.2014 passed by Division Bench of this Court one post of PGT (Informatics Practices) has been kept vacant, there is no difficulty for the respondents to offer appointment to the petitioner against such post. Since petitioner has been running from pillar to post to get his due for more than seven years, this Court hopes and trust that needful shall be done within a period of two weeks from today. Pending application(s), if any, also stands disposed of.

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

Between:-

SMT. RAVINDER KAUR, WIDOW OF SHRI SURJEET SINGH, SON OF LATE SHRI BALWANT SINGH, R/ FLAT NO. 6, VISHNU BHAWAN, BEHIND HOTEL PRESTIGE, NEAR SABZI MANDI, SHIMLA, H.P.

....PETITIONER

(BY MR. R.K. BAWA, SENIOR ADVOCATE, WITH MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

1. SHRI RAJIV SOOD
2. SHRI VIVEK SOOD

(BOTH SONS OF LATE SHRI OM PRAKASH SOOD, C/ O FRIENDS DRY CLEANERS, 43, THE MALL, SHIMLA-1, H.P.

...RESPONDENTS

(BY SHRI ARJUN LALL, ADVOCATE)

2. CIVIL REVISION No. 18 of 2020

Between:

SMT. RAVINDER KAUR, WIDOW OF SHRI SURJEET SINGH, SON OF LATE SHRI BALWANT SINGH, R/ FLAT NO. 6, VISHNU BHAWAN, BEHIND HOTEL PRESTIGE, NEAR SABZI MANDI, SHIMLA, H.P.

.....PETITIONER

(BY MR. R.K. BAWA, SENIOR ADVOCATE, WITH MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

1. SHRI RAJIV SOOD
2. SHRI VIVEK SOOD

(BOTH SONS OF LATE SHRI OM PRAKASH SOOD, C/ O FRIENDS DRY CLEANERS, 43, THE MALL, SHIMLA-1, H.P.

.....RESPONDENTS.

(BY SHRI ARJUN LALL, ADVOCATE)

Civil Revision No. 15 of 2020 a/w
Civil Revision No. 18 of 2020
Date of Decision: 12.08.2021

H.P. Urban Rent Control Act, 1987 - Section 24(5) – Revision against Order -Civil Revision challenging the orders passed by Ld. Rent Controller setting aside dismissal order and restoring the Rent petition to its original number – A party should not suffer for the acts of omission of counsel- It is not mandatory that in every case ,issues have to be framed and discretion stands conferred upon the courts including Rent Controller, as to whether in the peculiar facts and circumstances of a particular case, issues need to be framed or not- the C.R- being without merit- dismissed.

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

O R D E R

CMP(M) No. 67 of 2020 in Civil Revision No. 15 of 2020 & CMP(M) No. 78 of 2020 in Civil Revision No. 18 of 2020

By way of these applications, a prayer has been made for condonation of delay in filing the present petitions.

2. Having heard Mr. R.K. Bawa, learned Senior Counsel for the applicant(s) and Mr. Arjun Lall, learned counsel for the respondents and after perusing the averments made in the applications, this Court is of the view that it will be in the interest of justice in case these applications are allowed and the petitions are heard on merit. Accordingly, the delay in filing the Civil Revision Petitions is condoned. Applications stand disposed of.

CIVIL REVISION No. 15 of 2020 a/w
CIVIL REVISION No. 18 of 2020

3. Both these petitions, as agreed, are being disposed of by a common order.

4. Brief facts necessary for the adjudication of these petitions are as under:-

Predecessor-in-interest of the respondents herein filed a Rent Petition under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 against one Smt. Kulwant Kaur, *inter alia,* on the grounds of arrears of rent and cease to occupy.

5. This petition was initially dismissed in default on 11.09.1997, but was restored on an application so filed by the landlord on 23.10.1998. Thereafter, the same was again dismissed in default on 21.06.1999. Application filed for restoration of the petition dismissed in default, itself was dismissed in default on 16.12.1999. Thereafter, another application filed for

the same relief met with the same fate on 24.02.2000. Another application filed for restoration of the petition was dismissed on merit on 04.09.2004.

6. Feeling aggrieved, the landlord preferred an appeal, which was allowed by the learned Appellate Authority. The order passed by the learned Appellate Authority was assailed by the respondents therein by way of Revision Petition No. CR No. 179 of 2006 before this Court, which was disposed of by this Court in the following terms:

> *"6. Learned Appellate Authority, as such, has rightly set aside the order dated 04.09.2004 passed by learned Rent Controller in an application filed with a prayer to recall the order dated 24.2.2020. The impugned order, as such, cannot be said to be illegal or contrary to the facts and circumstances of the case. The same rather is upheld.*
>
> *7. In view of the present being an old matter, there shall be a direction to learned Rent Controller to decide the application filed with a prayer to recall the order dated 24.2.2000 within a period of two months in accordance with law and in the light of the observations hereinabove.*
>
> *8. It is also left open to learned Rent Controller to consider the law laid down by this Court in CR No. 147 of 2007, titled Shri Gurdev Singh Versus Shri Khuswant Mallick & Ors., decided on 5.12.2011 which is upheld even by Hon'ble Apex Court also vide order dated 4.7.2013 passed in Special Leave to Appeal (Civil) No(s).3775/2012.*
>
> *9. The parties, through learned counsel representing them are directed to appear before the learned Rent Controller on 6.9.2018."*

Consequent thereto, learned Rent Controller vide impugned order dated 29.11.2018 (assailed in CR No. 15 of 2020), firstly set aside the order of dismissal of application dated 16.12.1999 and restored the same to its original number. Thereafter, CMP No. 17-6 of 1999 was allowed by the learned Rent

Controller vide impugned order dated 19.03.2019 (assailed in CR No. 18 of 2020) in the following terms:-

> *".....There is nothing on record which could suggest that petitioner got anything by not appearing the Court. There is apparently no malafide on the part of the applicant, rather, it appears that he suffered as his counsel did not appear. As such, petitioner cannot be allowed to suffer on account of fault on part of the counsel and it is manifest that reasons are satisfactory. Accordingly, application filed by the applicant/petitioner is allowed and order of dismissal dated 21.06.1999 is set aside and petition is ordered to be restored to its original number. Application be tagged with main file after due completion. Let office to check, report and register petition to its old number and be put up for 18.04.2019."*

7. Feeling aggrieved, the present petitioner has assailed both these orders before this Court.

8. Learned Senior Counsel for the petitioner argued that the orders passed by the learned Rent Controller are not sustainable in the eyes of law, as the learned Rent Controller has erred in not appreciating the conduct of the respondent-landlord, who unnecessarily lingered on the litigation and, thus, caused undue hardship to the petitioner. He further submitted that learned Rent Controller has also not appreciated that by allowing the applications and passing the impugned orders, grave mis-carriage of justice has been caused to the petitioner, as the rights which stood accrued upon the petitioner, have been now taken away. He further submitted that the factum of dismissal in default could not have been decided by the learned Court below without framing of the issues and directing the parties to lead evidence in this regard. Accordingly, a prayer has been made that both the petitions be allowed and the impugned orders be set aside.

9. Opposing the petitions, Mr. Arjun Lall, learned counsel for the respondents has submitted that there is no infirmity with the orders, which have been passed by the learned Rent Controller, as the learned Rent Controller has rightly allowed the application which was filed for restoration of the application filed for restoration of the main petition, as the averments made in the same made it abundantly clear that it was on account of *bonafide* reasons that the counsel could not appear before the Court. He has further argued that there is no infirmity in the orders vide which the main Rent Petition has been restored to its original number, because non-appearance on the said date also, on the part of the petitioner, was on account of act of omission on the part of his counsel. As per him, a party should not suffer for the acts of omission of the counsel. He further submits that it is not as if in each and every case issues have to be framed wherein an application is filed for restoration of proceedings for dismissal in default and the present petitioner has also not been put to any inconvenience nor any valuable right of the petitioner has been denied. On these counts, he has prayed for the dismissal of the petitions.

10. I have heard learned counsel for the parties and also gone through the impugned orders as well as other pleadings on record.

11. It is not in dispute that one of the applications filed for restoring the application, filed for restoring another application for restoring the main petition, came up for adjudication before this Court and this Court allowed the same and ordered learned Rent Controller to adjudicate the application filed for restoring the application, filed for restoring the main petition.

12. A perusal of the findings returned by the learned Rent Controller demonstrates that primarily what has weighed with the learned Rent Controller while allowing the applications, was the fact that the main petition as well as subsequent applications stood dismissed on account of the absence of the counsel. Learned Rent Controller also observed that non-appearance of

the parties before the Court was not intentional, but on account of in action on the part of the counsel. Besides this, what further weighed with the learned Rent Controller, was that it would be in the interest of justice to give an opportunity to the parties to put forth their respective contentions in the main petition, on merits, rather than closing the proceedings on technical grounds.

13. In the considered view of this Court, the reasons which have weighed upon the learned Rent Controller while allowing the applications in issue, are cogent reasons, as it is clearly borne out from the record of the case that learned counsel representing the landlord, for some reason or the other, did not appear when the main petition was dismissed in default as well as when the subsequent applications filed for restoration were dismissed in default. This Court is of the considered view that a party should not suffer for the acts of omission of the counsel and therefore, learned Rent Controller rightly allowed the applications in issue, so that the matter could be heard on merit.

14. As far as the contention raised by learned Senior Counsel for the petitioner that no issues were framed for deciding the fact whether the non-appearance of the counsel was intentional or not is considered, in the considered view of this Court, it is not mandatory that in every case, issues have to be framed and discretion stands conferred upon the learned Courts below, which obviously includes the Court of learned Rent Controller also, as to whether in the peculiar facts and circumstances of a particular case, issues need to be framed or not. In the present case, learned Rent Controller has exercised the discretion by observing that there was no need to fame the issues and the sane cannot be faulted with.

15. As far as the contention of learned Senior Counsel for the petitioner that rights of the petitioner have been taken away by way of the impugned orders is concerned, this Court is of the considered view that the

impugned orders advance the cause of justice and do not in any manner abridge any of the rights of the petitioner.

16. Accordingly, these two petitions being devoid of any merit, are disposed of without interfering with the impugned orders, but with the observation that the learned Rent Controller may make an endeavour to decide the *lis* between the parties as expeditiously as possible. Miscellaneous applications, if any, also stand disposed of.