**THE**

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***And***

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## SUBJECT INDEX

### 'A'

**Arbitration and Conciliation Act, 1996**- Section 9- Dispute between the parties has been referred to Arbitrator- Petitioner aggrieved from interim order assailed the same- Held- Order dated 28.03.2022 modified to the extent that respondents are restrained from taking any coercive action against the petitioner, including recovery of amount already paid, but respondents shall have liberty to invite fresh tenders for balance work of the Dam, if so advised and desired as such and the petitioner shall also have right to claim damages, if any, on account of that and the aforesaid order shall be subject to final outcome of the Award passed by learned Arbitrator and in case fresh tenders are invited, the same shall not be finalized without leave of learned Arbitrator- Parties are at liberty to apply or pray before learned Arbitrator for alteration, vacation or modification of the aforesaid interim order – Petition disposed of accordingly. (Para 9) Title: GSCO Infrastructure Pvt. Ltd. vs. State of H.P. Page-28

**Arbitration and Conciliation Act, 1996**- Section 11(6)- Appointment of Arbitrator- Held- Where in terms of the agreement, arbitration clause has already been invoked by one of the parties thereto, provisions of sub-section (6) of S.11 cannot be invoked and in that case, the aggrieved party has remedy to file petition under S.13 of the Act before arbitrator laying therein challenge to the appointment of arbitrator by the other party in terms of the agreement- Petition not maintainable. (Para 26) Title: State of HP vs. M/s BMD Pvt. Ltd. Page – 607

### 'C'

**Central Civil Services (Pension) Rules, 1972** - **H.P. Civil Services Contributory Pension Rules, 2006**- Petitioner a forest worker served 26 years but denied pension- Held- It becomes crystal clear that respondent-department is itself very well aware that period of work charge service followed by regular service is to be considered for the purpose of grant of pension- That being so, respondent-department cannot take contrary plea to defeat the pension claim of the petitioner- Petti6ioner entitled for pension- Petition allowed. (Para 4(v) (vi) (vii)] Title: Bhim Sen vs. State of H.P. Page-353

**Code of Civil Procedure, 1908**- Order VII Rule 10, 11 and Section 151- Return of plaint- **Commercial Courts Act, 2015**- Sections 7 and 12- The plaintiffs have failed to disclose that commercial dispute raised by the plaintiffs was of what special value, therefore, suit is not maintainable as a commercial suit- Held- It is apparent from the contents of the plaint that the dispute raised by the plaintiff is a commercial dispute and the specified value in relation to the commercial disputes stands spelled out by the plaintiff in Paras 45 and 46 of the plaint-Application dismissed. (Para 18) Title: Boehringer Ingelheim Pharma GmbH & Co. & another vs. MSN Laboratories Pvt. Ltd. Page- 43

**Code of Civil Procedure, 1908-** Order 39 Rule 1 & 2- Section 151- Suit for permanent prohibitory injunction along with application for interim injunction Restraining the respondents from infringing the patent rights of Applicant No. 1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product, Linagliptin in any form whatsoever- Held- Prima facie case and balance of convenient in favour of plaintiffs- If an infringer is not restrained from infringing the patent of patent holder, then, but of course, the patent holder will suffer from irreparable loss and it cannot be said that the infringer stands on the same pedestal on which the patent holder is- Applications under Order 39 Rule 1 & 2 CPC allowed. (Para 31, 32) Title: Boehringer Ingelheim Pharma Gmbh & Co. & another vs. MSN Laboratories Pvt. Ltd. Page-492

**Code of Civil Procedure, 1908**- Section 100- Regular Second Appeal- Suit for permanent prohibitory and mandatory injunction- Suit decreed and Ld. Appellate Court upheld the judgment and decree- Report of Local Commissioner demonstrated that the defendant had encroached upon part of the suit land- Held- Concurrent findings of fact returned by the Ld. Courts below- No perversity with the findings returned by the Courts below- No substantial question of law in the present appeal- Appeal dismissed. (Para 7, 8) Title: Dharminder Kumar vs. Mohinder Kumar Page-8

**Code of Civil Procedure, 1908**- Section 100- Regular Second Appeal- Indian Evidence Act, 1872- Section 91- Suit for redemption was dismissed- Appeal was also dismissed- Mortgage deed claimed to be written but not produced during the trial- Held- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document,

and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself- Findings not perverse- Appeal dismissed. (Para 18) Title: Parkash & others vs. Mohinder Singh & another Page-710

**Code of Civil Procedure, 1908-** Section 115- Revision- Order 21 Rule 32- Execution- Executing Court ordered for the attachment of immovable property of judgment debtor as well as detention of the judgment debtor in civil imprisonment- Held- No demonstrated by the petitioner that the findings returned by the Ld. Executing Court were perverse- Judgment debtor has been found to have encroached upon the suit land during demarcation- No infirmity in the order of Ld. Executing Court- Revision dismissed. (Para 10, 11) Title: Chaman Lal vs. Kulbir Singh & another Page-581

**Code of Criminal Procedure, 1973**- Section 397- Criminal Revision- Petitioner assailed the conviction and sentenced passed by Ld. JMFC, Bilaspur affirmed by Ld. Sessions Judge, Bilaspur, whereby petitioner was held guilty of having committed offence under Section 409 IPC- Held- Having scanned the entire evidence available on record, this court finds no illegality or infirmity in the conclusion drawn by learned Courts below that the prosecution has successfully proved its case against the accused beyond reasonable doubt that the accused misappropriated the amount received by him as fine from PW-8, Sukh Dei and as such, committed criminal breach of trust qua said amount- Petition dismissed however benefit of the Probation of Offenders Act extended. (Para 27, 29) Title: Shyam Lal vs. State of H.P. Page-678

**Code of Criminal Procedure, 1973**- Sections 397, 401- Judgment of conviction and order of sentence under Section 138 of Negotiable Instruments Act- Held- once factum with regard to issuance of cheque as well as signatures thereupon are admitted by accused, presumption as available under Section 118 and 139 of the Act, is applicable in favour of complainant. No doubt, aforesaid presumption is rebuttable, but for that purpose accused is to raise probable defence either by leading some positive evidence or to refer to the evidence led on record by the complainant. However, in the case at hand, no probable defence has been raised by the accused to rebut the presumption of issuance of cheque for discharge of lawful liability by him in favour of

complainant- No probable defence has been raised by the accused to rebut the presumption of issuance of cheque for discharge of lawful liability by him in favour of complainant- No infirmity in judgment passed by Ld. Trial Court and upheld by Ld. Appellate Court and as such same are upheld- Revision dismissed. (Para 12, 20) Title: Ram Chand vs Dhian Singh Page-478

**Code of Criminal Procedure, 1973**- Section 439- Bail- **Indian Penal Code, 1860**- Sections 307, 323, 324, 147, 148, 149 & 506- Arms Act- Sections 52, 54 & 59- Held- Object of the bail is to secure the attendance of the accused during trial- Bail is not to be withheld as a punishment- Bail application allowed subject to conditions. (Para 8, 10, 11, 12) Title: Rajat Rana vs. State of H.P. Page-401

**Code of Criminal Procedure, 1973**- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 18 & 29- 2.930 Kg. opium- Held- Object of the bail is to secure the attendance of the accused during trial- Bail is not to be withheld as a punishment- Bail application allowed subject to conditions. (Para 7, 11) Title: Mohan Gharati vs. State of H.P. Page-379

**Code of Criminal Procedure, 1973**- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 & 29- 1.135 Kg. charas- Held- Object of the bail is to secure the attendance of the accused during trial- Bail is not to be withheld as a punishment- Bail application allowed subject to conditions. (Para 7, 11) Title: Het Ram vs. State of H.P. Page-389

**Code of Criminal Procedure, 1973**- Section 482- **Indian Penal Code, 1860**- Sections 420, 467, 468, 471 and 120-B- Quashing of F.I.R. dispute being of civil nature- Held- Foul play of the petitioner is manifest and it does not appear to be a simple case of sale of land, which can be termed to be an issue of civil nature- No a fit case for quashing- Petition dismissed. (Para 6, 7) Title: Sarmad @ Sharmad vs. State of H.P. Page-1

**Code of Criminal Procedure, 1973**- Section 482- **Indian Penal Code, 1860**- Sections 307, 382, 201 and 34- Scope- Held- It cannot be said that the allegations which have been made against the petitioner even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the petitioner- The variety of the veracity of the statements is to be tested at the time of trial and not at this stage- Petition dismissed. (Para 17 to 20) Title: Reema Devi vs. State of H.P.

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**Code of Criminal Procedure, 1973**- Section 482- Petitioner seeking extension of the parole granted to petitioner on medical grounds- Held- Instead of filing petition under Section 482 Cr.P.C. a petitioner Article 226 of the Constitution of India shall be maintainable- Petition disposed of. (Para 3) Title: Mohd. Margoob vs. State of H.P. Page-112

**Code of Criminal Procedure, 1973**- Section 482- Quashing of FIR as well as judgment of Ld. Judicial Magistrate First Class, Indora- Amicable settlement between the parties- Held- Fuided by the principles laid down by Hon'ble Supreme Court of India in Ramgopal's case (supra), this petition is allowed. (Para 8, 9) Title: Raj Kumar @ Raj & others vs. State of H.P. Page-253

**Code of Criminal Procedure, 1973**- Section 482- Quashing of FIR- **Indian Penal Code, 1860**- Section 306 read with Section 34- Held- Though, offence alleged to have been committed is serious in nature but, definitely, it cannot be said to be heinous – No impediment in quashing the FIR- Petition allowed. (Para 11, 12) Title: Mohd. Arif & others vs. State of H.P. Page-425

**Code of Criminal Procedure, 1973**- Section 482- Quashing of order passed by Ld. District Consumer Disputes Redressal Forum, Una, camp at Hamirpur- Held- Petition not maintainable in view of the statutory remedy ebing available to the petitioner against the order which has been assailed- Petition dismissed. (Para 3, 4) Title: Sneh Lata Mandial vs. State of H.P. Page-98

**Code of Criminal Procedure, 1973**- Section 482- Quashing the complaint under Section 138 of Negotiable Instruments Act, 1881- Held- Trial issue involved in the matter- It cannot be said that on the strength of provisions of Section 31(2) of the Partnership Act, any case has been made out for quashing of the complaint against the petitioners- Petition dismissed. (Para 10) Title: Vikas Bhatnagar & another vs. M/s Kay Bee Sons & others Page-258

**Code of Criminal Procedure, 1973**- Sections 438- **Indian Penal Code, 1860**- Sections 409 and 120B- It cannot be said to be totally false case and, therefore, in present case accusation cannot be said to have been made with object to injuring or humiliating the petitioners by having them so arrested without any cause- Bail petition dismissed. (Para 18) Title: Sunil Dutt & others vs. State of H.P. Page-135

**Code of Criminal Procedure, 1973**- Sections 482- Petition for quashing the judgment passed by the Ld. J.M.F.C. on the ground that the matter has been amicably settled between the parties- Held- Taking into consideration the circumstances surrounding the incident and the manner in which the compromise has been arrived at between the parties as also the nature and seriousness of the offence, this petition deserves to be allowed, more so for the reason that the complainant herself has given her consent to this effect- Petition allowed. (Para 7 to 9) Title: Pravesh Rani vs. State of H.P. Page-130

**Code of Criminal Procedure, 1973**- Sections 482- Petitioner assailed the order vide which right of the accused to lead defence evidence has been closed when despite reasonable opportunities accused failed to adduce evidence- Held- Once the accused had taken steps for summoning the witnesses and summons received unserved then the prudent thing for learned Trial Court would have been to fix another date for recording the statement of said defence witnesses rather than closing the evidence- Order not sustainable- Petition allowed. (Para 5) Title: Amarjit Malhotra vs. Brijandar Sharma Page-23

**Code of Criminal Procedure, 1973**- Sections 482- Quashing the order of Ld. Sessions Judge passed in criminal revision as well as order of Ld. Judicial Magistrate First Class, Mandi- Application of petitioner/ accused under Section 227 Cr.P.C. for discharge was dismissed- Held- Ld. Trial Court and Ld. Remand Court rightly held that there are sufficient grounds to proceed against the Copyright Act and recorded prima facie satisfaction to proceed against the petitioner/ accused- Petition dismissed. (Para 8) Title: Raman Vaidya vs. State of H.P. Page-19

**Code of Criminal Procedure, 1973**- Sections 482, 107, 150, 145- Petition for quashing the order passed by Ld. Additional Sessions Judge in criminal revision affirming the order of Ld. Sub Divisional Magistrate- Held- There is complete non-compliance of provisions contained under Section 111 of Cr.P.C. and even the revisional Court lost sight of this **important** aspect of compliance of provisions of Section 111 Cr.P.C .- Summons issued to the petitioners being bad in law, are not sustainable in the eye of law- Petition allowed and orders passed by Ld. Additional Sessions Judge and Sub Divisional Magistrate are quashed and set aside. (Para 14, 15, 16) Title: Kamla Devi & another vs. State of H.P & others Page-114

**Code of Criminal Procedure, 1973**- Sections 482, 125- Petitioner challenged

the order of Ld. Additional Sessions Judge, passed in criminal revision modifying order of interim maintenance passed by Ld. Judicial Magistrate First Class- Held- Amount of interim maintenance enhanced from Rs.800 to Rs.2000 cannot be said to be on higher side and petitioner being father of respondent is duty bound to fulfill the basic necessities of the respondent till he attains majority- Petition dismissed. (Para 6, 7) Title: Sandeep Gautam vs. Dharuv Dutt Gautam Page-126

**Constitution of India, 1950**- Article 226- Applicant sought reevaluation of his OMR/Answer sheet – Post of Constable (Male) in the Police Department- Held- Answer sheet of the petitioner was shown to him who gave his satisfaction qua the official answer key- Petition dismissed. (Para 5 to 7) Title: Anshul Sharma vs. State of H.P. Page-194

**Constitution of India, 1950**- Article 226- Compassionate appointment- Father of petitioner died during employment with respondent- His case for compassionate appointment was rejected- Held- Very purpose and object of compassionate appointment is to provide immediate respite to the family members of an employee, who dies in harness- Condition does not only appears to be harsh but same is also without any rationale- Petition allowed. (Para 3 & 4) Title: Sanjay Kumar vs. Union of India & others Page-162

**Constitution of India, 1950**- Article 226- Petitioner appointed as Chowkidar on compassionate ground- The grievance of the petitioner is that in view of his educational qualification he should be appointed as a Clerk instead of chowkidar on compassionate ground- Held- When the petitioner admittedly did not fulfill the qualification criteria required for appointment to the post of clerk in accordance with R&P Rules framed for the said post then the respondents cannot be directed to change his designation from the post of Chowkidar to that of Clerk- Petition dismissed. [Para 5(iii)] Title: Pratap Singh vs. State of H.P. Page-182

**Constitution of India, 1950**- Article 226- Compassionate appointment- Father of petitioner who was service as Constable in the Police Department dies in harness and at that time petitioner was minor- His case for compassionate appointment was rejected when he applied after attaining the age of majority on the ground of delay- Held- There was no delay on the part of the petitioner in approaching the department for grant of compassionate appointment as on attaining the age of majority he immediately took up the

case with the Department- Petition allowed. (Para 6 & 7) Title: Ravi Sharma vs State of H.P. Page-173

**Constitution of India, 1950-** Article 226- Compassionate appointment- Petitioner applied for job under the policy of the Government regarding employment on compassionate ground after the death of his father serving as Beldar in H.P.P.W.D. on regular basis- Application was rejected by the department- Held- Ignoring the daughter of the deceased which taking into consideration the number of the family members is arbitrary and mandamus is issued to offer appointment to petitioner on compassionate basis as per his qualification. (Para 6, 7) Title: Rakesh Kumar vs. State of H.P. Page-589

**Constitution of India, 1950**- Article 226- Marks of non-employment certificate while considering for batch wise post of TGT (Arts) not given to petitioner- Held- Non Employment Certificate was issued by Competent Authority in accordance with law- Selection Committee has done injustice to the petitioner and the petitioner has been denied one mark for the fault of his- Petition allowed. (Para 9 & 10) Title: Suresh Kumar vs. State of H.P. Page-166

**Constitution of India, 1950**- Article 226- New Pension Scheme- Dispute- Payment of gratuity to petitioner as they stood retired before the publication of the said Office Memorandum dated 17.08.2006 in the Rajpatra- Held- Petitioners shall make appropriate applications for grant of benefit of due defined Contributory Pension Scheme through their parent department within a period of four weeks from today and the same shall be processed by the department concerned and appropriate relief as is admissible to the petitioners shall be granted to them within a period of eight weeks as from the date of receipt of their respective applications- Petition disposed of. (Para 7) Title: Paramjeet Singh vs. State of H.P. & others Page-197

**Constitution of India, 1950**- Article 226- Petitioner being aggrieved and dissatisfied with issue of communication issued by the Special Secretary (Power) to the Government of Himachal Pradesh has sought to issue writ of certiorari in order to quash the findings leading to the issuance of impugned communication and further writ of mandamus directing the respondents to refund the sum of Rs. 288.96 crore to petitioner- Held- Retaining the money of the petitioner by the respondent-State, when project has been allotted to SJVNL, amounts to unjust enrichment of the State, which is not permissible in law. It is another aspect of the matter that the said project could never be

executed on the ground, in view of the objections raised by the general public- State cannot be allowed to take advantage of its own wrongs- Petition allowed- Communication dated 30.11.2017 (p.368) whereby decision of the Cabinet regarding implementation of Jangi-Thopan HEFP(480 MW) and Thopan-Powari HEP (480 MW) was approved and further the communication dated 7.12.2017 (Annexure-R), whereby decision of Council of Ministers to review decision dated 4.9.2015 was conveyed to the petitioner, are hereby quashed. Respondent-State is directed to pay the amount of Upfront Premium to the petitioner in terms of the decision of the Council of Ministers dated 4.9.2015, within a period of two months from today, failing which, the State shall be liable to pay interest on the amount in question, at the rate of 9% per annum, from today, till realization. (Para 114, 115, 116) Title: M/s Adani Power Ltd. vs. The State of H.P. Page-723

**Constitution of India, 1950**- Article 226- Petitioner has challenged the order of H.P. Administrative Tribunal granting daily wage status to the respondent and work charge status after completion of eight years of service- Held- Since the respondent had become eligible to be conferred daily wage status on 1.4.1998, learned Tribunal below rightly directed the respondents to confer daily wage status after completion of ten years and thereafter work charge status /regularisation after completion of eight years thereafter- Petition dismissed. (Para 9) Title: State of H.P. vs. Girdhari Lal **(D.B.)** Page-706

**Constitution of India, 1950**- Article 226- Petitioner sought to quash the appointment order of respondent No. 3 being arbitrary- Post of Junior Officer (Personnel & Administration)- OBC category- Held- It was expected from the Commission to have given an opportunity to the petitioner by quoting its decision to provide fresh information by way of hard copy, which admittedly has not been done by the Commission- Rejection of candidature of the petitioner by the Commission cannot be sustained in law- Petition disposed of with directions. (Para 8 to 10) Title: Chaman Lal vs. The Secretary, HPSSC Page-188

**Constitution of India, 1950**- Article 226- **Punjab Police (H.P. Amendment) Rules, 2011**- **H.P. Police Act, 2007**- Section 144- Recruitment in the Police Department- Petitioner appeared in the personality test after qualifying ground and written test but could not make it to the final merit list- Held- It is settled law that a process of selection cannot be challenged by an unsuccessful

candidate by pointing to certain irregularities here and there in the process of which he was aware, once the result is not to his liking. Relief, in such a case, is to be declined by applying the principles of estoppel, acquiescence and/or waiver- Since it stands duly established on record that the petitioner before laying challenge to selection process had participated in selection process without any demur, now it is not open for him to lay challenge to selection process after having been declared unsuccessful that too on the bald and baseless allegations- Petition dismissed. (Para 18, 20, 21) Title: Siddharth Sharma vs. State of H.P. Page-841

**Constitution of India, 1950**- Article 226- Regularization of the services of the petitioner with all consequential benefits- Held- Though this court was unable to find any policy, introduced by the respondent-University, for regularization of employees appointed under the Schemes/Projects, but as has been taken note herein above, it clearly emerges from the record that respondent-University on its own whims and fancies adopted a pick and choose method, while ordering regularisation of some of those persons, who were initially given appointment on ad-hoc/co-terminus basis like the petitioner- Respondent University adopted pick and choose method for regularizing/ absorbing number of persons, whose initial appointment was on co-terminus/ad hoc basis- Petition allowed with the direction to respondent Unit to regularize/absorb the petitioner against the post in question. (Para 10, 11, 13, 15) Title: Rajan Katoch vs. Chaudhary Sarwan Kumar & others Page-817

**Constitution of India, 1950-** Article 226- Application for recalling order dated 10.01.2020 to protect the career of students already admitted to their respective courses- Held- The interest of the students who have been admitted pursuant to the interim order passed by this Court, needs to be protected specially when the students have, on the basis of interim order pursued more than two years of the courses- Application allowed. (Para 16, 17) Title: Shimla College of Education and others vs. State of H. P.,**(D.B.)** Page-860

**Constitution of India, 1950**- Article 226- Representation of petitioner, a forest workman, for regularization of his service has been rejected by the Competent Authority- Held- Petitioner has not put 240 days in any of the calendar year- Petitioner has not been able to demonstrate that respondent has discriminated him for regularization despite being eligible- Petition dismissed. (Para 9) Title: Mauji Ram vs. State of H.P. Page-265

**Constitution of India, 1950**- Article 226- The Demobilized Armed Forces Personnel (Reservation of Vacancies in The Himachal State Non-Technical Services) Rules, 1972- Rule 3 & 5- Petitioner who is an ex-serviceman after being returned from the armed forces joined as a Trained Graduate Teacher (Arts) with Education Department of H.P. in the year 2016 on contract basis and thereafter regularized in the year 2019- Held- Amendment carried out in sub-rule 1 of Rule 5 vide Notification dated 29.1.2018, otherwise does not affect rights of the petitioners, who are claiming benefit of counting of approved military service towards fixation of pay. Government of Himachal Pradesh with a view to bring 1972 Rules in harmony with judgment of this Court in **V.K. Behal** supra has amended aforesaid rules providing therein that the approved military service shall be counted only for the period, when such Ex-serviceman acquired the minimum age and educational qualification. However, this court is of the view that provision of grant of benefit of approved military service for fixation of pay was very much in 1972 Rules and the same has not been altered /amended even by the amendment carried out vide Notification dated 29.1.2018 and as such, this court has no hesitation to conclude that the Notification dated 29.1.2018 does not affect the right of the Ex-serviceman for counting of approved military service towards fixation of pay- Petition dismissed. (Para 23, 24, 25) Title: Babu Ram vs. State of H.P. **(D.B.)** Page-556

**Constitution of India, 1950**- Article 226- The Rights of Persons with Disabilities Act, 2016- Section 20- Appointment on compassionate grounds in lieu of the services rendered by petitioner's father to H.P. State Electricity Board on the post of T-Mate, who died in harness on 06.11.2020- Application of petitioner was not considered- Held- The manner in which the case of the petitioner for grant of compassionate appointment has been dealt with by the respondents leaves men to be desired impression that they have no compassion for an employee, who was rendered 100% disabled, while discharging duties on 13.7.2005- Petition allowed. (Para 15, 16) Title: Nagender Kumar vs. H. P. State Electricity Board Ltd & others **(D.B.)** Page-806

**Constitution of India, 1950**- Article 226-Primary Assistant Teacher Scheme, 2003- Petitioner was appointed as Primary Assistant Teacher in the year 2006, however for dereliction of duty was removed in the year 2010- Held- In the inquiry conducted by the Gram Panchayat petitioner was not found guilty- Authority to remove the petitioner from the post of Primary Assistant Teacher

lies with the Gram Panchayat being the appointing authority and as such, there was no occasion for the Deputy Director Elementary Education to initiate Inquiry against the petitioner- Petition allowed. (Para 13, 14, 17, 18) Title: Anita Devi vs. State of H.P. Page-828

**Constitution of India, 1950**- Article 226 & 227- Quashing the order whereby the contractual services of the petitioner have been cancelled- JOA (IT) on contract basis- Held- Petitioner besides having qualification of 10+2 from a recognized Board of Education, also possesses "O" or "A" level Courses from Institutions accredited from National Institute of Electronics and Information Technology (NIELIT), his contract could not have been cancelled by the respondent-Corporation on the ground that he is not qualified, in terms of essential qualification, as provided in (R & P), Rules- Petition allowed. (Para 6, 7, 8) Title: Yash Paul Singh Katoch vs Himachal Road Transport Corporation Page-371

**Constitution of India, 1950**- Article 227- Appointment to the post of constable under category of General Home Guard- Held- No illegality and infirmity in the action of respondent- Petition dismissed. (Para 3, 4) Title: Sunny Thakur vs.State of H.P. Page-348

**Constitution of India, 1950**- Article 227- **Central Civil Services (Conduct) Rules, 1964**- Held- Non-supply of inquiry report to the petitioner clearly amounts to violation of principles of natural justice- Order of Conservator of Forest is quashed- Writ petition disposed of accordingly. (Para 7, 9) Title: Nazra Khan vs. State of H.P. & others **(D.B.)** Page-148

**Constitution of India, 1950**- Article 227- **Central Civil Services (Classification, Control and Appeal) *Rules* 1965**- Rule 14- Departmental Inquiry on sexual harassment- Remand thereof- Held- No action could be taken on the anonymous complaint containing allegations of sexual harassment, as such, prayer for quashing complaint as well as enquiry deserves to be accepted- Petition allowed. (Para 15 to 18) Title: Shamsher Singh vs. State of H.P. Page-304

**Constitution of India, 1950**- Article 227- **Code of Civil Procedure, 1908**- Order 41 Rule 25- Petitioner assailed the order of Ld. Appellate Court vide which application under Order 41 Rule 25 Code of Civil Procedure to frame additional issues and remand the matter to Trial Court was dismissed- Held-

There is infirmity in impugned order as amendment of issues was not sought and issues No. 1 and 2 actually covered the entire lis- Petitioner has failed to bring his case within the ambit of parameters laid down for exercise of supervisory jurisdiction under Article 227 of the Constitution of India. [Para 4(i) to (v)] Title: Sanjeev Kumar vs. Suman Jain & others Page-57

**Constitution of India, 1950**- Article 227- **Code of Civil Procedure, 1908**- Order 39 Rule 1 and 2- Section 151- Police assistance- Implementation of ex-parte order- Held- Impugned order has been passed by Ld. Court below without due application of judicial mind- Impugned order not sustainable- Petition allowed with direction to decide afresh as per law. (Para 6 to 8) Title: Sarup Chand vs Sardul Singh Page-239

**Constitution of India, 1950**- Article 227- GPF- Payment of withheld amount of GPF along with interest- Held- Retiral benefits due to the employee are not bounty to be distributed by the government to its employees on their retirement, but is a valuable right and property in their hands- That any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of current interest rate till actual payment to the employee – The action of the respondents cannot be sustained and petitioner is entitled to refund of withheld amount of GPF- Petition allowed. [Para 4(i)(ii)(iii)] Title: Jagmohan Mehta vs. State of H.P. Page-328

**Constitution of India, 1950**- Article 227- **Hindu Marriage Act, 1955**- Section 24- Ld. Principal Judge, Family Court ordered monthly maintenance of Rs.6500/- in favour of wife- Report of the Deputy Commissioner regarding properties and income of husband and his family was called- Held- Amount of maintenance awarded by the Ld. Court below is reasonable and there is no perversity in the impugned order- Petition dismissed. (Para 5) Title: Amit Kumar vs. Aditi Sareen Page-230

**Constitution of India, 1950**- Article 227- **Motor Vehicle Act, 1988**- Section 206, 19, 185- Petitioner sought release of his driving licence retained by respondent 3- Challenged for drunken driving- Held- Respondent No. 3 ignored all the provisions of Motor Vehicle Act and no steps for disqualifying the petitioner from holding the driving licence and retained the driving licence unauthorizedly after 1.6.2019- Writ petition allowed with the direction to respondent 3 to return the driving licence to petitioner . (Para 5(iii & iv)) Title:

Khem Raj vs. State of H.P. Page-360

**Constitution of India, 1950**- Article 227- Petitioner assailed the order of A.C. 2nd Grade whereof petitioner proceedings stand deferred on the ground that there is an order of the Court with regard to stay qua the partition proceedings- Held- The impugned order is silent about the case in which stay order has been passed- Partition proceedings could not have been deferred by passing non-speaking order- Petition allowed with the direction to A.C. 2nd Grade to proceed with the partition proceedings. (Para 9, 10) Title: Vishwanath vs. Assistant Collector & others Page-13

**Constitution of India, 1950**- Article 227- Petitioner has assailed the award passed by the Ld. Industrial Tribunal-cum-Labour Court, Shimla- Held- Ld. Labour Court erred in holding the workman entitled for annual increment for the year 2009-2010 in view of the fact that the workman had not performed any work in said years- Petition allowed. (Para 12) Title: M/s HFCL Ltd. vs. Ranjeet Singh Page-156

**Constitution of India, 1950**- Article 227- Petitioners have assailed the order of Ld. H.P. State Administrative Tribunal- Held- Grant of benefit to respondent under Section 25(B)(1) of Industrial Disputes Act by learned H.P State Administrative Tribunal, vide impugned order dated 15.12.2017, cannot be said to be unreasonable- Petition dismissed. (Para 9) Title: State of H.P. vs. Jiya Lal **(D.B.)** Page-152

**Constitution of India, 1950**- Article 227- Senior Scale Stenographer- Up-gradation the post of Senior Scale Stenographer held by the petitioner in Printing and Stationery Department was upgraded to the post of Personal Assistant on 15.3.2012, however petitioner wants upgradation should be w.e.f. 6.8.2003 when he made representation seeking upgradation of the post- Respondents rejected the prayer- Held- . Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India- The post of Personal Assistant was not in existence prior to 15.03.2012, therefore, the petitioner cannot be held entitled for the upgradation of post prior to 15.03.2012- Petition dismissed.

(Para 4(i)(iii)(iv) Title: Karan Singh Pathania vs State of H.P. Page-290

**Constitution of India, 1950**- Article 227- Wrong fixation of pay- Recovery- Held- Excess payment has been made to petitioner on account of wrong fixation of his pay and recovery of such excess payment would be impermissible, iniquitous and harsh upon him- Petition allowed. [Para 5(i) & (ii)] Title: Suresh Dutt vs. State of H.P. Page-298

**Constitution of India, 1950**- Articles 227 & 324- Honorarium to the employees of State Election Department who perform duties in Vidhan Sabha elections- Held- The instructions issued by the Election Commission of India regarding payment of honorarium would be binding on the State Government- Finance Department of the State Government cannot sit over the instructions issued by the Election Commission of India source of which lies in Article 324 of the Constitution of India- Petition allowed. (Para 5 (i to v) Title: H.P. State Election Department vs. State of H.P. Page-333

**Contempt**- Petition to punish the respondents for willfully defying the order dated 30.12.2018 passed by erstwhile H.P. State Administrative Tribunal- Held- Petitioner has to agitate his case by filing appropriate writ petition for adjudication of his eligibility and entitlement for appointment- Petition closed. (Para 18) Title: Rajinder vs. Sita Ram Mardi & another Page-71

**'D'**

**Delhi High Court Original Side Rules**, **2018** - Section 10- Letters Patent Appeal- Ld. Single Judge quashed and set aside the communication dated 3.7.2001 issued by the Secretary, Himachal Pradesh State Electricity Board to its Chief Accounts Officer to grant benefit of time bound promotional scale on completion of 9/16 years of regular service- Held- Appellant Board, in principle, follows PSEB pattern in the matter of pay scales and other career progression schemes like TBPS to its employees- Appellant Board has deviated from PSEB pattern, as such, Ld. Single Judge has rightly passed the order- Appeal dismissed. (Para 10, 11, 12) Title: The H.P. State Electricity Board vs. HPSEB Supervisory Accounts Services Association & Others **(D.B.)** Page-637

**'E'**

**Employees Compensation Act, 1923**- Section 30- Appeal- Application under

Section 4 of Workmen Compensation Act was allowed and compensation of Rs.4,06,656/- was ordered on account of death of workman Kuldeep- Held- At the time of alleged incident deceased Kuldeep Singh was a workman as such his dependants rightly filed the petition- No illegality and infirmity committed by Court below while passing the impugned award- Appeal dismissed. (Para 7, 8, 9) Title: Hem Raj Sharma vs. Jogindro Devi & others Page-285

**'H'**

A. **H.P. Grant of Nautor Land to Landless Persons and Other Eligible Persons Scheme, 1975**- Where jurisdiction of Civil Court can be held to barred in matters arising out of Nautor Scheme, 1975 which is a non-statutory scheme- Held- 'A' ordinarily Civil Court has jurisdiction to decide all matters of civil nature, save and except where its jurisdiction is expressly or impliedly barred. (Para 23)

B. **Jurisdiction of Civil Court cannot be said to be barred in matters arising out of Nautor Scheme, 1975, which is admittedly a non-statutory scheme and this scheme cannot be** equated with other two schemes i.e. the Himachal Pradesh Utilisation of Surplus Area Scheme, 1975 and the Himachal Pradesh Village Common Land Vesting and Utilisation Scheme, 1975, because both have sanction of law/Act passed by State Legislature- Reference is accordingly answered. (Para 43, 45) Title: Lachman vs. State of H.P. & others **(D.B.)** Page-645

**H.P. Urban Rent Control Act, 1987**- Section 24- Revision- Petitioner assailed the order of eviction passed by Ld. Rent Controller (I), Shimla, on the ground of arrears of land affirmed by Ld. Appellate Authority (IV), Shimla- Held- Since this court does not find any glaring error in the appreciation of evidence by both the learned Courts below, this court sees no occasion to exercise its revisionary powers in the case at hand- Petition dismissed. (Para 31, 32) Title: M/s Eagle Tours & Travels vs. JBS Bawa Page-692

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Ld. Rent Controller decided the issue of maintainability against the tenant and in favour of landlord- Held- Code of Civil Procedure are stricto senso not applicable as far as rent proceedings are concerned- Revision maintainable- The intent of the landlord that the premises in fact was needed to be used as a godown could not have been ignored – Findings of Ld. Rent Controller are perverse and erroneous- Petition allowed. (Para 10, 14) Title: Ramesh Chhabra vs.

Harminder Singh Page-244

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Revision assailing the order rejecting the prayer of petitioner for withdrawal of amount of Rs.34800/- deposited as arrears of rent- Held- No order of forfeiture of deposited rent was passed by Ld. Rent Controller- Matter has been settled between tenant and legal heirs of the landlord, thus prayer for withdraw of rent deserves to be allowed- Revision allowed. (Para 7) Title: Anand Sharma vs. Bhagat Ram Sachdeva Page-36

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Revision- Eviction on the ground of arrears of rent- Tenant failed to pay the rent as ordered by the Ld. Rent Controller- Held- Ordering eviction- In the case at hand, tenant was directed to pay arrears of rent vide order dated 1.10.2020, on or before the next date of hearing i.e. 29.10.2020, but interestingly, tenant instead of doing the needful in terms of order himself chose to file appeal before the appellate authority, wherein admittedly, no stay ever came to be granted against the aforesaid order dated 1.10.2020, and as such, no illegality and infirmity can be said to have been committed by the appellate authority while passing order dated 30.4.2022, whereby order dated 29.4.2021 passed by the learned Rent Controller, ordering eviction on the ground of non-payment of interim arrears of rent as assessed by the learned Rent Controller came to be upheld. (Para 7) Title: Pritika vs. Parshottam Kumar Page-413

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Revision- Eviction on the ground of rebuilding and arrears of rent- Held- Section 18 of the Act not attracted- No illegality, infirmity or perversity in the impugned order- Petition dismissed. (Para 4, 20) Title: Moti Lal & others vs. Shankar Kumar & others Page-418

**'I'**

**Indian Penal Code, 1860**- Section 302- Appeal against conviction- Circumstantial evidence- Held- The cardinal principle of criminal jurisprudence has remained impassive. The prosecution has to prove its case beyond all reasonable doubts. Appearance of serious doubt in the prosecution case only helps the case of accused. More serious the offence, more arduous is the duty cast upon prosecution to discharge its burden strictly in accordance with law. In absence of direct evidence, circumstances relied upon by the

prosecution have to satisfy the same standard of proof i.e. beyond all reasonable doubts. Once this barrier is successfully crossed, it is to be shown that all the circumstances form a complete chain of facts suggesting only one hypothesis i.e. the guilt of the accused- Appeal allowed- Conviction set aside. (Para 24, 25) Title: Laxman Patel vs. State of H.P. **(D.B.)** Page-455

**Indian Penal Code, 1860** - Sections 341, 323, 325 read with Section 34- Criminal appeal- The judgment of acquittal under Sections 341, 323, 325 read with Section 34 IPC- Held- There are contradictions in the statements of the prosecution witnesses- Some of the accused falsely implicated- As per medical expert injuries possible by fall- Victim had also assaulted the accused- There is a serious doubt about the veracity of the case of the prosecution- Judgment of acquittal calls for no interference- Appeal dismissed. (Para 15, 16, 17) Title: State of H.P vs. Baldev Chand & others Page-101

**Indian Penal Code, 1860**- Section 420, 467, 468, 471 read with Section 120-B- **Code of Criminal Procedure, 1973**- Section 311- Trial Court dismissed the application- Held- The documents sought to be placed on record are related to omissions and commissions of the petitioners, for which prosecution has been launched against them and have been tendered in evidence, but have not been exhibited for want of original record- Rejection of application not sustainable. (Para 13) Title: Suraj Kant & another vs. Central Bureau of Investigation Page-443

**Industrial Disputes Act, 1947**- Section 25- Retrenchment of respondents was declared void-ab-initio with the directions to appellants to regularize the services of the respondents- Held- Conduct of the appellants amounts to unfair labour practices under clause 5(b) and clause 10 of fifth Schedule appended to the Act- Respondent definitely had acquired right to be considered for regularization- Appeals dismissed. (Para 11) Title: State of H.P. vs. Krishan Chand & others **(D.B.)** Page-225

**'L'**

**Letters Patent Appeal** - Ld. Single Judge while allowing petition filed by the respondent directed the State to grant work charge status to respondent from the date of completing ten years of work- Held- Daily wage employee, who has completed requisite period in terms of policy framed by the Government for conferment of work charge status shall be entitled for such benefit, even in

those departments, where work charge establishment has ceased to exist- No illegality or infirmity in judgment passed by Ld. Single Judge- Appeal dismissed. (Para 8, 9) Title: State of H.P. vs. Smt. Akalmani **(D.B.)** Page-875

**Limitation Act, 1963**- Section 5- Prayer for condonation of delay of 4 years 23 days in filing the appeal- Held- Delay has not been satisfactorily explained and the reason so assigned does not inspire confidence- Application dismissed so also in the fate of appeal. (Para 6, 7) Title: Dhani Ram vs. Raj Kumar & others Page-53

**'M'**

**Motor Vehicle Act, 1988**- Sections 163A and 140- Appeal against the dismissal of claim petition under Section 163 of Motor Vehicle Act- Held- Someone who has preferred a petition under Section 140 of the Motor Vehicles Act cannot prefer another petition under Section 163A of the Act and vice versa- Petition dismissed. (Para 7) Title: Kamla Devi vs. Bansal Roadways Pvt. Ltd. & others Page-235

**Motor Vehicle Act, 1988**- Section 173- Appeal- Appellant Insurance Company challenged the award passed by the Ld. Motor Accident Claims Tribunal-IV, Shimla, directing the appellant to pay compensation in the sum of Rs.26,44,200/- to the claimants along with interest @ 7.5% per annum- Deceased aged 35 was earning Rs.22,500/- per month as cook- Held- No cogent and convincing evidence with regard to income of deceased- Minimum wages payable to a cook in the Sate, under the Minimum Wages Act, ought to have been taken, as such, monthly income of deceased would be 180 X 30= 5400 per month- Overall income assessed as Rs.8000/- per month- Impugned award modified- Total compensation of Rs.18,02,800/- awarded. (Para 12 to 18) Title: United India Insurance Company Ltd. vs Sarla & another page-797

**Motor Vehicle Act, 1988**- Section 173- Appeal- Motor Accident Claims Tribunal saddled Insurance Company with liability to pay compensation of Rs.1,02,000 on account of injuries sustained by petitioner in the road accident- Held- In the insurance policy there is no specific condition with regard to expiry of fitness certificate coupled with the fact that it is not the case of the appellant/Insurance Company that at the time of accident, there was no valid Registration Certificate in favour of the offending vehicle- No infirmity and illegality in order awarding compensation- Appeal dismissed.

(Para 7, 8, 9) Title: United India Insurance Co. Ltd. vs. Mohan Singh & others Page-278

**Motor Vehicle Act, 1988**- Section 173- Claim petition was dismissed- Petitioner aged 14 years sustained injuries in an accident- Held- No evidence to prove the facts necessary to fasten the liability of payment of compensation on respondents- Findings of the Ld. Tribunal on the basis of material on record and no fault can be found there- Appeal dismissed. (Para 13, 14, 15) Title: Wajid Ali vs. Arjun Singh & another Page-202

**Motor Vehicle Act, 1988**- Section 173- Legal Services Authority Act, 1987- Section 21- Held- Appeal against the award of Lok Adalat- Lok Adalat has passed the award on the basis of statements of the parties as well as their Ld. Counsel, therefore, no appeal is maintainable- Appeal dismissed. (Para 4) Title: Geeta Devi & others vs. Jodh Singh & others Page-208

**Motor Vehicle Act, 1988-** Section 173- Motor Accident Claims Tribunal ordered to pay compensation of Rs.41,29,259/- along with interest at the rate of 7.5% per annum- Death case – Annual income of the deceased has been taken as Rs.2,16,427/- as per income tax return- Held- Deduction on account of income tax- Ld. Tribunal below has awarded excessive amount under the heads of loss of estate and funeral expenses which ought to have been Rs.15000/- each only- Appeal partly allowed. (Para 16, 17, 18, 19, 20) Title: ICICI Lombard General Insurance Company Limited vs. Aditya & Others Page-594

**Motor Vehicle Act, 1988**- Section 173- One of the respondents died during the pendency of the petition before the Ld. Claim Tribunal- Held- Judgment passed against a dead person is nullity and as such award is set aside and the matter is remanded back to the Ld. Tribunal to take a care of the effect of the death of the deceased claimant and decide afresh. (Para 4 & 5) Title: The New India Assurance Co. Ltd. vs. Raj Kumari & others Page-178

**'N'**

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8, 20, 29- Petitioner sold 800 gram charas to accused- Held- There is a prima facie case to infer implication of petitioner in the crime- The petitioner absconded for considerable period of the registration of case- It cannot be guaranteed that

there will be no re-indulgence by the petitioner, in case released on bail. Keeping in view the fact that petitioner absconded for considerable period after registration of case, it cannot be ruled-out that he may again flee from the course of justice and try to tamper with the prosecution evidence- Petition dismissed. (Para 12, 13, 14) Title: Mehar Singh vs. State of H.P. Page-107

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- Appellant assailed conviction- Charas 1.300 Kg- Held-

**A.** Section 52A- The Investigating Officer had not chosen to comply with Section 52A, rather he had chosen to draw the samples on the spot.

**B.** Sample of 25 grams examined at Central Revenue Control Laboratory, Delhi was representative of entire bulk of substance- Appellant convicted for having been found in conscious possession of small quantity of charas- Sentence accordingly modified. (Para 12, 13, 14, 20, 27) Title: Pawan Kumar @ Lucky Sharma vs Narcotics Control Bureau **(D.B.)** Page-79

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- 22 Kg. 8 gm Charas- Bail- petitioner has assailed order of Ld. Special Judge, Sunder Nagar whereby bail graned to petitioner has been cancelled- Held- Needless to say that petitioner has right to file bail application and successive bail applications for enlarging him on bail on valid ground in accordance with law including the ground taken in present petition but not on the grounds which are contrary to judgment of Full Bench in **Mehboob Khan's case** and Division Bench in **Bhavan Kumar's case**, and therefore, petitioner is at liberty to file appropriate fresh application for bail if advised and desired so and such application, if so filed, shall be considered by the Court on the basis of its merits considering material placed before the Court- Petition dismissed. (Para 18, 19) Title: Devi Ram vs. State of H.P. Page-449

**'W'**

**Workmen Compensation Act, 1923**- Section 30- Appeal- Ld. Commissioner allowed the application and ordered for compensation of Rs. 3,50,880/- - Workman suffered 40% burn injury and remained hospitalized for more than 10 months- Held- Ld. Court below rightly considered the monthly wages of workman as Rs.4000/-- Disability certificate states that workman has been 100% disabled- No illegality and infirmity committed by the Court below while passing the impugned award- Appeal dismissed. (Para 12 to 14) Title: Baldev

& others vs. Asha Ram Page-269

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Mahabir Kishore v. State of M.P., AIR 1990 SC 313;

Managing Director, ECIL, Hyderabad and others vs. B. Karunakar and others, 1993 (4) SCC 727;

Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim. LC 860;

Manoranjana Sinh Alias Gupta vs. CBI 2017 (5) SCC 218;

Merck Sharp and Dohme Corporation and Anr. vs. Glenmark Pharmaceuticals, 2015 SCC Online Del 8227;

Minu Kumari and Another vs State of Bihar and Others, (2006) 4 SCC 359;

Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405;

Ms. X vs. The State of Telangana and another, (2018)16 SCC 511;

Mulamchand v. State of M.P., AIR 1968 SC 1218;

Mumbai International Airport Private Limited Vs. Golder Chariot Airport and another, (2010) 10 SC 422;

**'N'**

Nahar Industrial Enterprises Limited v. Hong Kong & Shanghai Banking Corpn. (2009) 8 SCC 646;

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

National Insurance Co. Ltd. v. Pranay Sethi, (2017)16 SCC 680;

Noor Aga v. State of Punjab (2008) 16 SCC 417;

Novartis AG Vs. Natco Pharma Ltd., 2021 SCC Online Del 5340;

**'P'**

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

P.U. Joshi and Others vs. Accountant General, Ahmedabad and Others (2003) 2 SCC 632;

Pepsi Foods Ltd. and Another vs Special Judicial Magistrate and Others, (1998) 5 SCC 749;

Perkins Eastman Architects Dpc v. Hscc (India) Limited, 2019 (SCC Online 1517);

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

Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;

Public Interest Foundation and others vs. Union of India and another, (2019) 3 SCC 224;

**'R'**

Raj Kumar vs. Director of Education & others 2016 (6) SCC 541;

Rajeev Kourav vs Baisahab and Others, (2020) 3 Supreme Court Cases 317;

Rajiv Thapar and Others vs Madan Lal Kapoor, (2013) 3 SCC 330;

Rakesh Wadhawan v. M/s Jagdamba Industrial Corporation, 2002 (1) RCR 514;

Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858;

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

Robust Hotels (P) Ltd. v. EIH Ltd. (2017) 1 SCC 622;

Rohitbhai Jivanlal Patel v. State of Gujarat, (2019) 18 SCC 106;

**'S'**

Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49;

Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121;

Secretary of State v. Mask and Company, AIR 1940 PC 105;

Shyamwati Sharma v. Karam Singh, (2010) 12 SCC 378;

SP Singla Construction v. State of Himachal Pradesh (2019) 2 SCC 488;

State (NCT of Delhi) Vs. Ajay Kumar Tyagi (2012) 9 SCC 685;

State Bank of India vs. the Presiding Officer, Central Government Labour Court Dhanbad and Another, 1972 (3) SCC 595;

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

State of HP vs. Mehbood Khan, 2013(3) Him.L.R. (FB) 1834;

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 SCC 452;

State of Madhya Pradesh and others vs. Ashish Awasthi, (2022) 2 SCC 157;

State of Maharashtra v. Swanstone Multiplex Cinema (P) Ltd., (2009) 8 SCC 235;

State of Punjab and Others Vs. Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2);

State of Telangana vs Habib Abdullah Jeelani and Others, (2017) 2 SCC 779;

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

State of West Bengal v. B.K. Mondal & Sons, AIR 1962 SC 779;

Syed Abdul Qadir Vs. State of Bihar (2009) 3 SCC 475;

**'T'**

Town Area Committee v. Rajendra Kumar and another, AIR 1978 All 103;

TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377;

**'U'**

Unichem Laboratories v. Rani Devi (2017) 13 SCC 509;

Union of India (UOI) v. Mohanlal and Ors. (2016) 3 SCC 379;

Union of India and Ors v. B.V. Gopinath, (2014) 1 SCC 351;

Union of India and others vs. Mohd. Ramzan Khan, 1991 (1) SCC 588;

Union of India vs. Association for Democratic Reforms and another, (2002) 5 SCC 294;

Urban Improvement Trust, Bikaner v. Mohan Lal, (2010) 1 SCC 512;

**'V'**

Vikram Cement v. State of M.P., (2015) 11 SCC 708;

Vipan Kumar Dhir vs. State of Punjab 2021 AIR 2021 SC 4865;

**'W'**

Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff & Widmann, A.G., v. Municipal Corporation of Great Mumbai and another, (2015) 3 SCC 800 (2017);

**'Y'**

Yudhbir Singh versus State of Himachal Pradesh 1998(1) S.L.J. 58;

**********

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

Between:-

SARMAD @ SHARMAD, AGE 30 YEARS, SON OF ABBAS AHMAD, RESIDENT OF VILLAGE KHATAKHERI, PARGANA BHAGWANPUR, TEHSIL RURKI, DISTRICT HARIDWAR, UTTARAKHAND, OCCUPATION AGRICULTURIST.

...PETITIONER

(M/S VIVEK THAKUR & LEENA GULERIA, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH.

2. SANJAY KUMAR, S/O SH. REWATI RAM, R/O H. NO. 168/8, DHALPUR, TEHSIL AND DISTRICT KULLU, H.P.

...RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT DHUMAL, DEPUTY ADVOCATE GENERAL & MR. J.S. BAGGA, ASSISTANT ADVOCATE GENERAL FOR R-1.

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.126 of 2021
Decided on: 24.05.2022

**Code of Criminal Procedure, 1973**- Section 482- **Indian Penal Code, 1860**- Sections 420, 467, 468, 471 and 120-B- Quashing of F.I.R. dispute being of civil nature- Held- Foul play of the petitioner is manifest and it does not appear to be a simple case of sale of land, which can be termed to be an issue of civil nature- No a fit case for quashing- Petition dismissed. (Para 6, 7)

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

**J U D G M E N T**

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has prayed for quashing of FIR No. 162, dated 01.08.2017, registered under Sections 420, 467, 468, 471, 420 and 120-B of the Indian Penal Code as well as subsequent criminal proceedings arising therefrom.

2. Learned counsel for the petitioner has argued that the FIR in issue has been registered against the petitioner for settling a civil dispute and as no offence was in fact committed by the petitioner under the jurisdiction of Police Station Kullu, District Kullu, H.P. and further the dispute involved in the case being of civil nature, the petition be allowed and the FIR in issue as also ensuing criminal proceedings be ordered to be quashed and set aside. No other ground was urged.

3. On the other hand, learned Additional Advocate General argued that no case was made out by the petitioner for quashing of FIR as well as ensuing criminal proceedings under the provisions of Section 482 of the Criminal Procedure Code and what was being contended on behalf of the petitioner before this Court can be submitted before the learned Trial Court in the course of trial.

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

5. The allegations, as are borne out from the FIR in issue are that the complainant received a telephone call from one Pankaj Kumar from Roorkee to the effect that one lady, namely, Kashmiri Devi had purchased land from one Sharmad, son of Abhaas Ahmed (the present petitioner), resident of Khatakheri, Pargana Bhagwanpur, Tehsil Roorkee, District Haridwar, Uttarakhand and that he was interested in purchasing the said land and if the complainant help him to do so, then he would get 2%

commission for the same. As per the complainant, he after telephonically contacting Kashmiri Devi, met her in a Cafe at Bilaspur, from where she took him to her sister's house. There, Kashmiri Devi showed an agreement as well as *Jamabandis* of the land to the complainant and told him that total land was 15 bighas and she would sell the same for an amount of Rs.29,00,000/- per Bigha. He clicked the photos of the agreement and sent the same to Pankaj Kumar on Whatsapp, who after reading the same and finding the contents thereof to be correct, asked the complainant to come to Roorkee. Thereafter, the complainant went to Roorkee and met Pankaj and discussed the things with him. Pankaj asked the complainant that he should meet the petitioner and see the land as he had a party, who was interested in purchasing the same. Pankaj further told the complainant that in case the complainant was satisfied with the land, then both of them could contribute the money and give token money to Kashmiri Devi and thereafter get the sale deed executed. Thereafter, as per the complainant, he met the petitioner and saw the land and found it to be good. He reverted back to Pankaj, who told him that they will contribute the money in equal shares and that the complainant should enter into an agreement with Kashmiri Devi for an amount of Rs.20,00,000/-. Pankaj stated that he would send Rs.10,00,000/- to the complainant and balance be provided by the complainant, which will be returned back to him. As per the complainant, thereafter he came back to Bilaspur on 05.07.2017 and met Kashmiri Devi, who entered into an agreement for an amount of Rs.20,00,000/-. He made a call to Pankaj to send Rs.20,00,000/-, on which, Pankaj stated that he could send only Rs.10,00,000 and balance be provided by the complainant. Pankaj sent two persons with an amount of Rs.10,00,000/- from Roorkee and told him that the agreement will be made in the name of the complainant. Complainant entered into an agreement with Kashmiri Devi and gave Rs.16,00,000/- in cash and Rs.4,00,000/- by cheque, which was encashed by Kashmiri Devi.

The persons who were sent by Pankaj returned back alongwith a copy of agreement. Pankaj further told the complainant that he would get the agreement perused by an Advocate, who will give his legal opinion after charging legal fee of Rs.5,00,000/-. Thereafter, he received a call from the Advocate, who asked him to pay an amount of Rs.5,00,000/-, but he informed the Lawyer that he was not having the money. Thereafter, on the asking of Pankaj and the Advocate, the complainant went to Saharanpur with an amount of Rs.2,80,000/- and made good this payment to the Advocate, where Pankaj Sharma told him that he had already paid the balance payment to the Advocate. Thereafter, Pankaj told him that the person who was interested in purchasing the land would speak to him and one Mr. Aggarwal made a phone call to the complainant. As per the complainant, thereafter Aggarwal stopped contacting him and so did Pankaj. As they were not taking up his calls, the complainant realized that there was something wrong and there was some foul play. On this, when he perused the documents, he came to know that the land which Kashmiri Devi had agreed to sell was not owned by her to the extent to which she had agreed to sell the same and the same was in the name of five co-sharers and the share of the petitioner and Kashmiri Devi was not to the extent of 15 bighas. It was then that the complainant realised that a big fraud has been played with him and it was for this reason that Pankaj was not picking up the phone. An FIR was thus got registered by the complainant on the ground that the persons aforesaid were playing fraud with many persons with regard to purchase of land in the State and as these persons were in connivance with each other and were involved in a scam, it was accordingly requested that action be initiated against them. This is the background in which the FIR was lodged.

6. The response, which has been filed to the petition by the State demonstrates that after lodging of the FIR, the petitioner evaded the investigation and after warrant of arrest was issued against the petitioner and

the same was returned to the Court as unserved, notices under Sections 82 & 83 of the Code of Criminal Procedure were issued against the petitioner and affixed at his native place. It is further mentioned in the reply that the petitioner was also a beneficiary of the money transaction, as was mentioned in the FIR and this was clearly borne out in the course of investigation. It was also mentioned in the reply that the final report after investigation already stood submitted before the learned Trial Court against the accused under Sections 420, 467, 468, 471 and 120-B of the Indian Penal Code. It is also stated in the reply that investigation has revealed that the petitioner was in fact in touch with the complainant and, thus, was involved in the foul play.

7. Be that as it may, as the final report has been filed by the Police before the learned Trial Court and it is for the learned Trial Court to take a call upon the same, if not already taken, this Court does not wants to make any observation with regard to the merits of the case so as to not to prejudice the stands of any of the parties. Suffice to say that a perusal of the contents of the FIR *prima facie* do not make out any case for quashing of FIR as also the ensuing criminal proceedings, because this does not appears to be a simple case of sale of land, which can be termed to be an issue of civil nature. The complainant alleges fraud and foul play and thus, there is an element of *mens rea* attributed to the accused. Whether or not the allegations are correct, is a matter of trial, but taking into consideration the well settled principles, as they exist with regard to the scope within which this Court can exercise its powers under Section 482 of the Code of Criminal Procedure, this Court does not finds the present to be a fit case for quashing of FIR. It is fruitful at this stage to refer to the judgment of the Hon'ble Supreme Court in ***M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others,*** Criminal Appeal No. 330 of 2022, in which, the Hon'ble Supreme Court, after taking into consideration its earlier judgments on the issue, has culled out the guidelines as to under what circumstances, this Court can exercise the

jurisdiction so vested in it under Section 482 of the Code of Criminal Procedure, which read as under:-

> *"10. From the aforesaid decisions of this Court, right from the decision of the Privy Council in the case of Khawaja Nazir Ahmad (supra), the following principles of law emerge:*
>
> *i) Police has the statutory right and duty under the relevant provisions of the Codeof Criminal Procedure contained in Chapter XIV of the Code to investigate into cognizable offences;*
> *ii) Courts would not thwart any investigation into the cognizable offences;*
> *iii) However, in cases where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go on;*
> *iv) The power of quashing should be exercised sparingly with circumspection, in the 'rarest of rare cases'. (The rarest of rare cases standard in its application for quashing under Section 482 Cr.P.C. is not to be confused with the norm which has been formulated in the context of the death penalty, as explained previously by this Court);*
> *v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;*
> *vi) Criminal proceedings ought not to be scuttled at the initial stage;*
> *vii) Quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule;*
> *viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities. The inherent power of the court is, however, recognised to secure the ends of justice or prevent the above of the process by Section 482 Cr.P.C.*
> *ix) The functions of the judiciary and the police are complementary, not overlapping;*
> *x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;*
> *xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;*

> *xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. During or after investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;*
>
> *xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the court;*
>
> *xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint; and*
>
> *xv) When a prayer for quashing the FIR is made by the alleged accused, the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merits whether the allegations make out a cognizable offence or not and the court has to permit the investigating agency/police to investigate the allegations in the FIR."*

Aforesaid guidelines, in the considered view of this Court do not encompass the facts of the present case and, therefore, as already observed hereinabove, this Court is not inclined to exercise its jurisdiction to quash the FIR or the ensuing criminal proceedings.

8. Accordingly, this petition is dismissed, but with the observation that what has been held in the present order is only for the purpose of decision of the present petition and the learned Trial Court shall not be influenced in any manner whatsoever by the same in the course of the

adjudication of the case. Miscellaneous applications, if any, also stand disposed of.

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

BETWEEN:-

DHARMINDER KUMAR, AGED 50 YEARS, ALIAS DHARAM PAL, SON OF SHRI BESHASHER, RESIDENT OF VILLAGE KIYANI, PARGANA-RAJNAGAR, TEHSIL & DISTRICT CHAMBA (H.P.), THROUGH HIS SPECIAL POWER OF ATTORNEY SHRI KAMAL KUMAR, AGED 62 YEARS, S/O SHRI BESHASHER, RESIDENT OF VILLAGE & GRAM PANCHAYAT-KIYANI, PARGANA-RAJNAGAR, BLOCK-TEHSIL & DISTRICT CHAMBA (HP).

...APPELLANT

(BY SHRI ADARSH K. VASHISTA, ADVOCATE)

AND

MOHINDER KUMAR, S/O SHRI JATINDER NATH, RESIDENT OF VILLAGE KIYANI, PARGANA RAJNAGAR, TEHSIL & DISTRICT CHAMBA (HP).

...RESPONDENTS

(SHRI NIMISH GUPTA, ADVOCATE)

REGULAR SECOND APPEAL
No.276 of 2020
Decided on: 15.06.2022

**Code of Civil Procedure, 1908**- Section 100- Regular Second Appeal- Suit for permanent prohibitory and mandatory injunction- Suit decreed and Ld. Appellate Court upheld the judgment and decree- Report of Local Commissioner demonstrated that the defendant had encroached upon part of the suit land- Held- Concurrent findings of fact returned by the Ld. Courts below- No perversity with the findings returned by the Courts below- No substantial question of law in the present appeal- Appeal dismissed. (Para 7, 8)

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*This Regular Second Appeal is coming on for admission this day, the Court passed the following:-*

**J U D G M E N T**

Respondent/plaintiff filed a suit for permanent prohibitory and mandatory injunction against the present appellant/defendant to the effect that land comprised in Khata Khatoni No. 155/209, Khasra No. 2666/1157, measuring 02-01-00 Bighas, situated at Mohal Kiyani, Pargna Rajnagar, Tehsil and District Chamba, H.P. (hereinafter referred to as "the suit land") was recorded in the ownership and possession of the plaintiff and other co-sharers and the defendant, who was a stranger to the suit land, having no right, title and interest thereupon was threatening to raise construction upon the same and in the second week of April 2010, the defendant started digging the suit land for the purpose of raising new construction and for this, he had also collected construction material. In fact, during the pendency of the suit, defendant had forcibly and illegally encroached upon the land of the plaintiff and raised construction of his house to the extent of an area measuring 00-00-09 bighas out of the total land measuring 02-01-00 bighas, as denoted by Khasra No. 2666/1157/1, which was evident from the demarcation report dated 05.05.2010 submitted by Field Kanungo, Circle Rajnagar, Tehsil and District Chamba, H.P. As per the plaintiff, the defendant was called upon time and again to not to dig and change the nature of suit land, but he was adamant to do so and refused to admit the claim of the plaintiff and it is in this background that the suit was filed.

2. The suit was contested by the defendant on the ground that the same was neither maintainable nor the plaintiff had approached the Court with clean hands. Though the defendant had admitted that he was a stranger qua the suit land and was owner of the land adjacent to the suit land, but denied that in the month of April 2010, he had started digging the suit land for the purpose of raising new construction. According to him, he already had

raised construction upon the suit land before the filing of the suit, regarding which, no objection was raised at any stage by the plaintiff. The demarcation report was not accepted by the defendant on the ground that the same was not carried out as per the directions of the Financial Commissioner.

3. To clarify the facts, it is necessary to mention that the Civil Suit which was initially filed, was decreed for permanent prohibitory injunction and mandatory injunction vide judgment and decree dated 26.04.2016. In the appeal, which was preferred by the defendant, the matter was remanded back with the direction to appoint a Local Commissioner to conduct the demarcation in accordance with law and thereafter decide the matter. It was thereafter that Tehsildar, Chamba was appointed as a Local Commissioner to carry out the demarcation of the suit land, who submitted his report on 26.06.2018, to which objections were preferred by the defendant.

4. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

> *"1. Whether the plaintiff is entitled for injunction?*
> *OPP.*
> *2. Whether the suit of the plaintiff is entitled for mandatory injunction by way of demolition of unauthorized and illegal structure, if any, found to have been raised over the suit land during the pendency of the suit? OPD.*
> *3. Whether suit is not maintainable in the present form? OPD.*
> *4. Whether the plaintiff is estopped by his own act and conduct to file the present suit? OPD.*
> *5. Whether the plaintiff has suppressed the material facts, if so, its effect? OPD.*
> *6. Relief."*
> 6

5. On the basis of the evidence which was led by the parties in support of their respective pleadings and contentions, the same were decided as under:-

*"Issue No. 1: Partly Yes.*
*Issue No. 2: Yes.*
*Issue No. 3: No.*
*Issue No. 4: No.*
*Issue No. 5: No.*
*Relief: Suit of the plaintiff is decreed as per operative part of the judgment."*

6. The suit was decreed by the learned Trial Court by holding that the factum of encroachment made by the defendant upon the suit land was writ large and this fact clearly emerged from the report of Local Commissioner Ex. OW1/B. Learned Trial Court held that the demarcation was carried in strict compliance with the relevant Rules and Orders and in fact, the objections which were preferred against the same by the defendant were without any merit. It held that the final report of the Local Commissioner clearly mentioned that the parties were duly represented at the spot and that he had visited the spot alongwith the Kanungo and Patwari after issuance of notices to the parties. The mode and manner in which the demarcation was conducted has been duly spelled out by the learned Trial Court in para-20 of its judgment and after referring to the judgment of this Court in *Kishori Lal and others* Vs. *Smt. Pingla Devi and others* 1999 (1) Shim. L.C. 221,learned Trial Court held that the objections which were filed against the report of the Local Commissioner were not sustainable and the demarcation report was liable to be accepted. The suit of the plaintiff was accordingly decreed for permanent prohibitory injunction and also for mandatory injunction and the defendant was directed to demolish the illegal structure raised over the suit land during the pendency of the suit land. The plaintiff was also held entitled for vacant possession of the encroached suit land as shown in Local Commissioner's report Ex. OW1/B , Tatima Ex.O-1 and Field Book Ex. O-2.

7. In appeal, learned Appellate Court upheld the judgment and decree passed by the learned Trial Court. Learned Appellate Court after taking note of the respective contentions of the parties as well as the pleadings and the judgment and decree passed by the learned Trial Court held that the report of the Local Commissioner Ex. OW1/B clearly demonstrated that defendant had encroached upon the part of suit land and that other evidence on record clearly proved that plaintiff had successfully proved that the defendant had encroached upon the suit land over an area of 00-00-12 *biswansi*. It further held that as the judgment and decree passed by the learned Trial Court was based on sound footings and proper appreciation of facts, therefore, the same did not suffer from any illegality, propriety or irregularity. Feeling aggrieved, the defendant has filed the present appeal. Feeling aggrieved, the defendant has filed this Regular Second Appeal.

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

9. In the present case, there are concurrent findings of fact returned by both the learned Courts below, in terms whereof, the factum of the plaintiff being owner of the suit land and the factum of the defendant having encroached upon a part of the suit land has been concurrently decided in favour of the plaintiff. These, obviously, are findings of fact. Incidentally, the factum of the suit land being owned by the plaintiff was never in dispute, as the same has been admitted by the defendant. On the other hand, the factum of the suit land having been encroached upon by the defendant has been proved on record on the basis of demarcation report which was conducted pursuant to the earlier judgment passed by the learned Appellate Court while earlier remanding the matter back to the learned Trial Court, which demarcation, in terms of the judgment passed by the learned Court below, was carried as per procedure and in the presence of parties. That being the case, this Court finds no perversity with the findings which have been returned by

both the learned Courts below with regard to the decrees which have been passed in favour of the plaintiff and against the defendant. Therefore, as this Court finds no substantial question of law involved in the present appeal, the same being devoid of any merit is dismissed, so also pending miscellaneous applications, if any.

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

Between:-

VISHWANATH, SON OF SHRI MADAN LAL, SON OF SHRI RODDA RAM, RESIDENT OF VILLAGE GULABPURA, POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.

...PETITIONER

(BY SHRI R.K. GAUTAM, SENIOR ADVOCATE, WITH MR. RISHABH CHANDEL, ADVOCATE)

AND

1. ASSISTANT COLLECTOR, 2nd GRADE, PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

2. SHRI RAJEEV KUMAR, SON OF SHRI ASHOK KUMAR, RESIDENT OF VILLAGE SAURI GUJJRAN, POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

3. SHRI RAM KUMAR, SON OF SHRI TILAK RAJ, RESIDENT OF NALAGARH TOWN, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

4. SHRI BHUVNESHWAR DUTT, SON OF SHRI TILAK RAJ, RESIDENT OF NALAGARH TOWN, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

5. SHRI TRIAMBKESHWAR DUTT @ ANIL KUMAR, SON OF SHRI TILAK RAJ, RESIDENT OF VILLAGE AND POST OFFICE KHILLIAN, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

6. SHRI RAM KISHAN, SON OF SHRI RODDA RAM, RESIDENT OF KANDAGHAT, NEAR BDO OFFICE, TEHSIL KANDAGHAT, DISTRICT SOLAN, HIMACHAL PRADESH.

7. SHRI YOG RAJ, SON OF SHRI MADAN LAL, RESIDENT OF GULABPURA, POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

8. SHRI SOM RAJ, SON OF SHRI MADAN LAL, RESIDENT OF GULABPURA, POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

9. SHRI GANESH DUTT, SON OF SHRI MADAN LAL, RESIDENT OF GULABPURA, POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

10. SHRI KESHWA NAND, SON OF SHRI SURJEET SINGH @ SURJEET KUMAR, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

11. SHRI SHYAM BIHARI, SON OF SHRI SURJEET SINGH @ SURJEET KUMAR, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

12. SMT. TRIPTA DEVI, WIDOW OF SHRI SURJEET SINGH @ SURJEET KUMAR, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

13. SHRI NARESH KUMAR, SON OF SHRI OM PARKASH, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

14. SHRI SANJEEV KUMAR, SON OF SHRI OM PARKASH, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

15. SMT. SARASWATI, WIDOW OF SHRI OM PARKASH, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

16. SHRI ONKAR NATH, SON OF SMT. GOMATI DEVI, DAUGHTER OF SHRI RODDA RAM, RESIDENT OF VILLAGE AND POST OFFICE PANJEHRA, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.

...RESPONDENTS

17. ASHWANI, SON OF SHRI RAM KRISHAN, RESIDENT OF VILLAGE KHILLIAN, PARGANA GULLARWALA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

18. DARMENDER, SON OF SHRI RAM KISHAN, RESIDENT OF VILLAGE KHILLIAN, PARGANA GULLARWALA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

19. DEV DUTT, SON OF SHRI RAM KISHAN, RESIDENT OF VILLAGE KHILLIAN, PARGANA GULLARWALA, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH.

...PROFORMA RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL AND MR. J.S. BAGGA, ASSISTANT ADVOCATE GENERAL, FOR R-1.

MR. DINESH BHANOT, ADVOCATE, FOR R-2

NONE FOR R-5 & R-6.

RESPONDENT NO. 7 IS STATED TO BE DEAD.

MS. KOMAL CHAUDHARY, ADVOCATE, FOR R-8 TO R-16)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 356 of 2020
Decided on: 17.06.2022

**Constitution of India, 1950**- Article 227- Petitioner assailed the order of A.C. 2nd Grade whereof petitioner proceedings stand deferred on the ground that there is an order of the Court with regard to stay qua the partition proceedings- Held- The impugned order is silent about the case in which stay order has been passed- Partition proceedings could not have been deferred by passing non-speaking order- Petition allowed with the direction to A.C. 2nd Grade to proceed with the partition proceedings. (Para 9, 10)

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

**J U D G M E N T**

***CMP(M) Nos. 195 & 196 of 2021***

Though by way of these two applications, a prayer has been made to bring on record the legal representatives of deceased respondent No. 7-Yog Raj as well as for condonation of delay in filing the application, however, at this stage, Mr. R.K. Gautam, learned Senior Counsel for the applicant/petitioner submits on instructions that the name of said respondent be ordered to be deleted from the array of respondents for the purpose of adjudication of this petition, as the order passed by the Court in the present petition shall not act to the prejudice of legal representatives of deceased respondent.

2. Learned counsel for the non-applicants/represented respondents submit that this be done subject to all just exceptions.

3. In view of the submission made by learned Senior Counsel for the applicant/petitioner, these applications are ordered to be closed, with the direction that name of respondent No. 7 is ordered to be deleted from the array of

respondents, subject to all just exceptions. Registry is directed to carry out necessary corrections in the memo of parties.

**CIVIL MISC. PETITION MAIN (ORIGINAL) No. 356 of 2020**

4. By way of this petition filed under Article 227 of the Constitution of India, the petitioner has assailed order dated 28.07.2020, passed by learned Assistant Collector, 2nd Grade, Panjehra, Tehsil Nalagarh, District Solan, Himachal Pradesh, in terms whereof, the partition proceedings which are pending before the said authority, stand deferred on the ground that there is an order of the Court with regard to stay qua the partition proceedings.

5. Learned Senior Counsel appearing for the petitioner submits that there are five partition proceedings, which are pending before the authority concerned, i.e., Partition Case Nos. 23/15, 25/15, 26/15, 27/15 and 28/15. As per learned Senior Counsel, in the said partition proceedings, the mode of partition also stands prepared and generally the co-sharers are in agreement with regard to the mode of partition also. However, because of the impugned order, which now has been passed by the authority concerned, the entire thing has come to standstill. Learned Senior Counsel submits that the petitioner, who is applicant in the partition proceedings is neither a party to any civil litigation in which any stay order has been passed with regard to partition proceedings nor as per him, in fact any such order has been passed by any competent Court of law, in terms whereof, the partition proceedings in the above mentioned partition cases have been ordered to be stayed. In this background, a prayer has been made by learned Senior Counsel for setting aside the order under challenge and for direction to the authority concerned to take the partition proceedings to their logical conclusion as expeditiously as possible.

6. Ms. Chaudhary, learned counsel appearing on behalf of respondents No. 8 to 16 submits that as the interest of the respondents being

represented by her is with the petitioners, she has no objection in case the petition is allowed, as prayed for and in fact it is in the interest of the said respondents also in case the partition proceedings are taken to their logical conclusion as expeditiously as possible.

7. Mr. Dinesh Bhanot, learned counsel appearing for respondent No. 2 also adopted the submission of Ms. Chaudhary.

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

9. A perusal of the impugned order demonstrates that the said authority has ordered deferring of the partition proceedings on the ground that there is an order passed by the Court of law, in terms whereof, no further action can be taken in the partition petitions. Incidentally, in the impugned order, neither there is any reference of the case in which the stay order has been passed nor there is any reference of the contents of the order. This Court is of the considered view that in case there is an order passed by the competent Court of law staying the proceedings in the partition matters, which are pending before the authority concerned, then the least that was expected from the authority was to give some details of the said case as well as the application in which the order stood passed, as also the contents of the order in terms whereof the proceedings in the partition matters stood stayed by the said Court. However, the partition proceedings could not have been deferred by the authority concerned by passing the kind of non-speaking order which has been passed in the present case. The impugned order discloses nothing with regard to the details/particulars of the civil litigation, in lieu whereof, the authority has decided not to proceed with the partition proceedings.

10. In this view of the matter, this petition is allowed to the extent that the impugned order dated dated 28.07.2020, passed by learned Assistant Collector, 2nd Grade, Panjehra, Tehsil Nalagarh, District Solan, Himachal Pradesh is quashed and set aside, with direction to the authority concerned to

proceed with the partition proceedings which are pending before it. However, it is at liberty to appreciate the order, if any, passed by the Civil Court relating to the partition proceedings pending before it. In case the authority comes to the conclusion that partition proceedings pending before it stand stayed before it by the Civil Court, then the same shall be explained by the authority by way of passing a speaking order and by giving reference of the cases pending before the learned Civil Court as well as the interim order passed by the said Court. On the other hand, in case the authority comes to the conclusion that the stay order either does not pertains to the land involved in the partition proceedings or no such stay order has been passed, then the partition proceedings be taken to their logical conclusion as expeditiously as possible.

The petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Between:-

RAMAN VAIDYA, S/O SH. RAMESH CHAND VAIDYA, R/O HOUSE NO. 29/10, POST OFFICE ROAD, MANDI TOWN, DISTRICT MANDI, H.P.

...PETITIONER

(BY SHRI G.R. PALSRA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

...RESPONDENT

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

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.363 of 2022
Decided on: 11.05.2022

**Code of Criminal Procedure, 1973**- Sections 482- Quashing the order of Ld. Sessions Judge passed in criminal revision as well as order of Ld. Judicial Magistrate First Class, Mandi- Application of petitioner/ accused under Section 227 Cr.P.C. for discharge was dismissed- Held- Ld. Trial Court and Ld. Remand Court rightly held that there are sufficient grounds to proceed against the Copyright Act and recorded prima facie satisfaction to proceed against the petitioner/ accused- Petition dismissed. (Para 8)

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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**

Notice. Mr. Sumesh Raj, learned Additional Advocate General, accepts notice on behalf of the respondent.

***2.*** By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has prayed for the following reliefs:-

> *"It is, therefore, most respectfully prayed in view of the submissions made hereinabove, this petition may kindly be allowed and the order dated 08.04.2022, passed by the learned Sessions Judge, Mandi in Cr. Revision No. 16/2021/18 as well as the order of Ld. Judicial Magistrate First Class, Court No. 4, Mandi dated 15.06.2018 passed in Cr.M.A. No. 327-IV/18 may kindly be quashed and set aside after discharging the petitioner from the offences under Sections 51, 52 and 63 of The Copyright Act, 1957 and justice be done."*

***3.*** Brief facts necessary for the adjudication of present petition are that an application filed under Section 227 of the Criminal Procedure Code by the present petitioner for his discharge in Police Challan presented under Sections 51, 62 and 63 of the Copyright Act, 1957 stood rejected by the Court of learned Judicial Magistrate 1st Class, Court No. 4, Mandi, H.P., vide order dated 15.06.2018. Revision Petition preferred by the petitioner against the

said order was also dismissed by the learned Revisional Court vide order dated 8th April, 2022. Feeling aggrieved, the petitioner has preferred the present proceedings.

***4.*** Learned counsel for the petitioner has argued that the orders passed by both the learned Courts below are not sustainable in the eyes of law, for the reason that no case was made out against the petitioner under Sections 51, 51 and 63 of the Copyright Act, 1957. As per him, the report of the Assistant Director, Physics & Ballistics Regional, F.S.L. Central Range, Mandi, H.P. is vague and cannot be relied upon. He further argued that the petitioner in fact purchased the cartridges from a company named and styled as Computer Land A-169, Kalkaji, New Delhi. These cartridges were purchased by the petitioner on 07.01.2017, but the Company in issue was not impleaded as a party accused and case stands wrongly registered against the petitioner who happens to be the *bonafide* purchaser and, that too, for consideration. On these basis, learned counsel has submitted that the orders passed by the learned Courts below, being not sustainable in the eyes of law, be quashed and set aside.

***5.*** Opposing the petition, learned Additional Advocate General has submitted that a perusal of the order passed by the learned Trial Court and the subsequent order passed by the learned Revisional Court would demonstrate that there is no perversity in the same. Learned Additional Advocate General has argued that taking into consideration the scope of Section 227 of the Code of Criminal Procedure, when the learned Trial Court was not satisfied that it was a fit case for discharge of the accused, then it rightly dismissed the application filed by the petitioner, because learned Trial Court on the basis of material produced before it was otherwise satisfied that there was enough material available to proceed against the accused. Learned Additional Advocate General further submitted that the Revisional Court also in para-11 of the order took into consideration the factual matrix involved in

the case and while dismissing the revision petition, it held that as the learned Trial Court was yet to apply its mind to determine as to what offences, if any, stood made out against the accused in the facts and circumstances of the case, the revision petition in said background was rightly dismissed.

***6.*** Having heard learned counsel for the parties and perused the petition as well as the documents appended therewith, including the orders impugned, this Court is satisfied that there is no merit in the present petition.

***7.*** Section 227 of the Code of Criminal Procedure provides that if upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. This demonstrates that the condition precedent before passing an order of discharge of the accused is that the Judge has to come to the conclusion that there is no sufficient ground for proceeding against the accused and to this effect reasoning has to be recorded by the learned Judge.

***8.*** Coming to the facts of the present case, while dismissing the application filed under Section 227 of the Code of Criminal Procedure by the petitioner, learned Trial Court categorically held that having perused the detailed report filed under Section 173 of the Code of Criminal Procedure, the Court was of the view that there were sufficient grounds to proceed against the accused under the Copyright Act. That being the case, as rightly pointed out by learned Additional Advocate General also, having recorded its *prima facie* satisfaction that there was sufficient material to proceed against the petitioner, there was no occasion for the learned Trial Court to have had allowed the application filed under Section 227 of the Code of Criminal Procedure for discharging the accused. The effect of the opinion of RFSL with regard to the Logo was weighed by the learned Trial Court vis-a-vis other

material which was placed before it and it is thereafter that the learned Court gave its mind that according to it, there were sufficient grounds available to proceed against the accused. Similarly, a perusal of the order passed by the learned Revisional Court in general and paras-11 & 12 in particular demonstrates that learned Revisional Court by way of a reasoned order held that on the basis of allegations which stood made against the petitioner and on the material which was before the learned Trial Court, said Court was yet to apply its mind to determine as to what offences, if any, stood made out against the accused and merely because RFSL could not give any opinion regarding the Logo, the same was not sufficient so as to discharge the accused. Learned Revisional Court also observed and rightly so that whereas the police had only mentioned the offences punishable under Sections 51, 52 and 63 of the Copyright Act, but the Court was not restricted by the offences mentioned in the charge sheet and it was open for the Court to determine which offences stood made out from the investigation report which is filed before it.

***9.*** In view of what has been observed hereinabove, as this Court is of the considered view that there is no perversity in the orders which have been passed by the learned Courts below while dismissing the application filed by the petitioner under Section 227 of the Criminal Procedure Code praying for discharge, this petition being devoid of any merit, is dismissed.

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

Between:-

AMARJIT MALHOTRA, S/O SH. BISHAN LAL MALHOTRA, R/O 184, MASTER TARA SINGH NAGAR, JALADHAR (PB), PROPRIETOR OF MODERN REFRIGERATION INDUSTRIES, BANEH DI HATTI MUBARIKPUR, TEHSIL AMB, DISTRICT UNA H.P.

...PETITIONER

(BY SHRI SANJEEV KUTHIALA, SENIOR ADVOCATE, WITH M/S ANAIDA KUTHIALA & SHALINI THAKUR, ADVOCATES)

AND

BRIJANDAR SHARMA, S/O SH. NARINDER NATH SHARMA, R/O VILLAGE AND POST OFFICE BHANJAL, TEHSIL AMB, DISTRICT UNA, H.P.

...RESPONDENTS

(BY SHRI AJAY SHARMA, SENIOR ADVOCATE, WITH SHRI ATHARAV SHARMA, ADVOCATE)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 623 of 2021
Decided on; 22.06.2022

**Code of Criminal Procedure, 1973**- Sections 482- Petitioner assailed the order vide which right of the accused to lead defence evidence has been closed when despite reasonable opportunities accused failed to adduce evidence- Held- Once the accused had taken steps for summoning the witnesses and summons received unserved then the prudent thing for learned Trial Court would have been to fix another date for recording the statement of said defence witnesses rather than closing the evidence- Order not sustainable- Petition allowed. (Para 5)

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

**J U D G M E N T**

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner/accused has assailed order dated 29.10.2021, passed by the Court of learned Additional Chief Judicial Magistrate (1), Amb, District Una, H.P., in terms whereof, the right of the accused to lead defence evidence, after the complainant was provided an opportunity to lead additional evidence, has been closed, *inter alia*, on the ground that despite reasonable opportunities having been granted, the

petitioner/accused has failed to adduce evidence. Learned Court below also held that by seeking repeated opportunities for examining defence witnesses and not taking appropriate steps to ensure the presence of the witnesses, the accused intended to delay the disposal of the case, which was already more than 12 years old.

2. Mr. Kuthiala, learned Senior Counsel, while taking the Court through the impugned order, has argued that a perusal of the order passed demonstrates that Dealing Officer of the Income Tax Department, to whom summons were issued and who was called by the accused as his witness, was duly served, but the summons were sent back as un-executed for want of PAN number of the complainant. He submitted that as the petitioner/accused had performed his part as far as summoning of the witness was concerned, learned Court below erred in closing the defence evidence of the petitioner/accused and the petitioner/accused has been made to suffer for no fault of his.

3. Opposing the petition, learned Senior Counsel appearing for the respondent/complainant submitted that the summons which were issued to the Dealing Officer of the Income Tax Department were received back un-executed for want of PAN number of the complainant, which demonstrates that the particulars that were provided by the petitioner/accused were incomplete and the intention of petitioner is apparent that it was also a step so as to delay the adjudication of the complaint, which at the time of passing of the order by the learned Trial Court itself was more than a decade old.

4. In rebuttal, Mr. Kuthiala, learned Senior Counsel for the petitioner/accused submitted that as PAN number of the complainant is not in the knowledge of the petitioner/accused, therefore, the accused rightly was not in a position to furnish the same, as in his cross-examination, in the course of leading additional evidence, even the complainant stated in the Court that he was not aware of the PAN number.

5. Having heard learned Senior Counsel for the parties and after going through the petition as well as the documents appended therewith and also the record of the case, this Court is of the considered view that the impugned order *per se* is not sustainable in the eyes of law. *De hors* the fact as to whether the case is old or that number of opportunities stand granted to a party to lead evidence etc., in case a Court is passing an order with regard to closure of evidence of either of the parties, then the Court has to see on that particular day the act of omission on the part of the party, leading to non-presence of witnesses. A perusal of the impugned order demonstrates that one DW Gopal Krishan was present in the Court on the said date, who was given up by learned defence counsel. Summons issued to DW-2, i.e., Dealing Officer of the Income Tax Department were stated to have been received back un-executed for want of PAN number of the complainant. However, summons issued to DW Suresh Kumar were received back unserved. That being the case, this Court fails to understand as to how in these circumstances, the evidence of the accused could have been closed by the learned Court below. This Court is of the considered view that once the accused had taken steps for summoning the witnesses and summons issued to one of the witness were received back unserved and summons issued to the other witnesses were received back un-executed on account of some reason, then the prudent thing for learned Trial Court would have been to fix another date for recording the statement of said defence witnesses rather than closing the evidence, that too, on account of the reasons which have been mentioned in the impugned order. Yes, if on that date the witnesses were not present before the learned Trial Court on account of some act of omission of the accused, then the learned Trial Court would have been justified in passing the order which has been passed in the present case, but in the absence of same, said order cannot be sustained in law.

6. Accordingly, without dwelling any further on the matter, this petition is disposed of by setting aside order dated 29.10.2021, passed by the Court of learned Additional Chief Judicial Magistrate (1), Amb, District Una, H.P., in Case No. 162-I-09, titled as *Brijandar Sharma Vs. Sh. Amarjit Malhotra,* with the following directions:-

A. As agreed, DW Suresh Kumar shall be produced by the petitioner/accused on self responsibility on a date to be fixed by the learned Trial Court and in case the petitioner/accused fails to do so, then no further opportunity in this regard shall be granted.

B. As far as the Dealing Officer of the Income Tax Department is concerned, on the date when the parties shall appear before the learned Trial Court, opportunity shall be granted by the learned Trial Court for summoning of said witness, by calling upon the accused to take necessary steps in this regard. It is made clear that post service of the summons upon the Dealing Officer of the Income Tax Department, he shall appear before the learned Trial Court and depose whatever he has to say. Alongwith the summons which shall be issued to the Dealing Officer of the Income Tax Department, a copy of this order shall also be appended and it shall be mentioned in the summons which shall be issued to the Dealing Officer of the Income Tax Department that in case the Officer fails to appear before the learned Trial Court for the purpose of deposition alongwith the relevant record which may be brought by him, then the same shall be construed as contempt of the present order which is being passed by this Court today and this Court will not hesitate in taking cognizance against the Officer concerned.

C. Despite opportunity, in case no steps are taken by the accused for service of the Officer of the Income Tax Department, then no further opportunity in this regard shall be granted by the learned Trial Court.

D. It is clarified that learned Trial Court may not pass any order closing the evidence of the petitioner/accused in the event of the summons

issued to the Dealing Officer of the Income Tax Department not being served, however, this indulgence shall be shown by the Court only if appropriate steps stand taken by the petitioner/accused for summoning of the witness.

Parties through learned counsel are directed to appear before the learned Trial Court on 12th July, 2022, on which date, learned Trial Court shall fix a date for recording the evidence of the accused. It is made clear that the witness who has to be produced by the accused on self responsibility shall also be produced on the date which shall be so fixed by the Court for recording the evidence of the accused. It is further made clear that taking into consideration the fact that the complaint itself was filed more than 12 years back, all endeavour shall be made by the learned Trial Court to dispose of the petition before 30th September, 2022 and the date for recording the evidence of the accused shall be fixed taking into consideration the directions issued in this order.

An amount of Rs.10,000/- deposited before the Registry of this Court by the petitioner/accused in terms of order dated 30.11.2021, is ordered to be released in favour of the respondent in his bank account as cost, details whereof shall be supplied by the respondent to the Registry of this Court. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

GSCO INFRASTRUCTURE PRIVATE LIMITED,
SCO NO.67, SECTOR 20-C, CHANDIGARH THROUGH ITS AUTHORIZED SIGNATORY,
AVTAR SINGH, AGED 38 YEARS,
SON OF SHRI GURMEET SINGH,
RESIDENT OF HOUSE NO.517,
SECTOR 33-B, CHANDIGARH.

(BY S/SH. ANKIT MIDHA & ASHISH MIDHA, ADVOCATES)

….PETITIONER

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY, JAL SHAKTI VIBHAG (IPH), IRRIGATION AND PUBLIC HEALTH DEPARTMENT, SHIMLA

2. THE ENGINEER-IN-CHIEF (P) JAL SHAKTI VIBHAG (HPIPH), IRRIGATION AND PUBLIC HEALTH DEPARTMENT, SHIMLA.

3. THE CHIEF ENGINEER (D/Z), JAL SHAKTI VIBHAG (HPIPH), IRRIGATION AND PUBLIC HEALTH DEPARTMENT, DHARAMSHALA, HIMACHAL PRADESH.

4. THE SUPERINTENDING ENGINEER (JSV CIRCLE), JAL SHAKTI VIBHAG (HPIPH), IRRIGATION AND PUBLIC HEALTH DEPARTMENT, NURPUR, DISTRICT KANGRA, HIMACHAL PRADESH.

5. THE EXECUTIVE ENGINEER, PSMIP DIVISION, JAL SHAKTI VIBHAG (HPIPH), SADWAN, NURPUR DISTRICT KANGRA, HIMACHAL PRADESH.

6. TENDER EVALUATION COMMITTEE THROUGH ITS CHAIRMAN, ENGINEER-IN-CHIEF (P) JAL SHAKTI VIBHAG (HPIPH), IRRIGATION AND PUBLIC HEALTH DEPARTMENT, SHIMLA.

(BY SH.ASHOK SHARMA, ADVOCATE GENERAL, ALONGWITH S/SH.HEMANT VAID, ADDITIONAL ADVOCATE GENERAL & RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

….RESPONDENTS

ARBITRATION CASE
NO.24 OF 2022
Decided on: 13.06.2022

**Arbitration and Conciliation Act, 1996**- Section 9- Dispute between the parties has been referred to Arbitrator- Petitioner aggrieved from interim order assailed the same- Held- Order dated 28.03.2022 modified to the extent that respondents are restrained from taking any coercive action against the petitioner, including recovery of amount already paid, but respondents shall have liberty to invite fresh tenders for balance work of the Dam, if so advised and desired as such and the petitioner shall also have right to claim damages, if any, on account of that and the aforesaid order shall be subject to final outcome of the Award passed by learned Arbitrator and in case fresh tenders are invited, the same shall not be finalized without leave of learned Arbitrator- Parties are at liberty to apply or pray before learned Arbitrator for alteration, vacation or modification of the aforesaid interim order – Petition disposed of accordingly. (Para 9)

**Cases referred:**

Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125;

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

**O R D E R**

Petitioner, by way of present petition, has approached this Court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Conciliation Act').

2. Respondents-State have filed OMP No.319 of 2022 for vacation of ad-interim order passed by this Court on 28.03.2022, wherein this Court, after taking into consideration material placed before the Court, has passed the following order:-

"3. Case of the petitioner, in brief, is that in the year 2015, IPH Division Nurpur, District Kangra, H.P., had issued Notice Inviting Tender for the work C/O Phina Singh Medium Irrigation Project in Tehsil Nurpur, District Kangra, H.P. [("SH: Lump sum Contract for Construction of Concrete Gravity Dam (Height=22.00m, Top Length=160.00m, Average foundation dept below the NSL=13.16m)] in Chakki Khad at Village Lahru to Check 350 cumecs flood discharge and to create 0.571 million cubic meter live storage. On completion of process, in response thereto, petitioner was found L-1 and work was awarded to the petitioner and thereafter on completion of Geological investigations, planning and designing, petitioner submitted detailed working plan to the respondents-Department, which was sent to the Central Water Commission (CWC), New Delhi.

4. In response, CWC, had directed to increase the capacity of the Check Dam from 350 cumecs to 1145 cumecs almost more than three times. Further that no item wise rate was determined in the work and the tender was for lump sum amount and after increase in the capacity, no rate was finalized between the parties and thereafter petitioner has started execution of work and submitted running bills. Out of them, 18 running bills, were paid by the respondents-Department, however, suddenly vide letter dated 03.03.2022 (Annexure P-29) minutes of meeting have been communicated to the petitioner-Company, whereby decision has been taken by the Tender Evaluation Committee (TEC) in meeting held on 12.11.2021, on the basis of Audit Report of the Project received from the Principal Auditor General, Himachal Pradesh, vide communication dated 06.08.2021. Petitioner has also received communication dated 04.03.2022 from Executive Engineer concerned alongwith minutes of meeting of TEC held on 21.02.2022, whereby revised rates for execution of work have been determined and approval of the petitioner has been sought in this regard. There is

also reference of recoveries to be effected accordingly from petitioner by the Executive Engineer as per Clause-63 of Contract Agreement from the petitioner.

5. Learned counsel for the petitioner submits that in view of Clause 59, containing provisions of 'Payments for Deviations' especially 59.4, as applicable in present case, alteration of rate was to be communicated by the Contractor within 14 days of the date of receipt of the order to carry out the said work informing the Engineer-in-Charge in writing the rate at which he proposes to claim for such item of work and Engineer-in-Charge had to determine rate of the item(s) in question on the basis of prevailing rates within two months thereafter. According to him, in present case, petitioner started execution of work in the year 2019 and submitted running bills, in accordance with rate which the petitioner had proposed to claim for such execution of work and those bills were approved by the concerned Engineer-in-Charge making payment of two running bills on the same rates, but thereafter, they determined Revised Payment Schedule/Rates for construction of Dam in meeting of TEC held on 27.02.2020 which were communicated by the Engineer-in-Charge Jal Shakti Vibhag, vide communication dated 19.03.2020 (Annexure P-7) and thereafter, all running bills have been paid as per these rates and, therefore, in terms of contract, the rate for execution of work stands determined in February 2020 and on the basis of audit objection, instead of settling the para with Principal Auditor, recovery of the amount already paid to the petitioner as well as revision of the rates on the basis of such Audit Report has been proposed which is contrary and in violation of terms of agreement executed between the parties.

6. Learned Deputy Advocate General seeks time to file response. Be filed within two weeks, as prayed.

7. A *prima facie* case is made out for ad-interim stay, therefore, respondents are restrained from taking any

> coercive action, including recovery of amount already paid and also from inviting fresh tenders for balance work of the Dam till next date of hearing.
>
> 8. List for consideration on 21.04.2022.
>
> 9. Petitioner is permitted to produce a copy of this order, 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."

3. Claim of the petitioner entitling it for interim, as prayed and as granted by this Court, has been disputed by respondents.

4. Learned Advocate General referring Section 14(d), 20A and 41(ha) of Specific Relief Act, 1963 (hereinafter referred to as 'Relief Act'), has contended that contract in present case, in its nature is determinable, relating to infrastructure project and, therefore, no injunction can be granted by this Court in favour of the petitioner, as prayed, as it would impede or delay the progress of completion of the infrastructure project as project in present case is an infrastructure project which was to be completed by the petitioner within a time bound period, but the petitioner has failed to do so and, therefore, continuation of stay restraining the respondents from recovery of the amount already paid to the petitioner and also from inviting fresh tender of remaining work of the Dam is hampering public interest and impeding and delaying the progress of completion of infrastructure project of public importance. To substantiate plea for vacation of stay, he has also placed reliance on pronouncement of the Supreme Court in ***Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.,*** reported in ***(2007) 7 SCC 125.***

5. Learned counsel for the petitioner has submitted that after passing of interim order by this Court, Hon'ble the Chief Justice of this High Court, in ***Arbitration Case No.150 of 2021, titled as GSCO Infrastructure***

***Private Limited vs. State of Himachal Pradesh & others,*** an application filed under Section 11(6) of the Conciliation Act, between the same parties regarding same dispute, has appointed Arbitrator for adjudicating the rival claims of the parties and, thereafter, learned Arbitrator has entered the reference and has also fixed date of hearing in the said proceedings. Therefore, it has been contended that in such circumstances, this Court instead of evaluating merits of rival contentions of the parties should continue interim order till further orders, subject to final Award passed in arbitration proceedings. It has further been stated that petitioner is ready and willing to complete the project and it, in no circumstances, intends to impede or delay the progress of completion and it is claimed that rather respondents are not having sufficient funds for completion or re-tendering the work.

6. To substantiate the plea of paucity of funds, learned counsel for the petitioner has pointed out contents of communication dated 07.10.2021 (Annexure P-20) wherein, it has been informed that there was paucity of funds and Department was processing the Central Assistance case under PMKSY (AIBP) with Central Water Commission (CWC) which was under progress, and also, averments made in para-2 of the reply, wherein it is stated that the revised financial assistance from Government of India is also expected very shortly with arguments that respondents are not having sufficient funds and for that reason only bills/claims of the petitioner have also not been cleared and paid.

7. Lastly, it is contended that petitioner has no objection for permitting the respondents to invite fresh tenders, if they intend to do so, but subject to liability for damages caused to and claimed by the petitioner for causing loss to it, on account of such action of the respondents as claim of the petitioner is that by inviting fresh tenders, instead of allowing the petitioner to complete the project after settling terms and conditions, is illegal, unjust,

unfair and contrary to law and thus, in the eventuality of allowing the respondents to invite fresh tenders, liberty to claim damages has been prayed.

8. Dispute between parties has been referred to learned Arbitrator, who has entered into the proceedings and has also fixed next date of hearing and parties are expected to put their all claims and counterclaims before learned Arbitrator for adjudication which are covered by and arising out of arbitration agreement and, therefore, for claiming damages, if any, no liberty of this Court is required and parties are entitled to claim/raise any relief/issue before learned Arbitrator.

9. Taking into consideration provisions of law and submissions made by learned counsel for the parties, order dated 28.03.2022 is modified to the extent that respondents are restrained from taking any coercive action against the petitioner, including recovery of amount already paid, but respondents shall have liberty to invite fresh tenders for balance work of the Dam, if so advised and desired as such and the petitioner shall also have right to claim damages, if any, on account of that and the aforesaid order shall be subject to final outcome of the Award passed by learned Arbitrator and in case fresh tenders are invited, the same shall not be finalized without leave of learned Arbitrator. Parties are at liberty to apply or pray before learned Arbitrator for alteration, vacation or modification of the aforesaid interim order as this order is subject to any further order, interim or final, passed by learned Arbitrator.

10. Any observations made in this order shall not have any bearing on merits of the case of the parties put forth before learned Arbitrator. Same shall be confined for the purpose of adjudication of this petition only.

11. Petition is disposed of in aforesaid terms alongwith pending application(s).

12. Parties are permitted to produce a copy of this order, 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 MS. JUSTICE JYOTSNA REWAL DUA, J.**

Between:-

ANAND SHARMA,
S/O SH. K.D. SHARMA,
AGED 65 YEARS,
AT PRESENT CHANDAN HOTEL,
ROOM NO.102, THE MALL,
SHIMLA-171001 (HP)

.....PETITIONER

(BY MR. Y.P.SOOD, ADVOCATE)

AND

BHAGAT RAM SACHDEVA,
R/O 37, MIDDLE BAZAR, SHIMLA
SINCE DECEASED THROUGH
HIS LEGAL REPRESENTATIVE
SHRI RAJESH SACHDEVA,
S/O SHRI BHAGAT RAM SACHDEVA,
RESIDENT OF 33, MIDDLE BAZAR,
SHIMLA-171001, H.P.

.....RESPONDENT

CIVIL REVISION
NO.10 OF 2022
Decided on: 15.06.2022

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Revision assailing the order rejecting the prayer of petitioner for withdrawal of amount of Rs.34800/-

deposited as arrears of rent- Held- No order of forfeiture of deposited rent was passed by Ld. Rent Controller- Matter has been settled between tenant and legal heirs of the landlord, thus prayer for withdraw of rent deserves to be allowed- Revision allowed. (Para 7)

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

**O R D E R**

Petitioner has invoked Section 24 (5) of the H.P. Urban Rent Control Act, 1987 (Act in short) against the impugned order passed by learned Rent Controller on 09.08.2018, rejecting the prayer of the petitioner for withdrawal of amount of Rs.34800/- deposited by him in the Court as arrears of rent.

**2. Relevant facts are as under: -**

**2(i)** Petitioner moved an application under Section 21 of the Act. This application filed in the year 2016/2017was with the averments that the petitioner was tenant in the premises in question, belonging to the respondent-landlord Sh. Bhagat Ram Sachdeva. Petitioner had been paying the rent of the premises in question. The landlord Sh. Bhagat Ram Sachdeva had refused to accept the rent w.e.f. August 2014. The prayer was made in the application to allow the petitioner to deposit a sum of Rs.34800/- towards rent of the tenanted premises in the Court for the period 1.08.2014 to December, 2016.

**2(ii).** The petitioner deposited a sum of Rs.34800/- in the Court on 01.01.2017 by way of a demand draft.

**2(iii).** It appears that reply to the application moved by the petitioner was filed by the landlord Sh. Bhagat Ram Sachdeva, contending that the rate of rent was Rs.1500/- per month. He also alleged in the reply that original tenant was one Shri Naresh Gupta, who had sublet the premises in question to the petitioner.

**2(iv).** The landlord Sh. Bhagat Ram Sachdeva died during pendency of the proceedings.

**2(v).** During hearing of the case before learned Rent Controller on 09.08.2018, learned counsel for the petitioner made an oral prayer for withdrawing the application filed by the petitioner under Section 21 of the Act with further prayer to allow the petitioner to withdraw the rent deposited by him.

**2(vi).** The oral prayer made by learned counsel for the petitioner qua withdrawal of the rent amounting to Rs.34800/- was disallowed by learned Rent Controllervide order dated 09.08.2018.

**3.** Aggrieved against non-acceptance of his prayer for withdrawing the rent amount so deposited, the petitioner has preferred the instant civil revision.

In the instant case, notice was issued to the sole respondent Shri Rajesh Sachdeva, son of landlord Sh. Bhagat Ram Sachdeva, (respondent in application under Section 21 of the Act). As per office report, the said respondent has been served, however, none appeared on his behalf.

**4.** To a query of the Court regarding maintainability of the civil revision, learned counsel for the petitioner placed reliance upon the notification dated 10.10.2006, issued by the State Government under Section 24 (1) of the Act, which reads as under:-

> *"No. LSG-A(3)-1/71-11-In supersession of this Department notification of even number dated 26-5-1988, published in Rajpatra, Himachal Pradesh (Extra-ordinary), dated 7th June, 1988 and in exercise of powers vested in him under sub section (1) of Section 24 of the Himachal Pradesh Urban Rent Control Act, 1987 (Act No. 25 of 1987) the Governor, Himachal Pradesh is pleased to confer the powers of appellate authorities on all the District and Sessions Judges/Additional District and Sessions Judges in respect of the urban areas in their respective existing jurisdictions to hear appeals against*

*the orders made by the Rent Controllers under sections 4,5,11,12,13,14 [Except 14(3) (a) (i) and 21 of the said Act."*

The order impugned herein has not been passed under the provisions made specifically appealable in the aforesaid notification. Therefore, in terms of Section 24(5) of the Act, the instant civil revision would be maintainable.

**5.** Coming to the merits of the matter, the petitioner had moved an application under Section 21 of the Act for deposit of the rent. He deposited an amount of Rs.34800/- towards the rent of the premises in question for the period August 2014 to December, 2016. Learned Rent Controller has recorded in the impugned order that landlord Sh. Bhagat Ram Sachdeva died during pendency of the application under Section 21 of the Act. The oral prayer made by learned counsel for the petitioner before the learned Rent Controller on 09.08.2018 for withdrawing the application under Section 21 of the Act and for withdrawing the rent deposited by him, has been disallowed by the learned Rent Controller for the following reasons: -

"*There is no provisions under H.P. Urban Rent Control Act for withdrawal of the rent once deposited by the tenant under Section 21 of the H.P. Urban Rent Control Act. As per section 23 of the H.P. Urban Rent Control Act, any rent which is not withdrawn by the landlord within 5 years which is deposited will be forfeited to the government by an order made by the Controller. Thus, if respondent does not claim the rent same will be forfeited to the government of Himachal Pradesh."*

**6.** Learned counsel for the petitioner canvassed the following pleaded reasons for making the prayer for withdrawing the application as well as the deposited rent:-

**(a).** During the pendency of the application moved by the petitioner-tenant under Section 21 of the Act, the landlord Sh. Bhagat Ram Sachdeva died.

**(b).** After the death of Sh. Bhagat Ram Sachdeva, a settlement was arrived between the petitioner and the legal heirs of Sh. Bhagat Ram Sachdeva.

**(c).** In terms of the said settlement/arrangement, the possession of the tenanted premises was handed over by the petitioner to the legal heirs of the landlord Sh. Bhagat Ram Sachdeva.

**(d).** The payment of rent was also settled between the petitioner and the legal heirs of Sh. Bhagat Ram Sachdeva. The due and admissible rent payable by the petitioner was paid to the legal heirs of the landlord Sh. Bhagat Ram Sachdeva.

**(e).** The disputes between the petitioner and landlord were settled, therefore, the petitioner did not intend to pursue the application moved by him under Section 21 of the Act. Accordingly, he made an oral prayer before the learned Rent Controller on 09.08.2018 for withdrawing the application as well as for withdrawing the rent deposited by him.

**7.** As already observed above, there is no appearance on behalf of the respondent-legal heir of the original landlord Sh. Bhagat Ram Sachdeva, therefore, factual assertions projected on behalf of the petitioner having gone unrebutted, are to be accepted.

While turning down petitioner's prayer for withdrawal of deposited rent, learned Rent Controller has observed in the impugned order that there is no provision in the Act for withdrawal of the rent once deposited by the tenant. As per the impugned order, in terms of Section 23 of the Act, the rent which is not withdrawn by the landlord within five years from the date of deposit, will be forfeited to the State Government by an order made by the Controller. Learned Rent Controller has further observed that if the respondent does not claim the rent, the same will be forfeited to the State Government.

The above observations are not in consonance with the provisions of Sections 21 and 23 of the Act. Section 21 (1) of the Act reads as under: -

> *"21.* ***Deposit of rent by the tenant.*** *-(l) Where the landlord does notaccept any rent tendered by the tenant within the time referred to in section 20 or refuses or neglects to deliver a receipt referred to therein or where there is abona fide doubt as to the person or persons to whom the rent is payable, thetenant may deposit such rent with the Controller in the prescribed manner."*

Section 21 (4) pertains to withdrawal of deposited rent and is extracted hereinafter: -

> *"21(4). If an application is made for the withdrawal of any deposit of rent, the Controller shall, if satisfied that the applicant is the person entitled to receive the rent deposited, order the amount of the rent to be paid to him in themanner prescribed:*
>
> *Provided that no order for payment of any deposit of rent shall bemade by the Controller under this sub-section without giving all persons named by the tenant in his application under sub-section (2) as claiming to beentitled to the payment of such rent an opportunity of being heard and suchorder shall be without prejudice to the rights of such persons to receive suchrent being decided by a court of competent jurisdiction."*

Section 23 of the Act pertains to forfeiture of the deposited rent and runs as follows: -

> *"23.* ***Savings to acceptance of rent and forfeiture of rent in deposit.-***
> *(1) The withdrawal of rent deposited under section 21 in the manner provided therein shall not operate as an admission against the person withdrawing it ofthe correctness of the rate of rent, the period of default, the amount due, or ofany other*

*facts stated in the tenant's application for depositing the rent underthe said section.*
*(2) Any rent in deposit which is not withdrawn by the landlord or bythe person or persons entitled to receive such rent shall be forfeited toGovernment by an order made by the Controller, if it is not withdrawn before the expiration of five years from the date of posting of the notice of deposit.*
*(3) Before passing an order of forfeiture, the Controller shall givenotice to the landlord or the person or persons entitled to receive the rent indeposit by registered post at the last known address of such landlord of personor persons and shall also publish the notice in his office and in any localnewspaper."*

Section 21(4) of the Act provides for withdrawal of the deposited rent subject to the satisfaction of the Rent Controller that the applicant seeking withdrawal of the deposited rent is the person entitled to receive the same. The person entitled to receive the deposited rent can be either the landlord or any other person. It is open for the tenant to indicate in his application, names of the persons, who according to him, are entitled to receive the rent.Section 23(2) makes it evident that the deposited rent, which is not withdrawn before the expiry of five years from the date of posting of deposit notice either by the landlord or the person who is entitled to receive such rent, shall be forfeited to the State Government by an order made by the Rent Controller. Section 23(3)makes it incumbent upon the learned Controller to give notice to the landlord or the person(s) entitled to receive the deposited rent before passing an order of forfeiture. Sub-Sections (2) and (3) of Section 23 of the Act envisage that it is not just the landlord who can withdraw the deposited rent amount, the withdrawal of the deposited rent can be by any other person entitled to receive the rent. In theinstant case, on 09.08.2018, petitioner had prayed for withdrawal of his application moved in the year 2016/2017 under Section 21 of the Act as well as the rent deposited by him before the learned Rent Controller. Five years had not elapsed at the time even

from the date of deposit. No order of forfeiture of deposited rent was passed by the learned Rent Controller. The petitioner had not moved any formal application for withdrawal of deposited rent but had prayed orally for withdrawal of his application moved under Section 21 of the Act as well as for refund of deposited rent. In the facts of the case, when the applicant has now pleaded having settled the matter amicably with the legal heirs of the landlord and further that the payment of rent of the premises in question had been made to the legal heirs of the original landlord Sh. Bhagat Ram Sachdeva and also that possession of the premises in question has been handed over by him to the legal heirs of landlord, then under the circumstances, prayer for withdrawal of the application moved by the petitioner under Section 21 of the Act as well as for withdrawal of the rent deposited by him deserves to be allowed. The impugned order rejecting the prayer cannot be sustained in the facts of the case now canvassed by learned counsel for the petitioner, which have not been rebutted by the other side.

For the foregoing reasons, the civil revision is allowed. The impugned order dated 09.08.2018, passed by learned Rent Controller,Court No. (2), Shimla is set-aside. The application No.29-2 of 2017 moved under Section 21 of the Act by the petitioner before learned Rent Controller is ordered to be treated as withdrawn. The amount of Rs.34800/- deposited by the petitioner in application No.29-2 of 2017 before learned Rent Controller, Court No.(2),Shimla is ordered to be refunded to him alongwith up to date interest. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:

1) BOEHRINGER INGELHEIM PHARMA GmbH & CO. KG, D- 55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER.

2) BOEHRINGER INGELHEIM (INDIA) PVT. LTD. UNIT NO.202 AND PART OF UNIT NO.201, 2ND FLOOR GODREJ 2, PIROJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI 400079 THROUGH ITS POWER OF ATTORNEY HOLDER.

….PLAINTIFFS.

(BY. M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES, WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, ARPITA SAWHNEY AND PRIYANKA SHARMA, ADVOCATES)

AND

1. MSN LABORATORIES PRIVATE LIMITED 22-23, INDUSTRIAL AREA, MEHATPUR, UNA, HIMACHAL PRADESH, 174315 THROUGH ITS MANAGING DIRECTORS.
ALSO AT
MSN LABORATORIES PRIVATE LIMITED MSN HOUSE, PLOT NO.C-24, SANATH NAGAR INDUSTRIAL ESTATE SANATH NAGAR, TELANGANA 500018

ALSO AT MSN CORPORATE, H.NO.2-91/10 & 11/MSN WHITEFIELDS, KONDAPUR, HYDERABAD 500084 TELANGANA

2. ERIS LIFESCIENCES LIMITED AF-10 KANCHAN PHARMA HOUSE NATIONAL HIGHWAY NO.8, ASLALI, AHMEDABAD-382427 GUJARAT
THROUGH ITS MANAGING DIRECTOR.

….DEFENDANTS.

(BY. MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE, WITH M/S GURU NATRAJAN, SHRADHA KAROL, ADVOCATES, FOR DEFENDANT NO.1)

( MR. NEERAJ GUPTA, SENIOR ADVOCATE, WITH M/S RAJESHWARI, ANUJ GUPTA, SWAPNIL GAUR AND ABHINEETA CHATURVEDI, ADVOCATES, FOR DEFENDANT NO.2)

OMP No.129 of 2022
in COMS No.7 of 2022
Reserved on: 29.03.2022
Decided on: 21.04.2022

**Code of Civil Procedure, 1908**- Order VII Rule 10, 11 and Section 151- Return of plaint- **Commercial Courts Act, 2015**- Sections 7 and 12- The plaintiffs have failed to disclose that commercial dispute raised by the plaintiffs was of what special value, therefore, suit is not maintainable as a commercial suit- Held- It is apparent from the contents of the plaint that the dispute raised by the plaintiff is a commercial dispute and the specified value in relation to the commercial disputes stands spelled out by the plaintiff in Paras 45 and 46 of the plaint-Application dismissed. (Para 18)

**Cases referred:**

Ambalal Sarabhai Enterprises Ltd. vs. K.S. Infraspace LLP (2020) 15 Supreme Court Cases 585;
Condor Healthcare Pvt. Ltd. and another vs. M/s Corem Pharma Pvt. Ltd, 2018 SCC OnLine Hyderabad 348;
Laxmi Polyfab Pvt. Ltd. vs. Eden Realty Ventures Pvt.Ltd. And Another, AIR 2021 Calcutta 190;

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*This application coming on for pronouncement of order this day, the Court passed the following:*

**O R D E R**

This order will dispose of an application filed by the applicant/defendant No. 2 under Order VII, Rules 10 and 11 read with Section 151 of the Code of Civil Procedure praying for rejection/return of the plaint on the grounds taken thereunder.

2. At the very outset, it may be clarified that the ground of the suit being bereft of any cause of action against the defendant No. 2 stands pleaded in the application, but the same was not pressed and the application was primarily argued on the ground that in terms of the provisions of the

Commercial Courts Act, 2015, the Courts have jurisdiction to entertain a "commercial dispute of a specified value" and not a "commercial dispute not of specified value" and as the plaintiffs have failed to disclose that commercial dispute raised by the plaintiffs was of what specified value, therefore, the suit was not maintainable as a commercial suit and the same was liable to be returned to the plaintiffs for its presentation before the appropriate Court as an ordinary Civil Suit.

3. Mr. Neeraj Gupta, learned Senior Counsel appearing for defendant No. 2 has referred to the provisions of Sections 7 and 12 of the Commercial Courts Act, 2015 (hereinafter referred to as "the 2015 Act"). By placing reliance thereupon, he has submitted that in terms of the provisions of Section 7 of the Act, all suits and applications relating to commercial disputes of a Specified Value filed in the High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court. He further submitted that in terms of the provisions of Section 12(1)(d), the "Specified Value" of the subject matter of the commercial dispute in a suit shall be determined, where the relief sought in a suit, relates to any other intangible right, as the market value of the said rights, as estimated by the plaintiff. Learned Senior Counsel has thereafter taken the Court through the averments as they stand contained in the plaint and submitted that a perusal of the plaint demonstrates that it lacks material particulars, as are necessary in terms of the 2015 Act for a suit to be maintained as a commercial suit. By referring to para-21 of the plaint, he argued that all that is mentioned in this para is that subject matter of the present suit was a commercial suit, as defined in Section 2(1)(c)(xvii) and is of "Specified Value", as defined in Section 2(1)(i) read with Section 12 of the 2015 Act, without disclosing as to what the "Specified Value" of the subject matter was. Thereafter, by referring to the averments as are contained in paras-45 and 46 of the plaint, learned Senior Counsel has urged that there is no

specific mention in these paras of the "Specified Value" of the subject matter of the commercial dispute and, therefore, the application filed under Order VII, Rules 10 & 11 read with Section 151 of the Code of Civil Procedure has to be allowed and the plaint is liable to rejected to the plaintiffs for its presentation before the appropriate Court of law, as an ordinary Civil Suit. Learned Senior Counsel has relied upon the following two judgments in support of his contentions:-

> *"1. Ambalal Sarabhai Enterprises Limited Vs. K. S. Infraspace LLP and another (2020) 15 Supreme Court Cases 585.*
> *2. Laxmi Polyfab Pvt. Ltd. Vs. Eden Realty Ventures Pvt. Ltd. And another, AIR 2021 Calcutta 190."*

4. By way of the response that stands filed to the application, the plaintiffs have contested the application on the ground that the contention of the applicant/defendant No. 2 that the present commercial suit does not contains any averments as to the "Specified Value" of the Intellectual Property Rights, i.e., Suit Patent IN'301 is baseless and misleading, as in paras-21, 45 and 46 of the plaint, the plaintiffs have categorically indicated the aggregate suit valuation and thus, complied with the mandate of law. According to the plaintiffs, the *lis* in issue is a commercial dispute, as it falls within the ambit of Section 2(c)(xvii) of the 2015 Act and plaintiffs have specifically valued the infringement of its patent, i.e., IN '301 at rupees one crore and sought damages on this count. Further, as per the plaintiffs, Sections 6, 7 and 12 of the Commercial Courts Act have to be read together with Sections 104 and 108 of the Patents Act, 1970, harmonious reading of which would demonstrate that the objections raised by defendant No. 2 are without any merit.

5. Mr. Ashok Aggarwal, learned Senior Counsel, appearing for the plaintiffs has argued that a patent dispute is always a commercial dispute and further in terms of Section 108 of the Patents Act, 1970, the reliefs which

a party can get in a suit for infringement, include an injunction and at the option of the plaintiff, either damages or an account of profits. Learned Senior Counsel by referring to the contents of the plaint, has submitted that whereas in para-21 of the plaint, the plaintiffs have clearly spelled out that the subject matter of the suit was a commercial dispute, as defined in the Commercial Courts Act, which was of a "Specified Value" in terms of the said Act and thereafter, in paras-45 and 46 of the plaint, the plaintiffs have further stated that the plaintiffs were assessing the value of the suit for the purpose of decree for permanent injunction at rupees 10,000/-, whereupon requisite Court Fee stood paid and for the prayer of money decree of damages, the suit was valued at rupees one crore, whereupon, *ad valorem* Court Fee stood paid.

6. Learned Senior Counsel has also argued that the averments that are contained in paras 45 and 46 of the plaint do take care of the provisions of Section 12(1)(d) of the 2015 Act, as the market value of the rights infringed by the defendants is to be as per the estimate of the plaintiffs and same has to be taken into account for determining specified value which has to be in terms of the estimation of the plaintiffs and the same can not be at the whims of the defendant. Learned Senior Counsel has also argued that herein as the right of the plaintiffs of exclusive use of its patent stood infringed, for which damages were being sought by the plaintiffs alongwith other reliefs, therefore, it was the estimation of the plaintiffs of the market value of the said rights, which stood infringed, which were to be taken into account for determining the "Specified Value". Learned Senior Counsel has also relied upon the following judgment in support of his contention:-

> "Condor Healthcare Privae Limited and another 2018 SCC Online Hyd 348.

7. I have heard learned counsel for the parties and have also gone through the averments contained in the application as well as the reply and

also the plaint.

8. The application in issue stands filed under Order VII, Rule 10 of the Code of Civil Procedure read with Rule 11 thereof. In terms of Order VII, Rule 10 of the Code, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted, subject to the provisions of Rule10-A thereof. In terms of the provisions of Order VII, Rule11 of the Code, the plaint shall be rejected if the same, *inter alia,* does not disclose a cause of action; or where the suit appears from the statement in the plaint to be barred by any law.

9. In the present case, the plea of non-disclosure of cause of action has not been pressed by the applicant/defendant No. 2. During the course of arguments of the application in hand, learned Senior Counsel for the applicant/defendant No. 2 could not point out that the suit in issue appeared to be barred by any law from the statement in the plaint.

10. As far as the contention so raised on behalf of applicant/defendant No. 2 that the suit which stood filed, as a commercial suit was not maintainable as such is concerned, this Court is of the considered view that the arguments which have been raised in this regard by the applicant/defendant No. 2 cannot be accepted. Section 2(1)(c)(xvii) defines "commercial dispute" to mean a dispute arising out of intellectual property rights relating to registered and unregistered trademarks, copyright, patent etc. Section 2(1)(i) defines "Specified Value" in relation to a commercial dispute to mean the value of the subject matter of the suit, as determined in accordance with Section 12 , which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government. In terms of Section 12(1)(d), the "Specified Value" of the subject matter of the commercial dispute in a suit, where the relief sought relates to any other intangible right, is the market value of the said rights, as estimated by the plaintiff.

11. Herein, the suit filed by the plaintiffs is for permanent

prohibitory injunction, restraining the defendants from infringing the patent owned by plaintiff No. 1 and other consequential reliefs. The reliefs prayed for by the plaintiffs are to restrain the defendants by a permanent order and injunction from infringing the patent rights of the plaintiffs under Indian Patent No. 243301 and for ordering the defendants to jointly and severally pay to the plaintiffs a sum of rupees one crore as and by way of damages. There are other reliefs also sought by the plaintiff, however, the principal reliefs are of permanent injunction and damages. In para-46 of the plaint, the valuation of the suit for the purpose of Court Fee and jurisdiction has been done and the same reads as under:-

> *"(i) Prayer (a) for permanent injunction is valued at Rupees 10,000/-wheeon court fee of Rupees 1260 has been paid.*
> *(ii) Prayer (b) for a money decree of damages, the suit is valued at Rs.1 Crore whereon ad valorem court fees of Rs.1,02,760/- has been paid.*
> *(iii) Prayer (c) for seizure/forfeiture delivery up the suit is valued at Rs.10,000/- whereon Court fees of Rs.1260/- has been paid.*
> *(iv) Prayer (a) and (c) is valued at Rs.10,000 each and court fee of Rs.2520/- is paid.*
> *Thus total court fee of Rs.105080/- has been paid on the plaint on the aggregate suit valuation of Rs.1 Crore+10,000/-+10,000/-."*

12. This Court is of the view that the contents of para-46 of the plaint specify the "Specified Value" of the intangible right, as estimated by the plaintiffs and, therefore, it cannot be said that the plaint does not discloses the "Specified Value" of the commercial dispute.

13. Now coming to the judgments relied upon by the parties:-

In ***Ambalal Sarabhai Enterprises Ltd.*** Versus ***K.S. Infraspace LLP (2020) 15 Supreme Court Cases 585***, Hon'ble Supreme Court after referring to the relevant provisions of Section 2 and Sections 6 &

7 of 2015 Act, held that a matter will fall under the jurisdiction of the Commercial Court or the Commercial Division of the High Court on the following factors:-

**(i) it shall be a commercial dispute within the meaning of Section 2(1)(c) of the Act; and**

**(ii) such commercial disputes are of a specified value as per Section 2 (i) of the Act.**

14. Hon'ble Supreme Court also held that in terms of Section 11 of the Act, notwithstanding anything contained in the Act, a Commercial Court or a Commercial Division shall not entertain or decide any suit relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

15. In ***Laxmi Polyfab Pvt. Ltd.*** Versus ***Eden Realty Ventures Pvt.Ltd. And Another, AIR 2021 Calcutta 190***, Honble High Court of Calcutta held with regard to Civil Suit No.116 being adjudicated by it that the plaintiffs have sought to recover money lent and advanced, from the defendant and the plaintiffs had not established themselves to fall in any category under Section 2 (1) (c) of the Act of 2015 and therefore, the dispute involved in the suit cannot be said to be a "commercial dispute" within the meaning of the Act of 2015.

16. In ***Condor Healthcare Private Limited and another*** Versus ***M/s Corem Pharma Private Limited***, ***2018 SCC OnLine Hyderabad 348***, Hon'ble High Courts of Andhra Pradesh and Tenalgana at Hyderabad held that the value of reliefs estimated by the plaintiffs deciding the jurisdiction of the Commercial Court and not the value mentioned in the MOU. Hon'ble Court in the said judgment referred to another judgment of the said Court

delivered in *Y. Venkata Sesha Reddy Vs. Chembati Kaushal Yamma (2007 (6) ALD 561)*, in which it was held that the subject matter is not the same thing as the property, but is the substance for adjudication and it has reference to the right which the plaintiff seeks to enforce and the valuation of the suit depends upon the value of the subject matter thereof and the same is valued according to the court fee Act. In this very judgment, Hon'ble Court also referred to a full Bench judgment of the said Court in *Kalla Yadagiri* Versus *Kotha Bal Reddy (1999 (1) ALD 222)*, in which the full Bench had held that it is not the value of the things affected that settles the value of the thing affected that settles the value of the relief sought, but it is the value of the relief sought, which determines the jurisdiction. "Subject matter" is not the same thing as property. Subject matter is the substance for adjudication and it has reference to the right which the plaintiff seeks to enforce and the valuation of the suit depends upon the value of the subject matter thereof and the same is valued according to the Court Fee Act.

17. Thus, from what has been discussed hereinabove, it is apparent and evident that as per the Hon'ble Supreme Court, a commercial dispute is a dispute which falls within the meaning of Section 2 (1) (c) of the 2015 Act and such commercial disputes are to be of a specified value as per Section 2 (1) (i) of the same. Further, as is evident from the orders which have been referred to hereinabove passed by Hon'ble High Courts, the specified value of the reliefs estimated by the plaintiff decides the jurisdiction of the Commercial Court and the subject matter is not the same thing as the property, but it is the substance for adjudication and it has reference to the right which the plaintiff seeks to enforce and the value of the suit depends upon the value of the subject matter as assessed by the plaintiff.

18. Coming to the present case, it is apparent from the contents of the plaint that the dispute raised by the plaintiff is a commercial dispute and the specified value in relation to the commercial disputes stands spelled out by the plaintiff in Paras 45 and 46 of the plaint.

19. Accordingly, in view of what has been held hereinabove, this application being devoid of any merit is dismissed.

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

Between:

DHANI RAM SON OF SHRI MOTHU RAM, RESIDENT OF VILLAGE DHANATAR, PARGANA BHARYARA, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

....APPLICANT/APPELLANT.

(BY MR. R.L. CHAUDHARY, ADVOCATE)

AND

1. RAJ KUMAR SON OF LATE SHRI TEK CHAND
2. SURESH KUMAR SON OF LATE SHRI TEK CHAND
3. ROSHANI DEVI WIDOW OF LATE SHRI TEK CHAND
4. KANTA DEVI DAUGHTER OF LATE SHRI TEK CHAND
5. KANCHANA DEVI DAUGHTER OF LATE SHRI TEK CHAND
6. ANJANA DEVI DAUGHTER OF LATE SHRI TEK CHAND
7. RAM PYARI DAUGHTER OF LATE SHRI TEK CHAND

ALL RESIDENTS OF VILLAGE DHANETER, P.O. CHANTRA, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

8. SMT. LATA DEVI WIFE OF SHRI KULDEEP SONI CONTRACTOR, V.P.O. PAPROLA, TEHSIL BAIJNATH, DISTRICT KANGRA, H.P.
9. SHRI FAKIR CHAND SON OF JAI RAM
10. OM PARKASH SON OF SHRI SHER SINGH

11. RAMESH CHAND SON OF SHER SINGH
12. PINKU RAM SON OF SHER SINGH
13. SITA DEVI WIFE OF SHER SINGH
14. VEENA DEVI WIFE OF SHER SINGH
15. BIRBAL SINGH SON OF SHRI SANT RAM
16. PAPU SON OF SHRI SANT RAM
17. CHANCHLO DEVI WIFE OF SHRI SANT SINGH ALIAS SANT RAM

ALL RESIDENTS OF VILLAGE BHARYARA, P.O. CHAUNTRA, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

....RESPONDENTS.

( RESPONDENTS NO.1, 3, 8 TO 17 *EX PARTE )*
( Mr. DIVYA RAJ SINGH, ADVOCATE, FOR RESPONDENTS NO.2 AND 5 )
( NONE FOR RESPONDENTS NO.4 & 6)
( RESPONDENT NO.7 IS REPORTED TO BE DEAD )

CMP(M) No.505 of 2020
in RSAST No.24977 of 2020
Decided on: 19.04.2022

**Limitation Act, 1963**- Section 5- Prayer for condonation of delay of 4 years 23 days in filing the appeal- Held- Delay has not been satisfactorily explained and the reason so assigned does not inspire confidence- Application dismissed so also in the fate of appeal. (Para 6, 7)

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

**O R D E R**

***CMP(M) No.505 OF 2020 in RSAST No.24977 of 2020***

As per report of the Registry, respondents No.4 to 6 stand served. Mr. Divya Raj Singh, learned counsel has put in appearance on behalf of

respondents No.2 and 5.

By way of this application, a prayer has been made by the applicant/appellant for condonation of delay of 4 years and 23 days delay in filing the appeal.

2. The judgment in issue was passed by the learned Appellate Court on 06.10.2016. Learned counsel for the applicant has submitted that as the applicant is an old person, aged about eighty three years and he is mostly bed-ridden, on this count he was not aware that his case was decided and he was under the bonafide impression that the appeal was still pending. It was only somewhere in the year 2020 when he made inquiries from the counsel that he came to know that the appeal stood decided against him as far back as in the month of October, 2016. Thereafter, as per learned counsel for the applicant, appropriate steps were taken without any further delay in filing the appeal. Accordingly, a prayer has been made for condonation of delay in filing the appeal.

3. Mr. Divya Raj Singh, learned counsel for respondents No.2 and 5 has vehemently submitted that the reasons which have been given in the application, justifying the delay of almost four years in filing the appeal do not inspire any confidence and it is just a concocted story to justify the act of omission of the applicant of not approaching the Court in time for filing the appeal or within some reasonable time after the expiry of period of limitation. Accordingly, he has prayed that the application be dismissed.

4. Having heard learned counsel for the parties and after perusing the averments made in the application, this Court is of the considered view that delay in filing the appeal has not been satisfactorily explained by the applicant. By simply stating that the applicant happens to be an aged person, who is mostly bed-ridden, the onus of explaining huge delay of almost four

years in filing the appeal cannot be said to have been discharged so as to give the benefit of condonation of delay in his favour.

5. A perusal of the record demonstrates that a suit for declaration and for specific performance of contract and injunction filed by the applicant in the year 2003, was dismissed by the learned Trial Court vide judgment and decree dated 19.11.2012. The judgment and decree so passed by the learned Trial Court was affirmed in appeal by the learned Appellate Court in an appeal which was preferred by the present applicant, vide judgment and decree dated 06.10.2016.

6. Present appeal alongwith an application for condonation of delay was filed by the applicant on 16.08.2020, i.e. after almost four years of the pronouncement of the judgment and decree by the learned Appellate Court. Though, this Court does not expects the applicant to explain each and every day's delay in filing the appeal, however, as the applicant has filed this appeal almost after four years from the date of pronouncement of judgment by the learned Appellate Court, the Court expected some cogent explanation as to why there was this prolonged delay in the filing of appeal. The reasons which have been assigned in the application do not inspire the confidence in the Court and it concurs with the submissions which have been made by learned counsel for respondents No.2 and 5 that the story appears to be concocted just to justify the inordinate delay. Otherwise also, with the afflux of time, rights too stand crystallized in favour of the respondents and the same cannot be taken away by the Court by condoning inordinate delay in the absence of delay being satisfactorily explained, which is lacking in the present case.

7. Accordingly, in view of what has been discussed hereinabove, this application is dismissed, so also is the fate of the accompanying appeal.

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

BETWEEN:-

SANJEEV KUMAR, AGED 62 YEARS,
S/O SHRI SHYAM PARKASH,
R/O KISHORE HOUSE,
DAIZEY BANK ESTATE,
SHIMLA-171001 (H.P.).

....PETITIONER

(BY MR. Y.P. SOOD and MR. PARVEEN CHAUHAN, ADVOCATES)

AND

1. SMT. SUMAN JAIN,
W/O SHRI ADESH JAIN,
R/O DAIZEY BANK ANNEXE,
THE RIDGE, SHIMLA- 171001 (H.P.).

2. SMT. JANKI DEVI KHANNA,
DECEASED THROUGH HER LEGAL HEIRS
SMT. ARCHANA SETH,
W/O SHRI SANJEEV SETH,
R/O KISHORE HOUSE,
LOWER JAKHU, SHIMLA- 171001 (H.P.).

3. UNION BANK OF INDIA
THROUGH ITS MANAGER,
BELL VILLA, RIVOLI ROAD,
SHIMLA -171001 (H.P.).

....RESPONDENTS

(BY MR. DEEPAK BHASIN & MR. SAMBHAV BHASIN,
ADVOCATES FOR R-1 &
MS. ANJNA, ADVOCATE, VICE

MR. SANJAY DALMIA, ADVOCATE, FOR R-3.)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 210 of 2022
Decided on: 20.06.2022

**Constitution of India, 1950**- Article 227- **Code of Civil Procedure, 1908**- Order 41 Rule 25- Petitioner assailed the order of Ld. Appellate Court vide which application under Order 41 Rule 25 Code of Civil Procedure to frame additional issues and remand the matter to Trial Court was dismissed- Held- There is infirmity in impugned order as amendment of issues was not sought and issues No. 1 and 2 actually covered the entire lis- Petitioner has failed to bring his case within the ambit of parameters laid down for exercise of supervisory jurisdiction under Article 227 of the Constitution of India. [Para 4(i) to (v)]

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

**O R D E R**

Caveat Petition No. 203 of 2022

Discharged. The Caveat Petition stands disposed of.

CMPMO No. 210 of 2022

An application was moved by the petitioner under Order 41 Rule 25 read with Section 151 of Code of Civil Procedure before the learned Appellate Court with a prayer to frame additional issues and to remand the matter to the learned Trial Court for calling findings on the additional issues after taking evidence of the parties and also to direct the learned Trial Court for recording proper findings on issues No. 3 and 6. This application was dismissed on 4.4.2022. Dissatisfied, the petitioner has invoked Article 227 of the Constitution of India.

Parties to the present petition are referred to hereinafter according to their status before the learned Trial Court.

2. **Facts:**

Facts required to be noticed for the adjudication of the present petition are that:

2(i) Respondent No. 1 instituted a Civil Suit for declaration to the effect that sale deed dated 18.12.2001 executed by respondent No. 2 (original defendant No. 1) in favour of present petitioner (defendant No. 2) registered at Sr. No. 517 on 18.12.2001 with Sub Registrar Shimla (Urban), Shimla, was null, void, illegal, forged, sham, fraudulent and inoperative qua the plaintiff. Further declaration was prayed to the effect that mortgage, if any, created by defendant No. 2 in favour of defendant No. 3 on the basis of the said sale deed was also void ab initio, forged, fraudulent and not binding upon the plaintiff. A permanent prohibitory injunction restraining the defendants from interfering with the peaceful possession of the plaintiff over the suit property was also prayed for.

2(ii) On 15.03.2010, learned Trial Court framed the following issues:

> "1. Whether mortgage, if any, created by defendant No. 2, qua the suit property or any part thereof in favour of defendant No. 3 is void-ab-initio, forged and fraudulent and inoperative and not binding upon the plaintiff as alleged?
>
> OPP
>
> 2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP
>
> 3. Whether the suit of the plaintiff is within time as alleged?
>
> OPP
>
> 4. Whether the suit of the plaintiff is not maintainable in the present form, as alleged? OPD
>
> 5. Whether the suit of the plaintiff is bad for non-joinder of necessary parties, as alleged? OPD
>
> 6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD
>
> 7. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD

Parties led evidence in support of their respective assertions and pleadings. After appreciating the pleadings, evidence and the submissions advanced on behalf of the parties, learned Trial Court decreed the suit on 24.12.2019. The sale deed dated 18.12.2001 executed by defendant No. 1 in favour of defendant No. 2 was declared null, void, illegal, sham, fraudulent and executed due to misrepresentation. The sale deed was held to be inoperative and not binding upon the plaintiff. The mortgage, if any, created by defendant No. 2 qua the suit property in favour of defendant No. 3 was also held to be void ab initio and not binding upon the plaintiff. Since defendant No. 2 was held to have no legal right over the suit property, therefore, he was restrained from interfering in the suit property. Defendant No. 3, through its agents or representatives was also permanently restrained from taking any coercive action, taking possession or alienation, causing any obstruction, damaging or changing the nature of the suit property or any part thereof in any manner whatsoever arising on the basis of the aforesaid transaction held to be sham.

2(iii). Defendant No. 2 assailed the judgment and decree passed by the learned Trial Court by filing an appeal under Section 96 of the Code of Civil Procedure on 18.1.2020. Defendant No. 2 in his appeal, *inter alia,* contended that the judgment and decree passed by the learned Trial Court was unsustainable as the learned Trial Court had failed to struck proper issues arising out of the pleadings of the parties for determination. That the learned Trial Court exceeded its jurisdiction while passing impugned judgment and decree. Defendant No. 2 also contended that the findings on issues No. 3 and 6 had not been returned in accordance with law. The appeal was put to hearing. In December, 2021, defendant No. 2 (appellant before the First Appellate Court) moved an application under Order 41 Rule 25 read with Section 151 of the Code of Civil Procedure. The application was with the contention that the learned Trial Court while passing impugned judgment

and decree had omitted to frame issues about the relief of declaration claimed by the plaintiff in the Civil Suit. That no issue was framed regarding declaration sought by the plaintiff in respect of sale deed dated 18.12.2001. Defendant No. 2 also contended that proper issue was not framed by the learned Trial Court in respect of the relief claimed by the plaintiff regarding permanent prohibitory injunction. Prayer was made in the application that after framing the following additional issues the matter be remanded to the learned Trial Court for giving findings thereupon:

> "Additional issues:
>
> 1(a). Whether plaintiff is entitled for relief of declaration to the effect that the Sale Deed No. 517 dated 18.12.2001 registered in Book No. 1 Vol. No. 44 at page 353 with the office of Sub Registrar, Shimla (Urban) executed by Janki Devi defendant No. 1 in favour of defendant No. 2 Shri Sanjeev Kumar is null & void, illegal, sham, forged and fraudulent document prepared due to misrepresentation of facts and is inoperative against the plaintiff Smt. Suman Jain? OPP
>
> 1(b) Whether plaintiff is entitled for relief of permanent prohibitory injunction against defendants claiming her right in the suit property based on sale deed executed in her favour by her predecessors in interest vide Sale Deed No. 227 dated 12.06.2009 registered in Book No. 1, Vol. No. 44 at page 353 with the office of Sub Registrar, Shimla (Urban) executed by Janki Devi defendant No. 1 in favour of defendant No. 2 Shri Sanjeev Kumar is null & void, illegal, sham, forged and fraudulent document prepared due to misrepresentation of facts and is inoperative against the plaintiff Smt. Suman Jain? OPP

Defendant No. 2 also contended that learned Trial Court had not recorded its findings on Issues No. 3 and 6. That defendant No. 2 had pleaded in the written statement about the suit having not been valued properly for the purpose of Court fee and jurisdiction but the learned Trial Court had not decided the issues in accordance with law. Therefore, the matter was required

to be referred back to the learned trial Court not only for calling findings on the additional issues proposed to be framed by defendant No. 2 after taking evidence of the parties but also for recording proper findings on already framed issues No. 3 and 6.

The application was opposed by the plaintiff. At the insistence of defendant No. 2 (appellant before the Appellate Court), parties were heard on the application moved under Order 41 Rule 25 of the Code of Civil Procedure. Vide order dated 4.4.2022, learned Appellate Court dismissed the application. Learned Appellate Court observed that the question of determining the legality and validity of the sale deed Ext. DX-1 has already been dealt with by the learned Trial Court. The appellant has also availed opportunity to prove this document. It was further observed that the learned Trial Court has returned specific findings regarding validity of the execution of the sale deed and its impact on the relief sought by the plaintiff and that no prejudice has been caused to defendant No. 2 by non-framing of the two additional issues mentioned in the application. Regarding alleged non-returning of proper findings on the already framed issues No. 3 and 6, learned Appellate Court observed that objection in this regard has already been raised in the main appeal by defendant No. 2, therefore, question relating to the findings on issues No. 3 and 6 can be considered along with the main appeal. It is in the aforesaid background that defendant No. 2 has assailed order dated 4.4.2022 by means of present petition filed under Article 227 of the Constitution on India.

3. **Contentions:**

3(i) Learned counsel for defendant No. 2 (present petitioner) vehemently argued that the learned Trial Court exceeded its jurisdiction and exercised its jurisdiction with material irregularity and illegality in not framing the proper issues. Plaintiff had claimed relief of declaring the sale deed in question as null and void. Mortgage, if any, executed on the basis of this sale deed was

also sought to be declared null and void. It was on the basis of these two declarations sought for that the plaintiff had also prayed for the relief of permanent prohibitory injunction. However, specific issues in this regard were not framed. The onus to prove that sale deed in question was result of fraud and mis-representation lay upon the plaintiff. Since there was no issue framed with respect to declaratory reliefs, plaintiff cannot be said to have discharged the burden of proof that the sale deed in question was sham, forged and illegal document not binding upon him. Relying on *Harbans Lal vs. Bhim Sain etc,* 1977 (Vol. 17) Current Law Journal (Civil) (P&H) 259, learned counsel for the petitioner contended that the question of title was raised before the Civil Court, therefore, without framing specific issue concerning title of the suit property, the impugned judgment and decree becomes vitiated. Learned counsel also argued that defendant No. 2 had taken specific objection regarding incorrect valuation of the suit property and that the learned Trial Court had no jurisdiction to entertain the suit. Proper findings in accordance with law on these objections framed as issues No. 3 and 6 were not returned by the learned Trial Court. Therefore, application moved by defendant No. 2 (petitioner herein) under Order 41 Rule 25 of the Code of Civil Procedure was liable to be allowed. Learned Counsel prayed that the impugned order dated 4.4.2022 passed by the learned Appellate Court be set aside and the matter be remanded to the learned Trial Court in terms of the prayer made by the petitioner in his application under Order 41 Rule 25 CPC.

3(ii) Learned Counsel for the plaintiff (respondent No. 1 herein), emphatically opposed the petition. Learned counsel argued that the main appeal preferred by the petitioner contained the very grounds which were specifically put forth by the petitioner in the application moved under Order 41 Rule 25 CPC. The appeal was at the stage of hearing when petitioner moved the miscellaneous application for remanding the matter back to the

Trial Court in respect of non framing of two issues as aforesaid by the learned Trial Court and alleged incorrect finding on issues No. 3 and 6. This was only a delay tactics on the part of defendant No. 2. Learned counsel also invited attention towards the provisions of Order 41 rule 24 alongwith Rule 25 CPC to contend that the application preferred by the petitioner was wholly misconceived. Learned counsel also submitted that issues in the Civil Suit were framed as far back on 15.3.2010 without any demur or objection by the petitioner. Ten years after framing of the issues it was not open to the petitioner to seek remand of the case from the learned Appellate Court on the ground that proper issues had not been framed by the learned Trial Court. It was also submitted that the instant petition filed under Article 227 of the Constitution of India did not even satisfy the parameters for the exercise of discretionary relief. Prayer was made for dismissal of the petition.

4. **Reasoning:**

Defendant No. 2's application rejected by the learned Appellate Court was moved under Order 41 Rule 25 CPC. It will be appropriate to first take note of Order 41 Rule 25 CPC which reads as under:

> "25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from:
>
> Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

According to the above extracted provision where the Court from whose decree the appeal is preferred has omitted to frame or try any issue or to determine any question of fact, which fact according to the learned Appellate Court is essential for the right decision of the case on merits, then the Appellate Court may, if it consider necessary, frame the issues and refer those issues for trial to the learned Court from whose decree the appeal is preferred. If required, the Appellate Court is also to direct the said Court to take additional evidence. Such Court is then to proceed to try the additional issues and is to return the evidence to the Appellate Court alongwith its findings thereupon.

In the facts of the case, in my considered view, there is no infirmity in the impugned order passed by the learned Appellate Court in dismissing the application moved by the petitioner under Order 41 Rule 25 CPC. This is on account of the following reasons:

4(i) Suit was filed by respondent No. 1 for declaration that sale deed dated 18.12.2001 executed by respondent No. 2 (defendant No. 1) in favour of present petitioner (defendant No. 2) was null, void and inoperative qua the plaintiff. That mortgage, if any, created by defendant No. 2 in favour of defendant No. 3 on the basis of the aforesaid sale deed was also forged and fraudulent and not binding upon the plaintiff. On the basis of the aforesaid declaration, relief of permanent perpetual prohibitory injunction was sought by the plaintiff (respondent No. 1) against defendant No. 2(petitioner) and defendant No. 3 (respondent No. 3). Issues in the Civil Suit were framed on 15.3.2010. Two such issues framed were: *"1. Whether mortgage, if any, created by defendant No. 2 qua the suit property or any part thereof in favour of defendant No. 3 is void-ab-initio, forged and fraudulent and inoperative and not binding upon the plaintiff, as alleged?... OPP; and 2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for?.....OPP"*.

The issues were framed in the presence of the learned Counsel for the parties. The parties were fully aware about the matter and the controversy involved therein. No application was moved on behalf of defendant No. 2 under Order 14 Rule 5 CPC for amending the issues. Order 14 Rule 5 CPC reads as under:

> "Power to amend and strike out issues:
> (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.
> (2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced."

In case defendant No. 2 had any grievance in respect of non framing of a specific issue, as is being projected now, it was incumbent upon him, in the facts and circumstances of the case, to seek amendment of the issues. Such recourse was not adopted.

4(ii) Parties went to trial and evidence was led by them. On considering the pleadings, evidence and the arguments advanced by the parties, the learned Trial Court vide judgment and decree dated 24.12.2019 decreed the suit of the plaintiff observing therein that sale deed dated 18.12.2001 (Ext. DX-1), was null, void, illegal, sham, fraudulent and executed due to misrepresentation, hence the same was held to be inoperative and not binding upon the plaintiff. In this regard, it will be worthwhile to extract the following findings returned by the learned Trial Court in the judgment and decree dated 24.12.2019:

> "76. As such, through the testimony of the witnesses brought on record, the defendant No. 2 has failed to prove the fact that sale deed Ext. DX1 was executed by Smt. Janki Khanna with her own

will and consent. Even, the witness to the sale deed Ext. DX1 has not duly supported the case of defendant No. 2.

77. The defendant No. 3 has examined one witness who has admitted in his cross-examination that the entry qua khasra Nos. 1884 was wrongly made as 884 and has not been corrected in mortgage register. Perusal of document Ext. DW10/D3 shows that the entry of khasra No. 884 has been made on 12.02.2002. This shows that even the bank officials did not act vigilantly while sanctioning the loan to defendant No. 2 as they have not make proper inquiries as required under the rules before sanctioning of loan. The bank has failed to produce on record the search report. He has admitted that in the present case the title has not been verified. The fact that the entries in the bank record qua loan have been made against wrong khasra and that the loan has been sanctioned without mutation and verification of title of the property. This shows that the loan has been sanctioned by the bank officials without following proper procedure in connivance with the defendant No. 2.

78. Hence, it is clear from the above discussion that no valid sale deed was executed in favour of the defendant No. 2 by Smt. Jankij Devi Khanna in the year 2001. The defendant No. 2 in order to create mortgage over suit property has fraudulently executed the sale deed Ext. DX1. As such, this mortgage is void-ab-initio and fraudulent and not binding upon the plaintiff.

79. In view of above discussion, both the points are answered in affirmative and in favour of the plaintiff."

A perusal of the judgment & decree passed by the learned Trial Court clarifies that not only the parties were very well aware of the points actually in issue, but they had also led evidence on all the contentious points after truly understanding the gist of the controversy. Learned Trial Court has already given the findings on the points now sought to be framed as additional issues. In fact, issues No. 1 and 2 actually covered the entire *lis*. No prejudice, therefore, can be said to have been caused to defendant No. 2 on account of non framing of two issues now proposed by him in his application.

It would be beneficial to refer here to the judgment of the Hon'ble Apex Court reported in *Kali Prasad Agarwalla (Dead) by LRs. & others vs. M/s. Bharat Coking Coal Limited & others,* 1989 Supp (1) SCC 628, wherein it was held as under:-

> "19. It was, however, urged for the appellants that there is no proper pleading or issue for determination of the aforesaid question and the evidence let in should not be looked into. It is too late to raise this contention. The parties went to trial knowing fully well what they were required to prove. They have adduced evidence of their choice in support of the respective claims. That evidence has been considered by both courts below. They cannot now turn round and say that the evidence should not be looked into. This is a well accepted principle."

4(iii) Aggrieved of the judgment and decree dated 24.12.2019, defendant No.2 preferred an appeal under Section 96 CPC. In the said appeal, defendant No. 2 has taken ground of non framing of proper issues by the Trial Court as well as in respect of not recording proper findings on issues No. 3 and 6.

It is an admitted position that during the course of hearing of the appeal, the application under Order 41 Rule 25 CPC was moved praying for framing of additional issues in respect of the plaintiff's entitlement for relief of declaration to the effect that sale deed in question was null, void, illegal and fraudulent document and also plaintiff's entitlement for the relief of permanent prohibitory injunction based on the proposed issues. Defendant No. 2 also prayed for remand of the matter to the learned Trial Court for recording proper findings on issues No. 3 and 6. Even though the main appeal was being heard but on the persistence of defendant No. 2 for disposing his application under Order 41 Rule 25 CPC prior to hearing of the main appeal the application was considered for disposal. When the main appeal was itself being heard finally and when the grounds put forth in the new application were also the grounds of main appeal, then the question

arises what led defendant No. 2 to institute separate application a year later to the filing of the main appeal, putting forth the same very grounds? The obvious conclusion that can be drawn is that defendant No. 2 was adopting delay tactics.

4(iv) While deciding the application under Order 41 Rule 25 CPC, the submission of defendant No. 2 in respect of there being improper and incorrect findings on issues No. 3 and 6 has been left open to be considered alongwith the main appeal. No illegality can be said to have been committed by the learned Appellate Court in observing that the ground put forth by defendant No. 2 regarding incorrect and improper findings on issues No. 3 and 6 will be taken up alongwith hearing of the main appeal. The ground has still been left open for defendant No. 2 to be raised in appeal. No prejudice has been caused to defendant No. 2 by reserving right to him to raise this ground during hearing of appeal. As it is, this point has already been taken by him in his grounds of appeal. Hence there is no error in the impugned order regarding this aspect also.

4(v) It is also to be noticed that the present petition has been filed under Article 227 of the Constitution of India. It would be beneficial to refer here to the judgment of the Hon'ble Apex Court reported in *Garment Craft vs Prakash Chand Goel*, (2022) 4 SCC 181, wherein the nature and scope of exercise of supervisory jurisdiction under Article 227 was reiterated. The Hon'ble Apex Court held that while exercising supervisory jurisdiction under Article 227 of the Constitution of India, the High Court does not act as a Court of First Appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. Power under Article 227 is to be exercised where there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a

conclusion arrived at by the Courts below. Relevant part of the judgment reads as under:

> "15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.
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> 16. Explaining the scope of jurisdiction under Article 227, this Court in *Estralla Rubber v. Dass Estate (P) Ltd.* (2001) 8 SCC 97 has observed:(SCC pp. 101-102, para 6)
>
> > "6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the

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

The petitioner has failed to bring his case as urged within the ambit of parameters laid down for exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

For all the aforesaid reasons, no case for interference in the impugned order is made out. Petition being devoid of merits is dismissed. Pending application(s), if any, shall also stand disposed of accordingly.

It goes without saying that above observations are confined to the adjudication of present petition only.

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

Between

RAJINDER, AGED 39 YEARS,
S/O SHRI JAGAT RAM,
PRESENTLY UNEMPLOYED,
R/O VILLAGE KOTRI, P.O. KOTRI BIAS,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR,
HIMACHAL PRADESH.

.....PETITIONER

(BY SHRI PREM P. CHAUHAN, ADVOCATE)

AND

1. SHRI SITA RAM MARDI, IPS,
   DIRECTOR GENERAL OF POLICE,
   HIMACHAL PRADESH,
   SHIMLA.

2. SHRI SANJAY KUNDU, IPS,
   DIRECTOR GENERAL OF POLICE,
   HIMACHAL PRADESH.

....RESPONDENTS

(BY SHRI RAJU RAM RAHI,
DEPUTY ADVOCATE GENERAL)

CIVIL ORIGINAL PETITION CONTEMPT (TRIBUNAL)
No.78 OF 2019
Decided on : 17.6.2022

**Contempt**- Petition to punish the respondents for willfully defying the order dated 30.12.2018 passed by erstwhile H.P. State Administrative Tribunal- Held- Petitioner has to agitate his case by filing appropriate writ petition for adjudication of his eligibility and entitlement for appointment- Petition closed. (Para 18)

**Cases referred:**

A.P. SRTC and others v. G. Srinivas Reddy and others, (2006) 3 SCC 674;
Bhikhubhai Vithlabhai Patel & Ors. v. State of Gujarat & Anr., AIR 2008 SC 1771;
Chairman, Life Insurance Corporation of India and others v. A. Masilamani, (2013) 6 SCC 530;
Debendranath Nanda v. Chandra Shekhar Kumar, (2012) 13 SCC 295;
Director, Marketing, Indian Oil Corpn. Ltd. & Anr. v. Santosh Kumar, (2006) 11 SCC 147;
J.S. Parihar Vs. Ganpat Duggar and others, (1996) 6 SCC 291;

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

**O R D E R**

Present Petition has been preferred with prayer to punish the contemnor/respondent for willfully, knowingly, intentionally, repeatedly defying/disobeying the order dated 31.12.2018, passed by the erstwhile H.P. State Administrative Tribunal in **OA No.7650 of 2018**, titled as **Rajinder v. State of H.P. & others.**

2. In the Original Application, claim of the petitioner was that he was entitled for benefit of judgment passed by this High Court in **CWP No.2059 of 2010,** titled as **Hirdye Prakash v. State of H.P. and another and connected matters**, decided on 26.7.2011.

3. In response, it was submitted on behalf of the State that in case of finding the petitioner similarly situated, on verification, benefit of aforesaid judgment shall be extended to him.

4. In view of above, Original Application was disposed of with direction to the respondents to extend the benefit of judgment referred supra to the applicant (petitioner herein), within three months, in case he was similarly situated.

5. Petitioner was seeking appointment on the basis of judgment of this Court in **Hirdye Prakash's** case, but he was not offered appointment, which led to filing of present petition.

6. In response to this petition, it has been stated in the reply that name of petitioner was sponsored by Ex-servicemen Cell in response to requisition of the Department to fill the vacancy of Constable vacated by Mast Ram, an Ex-serviceman. Thereafter, candidature of petitioner was scrutinized but he was not found eligible for appointment as per criteria notified by the Government vide Notification No.Home-A(3)-4/2011 dated 24.5.2013 and,

thus, was not appointed in place of Mast Ram who resigned from service on 12.5.2017. Further that, in **Hirdye Prakash's** case, appointment as TGT of Ex-serviceman was made on 20.9.2003, but the petitioner therein was deemed to be appointed w.e.f. 18.12.2002, as he was held entitled for offer of appointment within 15 days of sponsorship by Ex-servicemen Cell.

7. It has been stated on behalf of respondents that in present case, as petitioner was not found eligible for appointment and, therefore, there was no question of considering his entitlement for appointment from 15th day of sponsorship of his name. He was never appointed for want of eligibility and, therefore, **Hirdye Prakash's** case was not applicable to him and, thus, his representation was considered and rejected, on 10.2.2020, by passing a speaking order.

8. Claim of the petitioner is that aforesaid Notification dated 24.5.2013 is not applicable to him and, thus, he was entitled for appointment within 15 days of sponsorship of his name by the Ex-servicemen Cell.

9. It is contended on behalf of the petitioner that rule being referred and as interpreted, to reject the claim of the petitioner is neither applicable to the case of petitioner nor is to be interpreted in such manner and, therefore, rejection of claim of the petitioner is in conflict with the order passed by the Court and, thus, respondents are liable to be punished for committing contempt.

10. Learned counsel for the petitioner, in support of contention of the petitioner, has placed reliance upon **A.P. SRTC and others v. G. Srinivas Reddy and others, (2006) 3 SCC 674; Debendranath Nanda v. Chandra Shekhar Kumar, (2012) 13 SCC 295;** and **Chairman, Life Insurance Corporation of India and others v. A. Masilamani, (2013) 6 SCC 530.**

11. Learned Deputy Advocate General has advocated for dismissal of the petition by placing reliance upon judgment dated 28.10.2020, passed by Division Bench of this Court in **CWP No.4729 of 2020,** titled as **Managing**

**Director, H.P. Electronics Development Corporation v. State of Himachal Pradesh & others.**

12. Eligibility as well as entitlement of the petitioner was not adjudicated by the Tribunal on merits, but on the undertaking given on behalf of the State, petition was disposed of with direction to verify the facts and extend the benefit of **Hirdye Prakash's** case to the petitioner, in case he was found to be similarly situated.

13. Learned counsel for the petitioner has referred the following paragraphs of **G. Srinivas Reddy's** case:

> "14. We may, in this context, examine the significance and meaning of a direction given by the court to "consider" a case. When a court directs an authority to 'consider', it requires the authority to apply its mind to the facts and circumstances of the case and then take a decision thereon in accordance with law. There is a reason for a large number of writ petitions filed in High Courts being disposed of with a direction to "consider" the claim/case/representation of the petitioner/s in the writ petitions.
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> ..... ..... .....
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> 17. Where the High Court finds the decision-making process erroneous and records its findings as to the manner in which the decision should be made, and then directs the authority to 'consider' the matter, the authority will have to consider and decide the matter in the light of its findings or observations of the court. But where the High Court without recording any findings, or without expressing any view, merely directs the authority to 'consider' the matter, the authority will have to consider the matter in accordance with law, with reference to the facts and circumstances of the case, its power not being circumscribed by any observations or findings of the court.
>
> ..... ..... .....

> 20. Therefore, while disposing of writ petitions with a direction to 'consider', there is a need for the High Court to make the direction clear and specific. The order should clearly indicate whether the High Court is recording any finding about the entitlement of the petitioner to the relief or whether the petition is being disposed of without examining the claim on merits. The court should also normally fix a time-frame for consideration and decision. If no time-frame is fixed and if the authority does not decide the matter, the direction of the court becomes virtually infructuous as the aggrieved petitioner will have to come again to court with a fresh writ petition or file an application for fixing time for deciding the matter."

14. In **A. Masilamani's** case, the lerned counsel has referred the following paragraph:

> "19. The word "consider", is of great significance. Its dictionary meaning of the same is, "to think over", "to regard as", or "deem to be". Hence, there is a clear connotation to the effect that, there must be active application of mind. In other words, the term "consider" postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority, should reflect intense application of mind with reference to the material available on record. The order of the authority itself, should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority, and proceed to affirm its order. (Vide: **Director, Marketing, Indian Oil Corpn. Ltd. & Anr. v. Santosh Kumar, (2006) 11 SCC 147;** and **Bhikhubhai Vithlabhai Patel & Ors. v. State of Gujarat & Anr., AIR 2008 SC 1771**)."

15. Referring **Debendranath Nanda's** case, it has been contended that for non-compliance with the order passed by the Court, petitioner has been made to suffer and denied appointment for which he was entitled and, therefore, respondents are liable to be punished for committing contempt and in alternative, in addition to extending benefit of direction of Court in favour of

the petitioner, petitioner is also entitled for suitable damages from respondents-Department.

16. Learned Deputy Advocate General, in the pronouncement of this Court in **Managing Director, H.P. Electronics Development Corporation's** case, has referred the following paragraphs:

> "5. It is more than settled that contentious issues cannot be decided in contempt petition and here what relief had not even given by the Tribunal, appears to have been granted by the Court exercising its contempt jurisdiction.
>
> 6. It is not in dispute that the petitioner had infact considered and decided the case of the private respondents, though belatedly, on 29.02.2020, but that was much prior to the order passed by the Court on 21.8.2020 in the contempt petition. If at all the private respondents were aggrieved by the consideration order, then the only remedy available to them was to file substantive petition, assailing the same.
>
> 7. Once the order is passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to seek redressal in an appropriate forum. The order may be wrong or may be right or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail opportunity by way of judicial review. But that cannot be considered to be the willful violation of the order.
>
> 8. In taking this view, we are supported by the judgment passed by three Judges of the Hon'ble Supreme Court in **(1996) 6 SCC 291** titled **J.S. Parihar Vs. Ganpat Duggar and others**, wherein it was observed as under:
>
> > "6……. It is seen that once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an

> appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the wilful violation of the order….."

9. Section 2(b) of the Contempt of Courts Act, 1971, (for short the 'Act') which is relevant for the adjudication of these cases, reads as under:

> "(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;"

10. There can be no doubt that where there has been an unequivocal, deliberate and willful disobedience to the order of the Court, punishment for contempt of Court is called for and should be unhesitatingly imposed upon the party, if found guilty. But, then it should be remembered that the Court's power to punish the contemnor in summary proceedings is to be used sparingly and with circumspection. In a contempt petition as indeed, in every other case the decision must necessarily rest on the facts of that case.

17. Response of the respondents in the reply as well as reasons given in the order passed by the Department after considering his case is that petitioner is not entitled for appointment for want of eligibility and that in **Hirdye Prakash's** case, petitioner was eligible for appointment and, in fact, was offered appointment at a later stage and, therefore, he was directed to be considered to have been appointed within 15 days after sponsorship by the Ex-servicemen Cell. Whereas, in present case, petitioner is not entitled for

appointment and, thus, there is no question of offering appointment within 15 days or at later point of time and, therefore, **Hirdye Prakash's** case, mandating to consider appointment within 15 days of sponsorship, is not application to the petitioner.

18. In aforesaid circumstances, I am of the opinion that case law cited on behalf of the petitioner is of no help to the petitioner, rather petitioner has to agitate his cause by filing appropriate Writ Petition for adjudication of his eligibility and entitlement for appointment and, in such eventuality, if Court comes to the conclusion that he was entitled for appointment and has been ignored and subjected to unwarranted avoidable litigation, then apart from relief of appointment and consequential benefits, he may be compensated by awarding appropriate relief by the Court, but, in any case, such adjudication is not warranted in present case in the given facts and circumstances.

19. In aforesaid circumstances, present petition is closed and disposed of with liberty to the petitioner to file appropriate comprehensive Writ Petition for adjudication of his claim and redressal of grievance, and in case such petition is preferred by the petitioner, delay and latches shall not come in his way as he was bonafide pursuing his case in present petition.

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

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

Between:-

PAWAN KUMAR @ LUCKY SHARMA,
SON OF SHRI MAHINDER PAL,
RESIDEN OF RAM NAGAR BATALA,
TEHSIL & DISTRICT GURDASUR,
PUNJAB, PRESENTLY CONFINED IN
JUDICIAL CUSTODY IN MODEL CENTRAL

JAIL NAHAN, DISTRICT SIRMOUR, H.P.
AGE 40 YEARS.

….APPELLANT

(BY SH. BIMAL GUPTA, SR. ADVOCATE WITH MS. SALOCHNA KAUNDAL, ADVOCATE)

AND

NARCOTICS CONTROL BUREAU,
SUB ZONE MANDI, H. NO. 307/12
RAM NAGAR MANDI, H.P. THROUGH
ITS INTELLIGENCE OFFICER
KARAMVIR SINGH.

…. RESPONDENT

(SH. ASHWANI PATHAK, SR. ADVOCATE WITH SH. DEV RAJ ADVOCATE)

CRIMINAL APPEAL
Nos. 324 of 2020
Decided on: 27.06.2022

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- Appellant assailed conviction- Charas 1.300 Kg- Held-

**C.** Section 52A- The Investigating Officer had not chosen to comply with Section 52A, rather he had chosen to draw the samples on the spot.

**D.** Sample of 25 grams examined at Central Revenue Control Laboratory, Delhi was representative of entire bulk of substance- Appellant convicted for having been found in conscious possession of small quantity of charas- Sentence accordingly modified. (Para 12, 13, 14, 20, 27)

**Cases referred:**

Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa, AIR 1993 SC 1456;

Noor Aga v. State of Punjab (2008) 16 SCC 417;

Union of India (UOI) v. Mohanlal and Ors. (2016) 3 SCC 379;

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This appeal coming on for hearing this day, **Hon'ble**

**Mr. Justice Satyen Vaidya**, delivered the following:

**J U D G M E N T**

By way of instant appeal, judgment dated 26.11.2014 passed by learned Special Judge-II, Mandi, District Mandi, H.P. in Sessions Trial No. 9 of 2013 along with sentence order dated 16.12.2014 have been assailed by the appellant, whereby he has been convicted for offence under Sections 20 of the NDPS Act and has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. one lakh and in default to undergo simple imprisonment for a period of one year.

2. The brief facts of the case are that Narcotics Control Bureau, Sub Zone Mandi (for short NCB) registered Crime No. 35 of 2012 dated 19.12.2012. As per NCB case, on 19.12.2012, PW-5 Karamvir Singh, Intelligence Officer received secret information regarding commission of offence under the NDPS Act. A raiding party was constituted. PW-2 R. L. Negi, Intelligence Officer besides other officials of NCB and independent witnesses Narain Singh and Jia Lal were associated. A Naka was laid at Katindi Road Mandi at about 6.45 a.m. Two persons including the appellant were found coming from Katindi side at about 7.20 a.m. 1 kg 300 grams of charas was recovered from the bag carried by the appellant. Recovered contraband was seized vide recovery-cum-seizure memo Ext. PW-2/A. *Panchnama* Ext. PW2/B was also prepared. Appellant along with his co-accused named Raj Kumar were arrested. Two samples weighing 25 grams each were drawn and were sent for chemical analysis to Central Revenue Control Laboratory, Delhi. One of the sample was tested as positive for charas vide report Ext. PW1/A.

3. On completion of investigation, challan was prepared. Appellant along with his co-accused were tried in Sessions Trial No. 9 of 2013 and were convicted. Appellant was sentenced as noticed above. Co-accused Raj Kumar is stated to have died.

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

5. Prosecution examined PW-2 R.L. Negi, Intelligence Officer and PW-5 Karamvir Singh, Intelligence Officer as spot witnesses. In addition, Jia Lal the alleged independent witness was also examined as PW-3.

6. PW-1 Sh. V. K. Sharma, Chemical Examiner proved report Ext. PW1/A. Sh. S. K. Singh, Deputy Superintendent of CBI was examined as PW-6, who deposed to have received information under Section 42 of the NDPS Act.

7. Sh. Bimal Gupta, learned senior counsel representing the appellant at the very outset contended that the samples sent for chemical analysis were not the representative samples. In absence of sample being representative, the entire quantity allegedly recovered by NCB could not be said to be charas.

8. Recovery-cum-seizure memo Ext. PW2/A reveals that the recovered 1 kg 300 grams charas was found in "*indigenous finger shape*".

9. PW-2 stated on oath that during search, one polythene bag was recovered, which was containing finger shape dark brown substance. The substance was weighed and found 1 kg 300 grams. Two samples of 25 grams each were separated from the recovered charas. In cross-examination, this witness stated that the sample was taken randomly.

10. PW-5 also deposed almost in same terms. According to him, during search one polythene bag was recovered which contained finger shaped brown substance, packed in a transparent polythene cover. The recovered substance was weighed. Two samples of 25 grams each were separated from the recovered charas and were separately sealed. In cross-examination, PW-5 stated that he had not counted the sticks of contraband.

11. PW-3, the alleged independent witness did not support the case of prosecution and was declared hostile. According to this witness, no

proceedings were held in his presence and he was called to the NCB Office where his signatures were obtained on papers. Nothing material could be elicited from his cross-examination.

12. The material on record thus suggested that the substance recovered from the appellant was in the shape of fingers/small sticks. Neither PW-3 nor PW-5, have clarified as to what was the number of sticks having finger shape. The answer given by PW-5 in cross-examination that he had not counted the sticks of contraband definitely goes to suggest that the sticks were more than one in number. No explanation has been rendered either by PW-2 or PW-5 regarding non supply of the details of the number of plural masses in which contraband was found. Even document Ext. PW2/A mentions the substance as indigenous finger shaped. It is not the prosecution case that the entire substance was a single mass. Reference can be made to contents of *Panchnama* Ext. PW2/B, in which it was mentioned that the sample was drawn from the different parts of the substance.

13. Interestingly, neither PW-2 nor PW-5 have detailed as to how the samples were drawn. None of these witnesses have stated that the entire bulk was made homogeneous and thereafter the samples were drawn as representative samples. PW-2 and PW-5 have not even endorsed the mode and manner stated in *Panchnama* Ext. PW2/B for drawl of samples. Nothing has been found in the evidence led by the prosecution that the substance was not a single mass. On the contrary, the material on record suggested the substance to be having plurality of masses.

14. In the instant case, the entire bulk has been branded as charas on the basis of report Ext. PW1/A, issued by Central Revenue Control Laboratory, Delhi. The scrutiny of such report further reveals that the laboratory examined only one sample of 25 gram. To hold the sample to be representative of entire bulk, it had to be proved by prosecution that the

sample examined, in fact, was the true representative sample of entire bulk. This evidence, in our considered view, is clearly missing in the case in hand.

15. NDPS Act was amended in the year 1989 and Section 52A was incorporated, which read as under:

> **"52A. Disposal of seized narcotic drugs and psychotropic substances.**
>
> (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.
>
> (2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—
>
> (a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

16. Evidently, the aforesaid provision was incorporated for safe custody and disposal of narcotic and psychotropic substances, so as to avoid their misuse. In the case in hand, the Investigating Officer had not chosen to comply with Section 52A of the Act, rather he had chosen to draw the samples on spot. The aforesaid provision was amended in 2014, nevertheless the contemporaneous provision contained in Section 52A on 8.5.2008 i.e. at the time of commission of offence, substantially carried the same mandate as amended Section 52A.

17. The Central Government in exercise of powers vested under sub-section (i) of Section 52 (A) of the Act, has issued standing order No.1 of 1989, prescribing the procedure to be followed while conducting seizure of the contraband. This standing order succeeds the provision of standing order No. 1 of 1988. Section 2 of the standing order No.1 of 1989 provides for general procedure of sampling and storage etc. as under: -

STANDING ORDER No. 1/89 SECTION II - GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.

2.1. All drugs shall be properly classified, carefully weighed and sampled on the spot of seizure.

2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. **The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn**.

2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (i n duplicate) may be drawn.

2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8. While drawing one sample (in duplicate ) from a particular lot , it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned.

3. The seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotic s Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities . The other central agencies like BSF, CBI and other central police organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State enforcement agencies

> may send samples of seized drugs to the Director/Deputy Director/ Assistant Director of their respective State Forensic Science Laboratory.
>
> 3.1. After sampling, a detailed inventory of such packages/containers shall be prepared for enclosure with the Panchama. Original wrappers shall also be preserved for evidentiary purposes.

18. The sanctity of the Standing Order 1/89 came for consideration before the Supreme Court in ***Noor Aga*** v. ***State of Punjab (2008) 16 SCC 417***, wherein it was held as under:-

> "89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.
>
> 90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.
>
> "91. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to

the effect that had such evidence been produced, the same would have gone against the prosecution."

19. If one goes through the Standing Order 1/89 and Section 52A (2) (c) of the NDPS Act, an apparent conflict arises as the former provides for sampling at the spot of seizure and sending the same to laboratory within 72 hours whereas the latter provides for sampling before a Magistrate. The said conflict has been dealt with by the Hon'ble Supreme Court elaborately in **Union of India (UOI) v. Mohanlal and Ors**. (2016) 3 SCC 379. The relevant paragraphs of the said Judgment of the Hon'ble Apex Court are reproduced hereunder:

*"Seizure and sampling*

*12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:*

*"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."*

*13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the states or the central agencies in the matter of drawing sample. This is, therefore, an area that needs to be suitably addressed in the light of statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regards drawing of sample.*

*14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:*

*"52-A.Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.*

*(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the*

*officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—*

*(a) certifying the correctness of the inventory so prepared; or*

*(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or*

*(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.*

*(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.*

*(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."*

*15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of*

*(a) certifying the correctness of the inventory,*

*(b) certifying photographs of such drugs or substances taken before the Magistrate as true, and*

*(c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.*

*17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.*

*18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government, therefore, will do well to re-examine the matter and take suitable steps in above direction."*

20. There is nothing in the prosecution evidence that any of these procedures were followed while drawing samples. There is not even any semblance of any procedure having been adopted for drawing a representative sample. This creates a serious doubt on the very legitimacy of the case of prosecution. To have credence, the sample had to be representative sample, of entire 1 Kg 300 Grams of substance, failing which it can be a case of recovery of only 25 gms. of charas or at the most 50 grams by including weight of second sample, having entirely different legal consequences.

21. In **AIR 1993 SC 1456**, titled **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa**, it has been held as under:-

"5. The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances

> and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

22. We consider it appropriate to reproduce hereunder the observations and conclusions rendered by different Division Benches of this Court while dealing with identical or akin proposition from time to time.

23. In ***Khek Ram*** Vs ***NVB*** Criminal Appeal No. 450 of 2016 decided on 29.12.2017, paras 78 to 80 read as under:

> "78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.
>
> 79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in absence of there being chemical examination of whole quantity, can be held to be charas.

80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon'ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145, wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

24. In ***State*** Vs ***Naresh Kumar*** Criminal Appeal No. 782 of 2008 decided on 28.6.2019, paras 23 to 25 read as under:

"23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to

have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.

25. In ***State of HP*** Vs ***Sultan Singh and Others*** Criminal Appeal No. 324 of 2008, decided on 22.4.2016 para 16 reads as under:

"16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

26. In ***State of Himachal Pradesh*** Vs ***Sohan Singh*** Criminal Appeal No. 259 of 2009 decided, on 23.12.2015 para 16 reads as under:

"16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not

> prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL."

27. Thus, from the entirety of evidence available on record, we are not convinced that the sample of 25 grams examined at Central Revenue Control Laboratory, Delhi was representative of entire bulk of substance and hence the appellant cannot be held to have been found in conscious possession of 1 kg 300 grams. The appellant can be held to in possession of 25 grams or at the most 50 grams of Charas by including the weight of other sample, which as per NDPS Act is small quantity.

28. Prior to amendment Act 16 of 2014, the punishment involving small quantity of charas under Section 20(b)(ii) (A) was rigorous imprisonment for terms extending up to six months or extending up to Rs. 10,000/- or with both.

29. Appellant is held guilty of offence under Section 20(b)(ii)(A) for having been found in conscious possession of only small quantity of charas and is sentenced to undergo rigorous imprisonment for six months. The judgment and sentence order passed by learned trial court is accordingly modified.

30. Appellant was arrested on 19.12.2012. He remained undertrial and since his conviction has been undergoing the sentence imposed against him. Since the appellant has already undergone much more sentence than

could be inflicted upon him, the appellant is ordered to be released immediately, if not required in any other case. The Registry is directed to prepare the release warrant forthwith. Records be sent back. The appeal is accordingly disposed of. Pending applications, if any, also stand disposed of.

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

Between:

SNEH LATA MANDIAL W/O OM NARIAN MANDIAL AGED 67 YEARS, RESIDENT OF WARD NO.4 HOUSE NO.87, JAIN CHOWK, NADAUN, DISTRICT HAMIRPUR, HIMACHAL PRADESH, PROP. JAI GURUDEV TRACTOR AUTHORISED DEAR, KUTHAR GAGAAL ROAD, TEHSIL NADAUN, DISTRICT HAMIRPUR.

....PETITIONER.

(BY. MR. KULWANT SINGH GILL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HOME).

2. RAKESH KUMAR S/O SHRI DURGA DASS, R/O HARIPUR, TEHSIL DEHRA, DISTRICT KANGRA.

....RESPONDENTS.

(BY. MR. DINESH SHARMA, MR. SUMESH RAJ, MR SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENT NO.1.
NONE FOR RESPONDENT NO.2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.129 of 2022
Decided on: 08.03.2022

**Code of Criminal Procedure, 1973**- Section 482- Quashing of order passed by Ld. District Consumer Disputes Redressal Forum, Una, camp at Hamirpur- Held- Petition not maintainable in view of the statutory remedy ebing available

to the petitioner against the order which has been assailed- Petition dismissed. (Para 3, 4)

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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**

By way of this petition, filed under Section 482 of the Criminal Procedure code, the petitioner has prayed for quashing of order dated 06.10.2021, passed by learned District Consumer Disputes Redressal Commission, Una, Camp at Hamirpur, H.P., in E.A. No.07 of 2016, titled as Rakesh Kumar Versus Jai Gurudev Tractors, vide which the learned Consumer Forum has passed the following order:-

> " *At this stage, ld. Counsel for complainant/DH stated that he do not want to lead further evidence in absence of accused. Now we switch off to Section 299 Cr.P.C. 1973 as accused has absconded and declared proclaimed person and reference has ordered to be sent in the Proclaimed Offender Register of Police Station concerned. As complainant/DH do not want to lead further evidence so this criminal case u/S 27 of Consumer Protection Act, 1986 be consigned to record room u/S 299 Cr.P.C. of 1973 and proceedings in this complaint is to be re-opened as and when accused is arrested and brought to this Commission in capacity of Judicial Magistrate, 1st Class, by the police. Complainant is also given liberty to get the proceedings revived movement when accused is arrested And produced before this Commission and thereafter, accused would be tried for the said offence. Certified copy of this order be sent to the parties free of cost.*"

2. Having heard learned counsel for the petitioner as also learned Additional Advocate General who has put in appearance on behalf of respondent No.1, this Court is of the considered view that filing of the present petition under

Section 482 of the Criminal Procedure Code is nothing but an abuse of the process of law.

3. The Consumer Protection Act is both substantive as well as procedural law. The order which is intended to be assailed under Section 482 of the Criminal Procedure Code before this Court has been passed by the learned District Consumer Forum in terms of the powers so conferred upon it under Section 27 of the Consumer Protection Act, 1986. Section 27A of the Consumer Protection Act reads as under:-

> "*27A. Appeal against order passed under section 27-(1) Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974), an appeal under section 27, both on facts and on law, shall lie from-*
> *(a) the order made by the District Forum to the State Commission;*
> *(b) the order made by the State Commission to the National Commission; and*
> *(c) the order made by the National Commission to the Supreme Court.*
> *(2) Except as aforesaid, no appeal shall lie to any court from any order of a District Forum or a State Commission or the National Commission.*
> *(3) Every appeal under this section shall be preferred within a period of thirty days from the date of an order of a District Forum or a State Commission or, as the case may be, the National Commission:*
> *Provided that the State Commission or the National Commission or the Supreme Court, as the case may be, may entertain an appeal after the expiry of the said period of thirty days, if, it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.*"

A perusal of this Section demonstrates that the same starts with non-obstante laws and in very unambiguous terms makes it clear that an order passed under Section 27 of the Act is appealable only under Section 27A of Act before the

learned State Commission and this is notwithstanding anything contained in the Criminal Procedure Code.

4. As the present petition is not maintainable in view of the statutory remedy being available to the petitioner against the order which stands assailed by this of this petition, the same is dismissed in limini.

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

Between:

STATE OF HIMACHAL PRADESH

....APPELLANT.

(BY. MR. DINESH THAKUR, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

AND

1. BALDEV CHAND SON OF LATE SHRI MUNSHI RAM, RESIDENT OF VILLAGE DOHB, TEHSIL SHAHPUR, P.S. SHAHPUR, DISTT. KANGRA, H.P.

2. INDIRA DEVI WIFE OF SHRI BALDEV CHAND, RESIDENT OF VILLAGE DOHB, TEHSIL SHAHPUR, P.S. SHAHPUR, DISTT. KANGRA, H.P.

3. MAYA DEVI WIFE OF LATE SHRI MUNSHI RAM, RESIDENT OF VILLAGE DOHB, TEHSIL SHAHPUR, P.S. SHAHPUR DISTT. KANGRA, H.P.

....RESPONDENTS.

(BY. MR. SANJAY JASWAL, ADVOCATE)

CRIMINAL APPEAL
No.156 of 2010
Decided on: 05.04.2022

**Indian Penal Code, 1860** - Sections 341, 323, 325 read with Section 34- Criminal appeal- The judgment of acquittal under Sections 341, 323, 325 read

with Section 34 IPC- Held- There are contradictions in the statements of the prosecution witnesses- Some of the accused falsely implicated- As per medical expert injuries possible by fall- Victim had also assaulted the accused- There is a serious doubt about the veracity of the case of the prosecution- Judgment of acquittal calls for no interference- Appeal dismissed. (Para 15, 16, 17)

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

**J U D G M E N T**

By way of this petition, the appellant/State has challenged the judgment passed by the Court of learned Chief Judicial Magistrate, Kangra at Dharamshala, District Kangra, H.P., in Criminal Case No.50-II/2007, titled as State Versus Baldev Chand & others, decided on 29.10.2009, vide which the respondents/accused were acquitted of the charges under Sections 341, 323, 325 read with Section 34 of the Indian Penal Code by giving them benefit of doubt.

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

The case of the prosecution was that on the fateful day, i.e. 02.05.2007, complainant Soni Devi alongwith her sister-in-law (Jethani) Salochana Devi and Tripta Devi (Devrani) were wrongfully restrained by the accused at around 2.00 p.m. at village Dohb, when the complainant and others were on their way, carrying the wheat husk. Accused Indira Devi caught hold of the complainant from her arm and accused Maya Devi caught hold of the complainant from her hair. Accused Baldev Chand assaulted the complainant with a 'Danda' by proclaiming that the cowshed in issue belonged to him. As this was objected to by the complainant, the accused assaulted the complainant and others and voluntarily caused simple hurt to other victims and grievous hurt to Salochana Devi. When the complainant and others raised hue and cry, Budhi Singh and Parkash Chand came to the spot and saved the

complainant party from the clutches of the accused. On the complaint of Soni Devi, FIR Ext.PW1/A was lodged. The investigation was carried out. On an application filed by the Investigating Officer, the injured were medically examined and Medico Legal Certificates were issued. The injuries on the person of Soni Devi and Tripta Devi were found to be simple and that on the body of Salochana Devi were found to be grievous. During the course of investigation, the site was visited by the Investigating Officer. Statements of the witnesses were recorded under Section 161 of the Criminal Procedure Code. After completion of investigation, challan was presented in the Court and accused were summoned. As a *prima facie* case was found against the accused, accordingly they were charged for having committed offences punishable under Sections 341, 323, 325 read with Section 34 of the Indian Penal Code.

3. To prove its case, the prosecution examined nine witnesses, whereas two witnesses were examined by the accused in their defence.

4. Learned Trial Court vide its judgment dated 29.10.2009 held that as the prosecution failed to prove its case against the accused beyond reasonable doubt, therefore, the accused deserved benefit of doubt and on this ground, they were acquitted.

5. When this case was taken up for final hearing today, the Court was informed that respondent No.3/accused was since dead and on the prayer by the learned Additional Advocate General, the name of said respondent was ordered to be deleted by holding that the appeal against her had abated.

6. Learned Additional Advocate General has argued that the judgment of acquittal passed by the learned Court below was not sustainable in the eyes of law for the reason that the learned Court below had not appreciated the evidence on record in its correct perspective. Learned Additional Advocate General further argued that statement of PW-1 Soni Devi was completely ignored by the learned Trial Court whose statement was duly

corroborated by PW-3 Tripta Devi. He also argued that the learned Trial Court gave undue weightage to the testimony of DW-1 Roshan Lal, whereas credible evidence of the prosecution was ignored by the learned Trial Court.

7. On the other hand, learned counsel for respondents No.1 and 2/accused submitted that there was no infirmity with the judgment passed by the learned Court below as the prosecution was not able to prove its case against the accused beyond reasonable doubt, therefore, the learned Trial Court correctly ordered the acquittal of the accused.

8. I have heard learned counsel for the parties and have gone through the record of the case as well as the impugned judgment.

9. As per the record, Soni Devi entered the witness box as PW-1 and deposed in the Court that on the fateful day she was stacking grass in her cowshed when the accused wrongfully restrained her. Accused Indira Devi and Maya Devi caught hold of her whereas accused Baldev Singh physically assaulted her with a 'Danda' on her arms and legs. As per her, accused Baldev Singh was claiming that the cowshed in issue was belonged to her. While this was happening, her sister-in-law Tripta Devi came to the spot alongwith other sister-in-law (PW-2 Salochana Devi), who were also assaulted by the accused. She deposed that the FIR in issue, i.e. Ext.PW1/A, was lodged at her behest and she was medically examined by the doctor. In her cross-examination she denied that on the fateful day, it was a holiday due to 'Budh Purnima' and she stated that her husband and brother-in-law returned to the house in between 3 to 4 p.m. She, however, admitted that there was a dispute with the accused persons regarding the cowshed and land. However, she refused the suggestion of the defence that on the fateful day she alongwith her other family members had tried to forcibly occupy the cowshed.

10. PW-2 Salochana Devi also stated that she was assaulted by the accused persons. In her cross-examination she reiterated that on the fateful day, her husband was on duty. She admitted that there was a dispute between

her and the family of the accused regarding some land and a cowshed and her husband etc. were at home when they were assaulted. She denied that Baldev and Akshay were not at the spot at the time of occurrence of the incident.

11. A perusal of the statement of PW-3 Tripta Devi demonstrates that in the course of her cross-examination, she admitted that on the day when the incident took place, it was a holiday on account of 'Budh Purnima' and Kartar Chand was at his home though Jagdish Chand was out on duty. She also mentioned that Kartar Chand informed the police after he came to the cowshed and the police in fact came to the spot as a result of his telephonic call. This deposition by the said witness was not corroborated by the statement of any other prosecution witness nor these facts find mention in the FIR. This clearly demonstrates that said witness had made improvements in the course of her deposition in the Court. The factum of a dispute being there with regard to the cowshed with the accused was admitted by her. She also admitted in her cross-examination that the report to the police was made by Soni Devi and that the name of Akshay Kumar was falsely got recorded therein. She also admitted that the name of Akshay Kumar was got included as Soni Devi was in anger. She also admitted that they all were angry, for the reason that Maya Devi and Indira Devi had not permitted them to keep the wheat husk (Tudi), which had led to the dispute between them.

12. PW-4 Budhi Singh, the spot witness deposed that he went to the spot when he heard the cries and he found Baldev assaulting and injuring the victims with 'Danda' and other accused arguing with the victims. This witness further stated that he alongwith Prakash Chand came to intervene and save the injured. He denied that Akshay and Baldev were not present at the spot and he also denied that Maya Devi and Indira Devi were being assaulted by Sulochana, Tripta and Soni Devi. PW-6 Parkash Chand, the other spot witness turned hostile. PW-5 Dr. Sushil Sharma medically examined Salochana Devi and the Medico Legal Certificate stands exhibited as Ext.PW5/C. As per PW-8

Dr. Anupama Kapoor, the Radiologist, injury No.2 on the left hand was found grievous whereas other injuries were found to be simple in nature. This witness also examined injured Tripta Devi and injuries were found to be simple in nature. The same was the result of the examination of Soni Devi. The x-ray examination of Salochana Devi by PW-8 Dr. Anupama Kapoor revealed that there was a fracture of the forehead of fourth metacarpal which injury could be caused with a 'Danda'**.** But, this witness also admitted in her cross-examination that an injury could be caused by fall on hard surface.

13. The Investigating Officer Najender Kumar entered the witness box as PW-7. He admitted that though the name of Akshay Kumar figured in the FIR, but his involvement was not there in the matter. His deposition reveals that he did not take into possession any revenue record to prove that the complainant party was the owner of the cowshed.

14. The record further reveals that one Shri Roshan Lal, relative of the accused was examined by the accused as DW-1, who stated that on 02.05.2007, his wife had organizing a function of 'Purnmasi' in which accused Baldev and his Akshay were present till around 2.30 O'clock, when they received a telephonic message that the mother and wife of the accused stood assaulted. On this, accused left for their house.

15. From the evidence on record, on thing which is clear is that there are contradictions in the statements of the prosecution witnesses as has been taken note of also by the learned Trial Court. Not only this, the factum of the cowshed in issue being owned by the victims has also not been proved on record. It is also evident from the record that there was a dispute between the accused and the complainant with regard to the ownership of the said cowshed and that contents of the FIR were found to be contrary to the version of the prosecution witnesses. Statement of PW-3 demonstrates that some of the accused were falsely implicated in the FIR. The testimony of medical experts is to the effect that injuries sustained by the complainant/victim could have been

caused by fall on hard surface and a rapat having been registered of the incident even by the accused, which is on record as Ext.DW2/A, further demonstrates that in terms thereof, it were the victims who had assaulted the accused.

16. From all this, there is a serious doubt about the veracity of the case of the prosecution and further it cannot be said that on the strength of statements of the witnesses examined by the prosecution, the guilt of the accused was proved by the prosecution beyond reasonable doubt. These are exactly the findings that stand returned by the learned Trial Court also. In fact, this Court concurs with the findings so returned by the learned Trial Court, for the reason that it is clearly borne out from the record that the prosecution was not able to prove its case against the accused beyond reasonable doubt. Further, as the findings returned by the learned Trial Court are borne out from the record of the case and this Court does not finds any perversity therein, the judgment of acquittal passed by the learned Trial Court, in the considered view of this Court calls for no interference.

17. Accordingly, in view of what has been discussed hereinabove, this appeal being devoid of any merit is dismissed, so also the pending miscellaneous applications, if any. Bail bonds stand discharged.

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

Between:-

MEHAR SINGH
SON OF SHRI SHER SINGH, AGED 40 YEARS,
RESIDENT OF VILLAGE SHANGNA, POST OFFICE
MANI KARAN, TEHSIL BHUNTER, DISTRICT
KULLU, HIMACHAL PRADESH
(PRESENTLY LODGED IN JUDICIAL CUSTODY
SINCE 13.06.2021).

....PETITIONER

(BY MR. MAAN SINGH, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH

2. NARCOTICS CONTROL BUREAU SUB ZONAL UNIT MANDI, DISTRICT MANDI, H.P.

..RESPONDENT

(MR. ASHWANI PATHAK, SENIOR ADVOCATE WITH MS. TAMANNA, ADVOCATE R-2)

CRIMINAL MISC. PETITION (MAIN)
No. 576 of 2022
Reserved on:17.06.2022
Decided on: 21.06.2022

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8, 20, 29- Petitioner sold 800 gram charas to accused- Held- There is a prima facie case to infer implication of petitioner in the crime- The petitioner absconded for considerable period of the registration of case- It cannot be guaranteed that there will be no re-indulgence by the petitioner, in case released on bail. Keeping in view the fact that petitioner absconded for considerable period after registration of case, it cannot be ruled-out that he may again flee from the course of justice and try to tamper with the prosecution evidence- Petition dismissed. (Para 12, 13, 14)

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

**O R D E R**

Petitioner is accused in case FIR No. 41 dated 13.6.2021 registered at Police Station, Narcotics Control Bureau, Sub Zone, Mandi, District Mandi, H.P. under Sections 8, 20 and 29 of the Narcotics Drugs and Psychotropic Act. The petitioner was arrested on 8th February, 2022.

2. The brief facts of the case are that officials of Narcotics Control Bureau (for short 'NCB'), Sub Zone, Mandi had laid a '*Nakka*' at place Pul Gharat near Mandi town on a secret information. Simranjeet Singh and Amanpreet Singh were apprehended with motorcycle No. PB-13-AD2700. Whereas Simranjeet Singh was the rider, Amanpreet Singh was on the pillion. 526 grams of charas was recovered from the bag carried by Ms. Amanpreet Singh and 780 grams of charas was recovered from the bag carried by Simranjeet Singh. Both were found to be husband and wife. The case was formally registered and both the above noted persons were arrested.

3. During investigation, the Investigating Officer found that Simranjeet Singh had purchased charas from the petitioner against consideration. Efforts were made to trace the petitioner, but he could not be found until he filed an application for grant of pre-arrest bail before this Court in the month of December, 2021. During interim bail, petitioner joined investigation. The application for pre-arrest bail was finally rejected by this Court on 14.12.2021.

4. As per case of respondent, the complicity of petitioner in the crime has been found. Frequent phone calls between the petitioner and Simranjeet Singh have been traced during relevant period. Additionally, money transaction has also taken place between them.

5. On the other hand, petitioner has made a prayer for grant of bail under Section 439 Cr.P.C on the ground that he is innocent and the respondent is not possessed of any legal evidence to connect petitioner with the alleged crime. It is further contended that the petitioner has no past criminal history. He is permanent resident of Village Shangna, Post office Mani Karan, Tehsil Bhuntar, District Kullu, Himachal Pradesh and there is no likelihood of his fleeing from the course of justice. Petitioner is ready and willing to abide by all the conditions as may be imposed. Section 37 will not be applicable in so far as the allegations against the petitioner are concerned.

Learned counsel for the petitioner has further pointed out that NCB has already filed a complaint against Simranjeet Singh and Amanpreet Singh alleging inter-alia that Simranjeet Singh had purchased 800 grams of charas from the petitioner, which was intermediate quantity.

6. I have heard learned counsel for the petitioner and Sh. Ashwani Pathak, learned Senior Advocate assisted by Ms. Tamanna, Advocate for the respondent-NCB and have also gone through the record carefully.

7. This Court, while deciding bail application will not minutely scan the material collected during investigation, still a cursory look at such material would be necessary only for the purposes of assessing seriousness and gravity of charges against the petitioner.

8. A sum of Rs.10,000/- has been found to be transferred from the account of Simrajeet Singh to the bank account of petitioner on 28.05.2021 i.e. about 15 days before the apprehension of Simranjeet Singh with the contraband. The explanation rendered on behalf of the petitioner for such money transaction does not appear to be genuine and plausible. Learned counsel for the petitioner has argued that co-accused Simranjeet Singh was negotiating some deal with the petitioner regarding taking of land on lease, but he has failed to place on record any tangible material to prove such fact. He relied upon the fact that exchange of telephone calls between Simranjeet Singh and petitioner was since long time and this fact should be taken in support of his contention. However, this again cannot be considered as corroborative to the plea raised on behalf of the petitioner. The plea raised appears to be an afterthought. Simranjeet Singh, in order to have lease of land in Himachal Pradesh, needed to qualify the test of Section 118 of H.P. Tenancy and Land Reforms Act. The bare minimum would be execution of an agreement to lease.

9. The fact that petitioner has tried to raise a false plea coupled with his conduct that he could not be found by the NCB for considerable long

period casts a serious doubt on the *bonafides* of petitioner. Merely because the complaint filed against Simranjeet Sigh and Amanpreet Singh makes a mention of purchase of 800 grams charas from petitioner, will not be sufficient for petitioner to claim liberty of bail in the instant case. Even assumingly he had sold 800 grams of charas, the said quantity cannot be termed to be less by any stretch of imagination. The evident nature of commercial transaction and deal into the contraband aggravates the situation for the petitioner. In cases, where Section 37 of the NDPS Act is not applicable, the bail cannot be claimed as a matter of right. The fate depends on the facts of each and every case.

10. The menace of drug addiction especially in the adolescents and students has seriously eroded into the fabric of the society, putting the future generation as also the prospects of future nation building into serious peril.

11. It is not a case where the investigating agency has not been able to lay its hand on any legal evidence against the petitioner. Though allegations against the petitioner are yet to be proved in accordance with law, it cannot be singally taken as a factor to grant bail to the petitioner. Nothing has been placed on record as to how and in what manner petitioner came in contact with the persons who were not the residents of the State. Thus, there is *prima-facie* material to infer implication of the petitioner in the crime and in such circumstances, the release of petitioner on bail will send a negative signal in the society, which definitely shall be detrimental to its interest.

12. Even 800 grams of charas allegedly sold by the petitioner cannot be said to be a lesser quantity. The *prima-facie* involvement of petitioner in the dangerous trade of contraband cannot be ignored merely on account of the fact that he has no past criminal history. It cannot be guaranteed that there will be no re-indulgence by the petitioner, in case released on bail. Keeping in view the fact that petitioner absconded for considerable period after

registration of case, it cannot be ruled-out that he may again flee from the course of justice and try to tamper with the prosecution evidence.

13. The petitioner has placed reliance on orders passed by this Court in Cr.M.P(M) No. 2444 of 2021, Cr.M.P(M) No. 675 of 2022 and also Cr.M.P(M) No. 218 of 2021 to contend that the persons in identical situations have been granted bail. The contention raised on behalf of the petitioner is liable to be rejected for the reason that orders passed in the above noted cases were keeping in view the respective fact situations of individual case, which were not identical to the facts of the present case.

14. The petitioner, in the given facts and circumstances of the case, is not entitled to grant of bail. The petition is accordingly dismissed.

15. Any observation made hereinabove shall not be taken as an expression of opinion on the merits of the case and the trial court shall decide the matter uninfluenced by any observation made hereinabove.

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

Between:-

MOHD. MARGOOB (IN JAIL) SON OF SHRI MOHD. MAHBOOB, RESIDENT OF HOUSE NO. 403, GULAARWALI GALI, PS KOTWALI, DISTRICT MUJJAFFARNAGAR UP

....PETITIONER

(BY SHRI VINOD KUMAR, ADVOCATE)

AND

1. STATE OF H.P., THROUGH HOME SECRETARY, SHIMLA-2.

2. DIRECTOR GENERAL OF PRISON, KASUMPTI, SHIMLA-9 H.P.

...RESPONDENTS

(BY SHRI HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NO. 470 OF 2022
Decided on: 21.06.2022

**Code of Criminal Procedure, 1973**- Section 482- Petitioner seeking extension of the parole granted to petitioner on medical grounds- Held- Instead of filing petition under Section 482 Cr.P.C. a petitioner Article 226 of the Constitution of India shall be maintainable- Petition disposed of. (Para 3)

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

**O R D E R**

This petition, invoking provision of Section 482 Cr.P.C., has been filed for extension of term of parole granted to petitioner on medical grounds.

2 Grant of parole to a convict/prisoner is governed by provision of H.P. Good Conduct Prisoners (Temporary Release), Rules, 1968 and Rules framed thereunder.

3 Omission or commission on the part of concerned authority in granting or rejecting the claim of a prisoner under H.P. Good Conduct Prisoners (Temporary Release) Rules, 1968 is an administrative action, but not an action governed by provisions of Code of Criminal Procedure or any other Criminal Law and therefore, I am of considered opinion that in such a case, instead of filing petition under Section 482 Cr.PC, a petition under Article 226 of Constitution of India shall be maintainable.

4 Faced with aforesaid situation, learned counsel for petitioner seeks permission to withdraw this petition with liberty to file appropriate petition under Article 226 of Constitution of India, with further submissions that till filing of Civil Writ Petition, petitioner may not be subjected to any action by concerned Authorities for not surrendering before concerned Jail Superintendent for expiry of his parole period because he is suffering from

serious ailment and is not able to move out from his house and at present, he is at Mujjaffarnagar.

5 Taking into consideration the submissions of learned counsel for petitioner, petition is dismissed as withdrawn with liberty, as prayed for filing afresh comprehensive petition, and in case petition is preferred within a reasonable period and taking into account the peculiar condition of health of: petitioner, as placed on record, respondent Authority is directed to take any coercive action till ***15th July, 2022*** enabling the petitioner to file an appropriate petition and thereafter, case of petitioner shall be governed by order, if any, passed by Court, in the petition so preferred by petitioner, failing which Authority shall be at liberty to take appropriate action thereafter.

Petition stands disposed of in above terms, so also pending application, if any.

The parties are permitted to produce copy of order downloaded from the High Court website and the concerned authority shall not insist for certified copy of the order, however, they may verify the order from the High Court website or otherwise.

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

Between:

1. SMT. KAMLA DEVI,
W/O SH. HEM RAJ,
AGE 66 YEARS.

2. SMT. CHANCHLA DEVI,
W/O SH. SANJAY KUMAR,
AGE 37 YEARS.
BOTH R/O VILLAGE BHERI
PO SAJAO PIPLU ILLAQUA ANANTPUR,
TEHSIL DHARAMPUR & DISTRICT MANDI H.P.

....PETITIONERS

(BY MR. J.L. SHARMA AND
MR. TEK CHAND SHARMA,
ADVOCATES)

AND

1. STATE OF H.P.
THROUGH ADVOCATE GENERAL
STATE OF HP.

2. SH. LUDAR SINGH,
S/O SH. DEVI RAM,
RESIDENT OF VILLAGE BHERI,
PO SAJAO PIPLU ILLAQUA ANANTPUR,
TEHSIL DHARAMPUR & DISTRICT MANDI H.P.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR. NARENDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
AND MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL
FOR R-1)

(NEMO FOR R-2)

2. CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC No. 608 OF 2021

Between:

SMT. AMRITA DEVI,
W/O SH. SATRUGHAN,
AGE 69 YEARS.
R/O VILLAGE BHERI,
PO SAJAO PIPLU,
ILLAQUA ANANTPUR,

TEHSIL DHARAMPUR
& DISTRICT MANDI, H.P.

....PETITIONER

(BY MR. J.L. SHARMA AND
MR. TEK CHAND SHARMA,
ADVOCATES)

AND

1. STATE OF H.P.
THROUGH ADVOCATE GENERAL
STATE OF HP.

2. SMT. KRISHNA DEVI,
W/O LUDAR SINGH,
RESIDENT OF VILLAGE BHERI,
PO SAJAO PIPLU ILLAQUA ANANTPUR,
TEHSIL DHARAMPUR & DISTRICT MANDI H.P.

3. CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC No. 610 of 2021

Between:

1. SMT. AMRITA DEVI,
W/O SH. SATRUGHAN,
AGE 69 YEARS.

2. SH. SHATRUGHAN,
S/O SH. DEVI RAM
AGE 74 YEARS,

3. SH. AJAY KUMAR,
S/O SH. SHATRUGHAN
43 YEARS

ALL R/O VILLAGE BHERI,
PO SAJAO PIPLU,
ILLAQUA ANANTPUR,
TEHSIL DHARAMPUR
& DISTRICT MANDI, H.P.

....PETITIONER

(BY MR. J.L. SHARMA AND
MR. TEK CHAND SHARMA,
ADVOCATES)

AND

1. STATE OF H.P.
THROUGH ADVOCATE GENERAL
STATE OF HP.

2. SH. LUDAR SINGH,
S/O SH. DEVI RAM,
RESIDENT OF VILLAGE BHERI,
PO SAJAO PIPLU ILLAQUA ANANTPUR,
TEHSIL DHARAMPUR & DISTRICT MANDI H.P.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR. NARENDER GULERIA, ADDITIONAL
ADVOCATES GENERAL AND MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL FOR R-1)

(NEMO FOR R-2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 629 of 2021
Reserved on:16.6.2022
Decided on: 24.06.2022

**Code of Criminal Procedure, 1973**- Sections 482, 107, 150, 145- Petition for quashing the order passed by Ld. Additional Sessions Judge in criminal revision affirming the order of Ld. Sub Divisional Magistrate- Held- There is complete non-compliance of provisions contained under Section 111 of Cr.P.C. and even the revisional Court lost sight of this **important** aspect of compliance of provisions of Section 111 Cr.P.C .- Summons issued to the petitioners being bad in law, are not sustainable in the eye of law- Petition allowed and orders passed by Ld. Additional Sessions Judge and Sub Divisional Magistrate are quashed and set aside. (Para 14, 15, 16)

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

**O R D E R**

Since common questions of facts and law are involved in the above captioned cases and parties to the lis are same and by way of these petitions challenge has been laid to orders dated 22.9.2021, passed by the learned Additional Sessions Judge in Criminal Revision Petition Nos. 83 of 2018, 4 of 2019, and 56 of 2019, same were heard together and are being decided vide common judgment.

2. By way of instant petitions filed under Section 482 Cr.PC, challenge has been laid to order(s) dated 22.9.2021, passed by the Additional Sessions Judge Sarkaghat in Criminal Petitions No. 83/18, 4 of 2019 and 56 of 2019, affirming order(s) dated 25.9.2018, 11.12.2018 and 26.8.2019, passed by the Sub-Divisional Magistrate, Dharampur, District Mandi, whereby summons came to be issued to the petitioners by Sub-Divisional Magistrate, Dharampur, taking cognizance of the Kalandra filed by the Police Station Dharampur against the petitioners, alleging therein that they are interfering in the land of respondent-complainant and have also threatened the complaint to do away of their lives.

3. For brevity, facts of Cr.MMO No. 629 of 2021 are being discussed. Briefly stated facts are that police after having received the complaint from respondent No.2 that petitioners have interfered in the possession of the land by cutting grass and they have also threatened to do away with their lives, conducted the investigation and thereafter filed Kalandra before the Sub-Divisional Magistrate, praying therein to proceed against the petitioners under Sections 107, 150 and 145 of Cr.PC.

4. Sub-Divisional Magistrate Dharampur, vide order dated 25.9.2018, (Annexure P-3), ordered for issuance of process against the petitioners (respondents therein) for 29.10.2018. Being aggrieved and dissatisfied with issuance of the process without there being compliance of provisions contained under Sections 107, 111 and 112 Cr.PC, respondents filed criminal revision petition in the court of learned Additional Sessions Judge, praying therein to quash and set-aside the summoning order issued by the Sub-Divisional Magistrate, Dharampur.

5. Learned Additional Sessions Judge Sarkaghat, Mandi, vide order dated 22.9.2021 (Annexure P-5) dismissed the criminal revision petition and directed the parties to appear before the court below on 8.10.2021, with further direction to Sub-Divisional Magistrate to decide the case within three months. In the aforesaid background petitioners have approached this Court in the instant proceedings filed under Section 482 Cr.PC, praying therein to set-aside aforesaid orders dated 22.9.2021, passed by the learned Additional Sessions Judge and 25.9.2018, passed by learned Sub-Divisional Magistrate.

6. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the orders impugned in the instant proceedings, this Court finds force in the submissions made by Mr. J.L. Sharma, learned counsel appearing for the petitioners that Sub-Divisional Magistrate, Dharampur, after having received Kalandra/inquiry report from the Police Station concerned could not have

directly issued summons to the petitioners (respondents therein), rather before doing so, it ought to have followed the procedure provided in statutory provisions as contained under Sections 107, 111 and 112 of the Cr.PC. Mr. Sharma, argued that bare perusal of order dated 25.9.2018, (Annexure P-3), whereby respondents (petitioners herein) came to be summoned for 29.10.2018 clearly reveals that Sub-Divisional Magistrate directly on the basis of report submitted by the Reader of his court proceeded to issue notice, whereas he before issuing process ought to have formed an opinion whether persons sought to be summoned are likely to commit breach of peace and disturb the public tranquility or not. Since no opinion, if any, as stated herein above, ever came to be formed by the Sub-Divisional Magistrate before issuing process against the respondents, order dated 25.9.2018, is not sustainable and could not have been upheld by the Revisional Court.

7. Mr. Narender Guleria, learned Additional Advocate General while supporting the order impugned in the instant proceedings contended that there is no infirmity in the summoning order or in the order passed by the Revisional Court. He submitted that before issuing process, due procedure was followed and as such, no illegality can be said to have been committed by the learned Additional Sessions Judge while dismissing the criminal revision petition having been filed by the petitioners.

8. In the case at hand, record reveals that police after having received the complaint from the respondents that petitioners are interfering in their land and have threatened to do away with their lives, conducted investigation and thereafter, filed Kalandra/inquiry report before the Sub-Divisional Magistrate, Dharampur, praying therein for registration of case under Sections 107, 150 and 145 of Cr.PC against the respondents. Sub-Divisional Magistrate Dharampur, after having received the aforesaid Kalandera was required to constitute an inquiry to arrive at conclusion that whether there is every likelihood of breach of peace and tranquility by the

petitioners-respondents, but he directly on the basis of report submitted by his Reader approved the proposal for issuance of summons to the petitioners-respondents for 29.10.2018 as is evident from Annexure P-4, which reads as under:

> *"This complaint was received in this office from Sh.Ludar Singh son of Sh. Devi Ram, resident of Bhedi, P.O. Sajao. In this matter, necessary direction was given to Police Station, Dharamapur for taking legal action. From the perusal of Kalandra received from In-charge, Police Station, Dharampur, it is clear that the respondents are cutting the grass from the disputed land for the last 2-3 years and the payment of grass is being given to the elder brother of complainant Shatrughan. The matter relates to land dispute and civil nature due to which there is apprehension of quarrel and breach of peace in the Illaqua. Due to which, Kalandra has been prepared by the police Station, Dharam under Sections 107, 150, 145 Cr.P.C.*
> *Sir, if approved, the complainant and respondents/other party may be summoned before this court on 29-10-18."*

9. Again on 29.10.2018, case was called, but since none came present on that date, matter was adjourned to 28.11.2018. On 28.11.2018, respondent was present and summon were ordered to be issued to the respondents for 19.12.2018. On 19.12.2018, both the parties were present and SDM after having given Kalandra to both the parties issued summons to the witnesses. At this stage, petitioners approached the Additional Sessions Judge Sarkaghat, Mandi, by way of criminal revision petition No. 83 of 2018.

10. Before ascertaining correctness and genuineness of the rival contentions of both the parties, it would be apt to take note of Section 107 of Cr.PC, which reads as under:

> *"107. Security for keeping the peace in other cases.*

> *(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.*
> *(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction."*

11. Careful perusal of aforesaid provision reveals that when Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, then he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year. Procedure requires to be followed finds mention in Section 111 of the Cr.PC, which reads as under:

> *"111. Order to be made. When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required."*

12. Careful perusal of aforesaid section reveals that when a Magistrate acting under Sections 107 to 110 Cr.PC, deems it necessary to require any person to show cause under such section, then he is required to make order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties, if any, required.

13. Section 112 Cr.PC provides that if the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him. Section 113 of Cr.PC, provides that if such person is not present in Court, the Magistrate shall issue summons requiring him to appear. Section 114 Cr.PC provides that every summons or warrant issued under Section 113 shall be accompanied by a copy of the order made under Section 111, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same. Section 116 Cr.PC provides that when an order under Section 111 has been read over or explained under Section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under Section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken.

14. If the aforesaid provisions of law are read juxtaposing each other, it is quite apparent that when a Magistrate acting under Sections 107 to 110 of the Code, deems it necessary to require any person to show-cause, then in that eventuality, he is required to make an order in writing setting forth the substance of the information received, the amount of the bond to be executed etc. Show cause notice under Section 111 Cr.PC can be issued only after an

order is made in writing by the Sub-Divisional Magistrate, setting forth the substance of the information received etc. In other words, before issuing show cause, he is required to form an opinion whether person against whom process is being issued was likely to cause breach of peace or tranquility in the area or not. Interestingly, in the case at hand, aforesaid aspect is completely missing. Notice under Section 111 Cr.PC has been issued to the petitioners herein by the Sub-Divisional Magistrate without making order in writing, detailing therein substance of the information received. In the instant case, perusal of order issuing notice clearly reveals that Sub-Divisional Magistrate merely on the basis of report submitted by the reader after having received Kalandra from the police station concerned, ordered for issuance of process/summons against the petitioners herein. Since no order in writing setting forth the substance of the opinion was made by the Magistrate concerned, issuance of notice under Section 111 of Cr.PC is bad in law. Order impugned in the instant proceedings passed by the learned Revisional court is not based upon the proper appreciation of the facts as well as law as has been observed herein above. There is complete non-compliance of provisions contained under Section 111 of Cr.PC, which clearly provides that show cause notice under this Section can only be issued after an order is made in writing by the Sub-Divisional Magistrate detailing the reasons or forming therein opinion that person against whom summons are intended to be issued are likely to cause breach of peace and tranquility in the area. Though Revisional court while deciding the criminal revision petition on merits specifically took note of the provisions contained under Sections 107, 111 and 116 of Cr.PC, but failed to appreciate that for issuance of show cause notice under Section 111 Cr.PC, due procedure as prescribed under Section 107 of Cr.PC is required to be followed. Learned Revisional Court below rejected the plea raised by the learned counsel for the petitioners on the ground that no substance of information i.e. date, month or year in the order was required to

be mentioned in the notice because it stood established on the basis of police complaint that offence under Section 107, 145 and 150 of the Cr.PC is made out against the petitioner. Learned Revisional court further erred in concluding that matter is to be decided on merits after parties adduce the evidence and at present, there is nothing on record prima facie to substantiate the submissions made by the petitioners. Finding returned by the Revisional court that Sub-Divisional Magistrate established on the basis of police complaint that offence under Sections 107, 145 and 150 CrPC is made out against the petitioners, is totally absurd and not based upon the proper appreciation of facts as well as provisions of law contained under Sections 107, 111 and 116 of the Cr.PC.

15. The Revisional Court below lost sight of the fact that no compliance of provision of Section 111 Cr.PC ever came to be made at the time of issuance of notice under said Section. There is no order ever came to be made in writing, detailing therein substance of the information received by the Sub-Divisional Magistrate or forming therein opinion that there is likelihood of breach of peace and tranquility by the persons, to whom summons/process is proposed to be issued in terms of Section 111 Cr.PC. Since there is a complete non-compliance of provisions contained under Sections 107 and 111 CrPC, summons issued to the petitioners being bad in law, are not sustainable in the eye of law.

16. Consequently, in view of the above, present petitions succeed and order dated 22.9.2021, passed by the learned Additional Sessions Judge in Criminal Petitions No. 83/18, 4 of 2019 and 56 of 2019 and orders dated 25.9.2018, 11.12.2018 and 26.8.2019, passed by the learned Sub-Divisional Magistrate, are quashed and set-aside being bad in law. In view of the above, present petitions are disposed of alongwith pending application if any.

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

Between:

SANDEEP GAUTAM,
S/O LATE SHRI RITENDER DEV GAUTAM,
AT PRESENT RESIDENT OF VILLAGE THARU,
POST OFFICE AND TEHSIL NAGROTA BAGWAN,
DISTRICT KANGRA, H.P.

....PETITIONER

(BY MR ATHARV SHARMA,
ADVOCATE)

AND

DHARUV DUTT GAUTAM,
MINOR SON OF SANDEEP GAUTAM,
AT PRESENT RESIDING WITH HIS MOTHER
AT VILLAGE MACHHYAL, POST OFFICE YOL JHARED,
TEHSIL SHAHPUR, DISTRICT KANGRA, H.P.,
THROUGH HIS MOTHER, SMT.
SONIKA GAUTAM, WIFE OF SANDEEP GAUTAM.

....RESPONDENT

(BY MR. MUKESH SHARMA,
ADVOCATE)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 795 of 2019
Decided on: 23.06.2022

**Code of Criminal Procedure, 1973**- Sections 482, 125- Petitioner challenged the order of Ld. Additional Sessions Judge, passed in criminal revision modifying order of interim maintenance passed by Ld. Judicial Magistrate First Class- Held- Amount of interim maintenance enhanced from Rs.800 to

Rs.2000 cannot be said to be on higher side and petitioner being father of respondent is duty bound to fulfill the basic necessities of the respondent till he attains majority- Petition dismissed. (Para 6, 7)

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

**O R D E R**

Instant petition filed under Section 482 Cr.PC, lays challenge to order dated 5.10.2019, passed by the learned Additional Sessions Judge-II, Kangra at Dharamshala, H.P., in criminal revision No. 45-D/X/2016, modifying order of interim maintenance dated 16.7.2016, passed in case No. 154-IV/2016 by the Judicial Magistrate First Class, Dharamshala, in petition filed under Section 125 Cr.PC, having been filed by the respondent, who happens to be son of the petitioner.

2. Precisely, the facts of the case as emerge from the record are that respondent claiming himself to be son of the petitioner filed petition under Section 125 CrPC, praying therein for interim maintenance to the tune of Rs. 6,000/- p.m. though his natural guardian (mother). Respondent No.2 averred in the application that marriage inter-se his mother and father-petitioner was solemnized on 8.12.2004, at village Machhyal, Post Office Yol Jhared, Tehsil Shahpur, District Kangra, H.P., as per Hindu Rites and Customs and out of their wedlock, he was born on 5.1.2006. He averred that since his birth, he is living in the care and custody of his mother, Smt. Sonika Gautam. He alleged that after few days of marriage, petitioner alongwith other family members started treating his mother with utmost cruelty, as a consequence of which, she was compelled to leave her matrimonial home. Respondent No.2 alleged that petitioner also gave beatings to his mother under the influence of liquor and as such, she had no option, but to take shelter in her parental house and since then, she is residing with her parents alongwith him. The respondent further alleged that he is studying in class-5

in Vinayak Senior Secondary School Dodhambh and his mother has already spent sum of Rs. 22,000/- till date on his admission fees, books, dress etc. excluding the monthly fee of Rs. 550 p.m and Rs. 450 p.m. for school van. Respondent claimed that petitioner is working in a shopping complex at Nagrota Bagwan and is earning salary of Rs. 20,000/-. Besides this, he is also getting rent to the tune of Rs. 50,000- from his flat at Delhi. He stated that petitioner is duty bound to maintain him and as such, made prayer for maintenance allowance to the tune of Rs. 6,000- in his favour be allowed.

3. Aforesaid prayer made by respondent No.2 came to be resisted by the petitioner, who by way of reply denied all the allegations leveled against him as taken note herein above. He specifically denied that he earns Rs. 20,000- p.m. by work in the job at shopping complex. He stated that he is a helper in a shop of dry-cleaner and earning only Rs.3,000 pm. He also denied that he is not getting rent from any flat at Delhi. He claimed that mother of the applicant has succeeded a large estate from her father.

4. Learned trial court on the basis of pleadings adduced on record by the respective parties, vide order dated 16.7.2016, directed the petitioner to pay Rs. 800 pm to the respondent as interim maintenance.

5. Being aggrieved and dissatisfied with aforesaid order, respondent preferred criminal revision under Section 397 Cr.PC in the court of Additional Sessions Judge-2 Kangra at Dharamshala, whereby order granting interim maintenance passed by the court below, came to be modified vide order dated 5.10.2019. Learned Additional Sessions Judge while upholding the order of maintenance passed by the court below enhanced the interim maintenance from Rs.800 to Rs.2000/-. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein to set-aside aforesaid order dated 5.10.2019, passed by the learned Additional Sessions Judge.

6. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the judgment impugned in the instant proceedings, this Court finds no force in the submissions of Mr. Atharv Sharma, learned counsel for the petitioner that since sum of Rs. 2000/- has been already awarded in favour of the mother of the respondent in the proceedings initiated by her under the domestic violence Act (in short the "Act"), there was no occasion, if any, for the court to grant interim maintenance in favour of the respondent, who is residing with his mother. Admittedly, amount, if any, of maintenance in the proceedings under the Act has been awarded in favour of the mother of the respondent, but definitely not in favour of the respondent, who otherwise being minor son of the petitioner is entitled to claim maintenance under Section 125 Cr.PC independently from his father. Otherwise also, sum of Rs. 2000/-, if any, awarded under the Act, cannot be said to be sufficient for the sustenance of respondent and his mother, especially when in today's scenario, one LPG cylinder costs Rs. 1100/-. Though learned counsel for the petitioner argued that the factum with regard to claim of the respondent that petitioner earns Rs. 20,000/- per month, has been specifically denied by the respondent and as such, court below while granting interim maintenance ought not have taken sum of Rs. 20,000 /- as monthly income of the petitioner, who otherwise only earns Rs. 3000 per month by working in some dry-cleaner shop. This Court finds no merit in the aforesaid submissions of learned counsel for the petitioner for the reasons that while granting interim maintenance, court is only required to see pleadings adduced on record by the respective parties. The evidence, if any adduced on record in support of respective claims can only be seen by the court while determining the liability, if any of the party under Section 125 Cr.PC. In the instant case, there is no dispute that respondent is legitimate son of the petitioner and at present, he is being taken care of by his mother. Needless to say, petitioner being father of

the respondent is otherwise duty bound to fulfill all basic necessities of the respondent till the time he attains majority and become independent. Sum of Rs. 2000/- awarded by the learned Additional Sessions Judge on account of interim maintenance cannot be said to be on higher side by any stretch of imagination. As has been observed herein above, no one can sustain oneself in sum Rs. 2000/-. Respondent has categorically stated in his petition under Section 125 Cr.PC that his mother has already spent Rs. 20,000/- on his admission fee books etc after borrowing money from the parents. He stated that every month, he is to pay Rs. 550/- school fees and Rs.500/- p.m. for school van. If it is so, sum of Rs. 2000/- awarded by the court below cannot be said to be sufficient. Otherwise also, aforesaid amount has been awarded as interim maintenance, which shall be paid by the petitioner till the time proceedings initiated by the respondent under Section 125 for grant of maintenance are decided finally.

7. Consequently in view of the above, this Court finds no merit in the present petition and same is dismissed. However, having taken note of the fact that the petition filed under Section 125 Cr.PC is pending adjudication for the last 5 years, this Court hopes and trust that court below would make all out efforts to conclude the proceedings expeditiously, preferably within four weeks. Learned counsel for the parties undertake to cause presence of their respective clients on 4.7.2022, enabling it to do the needful well within the stipulated time. All pending applications stand disposed of.

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

Between:

PRAVESH RANI D/O SH. THURU RAM, VILLAGE & POST OFFICE KATHGARH, TEHSIL INDORA,

DISTRICT KANGRA, H.P. AGED 42 YEARS

....PETITIONER.

(BY MR. R.K. GAUTAM, SENIOR ADVOCATE, WITH MS. RADHIKA GAUTAM, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH.
2. DARSHANA DEVI WIFE OF SH. JASWANT SINGH, VILLAGE & POST OFFICE KATHGARH, TEHSIL INDORA, DISTRICT KANGRA, H.P.

....RESPONDENTS.

(BY SHRI SUMESH RAJ AND SHRI SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENT NO.1-STATE)

(MS. KOMAL CHAUDHARY, ADVOCATE, FOR RESPONDENT NO.2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.29 of 2022
Decided on: 28.03.2022

**Code of Criminal Procedure, 1973**- Sections 482- Petition for quashing the judgment passed by the Ld. J.M.F.C. on the ground that the matter has been amicably settled between the parties- Held- Taking into consideration the circumstances surrounding the incident and the manner in which the compromise has been arrived at between the parties as also the nature and seriousness of the offence, this petition deserves to be allowed, more so for the reason that the complainant herself has given her consent to this effect- Petition allowed. (Para 7 to 9)

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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**

By way of this petition, filed under Section 482 of the Code of Criminal Procedure, the petitioner is seeking quashing of judgment dated 08.09.2020/25.09.2020, passed by the Court of learned Judicial Magistrate, 1st Class, Indora, District Kangra, H.P., in Criminal Case No.51-II/2012, titled as State of H.P. Versus Smt. Parvesh Rani, as also the consequential orders in the appeal which have been filed by the present petitioner against the judgment passed by the learned Trial Court before the learned Appellate Court, on the ground that the matter has been amicably settled between the accused and the complainant.

2. Learned Senior Counsel appearing for the petitioner has submitted that the FIR stood registered at the behest of private respondent which led to initiation of the trial against the petitioner by way of Criminal Case No.51-II/2012, details whereof have been given hereinabove and the petitioner herein was convicted for commission of offences punishable under Sections 420, 468 and 471 of the Indian Penal Code. The judgment of conviction is under challenge before the learned Appellate Court. He has submitted that the issue which led to the registration of FIR has now been amicably settled between the petitioner and respondent No.2 and in terms of the settlement so arrived at between them, the judgment of conviction so passed against the petitioner be quashed and set aside. To demonstrate the fact of settlement between the parties, learned Senior Counsel has drawn the attention of the Court to an affidavit of respondent No.2 appended with this petition as Annexure P-2, perusal whereof demonstrates that the complainant expressed therein her intention of the petitioner being acquitted.

3. Ms. Komal Chaudhary, learned counsel, who has put in appearance on behalf of respondent No.2, has submitted that taking into consideration the facts involved in the case which led to the registration of the

FIR which resulted in the ensuing criminal proceedings and the conviction of the petitioner, respondent No.2 has in fact taken a concious decision to make a request to this Court to set aside the judgment of conviction so passed against the petitioner. She has also handed over a certificate issued by Dr. R. Gupta, dated 15.03.2022 of Guri Kripa Hospital, G.T. Road, Purana Bhangala (Hoshiarpur), Punjab, in terms whereof on account of the medical problems from which respondent No.2 is suffering, she has been advised complete bed rest of ten to twelve weeks. This certificate is ordered to be taken on record.

4. Having heard learned counsel for the parties and after perusing the pleadings as well as documents appended therewith, this Court is of the considered view that in terms of the judgment of the Hon'ble Supreme Court in ***Criminal Appeal No.1489 of 2012***, titled as ***Ramgopal & Anr.*** Versus ***The State of Madhya Pradesh***, decided on ***29.09.2021***, this is a fit case wherein this Court should invoke its inherent powers so vested upon it under Section 482 of the Criminal Procedure Code and set aside the judgment of conviction passed against the petitioner by the learned Trial Court.

5. Hon'ble Supreme Court, in Ramgopal & Anr. Versus The State of Madhya Pradesh's case (supra) has held that the criminal proceedings involving non henious offences or where the offences are per-dominantly of private nature, can be annulled irrespective of the fact that trial has been concluded or appeal stands dismissed against the conviction. Hon'ble Supreme Court has been pleased to hold that handing out punishment is not the sole form of delivering justice. Societal method of applying laws even is always subject to lawful exceptions and it goes without saying that the cases where compromise is struck post-conviction, the High Court ought to exercise such discretion with rectitude keeping in view the circumstances surrounding the incident etc.

6. Coming to the facts of this case, herein the allegations of the complainant against the petitioner were that the petitioner had obtained the

job of Anganbari Worker by furnishing false affidavit and forged documents with regard to annual income of family of the accused. The FIR so registered at the best of respondent No.2, i.e. FIR No.288/10, lodged at Police Station Indora, District Kangra, H.P., under Section 420, 468 and 471 of the Indian Penal Code, resulted in the criminal trial which led to the conviction of the accused. The judgment of conviction passed by the learned Trial Court is under challenge in the appeal.

7. This Court is of the considered view that taking into consideration the circumstances surrounding the incident and the manner in which the compromise has been arrived at between the parties as also the nature and seriousness of the offence, this petition deserves to be allowed, more so for the reason that the complainant herself has given her consent to this effect.

8. Accordingly, in view of what has been discussed hereinabove, this petition is allowed and judgment dated 08.09.2020/25.09.2020, passed by the Court of learned Judicial Magistrate, 1st Class, Indora, District Kangra, H.P., in Criminal Case No.51-II/2012, titled as State of H.P. Versus Smt. Parvesh Rani, as also the consequential orders, vide which the petitioner was convicted for the commission of offences punishable under Sections 420, 468 and 471 of the Indian Penal Code, is set aside and FIR No.288/10, dated 26.08.2010, lodged at Police Station Indora, District Kangra, H.P., under Section 420, 468 and 471 of the Indian Penal Code, which lead to the initiation of the trial is also ordered to be quashed and set aside.

9. In view of the setting aside of the judgment of conviction, its natural corollary is that the appeal which has been filed by the petitioner against the judgment of conviction has now been rendered infructuous and the learned Appellate Court is directed to close the same by placing on record a

copy of the order so passed by the Court today in the present proceedings. Pending miscellaneously applications, if any, stand disposed of.

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

Between

SUNIL DUTT, AGED ABOUT 40 YEARS
SON OF SHRI GEETA RAM, RESIDENT
OF VILLAGE AND PO JHARAG, TEHSIL
JUBBAL, DISTRICT SHIMLA H.P.

.....PETITIONER

(BY SH. BASANT PAL THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY SH. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

2. CRMPM NO.958 OF 2022

MOOL RAJ CHAUHAN, SON OF
SHRI VIJAY NAND, AGED ABOUT
58 YEARS, RESIDENT OF VILLAGE
DHARA, PO LOWER KOTI, TEHSIL
ROHRU, DISTRICT SHIMLA H.P.

.....PETITIONER

(BY SH. K.S. THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY SH. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
Nos.949 & 958 of 2022
Decided on: 17.06.2022

**Code of Criminal Procedure, 1973**- Sections 438- **Indian Penal Code, 1860**- Sections 409 and 120B- It cannot be said to be totally false case and, therefore, in present case accusation cannot be said to have been made with object to injuring or humiliating the petitioners by having them so arrested without any cause- Bail petition dismissed. (Para 18)

**Cases referred:**

Freed and other connected matters v. State, 2020(4) Shim. LC 1614;
Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim. LC 860;
P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;
Pokar Ram v. State of Rajasthan and others, (1985) 2 SCC 597;

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

**O R D E R**

These petitions, arising out of one and same FIR, to be decided on the basis of common facts and circumstances, and material on record, are being disposed of by this common order.

2. Petitioners, invoking Section 438 of the Code of Criminal Procedure, have approached this Court for grant of bail in case FIR No.28 of 2022, dated 21.4.2022, registered under Sections 409 and 120-B of the Indian Penal Code (for short 'IPC'), in Police Station Theog, District Shimla, Himachal Pradesh.

3. Status Report stands filed. Record has also been made available. Earlier petitioners had approached the Special Judge (CBI), Shimla by filing Bail Application No. 22-S/22 of 2022 titled Mool Raj Chauhan vs. State of HP and Bail Application No. 24-S/22 of 2022 titled Sunil Dutt vs. State of HP

4. Prosecution case is that on finding shortage of stock and discrepancies with respect to receipt and sale of stock at Petrol Pump Deorighat, being run by HIMFED, four members Departmental Committee, under the General Manager, HIMFED, was constituted on 11.4.2022 to look into the issue. The Committee in its Report dated 18.4.2022 pointed out serious financial irregularities and embezzlement of Government funds to the tune of Rs.1,30,83,787.36 Ps. During inquiry, two employees namely Mool Raj, who was Incharge of Petrol Pump, and Sunil Dutt, who was Outsourced Clerk, deployed on the same Petrol Pump accepted their role in embezzlement and promised to repay the amount.

5. On the basis of aforesaid Report, a complaint dated 19.4.2022 was received from Incharge, HIMFED Regional Office Shimla, in Police Station Theog. On the basis of it, FIR was registered and investigation was handed over to Sub Inspector/Incharge Ram Asra. Keeping in view the sensitivity and seriousness of matter, the Director General of Police, Himachal Pradesh constituted a Special Investigating Team.

6. During investigation, petitioners after obtaining interim bail from Special Judge (CBI), Shimla on 23.4.2022, joined investigation, but their bail applications were dismissed on 30.4.2022. Thereafter, petitioners obtained anticipatory bail from this Court on 4.5.2022 and joined the investigation.

7. During investigation, as per status report, petitioners disclosed that during the year 2018, there was deficit of Rs.2,40,000/- in the accounts of Petrol Pump and to cover-up this gap, Mool Raj had deposited Rs.1 lac but remaining amount was not deposited by anyone and to recover the aforesaid amount, Mool Raj and Sunil Dutt started to record lesser sale in the Register than actual sale but by 31st March, 2019 this deficit became Rs.5 lacs and, therefore, Mool Raj started to deposit the amount in the account of HIMFED after borrowing it from persons other than employees of HIMFED and on 31st March, 2022, in the Cash Book, deficiency became Rs.13,84,000/-

whereupon, Mool Raj arranged Rs.11 lacs and deposited the same in the account of HIMFED in order to keep the account of HIMFED in order during Financial Year. Further that Mool Raj and Sunil Dutt, during 22nd March to 30th March, 2022, did not enter/record supply of seven tankers to Petrol Pump in Registers because after recording receipt of these tankers in the Register, Cash Book, account of HIMFED, on 31st March, 2022, would not have been settled. In this regard, Managing Director of HIMFED received an information on 11.4.2022 whereupon he constituted a Committee and as per Report of Committee, there was shortage of 81598 litres petrol, 47308 litres diesel, 13500 lubricants on Petrol Pump with underground shortage of 4246 litres petrol, 2124 litres diesel, which was worth Rs.1,30,83,787.36 Ps.

8. As per status report, it has come in investigation that according to appointment orders, Vipin Mista, Sita Ram and Suresh Kumar were appointed as Clerks, Storekeeper and Peon respectively but Mool Raj, at his own level, had ordered specially that Sunil Dutt shall maintain the office record, bank record and bills and daily sales summary as well as depositing of cash in bank. During investigation, entries in Cash Book of Petrol Pump, daily sale record and stock registers have also been found incorrect. As per prosecution case, Mool Raj and Sunil Dutt were showing lesser sale in Petrol Pump since 2018 and used to deposit lesser amount of sale in Bank by embezzling the amount and after sometime, they used to manage/settle the details of sale in record. As per status report, Investigating Agency is perusing remaining record of the years 2018 to 2022 pertaining to Petrol Pump in question.

9. As per status report, Devinder Thakur, who remained Accountant in HIMFED Area Office since 2018, has been associated during investigation but during interrogation, he is not disclosing anything. Further that Anil Kashyap, appointed in HIMFED Area Office since 2018 has also been asked to join the investigation by informing him. It has been stated in status report that petitioners are levelling allegations upon each other and in absence of custody,

Investigating Officer is not able to carry out intensive investigation and therefore, request for custodial interrogation has been made.

10. It has been submitted by learned counsel for petitioners that petitioners were not only employees deputed on Petrol Pump but other employees were also serving on Petrol Pump and further that as per prescribed procedure, everyday sale was to be reported to Area Manager and was to be entered in record by concerned Accountant and, therefore, it was not possible for petitioners to involve in commission of offence as alleged, and in case any discrepancy or shortfall in stock or amount deposited in Bank of HIMFED is there, then Accountant as well as Area Manager were and are responsible for maintaining the record on day-to-day basis and they should be main accused persons, but petitioners are being made scapegoat.

11. It has also been submitted by Mr. Basant Pal Thakur, Advocate, that though it is claimed by complainant and Investigating Agency that embezzlement was going on since 2018 but balance sheet of years 2018-19 does not reflect any such shortfall but depicts that everything was in order at that time.

12. It has been further contended by Mr. Basant Pal Thakur, Advocate, that though some amount against the payment of sale has been received in the account of Sunil Dutt, but such amount was received by him for the reason that HIMFED had not provided QR Code for receiving the payments through Google Pay whereas some customers used to make payments through Google Pay and to facilitate them, petitioner Sunil Dutt used to receive the amount in his account through Google Pay and thereafter deposit/transfer the same in Bank Account of HIMFED.

13. Mr. K.S. Thakur, Advocate, in addition, has submitted that since last two months, petitioners are joining the investigation and fully cooperating the Investigating Agency and there is no activity to tamper of evidence on their

part and investigation is almost complete and therefore, there is no ground for seeking custodial interrogation of petitioners.

14. Learned Additional Advocate General, under instructions, of Investigating Officer submits that other persons posted in concerned Petrol Pump as well as Area Office of HIMFED are being associated and interrogated in investigation and in case of finding commission of offence on their part, they shall also be arrayed as accused in present case.

15. This Court in **Freed and other connected matters v. State,** reported in **2020(4) Shim. LC 1614,** and **Mangal Singh Negi v. Central Bureau of Investigation,** reported in **2021(2) Shim. LC 860 : 2021(2) Him L.R. (HC) 917,** has discussed the law related consideration of bail applications under Section 438 Cr.PC viz-a-viz a right of Investigating Agency to have custody of an accused.

16. In **P. Chidambaram v. Directorate of Enforcement**, **(2019) 9 SCC 24,** the Supreme Court has observed as under:

> **"*Grant of anticipatory bail in exceptional cases***
>
> **69.** Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

**70.** On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

**71.** Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "....except according to a procedure prescribed by law." In *State of M.P. and another v. Ram Kishna Balothia*, (1995) 3 SCC 221, the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under: (SCC p.226, para 7)

> "7. .....We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:
>
> 'We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.'
>
> In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. *Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of*

*offences cannot be considered as violative of Article 21*." (emphasis supplied)

**72.** We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

**73.** The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to confront the accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an in-built safeguard against arbitrary exercise of power of arrest by the investigating officer. Submitting that custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed reliance upon *State v. Anil Sharma*, (1997) 7 SCC 187; *Sudhir v. State of Maharashtra*, (2016) 1 SCC 146; and *Directorate of Enforcement v. Hassan Ali Khan*, (2011) 12 SCC 684.

**74.** Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In *State v. Anil Sharma*, (1997) 7 SCC 187, the Supreme Court held as under: (SCC p.189, para 6)

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation- oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

**75.** Observing that the arrest is a part of the investigation intended to secure several purposes, in *Adri Dharan Das v. State of W.B.*, (2005) 4 SCC 303, it was held as under: (SCC p.313, para 19)

"19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest

> cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

**76.** In *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694, the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

**77.** After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State of Bihar*, (2012) 4 SCC 379, the Supreme Court held as under: (SCC p.386, para 19)

> "19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu v. P.T. Manokaran*, (2007) 4 SCC 434, *State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain*, (2008) 1 SCC 213 and *Union of India v. Padam Narain Aggarwal*, (2008) 13 SCC 305.)"**”**

***Economic offences***

**78.** Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In *Directorate of Enforcement v. Ashok Kumar Jain*, (1998) 2 SCC 105, it was held that in economic offences, the accused is not entitled to anticipatory bail.

**79.** The learned Solicitor General submitted that the "Scheduled offence" and "offence of money laundering" are independent of each other and PMLA being a special enactment applicable to the offence of money laundering is not a fit case for grant of anticipatory bail. The learned Solicitor General submitted that money laundering being an economic offence committed with much planning and deliberate design poses a serious threat to the nation's economy and financial integrity and in order to unearth the laundering and trail of money, custodial interrogation of the appellant is necessary.

80**.** Observing that economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community, in *State of Gujarat v. Mohanlal Jitamalji Porwal and others*, (1987) 2 SCC 364, it was held as under:-

> "5. .....The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even- handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest....."

81. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in *Y.S. Jagan Mohan Reddy v. CBI*, (2013) 7 SCC 439, the Supreme Court held as under:-

> "34. *Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.*
>
> 35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

82. Referring to *Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria*, (1998) 1 SCC 52, in *Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Bora and others*, (1999) 5 SCC 720, while hearing an appeal by the Enforcement Directorate against the order of the Single Judge of the Bombay High Court granting anticipatory bail to the respondent thereon, the Supreme Court set aside the order of the Single Judge granting anticipatory bail.

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely

hamper the effective investigation. Having regard to the materials said to have been collected by the respondent- Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail."

17. In ***Pokar Ram v. State of Rajasthan and others,*** **(1985) 2 SCC 597,** the Supreme Court had observed that relevant considerations governing the court's decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation.

18. Taking into consideration the aforesaid pronouncements and material placed before me and also submissions made by learned counsel for the parties, I am of the considered opinion that it is not a case where ex-facie no case is made out at all against the petitioners. For conduct of the petitioners, as has come in the report of Committee, as well as reported by the Investigating Agency, it cannot be said to be totally false case and, therefore, in present case accusation cannot be said to have been made with object to injuring or humiliating the petitioners by having them so arrested without any cause. Investigation in present case is at initial stage.

19. Without commenting upon the merits of the rival contentions, but taking into consideration entire facts and circumstances of case, stage of investigation, and the factors and parameters to be considered at the time of adjudicating an application for anticipatory bail, as propounded by the Courts, including the Supreme Court, balancing the personal interest vis-à-vis public interest, I am of the opinion that no case for grant of anticipatory bail is made out.

20. Hence, in view of the above discussion, the bail petitions are dismissed and disposed of.

The parties are permitted to produce copy of order downloaded from the High Court website before the authorities concerned and the said

authorities shall not insist for certified copy of the order, however, passing of order may be verified from the High Court website or otherwise.

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

Between:-

SMT. NAZRA KHAN,
W/O SH. INTIZAR ALI,
R/O VILLAGE KANSHIPUR, P.O. NIHALHGARH,
TEHSIL POANTA SAHIB, DISRICT SIRMOUR,
HIMACHAL PRADESH.

....PETITIONER

(BY MR. KUSH SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (FOREST) SHIMLA-2,
HIMACHAL PRADESH.

2. PRINCIPAL CHIEF CONSERVATOR OF FOREST,
HIMLAND, SHIMLA-2, HIMACHAL PRADESH.

3. CONSERVATOR OF FOREST, NAHAN CIRCLE,
DISTRICT SIRMOUR, HIMACHAL PRADESH.

4. DIVISIONAL FOREST OFFICER SIRMOUR
AT NAHAN, DISTRICT SIRMOUR,
HIMACHAL PRADESH.

5. INQUIRY OFFICER-CUM-ACF NAHAN
FOREST DIVISION, NAHAN, HIMACHAL PRADESH.

..RESPONDENTS

(MR. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 575 OF 2022
Decided on: 27.06.2022

**Constitution of India, 1950**- Article 227- **Central Civil Services (Conduct) Rules, 1964**- Held- Non-supply of inquiry report to the petitioner clearly amounts to violation of principles of natural justice- Order of Conservator of Forest is quashed- Writ petition disposed of accordingly. (Para 7, 9)

**Cases referred:**

Managing Director, ECIL, Hyderabad and others vs. B. Karunakar and others, 1993 (4) SCC 727;

Union of India and others vs. Mohd. Ramzan Khan, 1991 (1) SCC 588;

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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, petitioner has prayed for the following substantive reliefs:-

i) *"That the impugned order dated 27-11-2021, Annexure P-3, passed by the respondent No.3, whereby penal action has been taken against the petitioner may kindly be quashed and set aside.*

ii) *That the impugned remarks under the column of 'pending disciplinary authority' whereby mentioned that "…Bar on promotion" in the list of Forest Guards to be considered for promotion (Annexure P-4) may kindly be set aside."*

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

a) Petitioner is working as Forest Guard. A departmental inquiry was initiated against the petitioner in pursuance to order dated 17.06.2020 (Annexure P-1) issued by the CCF, Forest Circle, Nahan. Petitioner was served

with memorandum (Annexure P-2), wherein following article of charges were framed against him:-

| | |
|---|---|
| *"Charge No.1:* | *Negligence/dereliction in performance of Government duty (illicit felling).* |
| *Charge No.2:* | *Pecuniary loss to the loss exchequer amounting to Rs.65,131/-* |
| *Charge No.3:* | *Misuse of official position and misrepresentation of facts in the official record (malfeasance in Timber removed for cremation purpose)."* |

b) Respondent No.5 was appointed as Inquiry Officer. The inquiry Officer submitted his report dated 25.10.2021.

3. The grievance of the petitioner is that she was directly served with an order dated 27.11.2021 issued by the Conservator of Forest, Nahan Circle, Nahan, whereby a penalty has been imposed upon the petitioner by withholding two annual grade increments with cumulative effect under Rule 11(iv) of CCS(CCA) Conduct Rules with a bar on promotion during this period. As per petitioner, before imposition of penalty, she was not heard and even inquiry report was not supplied to her.

4. In reply, the factual position has not been denied by the official respondents. It has not been specifically or impliedly denied that before issuance of penalty order Annexure P-3, petitioner was not heard and was not even supplied a copy of inquiry report.

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

6. Rule 15(2) of CCS(CCA) Rules reads as under:-

> *"The Disciplinary Authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the Disciplinary Authority or where the Disciplinary Authority is not the Inquiring Authority, a copy of the report of the Inquiring Authority*

> *together with its own tentative reasons for disagreement, if any, with the findings of Inquiring Authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the report is favourable or not to the Government Servant."*

7. Non supply of inquiry report to the petitioner (delinquent) clearly amounts to violation of principles of natural justice. Petitioner was entitled to a copy of inquiry report and to represent against it before the final decision could be taken by the disciplinary authority. Undisputedly, in the instant case, the Inquiry Officer and the disciplinary authority was not the same.

8. In ***Union of India and others*** vs. ***Mohd. Ramzan Khan, 1991 (1) SCC 588***, the Hon'ble Apex Court has held as under:-

> *"We make it clear that whenever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."*

9. Similarly, in ***Managing Director, ECIL, Hyderabad and others*** vs. ***B. Karunakar and others, 1993 (4) SCC 727***, the Hon'ble Apex Court has held as under:-

> *"29. Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary*

> *authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."*

10. Thus, on exposition of aforesaid legal position, there remains no doubt that an indefeasible right of the petitioner to have report of Inquiry Officer so as to enable her to represent against such report, has been violated. Therefore, the order dated 27.11.2021 (Annexure P-3) passed by Conservator of Forests, Nahan Circle, Nahan cannot be sustained and the same is quashed with a direction to respondent No.3 to supply a copy of inquiry report to the petitioner and to afford a reasonable opportunity to her to represent and decide the matter thereafter in accordance with law.

11. The writ petition is disposed of in the aforesaid terms. Pending applications, if any, shall also stand disposed of.

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

BETWEEN:

1. THE STATE OF HIMACHAL PRADESH THROUGH ITS SERETARY (HPPWD), SHIMLA TO THE GOVERNMENT OF HIMACAHL PRADESH, SHIMLA-02.

2.EXECUTIVE ENGINEER, RAMPUR DIVISION (B&R) HPPWD, RAMPUR, DISTT. SHIMLA, H.P.

.....PETITIONERS

( BY MR. ASHWANI K. SHARMA, ADDITIONAL ADVOCATE GENERAL )

AND

SH. JIYA LAL, S/O SH. TWARSI, R/O VILLAGE KAMSU, P.O. NOGLI, TEHSIL RAMPUR, DISTRICT SHIMLA (H.P)

.....RESPONDENT

(BY MR. VINOD K. SHARMA, ADVOCATE )

CIVIL WRIT PETITION
No. 2777 of 2018
Decided on: 28.06.2022

**Constitution of India, 1950**- Article 227- Petitioners have assailed the order of Ld. H.P. State Administrative Tribunal- Held- Grant of benefit to respondent under Section 25(B)(1) of Industrial Disputes Act by learned H.P State Administrative Tribunal, vide impugned order dated 15.12.2017, cannot be said to be unreasonable- Petition dismissed. (Para 9)

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

**O R D E R**

Petitionershave assailed order dated 15.12.2017, passed by learned H.P. State Administrative Tribunal in O.A. No. 3475 of 2015.

2. Admitted facts of the case are that the respondent was engaged as daily wage workman by petitioner No.2 in the year 1991. From 1991 till 2006, respondent worked for 240 days in each calender year except for the year 1994 when he worked only for 228 days. The services of the respondent

were regularized w.e.f. 26.10.2006 on the basis of regularization policy dated 09.06.2006. Respondent attained the age of superannuation on 30.04.2013.

3. Respondent approached this Court by filing CWP No. 9528 of 2013 claiming regularization w.e.f. 01.01.2000 in view of *Mool Raj Upadhayay's* case. He also claimed pensionary benefits. Respondent claimed benefit of Section 25 (B)(1) of Industrial Disputes Act, on the basis of his illness w.e.f. 02.05.1994 to 31.08.1994.CWP No. 9528 of 2013 was transferred to learned H.P. State Administrative Tribunal and was registered as O.A. No. 3475 of 2015.

4. The claim of the respondent was contested by petitioners before learned H.P. State Administrative Tribunal on the ground that the respondent was not entitled to the benefit of Section 25(B)(1) of Industrial Disputes Act, as he had not reported his ailment within time and his plea was just an after thought.

5. Learned H.P State Administrative Tribunal disposed of O.A. No.3475 of 2015, vide impugned order dated 15.12.2017, in following terms:-

> *"4. The applicant was suffering from right eye sight problem during the period 02.05.1994 to 31.08.1994. He had been under treatment per medical certificate Annexure P-2. The ailment of the applicant had forced him to be away from his work. He on account of his illness would be deemed to be in continuous service in view of the provisions of Section 25(B0(1) of the Industrial Disputes Act, which reads as under:-*
>
> > *25(B)(1) "a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is no illegal, or a lock out or an cessation of work whichis not due to any fault on the part of the workman."*

*5. The instructions to the contra that the benefit of deemed continuous service is only available to the indoor patient in violation of express provision is nonest. The applicant on account of deemed continuous service completed 10 years of service with 240 days upto the year 2000.*

*6. Consequently, the original application is allowed and the period from 02.05.1994 to 31.08.1994 of illness is deemed continuous service and the respondents are directed to consider the case of the applicant for conferment of work charge status on completion of 10 years service. needless to add that all consequential benefits including regularization, if any, shall follow."*

6. By way of instant petition, petitioners have sought quashing of impugned order dated 15.12.2017, passed by learned H.P State Administrative Tribunal, on the ground that benefit of Section 25(B)(1) of Industrial Disputes Act, could not have been granted to the respondent in view of the fact that respondent had not reported his ailment within time and it was only after a long lapse of four years that he produced the medical certificate, Annexure P-2.

7. We have heard learned Additional Advocate Generalas well aslearned counsel for the respondent and gone through the record.

8. Respondent alongwith CWP No.9528 of 2013 had annexed Annexure P-2, which was a medical certificate issued by Eye Surgeon of Referral Hospital, Rampur, District Shimla, H.P. It was certified by way of this document that the respondent had remained ill w.e.f. 02.05.1994 to 31.08.1994 on account of acute infection in right eye. Additionally, by way of Annexure P-3, respondent had informed his office regarding the ailment. Medical prescriptions issued from Referral Hospital, Rampur, District Shimla, H.P., were also placed on record.

9. There is nothing on record to suggest that documents collectively annexed as Annexure P-2 by respondent were false, fictitious or forged. The document, Annexure P-3, had also not been seriously disputed. In such circumstances, the grant of benefit to respondent under Section 25 (B)(1) of Industrial Disputes Act, by learned H.P State Administrative Tribunal, vide impugned order dated 15.12.2017, cannot be said tobe unreasonable.

10. Respondent was a daily wage employee. He was not expected to do anything morethan informing his employer through document, Annexure P-3. Even otherwise, keeping in view the longevity of service rendered by respondent on daily wage basis w.e.f. 1991 to 2006, the stand taken by the petitioners to deny the benefit of Section 25 (B)(1) of Industrial Disputes Act, to respondent merely on technical grounds is clearly unjustified. As per petitioners, respondent had rendered services of 228 days even in the year 1994. Meaning thereby that services were rendered by respondent w.e.f 01.01.1994 till 01.05.1994 and also w.e.f 01.09.1994 till end of the year. Respondent was allowed to rejoin by petitioners w.e.f. 01.09.1994, which belies its subsequent stand that the petitioners were not informed about the ailment of respondent.

11. In view of the above discussion, we do not find any merit in the petition and the same is dismissed.

12. Accordingly, the instant petition is disposed of, so also the pending application(s), if any.

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

Between:

M/S HFCL LIMITED EARLIER KNOWN HIMACHAL FUTURISTIC COMMUNICATIONS LIMITED, (WIRELINE AND WIRELES DIVISION) CHAMBAGHAT, DISTRICT SOLAN, H.P. THROUGH SH. ANUJ KUMAR JOIN S/O SH. M.K. JAIN, R/O HOUSE NO.10, HOUSING BOARD COLONY PHASE-

1 SAPROON, SOLAN, HP, PRESENTLY WORKING AS ASSOCIATE VICE PRESIDENT/AUTHORIZED SIGNATORY WITH HFCL LIMITED.

....PETITIONER.

(BY. MR. RAHUL MAHAUAN, ADVOCATE)

AND

RANJEET SNGH C/O SHRI ANOOP KUMAR, GENERAL SECRETARY, HIMACHAL FUTURISTIC COMMUNICATIONS LIMITED GROUP MAZDOOR SANGH CHAMBAGHAT, DISTRICT SOLAN, H.P. THROUGH SH. J.C. BHARDWAJ, PRESIDENT HP-AITUC, HEAD QUARTER SAPROON, DISTRICT SOLAN, H.P.

....RESPONDENTS.

(BY. MR. AJUN GUPTA, ADVOCATE)

CIVIL WRIT PETITION
No.1480 of 2020
Decided on: 25.03.2022

**Constitution of India, 1950**- Article 227- Petitioner has assailed the award passed by the Ld. Industrial Tribunal-cum-Labour Court, Shimla- Held- Ld. Labour Court erred in holding the workman entitled for annual increment for the year 2009-2010 in view of the fact that the workman had not performed any work in said years- Petition allowed. (Para 12)

**Cases referred:**

Government of NCT of Delhi vs. Ram Nath (2016) SCC Online Delhi 6455;
State Bank of India vs. the Presiding Officer, Central Government Labour Court Dhanbad and Another, 1972 (3) SCC 595;

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

**J U D G M E N T**

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

"*a) A writ in the nature of certiorari may kindly be issued for quashing and setting aside the award dated 22.10.2019 passed in Reference No.63 of 2016 in reference titled as Ranjeet Singh Vs. M/s Himachal Futuristic Communications Limited by the Industrial Tribunal -cum-Labour Court, Shimla.*"

2. There is a very short controversy involved in the present petition. The appropriate government made the following reference for adjudication to the learned Industrial Tribunal-cum-Labour Court, Shimla, H.P., under Section 10 of the Industrial Disputes Act.

" *Whether demand of General Secretary, Mazdoor Sangh Himachal Futuristic Communication Ltd. Chambaghat, Distt. Solan, H.P. vide demand notice dated 23-7-2014 raised before and to be full filled by the Factory Manager, M/s Himachal Futuristic Communication Ltd. Chambaghat, Distt. Solan, H.P. to pay Sh. Ranjeet Singh, the wages for the period from 26.11.2008 till 25.10.2010 and to allow him annual increment for the year, 2009 & 2010 along with promotion is legal and justified? If yes, what mandatory relief and other service benefits the aggrieved workman is entitled to from the said management?*"

3. The reference was answered by the learned Industrial Tribunal-cum-Labour Court, Shimla, H.P., as under:-

" *16. The petitioner himself having agreed not to press for the wages for the period he was under transfer i.e. w.e.f. 26.11.2008 till 25.10.2010 as is clear from Ex.4-9, cannot now turn around to claim the same. The respondents however had agreed not to consider the same as a break in service for all future benefits. In other words the petitioner was entitled only to seniority and continuity, but, no back-wages for the said interregnum. PW-2 has also agreed that the letter Ex.R-9 had been received by him on behalf of the union.*

*17. Even, as per the settlement arrived interse the management and the workers union vide Ex.PW-2/A, the CEO of the company was to take a final decision by awarding some minor punishment to Ranjeet Singh. Undoubtedly, before the settlement, the said*

*worker Ranjeet Singh had already been reinstated and he had categorically agreed to the stipulations of the reinstatement. Admittedly, no action has been taken against the workman by awarding any minor punishment. The withholding of the wages for the period of absence had already been agreed to by the workman Ranjeet Singh and thereafter, he continued working with the respondent management. It further emerges from record that the petitioner has already been granted promotion in the year 2012. He has also been granted increments w.e.f. 2010 regularly.*

*18. There is nothing much which survives now in the case. However, the cross-examination of Shri G.S. Rana, Senior Administrative Officer of the company (RW-1) shows that the worker Ranjeet Singh has not been granted increments during 2008 and 2010. Since, the wages of the workman Ranjeet Singh has been withheld for which the workman has himself agreed, but seniority and continuity was still allowed to him, the respondent have to pay increments for the year 2009 and 2010, which apparently has not been done. It is thus clear that the said workman will not be entitled to wages for the said interregnum but certainly he is entitled for annual increments for the years 2009 and 2010 which had not been granted to the workman Ranjeet Singh.*

***Relief***

*For the foregoing reasons discussed hereinabove supra, the reference is partly allowed. As a result the respondents are directed to grant two increments for the years 2009 and 2010 in favour of workman Ranjeet Singh which have not been granted to him, after his reinstatement. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.*"

4. Learned counsel for the petitioner has argued that the award passed by the learned Labour Court to the extent that the petitioner has been directed to grant two increments in favour of the workman for the year 2009-2010 is not sustainable in the eyes of law for the reason that as admittedly the workman did not perform any work in the year 2009-2010, which is an

undisputed fact and increment is earned only on account of the performance which a workman puts in, there was no occasion for the learned Labour Court to have had granted two increments in favour of the workman for the year 2009-2010.

5. Learned counsel for the respondent/workman has submitted that there is no infirmity in the award passed by the learned Labour Court. He has argued that in terms of what is contained in Paras 16 to 18 of the award passed by the learned Labour Court, there is no infirmity in grant of annual increment to the workman for the year 209-2010 and for the purpose of grant of annual increment it is not necessary that a workman should have had actually worked.

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

7. A perusal of the award passed by the learned Labour Court demonstrates that the workman had agreed not to press for the wages for the period he was under transfer w.e.f. 26.11.2008 to 25.10.2010. On this base, the prayer of the petitioner for grant of wages for the aforesaid period was declined. Leaned Labour Court also held that as the employer had agreed not to consider the said period as a break in service for all future benefits, the workman would be entitled only to seniority and continuity, but no back wages for the interregnum.

8. That being the case, it is not understood as to how the learned Labour Court thereafter ventured to hold the workman entitled for annual increments for the year 2009-2010.

9. Honble Supreme Court of India in ***State Bank of India*** Versus ***the Presiding Officer, Central Government Labour Court Dhanbad and Another, 1972 (3) Supreme Court Cases 595***, while dealing with the interpretation of proper application of paragraph 292 of the 'Sastry Award',

observed that an increment is in the same scale while a promotion is from one scale to a higher scale. Hon'ble Supreme Court further held that a promotion from a lower grade to a higher grade though both the grades may be in the same cadre is not an increment or increment by way of special promotion. Hon'ble Supreme Court also held that what is sought to be taken into account is the actual service of the workman.

10. Referring to the said judgment, Hon'ble High Court of Delhi in ***Government of NCT of Delhi*** Versus ***Ram Nath (2016) SCC Online Delhi 6455*** held that an employee gets an increment by working for full year and drawing full salary and an employee under suspension is not entitled for increment for the period he was not on duty, for the reason that during said period he does not works.

11. Hon'ble High Court of Judicature, Rajasthan [Jodhpur Bench] in ***Rajasthan State Electricity Board, Jaipur, and another*** Versus ***Narayan Lal Meena, Civil Special Appeal (Writ) No.106 of 1995-II L.L.N. 488*** again while dealing with the controversy of granting increment during suspension period, held that an incumbent is not entitled for grant of increment during the suspension period.

12. Coming to the facts of the present case, herein the workman had not worked for the period for which he has been granted annual increments by the learned Labour Court and this issue in fact is not in dispute at all. Therefore, taking into consideration the fact that increment becomes due to a workman or is earned by a workman on the strength of the work performed by him in the year concerned, learned Labour Court erred in holding the workman entitled for annual increment for the year 2009-2010 in view of the fact that the workman had not performed any work in said years.

13. Accordingly, in view of what has been discussed hereinabove, this petition is allowed to the extent that the award under challenge is ordered

to be set aside to the extent it ordered the grant of two increments for the year 2009-2010 in favour of the workman.

14. The petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Between:

SANJAY KUMAR,
S/O LATE SH. SHAKTI PRASAD,
VILLAGE AND POST OFFICE KOTI,
TEHSIL & DISTRICT CHAMBA, H.P.

....PETITIONER

(BY MR. SANJEEV K. SURI,
ADVOCATE)

AND

1. UNION OF INDIA THROUGH
SECRETARY MINISTRY OF POWER
CENTRAL SECRETARIAT,
RAFI MARG, NEW DELHI-110001.

2. NATIONAL HYDRO POWER CORPORATION LTD.,
THROUGH ITS CHAIRMAN AND MANAGING DIRECTOR,
SECTOR 33 FARIDABAD, HARYANA, 121003.

3. CHAMERA POWER STATION STAGE-1,
THROUGH ITS GENERAL MANAGER,
POST OFFICE KHAIRI, DISTRICT CHAMBA,
H.P. 176325.

....RESPONDENTS

(BY MR. BALRAM SHARMA,
ASGI, FOR R-1)

(BY MR. VIJAY ARORA, ADVOCATE,
FOR R-2 & R-3)

CIVIL WRIT PETITION
NO. 2683 OF 2015
Decided on: 21.06.2022

**Constitution of India, 1950**- Article 226- Compassionate appointment- Father of petitioner died during employment with respondent- His case for compassionate appointment was rejected- Held- Very purpose and object of compassionate appointment is to provide immediate respite to the family members of an employee, who dies in harness- Condition does not only appears to be harsh but same is also without any rationale- Petition allowed. (Para 3 & 4)

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

**O R D E R**

By of present writ petition filed under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:

> *"a. That the Hon'ble Court may kindly be pleased to issue the direction to respondents to consider the case of the petitioner and settle his grievances.*
> *b. That direction be issued to consider the case of the petitioner for the compassionate appointment in the respondent corporation keeping in view the peculiar facts and circumstances."*

2. Precisely, facts of the case as emerge from the record, are that father of the petitioner namely Sh. Shakti Prasad, was working with National Hydro Power Corporation as ex-mechanic (special) and was posted at Chamera Power Station-I, District Chamba, Himachal Pradesh. During his aforesaid posting, he was deputed on tour for a period of one month with equipment (Tata Hitachi Excavator) to Baira Siul Power Station. While on

duty at aforesaid place of posting, Shakti Prasad got ill and unfortunately, died on 26.12.1989 as is evident from the death certificate placed on record as Annexure R-1 with the reply filed by respondents No. 2 and 3. After the death of above named employee, his wife Smt. Geeta Devi, mother of the petitioner applied for compassionate appointment, but her representation was rejected. Being aggrieved on account of rejection of the representation, mother of the petitioner Smt. Geeta Devi alongwith elder brother of the petitioner, approached this Court by way of CWP No. 607 of 1996, which ultimately came to be disposed of vide order dated 17.12.2001 (Annexure P-5), with direction to the respondents to consider one of the petitioner for appointment on compassionate grounds, however, representation made by family members of the petitioner in terms of aforesaid judgment passed by this Court was rejected vide order dated 27.9.2013 (Annexure P-3), wherein respondents claimed that since late Mr. Shakti Prasad succumbed to natural death on 26.12.1989 due to illness while on tour to Baira Siul Power Station and compassionate appointment can only be given due to death on account of accidents arising out of and in the course of employment, compassionate appointment as is being prayed for cannot be granted. After passing of the aforesaid order dated 27.9.2013, petitioner being son of deceased employee Shakti Prasad represented afresh, but prayer made on his behalf for compassionate appointment was rejected on the ground that since deceased father of the petitioner died of natural death, he is not entitled to compassionate appointment. Claim of the petitioner is that his father died during the course of the employment and as such, being one of the Legal Heirs, he is entitled to appointment on compassionate grounds. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for reliefs as have been reproduced herein above.

3. Respondents in their reply have admitted the facts as narrated herein above. Careful perusal of reply filed by the respondents reveals that as

per policy dated 15.7.1986, compassionate appointment could only be given in the case, where an employee dies/died on account of accident arising out of and in the course of employment, but subsequently, some settlement took place inter-se management of National Hydro Power Corporation and Apex Level Union on 10.10.1991, wherein it was decided to extend the scheme for compassionate appointment to the families of all the workmen, who dies/died while in service due to natural death. Respondents have stated in the reply that though in terms of settlement dated 10.10.1991, family of the deceased employee Shakti Prasad became entitled for compassionate appointment, but since cut-off date of applicability of settlement dated 10.10.1991, is 1.1.1990, case of the petitioner, whose father expired on 20.12.1989 is not covered by the aforesaid policy. Now it is not in dispute that family of an employee, who dies of natural death during employment, is also entitled for compassionate appointment, but application in those cases where employees died on or before 1.1.1990 shall not be considered. Since in the instant case, father of the petitioner died on 26.12.1989 i.e. few days before the cut-off date, prayer made on behalf of the petitioner is not being considered. Once respondents have now decided to offer appointment on compassionate grounds to the families of those deceased employees, who die or had died of natural death during employment, ground raised on behalf of the respondents while rejecting the case of the petitioner is not sustainable in the eye of law. Case of the respondents is that petitioner is not covered under the settlement dated 10.10.1991, wherein admittedly cut-off date is/was 1.1.1990, but such condition does not only appear to be harsh, but same is also without any rationale. Otherwise also, there appears to be no reasonable classification, as has been attempted to be carved out by the respondents by introducing new policy on the basis of settlement dated 10.10.1991, whereby families of all the employee(s), who dies/died of natural death, have been made eligible for appointment on compassionate ground. Very purpose and

object of the compassionate appointment is to provide immediate respite to the family members of an employee, who dies in harness, but in the case at hand, respondents, interestingly, provided in earlier policy provision for compassionate appointment to the families of those employees also, who die/died in the accident, but now though subsequently in terms of settlement arrived *inter-se* management and Union, even employees who die/died of natural death during employment have been given the benefit of such policy, but from one particular date. Since petitioner never laid challenge to the afore policy framed by the respondents for compassionate appointment as detailed herein above, this Court has restrained itself from returning any finding with regard to same on merits, but definitely finds it a fit case for issuing direction to the respondents to consider and decide the case of the petitioner afresh in light of the subsequent policy prepared on the basis of settlement dated 10.10.1991, without insisting upon cutoff date.

4. Consequently, in view of the above, present petition is disposed of with direction to the respondents to consider and decide the representation having been filed by the petitioner, seeking therein compassionate appointment afresh in terms of the subsequent policy framed in terms of settlement dated 10.10.1991 expeditiously, preferably within four weeks, but without insisting on cutoff date. Liberty is reserved to the petitioner to approach appropriate court of law in the appropriate proceedings, if he still remains aggrieved. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Between:

SURESH KUMAR S/O SHRI DEVI SINGH, R/O VILLAGE RATHOHA, P.O. CHUNAHAN, TEHSIL BALH, DISTRICT MANDI (H.P.)

....PETITIONER.

(BY. MR. AJAY THAKUR, ADVOCATE )

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY EDUCATION TO THE GOVERNMENT OF HIMACHAL PRADESH AT SHIMLA (H.P.)

2. DIRECTOR ELEMENTARY EDUCATION DEEP BHAWAN LALPANI SHIMLA (H.P.)

3. NAIB-TEHSILDAR TEHSIL BALH DISTRICT MANDI (H.P.)
4. DHEERAJ PANWAR S/O SHRI GITA RAM PANWAR R/O VILLAGE BANKALA P.O. SHAMBHUWALA TEHSIL NAHAN DISTRICT SIRMOUR (H.P.)

....RESPONDENTS.

(BY. MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENTS NO.1 TO 3

MR. ANIL TOMAR, ADVOCATE, FOR RESPONDENT NO.4)

CIVIL WRIT PETITION
No.4337 of 2021
Decided on: 23.02.2022

**Constitution of India, 1950**- Article 226- Marks of non-employment certificate while considering for batch wise post of TGT (Arts) not given to petitioner- Held- Non Employment Certificate was issued by Competent Authority in accordance with law- Selection Committee has done injustice to the petitioner and the petitioner has been denied one mark for the fault of his- Petition allowed. (Para 9 & 10)

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*This petition coming on for hearing this day, the Court passed the following:* **O R D E R**

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

> *"i) That appropriate writ in the nature of mandamus or any other appropriate writ order or direction may very kindly be issued to respondents directing them to treat "Non Employment Certificate" of petitioner valid and up to the mark for all intents and purposes and grant him one mark of it to prepare his aggregate marks to consider his case for appointment to the post of TGT (Arts) on batch wise basis. Respondents have given 2.43 marks to petitioner while preparing merit list which is totally illegal. Respondents have not given one marks of "Non Employment Certificate" of petitioner on the ground that it is without date which is totally illegal. Respondents may very kindly be directed to grant him one marks of Non Employment Certificate and treat his final score 3.43. Supernumerary post of TGT (Arts) from SC (UR) category may very kindly be created in favour of petitioner if required in the interest of Law justice and fair play.*
>
> *ii) That appropriate writ in the nature of mandamus or any other appropriate writ or order may very kindly issued to respondents directing them to consider and give appointment to petitioner on notional basis from due date i.e. 18.02.2021 from the date on which other similarly situated TGT (Arts) were given appointments as per appointment order dated 18.2.2021 i.e. annexure P-6. Petitioner may very kindly be given seniority number and all other consequential and incidental benefits from due date i.e. 18.2.2021 above all his juniors in the interest of Law justice and fair play.*
>
> *iii) That appropriate writ in the nature of mandamus or any other appropriate writ or order may very kindly issued to respondents directing them to give petitioner arrears of salary from due date i.e. 18.2.2021 with interest to the tune of 9% till realization.*
>
> *iv) That appropriate writ in the nature of quo warranto or any other appropriate writ or order may very kindly issued to respondents directing them to terminate the services of private respondent no.4 if required or in alternative relief supernumerary post of TGT (Arts) may very kindly be created in favour of respondent No.4 in the interest of Law justice and fair play*."

2. The controversy involved in this petition is in a very narrow compass.

3. Vide annexure P-5, a requisition was made by Director Elementary Education, Himachal Pradesh for filling up various posts including 307 posts of TGT (Arts), further including 62 posts belonging to Scheduled Caste (unreserved) Category. The eligibility criteria for the post in issue stood spelled out in Column-7 of the said requisition. The petitioner applied for the post under the Scheduled Caste (unreserved) Category. His grievance arose when the merit list was issued by the department concerned (Annexure P-7) with regard to batch wise merit list of TGT (Arts). As per him, the counseling held in the months of September and October, 2020 demonstrates that the petitioner has been wrongly denied one mark by the Selection Committee to which he was otherwise entitled to on account of none of his family members being in government employment. The contention of the petitioner is that in terms of the final merit list issued by the department concerned, the last candidate selected under Scheduled Caste (unreserved) Category, i.e. Shri Dheeraj Panwar has been granted 2.69 marks, whereas the petitioner whose name is reflected at serial No.80, has been awarded 2.43 marks with the remarks "Non Employment Certificate without date", which has lead to the denial of one mark to him under the head. Learned counsel for the petitioner has argued that in terms of the Recruitment and Promotion Rules for the post in vogue, an incumbent, none of whose family members were in government employment, was entitled to one additional mark. The petitioner obtained the "Non Employment Certificate" from the competent authority, i.e. the office of Tehsildar, Tehsil Balh, District Mandi, H.P., copy whereof is appended with the petition as Annexure P-8. This "Non Employment Certificate" was acquired in the month of June, 2020 and its validity was for one year. It is not in dispute that it is this certificate which

was produced by the petitioner before the Selection Committee on 30.09.2020 and on account of non-mentioning on the said certificate of the date of issuance, the petitioner has been denied one mark. The petitioner has also appended with the petition Annexure P-9, which is another copy issued to him of the same certificate, which also bears ID:NE202061220192160. According to the petitioner, this document was obtained by him from the same office after he came to know, on the basis of information so obtained under Right to Information Act, that he stood denied one mark on account of non-mentioning of the date of issuance on Annexure P-8.

4. Learned Counsel for the petitioner has thus argued that as this certificate was issued by the competent authority of the government of Himachal Pradesh, therefore, in case there was something remiss in the said certificate, i.e. it did not contain the date of issuance of the certificate, then least that was expected from the Selection Committee was that one opportunity should have been granted to the petitioner to clarify this fact, which was not done leading to great prejudice being caused to the petitioner. On these basis, the petitioner has filed this petition with the prayers already enumerated hereinabove.

5. The stand of the respondent/State as is spelled out from Para-13 of the preliminary submissions is, that the petitioner alongwith other candidates was called for counseling on 30.06.2020, in the office of Deputy Director of Elementary Education, Mandi, District Mandi, H.P. On the said date, the petitioner submitted his testimonials before the Screening Committee and perusal of the documents so submitted revealed that no approval date was mentioned on the "Non Employment Certificate", whereas as per the government instructions, certificate issued to this effect was to be valid for a period of one year from the date of its issuance. Thus, as per respondent-department as the validity of the certificate could not be ascertained in the absence of date of approval on the same, resultantly the

petitioner was not awarded one mark for "Non Employment Certificate" and his name did not appear in the final selection list/merit list.

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

7. It is not in dispute that denial of one mark in favour of the petitioner vis-a-vis the certificate so produced by him demonstrating non-employment of family members is on the ground that the same did not bear it's date of issuance. As has already been mentioned hereinabove also, the certificate in issue was issued by the office of Tehsildar, Tehsil Balh, District Mandi, H.P. The procedure of issuance of such like certificates is that an incumbent approaches the authority concerned by way of an application as also an affidavit to the effect that none of the family members of the applicant are in government service and the authority concerned after satisfying this fact after making appropriate verification, issues a "Non Employment Certificate" in favour of the applicant. Before issuance of the certificate, report of the Patwari and Pradhan of the Gram Panchayat concerned is also called for by Tehsildar concerned, as has been informed at the Bar by learned Additional Advocate General himself.

8. In these circumstances, as the petitioner had produced before the Selection Committee a "Non Employment Certificate" which was duly issued by the competent authority, the non- mentioning of the date of issuance on the same was an act of omission on the part of the issuing authority.

9. This Court is of the considered view that on account of this act of omission on the part of the authority which issued the "Non Employment Certificate" the petitioner could not have been made to suffer. If the Screening Committee was having doubts with regard to validity of the "Non Employment Certificate" for want of date of issuance being reflected thereupon, the minimum that was required was that the Selection Committee should have

called upon the petitioner to clarify this fact as to when this "Non Employment Certificate" was issued to him by the competent authority and in case the petitioner failed to do so within reasonable time, then the Selection Committee would have been justified in denying one mark in favour of the petitioner under the head of 'Non Employment" in government service. However, by not affording such an opportunity to the petitioner and by unilaterally taking a call of not granting one mark to the petitioner for the reason that the date of issuance was not mentioned on the "Non Employment Certificate" (Annexure P-8), this Court is of the considered view that the Selection Committee has done injustice to the petitioner. In the present case, the petitioner has been denied one mark for no fault of his. The petitioner did everything that was in his means to obtain the certificate and furnish it before the Selection Committee. The fault, if any, for not mentioning the date of issuance upon the certificate is of the authority which issued the certificate. This extremely important aspect of the matter was overlooked by the Selection Committee while not considering the certificate so furnished by the petitioner before the Committee.

10. As it is not much in dispute that the "Non Employment Certificate" which was furnished by the petitioner before the Selection Committee was in fact issued on 12.06.2020 as is evident from Annexure P-9, which is a subsequent copy of the same certificate which was issued by the competent authority, accordingly, this writ petition is allowed and the respondents are directed to reassess the merit of the petitioner by granting one mark to him under the head of 'none of the family members being in government service'. Thereafter, if the marks obtained by the petitioner are found to be higher than the last candidate selected under the category of Scheduled Caste (unreserved), then the petitioner shall be offered appointment against the post of TGT (Arts), which appointment shall be prospective for all intents and purposes. This Court has been informed by the

State that there are vacant posts of TGT (Arts) available in various districts of the State of Himachal Pradesh. In this view of the matter, it is further observed that the last candidate so selected under the category of Scheduled Caste (unreserved), i.e. respondent No.4, shall be permitted to continue and his services shall not be dispensed with. Needful with regard to the petitioner be done within a period of four weeks from today.

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

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

Between:

RAVI SHARMA, S/O LATE SHRI HANS RAJ, RESIDENT OF VILLAGE GHARWASRA, P.O. KOSERIAN, SUB-TEHSIL KALOL, TEHSIL JHANDUTTA, DISTRICT BILASPUR, H.P.

....PETITIONER.

(BY MR AJAY SHARMA, SENIOR ADVOCATE, WITH MR. ATHARV SHARMA, ADVOCATE )

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. THE DIRECTOR GENERAL OF POLICE, HIMACHAL PRADESH, POLICE HEADQUARTERS, NIGAM VIHAR, SHIMLA-171002.

3. THE INSPECTOR GENERAL OF POLICE, CENTRAL ZONE, MANDI, DISTRICT MANDI, H.P.

4. THE SUPERINTENDENT OF POLICE, BILASPUR, DISTRICT BILASPUR, H.P.

....RESPONDENTS.

(BY MR AJAY VAIDYA, SENIOR ADDITIONAL ADVOCATE GENERAL, WITH MR. DINESH THAKUR, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
No.7002 of 2021
Decided on: 23.03.2022

**Constitution of India, 1950**- Article 226- Compassionate appointment- Father of petitioner who was service as Constable in the Police Department dies in harness and at that time petitioner was minor- His case for compassionate appointment was rejected when he applied after attaining the age of majority on the ground of delay- Held- There was no delay on the part of the petitioner in approaching the department for grant of compassionate appointment as on attaining the age of majority he immediately took up the case with the Department- Petition allowed. (Para 6 & 7)

**Cases referred:**

State of Madhya Pradesh and others vs. Ashish Awasthi, (2022) 2 SCC 157;

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

**J U D G M E N T**

***CMP No.2737 of 2022***

In view of the averments made in the application, the same is allowed, as prayed for.

***CWP No.7002 of 2021***

With the consent of the parties, the matter has been taken up for consideration today itself.

The case of the petitioner is that his father Shri Hans Raj, who was serving as a Constable in the Police Department, died in harness on 20.01.1993. At the relevant time, the petitioner was a minor and his elder sister Ms. Mangla Devi is otherwise suffering from disability to the extent of

90% and therefore, she was not in a position to apply for compassionate appointment. After the petitioner attained the age of majority he applied for compassionate appointment on account of death of his father, which is evident from Annexure P-1, appended with the petition. However, the case of the petitioner was rejected by the department concerned vide communication dated 28.06.2014 (Annexure P-2), assigning the following reasons:-

> "*I am to refer to your letters No.P.II(3) Anukampa/Ravi Sharma/ Bilaspur/2012-31477 dated 03-12-2012 on the subject cited above and to say that the matter under reference has been examined at Govt. level in detail in consultation with the Finance Department who have observed that the proposal do not meet the financial/income criteria so fixed by the Govt. in Finance Department as per DOP's instruction(s) dated 24,08.2002 & 02.09.2002 vis-a-vis F.D's latest instructions dated 21.12.2012. Thus it cannot be considered.*"

2. As the petitioner was not satisfied with the reasons stood assigned while rejecting his case for grant of compassionate appointment, he accordingly, again took the matter with the department, but the department again rejected his case on the ground that the same stood considered and rejected earlier also. It is in this background, that the present petition has been filed by the petitioner, praying for quashing of Annexure P-2 and Annexure P-7, dated 28.06.2014 and 06.07.2021, i.e. the communication vide which the case of the petitioner for grant of compassionate appointment was rejected.

3. Learned Senior Counsel appearing for the petitioner has argued that a perusal of the impugned communications would demonstrate that the case of the petitioner has been rejected by the department by following certain instructions which were issued much after the death of the father of the petitioner without appreciating that the case of the petitioner was liable to be considered on the basis of the policy which was in vogue in the State for

granting appointment on compassionate basis as on the date when death of father of the petitioner took place.

4. On the other hand, learned Senior Additional Advocate General has submitted that there is no infirmity with the decision which has been taken by the department, because the appointment on compassionate basis is not a source of regular recruitment and this being an exception to the norm, is obviously governed by the instructions which are issued by the government from time to time and the government rightly took into consideration the policy and the notification which were existing at the time when the case of the petitioner was considered by the department. Accordingly, a prayer has been made for rejection of the petition. He has also argued that otherwise also there is a considerable delay on the part of the petitioner in approaching this Court and therefore also, he is not entitled for compassionate appointment.

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

6. Addressing the question of delay, this Court is of the considered view that as the death of the father of the petitioner took place when the petitioner was a minor and as it is not much in dispute that after attaining the age of majority the petitioner immediately took up the case for grant of compassionate appointment with the department, *per se*, there was no delay on the part of the petitioner in approaching the department for grant of compassionate appointment. The documents appended with the petition further demonstrate that after the case of the petitioner was rejected vide Annexure P-2 on 28.06.2014, he had been persisting with the matter with the respondent-authority and it is only on 06.07.2021 that subsequently he was informed that the department was not reconsidering his case on the ground that it already stood rejected.

7. Therefore, this Court is of the considered view that there is no delay in filing of the petition on behalf of the petitioner and otherwise also

taking into consideration the prayer which the petitioner is making, this Court is of the considered view that the technicalities like delay and latches should not come in the way of the petitioner in seeking justice.

8. Now, addressing the issue which has been raised on merit, this Court is of the considered view that there is considerable force in the contention of learned Senior Counsel appearing for the petitioner that the rejection of the case of the petitioner for grant of compassionate appointment by taking into consideration the policy and notification subsequent to the date of death of the father of the petitioner is not sustainable in the eyes of law.

9. Hon'ble Supreme Court of India recently in ***State of Madhya Pradesh and others*** Versus ***Ashish Awasthi***, *(2022) 2 Supreme Court Cases 157,* has been pleased to hold that in the case of compassionate appointment, the policy in vogue at the time when the death took place, has to be taken into consideration. This Court is of the considered view that in the cases of compassionate appointment, the policy which is favourable to the petitioner be it as on the date when the death took place, or as on the date when the case of the petitioner is being considered by the department, should govern the field so that if two views are possible, the view which is in favour of such a person, can be taken by the department.

10. Accordingly, in view of the above discussion, this Writ Petition is allowed by quashing Annexure P-2 and Annexure P-7, dated 28.06.2014 and 06.07.2021, as this Court is of the considered view that rejection of the case of the petitioner on the basis of subsequent policy and notification is not sustainable in the eyes of law, with further direction to the respondent-department to consider the case of the petitioner for grant of compassionate appointment taking into consideration his qualification, but applying the policy which was in force qua appointment on compassionate basis as on the date of death of the father of the petitioner. Let, needful be positively done

within a period of eight weeks from today. Pending miscellaneous applications, if any, also stand disposed of.

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

Between:

THE NEW INDIA ASSURANCE COMPANY LIMITED, DHARAMPUR BRANCH AT DHARAMPUR, DISTRICT SOLAN, HIMACHAL PRADESH-THROUGH ITS DEPUTY MANAGER, THE NEW INDIA ASSURANCE CO. LTD; DIVISIONAL OFFICE, 3rd FLOOR, BLOCK-7, SDA COMPLEX, KUSUMPTI, SHIMLA-171009. (H.P.)

....RESPONDENT NO.1/APPELLANT.

(BY. MR. PRANEET GUPTA, ADVOCATE )

AND

1. RAJ KUMARI WIFE OF ]
2. ROHIT SON OF ] LATE SH. RAMESH CHAND
3. RAJAT SON OF ]
4. SH. KHIALI RAM SON ] SENIOR CITIZENS
   OF SH. NARI,
5. SMT. GANGA DASSI
   WIFE OF SH. KHIALI RAM]

ALL RESIDENTS OF VILLAGE JAHU, SUB TEHSIL NANKHARI, TEHSIL RAMPUR, DISTRICT SHIMLA, HIMACHAL PRADESH.

....PETITIONERS/CLAIMANTS/RESPONDENTS.

6. MEHAR CHAND THAKUR, SON OF SH. KANHIA RAM, RESIDENT OF

VILLAGE BAGGA, P.O. KANDHAR, TEHSIL ARKI, DISTRICT SOLAN, HIMACHAL PRADESH.
7. SHAMI KUMAR SON OF SH. DHARAM VEER, RESIDENT OF VILLAGE & P.O. SUKAR, TEHSIL DHARAMSALA, DISTRICT KANGRA, HIMACHAL PRADESH.
8. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HORTICULTURE), SHIMLA-171002.

..... RESPONDENT NO.2 TO 4/RESPONDENTS

(BY. MR. B.C. VERMA, ADVOCATE, FOR RESPONDENTS NO.1 TO 3 AND 5.
RESPONDENT NO.4 IS STATED TO HAVE DIED.
MR. ROHIT KUMAR, ADVOCATE, VICE MR. Y.P. SOOD, ADVOCATE, FOR RESPONDENT NO.6.
MR. MEHAR CHAND, ADVOCATE, VICE MR.MOHAN SINGH, ADVOCATE, FOR RESPONDENT NO.7.
MR. DINESH THAKUR, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENT NO.8-STATE)

FIRST APPEAL FROM ORDER
No.64 of 2020
Decided on: 02.04.2022

**Motor Vehicle Act, 1988**- Section 173- One of the respondents died during the pendency of the petition before the Ld. Claim Tribunal- Held- Judgment passed against a dead person is nullity and as such award is set aside and the matter is remanded back to the Ld. Tribunal to take a care of the effect of the death of the deceased claimant and decide afresh. (Para 4 & 5)

**Cases referred:**

Gurnam Singh and Others vs. Gurbachan Kaur (2017) 13 SCC 414;

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

**J U D G M E N T**

This order shall take care of the main appeal as well as miscellaneous applications which have been filed in the present proceedings.

This appeal has been filed by the Insurance Company feeling aggrieved by the award passed by learned Motor Accident Claims Tribunal-IV, Shimla, H.P., in MAC Petition No.31-S/2 of 2008, titled as Smt. Raj Kumari & others Versus The New India Assurance Company Limited & others, decided on 01.11.2019, in terms whereof a Motor Accident Claims Petition filed by the petitioners therein was allowed by the learned Tribunal by awarding an amount of Rs.19,60,540/- alongwith interest in their favour.

2. After the institution of the appeal and issuance of notices to the respondents, it transpired that respondent No.4 in the appeal (Shri Khiali Ram), who happened to be petitioner No.4 before the learned Tribunal, had in fact died during the pendency of the Claim Petition before the learned Tribunal on 16.05.2018. In this background, though an application was filed under Order 1, Rule 10 of the Code of Civil Procedure by the appellants for deletion of the name of said respondent, but by placing reliance upon the judgment passed by the Hon'ble Supreme Court in ***(2017) 13 Supreme Court Cases 414***, titled as ***Gurnam Singh (dead) through Legal representatives and Others*** Versus ***Gurbachan Kaur (Dead) by Legal Representatives***, learned counsel for the appellants has argued that as in the present case the award stood passed by the learned Tribunal, ignoring the factum of death of one of the party before it, therefore, the award is liable to be set aside on this count alone being a nullity.

3. Learned counsel for the respondents has submitted that though it is a matter of record that Shri Khiali Ram had died during the pendency of the Claim Petition, however, as the interest of Shri Khiali Ram was duly represented before the learned Tribunal, therefore, his death has not resulted

in any miscarriage of justice and the award cannot be termed to be a nullity on this count alone. Accordingly, he has prayed that the appeal be heard on merit.

4. Having heard learned counsel for the parties, this Court is of the considered view that as now in ***(2017) 13 Supreme Court Cases 414***, titled as ***Gurnam Singh (dead) through Legal representatives and Others*** Versus ***Gurbachan Kaur (Dead) by Legal Representatives***, Hon'ble Supreme Court has been pleased to hold that the judgment/order passed in favour of and also against a dead person is a nullity, in this backdrop this Court has no option but to set aside the award passed by the learned Tribunal and remand the matter back to the learned Tribunal to take a call of the effect of the death of the deceased claimant on the proceedings from the said stage.

5. Accordingly, this appeal is disposed of by setting aside the award passed by the learned Motor Accident Claims Tribunal-IV, Shimla, H.P., in MAC Petition No.31-S/2 of 2008, titled as Smt. Raj Kumari & others Versus The New India Assurance Company Limited & others, decided on 01.11.2019**,** on the ground that the same has been passed ignoring the death of one of the claimants before it, i.e. claimant No.4 Shri Khiali Ram, with the observation that the learned Tribunal to now proceed in the matter from the stage of the death of the said claimant and in the event of any appropriate application being filed in this regard before the learned Court below by the parties concerned, then the same be dealt with on its own merit.

6. The award amount, as prayed for, is ordered to be refunded in favour of the appellant with up-to-date interest. The record, if received by this Court is ordered to be returned back to the learned Court below. The represented parties are directed to appear before the learned Tribunal on **02.05.2022**. Pending miscellaneous applications, if any, stands disposed of. Interim order, if any, stands vacated.

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

Between:-

SH. PRATAP SINGH
S/O SH. RAM RAKHA,
R/O VILLAGE KALARI,
POST OFFICE NAKRANA,
TEHSIL SHRI NAINA DEVI JEE,
DISTRICT BILASPUR, H.P.

.....PETITIONER

(BY SH. M.L. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY HIMACHAL PRADESH PUBLIC WORKS DEPARTMENT, TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. CHIEF ENGINEER (H.Z.)
HIMACHAL PRADESH PUBLIC WORKS DEPARTMENT, HAMIRPUR.

3. SUPERINTENDING ENGINEER,
10th CIRCLE, HIMACHAL PRADESH WORKS DEPARTMENT, BILASPUR, H.P.

.....RESPONDENTS

(SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION(ORIGINAL APPLICATION)

No. 1895 OF 2019
Decided on: 20.06.2022

**Constitution of India, 1950**- Article 226- Petitioner appointed as Chowkidar on compassionate ground- The grievance of the petitioner is that in view of his educational qualification he should be appointed as a Clerk instead of chowkidar on compassionate ground- Held- When the petitioner admittedly did not fulfill the qualification criteria required for appointment to the post of clerk in accordance with R&P Rules framed for the said post then the respondents cannot be directed to change his designation from the post of Chowkidar to that of Clerk- Petition dismissed. [Para 5(iii)]

**Cases referred:**

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

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

**O R D E R**

**CMP(T) No.516/2022**

For the reasons stated in the application, the same is allowed and disposed of.

**CWPOA No.1895/2019**

With the consent of the parties, the matter is taken up for hearing.

2. Petitioner was appointed and working as Chowkidar on compassionate ground. The grievance of the petitioner in the instant petition is that in view of educational qualification possessed by him, he should have been appointed as a Clerk instead of Chowkidar on compassionate ground.

3. Following are the admitted facts of the case:-

3(a). Sh. Ram Rakha father of the petitioner was working as Beldar with the respondents-Public Works Department. He died on 14.08.2001

3(b). On 12.10.2001, the petitioner applied for compassionate appointment. At that time, his educational qualification was middle pass. During consideration of his application for being appointed on compassionate ground, he passed matriculation in third division.

3(c). Respondents on 06.07.2006 offered appointment on compassionate ground to the petitioner against the post of Chowkidar in Bilaspur Division-II, HPPWD Bilaspur. The offer was accepted by the petitioner. Office order engaging the petitioner as daily waged Chowkidar was passed on 13.07.2006. Petitioner continued to work as Chowkidar.

3(d). On 31.10.2012, the petitioner requested the respondents for change of his designation from Chowkidar to that of Clerk on the ground that he had qualified matriculation examination before the issuance of the appointment order. The request of the petitioner was turned down by respondent No.2-Chief Engineer (HZ), HPPWD Hamirpur on 21.11.2012, hence, the instant petition.

4. In support of change of designation prayed for by the petitioner, learned counsel for the petitioner has placed reliance on a judgment passed by the Division Bench of this Court in ***CWP No.1254/2011,*** titled ***Bal Krishan Vs. State of H.P. & Anr.*** Decided on 22.03.2011. Learned counsel submitted that in the said judgment direction was issued to the respondent to look into the case of Sh. Bal Krishan (petitioner therein). That case of Bal Krishan was situated similar to the present petitioner. Respondent considered the case of Bal Krishan (supra) and changed his designation from Chowkidar to that of Clerk. Learned counsel also drew attention to an order passed by the respondents on 15.10.2011. It was argued that in terms of this order one Sh. Sodhi Ram situated similarly as the present petitioner and appointed on compassionate ground against the post of Beldar, was ordered to be appointed as clerk.

Learned Additional Advocate General opposed the change of designation now sought by the petitioner. It was submitted that the Recruitment and Promotion Rules for the post of clerk required the incumbent to possess the educational qualification of either Matric in 2nd Division or 10+2. The petitioner was not eligible for appointment as a clerk as he did not satisfy the basic minimum required educational qualification. He was neither a matriculate in second division nor had he passed 10+2. Therefore, he could not be appointed on compassionate ground as a clerk and was accordingly offered the compassionate appointment as a daily waged Chowkidar.

5. On hearing learned counsel for the parties and going through the case record, I am of the considered view that for the following reasons the relief claimed by the petitioner cannot be granted:-

5(i). It is not in dispute that under the Recruitment & Promotion Rules for the post of clerk, an applicant in order to become eligible must possess educational qualification either of matriculation with 2nd division or he must have passed 10+2. It is an admitted position that the petitioner at the relevant time was a matriculate with third division. He did not possess the educational qualification required for appointment against the post of clerk in terms of Recruitment and Promotion Rules for the post of clerk.

5(ii). Since the petitioner was only matriculate with third division, therefore, respondents offered him compassionate appointment against the post of Chowkidar in July 2006. The petitioner accepted the offer and submitted his joining report. Six years later, he preferred a representation to the respondents for changing his designation from Chowkidar to that of Clerk. Having accepted compassionate appointment to the Class-IV post of Chowkidar, it was not open for the petitioner to seek appointment on compassionate ground to the Class-III post of clerk.

In ***2022(1) SCC 30*** titled State of ***Uttar Pradesh and others Vs Premlata,*** 'Dying-In-Harness Rules 1974' on compassionate ground

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

> *"10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that 'suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. 'Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment. In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of ClassII or ClassI post and the deceased*

*employee was working on the post of Class/Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.*

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

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

*As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground."*

5(iii). Reliance upon two cases of Sh. Bal Krishan and Sh. Sodhi Ram alleged to be similarly situated as the present petitioner, in whose cases, respondents had statedly changed the initial designation from Class-IV to Class-III, is also misplaced. Educational qualifications of these two persons are not before this Court. The circumstances in which, Class-IV designation of the aforesaid two persons was statedly changed to Class-III are not before this Court. The petitioner is before the Court of law. Relief prayed for by him cannot be granted on the ground of negative parity. When the petitioner admittedly did not fulfill the qualification criteria required for appointment to the post of clerk in accordance with R&P Rules framed for the said post then the respondents cannot be directed to change his designation from the post of Chowkidar to that of Clerk. Learned counsel for the petitioner also pressed for a direction to the respondents to relax the Recruitment & Promotion Rules for facilitating appointment of petitioner as clerk. Even this submission is misplaced as relaxation in respect of satisfying laid out educational criteria towards eligibility for a post under the Recruitment & Promotion Rules cannot be claimed as a matter of right.

No other point was urged.

For the foregoing reasons, this petition lacks merit and is dismissed accordingly. Pending miscellaneous applications, if any, shall also stand disposed of.

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

Chaman Lal ....Petitioner.

Versus

The Secretary, Himachal Pradesh
Staff Selection Commission

Hamirpur & another ...Respondents.

For the petitioner : Mr. Loveneesh Singh Thakur, Advocate.

For the respondents : Mr. Angrez Kapoor, Advocate, for respondent No.1.
Mr. Shashi Shirshoo, Central Government Standing Counsel, for respondent No.2.
Name of respondent No.3 stands deleted.

CWPOA No.61 of 2019
Decided on:15.03.2021

**Constitution of India, 1950**- Article 226- Petitioner sought to quash the appointment order of respondent No. 3 being arbitrary- Post of Junior Officer (Personnel & Administration)- OBC category- Held- It was expected from the Commission to have given an opportunity to the petitioner by quoting its decision to provide fresh information by way of hard copy, which admittedly has not been done by the Commission- Rejection of candidature of the petitioner by the Commission cannot be sustained in law- Petition disposed of with directions. (Para 8 to 10)

The following judgment of the Court was delivered:

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**Ajay Mohan Goel, Judge (Oral)**

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

> "(i) That the respondent may kindly be directed to quash the appointment order of respondent No.3 being arbitrary, illegal, wrong and false.
> (ii) That respondent may be directed to consider the candidature of the petitioner against the post and declare the result of the petitioner by evaluating him in the select list of successful candidates belonging to OBC category from the merit list

prepared in pursuance of advertisements and offer appointment the post of Junior Officer under OBC category."

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

A process was initiated by the respondent-Commission, *inter alia*, to fill up four posts of Junior Officer (Personnel & Administration), in terms of advertisement dated 16.05.2016, appended with the petition as Annexure A-12. The posts of Junior Officer (Personnel & Administration) at S.O. Level, were in the pay scale of Rs.10900-34800+Grade Pay Rs.4350 (PB-3) with basic pay of Rs.15250/- PM (Minimum of the Pay Band plus Grade Pay). The eligibility criteria, as can be deciphered from the documents appended with the petition was as under:-

| | |
|---|---|
| 10. Qualifications required<br>(a) Essential: | Graduate with one year Full Time Diploma in HR/ Personnel Management with 55% marks from a recognized University. Employees of HPPCL who have acquired The above referred Qualification with 55% marks through full time or part time or through correspondence/ distance mode from a recognized institute/ University shall also be Eligible/considered. Relaxation in age and % age of marks as per rules of HPPCL. Knowledge of Compute basics i.e. MS word, Excel, E-mail etc. |

3. Petitioner applied for the said post for being considered for appointment to the respondent-Commission. Vide Annexure A-3, dated 31.03.2018, Under Secretary Himachal Pradesh Staff Selection Commission, Hamirpur, District Hamirpur, H.P., addressed the following communication to

the petitioner under the subject "Recruitment to the Post of Junior Officer (P & A)), post Code 510:-

> "With reference to your online application submitted for the post of Junior Officer (P&A) post code 510. At the time of evaluation you have submitted the degree of MBA instead of Diploma in HR/Personnel Management. You are therefore advised to submit the degree of MBA in (PM/HR) on or before 10-04-2018, failing which it will be presumed that you do not fulfill the essential qualification and your candidature for this post shall stand rejected."

4. According to the petitioner, after receipt of this communication, copy of diploma was forwarded by him to the respondent-Commission through e-mail. Copies of the e-mail so sent to the respondent-Commission are appended with the petition as Annexures P-7 and P-8, which are dated 07.08.2018 and 10.04.2018.

5. The grievance of the petitioner is that vide Annexure P-10, when the result of the process in issue was declared by the respondent-Commission, the name of the petitioner did not figure amongst the selected candidates and his enquiry revealed that his candidature stood rejected by the Commission on the ground that the information which was sought from him vide communication dated 31.03.2018 was not made available to the Commission by him within the requisite time. It is under these circumstances, petitioner approached this Court praying for the reliefs already enumerated hereinabove, *inter alia*, on the ground that as he had already supplied requisite information to the Commission on 07.04.2018 and 10.04.2018, the act of respondent-Commission of rejecting his candidature is arbitrary. Learned counsel for the petitioner further submitted that after 31.03.2018, no communication whatsoever was ever received from the Commission by the petitioner either to the effect that the information sent by him through e-mail was not admissible and he should supply information through hard copy etc.

or that the information as sought vide letter dated 31.03.2018 was not received at all. The Court has been apprised by him that out of the selected candidates, the candidate who was offered appointment under the O.B.C. Category has not joined the duties and the post is still lying vacant. The petitioner also belongs to the O.B.C. Category.

6. Learned counsel for respondent No.1 has opposed the petition on the ground that the information as was sought from the petitioner vide communication dated 31.03.2018 was never supplied by him by way of hard copy which was the requirement and the submission of the documents through e-mail, cannot be construed to be a valid submission of the same because the petitioner was never instructed to supply the same through e-mail and there is a decision of the Commission, dated 07.03.2018, to the effect that no document sent to the Commission by a candidate through e-mail shall be entertained. He submitted that despite reasonable opportunities having been granted by the Commission to the petitioner, as he failed to supply the requisite information as was sought vide communication dated 31.03.2018, therefore, the candidature of the petitioner has been rightly rejected by the respondent-Commission. As far as the factum of one post of O.B. C. Category still lying vacant out of the four advertised posts is concerned, the same has not been disputed by the Commission.

7. I have heard learned counsel for the parties and have also through the pleadings as well as record which has been produced today in the Court by Mr. Angrez Kapoor, learned counsel for respondent No.1.

8. It is not in dispute that the bone of contention between the parties is the submission of the certificates by the petitioner through e-mail in response to communication dated 31.03.2018, which as per the petitioner was a valid compliance of communication dated 31.03.2018, but which as per respondent-Commission is not a valid compliance thereof. The documents in issue having been received through e-mail by the respondent-Commission on

07.04.2018 and 10.04.2018, is also not in dispute. The information which was sought by the petitioner to this effect under Right to Information Act, 2005 (relevant copies of which stand appended with the petition as Annexure P-11), demonstrates that the requisite documents were received through e-mail by the Commission on 07.10.2018 and10.04.2018.

9. Besides, it is not in dispute that at the relevant time, there was an e-mail portal of the Commission and the same was catering to candidates who were applying for various posts which were advertised by the said Commission. It is also not in dispute that the so called decision taken by the Commission, dated 07.03.2018, that henceforth no information provided to the Commission by a candidate through e-mail shall be entertained, was never put in public domain by it. In other words, it was a departmental decision taken by the Commission, which never saw the light of the day. In these circumstances, when it is not in dispute that requisite information as was sought by the Commission, vide communication dated 31.03.2018, stood supplied by the petitioner to the respondent-Commission on 07.04.2018 and10.04.2018, the act of the respondent-Commission of not acting upon it is indeed arbitrary and not sustainable in the eyes of law. Even if, benefit of doubt is to be given to the Commission that it did not act upon the information so supplied on account of the decision so taken by it on 07.03.2018, then also the minimum that was expected from the Commission was to have had given an opportunity to the petitioner by quoting its decision dated 07.03.2018, to provide fresh information by way of hard copy, which admittedly has not been done by the Commission.

10. Therefore, in these circumstances, rejection of candidature of the petitioner by respondent-Commission cannot be sustained in law and the same is accordingly quashed and set aside. Respondent-Commission is directed to consider the candidature of the petitioner for the post of Junior Officer (Personnel & Administration) against lying vacant post belong to

O.B.C. Category. For the assistance of the Commission, the petitioner shall supply a hardcopy of the details of his educational qualifications within 15 days from today. Thereafter, the candidature of the petitioner shall be considered by the respondent-Commission in accordance with law and in accordance with the Recruitment and Promotion Rules and appropriate decision upon the same shall be taken by it on or before 30.04.2021. The petition stands disposed of in above terms, so also pending miscellaneous applications, if any. No order as to costs.

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

Between:

ANSHUL SHARMA SON OF SH. NET RAM, VILLAGE BHAMNOLI, PO SUMMERKOT, TEHSIL ROHROO, DISTRICT SHIMLA, H.P.

....PETITIONER.

(BY. MR. SANJEEV BHUSHAN, SENIOR ADVOCATE, WITH MR. RAJESH KUMAR, ADVOCATE )

AND

1. STATE OF HP THROUGH SECRETARY (HOME) GOVERNMENT OF HP, SHIMLA.
2. DIRECTOR GENERAL OF POLICE, HP.
3. SUPERINTENDENT OF POLICE, SHIMLA.

....RESPONDENTS.

(BY. MR. DINESH THAKUR, MR. SUMESH RAJ, MR. SANJEEV SOOD,

ADDITIONAL ADVOCATES GENERAL, WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.5500 of 2019
Decided on:05.03.2022

**Constitution of India, 1950**- Article 226- Applicant sought reevaluation of his OMR/Answer sheet – Post of Constable (Male) in the Police Department- Held- Answer sheet of the petitioner was shown to him who gave his satisfaction qua the official answer key- Petition dismissed. (Para 5 to 7)

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*This petition coming on for hearing this day, the Court passed the following:* **J U D G M E N T**

The petitioner approached the learned erstwhile Himachal Pradesh Administrative Tribunal by way of O.A. No.2435 of 2015, seeking following reliefs:-

> "*That the respondents may kindly be directed to produce the OMR/answer sheet of the applicant before this Hon'ble Court and to show the same to the applicant and further if some questions have wrongly been answered by the respondents, the same may very kindly be ordered to be sent to some expert so that justice is done to the applicant in the interest of justice.*"

2. Post abolition of the learned Tribunal the matter was transferred to this Court and the same now stands registered as CWPOA No.5500 of 2019. The contention of the petitioner is that respondents advertised five hundred posts of constable (male) in Police Department which included sixty posts in Shimla district for which he also applied. The petitioner was directed vide Annexure A-1 by respondent No.3 to appear before the Recruitment Board for physical efficiency test. He appeared before the said Board on 26.05.2015. As the petitioner successfully cleared the physical efficiency test, he was called upon vide letter dated 12.06.2015 (Annexure A-2) to appear in a

written test by the respondents. This written test was conducted on 21.06.2015 and the petitioner participated in the same vide Roll No.588027. The petitioner secured fifty six out of eighty marks in the written test which included four grace marks.

3. The grievance of the petitioner is that on the basis of his performance in the written test he ought to have secured at least sixty five marks and the marks which have been awarded to him are on the lower side and not inconsonance with how he performed in the written test.

4. The petitioner approached the authorities concerned for rechecking of the answer sheet, but as nothing was done, the same lead to the filing of the case. When the case was listed before the learned Tribunal on 30.07.2015, the following order was passed:-

> "*Mr. R.P. Singh, learned Asstt. AG waives service of notice on behalf of the respondents.*
>
> *Short reply be filed within two weeks.*
>
> *In the meanwhile, there shall be a direction to respondent No.3, the Superintendent of Police, Shimla, District Shimla (H.P.) to consider and decide the representation dated 20.07.2015, Annexure A-4, submitted by the applicant with a prayer for rechecking of his paper for recruitment to the post of Police Constable in accordance with law, by 03.08.2015 upto 5.00 p.m. As personal interview for the post is stated to be held on 04.08.2015, failing which the applicant shall be entitled to appear in the interview provisionally.*
>
> *It shall be the responsibility of the applicant to produce certified copy of this order before respondent No.3 forthwith, but not later than 31.7.2015 by 3.00 p.m.*
>
> *List on 14.8.2015.*
>
> *Copy dasti.*"

5. The Court stands informed that pursuant to said order passed by the Court, the mark sheet of the petitioner was shown to him who gave his

satisfaction qua the official answer key. This is evident from the documents which have been appended alongwith the reply filed by the respondents.

6. This Court is of the considered view that as the petitioner has expressed his satisfaction with regard to the evaluation of his question paper on the strength of the official answer key, therefore, now nothing survives in this petition. As rightly pointed out, the petitioner is now estopped from taking the stand that evaluation of his paper was not proper. Even otherwise, it is settled law that in the absence of rules providing for rechecking of re-evaluation of answer sheets, the Courts cannot issue mandamus to this effect.

7. Accordingly, this Writ Petition is dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

**CWPOA No.6594 of 2020**
Paramjeet Singh ....Petitioner.
**Versus**
State of H.P. & others ...Respondents.

**CWP No.2577 of 2020**
Smt. Trishla Devi ....Petitioner.
**Versus**
State of H.P. & others ...Respondents.

**CWP No.2603 of 2020**
Smt. Raj Kumari ....Petitioner.
**Versus**
State of H.P. & others ...Respondents.

**CWP No.2636 of 2020**
Jagdish Chand ....Petitioner.
**Versus**
State of H.P. & others ...Respondents.

**CWP No.3540 of 2020**

Hem Chand ....Petitioner.

**Versus**

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

For the petitioners : Mr. A.K. Gupta, Advocate, in all the respective petitions.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Mr. Sanjeev Sood, Additional Advocates General, with Ms. Divya Sood, Mr. K.K. Chaudhary, Deputy Advocates General, for the respondents-State in all the respective petitions.
Mr. T.C. Chauhan, Advocate, for respondent No.5 in CWP No.2603 of 2020.
Mr. Sudhir Thakur, Senior Advocate, with Mr. Karun Negi, Advocate, for respondent No.5 in CWPOA Nos. 2577 of 2020 and for respondent No.5 in CWP No.2636 of 2020.
Mr. Balram Sharma, Assistant Solicitor General of India, for respondent No.4 in CWPOA No.6594 of 2020 and for respondent No.4 in CWP No.3540 of 2020.
Mr. Vinod Thakur, Advocate, for respondent No.5 in CWPOA No.6594 of 2020.

CWPOA No.6594 of 2020
a/w CWPOA Nos.2577, 2603,2636 and 3540 of 2020
Decided on: 09.03.2021

**Constitution of India, 1950**- Article 226- New Pension Scheme- Dispute- Payment of gratuity to petitioner as they stood retired before the publication of the said Office Memorandum dated 17.08.2006 in the Rajpatra- Held- Petitioners shall make appropriate applications for grant of benefit of due defined Contributory Pension Scheme through their parent department within

a period of four weeks from today and the same shall be processed by the department concerned and appropriate relief as is admissible to the petitioners shall be granted to them within a period of eight weeks as from the date of receipt of their respective applications- Petition disposed of. (Para 7)

The following judgment of the Court was delivered:

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**Ajay Mohan Goel, Judge (Oral)**

As common issues of law and fact are involved in all these petitions, the same are being disposed by a common judgment.

2. Petitioner(s) before this Court are employees of the Government of Himachal Pradesh, who superannuated from service on or after 15.05.2003. The Finance Pension Department of the Government of Himachal Pradesh, vide Office Memorandum dated 18.09.2017, on the subject "*Extension of benefits of 'Retirement Gratuity and Death Gratuity' to the Himachal Pradesh Government employees covered by New Defined Contributory Pension Scheme (known as NPS)*, issued instructions to the effect that employees of Government of Himachal Pradesh, who joined service in government departments on regular basis on or after 15.03.2003, are covered by the non-defined Contributory Pension Scheme, notified by the State Government, vide Notification No. Fin (Pen) A (3)-1/96, dated 17.08.2006 readwith Notification No.Fin (Pen) A (3) 1/96 dated 15.5.2003. However, this Office Memorandum was to take effect from the date of publication in the 'Rajpatra'. The grievance of the petitioners is that as they stood retired before the publication of the said Office Memorandum in the 'Rajpatra', the benefit of this Office Memorandum has not been granted to them. It is in this background that they approached this Court *inter alia* praying for the reliefs that the respondents be directed to pay gratuity to the petitioners also.

3. During the pendency of these petitions, the Finance Pension Department of the Government of Himachal Pradesh has issued another Office Memorandum dated 08.01.2021, which reads as under:-

> "Subject:- Extension of benefits of 'Retirement Gratuity and Death Gratuity' to the Himachal Pradesh Government employees covered by New Defined Contributory Pension Scheme (known as NPS).
>
> 1. The undersigned is directed to say that the benefit of Retiral Gratuity and Death Gratuity was extended to regular Government employees appointed on or after 15.05.2003 and governed by the New Defined Contributory Pension Scheme vide Office Memorandum No. Fin (Pen) A(3)-1/96 dated 18th September, 2017 from prospective effect i.e. from the date of publication of said instructions in the Rajpatra. The instructions dated 18th September, 2017 above, were published in the Govt. Rajpatra on 22.9.2017, therefore, these instructions were applicable w.e.f. 22.9.2017.
>
> 2. The matter for grant of benefit of Retirement Gratuity and Death Gratuity to regular Govt. employees who were/are covered under New Pension Scheme (NPS) and who have retired/died in harness between the period w.e.f. 15.05.2003 to 21.09.2017 was under active consideration of the Government for some time past.
>
> 3. Now, after careful consideration of the matter, the State Government, in partial modification of Para-5 of Office Memorandum No.Fin (Pen) A(3)-1/96, dated 18th September, 2017 has decided that these instructions shall be applicable retrospectively w.e.f. 15.05.2003 to regular employees governed by New Defined Contributory Pension Scheme (i.e. New Pension Scheme).
>
> 4. The clarification, earlier, issued on the subject matter vide this department letter No. Fin (Pen) A (3)-1/2019 dated 15th October, 2019 shall stand withdrawn from the date of its issuance".

4. On the previous dates of hearing, learned counsel for the petitioners submitted that in view of said Office Memorandum, dated 08.01.2021, the cases of the petitioners were now squarely covered therein as the Scheme in issue has been made applicable retrospectively w.e.f. 15.05.2003 and accordingly, a prayer was made by the learned counsel that respondents-State be directed to consider the case of the petitioners in terms of Office Memorandum, dated 08.01.2021.

5. In this back ground, this Court had directed learned Additional Advocate General to have specific instructions as to whether the cases of the petitioners were covered in terms of Office Memorandum, dated 08.01.2021 or not.

6. Today, learned Additional Advocate General, on instructions, informed the Court that on account of retrospective applicability of the New Defined Contributory Pension Scheme, the cases of the petitioners are covered under it and they shall also be given benefit of the same, but for said purpose they will have to come through proper channel by making applications through their respective parent departments.

7. In view of the statement so made before the Court by learned Additional Advocate General, all these petitions are disposed of with the direction that the petitioners shall make appropriate applications for grant of benefit of due defined Contributory Pension Scheme through their parent department within a period of four weeks from today and the same shall be processed by the department concerned and appropriate relief as is admissible to the petitioners shall be granted to them within a period of eight weeks as from the date of receipt of their respective applications.

8. With these observations, all these petitions are disposed of, so also pending miscellaneous applications, if any.

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

Between:-

SH. WAJID ALI SON OF LT. SH. AKBAR ALI,
RESIDENT OF VILLAGE MELION, TEH.
PAONTA SAHIB, DISTT. SIRMOUR, H.P.

....APPELLANT.

(BY SH. DEEPAK KAUSHAL, ADVOCATE)

AND

1. SH. ARJUN SINGH, S/O SH. DAULAT RAM,
R/O VILLAGE JAGATPUR, P.O. MISSARWALA,
TEHSIL PAONTA SAHIB, DISTT. SIRMOUR,
H.P. (OWNER AND DRIVER OF VEHICLE
/TVS MOTORCYCLE MAKE FLAME DH-
BLU, CHASSI NO. MD625BF-681K-59322,
ENGINE NO. OF6K81059663, KEY NO. 70
WITH REGISTRATION NO. HP-17A-9949).

2. THE ORIENTAL INSURANCE COMPANY LTD.
BRANCH AT THE MALL NAHAN, DISTT.
SIRMOUR, H.P. (INSURER OF VEHICLE
TVS MOTOR CYCLE NO. HP-17-A-9949)
THROUGH ITS BRANCH MANAGER.

....RESPONDENTS

(SH. BIMAL GUPTA, SR. ADVOCATE WITH MR. SATISH SHARMA, ADVOCATE, FOR R-1)

(SH. G. C. GUPTA, SR. ADVOCATE WITH MS. MEERA DEVI, ADVOCATE, FOR R-2).

FIRST APPEAL FROM ORDER (MVA)
No. 347 OF 2012

Reserved on:17.06.2022
Decided on: 21.06.2022

**Motor Vehicle Act, 1988**- Section 173- Claim petition was dismissed- Petitioner aged 14 years sustained injuries in an accident- Held- No evidence to prove the facts necessary to fasten the liability of payment of compensation on respondents- Findings of the Ld. Tribunal on the basis of material on record and no fault can be found there- Appeal dismissed. (Para 13, 14, 15)

**Cases referred:**

Balbir Singh vs. Ajay Kumar, 2016 (1) Suppl. HLR 3168;

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

**J U D G M E N T**

By way of instant appeal, the appellant has assailed award dated 11.6.2012, passed by learned Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short the Tribunal) in MAC Petition No. 57-MAC/2 of 2009, whereby his claim petition preferred under Section 166 of the Motor Vehicles Act was dismissed.

2. Appellant was minor at the time of institution of the appeal, therefore, the same had been instituted through his mother (natural guardian/next friend). During the pendency of appeal, appellant attained majority. He prayed for discharge of his guardian and opted to continue the appeal on his own, which was allowed.

3. Brief facts are that a claim petition under Section 166 of the Motor Vehicles Act was instituted on 27.7.2009 before the learned tribunal, alleging *inter-alia* that the appellant was victim of road accident involving a motorcycle ridden by respondent No.1 in a rash and negligent manner. It was alleged that the appellant was about 14 years of age. On 19.2.2009, he was returning home with his goat at village Melion, Tehsil Paonta Sahib, District Sirmaur, H.P. At about 6.15 P.M., respondent No.1 hit the appellant and the goat with his motorcycle being driven in a rash and negligent manner. The

appellant was stated to have received serious injuries. He was initially taken to Civil Hospital, Paonta Sahib from where he was advised to be referred either to Regional Hospital Nahan or to PGI, Chandigarh but the appellant was taken to Shri Mahant Indiresh Hospital, Dehradun and was got treated from such institution. A claim to the tune of Rs. 7,00,000/- was accordingly preferred.

4. Respondent No.1 contested the claim of the appellant by denying the factum of accident. As per respondent No.1 neither he was riding the motorcycle at the place of accident on the given date or time nor any accident had taken place with his motorcycle.

5. In light of the available pleadings learned Tribunal framed following issues:-

i) Whether petitioner Wajid Ali sustained injuries on his person due to rash or negligent driving of motor cycle NO. HP-17-A-9949, as alleged?

ii) In case issue No.1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom?

iii) Whether the respondent No.1 did not possess a valid and effective driving license at the relevant time, as alleged?

iv) Whether the petition has been filed in collusion with respondent No.1, as alleged?

6. Issue No.1 was decided in negative. Learned Tribunal held that the factum of injuries allegedly caused on the person of appellant Wajid Ali were not proved to have been caused by an accident involving the motorcycle ridden by respondent No.1. In fact, it was held that the factum of involvement of respondent No.1 or his motorcycle in the accident as alleged on behalf of the appellant was not proved. In view of such findings, issues No. 2 and 3 were

held redundant. Even issue No.4 was decided against the claimant. The claim petition was accordingly dismissed by the Tribunal.

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

8. Learned counsel for the appellant has strenuously argued that the findings recorded by learned Tribunal on issue No.1 were against the material on record. It has been contended that PW-1 Mohd. Yunis was an eye witness and had proved on record beyond doubt the factum of accident involving respondent No.1 and his motorcycle and also the consequent injuries received by the appellant on 19.2.2009 at about 6.15 P.M. at place Melion, Tehsil Paonta Sahib, District Sirmaur, H.P. It has further been contended that an FIR Ext. PW-3/A was registered at Police Station, Paonta Sahib in respect of the accident in question and after thorough investigation it was found that the accident was caused by respondent No.1 while driving his motorcycle in a rash and negligent manner. The challan was presented and respondent No.1 was tried for offences under Sections 279, 337 and 429 of IPC. Reliance has been placed on a judgment passed by a Coordinate Bench of this Court in ***Balbir Singh vs. Ajay Kumar, 2016 (1) Suppl. HLR 3168***.

9. The case of the appellant to large extent was dependent on the testimony of PW-1. On scanning the entire material on record minutely, PW-1 does not appear to be trustworthy. It also appears that he was a procured witness. PW-1 Mohd. Yunis while appearing as a witness stated that he was at a distance of about 100 meters on the National Highway, when accident took place. He was driving his personal car. In such event, he would have covered the distance of 100 meters within a minute or few minutes at the most to reach the exact place of occurrence. Respondent No.1 would have also been found on spot, whereas, PW-1 is completely silent regarding presence of respondent No.1 on the spot. He only stated that a motorcycle without number was lying on the side of the road. In addition, another glaring

aspect that casts serious doubt on the veracity of the version put-forth by PW-1 is that he was never associated by the police during investigation of the case. Though, he specifically stated that he had informed the police immediately through telephone. In such case, he would be the informant/complainant and the sole witness and would have definitely been associated by the police during investigation, especially when the investigation was carried to its logical end after registration of the FIR.

10. PW-1 for the first time made appearance when he swore his affidavit to be used as his examination-in-chief before learned Tribunal. It was on 3.7.2010 i.e. after elapse of more than one year and five months from the date of accident. His interest in the success of the claim petition becomes evident from the fact that on one hand he denied having any relation with the appellant or his family and on the other stated to have visited the appellant in Shri Mahant Indiresh Hospital, Dehradun 3-4 times. In these circumstances, it would not be safe to base the sole testimony of PW-1 for holding respondent No.1 liable for rash and negligent driving and thereby causing the accident in question.

11. Further, there is no corroborative material on record to lend support to the version of PW-1. Merely, because an FIR was registered and on investigation respondent No.1 was put to trial, respondent No.1 cannot be held liable for causing the accident in question. Needless to say that FIR is not a substantive piece of evidence. In the instant case, perusal of FIR Ext. PW-3/A reveals that it was recorded on the basis of a written complaint sent by HC Sanjay Kumar, Incharge Police Post Majra to Police Station Paonta Sahib. According to his complaint, he had received telephonic information at about 6.15 P.M. on 19.2.2019 from some unknown person regarding the occurrence of accident in question. He had also reported his visit to the spot where he had found a dead goat and a motorcycle on the side of the road, which was without registration number. According to the complainant HC

Sanjay Kumar, people present on spot had disclosed that child Wajid Ali was injured as a result of accident caused by respondent No.1 while riding his motorcycle. He had further mentioned that no eye witness was available on spot. Strangely, HC Sanjay Kumar has not been examined as a witness. Even the Investigating Officer, who had investigated the case, was not cited as a witness. In these circumstances, mere lodging of an FIR and presentation of a challan against respondent No.1 cannot be considered as evidence in proof of the factum of the accident having been caused by respondent No.1. Copy of FIR was marked as Ext. PW-3/A from the records of Judicial Magistrate, 1st Class brought before the Court by PW-3, who simply was an official of the said Court. Mere exhibition of a document would not dispense with the proof of its contents.

12. PW-2 Smt. Zarina Begum mother of the appellant undisputedly was not an eye witness. Her statement could not be relied upon for purposes of ascertaining the facts required for answering issue No.1. Whatever she had stated with respect to the occurrence of accident was mere hearsay.

13. Except as above, no other evidence was led by the appellant to prove the facts necessary to fasten the liability of payment of compensation on respondents No.1 or 2 as the case may be. Even, the identification of motorcycle allegedly found near the place of accident was not established. PW-3, an official from the court, had only stated that respondent No.1 had got the motorcycle released from the Court. No evidence to establish relation between the motorcycle allegedly found on spot and the one got released by respondent No.1 from the court was lead. Even the document through which Police had seized the motorcycle from spot of accident was not placed and proved on record.

14. Perusal of impugned award reveals that learned tribunal has thoroughly considered all the above aspects before answering issue No.1 against the appellant/claimant.

15. In view of above discussion, it is held that the findings recorded by learned Tribunal are based on the basis of material on record and no fault can be found therewith. Accordingly, the impugned award dated 11.6.2012, passed by the learned Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. in MAC Petition No. 57-MAC/2 of 2009 is upheld and the instant appeal is dismissed. Pending applications, if any, also stand disposed of. Records be sent back forthwith.

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

Between:-

1. GEETA DEVI
   WIDOW OF SANJAY KUMAR

2. LACHHAMI DEVI
   D/O SANJAY KUMAR, AGED ABOUT 10 YEARS, THROUGH PETITIONER NO.1 THE MOTHER.

3. GAURI SHANKAR
   S/O SANJAY, AGED ABOUT 8 YEARS,
   THROUGH PETITIONER NO.1 THE MOTHER

   ALL R/O VILLAGE DELAG (CHALAMA) P.O. NICHLI BHATER, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

(BY MS. RASHMI PARMAR, ADVOCATE, LEGAL AID COUNSEL, FOR THE APPELLANTS)

....APPELLANTS

AND

1. JODH SINGH
   S/O KANHAYA RAM,

R/O VILLAGE DELAG (CHALAMA) P.O. NICHLI BHATER, TEHSIL SADAR, DISTRICT BILASPUR, H.P. ALSO RESIDENT OF NEW LODGE BUILDING NEAR SDA COMPLEX KASUMPTI, SHIMLA, H.P. OWNER OF TIPPER NO.HP 63 1287.

(BY SH.ARVIND SHARMA, ADVOCATE.)

2. PARVEEN KUMAR @ BHURU
S/O MAST RAM,
R/O VILLAGE NALTI, P.O. KANDRAUR, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

3. INSURANCE COMPANY LTD. (TO BE DISCLOSED BY THE RESPONDENT NO.1)
(INSURER OF TIPPER/TRUCK NO. HP 63 1287)

4. SMT. KRISHNI
W/O SUKH RAM (MOTHER OF THE DECEASED)

BOTH RESIDENTS OF VILLAGE DELAG (CHALAMA), P.O. NICHLI BHATER, TEH. SADAR, DISTRICT BILASPUR, H.P.

.....RESPONDENT

(NEMO)

FIRST APPEAL FROM ORDER
NO. 120 OF 2022
Decided on: 22.06.2022

**Motor Vehicle Act, 1988**- Section 173- Legal Services Authority Act, 1987- Section 21- Held- Appeal against the award of Lok Adalat- Lok Adalat has passed the award on the basis of statements of the parties as well as their Ld. Counsel, therefore, no appeal is maintainable- Appeal dismissed. (Para 4)

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

J U D G M E N T

Heard.

2. Present appeal has been preferred against award dated 24.12.2011, passed by the Lok Adalat, Motor Accident Claims Tribunal, Bilaspur, H.P., in MAC No.31 of 2008, titled as *Geeta Devi & others vs. Jodh Singh & others,* whereby claim of the petitioners (appellants herein) was settled with Insurance Company in lump sum amount.

3. The impugned Award has been passed in a Lok Adalat by exercising powers conferred on it provided under Chapter-VI of the Legal Services Authority Act, 1987. Section 21 of the said Act is relevant for adjudication of present appeal, which reads as under:-

> "21. Award of Lok Adalat.—(1) 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 and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).
>
> (2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award."

4. In present case, as stated in the Award, Lok Adalat has passed the Award on the basis of statements of the parties as well as their learned counsel. Therefore, no appeal is maintainable against the impugned Award as filed.

5. Needless to say, appellants, if aggrieved in any manner, may avail appropriate remedy for redressal of their grievances as permissible under law.

6. With aforesaid observations, this appeal is dismissed being not maintainable, so also pending application(s), if any.

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

Between:

REEMA DEVI WIFE OF SHRI TARA CHAND, R/O VILLAGE CHAGOG, P.O. SHIRAN, TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.

....PETITIONER.

(BY MR. R.K. GAUTAM, SENIOR ADVOCATE WITH MS. MEGHA GAUTAM, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002 (H.P.)
2. SMT. BHAGMALI, WIFE OF LATE SHRI DEVKI NAND, R/O VILLAGE CHAGOG, P.O. SHIVAN, POLICE STATION & TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.

....RESPONDENTS.

(MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL AND M/S J.S. GULERIA AND KAMAL KANT CHANDEL, DEPUTY ADVOCATES GENERAL, FOR RESPONDENT NO.1.

MR. KUSH SHARMA, ADVOCATE, FOR RESPONDENT NO.2.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.389 of 2021
Reserved on: 04.09.2021
Decided on: 29.11.2021

**Code of Criminal Procedure, 1973**- Section 482- **Indian Penal Code, 1860**- Sections 307, 382, 201 and 34- Scope- Held- It cannot be said that the allegations which have been made against the petitioner even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the petitioner- The variety of the veracity of the statements is to be tested at the time of trial and not at this stage- Petition dismissed. (Para 17 to 20)

**Cases referred:**

Chirag M. Pathak and Others vs Dollyben Kantilal Patel, and others, (2018) 1 SCC 330;
Fakhruddin Ahmad vs State of Uttranchal and Another, (2008) 17 SCC 157;
Kaptan Singh vs State of Uttar Pradesh and Others, (2021) 9 SCC 35;
M/s Neeharika Infrastructure Pvt. Ltd. vs State of Maharashtra, AIR 2021 SC 1918;
Minu Kumari and Another vs State of Bihar and Others, (2006) 4 SCC 359;
Pepsi Foods Ltd. and Another vs Special Judicial Magistrate and Others, (1998) 5 SCC 749;
Rajeev Kourav vs Baisahab and Others, (2020) 3 Supreme Court Cases 317;
Rajiv Thapar and Others vs Madan Lal Kapoor, (2013) 3 SCC 330;
State of Haryana and Others vs. Bhajan Lal and Others, 1992 Supp (I), SCC 335;
State of Telangana vs Habib Abdullah Jeelani and Others, (2017) 2 SCC 779;

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

**J U D G M E N T**

By way of this petition, the petitioner has prayed for quashing of the proceedings pending before the Court of learned Additional Chief Judicial Magistrate, Rampur, in case No.143 of 2021, titled as State Versus Gulab Chand and Another, arising out of FIR No.28/2021, dated 22.03.2021, under

Sections 307, 382, 201 and 34 of the Indian Penal Code, registered at Police Station, Kumarsain, District Shimla, H.P.

2. Brief facts necessary for the adjudication of this petition are that the above mentioned FIR was registered at Police Station Kumarsain, District Shimla, H.P., on 22.03.2021. As per the petitioner, she as well as one Shri Gulab Chand were arrayed as accused in the matter. After the investigation was completed by the police, challan was presented in the Court of learned Additional Chief Judicial Magistrate, Rampur, under Section 173 of the Criminal Procedure Code. According to the petitioner, she has been wrongly involved in the matter and accordingly, this petition has been filed, praying for quashing of the criminal proceedings as well as the FIR, *inter alia*, on the ground that the allegations which stand levelled against the petitioner are vague and baseless and they do not constitute any offence and further the petitioner being Pradhan of the Gram Panchayat was a public representative and initiating vague proceedings against her also amounts to loss to the public trust.

3. Learned Senior Counsel appearing for the petitioner has argued that the petitioner has been roped as an accused just to harass her as she happened to be an elected public representative of the Panchayat concerned. He has submitted that scrutiny of the documents submitted by police under Section 173 of the Criminal Procedure Code would demonstrate that no case is in fact made out against the petitioner. Learned Senior Counsel has with vehemence argued that the only eye-witness to the occurrence, Smt. Bhagmali i.e. the victim, in her statement which was recorded at I.G.M.C. Shimla, H.P. in the presence of a doctor, on 03.04.2021, on which date this witness was duly certified to be fit enough to give a statement, had nowhere named the petitioner as an accused, but it was in her second statement recorded on 08.04.2021 that the petitioner was also named as an accused by the victim. He submitted that when on 03.04.2021, the victim was fit enough to make a

statement, then the subsequent statement of the victim recorded on 08.04.2021, cannot be taken into consideration and the subsequent improvement which has been made by the victim cannot be used to falsely implicate the petitioner in the crime. Learned Senior Counsel has thus submitted that on this count alone, this petition deserves to be allowed and the FIR in issue qua the petitioner needs to be quashed and set aside. He has also argued that the victim has an ulterior motive to falsely implicate the petitioner and the motive being that the daughter of the victim had contested and lost the elections of Pradhan against the petitioner and this entire exercise of falsely implicating the petitioner stood undertaken by respondent No.2 to tarnish the image of the petitioner. Learned Senior Counsel has heavily relied upon the documents appended with the petition and on the strength of contents thereof, he has argued that the continuation of the proceedings against the petitioner is an abuse of the process of law and accordingly, a prayer has been made for quashing of the FIR.

4. The petition has been resisted by the respondent/State as well as by the learned counsel appearing for the private respondent, *inter alia*, on the ground that the present proceedings are misconceived and is an attempt to thwart the criminal process which stands initiated against the petitioner and another. According to the respondents, no case is made out for either quashing of the FIR or ensuing criminal proceedings and the filing of this petition is nothing but an abuse of the process of law

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

6. I will first deal with the case law relied upon by learned counsel for the parties, from which the scope of indulgence by the High Court under Section 482 of the Criminal Procedure Code, in a case where quashing of a FIR is sought by a party, stands culled out.

7. In ***State of Haryana and Others*** Versus ***Bhajan Lal and Others***, *1992 Supp (I), Supreme Court Cases 335,* Hon'ble Supreme Court of India was pleased to cull down the following kind of cases, which list even as per the Hon'ble Supreme Court was not exhaustive, wherein power under Section 482 of the Criminal Procedure Code could be exercised for the purpose of quashing of the FIR:-

> *" (1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;*
> *(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code;*
> *(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;*
> *(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code;*
> *(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;*
> *(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;*
> *(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an*

*ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*"

These principles have been reiterated by the Hon'ble Supreme Court of India time and again and stand followed by the High Courts in the matters pertaining to quashing of FIRs in exercise of its powers under Section 482 of the Criminal Procedure Code.

**8.** **In** *Pepsi Foods Ltd. and Another* **Versus** *Special Judicial Magistrate and Others*, ***(1998) 5 Supreme Court Cases 749***, Hon'ble Supreme Court held that the provisions of Section 482 of the Criminal Procedure Code are devised to advance justice and not to frustrate and accused can approach the High Court under Section 482 of the Criminal Procedure Code or Article 227 of the Constitution of India to have the proceedings quashed against him when the complaint does not makes out any case against him and still he must undergo the agony of a criminal trial.

**9.** **In** *Minu Kumari and Another* **Versus** *State of Bihar and Others*, **(*2006) 4 Supreme Court Cases 359*,** Hon'ble Supreme Court has held that powers possessed by the High Court under Section 482 of the Criminal Procedure Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles and the High Court being the highest Court of the State should normally refrain from giving a *prima facie* decision in a case where the entire facts are incomplete and hazy and more so when the evidence has not been collected and produced before the Court.

**10.** **In** *Fakhruddin Ahmad* **Versus** *State of Uttranchal and Another*, ***(2008) 17 Supreme Court Cases 157*,** Hon'ble Supreme of India held that the inherent powers possessed by the High Court under Section 482 of the Criminal Procedure Code are to be exercised very carefully and with great caution so that a legitimate prosecution is not stifled. It also held that

nevertheless, where the High Court is convinced that allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not *prima facie* constitute any offence or make out a case against the accused or where the allegations made in the FIR or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the powers of the High Court under said provision should be exercised. While reiterating these principles, Hon'ble Supreme Court referred to its earlier judgment in Bhajan Lal's case (supra).

**11. Thereafter, in** *Rajiv Thapar and Others* **Versus** *Madan Lal Kapoor*, ***(2013) 3 Supreme Court Cases 330*,** Hon'ble Supreme Court laid down the following steps to determine the veracity of a prayer for quashing of criminal proceedings invoking the powers vested in the High Court under Section 482 of the Criminal Procedure Code:-

> *"(30.1) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?*
>
> *(30.2) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false? (30.3) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant? (30.4) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?"*

**12. In** *Kaptan Singh* **Versus** *State of Uttar Pradesh and Others*, ***(2021) 9 Supreme Court Cases 35*, Hon'ble Supreme Court was pleased to**

**hold as under:-**

> *"9.1 At the outset, it is required to be noted that in the present case the High Court in exercise of powers under Section 482 Cr.P.C. has quashed the criminal proceedings for the offences under Sections 147, 148, 149, 406, 329 and 386 of IPC. It is required to be noted that when the High Court in exercise of powers under Section 482 Cr.P.C. quashed the criminal proceedings, by the time the Investigating Officer after recording the statement of the witnesses, statement of the complainant and collecting the evidence from the incident place and after taking statement of the independent witnesses and even statement of the accused persons, has filed the charge-sheet before the Learned Magistrate for the offences under Sections 147, 148, 149, 406, 329 and 386 of IPC and even the learned Magistrate also took the cognizance. From the impugned judgment and order passed by the High Court, it does not appear that the High Court took into consideration the material collected during the investigation/inquiry and even the statements recorded. If the petition under Section 482 Cr.P.C. was at the stage of FIR in that case the allegations in the FIR/Complaint only are required to be considered and whether a cognizable offence is disclosed or not is required to be considered. However, thereafter when the statements are recorded, evidence is collected and the charge-sheet is filed after conclusion of the investigation/inquiry the matter stands on different footing and the Court is required to consider the material/evidence collected during the investigation. Even at this stage also, as observed and held by this Court in catena of decisions, the High Court is not required to go into the merits of the allegations and/or enter into the merits of the case as if the High Court is exercising the appellate jurisdiction and/or conducting the trial. As held by this Court in the case of Dineshbhai Chandubhai Patel (Supra) in order to examine as to whether factual contents of FIR disclose any cognizable offence or not, the High Court cannot act like the Investigating agency nor can exercise the powers like an Appellate Court. It is further observed and held that question is required to be examined keeping in view, the contents of FIR and prima facie material, if any, requiring no proof. At such stage, the High Court cannot appreciate evidence nor*

*can it draw its own inferences from contents of FIR and material relied on. It is further observed it is more so, when the material relied on is disputed. It is further observed that in such a situation, it becomes the job of the Investigating Authority at such stage to probe and then of the Court to examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.*

*9.2 In the case of Dhruvaram Murlidhar Sonar (Supra) after considering the decisions of this Court in Bhajan Lal (Supra), it is held by this Court that exercise of powers under Section 482 Cr.P.C. to quash the proceedings is an exception and not a rule. It is further observed that inherent jurisdiction under Section 482 Cr.P.C. though wide is to be exercised sparingly, carefully and with caution, only when such exercise is justified by tests specifically laid down in section itself. It is further observed that appreciation of evidence is not permissible at the stage of quashing of proceedings in exercise of powers under Section 482 Cr.P.C. Similar view has been expressed by this Court in the case of Arvind Khanna (Supra), Managipet (Supra) and in the case of XYZ (Supra), referred to hereinabove.*

*9.3 Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has exceeded its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 Cr.P.C."*

13. In ***State of Telangana*** Versus ***Habib Abdullah Jeelani and Others***, *(2017) 2 Supreme Court Cases* 779, Hon'ble Supreme Court was pleased to hold as under:-

"*23. We have referred to the authority in Hema Mishra (supra) as that specifically deals with the case that came from the State of Uttar Pradesh where Section 438 CrPC has been deleted. It has concurred with the view expressed in Lal Kamlendra Pratap Singh (supra). The said decision, needless to say, has to be read in the context of State of Uttar Pradesh. We do not intend to elaborate the said principle as that is not necessary in this case. What needs to be stated here is that the States where Section 438 CrPC has not been deleted and kept on the statute book, the High Court should*

*be well advised that while entertaining petitions under Article 226 of the Constitution or Section 482 CrPC, exercise judicial restraint. We may hasten to clarify that the Court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, has the jurisdiction to quash the investigation and may pass appropriate interim orders as thought apposite in law, but it is absolutely inconceivable and unthinkable to pass an order of the present nature while declining to interfere or expressing opinion that it is not appropriate to stay the investigation. This kind of order is really inappropriate and unseemly. It has no sanction in law. The Courts should oust and obstruct unscrupulous litigants from invoking the inherent jurisdiction of the Court on the drop of a hat to file an application for quashing of launching an FIR or investigation and then seek relief by an interim order. It is the obligation of the court to keep such unprincipled and unethical litigants at bay.*"

14. In ***Chirag M. Pathak and Others*** Versus ***Dollyben Kantilal Patel, and others***, *(2018) 1 Supreme Court Cases 330*, Hon'ble Supreme Court was pleased to hold as under:-

"*24) In our considered opinion, it is only when on reading the FIR, a sheer absurdity in the allegations is noticed and when no prima facie cognizable case is made out on its mere reading due to absurdity in the allegations or when facts disclose prima facie cognizable case and also disclose remarkable identity between the two FIRs as if the first FIR is filed second time with no change in allegations then the Court may, in appropriate case, consider it proper to quash the second FIR. Such is not the case here*.

15. In ***Rajeev Kourav*** Versus ***Baisahab and Others***, *(2020) 3 Supreme Court Cases 317*, Hon'ble Supreme Court was pleased to hold as under:-

"*8. It is no more res integra that exercise of power under Section 482 Cr.P.C. to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence/offences alleged. Interference by the*

*High Court under Section 482 Cr.P.C. is to prevent the abuse of process of any Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 Cr.P.C. for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding."*

16. In ***M/s Neeharika Infrastructure Pvt. Ltd.*** Versus ***State of Maharashtra***, *AIR 2021 SC 1918*, Hon'ble Supreme Court was pleased to hold as under:-

"*10. From the aforesaid decisions of this Court, right from the decision of the Privy Council in the case of Khawaja Nazir Ahmad (supra), the following principles of law emerge:*

*i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into cognizable offences;*

*ii) Courts would not thwart any investigation into the cognizable offences;*

*iii) However, in cases where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go on;*

*iv) The power of quashing should be exercised sparingly with circumspection, in the 'rarest of rare cases'. (The rarest of rare cases standard in its application for quashing under Section 482 Cr.P.C. is not to be confused with the norm which has been formulated in the context of the death penalty, as explained previously by this Court);*

*v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;*

*vi) Criminal proceedings ought not to be scuttled at the initial stage;*
*vii) Quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule;*
*viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities. The inherent power of the court is, however, recognised to secure the ends of justice or prevent the above of the process by Section 482 Cr.P.C.*
*ix) The functions of the judiciary and the police are complementary, not overlapping;*
*x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;*
*xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;*
*xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. During or after investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;*
*xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the court;*
*xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by*

*this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint; and*

*xv) When a prayer for quashing the FIR is made by the alleged accused, the court when it exercises the power under Section 482 Cr.P.C. only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merits whether the allegations make out a cognizable offence or not and the court has to permit the investigating agency/police to investigate the allegations in the FIR."*

17. Now, in the backdrop of the law which has been laid down by the Hon'ble Supreme Court with regard to exercise of powers conferred upon it under Section 482 of the Criminal Procedure Code, in the light of factual matrix involved in the present case, this Court is of the view that this petition cannot be allowed. In this case, it cannot be said that the allegations which have been made against the petitioner even if they are taken at their face value and accepted in their entirety, do not *prima facie* constitute any offence or make out a case against the petitioner.

18. The effect of the two statements of the complainant having been recorded in the hospital, has to be gone into by the learned Trial Court in case the trial takes place and it is not for this Court to form any opinion at this stage on this aspect of the matter and quash the FIR as also the ensuing criminal proceedings. The veracity of the statements is to be tested at the time of trial and not at this stage. The other allegations of the petitioner that she has been falsely implicated in the matter on account of political rivalry etc. are also points which need to be established in the course of trial by the defence. It is pertinent to mention at this stage that as the petitioner is an accused, the onus to prove its case against the accused is upon the prosecution and the petitioner enjoys the benefit of being presumed to be innocent till proved otherwise. The import of the investigation report as also the effect of the findings returned therein has to be tested by the learned Trial Court and this

Court in exercise of powers conferred under Section 482 of the Criminal Procedure Code cannot substitute itself for the Trial Court to assess the merits and demerits of the case of the prosecution. This of course is not the scope of Section 482 of the Criminal Procedure Code.

19. In terms of the law declared by the Hon'ble Supreme Court of India, the inherent powers so possessed by the High Court are to be exercised only if the allegations, on the very face value if accepted, do not constitutes any *prima facie* case and further allegations made in the FIR or the complaint are absurd and inherently improbable, on the basis of which no prudent person can reach a just conclusion that there is sufficient grounds for proceeding against the accused. These conditions, in the considered view of this Court do not exist in the present case in view of the facts involved therein. The allegations against the present petitioner alongwith other accused are of attempt to murder, causing disappearance of evidence of offence etc., which indeed are serious allegations.

20. Therefore, as the present case does not passes the touch stone of the principles which have been laid down by the Hon'ble Supreme Court of India, on the application of which this Court in exercise of its inherent powers can quash the FIR and ensuing criminal proceedings, this petition is accordingly dismissed. However, it is clarified that the observations which have been made by this Court in this judgment are only for the purpose of the adjudication of the present petition and the learned Court below shall not be prejudiced by any manner by any observation contained therein while adjudicating the matter before it.

21. Pending miscellaneous applications, if any, also stand dismissed. Interim order, if any, stands vacated.

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

Between:-

1. STATE OF H.P. THROUGH ADDL.
CHIEF SECRETARY (AGRICULTURE)
TO THE GOVT. OF HIMACHAL
PRADESH, SHIMLA-2 (H.P.).

2. THE DEPUTY DIRECTOR,
AGRICULTURE, MANDI,
DISTRICT MANDI, H.P.

....APPELLANTS

(SH. ASHWANI SHARMA ADDITIONAL ADVOCATE GENERAL)

AND

KRISHAN CHAND,
S/O SH. DIWAN SINGH
R/O VILLAGE NOURU, PO
BHANGROTU, TEHSIL SADAR,
DISTRICT MANDI, H.P.

....RESPONDENT

(SH. VIJAY CHAUDHARY, ADVOCATE).

2. LPA No. 85 of 2017

Between:-

1. STATE OF H.P. THROUGH ADDL.
CHIEF SECRETARY (AGRICULTURE)
TO THE GOVT. OF HIMACHAL
PRADESH, SHIMLA-2 (H.P.).

2. THE DEPUTY DIRECTOR,

AGRICULTURE, MANDI,
DISTRICT MANDI, H.P.

….APPELLANTS

(SH. ASHWANI SHARMA ADDITIONAL ADVOCATE GENERAL)

AND

KHUB RAM SON OF SHRI JANGLU RAM,
R/O VILLAGE THATHIAR, P.O. RAJWARI,
TEHSIL SADAR, DISTRICT MANDI, H.P.

….RESPONDENT

(SH. VIJAY CHAUDHARY, ADVOCATE).

LETTERS PATENT APPEAL
Nos. 158 OF 2016 & 85 OF 2017
Decided on: 13.06.2022

**Industrial Disputes Act, 1947**- Section 25- Retrenchment of respondents was declared void-ab-initio with the directions to appellants to regularize the services of the respondents- Held- Conduct of the appellants amounts to unfair labour practices under clause 5(b) and clause 10 of fifth Schedule appended to the Act- Respondent definitely had acquired right to be considered for regularization- Appeals dismissed. (Para 11)

**Cases referred:**

Bombay Union of Journalists & others vs. State of Bombay and Another, AIR 1994 SC 1617;

Raj Kumar vs. Director of Education & others 2016 (6) SCC 541;

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

**J U D G M E N T**

Since common questions of law and facts are involved in both these appeals, therefore, the same are being decided by a common judgment.

2. The common facts in both the appeals are that respondents in both the appeals were engaged as daily wagers by respondent No.2 in the month of May, 1996 and continued to work in the same capacity till 30.6.2006. The only difference is that the date of engagement of respondent in LPA No. 158 of 2016 was 17.5.1996, whereas, the date of engagement of respondent in LPA No. 85 of 2017 was 15.5.1996. Both of them were retrenched w.e.f. 30.6.2006. They raised their individual Industrial Disputes. The appropriate Government referred the matter to Labour Court-cum-Industrial Disputes Tribunal, Dharmshala, (for short, "the Tribunal"). The questions referred for adjudication to learned Tribunal in both the cases were substantially identical. Learned Tribunal was required to decide, whether the retrenchment of services of respondents in both the appeals by appellant No.2 *vide* retrenchment orders dated 30.6.2006, especially when, the Government had issued orders to regularize the services of all daily wagers etc. who had completed eight years of service as on 31.3.2004, was legal and justified?

3. Learned Tribunal registered Reference No. 54 of 2008 and Reference No. 455 of 2009 which now are subject matters in LPA Nos. 158 of 2016 and LPA No. 85 of 2017 respectively. Both the references were answered in negative vide separate Awards dated 11.12.2012. The retrenchment of respondents was held to be compliant with the provisions of Section 25-F of Industrial Disputes Act (for short, "the Act"). Whereas, sub-sections (a) and (b) of Section 25-F were held to have been complied with, sub-section (c) of Section 25-F was understood to be merely a directory provision and hence of no significance.

4. As regards the acquisition of the right of regularization by respondents, learned Tribunal again answered in negative on the ground that the cases of respondents were not comparable with the facts of the case in Mool Raj Upadhayaya vs. State of H.P. & others, 1994 (2) SLR 377 (SC).

5. Both the respondents assailed the respective awards passed against them. The Award in Reference No. 54 of 2008 was assailed by way of CWP No. 2365 of 2013 and Award in Reference No. 455 of 2009 was assailed in CWP No. 2366 of 2013.

6. Learned Single Judge allowed both the writ petitions vide judgments dated 4.8.2015 and 27.7.2016 respectively. The Awards passed in Reference No. 54 of 2008 and Reference No. 455 of 2009 were set aside. Retrenchment of the respondents was declared *void-ab-initio*. The appellants were directed to regularize the services of the respondents from the date of completion of eight years of uninterrupted service rendered by them with all consequential benefits, hence these appeals.

7. We have heard Mr. Ashwani Sharma, learned Additional Advocate General for the appellants and Mr. Vijay Chaudhary, Advocate for the respondents in both the appeals and have also gone through the records carefully.

8. Learned Tribunal had proceeded on the premise that compliance of sub-sections (a) and (b) of Section 25-F was required to be followed as mandatory condition precedent but the same was not held applicable in respect of sub-section (c) of said Section. Reliance was placed upon judgment passed by Hon'ble Supreme Court in ***Bombay Union of Journalists & others vs. State of Bombay and Another, AIR 1994 SC 1617***.

9. On facts, learned Tribunal had held that the provisions of sub-sections (a) and (b) of Section 25-F of the Act had been complied with by the appellants. However, on appraisal of the material on record, we find such findings to be perverse. Admittedly, the respondent in both the cases were retrenched w.e.f. 30.6.2006. There is nothing on record to suggest that till 30.6.2006, appellants had paid the salary to respondents in lieu of notice under sub-section (a) or retrenchment compensation under sub-section (b) of Section 25-F of the Act. Rather, the material on record suggested that such

compliance, if any, was alleged to have been made on 1.7.2006 i.e. after the retrenchment of respondents had already been effected. Since sub-sections (a) and (b) of Section 25-F of the Act were not complied as pre-condition, learned Tribunal had clearly erred in holding due compliance of said provisions of law. The retrenchment of respondents, thus, could not have been held to be legal and valid.

10. Indeed, there was no compliance of sub-section (c) of Section 25-F of the Act also. Non compliance of the aforesaid provisions of law also could not be said to be merely directory in light of judgment passed by Hon'ble Supreme Court in ***Raj Kumar vs. Director of Education & others 2016 (6) SCC 541***.

11. Learned Tribunal had further answered the respective references in cases of both the respondents in negative by holding that their cases were not comparable on facts with Mool Raj Upadhayays's case. Such findings, in our considered view, again cannot be sustained for the reason that the learned Tribunal, on one hand, had taken notice of the communication dated 9.6.2006, issued by the Secretary Personnel to the Government of Himachal Pradesh, communicating the decision of Government of Himachal Pradesh to regularize the services of all daily wage employees working in various departments of the Government, who had completed eight years of continuous service as on 31.3.2004, on the other had conveniently ignored such decision of the Government while answering the references against the respondents. Aforesaid decision of the State Government had come into being before retrenchment of respondents.

12. The undisputed facts of the case reveal that the respondents in both the appeals had remained engaged by the appellants for about ten years before their retrenchment. The action of appellants in retrenching the respondents came after issuance of correspondence dated 9.6.2006, as noticed above. The State has to act as model employer. Being a welfare State,

it cannot indulge in unfair labour practices. The facts of the instant cases clearly reveal that the conduct of appellants can easily be said to be amounting to unfair labour practices under Clause 5 (b) and Clause 10 of "*fifth schedule*" appended to the Act. Respondents definitely had acquired right to be considered for regularization in terms of the policy decision taken by the State Government. It cannot be overlooked that the decision of the State Government as conveyed vide correspondence dated 9.6.2006 was not one-time measure but it was followed by similar policy decisions from time to time. In view of this, the respondents could not have been denied the right of consideration for regularization.

13. Learned Single Judge while taking note of all relevant aspect of the matter has rightly concluded that the retrenchment of respondents was *void-ab-initio* and accordingly directed not only reinstatement of the respondents but their regularization also w.e.f. the due applicable dates with all consequential benefits.

14. On the basis of aforesaid analysis, we do not find any reason to take a view different than the one taken by learned Single Judge. Accordingly, both the appeals are dismissed. Pending applications, if any, also stand disposed of.

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

Between:-

AMIT KUMAR SON OF SHRI RATTAN CHAND, AGED 39 YEARS, RESIDENT OF VILLAGE JHALWANI, POST OFFICE NARELI, TEHSIL AND DISTRICT HAMIRPUR, HIMACHAL PRADESH.

.....PETITIONER

(BY MR. K.D. SOOD, SENIOR ADVOCATE WITH MR. AJEET SINGH SAKLANI, ADVOCATE)

AND

ADITI SAREEN WIFE OF SHRI AMIT KUMAR AT PRESENT AT THE HOUSE OF HER MOTHER SMT. KIRAN SAREEN, WIDOW OF SHRI AMARJEET SINGH, RESIDENT OF VILLAGE SANARLI, POST OFFICE BHANTHAL, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

.....RESPONDENT

(NONE )

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 137 of 2021
Decided on: 24.05.2022

**Constitution of India, 1950**- Article 227- **Hindu Marriage Act, 1955**- Section 24- Ld. Principal Judge, Family Court ordered monthly maintenance of Rs.6500/- in favour of wife- Report of the Deputy Commissioner regarding properties and income of husband and his family was called- Held- Amount of maintenance awarded by the Ld. Court below is reasonable and there is no perversity in the impugned order- Petition dismissed. (Para 5)

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

**O R D E R**

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for setting aside of the order passed by the Court of learned Principal Judge, Family Court, Hamirpur, in CMP (HMA) No. 248 of 2020, filed in HMA No. 17 of 2018, titled as Aditi Sareen vs. Amit Kumar, dated 19.04.2021, in terms whereof an application filed by the respondent under Section 24 of the Hindu Marriage Act has been allowed by the learned Court below by ordering maintenance at the rate of Rs.6500/- per month in favour of the respondent/wife from the date of filing of the application till disposal of the main petition.

2. Mr. K.D. Sood, learned Senior Counsel appearing for the petitioner has argued that the order passed by learned Court below is not

sustainable in the eyes of law for the reason that while awarding the amount of Rs.6500/- per month, learned Court has not appreciated in the correct perspective the effect of the applicant already receiving an amount of Rs.1500/- per month as maintenance in the proceedings initiated by her under the provisions of the Protection of Women from Domestic Violence Act. Learned Senior Counsel has submitted that learned Court below has erred in not appreciating that monthly income of the petitioner was only Rs.12078/-, and in view thereof, the award of maintenance by the learned Court below was on the higher side. Accordingly, learned Senior Counsel has prayed that this petition be allowed and the order passed by learned Principal Judge, Family Court, Hamirpur, be set aside.

3. When this case was listed before the Court on 13.12.2021, the following order was passed:-

> *"The petitioner and the respondent are present in person in the Court. The Court has interacted with the respondent who has stated in the Court that the marriage solemnized between her and the petitioner was an arranged marriage. She hails from Karsog area in District Mandi, H.P., and is presently residing with her mother. She has further stated in the Court that her father was serving in the Forest Department and he died in harness as a Deputy Ranger and presently, the source of income of her mother is the family pension which she is getting in lieu of the service rendered by her father in the Forest Department. On a query put to her by the Court, she stated that she has no independent source of income. She has no brother(s). She stated that they are three sisters two of whom are married. She further informed the Court that at the time of marriage, her family was informed by the family of the petitioner that the petitioner was having business of cosmetic. She further stated in the Court that as per her information, the petitioner/family of the petitioner possesses sufficient landed property. They have their own Mall(s) in Hamirpur near the vicinity of Ghandhi Chowk. They also have their own shop(s) in Ghandhi Chowk. She also stated that she*

*resided with the petitioner as his wife in a joint family set up and the home of the petitioner (ancestral home) is also joint. She also stated that the family of the petitioner owns sufficient land in the village also. On the other hand, the petitioner has refuted the said contentions which have been made by the respondent.*

*Be that as it may, as this Court of the considered view that before any endeavour is made to have the matter amicably settled between the parties, it is necessary to find out the financial worth of the petitioner, accordingly, Deputy Commissioner, Hamirpur is directed to have the property of the family of the petitioner identified. The property which has to be identified will not only be that which is owned by the petitioner but also which is owned and possessed by his father and his grandfather. It will also include property owned and possessed by his brothers. The report of the Deputy Commissioner shall specifically spell out as to whether the properties which are possessed by the brothers of the petitioner are self acquired properties or ancestral in nature. The value of the said properties be also informed to the Court. In addition, the details of the bank accounts of the family members of the petitioner shall also be intimated to the Court.*

*List on* ***27.12.2021****, on which date, parties shall remain present in person."*

4. In compliance to this order, report of the Deputy Commissioner, District Hamirpur, is on record. A perusal of the report demonstrates that the petitioner hails from a well off family. His father and grand-father own reasonable landed property, and in addition, family members of the petitioner as well as the petitioner himself is financially well off. In terms of said report, the value of the property of the grand-father of the petitioner is worth amount Rs.90.00 Lac. Further as per the report, the annual income of the family members of the petitioner as per ITRs is as under:-

| Sr. No. | Name of family member of petitioner | Annual income as per ITR |
|---|---|---|
| 1. | Rattan Chand s/o Sh. Babu Ram | 4,82,690/- |

| | | |
|---|---|---|
| 2. | Sushma Devi w/o Sh. Rattan Chand | 4,55,900/- |
| 3. | Amit Kumar S/o Sh. Rattan Chand | 1,98,990/- |
| 4. | Aman Kumar S/o Sh. Rattan Chand | 6,07,790/- |
| 5. | Tapinder Kumar S/o Sh. Rattan Chand | 5,68,000/- |
| 6. | Ankuj Kumara S/o Rattan Chand | 4,23,220/- |

5. In this background, when one goes through the impugned order passed by learned Principal Judge, Family Court, Hamirpur, the same demonstrates that in para-9 of the order, learned Court has taken into consideration the contents of the affidavit which stood filed by the present petitioner before the said Court, wherein the petitioner was stated to have raised loans almost to the tune of Rs.20.00 Lac. Learned Court below also took into consideration the fact that as per income tax return for the year 2017-18 submitted by the petitioner, the gross total income of his was reflected Rs.3,40,413/- and in terms of income tax return filed by him for the year 2018-19, the total income reflected was Rs.3,45,625/-. The possibility of the petitioner now intentionally reflecting his annual income on the lower side due to the matrimonial discord cannot be ruled out. In this background, this Court is of the considered view that award of maintenance, which has been granted by the learned Court below in favour of the respondent, i.e. Rs.6500/- per month, cannot be said to be on the higher side. In addition, it is not as if the learned Court below has not taken into consideration the quantum of maintenance, which has been awarded in favour of the respondent/applicant in the proceedings initiated under the Protection of Women from Domestic Violence Act. After taking into consideration the amount which was ordered to be paid in the said proceedings, learned Principal Judge, Family Court, Hamirpur, observed that keeping in view the income of the husband, the applicant/wife was at least entitled for maintenance of Rs.8000/- per month

and after deducting an amount of Rs.1500/- which she was already getting, further a sum of Rs.6500/- per month was being ordered to be paid in favour of the respondent-wife. Therefore, as this Court does not finds any perversity with the impugned order, and further as this Court is convinced that the amount which has been awarded by the learned Court below is reasonable, this petition being devoid of merit is dismissed.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to costs.

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

Between:-

SMT. KAMLA DEVI W/O SH. SUNDER LAL, R/O GOPAL BHAWAN, MIDDLE SHANKLI, TEHSIL AND DISTT. SHIMLA, H.P.

…….APPELLANT

(BY MR. V.S. CHAUHAN, SENIOR ADVOCATE
WITH MR. AJAY SINGH KASHYAP, ADVOCATE)

AND

1. BANSAL ROADWAYS PRIVATE LIMITED THROUGH SH. SANJAY BANSAL, R/O HOUSE NO. 525, AHATA MURARI LAL, MAIN BAZAR, KALKA HARYANA, (OWNER OF TRUCK NO. HR-03-3355)
2. SH. NEW INDIA INSURANCE COMPANY LIMITED, THROUGH ITS DIVISIONAL MANAGER, KALKA, DISTRICT PANCHKULA, HARYANA.
3. NEW INDIA INSUANCE COMPANY LIMITED SDA COMPLEX, KASUMPATI, SHIMLA, H.P. THROUGH ITS DIVISIONAL MANAGER.

……..RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE WITH
MR. SUMIT HIMALVI, ADVOCATE FOR RESPONDENT
NO. 2 AND 3;
NONE FOR RESPONDENT NO. 1)

FIRST APPEAL FROM ORDER

No. 426 OF 2012
Decided on: 27.05.2022

**Motor Vehicle Act, 1988**- Sections 163A and 140- Appeal against the dismissal of claim petition under Section 163 of Motor Vehicle Act- Held- Someone who has preferred a petition under Section 140 of the Motor Vehicles Act cannot prefer another petition under Section 163A of the Act and vice versa- Petition dismissed. (Para 7)

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

**J U D G E M E N T**

By way of this appeal, the appellant has challenged the award passed by the Court of learned Motor Accident Claims Tribunal, Shimla, H.P. in MACC No. 12-S/2 of 2009, titled Smt. Kamla Devi vs. Bansal Roadways Private Limited and others, dated 31.08.2012, in terms whereof the claim petition filed by the present appellant under Section 163-A of the Motor Vehicles Act has been dismissed by the learned Tribunal in the following terms:-

> *"In view of my findings on issues No. 1 to 8 above it is held that subsequent petition under Section 163A of Motor Vehicles Act is not maintainable in view of the fact that permission to convert former petitioner filed under Section 166 of Motor Vehicles Act qua same accident bearing No. 30/2 of 1997 titled Kamla Devi versus Ram Krishan into petition under Section 163A of Motor Vehicles Act was declined by the Tribunal vide order dated 23.12.2005 and it is held that order dated 23.12.2005 announced upon application under Order 6 Rule 17 C.P.C. in former M.A.C.T. No. 30-S/2 of 1997 has attained age of finality and petitioner has received Rs. 50,000/- in form claim petition. Parties are left to bear their own costs. Memo of costs be drawn accordingly. File after due completion be consigned to record-room."*

2. I have heard learned Senior Counsel appearing for the parties and also gone through the impugned award as well as other relevant record.

3. The petition which stands rejected of the present appellant is one filed under Section 163A of the Motor Vehicles Act in terms whereof the appellant was seeking compensation on account of death of one Shri Rajesh Kumar, son of the appellant, who lost his life while driving vehicle bearing No. HR 03-3355 near village Mansa, District Kurukshetra, HR, on 28.11.1996 when Truck being driven by the deceased was hit by another truck coming from the opposite side bearing No. DIG 1133. It is necessary to state that whereas the accident took place on 28.11.21996, the son of the appellant, who was gravely injured in the accident, succumbed to his injuries in PGI, Chandigarh on 23.12.1996. At the time of his death, according to the appellant, the age of the deceased was 19 years and 8 months and he was serving as a Driver, whose monthly income was Rs. 2000/-.

4. To cut the controversy short, the petition so filed by the petitioner has been rejected by learned Tribunal *inter alia* on the ground that the application bearing No. 30-S/2 of 1997, titled as Kamla Devi vs. Ram Krishan preferred for converting proceedings initiated under Section 166 of the Motor Vehicles Act with regard to the accident, into a petition under Section 163A of the Motor Vehicles Act was rejected by the learned Tribunal on 23.12.2005 in terms of the reasons assigned therein and further as the appellant had earlier also filed an application under Section 140 of the Motor Vehicles Act, in which, compensation was granted in favour of the appellant, therefore, subsequent application filed under Section 163A of the Motor Vehicles Act was not maintainable.

5. At this stage, it is necessary to take note of the fact that Mr. V.S. Chauhan, learned Senior Counsel appearing for the appellant has argued that though it is a matter of record that an application filed by the petitioner under Section 140 of the Motor Vehicles Act for the same accident but after the grant

of compensation therein, according to him, an application was filed by the Insurance Company for refund of the amount which so stood awarded.

6. Section 163-B of the Motor Vehicles Act reads as under:-

> ***"163B. Option to file claim in certain cases***
>
> *Where a person is entitled to claim compensation under Section 140 and section 163A, he shall file the claim under either of the said sections and not under both."*

7. During the course of hearing, learned Senior Counsel appearing for the appellant has fairly stated that the factum of an application having been filed under Section 140 of the Motor Vehicles Act by the appellant is a matter of record and he does not disputes the same. As far as his contention that the Insurance Company having moved an application for refund of the amount, entitles the petitioner/ appellant herein to maintain the petition under Section 163-A of the Motor Vehicles Act is concerned, this Court is of the view that the said contention is not acceptable in law. The provisions of Section 163B of the Motor Vehicles Act already stand mentioned hereinabove. Said statutory provisions are explicitly clear that where a person is entitled to claim compensation under Sections 140 and 163A of the Motor Vehicles Act, he shall file claim under either of the said Sections and not under both. That being the case, once the appellant exhausted her remedy by filing an application under Section 140 of the Motor Vehicles Act, the subsequent application filed under Section 163A of the said Act is not maintainable *per se* and is statutorily barred. The Court impresses that fate of the application is immaterial. In other words, the mere filing of the petition, may be under Section 140 or 163A of the Motor Vehicles Act, by a claimant debars such a claimant thereafter to file a subsequent petition. Meaning thereby that someone who has preferred a petition under Section 140 of the Motor Vehicles Act cannot prefer another petition under Section 163A of the Act and vice versa. As far as the application having been filed by the Insurance Company for refund of the amount is concerned, all that this Court can observe is this

that the claimant can agitate the request so made by the Insurance Company and resist the prayer that has been so made by the Insurance Company. However, simply because a prayer has been made by the Insurance Company for refund of the amount, the same in the considered view of this Court will not confer a right upon the petitioner to file and maintain a petition under Section 163-A of the Act after the petitioner already exhausted the remedy available under Section 140 of the same.

In view of the findings returned hereinabove, the petition which was preferred by the petitioner under Section 163-A of the Act in no way was maintainable, and accordingly, this appeal is dismissed without interfering with the order passed by learned Court below. Pending miscellaneous application(s), if any, also stands disposed of accordingly.

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

Between:-

SARUP CHAND, S/O SHRI KHUSHIA RAM, AGED 61 YEARS, R/O VILLAGE SAMKAR, PO DHAMETA, TEHSIL FATEHPUR, DISTT. KANGRA, H.P.

.....PETITIONER

(BY MR. JIYA LAL BHARDWAJ, ADVOCATE)

AND

SHRI SARDUL SINGH, S/O SHRI CHUNI LAL, R/O VILLAGE SAMKAR, PO DHAMETA, TEHSIL FATEHPUR, DISTT. KANGRA.

.....RESPONDENT

(*EX PARTE* )

CIVIL MISC. PETITION MAIN (ORIGINAL)

No. 335 of 2021
Decided on: 30.05.2022

**Constitution of India, 1950**- Article 227- **Code of Civil Procedure, 1908**- Order 39 Rule 1 and 2- Section 151- Police assistance- Implementation of ex-parte order- Held- Impugned order has been passed by Ld. Court below without due application of judicial mind- Impugned order not sustainable- Petition allowed with direction to decide afresh as per law. (Para 6 to 8)

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

**O R D E R**

By way of this petition, the petitioner has challenged the order passed by the Court of learned Civil Judge (Jr. Divn.), Jawali, District Kangra, H.P. in CMA No. 174/2021, dated 22.07.2021, vide which, an application filed by the applicant seeking police assistance for implementation and enforcement of order passed by learned Court below on an application preferred under Order 39, Rules 1 and 2 of the Code of Civil Procedure, which stood allowed on 06.11.2019, has been rejected.

2. As respondent did not put in appearance despite service, accordingly, he was proceeded against *ex parte* vide order dated 30.03.2022.

3. Mr. Jiya Lal Bhardwaj, learned Counsel for the petitioner has submitted that it is not as if as a matter of right, a party, which has an order in its favour in an application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, can seek police assistance but then, in case, a party does approaches the Court of law for the grant of police assistance, then, the circumstances, in which, said relief is being sought, has to be gone into by the Court, so also the conduct of the respondent/ defendant. He has submitted that the findings which have been returned by the learned Court below while rejecting the application of the petitioner seeking police assistance are not sustainable in the eyes of law for the simple reason that the learned

Court below erred in not appreciating the very fact that in the reply which was filed to the said application by the respondent, even the passing of order under Order 39, Rules 1 and 2 of the Civil Procedure Code was denied by the respondent/defendant. The same *ex facie* demonstrated the conduct of the respondent/defendant and this extremely important aspect of the matter has not been gone into by the learned Court below while dismissing the application filed by the petitioner.

4. Having heard Mr. Jiya Lal Bhardwaj, learned Counsel for the petitioner and having carefully perused the averments made in the petition as well as documents appended therewith, this Court concurs with the submissions made by Mr. Jiya Lal Bhardwaj, learned Counsel that the order passed by learned Court below is not sustainable as the same has not taken into consideration, the stand taken by the respondent in the reply filed by it to the application preferred under Section 151 of the Code of Civil Procedure, seeking police assistance in the right perspective. A perusal of the application which was filed under Section 151 of the Code of Civil Procedure seeking police assistance demonstrates that it was mentioned therein that after the orders were passed in favour of the petitioner/plaintiff on 06.11.2019, in an application preferred under Order 39, Rules 1 and 2 of the CPC, the respondent, who was having full knowledge of the order, was neither abiding by the same nor he was permitting the applicant/plaintiff to pass through the 2 Metre path in terms of interim order passed by learned Court below. It was in this background that police assistance was sought so that the order passed by the learned Court below could be given effect to in letter and spirit. Reply filed to the said application, which is on record as Annexure P-5, demonstrates that in para-1 of reply on merits, it stood mentioned that it was wrong and denied that respondent was restrained from blocking 2 metres path in the site plan reflected as 'ABCD' by way of construction and it was further

averred by the respondent that the learned Court had not granted any relief in respect of claimed path.

5. A perusal of the order passed by learned Court below in the application filed under Order 39, Rules 1 and 2 of the CPC demonstrates that the same was disposed of by the learned Court below by passing the following Order:-

> *"5. From the perusal of Sale Deed bearing Document No. 438/10 dated 16-07-2010, it is evident that 2 meter wide path has been agreed by the respondent to be given for ingress & outgress to the applicant, whereas respondent is denying this specific clause, but has not been denied the alleged Sale Deed in whole. Therefore, at this stage, prima-facie case has been made out in favour of the applicant, balance of convenience also lies in favour of the applicant. If some effective orders are not passed, then, the applicant shall suffer irreparable loss.*
>
> *6. Keeping in view of my aforesaid discussion, application is partly allowed and the respondent is restrained from blocking 2 Meter path shown in the site plan ABCD by way of construction or in any manner comprised in Khara No. 265 min, Khatauni No. situated in Mohal Samkar, Tehsil Fatehpur, Distt. Kangra-H.P. vide jamabandi for the year 2013-2014, till final disposal of the main suit. However, the respondent is free to enjoy the remaining land. Further, it is clarified that observations made by me herein-in-above, shall construe to be confined to the disposal of the present application and shall have no bearing on the merits of the main suit.*
>
> *7. Application U/O 39, Rules 1 & 2 of CPC bearing CMA No. 169/2017 (CIS No. 120/2017) is disposed off. It be tagged with main case file, after its due completion/registration."*

6. Whether or not the petitioner had made out a case for the grant of police assistance, but natural, was a matter, call upon which was to be taken by the learned Court below but then this Court is of the considered view that the same ought to have been done by the Court by taking into consideration the pleadings of the parties as well as arguments raised before

it. In the present case, learned Court below has observed that the respondent had denied disobedience of the Court order and existence of path on the spot. But it erred in not appreciating as to what relief stood granted to the petitioner in the application filed under Order 39, Rules 1 and 2 of the CPC by the same Court, relevant portion whereof has been quoted hereinabove. This demonstrates that the impugned order has been passed by the learned Court below without due application of judicial mind.

7. The impugned order neither discussed the direction which stood passed in the order, which was passed in the application filed for interim relief, nor as mentioned above, the response of the respondent was construed in the correct perspective. In the light of above, the impugned order is not sustainable in the eyes of law. In fact, while returning findings in para-5 of the impugned order that the applicant had failed to prove the alleged blockage of path by the respondent on the spot after the grant of injunction/stay order, learned Court erred in not referring to the reply of the respondent filed to the application seeking police assistance wherein said respondent had denied the grant of any interim relief in favour of the petitioner. The above in the considered view of this Court has caused prejudice to the present petitioner.

8. Accordingly, this petition is allowed and the impugned order is set aside with the direction to the learned Court below to revive the application which was filed before it by the present petitioner under Section 151 of the Code of Civil Procedure seeking police assistance for the implementation and enforcement of order dated 06.11.2019 with further direction to decide the same as per law in terms of the pleadings of the parties. It is made clear that while disposing of this petition, this Court has not made any observation on the merit of the application and the same be decided by the learned Court below uninfluenced of the observations made by this Court in this order but by basing its findings on the contents of the order, implementation of which is being sought by way of police assistance as well as respective stands of the

parties. As only hearing has to be given to the parties for the purpose of deciding the application, therefore, the application be disposed of by the learned Court below on or before 31st of August, 2022.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to costs.

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

Between:-

RAMESH CHHABRA S/O LATE SH. KESAR MUL CHHABRA RESIDENT OF FIRST FLOOR, 105-A, KRISHNA NAGAR, SHIMLA, H.P.

.....PETITIONER

(BY MR. R.K. BAWA, SENIOR ADVOCATE WITH MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

SH. HARMINDER SINGH S/O LATE SH. CHAMAN SINGH RESIDENT OF 105-A, KRISHAN NAGAAR, SHIMLA, H.P. THROUGH HIS SPA MANVINDER KAUR W/O SH. HARMINDER SINGH, RESIDENT OF 105-A, KRISHAN NAGAR, SHIMLA, H.P.

.....RESPONDENT

(MR. ARUN KUMAR, ADVOCATE )

CIVIL REVISION
No. 221 OF 2018
Decided on: 31.03.2022

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Ld. Rent Controller decided the issue of maintainability against the tenant and in favour of landlord- Held- Code of Civil Procedure are stricto senso not applicable as far

as rent proceedings are concerned- Revision maintainable- The intent of the landlord that the premises in fact was needed to be used as a godown could not have been ignored – Findings of Ld. Rent Controller are perverse and erroneous- Petition allowed. (Para 10, 14)

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

**J U D G E M E N T**

By way of this civil revision petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act, 1987, the petitioner herein has assailed order dated 25th September, 2018, passed by the Court of learned Rent Controller, Shimla, at Shimla, in Rent Petition No. 6-2 of 2018/14, vide which, prilimnary Issue No. 1 framed by learned Rent Controller as to 'whether the rent petition was maintainable or not' stands decided against the present petitioner, i.e. tenant and in favour of the respondent herein, i.e. landlord.

2. Brief facts necessary for the adjudication of the present petition are that an application for eviction of the present petitioner (hereinafter to be referred as the 'tenant') was filed by the respondent herein under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter to be referred to as '1987 Act'). The ground on which the eviction has been sought, as contained in para 18(a) of the rent petition, are reproduced herein below:-

| | | |
|---|---|---|
| 18(a) | Grounds on which the eviction is sought. | (1) The petitioner bonafidely required the premises in occupation of the tenant for the purpose of godown-cum-office. In fact the petitioner is running a shoe business since 1960 in the name and style of M/s Jai Hind Shoes situated at 31, Lower Bazaar, Shimla, H.P. The business is both type i.e. |

| | | |
|---|---|---|
| | | wholesaler as well as retailer. The petitioner has a warehouse for the aforesaid business at Godown 105, Krishna Nagar, Shimla, H.P. This godown is on the roof of the building, having tin structure and is not in good condition. All the manufactured material which the petitioner purchased from various companies, kept in this godown. As the business of petitioner is expanding, this godown is falling short for the material and nowadays the petitioner has to keep his manufactured material at veranda of the first floor of his building. As mentioned supra, the godown is having tin structure, therefore a person cannot sit in this godown. Because the business of petitioner is expending, therefore, he bonafidely requires the premises in occupation of the tenant for the purpose of godown-cum-office so that a person can permanently sit there and watch, how much material is coming and how much material is supplied to other and also maintain accounts of the stock. It is further submitted that it is the only largest space available with the petitioner.<br>(2) The petitioner is not occupying any other residential and non-residential building owned by him in the Urban Area nor he has vacated any such building without sufficient cause within five years of the filing of the application. |

3. By way of the reply which was filed to the rent petition, various preliminary objections were taken with regard to the maintainability of the rent petition, which included preliminary objection No. 1, which reads as under:-

> *"1. That the petition, as framed, is not at all maintainable. There is no provision in the HP Urban Rent Control Act, 1987 as amended upto date, for personal use of residential premises for non-residential (i.e. Godown-cum-office) purpose."*

4. During the pendency of the matter before the learned Rent Controller, Court No. 3, Shimla, on 25th July, 2018, the following order was passed:-

> *"Inadvertently the preliminary issues on the last date of hearing could not be framed and the case was listed for the evidence straightway. Therefore, the following issues require consideration before other issues are taking.*
>
> *1. Whether the petition is not maintainable as there is no provision in the H.P. Rent Control Act for personal use of residential premises for non-residential purpose i.e. godown cum office, alleged?OPP*
>
> *2. Whether the petition is bad for non-joinder of LR of Lt Sh. Kesarmall the tenant, as alleged? OPP*
>
> *3. Relief.*
>
> *Let the consideration on both the issues be conducted on the next date of hearing by both the parties on 18.08.2018."*

5. Upon consideration, learned Rent Controller not being satisfied with the objections so raised by the tenant, passed order dated 25.09.2018, rejecting preliminary issues. Feeling aggrieved, the tenant has preferred the present revision petition.

6. Mr. R.K. Bawa, learned Senior Counsel appearing for the petitioner/tenant has argued that the impugned order passed by learned Rent Controller, especially with regard to preliminary Issue No. 1, is not sustainable in the eyes of law for the reason that while passing the impugned order, learned Rent Controller has erred in not appreciating the statutory provisions of Section 14(3)(d) of the Act, perusal whereof makes it evident that eviction of a tenant from residential premises cannot be sought for use thereof for non-residential purposes, except for purposes specifically contained in Section 14(3) (d). Learned Senior Counsel has submitted that as requirement specified in the rent petition by the landlord was not in terms of what is provided in

Section 14(3)(d) of the 1987 Act, the preliminary objection No. 1 taken by the petitioner before the Rent Controller, could not have been dismissed by the said Court and dismissal of the same is an act of perversity which requires to be set aside by this Court by invoking its powers of revision. Learned Senior Counsel has also argued that otherwise also the impugned order is not sustainable in the eyes of law as the learned Rent Controller has erred in not appreciating that in terms of the provisions of Section 12 of the 1987 Act, residential premises cannot be permitted to be used for non-residential purpose, except with the written permission of the Collector and the present landlord was not having any such permission. It is primarily on these bases that the impugned order stands assailed by the petitioner.

7. Defending the order passed by learned Rent Controller, Mr. Arun Kumar, learned Counsel for the respondent-landlord has argued that there is no bar in Section 14(3)(d) of the Act that the owner of the residential premises cannot pray for eviction of a tenant on the ground that he wants to use the residential premises for non-residential purposes. Learned Counsel has argued that language of Clause (d) of Section 14(3) itself is self speaking that in case, landlord requires the residential premises for use as an office etc. then, he can do so and in the present case, the requirement, as was put forth by the landlord, was for the use of the demised premises as "**godown-cum-office"**, and in this background, the order under challenge cannot be faulted with and the present revision being devoid of merit deserves to be dismissed. Learned Counsel has also taken an objection with regard to the maintainability of the revision petition on the ground that the revision which has been preferred against the order impugned by the petitioner is not maintainable in view of remedy of appeal available to him. He has argued that as the order impugned rejects the prayer of the tenant for dismissal of the rent petition on the ground of same being not maintainable, then against said order, an appeal lyes and not a revision petition.

8. Controverting the argument so addressed by learned Counsel for the respondent, learned Senior Counsel appearing for the petitioner-tenant has drawn the attention of the Court to the three Judge judgment passed by this Court in Cr. No. 136 of 2010, titled as Shri Vinod alias Raja vs. Smt. Joginder Kaur, decided on 5th July, 2012, and on the strength of the findings returned in the said judgment, learned Senior Counsel has argued that the law as it stands is that at the behest of any person aggrieved by an order which finally decides his fate in the case, for which appellate authority is not provided in the notification issued by the government under Section 24(1) of the Himachal Pradesh Urban Rent Control Act, 1987, an appeal is maintainable as per the scheme of the Civil Procedure Code, until otherwise specified by the government by way of an appropriate notification, and in all other cases, the aggrieved party has to file the revision petition. As per him, as in the present case, the order passed by learned Rent Controller rejected the preliminary issues, therefore, as no right of appeal is available against such an order, the revision petition was rightly filed by the petitioner-tenant.

9. I have heard learned Counsel for the parties and have gone through the order impugned as well as the documents appended with the petition.

10. In the present case, the order under challenge is one, which has rejected the preliminary objection raised by the tenant with regard to non maintainability of the rent petition. Though, this Court is aware that the provisions of the Code of Civil Procedure are *stricto senso* not applicable as far as rent proceedings are concerned but taking a cue from what is contained under Section 115 of the Civil Procedure Code, this Court has no hesitation in holding that against an order vide which a preliminary objection has been rejected by the learned Rent Controller, a revision would be maintainable and not an appeal. This Court places reliance upon the judgment which has been passed by Hon'ble Coordinate Bench of this Court in C.R. No. 3 of 2011, titled

as **Rajesh @ Raju** vs **Shri Dayawant Singh and another**, decided on 26.11.2018, in which in paras 11 and 12 thereof, Hon'ble Coordinate Bench has been pleased to hold as under:-

> *11. An order passed under the provisions of Order IX Rule 8 CPC decides the fate of the person aggrieved finally. Since in the notification, as discussed hereinabove, there exists no provisions to challenge an order of this nature and as the impugned order has decided the fate of the rent petition finally, therefore, in view of the law laid down by the Full Bench of this Court in Vinod's case cited supra, learned Appellate Authority has not committed any illegality or irregularity in entertaining the appeal. The contentions to the contrary brought to this Court in the present petition are not legally sustainable.*
>
> *12. It is worth mentioning that the rules of procedure being hand made are meant for advancement of justice and not to thwart it. When by way of notification the forum to challenge an order dismissing the rent petition in default has not been provided by the legislature, therefore, the petitioner-landlord has rightly preferred the appeal under the Scheme of the Civil Procedure Code as per the law laid down by the Full Court in Vinod's case cited supra."*

In this case, as the order impugned did not finally decide the fate of the rent petition, therefore, but natural, the same could have been assailed by way of a revision petition, as has been done by the tenant.

11. This Court is further placing reliance upon judgment passed by Hon'ble Full Bench of this Court in Vinod alias Raja vs. Smt. Joginder Kaur (supra) , in which, the issue of 'which order can be appealed and which order can be revised' has been thoroughly discussed by Hon'ble Full Bench and the conclusions arrived at therein are as under:-

> *"30. Wherever a right is provided by a statute, a remedy though not expressly provided for, may necessarily be implied. Whenever there is a right, there should also be an action for its enforcement and the legal procedure should be sufficiently elastic and comprehensive to afford the requisite means for the protection of the rights which the law has recognized, as held by the apex Court in Constitution Bench decision in Makhan*

*Singh Tarsikka versus The State of Punjab, reported in AIR 1964 SC 381.*

*31. Guided thus by the salutary and first principles in the matter as above, we hold that any person aggrieved by an order which finally decides his fate in the case for which appellate authority is not otherwise provided in the notification issued by the government under Section 24(1) of the Himachal Pradesh Urban Rent Control Act, 1987, an appeal is maintainable as per the scheme of the Civil Procedure Code, until otherwise specified by the government by way the government by way of an appropriate notification."*

12. In this view of the matter, this Court holds that there is no merit in the objection taken by learned Counsel for the respondent that proceedings initiated against impugned order by way of revision petition are not maintainable.

13. Now coming to the merits of the case. I have already quoted the contents of para 18(a) of the rent petition hereinabove, perusal of which demonstrates that the possession of the demised premises was sought by the respondent herein for the purpose of using the same as a godown-cum-office. The contention of the landlord, as is borne out from the averments made out in the rent petition, was to the effect that the landlord was running a shoe business since 1960, both as a wholesaler and as a retailer and he had a warehouse for the aforesaid business, which now no more was in good condition and as the business of the petitioner was expanding and godown in issue was falling short, therefore, the demised premises were required by the landlord for the purpose of using the same as 'godown-cum-office. While dismissing the preliminary objection taken by the tenant qua the maintainability of the rent petition, learned Rent Controller held that Section 14(3)(d) of the 1987 Act clearly states that any residential property can be used for the purpose of office, consulting room for starting practice as a Lawyer and such like profession and if the petitioner has not acquired any other building for the use as an office, then, starting up a business or any

other profession and using any building as an office was duly covered under the provisions of the Act and make out a ground of eviction by law. It is by assigning these findings that the preliminary objection has been dismissed.

14. In terms of the provisions of Section 14(3)(d) of the 1987 Act, a landlord may apply to the controller for an order directing the tenant to put the landlord in possession in the case of any residential or non-residential building, if he requires it for use as an office or consulting room by his son who intends to start practice as a Lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner, including a practitioner of Ayurvedic Unani or Homeopathic System of Medicine or for the residence of his son who is married. This of course is subject to the subsequent statutory provisions contained therein. A bare reading of the said statutory clause demonstrates that a residential or for that purpose even a non-residential building can be got vacated by a landlord if he requires the same for use as an office, architect, dentist etc. as stands explicitly spelled out in this particular clause. Incidentally, the purposes which have been spelled out in this particular clause are the only purposes for which the premises can be got vacated. It is not as if the purposes are only illustrative. In view of this, in terms of Section 14(3)(d), a residential premises or may be a non-residential premises, if they are required to be vacated under this particular clause can be got vacated only for the purposes which are specified therein. Now if we compare the content of the provisions of Section 14(3)(d) either with the grounds mentioned in para 18(a) of the rent petition preferred by the landlord or the reasons which have been assigned by the Rent Controller while dismissing the preliminary objections, one finds that the learned Rent Controller has erred in not appreciating that the provisons of Section 14(3)(d) of the 1987 Act could not have been invoked by a landlord for getting a residential premises vacated for using the same as a godown. Simply by mentioning that the same was required for "**office-cum-godown**", the intent of

the landlord that the premises in fact was needed to be used as a godown could not have been ignored. Not only this, there is further a perversity in the findings which have been returned by learned Rent Controller and the same is that the conclusion drawn by the learned Rent Controller that in terms of provisions of Section 14(3)(d) of the 1987 Act, the demised premises can be got vacated for starting up a business or any profession is completely erroneous. In fact, these findings do violence to the language of Section 14(3)(d) of the 1987 Act, which specifically culls out the purposes for which the premises can be got vacated by invoking the provisions of the 14(3)(d) of the 1987 Act.

15. Accordingly, in view of what has been held hereinabove, the present petition is allowed by setting aside order dated 25.09.2018, passed by learned Rent Controller, Court No. 3, Shimla, and the preliminary objection No. 1 is upheld by holding that the rent petition filed by the petitioner seeking eviction of the tenant for personal use of residential premises for non-residential purpose, i.e. godown-cum-office, is not maintainable.

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

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

Between:-

1. RAJ KUMAR @ RAJ S/O SHAM LAL, R/O VILLAGE CHUHARPUR, TEHSIL INDORA, DISTRICT KANGRA (HP) POLICE STATION INDORA, DISTRICT KANGRA, H.P. AGED ABOUT 36 YEARS.

2. JEET SINGH @ FAUB S/O PREM CHAND, R/O VILLAGE CHUHARPUR, TEHSIL INDORA, DISTRICT KANGRA (HP) POLICE STATION INDORA, DISTRICT KANGRA, H.P. AGED ABOUT 38 YEARS.

3. VICKA S/O PREM CHAND R/O VILLAGE CHUHARPUR, TEHSIL INDORA, DISTRICT KANGRA (HP) POLICE STATION INDORA, DISTRICT KANGRA, H.P. AGED ABOUT 36 YEARS.

…….PETITIONERS

(BY MR. VIKAS RAJPUT, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THOUGH ADDITIONAL CHIEF SECRETARY (HOME) TO THE GOVERNMENT OF H.P. SHIMLA-2.
2. JAGDISH CHAND S/O SH. SOM RAJ, R/O VILLAGE CHUHARPUR, TEHSIL INDORA, DISTRICT KANGRA (HP) POLICE STATION INDORA, DISTRICT KANGRA, H.P.

……..RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENEAL FOR R-1.
MR. SANJEEV KUMAR AND ROHIT MANHAS, ADVOCATES FOR R-2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 393 OF 2022
Decided on: 15.06.2022

**Code of Criminal Procedure, 1973**- Section 482- Quashing of FIR as well as judgment of Ld. Judicial Magistrate First Class, Indora- Amicable settlement between the parties- Held- Fuided by the principles laid down by Hon'ble Supreme Court of India in Ramgopal's case (supra), this petition is allowed. (Para 8, 9)

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

**O R D E R**

SI Liyakat Ali, IO Police Station Indora, present in person.

2. By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioners have prayed for the following reliefs:-

> *"It is, therefore, most respectfully prayed that this petition may kindly be allowed and F.I.R. No. 246/2008 dated 06-11-2008 registered under Sections 341, 323, 324, 325 and 34 of the IPC at Police Station Indora, District Kangra, (H.P.) as well as judgment dated 01.11.2014 passed by the Ld. JMIC, Indora, District Kangra (HP) may kindly be quashed/set aside in the interest of law, equity and justice."*

3. On the basis of FIR No. 246/08, dated 6.11.2008, registered at Police Station Indora, District Kangra, at the behest of complainant/respondent No. 2 Jagdish Chand, the petitioners were tried for the commission of offences punishable under Sections 341, 323, 324 and 325, read with Section 34 of the Indian Penal Code and in terms of the judgment passed by the Court of learned Judicial Magistrate 1st Class, Indora, District Kangra, in Criminal Case No. 93-II/2009, titled as State vs. Raj Kumar and others, dated 01.11.2014, the petitioners were convicted for the commission of offences punishable under Section 341, 323, 324 and 325 read with Section 34 of the Indian Penal Code.

4. The sentence so imposed upon the petitioners has been assailed by the petitioners before the learned Appellate Court and the appeal is stated to be pending adjudication. The petitioners submitted that in the meanwhile, the issue which led to registration of the FIR and ensuing trial, which led to their conviction, stands amicably settled between them and the complainant. To demonstrate this fact, a copy of the compromise deed, which has been entered into between the complainant and the petitioners, has been appended with the petition as Annexure P-3.

5. After service, the complainant/respondent No. 2 has appeared in the Court today. His statement has been separately recorded in the Court wherein he has acknowledged the execution of the compromise deed and also deposed in the Court that he has no objection in case this petition is allowed

and the FIR is quashed and set aside and judgment of conviction passed against the petitioners by learned JMIC, Idora, is also ordered to be set aside.

6. Learned Additional Advocate General has also very fairly submitted that as the parties have amicably settled the matter between them and as they intend to live in peace and harmony, the respondent-State in the peculiar facts of this case, has no objection in case this petition is allowed vis-à-vis the prayer made by the petitioners by way of present petition.

7. Having heard learned Counsel for both the parties and having gone through the pleadings well as documents appended therewith, as well as statement which has been made by the complainant before the Court, this Court is of the Considered view that this is a fit case wherein this Court should exercise its inherent jurisdiction so vested in it under Section 482 of the Code of Criminal Procedure, more so, in light of law which has been laid down by Hon'ble Supreme Court of India in Ramgopal & Anr. Versus The State of Madhya Pradesh (Criminal Appeal No. 1489 of 2012), decided on 29.09.2021 and another connected matter, in which, Hon'ble Supreme Court of India has been pleased to hold that extraordinary power enjoyed by High Court under Section 482 of the Code of Criminal Procedure, ought to be exercised by the Court in the context of quashing of the criminal proceedings bearing in mind:(i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim and (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations. Hon'ble Supreme Court has been further pleased to hold in this case itself that in cases where compromise is struck post conviction, the High Court ought to exercise such discretion with rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at and with due regard to

the nature and seriousness of the offence, besides the conduct of the accused, before and after the incidence.

8. Coming to the facts of this case, the Court has been informed that the incident took place when the complainant had gone to the market for the purchase of household articles when he was allegedly attacked by the accused. Learned Additional Advocate General has informed the Court that as per his instructions, besides the FIR which stood lodged against the present petitioners by respondent No. 2 herein, previously the petitioners were not having any criminal history and even after lodging of the FIR, they have not been found to be involved in any other criminal act. Not only this, the Court has been informed that the matter has been got compromised between the parties by the elders of the village as well as Panchayat and as the petitioners and respondent No. 2/complainant happen to be the residents of the same village, they have taken a conscious decision to bury their differences so that they can live in peace and harmony with each other.

9. In these circumstances, guided by the principles which have been laid down by Hon'ble Supreme Court of India in Ramgopal's case (supra), this petition is allowed and the FIR No. 246/2008, dated 06.11.2008, registered at Police Station Indora, under Section 342, 323, 324, 325, read with Section 34 of the Indian Penal Code as well as judgment of conviction passed against the petitioners by the Court of learned JMIC, Indora, is ordered to be quashed and set aside. The petitioners shall be at liberty to place a copy of this order in the record of the appeal which is pending adjudication and on the strength of this order, learned Appellate Court, by passing appropriate orders, shall close the proceedings. Compromise deed as well as statement of respondent No. 2/complainant recorded today in the Court shall form part of the order.

Petition is accordingly disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Between:-

1. SH. VIKAS BHATNAGAR, PARTNER OF M/S ROSS ROBINZ BIOTECH, VILLAGE AND PO BAROG, TEHSIL AND DISTRICT SOLAN, H.P.
2. SH. PARDEEP CHAWLA, PARTNER OF M/S ROSS ROBINZ BIOTECH, VILLAGE AND PO BAROG, TEHSIL AND DISTRICT SOLAN, H.P.

.....PETITIONERS

(BY M/S ROHIT SHARMA AND ANUJ GUPTA, ADVOCATES)

AND

1. M/S KAY BEE SONS, LOWER BAZAR SOLAN, TEHSIL AND DISTRICT SOLAN, H.P. THROUGH ITS SOLE PROPRIETOR SMT. MEENA GUPTA, W/O SH. RAJEEV GUPTA, RESIDENT OF LOWER BAZAR SOLANN, TEHSIL AND DISTRICT SOLANN, H.P. THROUGH HER BROTHER-IN-LAW-CUM- SPECIAL ATTORNEY SH. SANJEEV GUPTA, S/O SH. KULBHUSHAN GUPTA, R/O LOWER BAZAR, SOLANN,TEHSIL ANND DISTRICT SOLAN, H.P.
2. M/S ROSS ROBINZ BIOTECHH, VILLAGE AND PO BAROG, TEHSIL AND DISTRICT SOLAN, H.P. THROUGH ITS PARNTER-CUM- AUTHORIOZED SIGNATORY SH. R. GOVINDARJAN.
3. R. GOVINDARJAN, S/O SH. G. RANGANATHAN, RESIDENT OF 14, NAGARJUNA NAGAR, IIND STREET, RANGARJUNAPURAM, KODAMBAKKAM, CHENNAI-60024, PARTNER-CUM-AUTHORIZED SIGNATORY OF M/S ROSS ROBINZ BIOTECHH, VILLAGE AND PO BAROG, TEHSIL AND DISTRICT SOLAN, H.P.
4. G. BALASUBRAMANANIAN S/O SH. K. GOVINDAN, RESIDENT OF 14, NAGARJUNA NAGAR, NAGARJUNA NAGAR, IIND STREET, RANGARJUNAPURAM, KODAMBAKKAM, CHENNAI-60024, PARTNER-

CUM-AUTHORIZED SIGNATORY OF M/S ROSS ROBINZ BIOTECHH, VILLAGE AND PO BAROG, TEHSIL AND DISTRICT SOLAN, H.P.

5. SH. G. RANGANATHAN, RESIDENT OF 14, NAGARJUNA NAGAR, IIND STREET, RANGARJUNAPURAM, KODAMBAKKAM, CHENNAI-60024, PARTNER-CUM-AUTHORIZED SIGNATORY OF M/S ROSS ROBINZ BIOTECHH, VILLAGE AND PO BAROG, TEHSIL AND DISTRICT SOLAN, H.P.

.....RESPONDENTS

(MR. NEERAJ GUPTA, SENIOR ADVOCATE WITH MR. AJEET PAL SINGH JASWAL, FOR R-1;
MR. C.N. SINGH, ADVOCATE FOR R-5

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 594 OF 2019
Decided on: 16.06.2022

**Code of Criminal Procedure, 1973**- Section 482- Quashing the complaint under Section 138 of Negotiable Instruments Act, 1881- Held- Trial issue involved in the matter- It cannot be said that on the strength of provisions of Section 31(2) of the Partnership Act, any case has been made out for quashing of the complaint against the petitioners- Petition dismissed. (Para 10)

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

**O R D E R**

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioners have prayed for the following substantive relief:-

> *"(i) Quash the complaint qua the petitioners in case No. 113-3 of 2013 (Annexure P-1) titled M/s Kayy Bee Sons Vs M/s Ross Robinz Biotech pending before the Ld. Judicial Magistrate 1st*

*Class, Court No, 1, Solan, H.P. alongwith summoning order dated 26.08.2013 and all proceedings ensuing thereof."*

2. The case of the petitioners is that they were inducted as partners of respondent No. 2-partnership firm, on 10th of February, 2011. The complaint, which has been instituted against them and other respondents, copy whereof stands appended with the present petition as Annexure P-1, pertains purportedly to a liability of the said partnership firm, which was pertaining to the period prior to the date of their induction as partners, and in this view of the matter, taking into consideration the provisions of Section 31 (2) of the Indian Partnership Act, 1932, the proceedings, which have been initiated against the present petitioners under Section 138 of the Negotiable Instruments Act, are *per se* bad in law and the same are liable to be quashed and set aside as far as the petitioners are concerned.

3. Mr. Rohit Sharma, learned Counsel for the petitioners has argued that under the provisions of Section 138 of the Negotiable Instruments Act, the accused can be tried provided he is guilty of violating the provisions of the Negotiable Instruments Act. He submitted that here is a case, wherein a cheque was issued on behalf of the partnership firm, i.e. respondent No. 2, pertaining to a liability thereof relatable to a period when the petitioners were not partners of the partnership firm, and in this view of the matter, by no stretch of imagination, it can be said that because the cheque which was issued by one of the partners of the partnership firm stood dishonoured, the present petitioners also are liable to be prosecuted for the said act. He has relied upon Section 31(2) of the Indian Partnership Act, 1932 and submitted that the provisions thereof make it crystal clear that a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner and in view of said statutory provision also the proceedings against the petitioner are liable to be quashed and set aside. Learned Counsel for the petitioner has drawn the attention of

the Court to order dated 16.03.2019, passed by learned Court below, appended with the petition as Annexure P-6 and fairly stated that during the pendency of the proceedings before the learned Court below, a prayer was made by the petitioners for their discharge but said prayer was rejected in terms of the order which has been passed vide Annexure P-6, perusal whereof would demonstrate that rejection of the prayer of the petitioners was not on merit but on technical grounds wherein learned Court held that it has no power to discharge the accused. In the course of his submissions, Mr. Sharma also referred to Annexure P-2, which is the copy of partnership deed vide which the petitioners were inducted as partners into the partnership firm dated 10th February, 2011, and by referring to the provisions thereof in general and Clause 15 in particular, he submitted that it was clearly mentioned in the said deed also that the petitioners shall not be responsible for any liability, responsibility and accountability of third party regarding the business activities as they are not working partners. On these grounds, it stands prayed that the petition be allowed and proceedings which were initiated under Section 138 of the Negotiable Instruments Act against the petitioners be quashed.

4. Opposing the petition, Mr. Neeraj Gupta, learned Senior Counsel appearing for respondent No. 1 has submitted that filing of the present petition is nothing but abuse of the process of law for the reason that it is apparent from the pleadings which are contained in the complaint filed under Section 138 of the Negotiable Instruments Act that the present petitioners were actively involved in the affairs of the partnership firm at the time when the cheque was dishonoured and not only were they aware of the issuance of the said cheque on behalf of the firm but they were party to it and it was with their consent that the cheque was issued. Mr. Gupta drew the attention of the Court to the averments, which are contained in paras 5 and 6 of the complaint (Annexure P-1) and argued that it is the specific case of the

complainant that after the induction of the present petitioners as partners in the partnership firm, a meeting was held of the complainant through its representatives with accused No. 2 to 6, which includes the present petitioners, when the complainant was informed that as the partnership firm was going under financial crisis, on this count, new partners, i.e. present petitioners were added and introduced as partners. He further submitted that the reliance placed upon the provisions of Section 31(2) of the Partnership Act is totally misplaced for the reason that herein the cheque, dishonour of which led to filing of the complaint, is dated after the induction of the present petitioners as partners, therefore, there is no merit in the contention of learned Counsel for the petitioners that the petitioners are not liable for the said act of the firm. On these bases, he submitted that the present petition being without merit be dismissed. Mr. Gupta has also submitted that even assuming that the liability was pertaining to the period prior to the induction of the petitioners as partners, then also, after their induction as partners, they have acknowledged this liability and it was in order to discharge this liability that the cheque stood issued by the partnership firm, may be signed by one of its partners other than the present petitioners.

5. Mr. C.N. Singh, learned Counsel for respondent No. 5 has submitted that as he is one of the accused before the learned Court below, though presently declared as proclaimed offender, he does not intends to make submissions in the present proceedings so as not to prejudice his case before the learned Trial Court.

6. Though time was granted to the petitioners to take steps for the service of respondents No. 3 and 4, but as per report of the Registry, as the same were not taken, the case is being decided without service of summons upon said respondents because no order prejudicial to their interest is being passed by the Court in the present proceedings.

7. I have heard learned Counsel for the parties and also gone through the averments made in the petition as well as documents appended therewith.

8. As has been mentioned hereinabove, the petitioners alongwith other accused are facing trial under section 138 of the Negotiable Instruments Act on the basis of a complaint which has been filed by respondent No. 1. In terms of the complaint, in order to discharge liability, which the partnership firm owed to the complainant, a cheque was issued by the partnership firm, signed by one of its partners, dated 15.03.2013 for a sum of Rs. 6,86,230/- in favour of the complainant. The same was drawn upon Indian Overseas Bank, Solan. When the complainant deposited said cheque in its bank for encashment, the same was returned back to the complainant with remarks "insufficient funds". Thereafter statutory notice was issued by the complainant to all the accused, which included the present petitioners also, calling upon them to make good the payment of cheque amount within a period of 15 days as from the date of receipt of the notice, and as payment was not made by the accused even after issuance of the notice, this led to filing of the complaint under Section 138 of the Negotiable Instruments Act.

9. This Court would like to make an observation at this very stage that it would not dwell upon the merits of the complaint for the reason that the Court does not intends to make any observation which may prejudice the case of either of the parties before the learned Court below. Suffice it to say that all that this Court will examine at this stage is as to whether the petitioners have made out a case under Section 482 of the Code of Criminal Procedure for quashing of the complaint against them or not.

10. This Court is of the view that when a complaint is filed under Section 138 of Negotiable Instruments Act, primarily the cause of action arises from the issuance and dishonour of the cheque which may be issued by one party to the other party to discharge the liability which it owes to the

other party. The issue of the liability if any existing, in lieu whereof the cheque has been issued, is a triable issue which the learned Trial Court decides during the course of the trial. In the present case, though there is no dispute that the petitioners were inducted as partners of the firm on 10th February, 2011, but fact of the matter remains that the cheque, dishonour of which has led to filing of the complaint under Section 138 of the Negotiable Instruments Act bears the date 15th March, 2013, i.e. after the induction of the petitioners as partners of the partnership firm. In this view of the matter, this Court is of the considered view that the provisions of Section 31(2) of the Partnership Act which provide that a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner do not come to the rescue of the petitioners for the purpose of quashing of the complaint under Section 482 of the Code of Criminal Procedure because herein the act which led to the filing of complaint under Section 138 of the Negotiable Instruments Act is issuance and dishonour of the cheque which bears the date 15th March, 2013, i.e. post the date on induction of the present petitioners as partners of the partnership firm. This Court is refraining from making any observation with regard to contention of the petitioner that liability for which the cheque was issued was relatable to the period prior to the induction of the petitioners as partners of the firm because this is an issue which has to be decided by the learned Trial Court. However, at this stage, it cannot be said that on the strength of provisions of Section 31(2) of the Partnership Act, any case has been made out for quashing of the complaint against the petitioners.

11. In view of what has been discussed hereinabove, this petition is dismissed, however, it is clarified that the observations which have been made in this order are only for the purpose of adjudication of present petition only and learned Trial Court shall not be influenced in any matter whatsoever by the same in the course of adjudication of the case before it.

12 Record be returned to learned Court below forthwith. Represented parties through Counsel are directed to appear before the learned Court below on 18.07.2022.

Pending miscellaneous application(s), if any, also stand disposed of accordingly. Interim order(s), if any, stand vacated.

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

Between:-

MAUJI RAM S/O SH. KARAM CHAND R/O VILLAGE ROPA RAJPUTAN, PO JAURE AMB, TEHSIL BARSAR, DISTT. HAMIRPUR, (H.P.) PRESENTLY WORKING AS DAILY WAGER AT FOREST RANGE MAAKTHI, TEHSIL BARSAR, DISTT. HAMIRPUR, H.P.

…….PETITIONER

(BY MR. DALIP K. SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY FOREST, SHIMLA-2.
2. CONSERVATOR OF FOREST, HAMIRPUR, H.P.
3. DIVISIONAL FOREST OFFICER, HAMIRPUR FOREST DIVISION, DISTT. HAMIRPUR, H.P.

…….RESPONDENTS

(BY. M/S SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDL. AGS WITH MR. AMIT KUMAR DHUMAL, DY.AG AND MR. MANOJ BAGGA, ASSTT. AG)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 1896 OF 2019
Decided on: 15.06.2022

**Constitution of India, 1950**- Article 226- Representation of petitioner, a forest workman, for regularization of his service has been rejected by the Competent Authority- Held- Petitioner has not put 240 days in any of the

calendar year- Petitioner has not been able to demonstrate that respondent has discriminated him for regularization despite being eligible- Petition dismissed. (Para 9)

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

**J U D G E M E N T**

**CMPT No. 490 of 2022**

Having heard learned Counsel for the applicant, this application is allowed as prayed for.

**CWPOA No. 1896 of 2019**

2. With the consent of learned Counsel for the parties, the case was taken up for consideration today itself.

3. By way of this petition, the petitioner has prayed for quashing of order dated 23.09.2010 (Annexure P-6), vide which representation made by the petitioner for regularization of his services has been rejected by the competent authority and further for issuance of writ of mandamus to the respondents to regularize the services of the petitioner from due date with all consequential benefits.

4. The case of the petitioner is that he was appointed as a daily wager in the Forest Department in the month of January, 1998 and though the petitioner continues to serve as such till date, yet his services have not been regularized by the department despite the fact that from time to time, the State has come forth with the policies of regularization of daily wage workers. According to the petitioner, he fulfills the eligibility criteria for being regularized by putting in more than 240 days in each calendar year, yet, needful till date has not been done by the department. As per the petitioner, he had earlier approached the Court by way of CWP No. 2424 of 2010, titled as Mauji Ram vs. State, with the prayer to regularize his services from the due

date, which petition was disposed of by this Court in terms of judgment dated 28.05.2010 (Annexure P-5) by directing the respondents to consider and pass appropriate order on a representation which was pending with the competent authority, and if found eligible, benefits be conferred upon the petitioner. Thereafter, vide Annexure P-6, representation of the petitioner was rejected by the authority concerned vide order dated 23rd September, 2010, rejecting his prayer for regularization of his services, which rejection order, as per the petitioner is not sustainable in law and it is in this background that present petition has been filed.

5. The petition is resisted by the State on the ground that the petitioner was engaged as a daily rated casual labourer in Barsar Range of the respondent-department on seasonal forestry works, which include planting nursery works, tending operation, fire control measure, maintenance operation etc. According to the respondents, duration of these works is limited depending upon the nature and extent of the area/works and forestry works are not in operation around the year due to their seasonal nature. As per respondents, the petitioner was engaged for different seasonal and causal works so that he could be accommodated for the maximum time but the petitioner has never served for 240 days and more in any calendar year and the contention of the petitioner to the contrary is incorrect and against the record. It is further the stand of the respondents that the services of the petitioner have not been regularized for the reasons that he does not fulfills the eligibility criteria contemplated in the policies of regularization in terms whereof a daily wage worker should have at least put in more than 240 days in each calendar year for requisite number of years as per the policy concerned, rendering such candidate eligible for regularization. Accordingly, a prayer has been made for dismissal of the petition.

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

7. The contention of the petitioner that he has put in more than 240 days in each calendar year is not substantiated by him by placing any cogent material on record. On the other hand, respondent-department has adduced documents, which include man day's chart of the petitioner in terms whereof the petitioner has not completed 240 days in either of the calendar year. Though a feeble attempt was made by learned Counsel for the petitioner on the strength of Annexure P-2 to demonstrate that requisite record up to the year 2002 was not made available by the department, but in my considered view, nothing precluded the petitioner from placing record from the year 2002 onwards to substantiate his contention that he had put in more than 240 days in each calendar year.

8. Coming to the policies of regularization which have been brought into force from time to time by the State Government, there is no dispute that earlier a daily wager, who had put in more than 240 days continuously in each calendar year regularly for a period of 10 years, was considered to be eligible for regularization subject to availability of posts but subsequently the period was reduced from 10 years to 8 years. The court stands informed that said period now stands lessened from 8 years to 5 years. Be that as it may, here is a case where the petitioner has not put in 240 days in any of the calendar year. That being the case, as the petitioner has not been able to demonstrate that respondent-department has discriminated him for regularization despite his being eligible as per policy of the State Government for regularization, this court is afraid that reliefs as prayed for cannot be granted to the petitioner.

9. Coming to Annexure P-6, the competent authority has rejected the representation of the petitioner vide this order. The reasoning which has been assigned by the competent authority is that the petitioner has not completed 240 days in each calendar year from January, 1998 till passing of the said order. The Court finds no infirmity with the findings returned by the

competent authority as the same are duly borne out from the record of the case.

10. Accordingly, in view of what has been held hereinabove, this petition, being devoid of merits, is dismissed, however, dismissal of this petition shall not be treated as a bar for the purpose of regularization of the services of the petitioner in case he becomes eligible for regularization in terms of policy(s) which may be formulated by the State.

11. Learned Counsel for the petitioner submits that the rejection of this petition should not be taken as a cue by the respondent-Department to throw out the petitioner from his current job. Learned Additional Advocate General assures that the services of the petitioner shall not be discontinued, except in accordance with law.

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

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

Between:-

1. SH. BALDEV, SON OF LATE SH. BALAK RAM SHANDIL.

2. SH. HEMANT SON OF LATE SH. BALAK RAM SHANDIL.

3. SH. YASHWANT, SON OF LATE SH. BALAK RAM SHANDIL.
ALL RESIDENTS OF VILLAGE GANOTI, P.O. MALYANA, TEHSIL AND DISTRICT SHIMLA, H.P.

……APPELLANTS

(BY MR. G.D. VERMA, SENIOR ADVOCATE
WITH MR. B.C.VERMA, ADVOCATE)

AND

SH. ASHA RAM, SON OF SUNDER SINGH, RESIDENT OF VILLAGE BANER, P.O. BEOLIA, TEHSIL AND DISTRICT SHIMLA, H.P.

……RESPONDENT

(BY MR. AMAN SOOD, ADVOCATE)

FIRST APPEAL FROM ORDER
No.448 OF 2012
Decided on: 10.11.2021

**Workmen Compensation Act, 1923**- Section 30- Appeal- Ld. Commissioner allowed the application and ordered for compensation of Rs. 3,50,880/- - Workman suffered 40% burn injury and remained hospitalized for more than 10 months- Held- Ld. Court below rightly considered the monthly wages of workman as Rs.4000/-- Disability certificate states that workman has been 100% disabled- No illegality and infirmity committed by the Court below while passing the impugned award- Appeal dismissed. (Para 12 to 14)

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

**JUDGMENT**

Instant appeal filed under Section 30 of Workmen Compensation Act, 1923,(hereinafter referred to as 'Act') lays challenge to order dated 30.6.2012, passed by learned Commissioner, Exercising Powers under Employees Compensation Act in Case No. 11-12 of 11/08, whereby court below while allowing claim petition having been filed by respondent/petitioner under Section 22 of the Act, held the appellants/employers (hereinafter referred to as 'employer') liable to pay compensation to the workman to the tune of Rs.3,50,880/- along with simple interest @ 12% per annum w.e.f. 4.1.2007 till the deposit/payment of the whole amount of compensation.

2. Precisely, the facts as emerge from the record are that claimant claiming himself to be an employee of the employer, filed petition under Section 22 of the Act, seeking therein compensation to the tune of Rs.10 lac on account of injuries suffered by him during his employment in the shop being run by employer in the name of Shandil Furniture House, Kasumpti, Shimla. Workman alleged that on 4.1.2007, while he was on duty and was doing wood polishing work in the shop, at about 2.15 P.M. one Kashmiri Coolie namely Yusuf came with LPG Gas Cylinder. He alleged that above-named coolie was known to the owner of the shop and usually used to come to the shop of employer with LPG cylinder. He alleged that suddenly fire broke out in the shop on account of leakage of LPG cylinder brought by above-named coolie and as a consequence of which, he got engulfed in fire and his body burnt to the extent of more than 40%. He alleged that he was taken to IGMC Hospital for treatment and he remained in hospital for more than 10 months. Workman also claimed that in the alleged accident, he lost his both hands as the fingers of the hands were completely burnt. He also alleged that beside above injuries, his eye sight also got damaged to the extent of 60%. He claimed that on account of injuries, he became permanently disabled to the extent of 100%. Claimant stated before the court below that he has spent sum of Rs. 60,000/- on his treatment which was arranged by his wife by raising loan from some other person. He also stated before court below that his wife made representation to the Hon'ble Chief Minister, whereby medical bills to the tune of Rs.30,000/- were reimbursed. Workman also stated in his petition that respondent/employer provided little help of Rs.7,000/- to him.

3. Aforesaid claim put-forth by workman came to be hotly contested and resisted by employer, who by way of reply, besides raising preliminary objection with regard to

maintainability, also denied employment, if any, given by him to the workman. Employer specifically stated in the reply that neither he employed workman, as claimed by him nor he is proprietor of M/s Shandil Furniture House. Employer claimed that workman has falsely claimed that he was getting salary of Rs.4200/- per month. He also stated that he had not booked any LPG cylinder nor had placed any order for supply of LPG Cylinder to Sh. Yusuf. While denying that Sh. Yusuf was usual visitor to shop with LPG Cylinder, employer stated that he was not present in the shop. Factum with regard to workman's having suffered 40% burn injury on his body was also denied by the employer. He claimed that injuries, if any, suffered by workman on his body cannot be attributed to him but to the person namely Sh. Yusuf. He also disputed genuineness of disability certificate adduced on record by the workman. While admitting factum with regard to lodging of FIR bearing No.14, dated 4.1.2007, employer claimed that fire in question had taken place due to the negligence of Yusuf and workman Asha Ram and as such, he cannot be burdened with the liability to pay compensation, if any, to the workman. On the basis of pleadings adduced on record by respective parties, following issues were framed by court below on 20.02.2009:-

1. Whether the petitioner is entitled for compensation, as sought? OPP

2. Whether the petition as filed lacks material and better particulars? OPR

3. Whether the petitioner was never employed as a workman by the respondent? OPR

4. Whether the petition is not maintainable due to its own acts, deeds, conduct, lapses and omissions? OPR

5. Relief

4. On the basis of aforesaid pleadings, as well as evidence led on record by respective parties, court below vide order dated 30.06.2012, allowed the petition filed by workman and held employer liable to pay compensation to the tune of Rs.3,50,880/-, as has been taken note hereinabove. In the aforesaid background, employer has approached this Court in the instant proceedings, praying therein to quash the order granting compensation in favour of workman.

5. Before proceeding to decide the case, it may be noticed that initially petition was filed against original owner of the shop, Balak Ram, who later on expired and present appellants being his LRs came to be impleaded on his place and as such, appellants are being referred to as 'employer'.

6. Having heard learned counsel representing the parties and perused the material available on record *vis-à-vis* reasoning assigned in the order impugned in the instant proceedings, this Court finds it difficult to agree with Mr. B.C. Verma, learned counsel representing the employer that the workman failed to establish on record employer-employee relationship, if any, *inter se* parties, rather evidence adduced on record by respective parties clearly reveals that on the date of alleged incident, workman was in active employment of the employer. Though, in the case at hand, attempt has been made by employer to carve out a case that neither he employed the workman in his shop nor he is owner of the shop, but if the statements of claimant witnesses are read in their entirety, they clearly establish on record that the workman was doing wood polishing work in the shop of employer and he was being paid monthly salary of Rs. 4200/- by the employer.

7. PW-1 Sh. Bhoop Ram, deposed that the workman Asha Ram is known to him for the last so many years and he is his neighbourer. He deposed that Asha Ram was Carpenter at Shandil Furniture House, Kasumpti and he used to receive Rs.4200/- per month as salary. He categorically deposed that on 4.1.2007, fire broke in Shandil Furniture on account of

leakage of gas from Cylinder, as a consequence of which, hand, face, head and other parts of body of Asha Ram got burnt completely. He also deposed that now Asha Ram is not able to do any work. He also deposed that family of Asha Ram is dependent upon him. In his cross-examination, though this witness admitted that he had not seen any record of employment of workman with the employer, but cross-examination conducted upon this witness nowhere suggests that opposite party was able to shatter his testimony, wherein he categorically deposed the factum with regard to employment of workman in the shop of employers. This witness specifically denied suggestion put to him that Asha Ram was not working in Shandil Furniture House and was not earning Rs. 4200/- per month. Interestingly, at no point of time, any suggestion ever came to put to this witness that employer is/was not the owner of the shop and the shop was not being run by him.

8. PW-2, Sh. Mohan Singh, also deposed that Asha Ram is his neighbourer and he was carpenter and used to do polishing etc. at Shandil Furniture House on monthly wages of Rs.4200/- per month. He also deposed that on 4.1.2007, fire broke out in Shandil Furniture House and Asha Ram suffered burn injuries and now he is not in a position to do any work. This witness in his cross-examination stated that Shandil Furniture House is situate at road head. He also deposed that house of Asha Ram was 1 KM away from his house. Most importantly, this witness deposed that Bala Nand is proprietor of Shandil Furniture House. This witness also denied the suggestion put to him that no wood work is/was done at Shandil Furniture House and only glass furniture is there .

9. PW-3 Asha Ram, i.e. workman deposed that he is a Carpenter and used to do wood and polish work etc. at Shandil Furniture house. He testified that on 4.1.2007, at 2.15 P.M. person namely Yusuf came with a gas Cylinder in the shop while he was doing polishing work. He further deposed that Yusuf occasionally used to bring Cylinder in the shop and on that day,

suddenly fire broke out in the shop on account of leakage of gas and he suffered burn injuries. He deposed that he remained under treatment for more than 10 months. He also proved on record discharge slips Ext. PW-3/A and Ext. PW-3/C. He also proved on record cash memos of purchase of medicines Ext.3/D-1 to Ext. PW-3/D-41. This witness also produced a copy of FIR and cutting of newspaper which came to be placed on record as Mark-A & Mark-D. Besides above, this witness also produced on record diability certificate Mark-C and photographs Ext.PW-3/F and Ext.PW-3/G. This witness deposed that he suffered 100% disability and as of today cannot do any work. He claimed during his deposition that he has already spent sum of Rs. 1 lac on his treatment and on the representation being made by his wife to the Hon'ble Chief Minister, sum of Rs.30,000/- was reimbursed to him. He deposed that he is to further undergo Surgery and for that purpose sum of Rs. 50,000/- is required. While stating that sum of Rs. 7000/- was paid to him by proprietor of M/s Shandil Furniture Houe, after burn injuries, this witness deposed that whole of his family consisting of three daughters and one son, is dependent upon him. Cross-examination conducted upon this witness nowhere suggests that opposite party was able to extract anything contrary to what this witness stated in his examination-in-chief. Suggestion put to this witness that he was not paid Rs.7000/- by Shandil Furniture House, was specifically denied by this witness. He also denied that he was not employee of the Shandil Furniture House. If the aforesaid statement made by this witness is read in its entirety, it clearly establishes on record that at the time of alleged incident, he was in the employment of employer i.e. M/s Shandil Furniture House

10. Though, the employers attempted to carve out a case that neither he had employed workman nor he is the owner of the shop, but interestingly, no such suggestion ever came to be put to the aforesaid claimant witnesses. Moreover, if the statements made by this witnesses adduced on

record by employer are perused in their entirety, they nowhere suggest that the shop, i.e. Shandil Furniture House was not being owned and run by employer Bala Ram.

11. RW-1, Bhagat Singh, while admitting factum with regard to his acquaintance with employer Bala Ram deposed that he had not seen Asha Ram doing work there, meaning thereby that at the time of incident M/s Shandil Furniture was being run by the employer namely Bala Ram. Similarly, this witness admitted factum with regard to fire in the shop, in the year 2007. This witness categorically stated in his statement that he had heard that two outsiders have been burnt in that fire. In his cross-examination, he stated that true name of Bala Ram is Balak Ram Shandil and he cannot say as to who was the proprietor of said shop. Similarly, he feigned ignorance about the person who used to work in the shop. He also admitted that Bala Ram is known by the name of Balak Ram. Though, he feigned ignorance that person named Asha Ram used to work in the said furniture, but he nowhere specifically denied factum with regard to employment of workman Asha Ram in the shop being run by Balak Ram Shandil. RW-2, Kuldeep Verma, categorically stated that Balak Ram @ Bala Nand runs Furniture shop at Kasumpati. This witness in his cross-examination feigned ignorance with regard to alleged incident of fire as well as employment of workman namely Asha Ram in the shop being run by employer Balak Ram. RW-3, Yashwant deposed that Bala Ram never ran any shop in the name of Shandil Furniture House nor he was proprietor of M/s Shandil Furniture House. He also stated that workman was never employed by Bala Ram. He deposed that he is not aware as to how Asha Ram was burnt. He stated that at the time of fire neither he nor Bala Ram was inside the shop. He also stated that neither Bala Ram nor they had employed/hired the workman. He deposed that he has not aware as to who was other person with workman at the time of fire but stated that he had later come to know that the person

namely Yusuf Khan had come there with workman for dropping a Cylinder and as soon as Cylinder was kept , it caught file on account of leakage of gas. If the statements of all the witnesses adduced on record by employer are read in conjunction, they clearly establish the factum with regard to employment given by employer Balak Ram Shandil to workman Asha Ram as well alleged incident of fire happened on 4.1.2007. If the statement of RW-3, Yashwant, who otherwise happens to be son of employer Balak Ram Shandil, is perused in its entirety, it clearly establishes that the shop in the name and style of Shandil Furniture House was being run in the premises at the time of incident

12. Having carefully scanned entire evidence led on record by respective parties, this Court finds no illegality and infirmity to the findings returned by court below with regard to employment of workman in the shop, i.e. Shandil Furniture, House, Kasumpti being run by employer Balak Ram Shandil

13. No doubt, in the case at hand, workman failed to prove on record by leading cogent and convincing evidence that at the time of alleged incident, he was being paid salary to the tune of Rs.4200/- per month, but court below has rightly considered the monthly wages of the workman for purpose of calculating amount of compensation as Rs.4,000/- per month taking note of explanation II to Section 4 (1) (a) (b) of Workmen Compensation Act, wherein, it has been specifically provided that where the monthly wages of a workman exceed Rs. 4000/-, the monthly wages for the purpose of clause (a) and (b) shall be deemed to be Rs. 4000/- only. Even if, aforesaid provision is ignored and is not taken into consideration, then monthly income of petitioner is/was required to be assessed on the basis of monthly wages payable at the time of incident under Minimum Wages Act Since, it stands duly established on record that at the time of alleged incident, workman was rendering services of Carpenter, in the shop being run by employer Bala Ram Shandil, he is

otherwise required to be considered as a skilled/ worker and by no stretch of imagination, sum of Rs.4,000/- assessed by court below as monthly wage of workman can be said to be on higher side. Factum with regard to workman having suffered burn injuries as well as disability thereafter, stand duly established on record, as is evident from the statements of PW-4, Dr. R.K. Sharma and PW-5, Dr. Anil Malhotra. PW-5, Dr. Anil Malhotra, who had issued disability certificate, has clearly stated before the court below that disability of Asha Ram is 100%. Cross-examination conducted upon this witness nowhere suggests that opposite party was able to shatter the testimony of aforesaid witness. Dr. Anil Malhotra, who is otherwise an independent witness, cannot be said to have any interest, if any, in the case.

14. Consequently, in view of detailed discussion made hereinabove, this Court finds no illegality and infirmity in the impugned order passed by court below granting compensation in favour of the workman. In view of above, no interference is called for in the impugned order and same is accordingly upheld. Present appeal fails and is dismissed accordingly.

**Cross Objections No.25 of 2013**

15. Learned counsel representing the cross-objector/workman, states that he does not intend to press the cross objection field by workman. Consequently, in view of the above, the cross-objections are dismissed as not pressed. Pending applications, if any, stand disposed of.

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

Between:-

UNITED INDIA INSURANCE COMPANY LIMITED, THROUGH ITS DIVISIONAL MANAGER, DIVISIONAL OFFICE, TIMBER HOUSE, CIRCULAR ROAD, SHIMLA, H.P.

……APPELLANT

(BY MR. P.S.CHANDEL, ADVOCATE)

AND

1. SHRI MOHAN SINGH SON OF SHRI BIRMA CHAND, RESIDENT OF VILLAGE SHANGO, POST OFFICE KATGAON, TEHSIL NICHAR, DISTRICT KINNAUR, H.P.

2. SHRI PRAKASH CHAND, SON OF LATE SHRI BUDHWA, RESIDENT OF VILLAGE AND POST OFFICE BHABANAGAR, TEHSIL NICHAR, DISTRICT KINNAUR, H.P. (OWNER OF VEHICLE nO.HP01A-2979 ALTO)

3. SMT. SARITA DEVI, WIFE OFLATE SHRI SURENDER NEGI, RESIDENT OF VILLAGE SUNGRA, POST OFFICE BHABANAGAR, TEHSIL NICHAR, DISTRICT KINNAUR, H.P. (LR'S DECEASED DRIVER OF VEHICLE NO. HP01A-2979 ALTO)

.....RESPONDENTS

(MR. K.R. KASHYAP, ADVOCATE FOR R-1.

MR. H.C.SHARMA, ADVOCATE, FOR R-2.

MR. B.S. THAKUR, ADVOCATE, FOR R-3)

FIRST APPEAL FROM ORDER
No.417 of 2018
Decided on: 16.09.2021

**Motor Vehicle Act, 1988**- Section 173- Appeal- Motor Accident Claims Tribunal saddled Insurance Company with liability to pay compensation of Rs.1,02,000 on account of injuries sustained by petitioner in the road accident- Held- In the insurance policy there is no specific condition with regard to expiry of fitness certificate coupled with the fact that it is not the case of the appellant/Insurance Company that at the time of accident, there was no valid Registration Certificate in favour of the offending vehicle- No

infirmity and illegality in order awarding compensation- Appeal dismissed. (Para 7, 8, 9)

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

**JUDGMENT**

Instant appeal under Section 173 of Motor Vehicles Act, lays challenge to impugned award dated 01.12.2017 in MAC Petition No.98-R/2 of 2016, titled *Mohan Singh vs. Sh. Praksh Chand & others*, passed by learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushehar, Himachal Pradesh, whereby tribunal below while allowing the claim petition having been filed by petitioner-claimant (hereinafter referred to as 'claimant') under Section 166 of Motor Vehicles Act (for short 'Act') saddled appellant/Insurance Company with liability to pay compensation to the tune of Rs.1,02,000/- on account of injuries sustained by the complainant in the road accident along with interest @ 9% per annum from the date of petition till realization.

2. Precisely, the facts of the case, as emerge from the record are that claimant instituted petition under Section 166 of the Act, claiming therein compensation to the tune of Rs.9 lac. on account of injuries sustained by him in the road accident. Claimant averred in the petition that on 14.12.2015, he was travelling in Maruti Car bearing No. HP-01-2979, being driven by late Surender Kumar, rashly and negligently. He alleged that on the date of accident, car fell into 60 feet gorge due to rash and negligent driving of the driver of car, who also died in the accident. He alleged that since he sustained multiple injuries on all parts of his body and remained admitted in hospital w.e.f. 14.12.2015 to 24.12.2015, he is entitled to compensation. He alleged that on account of injuries sustained by him, he has suffered disability, as a consequence of which, he is unable to do the horticulture and agriculture work from which he used to earn sum of Rs.15,000/- per month.

He claimed before learned tribunal below that on account of injuries suffered by him in the accident, he is unable to sit and walk properly and as such, finding it difficult to maintain himself. Aforesaid claim put forth by the claimant came to be contested by respondents including appellant/Insurance Company.

3. Appellant/Insurance Company claimed that since vehicle in question was being plied in violation of terms and conditions contained in the insurance policy and at the time of accident, petitioner was travelling in the vehicle as gratuitous passenger, it is not liable to indemnify the insured. On the basis of pleadings adduced on record by respective parties, following issues were framed on 04.01.2017:

1. Whether the petitioner sustained injuries on 14.12.2015, at about 10.00 AM, at Shinti Mod due to rash and negligent driving of deceased driver, who was driving the vehicle No.HP01-2979, rashy and negligently?OPP
2. If Issue No.1, is proved in affirmative, to what amount of compensation the petitioner is entitled and from whom?OPP.
3. Whether the petition is not maintainable in the present form?OPR-2 & 3.
4. Whether the vehicle was plied in contravention of terms and conditions of insurance policy? OPR-3.
5. Whether driver of the offending vehicle was not having a valid & effective driving licence at the time of accident? OPR-3
6. Whether the petitioner was gratuitous passenger in the offending vehicle? OPR-3.

7. Whether the petition is filed by the petitioner in collusion with the respondents No.1 & 2 ? OPR-3.
8. Relief.

4. Learned MACT below on the basis of evidence led on record by respective parties held appellant/insurance company liable to pay sum of Rs. 1,02,000/-, on account of injuries sustained by him in roadside accident along with interest @ 9% per annum from the date of petition till realization. In the aforesaid background, appellant/Insurance Company has approached this Court in the instant proceedings, praying therein to quash and set aside the impugned award.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that primarily challenge to the award has been laid on the ground that once it stood proved on record that at the time of accident, vehicle was not fit to be plied, there was no occasion, if any, for MACT below to saddle Appellant/Insurance Company with liability.

6. Mr. P.S. Chandel, learned counsel representing the appellant/Insurance Company while inviting attention of this Court to Ext.R-1, i.e. Certificate of Registration, vehemently argued that vehicle was fit to be plied on the road till 27.10.2015, whereafter at no point of time, Certificate of Registration came to be renewed and as such, tribunal below erred in holding appellant/Insurance Company liable to indemnify the insured.

7. No doubt, perusal of aforesaid Ext. R-1, placed on record by appellant/Insurance Company reveals that fitness of the vehicle was valid upto 27.10.2015, but RW-1 Neer Singh Mehta, Sr. Assistant, RTO, Shimla, produced as evidence by appellant/Insurance Company, in his cross-examination categorically admitted that fitness fee as well as fitness certificate

can be deposited/taken in any other office and he has not brought record from the other office of registration and licence authority. This witness in his examination-in-chief while tendering copy of verification of permit Ext.R-2, deposed that as per report, fitness of the vehicle in question was expired on 27.10.2015 and permit was valid up to 21.10.2016. However, careful perusal of insurance policy Ext.RW-2/B reveals that it nowhere contains conditions, if any, with regard to fitness certificate. Appellant/Insurance Company beside examining RW-1 Neer Singh Mehta, Sr. Assistant, RTO, Shimla, also examined authorized representative of Insurance Company, RW-2 Sanjay Negi, who tendered his affidavit Ext. RW-2/A, whereby, he testified that offending vehicle bearing No.HP01A-2979 was a taxi and at the time of accident, driver was driving aforesaid taxi without driving licence. He deposed that vehicle was being plied in violation of terms and conditions of insurance policy as at the time of accident, R.C. of the vehicle was found to have expired and vehicle was without fitness permit. Perusal of driving licence Ext.R-2, nowhere suggests that at the time of accident, driver of the vehicle was not having valid licence. Licence issued in favour of deceased driver was valid upto 22.11.2031 and it was issued for LMV. Since vehicle in question was Alto Car, it can nowhere be concluded that deceased driver was not entitled to drive the offending vehicle. Coordinate Bench of this Court in *Raman Kumar vs. Sunil Kumar & others*, reported in 2016(1) Him.Law Reporer 239, has held that once specific condition with regard to fitness certificate is not contained in the insurance policy, ground taken by appellant/Insurance Company to refute the claim on the ground of expiry of fitness certificate cannot be allowed to be raised. Careful perusal of insurance policy nowhere suggests that on account of expiry of fitness certificate, Insurance Company shall not be liable to indemnify the insured. No doubt, claim can be rejected if Insurance Company is able to prove that vehicle in question was being driven in violation of terms and conditions of the policy, but such condition should be specifically

contained in the insurance policy. Since, in the insurance policy, there is no specific condition with regard to expiry of fitness certificate coupled with the fact that it is not the case of the appellant/Insurance Company that at the time of accident, there was no valid Registration Certificate in favour of the offending vehicle, no fault, if any, can be said to have been committed by court below while saddling appellant/Insurance Company to indemnify the insured.

8. Though, besides aforesaid grounds, learned counsel representing the appellant/Insurance Company, also made endeavour to persuade this Court to agree with his contentions that tribunal below has failed to appreciate evidence in its right perspective and has wrongly proceeded to award compensation to the tune of Rs.1,02,000/-, but having carefully perused pleadings as well as evidence adduced on record by claimant *vis a vis* reasoning assigned by tribunal below while saddling the appellant/Insurance Company liable to pay sum of Rs.1,02,000/-, this court finds no force in the aforesaid submission made on behalf of the Insurance Company. Since, factum with regard to accident as well as injuries caused by the respondent/claimant stands duly established on record, no illegality and infirmity can be said to have been committed by tribunal below while awarding the compensation to the tune of Rs.1,02,000/-. In the case at hand, claimant had claimed that he was earning Rs. 15,000/-- per month from his horticulture and agriculture pursuit, but since, he was unable to prove his income, tribunal below while applying minimum wages payable at that time, rightly proceeded to consider income of petitioner to the tune of Rs.200/- per day, i.e. to Rs.6000/- per month. Similarly, this Court finds that tribunal below having taken note of the injuries sustained by the petitioner as well as inconvenience caused to him on account of injuries, has awarded very reasonable amount and as such, no interference is called for.

9. Leaving everything aside, this Court otherwise having taken note of quantum of compensation, i.e. Rs. 1,02,000/-, sees no reason to interfere in the impugned award, which otherwise appears to be based upon proper appreciation of evidence led on record by the respective parties.

Consequently, in view of the above, present appeal fails and is dismissed accordingly.

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

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

Between:-
HEM RAJ SHARMA, SON OF SHRI MILKHI RAM SHARMA, RESIDENT OF VILLAGE PANJIARA, POST OFFICE ADHWANI, TEHSIL JAWALAMUKHI, DISTRICT KANGRA, HIMACHAL PRADESH.

……APPELLANT

(BY MR. K.S. BANYAL, SENIOR ADVOCATE
WITH MR. K. VIJENDER KATOCH, ADVOCATE)

AND

1. JAGINDRO DEVI, WIDOW OF SH. KULDEEP SINGH;

2. BALJIT SINGH, MINOR SON OF SHRI KULDEEP SINGH;

3. INDU BALA, MINOR DAUGHTER OF SH. KULDEEP SINGH;
   BOTH MINORS THROUGH THEIR MONTHER AND NATURAL GUARDIAN SMT. JOGINDRO DEVI;

4. SARESHTA DEVI, DAUGHTER OF SHRI KULDEEP SINGH;

ALL RESIDENTS OF JATAHAD,
P.O. ADHWANI, TEHSIL JAWALAMUKHI,
DISTRICT KANGRA, H.P.

.....RESPONDENTS

(BY MR. VARUN RANA, ADVOCATE)

FIRST APPEAL FROM ORDER
No. 4121 of 2013
Decided on: 25.10.2021

**Employees Compensation Act, 1923**- Section 30- Appeal- Application under Section 4 of Workmen Compensation Act was allowed and compensation of Rs.4,06,656/- was ordered on account of death of workman Kuldeep- Held- At the time of alleged incident deceased Kuldeep Singh was a workman as such his dependants rightly filed the petition- No illegality and infirmity committed by Court below while passing the impugned award- Appeal dismissed. (Para 7, 8, 9)

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

**JUDGMENT**

Instant appeal filed under Section 30 of the Employee Compensation Act, 1923, lays challenge to order dated 20.10.2012, passed by learned Commissioner, Employees Compensation, Court No.1, Dehra, District Kangra, H.P., whereby learned court below while allowing the claim petition having been filed by petitioners/respondents herein (hereinafter to be called as "petitioners") under Section 4 of the Workmen's Compensation Act (for short 'Act') held them entitled for compensation to the tune of Rs.2,54,160/- along with interest at the rate of 12% per annum, i.e. Rs. 1,52,496/- (total Rs.4,06,656/-), along with further interest @ 12% per annum, in case aforesaid award amount is not deposited within a period of two months.

2. Precisely, the facts of the case, as emerge from the record are that the petitioners filed a petition under Section 4 of the Act, claiming therein compensation on account of death of one Sh. Kuldeep Singh being his

legal representatives and dependents. Petitioners claimed before the court below that deceased Kuldeep Singh was engaged/employed by the respondent/appellant herein (hereinafter to be called as "respondent") for construction of his house in the year 2007 on daily wages of Rs.100/- per day and on 12.09.2007, above-named deceased Kuldeep Singh buried under the debris of *katcha* wall of the house of the respondent. Though, aforesaid person was taken to hospital, but he was declared brought dead. Since deceased Kuldeep Singh was the sole bread earner of the family, the petitioners approached the Court below, seeking compensation to the tune of Rs. 3 lac. The respondent by way of filing reply refuted the aforesaid claim and claimed that he had not employed late Kuldeep Singh on 12.09.2007 for digging work, as alleged. He also denied that deceased Kuldeep Singh died after being buried under the debris of the katchawall. On the basis of pleadings adduced on record by respective parties, following issues were framed on 16.08.2010:-

(I) Whether the deceased Kuldip Singh was a workman with the respondent?

(ii) Whether the petitioners are entitled for compensation as alleged?

3. Subsequently, learned Commissioner, Employees Compensation vide award dated 20.10.2012, held petitioners entitled to compensation to the tune of Rs. 2,54,160/- along with interest @ 12% per annum, i.e. Rs. 1,52,496/- (total Rs. 4,06,656/-) and specifically ordered that in case aforesaid amount is not paid within a period of two months, the respondent shall be further liable to pay interest @ 12% per annum on the account of compensation as well as interest calculated thereupon. In the aforesaid background, the respondent has approached this Court in the instant proceedings, praying therein to dismiss the claim of the petitioners after

setting aside the award dated 20.10.2021 impugned in the instant proceedings

4. Aforesaid appeal came to be admitted on the following substantial question of law:-

> "Whether learned Commissioner has misconstrued and misinterpreted the pleadings and evidence in returning the findings that Kuldip Singh was a workman under the Employee's Compensation Act?"

5. Having heard learned counsel representing the parties and perused the pleadings as well as evidence adduced on record by respective parties, this Court finds that precise grouse of the appellant/respondent is that court below has erred while treating deceased Kuldeep Singh as a workman under Employee's Compensation Act, 1923. Mr. K.S. Banyal, learned Senior Counsel representing the appellant, vehemently argued that as per definition of 'workman' under Section 2 (1)(n) of the Act, "workman" would mean "person other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business". He further argued that as per own case set up by respondents, deceased Kuldeep Singh was engaged on daily wages for doing work of casual nature and as such, he could not be termed as 'workman', hence, on this sole ground, claim petition ought to have been dismissed.

6. However, having carefully perused the definition of 'workman' as provided under Section 2(1)(n) of the Act, this Court finds that words "other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business" stand omitted by Amendment Act 2000 w.e.f. 08.12.2000, whereafter 'workman's definition came to be enlarged and person employed in any such capacity as is specified in Schedule-II, is to be termed as workman. As on 12.09.2007, when

alleged incident took place, definition of 'workman' as given in Section 2(1)(n) of the Act, reads as under:-

> "(n) 'workman' means any person who is-
>
> (i) .....
> (ia) (a).....
> (b).....
> (c).....
> (c).....
> (ii) employed in any such capacity as is specified in Scheduled II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing, but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them."

7. Similarly, careful perusal of Schedule-II, para (viii) of the Act, *ibid*, clearly provides that person employed in the construction, maintenance, repair or demolition of any building which is designed to be or is or has been more than one storey in height above the ground or twelve feet or more from the ground level to the apex of the roof, shall be a workman within the Act, *ibid*.

8. There is no dispute that vide amendment Act, 2000, definition of 'workman' came to be amended whereby words "other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business" were deleted, meaning thereby at the time of alleged incident, deceased Kuldeep Singh was a workman and as such, respondents being his LRs/dependents rightly filed petition under Section 4 of the Workmen's Compensation Act and it cannot be said that Court below has misconstrued and misinterpreted the provisions of Section

2(1)(n) of the Act. Hence, no illegality and infirmity can be said to have been committed by court below while passing impugned award, which otherwise appears to be based upon appropriate appreciation of evidence as well as law. Substantial question of law is, thus, answered accordingly.

9. Consequently, in view of the detailed discussion made hereinabove, this Court finds no illegality and infirmity in the impugned order dated 20.10.2012 and same is upheld. Present appeal being devoid of merit, fails and is dismissed accordingly. Needless to say, court below would release amount deposited by the respondent to the petitioners on their filing formal application, by remitting the same in their saving bank accounts, details whereof shall be provided within a period of two weeks.

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

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

Between:-

KARAN SINGH PATHANIA
SON OF LATE SH. MAN SINGH PATHANIA
RESIDENT OF VILLAGE RUTTIAN,
POST OFFICE BARA, TEHSIL NADAUN,
DISTT. HAMIRPUR.

.....PETITIONER

(BY SH. P.K. VERMA, ADVOCATE, VICE
SH. KUL BHUSHAN KHAJURIA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH
SECRETARY (PRINTING AND STATIONARY)
TO THE GOVT. OF H.P. SHIMLA-2.

2. STATE OF H.P. THROUGH
SECRETARY FINANCE TO THE
GOVT. OF HIMACHAL PRADESH.

3. THE CONTROLLER
PRINTING AND STATIONARY DEPARTMENT
GOVT. OF HIMACHAL PRADESH, SHIMLA-5.

.....RESPONDENTS

(BY SHRI DESH RAJ THAKUR, ADDITIONAL
ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 2724 of 2019
Decided on: 14.06.2022

**Constitution of India, 1950**- Article 227- Senior Scale Stenographer- Up-gradation the post of Senior Scale Stenographer held by the petitioner in Printing and Stationery Department was upgraded to the post of Personal Assistant on 15.3.2012, however petitioner wants upgradation should be w.e.f. 6.8.2003 when he made representation seeking upgradation of the post- Respondents rejected the prayer- Held- . Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India- The post of Personal Assistant was not in existence prior to 15.03.2012, therefore, the petitioner cannot be held entitled for the upgradation of post prior to 15.03.2012- Petition dismissed. (Para 4(i)(iii)(iv)

**Cases referred:**
P.U. Joshi and Others vs. Accountant General, Ahmedabad and Others (2003) 2 SCC 632;

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

**O R D E R**

The post of Senior Scale Stenographer held by the petitioner in the pay scale of Rs. 10300/34800+3800 grade pay in the respondent-Printing and Stationary Department was upgraded on 15.3.2012 to the post of Personal Assistant in the pay scale of Rs. 10300-34800+4200 grade pay with immediate effect. The petitioner wants that the up-gradation should have been w.e.f. 6.8.2003 i.e. the date when he had submitted his representation seeking upgradation of the post held by him and, therefore, he should be considered and promoted to upgraded post of Personal Assistant w.e.f. 6.8.2003. His prayer has not found favour with the respondents, hence the instant petition.

2. The **brief facts** of the case are that:-

2(i) The petitioner joined the respondent-department as Steno-typist in August 1988. He worked as such till January 1998 when the post of Steno-typist was upgraded by the respondent-department as Senior Scale Stenographer. On 6.8.2003, the petitioner represented to the respondent-department for upgrading the post of Senior Scale Stenographer to the post of Personal Assistant on the ground that similar posts have been upgraded in the other departments. His representation was rejected on 19.12.2003. He filed an original application before the erstwhile H.P. State Administrative Tribunal against the rejection of his representation. This original application was decided by this Court as CWP(T) No. 11091 of 2008 on 21.2.2011. The communication dated 19.12.2003 was quashed being a non- speaking order. The respondent-department was directed to decide the petitioner's representation afresh by passing speaking order within a period of two months.

2(ii) In compliance to the judgment dated 21.2.2011, the respondent No. 1 passed a detailed order on 25.4.2011 deciding petitioner’s representation. Respondent No. 1 accepted the representation and ordered that the Administrative Department should move the case for upgradation of

the post of Senior Scale Stenographer to that of Personal Assistant to the Finance Department for its concurrence and to take the matter to the CMM on receipt of its advice and for final approval of the cabinet.

2(iii) The matter was accordingly processed by the respondents and finally office order was issued on 15.3.2012 upgrading the post of Senior Scale Stenographer to the post of Personal Assistant. In terms of this order, the incumbent of the post of Senior Scale Stenographer i.e. the petitioner was held entitled for the pay scale of Rs. 10300-34800+4200 grade pay as Personal Assistant w.e.f. 15.3.2012. The upgradation was ordered with immediate effect.

2(iv) In tune with office order dated 15.3.2012, the petitioner submitted his joining as Personal Assistant on 15.3.2012 itself. A year later i.e. on 23.3.2013, the petitioner filed a representation complaining that the post of Senior Scale Stenographer should have been upgraded to the post of Personal Assistant w.e.f. 6.8.2003 i.e. the date when he had first represented in this regard instead of actual date of upgradation i.e. 15.3.2012. Petitioner claimed appointment/promotion to the upgraded post w.e.f. 6.8.2003. His representation did not find favour with the respondents, compelling him to prefer the instant petition.

3. **Contentions**

3(i) Learned counsel for the petitioner in support of his plea that the upgradation of the post of Senior Scale Stenographer should have been from a retrospective date of 6.8.2003 has placed reliance upon the order dated 25.4.2011 (Annexure P-3). According to learned counsel for the petitioner, respondent No. 1 while accepting petitioner's representation for upgradation of the post had observed that there was no need of any representation from the incumbent and rather it was the responsibility of the department to have moved the case and ensured that the post of Senior Scale Stenographer gets upgraded to that of the post of Personal Assistant looking at the volume of the

work in the Directorate. The attention in this regard was invited to following two paras of the order:-

> "6. It seems that there has been a gross discrimination in non upgradation of the post of Senior Scale Stenographer to that of Personal Assistant in the Directorate of Printing & Stationary. The work in the Department has increased manifold and the post of Controller, Printing & Stationary is being manned either by Indian Administrative Service Officer or a senior Himachal Administrative Service Officer. There is ample justification for the upgradation of the post of Senior Scale Stenographer to that of Personal Assistant in the Directorate of Printing & Stationary. Otherwise also as per the revised pay scales, the pay scales of Senior Scale Stenographer and Personal Assistant are similar i.e. Rs. 10300-34800 except grade pay which is Rs. 3800 in the case of Senior Scale Stenographer and Rs. 4200 in the case of Personal Assistant, meaning thereby that the financial implication in the upgradation would be only Rs. 400 (Rs.4200-Rs.3800). The representation is accordingly accepted and it is ordered that the A.D. should again move the case to the Finance Department for their concurrence and take the matter to the CMM on the receipt of their advice for final approval of the Cabinet.
>
> 7. I feel that otherwise also there was no need of any representation form the present incumbent and it was incumbent on the Department to have moved a case and ensured that the post of Senior Scale Stenographer is upgraded to that of Personal Assistant looking at the volume of the work in the Directorate and the Finance Department Office Memorandum No. Fin(PR)B(7)-14/89 dated 20th June, 1994."

3(ii) Per contra, learned Additional Advocate General submitted that the post of Senior Scale Stenographer was actually upgraded to that of Personal Assistant only on 15.3.2012. There was no post of Personal Assistant in the respondent department prior to 15.3.2012. Therefore, there was no question of appointing/promoting the petitioner to the post of Personal Assistant w.e.f. 6.8.2003. Learned Additional Advocate General also argued that the creation/upgradation of the post lies in the exclusive domain of the employer.

4. **Observations**

4(i) By now, it is well settled that questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled from such promotions pertain to the field of policy and are within the exclusive discretion and jurisdiction of the State, subject to the limitations or restrictions envisaged in the Constitution of India. It will be appropriate to extract relevant observations of the Hon'ble Apex Court made in this regard in ***P.U. Joshi and Others vs. Accountant General, Ahmedabad and Others*** and connected matter, reported in ***(2003) 2 SCC 632:-***

> "10. *We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose*

*itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."*

4(ii) Coming to the facts of the case, the petitioner was appointed as Steno-typist on 18.8.1988. This post was further upgraded to that of Senior Scale Stenographer on 14.8.1998. The petitioner had represented for further upgradation of the post of Senior Scale Stenographer held by him to that of Personal Assistant. His representation dated 6.8.2003 was initially rejected by the respondents on 19.12.2003. Pursuant to the direction issued by this Court on 21.2.2011, petitioner's representation was considered afresh by respondent No. 1. In the fresh decision taken on 25.4.2011, the representation was accepted. The proposal of the petitioner for upgradation of

post of Senior Scale Stenographer to that of Personal Assistant was recommended to the Finance department. The matter was processed thereafter. It was finally approved by the Cabinet. The CMM in its meeting held on 9.3.2012 approved to upgrade the post prospectively. Consequent upon this approval, the office order was issued on 15.3.2012 upgrading the post of Senior Scale Stenographer to the post of Personal Assistant. The petitioner holding the post of Senior Scale Stenographer became Personal Assistant and entitled for the attached pay scale to the newly upgraded post of Personal Assistant. He accepted the terms and conditions of office order dated 15.3.2012, in terms of which the post was upgraded with immediate effect and joined his duties on 15.3.2012 itself.

4(iii) The post of Personal Assistant was not in existence prior to 15.3.2012, therefore, petitioner cannot be held entitled for the benefits of the upgraded post prior to 15.3.2012. The reliance placed upon the observations of respondent No. 1 in the order dated 25.4.2011 that the Department should have moved the case for upgrading the post of Senior Scale Stenographer, will not advance the case of the petitioner. All said and done, the fact remains that post was actually upgraded on 15.3.2012. The creation/upgradation of the post lies within the domain of the State government.

4(iv) The petitioner has not been able to substantiate violation of any of his constitutional or legal rights by the impugned action of the respondents in upgrading the post of Senior Scale Stenographer to that of Personal Assistant prospectively that is w.e.f. 15.3.2012. There is no vested right in the petitioner to seek his promotion to the post of Personal Assistant w.e.f. 6.8.2003 more so when the post in question came into existence only on 15.3.2012. Therefore, no fault can be found with the action of the respondents in turning down petitioner's claim of retrospective promotion and pay scale attached to the post of Personal Assistant w.e.f. 6.8.2003.

For the foregoing reasons, I do not find any merit in the instant petition and the same is accordingly dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

SURESH DUTT,
S/O SH. KRISHAN DUTT,
AGED ABOUT 47 YEARS,
R/O VILLAGE SAROGA, POST OFFICE CHAKLI,
TEHSIL NAHAN, DISTRICT SIRMOUR,
HIMACHAL PRADESH PRESENTLY POSTED AS
LANGUAGE TEACHER AT GOVERNMENT SENIOR
SECONDARY SCHOOL DHAUN, TEHSIL NAHAN,
DISTRICT SIRMOUR, HIMACHAL PRADESH.

.....PETITIONER

(BY SH TARUN K. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
ITS PRINCIPAL SECRETARY (EDUCATION) TO THE
GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. DIRECTOR OF ELEMENTARY EDUCATION SHIMLA,
HIMACHAL PRADESH.

3. DEPUTY DIRECTOR OF ELEMENTARY EDUCATION
SIRMOUR AT NAHAN, DISTRICT SIRMOUR, H.P.

4. PRINCIPAL GOVERNMENT SENIOR SECONDARY
SCHOOL DHAUN, TEHSIL NAHAN, DISTRICT SIRMOUR,
HIMACHAL PRADESH.

.....RESPONDENTS

(BY SH. DESH RAJ THAKUR, ADDITIONAL
*ADVOCATE GENERAL)*

CIVIL WRIT PETITION(ORIGINAL APPLICATION)
No. 6557 OF 2019
Decided on: 13.06.2022

**Constitution of India, 1950**- Article 227- Wrong fixation of pay- Recovery- Held- Excess payment has been made to petitioner on account of wrong fixation of his pay and recovery of such excess payment would be impermissible, iniquitous and harsh upon him- Petition allowed. [Para 5(i) & (ii)]

**Cases referred:**

Chandi Prasad Uniyal and Ors. Vs State of Uttrakhand and Ors. (2012) 8 SCC 417;

Col. B. J. Akkara (Retd.) Vs. Government of India and Others (2006) 11 SCC 709;

High Court of Punjab and Haryana & Ors Vs. Jagdev Singh (2016) 14 SCC 267;

State of Punjab and Others Vs. Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2);

Syed Abdul Qadir Vs. State of Bihar (2009) 3 SCC 475;

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

**O R D E R**

On 30.11.2015, the respondents issued an order for recovery of amount from the salary of the petitioner on account of alleged wrong fixation of his pay for the period 1.1.1996 to 30.11.2015. This order was followed by a notice dated 07.12.2015 informing the petitioner that Rs.218067/- is to be recovered from him in compliance to office order dated 30.11.2015. These actions of the respondents have compelled the petitioner to

institute the present petition seeking quashing of recovery order as well as the notice.

2. On hearing learned counsel for the parties and after considering the material available on record, the following **factual position** of the case emerges:-

2(i) The petitioner was initially appointed against the post of Junior Basic Trained Teacher (JBT) on ad-hoc basis. He joined as such on 26.09.1989 in the pay scale of Rs.1200-2100 fixed at Rs.1200/-. His services were regularized as JBT on 06.10.1993. He was promoted to the post of Language Teacher on 17.02.2000. The pay-scale was revised w.e.f. 1.1.1996 and the existing old scale of 1.1.1986 was accordingly revised. Petitioner's pay scale was also revised from Rs.1200-2100 to Rs.4550-7220. Petitioner was granted bunching benefits w.e.f. 1.1.1996. Basic pay of the petitioner was fixed at Rs.4850/- by giving him two additional increments over and above the bunching benefits.

2(ii) In the year 2015, the respondents observed that petitioner's basic pay as on 31.12.1995 was Rs.1420/- and on revision of pay-scale w.e.f. 1.1.1996 his pay was to be fixed at Rs.4550/- instead of Rs.4850/-. The respondents also took into consideration the Government letter dated 24.12.2010 that benefit of bunching increments shall not be admissible on the initial ad-hoc service. The respondents, therefore, passed an order on 30.11.2015 (part of Annexure P-1) re-fixing petitioner's pay and also directing recovery in lumpsum of the excess amount paid to him due to wrong fixation of his pay for the period from 1.1.1996 to 30.11.2015.

2(iii) In pursuance to the order dated 30.11.2015, respondents issued a notice to the petitioner on 07.12.2015 (Annexure A-1) directing him to pay an amount of Rs.218067/-.

In the above backdrop of facts, the petitioner has filed the instant petition for the following substantial reliefs:-

*"A. Quash the impugned notice Annexure A-1 being arbitrary malafide and illegal.*

*B. Direction be issued to the respondent department not to attach the salary of the petitioner on the basis of Annexure A-1."*

3. In the present petition, the petitioner has not disputed that his pay was wrongly fixed by the respondents for the period in question. His only grievance in the instant petition is against the recovery of excess payment ordered by the respondents for the period in question.

4. During hearing of the case, learned Additional Advocate General placed on record instructions dated Nil June, 2022 to the effect that *" petitioner Sh. Suresh Dutt after order dated 30.11.2015 was getting pay scale Rs.18350+4400 Grade Pay which is in terms of the entitlement of the petitioner to the post concerned at that relevant time."*

5. **Observations**

In view of the pleadings of the parties, the only issue to be adjudicated is whether the respondents are entitled to effect recovery from the petitioner on account of wrong fixation of his pay by them for the period 1.1.1996 to 30.11.2015.

5(i). The issue involved is no longer *res integra.* Taking note of various precedents of the Hon'ble Apex Court including the ***Col. B. J. Akkara (Retd.)*** Vs. ***Government of India and Others (2006) 11 SCC 709***, ***Syed Abdul Qadir*** Vs. ***State of Bihar (2009) 3 SCC 475, Chandi Prasad Uniyal and Ors.*** Vs ***State of Uttrakhand and Ors. (2012) 8 SCC 417***, ***State of Punjab and Others*** Vs. ***Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2)*** and ***High Court of Punjab and Haryana & Ors*** Vs. ***Jagdev Singh (2016) 14 SCC 267,*** Hon'ble Division Bench of this Court in ***CWP No.3145/2019*** titled ***S.S. Chaudhary*** Vs. ***State of H.P. & Ors.***

*alongwith connected* matters decided on 24.03.2022, has drawn the following conclusions in para-35 of the judgment:-

> *"35. In view of the aforesaid discussion, as held by Hon'ble Supreme Court in Rafiq Masih's case (supra), it is not possible to postulate all situations of hardship, where payments have mistakenly been made by the employer, yet in the following situations, recovery by the employer would be impermissible in law:-*
> *(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*
> *(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery. (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
> *(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
> *(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.*
> *(vi) Recovery on the basis of undertaking from the employees essentially has to be confined to ClassI/Group-A and Class-II/Group-B, but even then, the Court may be required to see whether the recovery would be iniquitous, harsh or arbitrary to such an extent, as would far overweigh the equitable balance of the employer's right to recover.*
> *(vii) Recovery from the employees belonging to Class-III and Class-IV even on the basis of undertaking is impermissible.*
> *(viii) The aforesaid categories of cases are by way of illustration and it may not be possible to lay down any precise, clearly defined, sufficiently channelised and inflexible gudielines or rigid formula and to give any exhaustive list of myriad kinds of cases. Therefore, each of such cases would be required to be decided on its own merit."*

It will also be appropriate to take note of a recent judgment of the Hon'ble Apex Court rendered on 2.5.2022 in ***Civil Appeal No.7115/2010*** titled ***Thomas Daniel*** Vs ***State of Kerala & Ors,*** holding that where the excess amount was not paid on account of any

misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. The relevant part from the judgment is extracted hereinafter:-

> *"9.This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess."*

5(ii). It is not in dispute that the petitioner is a Class-III employee working under the respondents. With effect from 30.11.2015, petitioner is being paid the salary as per his entitlement. The excess payment of Rs.218067/- has been made to him by the respondents on account of wrong fixation of his pay for a period in excess of five years. In fact, the period for which the recovery is now sought to be effected ranges from 1.1.1996 to 30.11.2015. It is a huge period of 19 years and 11 months. Recovery of excess payment on account of wrong fixation of petitioner's pay for a period of about 20 years would be impermissible, iniquitous and harsh upon him. It is not the case of the respondents that wrong fixation of petitioner's pay during the

period in question was on account of any fraud or misrepresentation of facts by the petitioner. The case of the petitioner is squarely covered in terms of conclusions drawn in Para-35 (iii), (v) & (vii) of the judgment in S.S. Chaudhary's case (supra). Recovery from the employees belonging to Class-III & Class-IV categories is impermissible even on the basis of their undertakings. Therefore, the so called readiness allegedly expressed by the petitioner in writing to the respondents on 27.11.2015 for returning the excess amount as mentioned in the impugned order dated 30.11.2015 is also of no help to the respondents.

For the foregoing reasons, this petition is allowed. Order dated 30.11.2015 (Annexure A-1) re-fixing petitioner's pay-scale is quashed only to the extent it orders to effect recovery from the petitioner for the excess payment made to him on account of wrong fixation of his pay by the respondents for the period from 1.1.1996 to 30.11.2015. Annexure A-1, the recovery notice issued by the respondents on 07.12.2015 in compliance to the order dated 30.11.2015 is also quashed and set aside. Pending miscellaneous application(s), if any, shall also stand disposed of.

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

Between:

SHAMSHER SINGH,
S/O LATE SH. HET RAM,
R/O VPO MANDHOL,
TEHSIL JUBBAL,
DISTRICT SHIMLA,
HP, AT PRESENT ADDITIONAL SP 1ST
IRBN BATTALIAN, BANGARH

....PETITIONER

(BY MR. SANJEEV BHUSHAN SENIOR
ADVOCATE WITH MR. RAJESH KUMAR
AND MR. RAKESH CHAUHAN,

ADVOCATES)

AND

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

2. DIRECTOR GENERAL OF POLICE, H.P. SHIMLA.

3. DEPUTY INSPECTOR GENERAL
OF POLICE, TTR H.P. SHIMLA CUM
CHAIRMAN INTERNAL COMMITTEE OF
PHQ, SHIMLA-02

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR
ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 4363 OF 2020
Decided on:17.06.2022

**Constitution of India, 1950**- Article 227- **Central Civil Services (Classification, Control and Appeal) *Rules* 1965**- Rule 14- Departmental Inquiry on sexual harassment- Remand thereof- Held- No action could be taken on the anonymous complaint containing allegations of sexual harassment, as such, prayer for quashing complaint as well as enquiry deserves to be accepted- Petition allowed. (Para 15 to 18)

**Cases referred:**

Union of India and Ors v. B.V. Gopinath, (2014) 1 SCC 351;

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

**O R D E R**

Being aggrieved and dissatisfied with order dated 18.12.2017 (Annexure-11), whereby Principal Secretary (Home) to the Government of Himachal Pradesh, remanded the inquiry back to the Complaint Committee on Sexual Harassment to further inquire into the matter in accordance with the provisions of Rule 14 of the CCS(CCA) Rules, 1965 and memorandum dated 20.4.2018 (Annexure A-13) issued by the Internal Complaint Committee, headed by Deputy Inspector General of Police, TTR, HP Shimla-2, petitioner approached the erstwhile HP State Administrative Tribunal by way of OA No. 2464 of 2018, which now on account of its abolishment stands transferred to this Court for adjudication, praying therein for following main reliefs:

> *"That the impugned orders Annexures A-10, A-11 and A-13 may very kindly be quashed and set aside and further the entire proceedings with respect to the enquiry may very kindly be quashed and set-aside."*

5. For having bird's eye view, certain undisputed facts as emerge from the pleadings adduced on record by the respective parties are that an anonymous complaint filed by one lady constable of First Reserved Battalion Junga, District Shimla, leveling therein serious allegation of sexual harassment against the petitioner, who at that relevant time was working as Additional Superintendent of Police, First Battalion Junga, came to be addressed to Director General of Police (Annexure A-1). In the aforesaid complaint, precisely, the allegation against the petitioner was that some lady constable posted at First Battalion Junga was being harassed sexually and mentally by the petitioner. Director General of Police having taken note of contents of the complaint as detailed herein above, constituted a Fact Finding Committee to ascertain the correctness of the allegations contained in the anonymous complaint, however, the allegations were not found correct and as such, no further action, if any, was taken by the office of Director General of Police. But since complainant had also addressed the aforesaid complaint to

other authorities including the Principal Secretary (Home) to the Government of Himachal Pradesh, matter subsequently came to be inquired by respondent No.3, who vide notice/communication dated 16.9.2016 (Annexure A-2) directed the petitioner to attend her office in connection with inquiry on 19.9.2016. Interestingly, respondent No.3, before issuing aforesaid notice dated 16.9.2016, to the petitioner, had already recorded the statements of the lady constables posted at First Reserved Battalion Junga (Annexure A-3) as is evident from the date mentioned by the witnesses under their signatures. Petitioner apart from presenting himself before respondent No.3 filed a detailed reply (Annexure A-4) to the complaint lodged against him, specifically refuting therein allegations contained in the anonymous complaint (A-1). Vide communication dated 28.9.2016 (Annexure A-5) respondent No.3 after having received reply filed by the petitioner afforded an opportunity to the petitioner to lead evidence, if any, in defence on 30.9.2016. On 30.9.2016, statement of defence witnesses, ten in number, was recorded jointly by respondent No.3 (Annexure A-7). Respondent No.3 after having recorded statement of defence witnesses and without affording an opportunity of cross-examination to the petitioner proceeded to submit final report of inquiry against the petitioner recommending therein action under the conduct rules and ethics of the police department.

6. Being aggrieved and dissatisfied with aforesaid inquiry report submitted by the Sexual Harassment Committee, petitioner filed a detailed representation to the Principal Secretary (Home) to the Government of Himachal Pradesh (Annexure A-9). In the aforesaid representation, petitioner besides highlighting the number of procedural irregularities committed by the Sexual Harassment Committee, raised specific issue with regard to non-compliance of provisions contained under CCS (CCA) Rules, 1965 as also the provisions contained under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (in short the "*Sexual*

*Harassment Act*"). Petitioner claimed that though at the first instance, no inquiry could have been initiated on the basis of anonymous complaint and thereafter further inquiry, if any, was to be conducted strictly in terms of provisions contained under Section 9 of the Sexual Harassment Act and Section 14 of the CCS(CCA) Rules, 1965. Having taken note of the grounds raised in the representation as detailed herein above, respondent No.1 i.e. Principal Secretary (Home) to the Government of Himachal Pradesh, vide order dated 21.5.2017 (Annexure A-10), remanded the case back to the Inquiry Committee with direction to further inquire into the matter in accordance with the Rule 14 of CCS(CCA) Rules, 1965. However, interestingly, the Sexual Harassment Committee headed by respondent No.3 again failed to follow the procedure as prescribed under Rule 14 CCS(CCA) Rules, 1965 Rules and Sections 9, 10 and 11 of the Sexual Harassment Act and again submitted the same report as was submitted at the first instance. Petitioner being aggrieved with the aforesaid inquiry again filed representation to the Principal Secretary (Home) to the Government of Himachal Pradesh, who after being convinced that alleged allegation against the petitioner as contained in the anonymous complaint (Annexure A-1) could only be decided in accordance with the provisions of Rule 14 of CCS(CCA) Rules, 1965, again remanded the inquiry back to the Complaint Committee in terms of Rule 15(1) of CCS(CCA) Rules, 1965 with direction to do the needful in terms of provisions contained in Rule 14 of CCS(CCA) Rules, 1965. After passing of the aforesaid remand order dated 18.12.2017 (Annexure -12), respondent No.3 again issued notice dated 10.4.2018, to the petitioner, asking him to attend her office on 20.4.2018 for cross-examination of defence witnesses on the allegations leveled against him. Vide memorandum dated 20.4.2018 (Annexure A-13), following allegations came to be leveled against the petitioner by respondent No.3, in terms of anonymous complaint by one lady constable posted at 1st Battalion Junga:

> *"1.The behaviour of charged officer remained undesirable and against the requirements of an officer in his senior position.*
> *2.Charged Officer has overstepped his mandate of a disciplinary authority by making personal remarks which can be construed to be harassing which cannot in any way be understood as words of encouragement or goodwill.*
> *3.Charged officer in one or another pretext calls the lady officials to his office and makes objectionable and embarrassing comments thereby causing mental & sexual harassment to the lady officials at their work place.*
> *4. Whenever lady officials visit his office, he asks for their mobile Nos. and says that he will speak during the night."*

7. Before further action, if any, could be taken by respondent No.3, pursuant to remand order dated 18.12.2017, passed by the Principal Secretary (Home) to the Government of Himachal Pradesh, (Annexure A-11), and memorandum dated 20.4.2018 (Annexure-13), petitioner approached the erstwhile HP State Administrative Tribunal by way of Original Application, praying therein for reliefs as have been reproduced herein above. Vide order dated 7.5.2018, the erstwhile Tribunal extended the time for filing reply to the petitioner to the memorandum dated 20.4.2018 (Annexure A-13). Vide order dated 20.6.2018, though learned erstwhile Tribunal permitted respondent No.3 to go ahead with the inquiry proceedings in terms of memorandum dated 20.4.2018 (Annexure-13), but ordered that final order shall not be pronounced till further orders.

8. As per instructions imparted to the learned Additional Advocate General, though inquiry is complete but final order can only be passed once permitted by this court. Mr. Sudhir Bhatnagar, learned Additional Advocate General argued that since fresh inquiry report is yet to be filed by the inquiry officer, present petition is not maintainable being premature.

9. On the other hand, Mr. Sanjeev Bhushan, learned Senior Counsel representing the petitioner vehemently argued that once it stands duly proved on record that no action, if any, could be initiated against the petitioner on the basis of anonymous complaint, inquiry report, if any, submitted by respondent No.3 being head of Sexual Harassment Committee is of no consequence and if allowed to sustain would be contrary to the provisions contained under the Sexual Harassment Act. Mr. Bhushan further argued that petitioner is aggrieved of order dated 18.12.2017 passed by the Principal Secretary (Home) to the Government of Himachal Pradesh ( A-11), for the reason that once aforesaid authority was convinced and satisfied that respondent No.3 has not conducted the inquiry in terms of the provisions contained under the Sexual Harassment Act as well as Rule 14 of CCS(CCA) Rules, 1965, he ought to have quashed the inquiry report as well as complaint, especially when on two occasions, inquiry officer failed to conduct the inquiry in the manner it was asked to do by the Principal Secretary (Home) vide order dated 27.5.2017.

10. Mr. Sudhir Bhatnagar, learned Additional Advocate General while refuting the aforesaid submissions made on behalf of the petitioner contended that procedural irregularities, if any, committed by respondent No.3 while furnishing inquiry report were duly rectified/removed by the inquiry officer while conducting fresh inquiry and as such, it cannot be said that fresh inquiry was not conducted in terms of the provisions contained in Section 14 of the CCS (CCA) Rules, 1965.

11. Having heard learned counsel for the parties and perused material available on record, this court finds that facts of the case as noticed herein above are not in dispute, rather stand duly admitted by the respondents in their reply. It is not in dispute that complaint, on the basis of which, inquiry proceedings came to be initiated against the petitioner, was not signed by anyone, rather same was anonymous. *First question which needs to*

*be determined in the instant proceedings is "whether anonymous complaint containing allegations of sexual and mental harassment at the work place could be probed or not*?" To explore answer to the aforesaid question this Court finds it necessary to take note of Section 9 of the Sexual Harassment Act which reads as under:

> *"9. Complaint of sexual harassment*
> *(1) Any aggrieved woman may make, in writing, a complaint of sexual harassment at workplace to the Internal Committee if so constituted, or the Local Committee, in case it is not so constituted, within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident:*
> *Provided that where such complaint cannot be made in writing, the Presiding Officer or any Member of the Internal Committee or the Chairperson or any Member of the Local Committee, as the case may be, shall render all reasonable assistance to the woman for making the complaint in writing:*
> *Provided further that the Internal Committee or, as the case may be, the Local Committee may, for the reasons to be recorded in writing, extend the time limit not exceeding three months , if it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the said period.*
> *(2) Where the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death or otherwise, her legal heir or such other person as may be prescribed may make a complaint under this section."*

12. Very initial lines of the aforesaid Section states that any aggrieved woman may make in writing a complaint of sexual harassment at work place to the Internal Committee, if so constituted or the Local Committee in case it is not so constituted within three months from the date of incident

and in case of serious of incidents, within a period of three months from the date of the last incident.

13. Aggrieved woman has been defined under Section 2 (a), which reads as under

> *"2 (a) "aggrieved woman" means-*
>
> *i.in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;*
>
> *ii. in relation to a dwel1ing place or house, a woman of any age who is employed in such a dwelling place or house;"*

14. As per the aforesaid provision, "*aggrieved woman*" would mean a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent. In the case at hand, complaint (Annexure A-1) was anonymous and as such, now question arises, whether there was any requirement, if any for Sexual Harassment Committee of the department to take cognizance of the same or not. As has been observed herein above, action, if any, in terms of Section 9 of the Act could only be taken on the complaint of Sexual harassment made by any aggrieved woman. Since in the case at hand, there was no aggrieved woman, rather anonymous complaint containing allegations of sexual harassment of some of lady constables in First Reserved Battalion Junga were leveled, there was no occasion at all for the Director General of Police or Principal Secretary (Home) to the Government of Himachal Pradesh, to take cognizance of the same. However, Interestingly, in the case at hand, though Director General of Police at the first instance constituted a Fact Finding Committee headed by Ms. Bindu Rana, Commandant, 6th IRB Battalion, Gariwala, but since nothing emerged against the petitioner, no action was taken. However subsequently on

the directions of Principal Secretary (Home) to the Government of Himachal Pradesh, matter came to be placed before the Sexual Harassment Committee headed by respondent No.3, who vide notice dated 16.9.2016, directed the petitioner to attend the office in connection with the inquiry on 19.9.2016, but Interestingly, by that time, Committee headed by respondent No.3 had already recorded the statements of ten lady constables working in First Reserved Battalion Junga as is evident from their statements placed on record as Annexure A-3, signed on 23/27.8.2016. Petitioner in compliance to aforesaid notice issued by respondent No.3 submitted reply (Annexure A-4), specifically denying the allegations against him. In reply, petitioner specifically stated that inquiry, if any, against him is required to be conducted in terms of provisions contained under Rule 14 of the CCS(CCA) Rules, wherein before initiation of inquiry, he ought to have been issued memorandum of charge and thereafter, opportunity to cross-examine the witnesses examined in support of the complaint and thereafter to lead evidence in defence. Though respondent No.3 vide communication dated 28.9.2016 (Annexure A-5) while acknowledging reply filed by the petitioner to notice dated 16.9.2016, directed the petitioner to cause presence of witnesses, if any, in defence before the Committee on 30.9.2019, but again failed to provide an opportunity to the petitioner to cross-examination the witnesses adduced in support of the complaint. Even at the stage of recording the statements of defence witnesses, glaring mistake came to be committed by the Committee headed by respondent No.3 because it recorded one joint statement of ten witnesses in defence adduced on record by the petitioner as is evident from Annexure A-6. It is pertinent to take note of the fact that at this stage, petitioner procured copies of the statements made by ten lady constables in support of the complaint dated 23/27.8.2016, wherein for the first time, signatures of Members of Sexual Harassment Committee were appended with remarks "RO&AC", to demonstrate that same were recorded in the presence of the

complainant, which fact is otherwise totally contrary to the record. For the first time, notice came to be issued to the petitioner on 16.9.2016 (Annexure A-2). If it is so, it stands duly established on record that statements of ten lady witnesses adduced in support of the complaint recorded on 23.8.2016 were recorded in the absence of the petitioner and other Committee Members. Copies of the statements made by ten lady constables in support of the complaint (Annexure A-3) made available to the petitioner alongwith notice dated 16.9.2016, nowhere bear signatures of Members of the Committee. Subsequently, Committee headed by respondent No.3 ignoring all objections with regard to the procedural irregularities committed at the time of the inquiry gave its final report (Annexure A-8), concluding therein that allegations of sexual and mental harassment leveled against the petitioner vide complaint (Annexure A-1) have been found to be correct and as such, strict action is recommended against the petitioner. Petitioner laid challenge to the aforesaid inquiry report by way of detailed representation to the Secretary (Home), who vide order dated 27.5.2017 (Annexure A-10) found merit in the representation of the petitioner and passed following order:

> *"WHEREAS the disciplinary authority has received a report of inquiry dated 25.10.2016 into the complaint of sexual harassment against Shri Shamsher Singh, Addl. SP, Ist HPAP Bn. Junga, conducted by the Internal Complaints Committee on Sexual Harassment of Women at Work Places constituted at Police Headquarters, H.P.*
> *WHEREAS the disciplinary authority vide Order of even number dated 13.12.2016 & letter of even number dated 02.01.2017 had sought the submissions/representation of Charged officer on the report of inquiry;*
> *WHEREAS the disciplinary authority has examined and considered the representation dated 11.01.2017 submitted by the Charged officer and also heard the Charged Officer in person on 18.03.2017;*

*WHEREAS as per the proviso to Rule 14 of CCS(CCA) Rules, 1965, the Complaints Committee established for inquiring in to the complaints of sexual harassment of women at work places shall be deemed to be the inquiring authority appointed by the disciplinary authority for the purpose of Rule 14 and the Complaint Committee is required to hold, if separate procedure has not been prescribed for the Complaints Committee for holding inquiry into complaints of sexual harassment, the inquiry as far as practicable in accordance with the procedure laid down in Rule 14 of CCS(CCA) Rules, 1965;*
*WHEREAS as per the information given by the Director General of Police vide his letter No.P-1(2)-DE/SK/ 14-9602 dated 05.04.2017, no independent or separate procedure has been prescribed at Police Headquarters for holding inquiry into the complaints of sexual harassment;*
*WHEREAS in absence of independent or separate procedure, the inquiry in the instant matter was required to be held, as far as practicable, in accordance with procedure laid down in Rule 14 of CCS(CCA) Rules, 1965;*
*WHEREAS from the perusal of the report of inquiry and after considering the representation of the Charged officer the disciplinary authority has noticed following shortcomings in the report of inquiry:-*

*i) The opportunity to cross-examine the prosecution witnesses has not been given to the Charged officer;*

*ii) Statements of witnesses have not been taken in the presence of the Charged Officer;*

*iii) Statements of Defence witnesses No.11-20 have been taken jointly;*

*iv) No daily order sheet has been maintained;*

*v) No opportunity has been given to the Charged Officer to submit his written*

*statement of defence under Rule 14(18) of CCS(CCA) Rules, 1965*

*WHEREAS in order to ensure that the inquiry into the complaints of sexual harassment is conducted in accordance with Rule 14 of CCS(CCA) Rules, 1965, the above listed shortcomings are required to be resolved;*

*NOW, THEREFORE, the disciplinary authority in accordance with the provisions of Rule 15(1) of CCS(CCA) Rules, 1965 remand the inquiry back to the Inquiring Authority to further inquire into the matter in order to remove the above shortcomings in the report of inquiry, in accordance with Rule 14 of CCS(CCA) Rules, 1965. The inquiring authority after holding further inquiry accordingly shall submit the report of inquiry to the disciplinary authority within a period of one month positively."*

15. Showing utter disregard to the aforesaid observations made by the Disciplinary Authority while passing order dated 27.5.2017, Committee headed by respondent No.3 again passed the same inquiry report compelling the petitioner herein to again lay challenge to fresh inquiry report by way of representation to the Disciplinary Authority i.e. Principal Secretary (Home) to the Government of Himachal Pradesh. Principal Secretary (Home), on 18. 12.2017, again found the inquiry report submitted by the Committee headed by respondent No.3 to be in violation of the provisions contained under CCS(CCA) Rules and Sexual Harassment Act and as such remanded the case back to the Committee to decide the same in accordance with the provision of rule 14 of CCS(CCA) Rules, 1965. At this stage, petitioner has approached this Court.

16. Though it has been vehemently argued on behalf of the respondents-State that since fresh inquiry in terms of order dated 18.12.2017

is still pending, present petition is not maintainable, but for the detailed discussion as well as reasons made/stated herein above, this Court is convinced and satisfied that anonymous complaint, containing allegation of mental and sexual harassment leveled against the petitioner was not maintainable and as such, ought not have been inquired into. Once no action, if any, could be taken by the respondents on the anonymous complaint, inquiry, if any, conducted qua the allegations contained in that complaint is of no consequence. At the cost of repetition, it may be again stated that in terms of Rule 9 of Sexual Harassment Act etc., complaint of sexual harassment at workplace, if any, could only be entertained if it was made by any aggrieved woman. "Aggrieved woman" as defined under Section 2(a), means a woman of any age working or non-working alleges to have been subjected to any act of sexual harassment by the respondent at work place. Though, in the case at hand, respondents with a view to prove guilt, if any, of the petitioner has recorded the statements of ten women constables working in the First Reserved Battalion Junga, but it is not understood that once none of them had ever lodged complaint of sexual harassment against the petitioner, how their statements made in support of the complaint could be made basis to hold petitioner guilty of sexual harassment. At no point of time, complaint as contained in Annexure A-1 was filed by the aggrieved woman, which is the basic necessity for initiation of proceedings, if any, under Sexual Harassment Act. Moreover, in terms of Section 9 of the aforesaid Act, complaint, if any, of sexual harassment could be filed within a period of three months from date of the incident, but since in the case at hand, anonymous complaint bears no date, there was otherwise no occasion for Sexual Harassment Committee to take cognizance of the same. Even if it is presumed that anonymous complaint made in the case could be entertained by Sexual Harassment Committee, inquiry report submitted by the Committee is vitiated on account of non-compliance of provisions

contained under Sections 11 of the Act, which prescribes mode and manner, in which, inquiry is to be conducted. Otherwise also, as per Section 10 of the Act, at the first instance, effort is to be made by the Committee for conciliation inter-se complainant and the delinquent official, but in the case at hand, no such efforts ever came to be made, rather Committee headed by respondent No.3 firstly recorded the statements of 10 women constables and thereafter, issued notice to the petitioner to explain his conduct. In normal circumstances, statements, if any, of the witnesses adduced in support of the complaint, ought to have been recorded in the presence of the delinquent officials so that he could cross-examine such witnesses before adducing any evidence in defence. In the instant case, what to talk about affording an opportunity of cross-examination to the petitioner, statement of ten witnesses adduced in defence by the petitioner was recorded jointly (Annexure A-6), which is not permissible.

17. At this stage, Mr. Sudhir Bhatnagar, learned Additional Advocate General argued that otherwise also, in terms of orders dated 27.5.2017 and 18.12.2017, passed by the Principal Secretary (Home) to the Government of Himachal Pradesh, inquiry, if any, against the petitioner was to be conducted in terms of the provisions contained under Rule 14 of the CCS(CCA) Rules, 1965 and not under Sexual Harassment Act. Though this Court finds no merit in the aforesaid submission made by the learned Additional Advocate General because very object of bringing aforesaid legislation is to provide internal mechanism for deciding the complaints, if any, with regard to sexual harassment of women official at work place, but even then, no procedure as prescribed under Section 14 of the CCS(CCA) Rules, ever came to be followed by the Inquiry Officer while submitting Inquiry Report. As per section 14 of the CCS(CCA) Rules, 1965, at the first instance, Disciplinary Authority after having received the complaint is required to frame memorandum of charge, enabling the delinquent official to refute the same by way of filing reply. In

case Disciplinary Authority is not satisfied with the explanation given by the delinquent official, it may order initiation of disciplinary proceedings by appointing inquiry officer, who in turn would again serve delinquent official with memorandum/article of charge and time to file written statement. Once written statement is filed, parties are permitted to lead the evidence. Opportunity is afforded to delinquent official to engage defence assistance. Once pleadings are complete and defence assistant is appointed, Inquiry Officer would afford an opportunity of leading evidence in support of the complaint. If evidence in support of the complaint is led on record, delinquent official would be afforded an opportunity of cross-examination. After conclusion of the evidence of prosecution, delinquent official is also required to be given opportunity to lead evidence in defence. After completion of aforesaid procedural formalities, inquiry officer can proceed to pass final inquiry report and thereafter, submit the same to the higher authorities for action, if any. In the instant case, sexual Harassment Committee headed by respondent No.3 nowhere followed procedure as detailed herein above and prescribed under Clause Rule 14 of the CCS(CCA) Rules, 1965, rather Committee of its own whims and fences, firstly, entertained the anonymous complaint and thereafter recorded the statements of some of the women constables in support of the allegations contained in the complaint and issued notice to the petitioner to explain his conduct. Since at no point of time, statements of witnesses adduced on record in support of the complaint were recorded in the presence of the petitioner, he was not afforded an opportunity to cross-examine. Though such opportunity subsequently came to be afforded to the petitioner in terms of order dated 27.5.2017, passed by Principal Secretary (Home) to the Government of Himachal Pradesh (Annexure A-10), but since by that time statements of witnesses adduced in support of the complaint stood already recorded, opportunity to cross-examine if afforded was not of much help to the petitioner. Though vide order dated 27.5.2017,

respondent No.1, specifically directed respondent No.3 to follow the procedure laid down under the Rule 14 of CCS(CCA) Rules, 1965 but yet Committee headed by respondent No.3 failed to adhere to aforesaid order passed by respondent No.1, compelling the petitioner to again approach the aforesaid authority, who again vide order dated 18.9.2017, observed that inquiry officer has not conducted inquiry into the complaint of sexual harassment in accordance with the provisions of Rule 14 of CCS(CCA) Rules, 1965 and as such, remanded the case back to the Committee. Reliance is placed upon judgment rendered by the Hon'ble Apex Court in ***Union of India and Ors v. B.V. Gopinath, (2014) 1 SCC 351*** (alongwith connected matters), which reads as under:

> *"40.Article 311(1) of the Constitution of India ensures that no person who is a member of a civil service of the Union or an all India service can be dismissed or removed by an authority subordinate to that by which he was appointed. The overwhelming importance and value of Article 311(1) for the civil administration as well as the public servant has been considered stated and re- stated, by this Court in numerous judgments, since the Constitution came into effect on 19th January, 1950. Article 311(2) ensures that no civil servant is dismissed or reduced in rank except after an inquiry held in accordance with the rules of natural justice. To effectuate the guarantee contained in Article 311(1) and to ensure compliance with the mandatory requirements of Article 311(2), the Government of India has promulgated CCS (CCA) Rules, 1965.*
>
> *41. Disciplinary proceedings against the respondent herein were initiated in terms of Rule 14 of the aforesaid Rules. Rule 14(3) clearly lays down that where it is proposed to hold an inquiry against a government servant under Rule 14 or Rule 15, the disciplinary authority shall draw up or cause to be drawn up the charge sheet. Rule 14(4) again mandates that the*

*disciplinary authority shall deliver or cause to be delivered to the government servant, a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and the supporting documents including a list of witnesses by which each article of charge is proposed to be proved. We are unable to interpret this provision as suggested by the Additional Solicitor General, that once the disciplinary authority approves the initiation of the disciplinary proceedings, the charge sheet can be drawn up by an authority other than the disciplinary authority. This would destroy the underlying protection guaranteed under Article 311(1) of the Constitution of India. Such procedure would also do violence to the protective provisions contained under Article 311(2) which ensures that no public servant is dismissed, removed or suspended without following a fair procedure in which he/she has been given a reasonable opportunity to meet the allegations contained in the charge sheet. Such a charge sheet can only be issued upon approval by the appointing authority i.e. Finance Minister.*

*45. Rule 14 of the CCS (CCA) Rules provides for holding a departmental enquiry in accordance with the provisions contained in Article 311(2) of the Constitution of India. Clause (8) also makes it clear that when the Finance Minister is approached for approval of charge memo, approval for taking ancillary action such as appointing an inquiry officer/presiding officer should also be taken. Clause (9) in fact reinforces the provisions in clause (8) to the effect that it is the Finance Minster, who is required to approve the charge memo. Clause (9) relates to a stage after the issuance of charge sheet and when the charge sheeted officer has submitted the statement of defence. It provides that in case the charge sheeted officer simply denies the charges, CVO will appoint an inquiry officer/presiding officer. In case of denial accompanied by representation, the Chairman is to consider the*

*written statement of defence. In case the Chairman comes to a tentative conclusion that written statement of defence has pointed out certain issues which may require modification/amendment of charges then the file has to be put up to the Finance Minster. So the intention is clearly manifest that all decisions with regard to the approval of charge memo, dropping of the charge memo, modification/amendment of charges have to be taken by the Finance Minister.*

*51. Ms. Indira Jaising also submitted that the purpose behind Article 311, Rule 14 and also the Office Order of 2005 is to ensure that only an authority that is not subordinate to the appointing authority takes disciplinary action and that rules of natural justice are complied with. According to the learned Addl. Solicitor General, the respondent is not claiming that rules of natural justice have been violated as the charge memo was not approved by the disciplinary authority. Therefore, according to the Addl. Solicitor General, the CAT as well as the High Court erred in quashing the charge sheet as no prejudice has been caused to the respondent.*

*52.In our opinion, the submission of the learned Addl. Solicitor General is not factually correct. The primary submission of the respondent was that the charge sheet not having been issued by the disciplinary authority is without authority of law and, therefore, nonest in the eye of law. This plea of the respondent has been accepted by the CAT as also by the High Court. The action has been taken against the respondent in Rule 14(3) of the CCS(CCA) Rules which enjoins the disciplinary authority to draw up or cause to be drawn up the substance of imputation of misconduct or misbehaviour into definite and distinct articles of charges. The term "cause to be drawn up" does not mean that the definite and distinct articles of charges once drawn up do not have to be approved by the disciplinary authority. The term "cause to be drawn up" merely refers to a delegation by the*

> *disciplinary authority to a subordinate authority to perform the task of drawing up substance of proposed "definite and distinct articles of charge sheet". These proposed articles of charge would only be finalized upon approval by the disciplinary authority. Undoubtedly, this Court in the case of P.V.Srinivasa Sastry & Ors. Vs. Comptroller and Auditor General & Ors.[19] has held that Article 311(1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, at the same time it is pointed out that*
> *"4……However, it is open to Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority."*
> *It is further held that*
> *"4…….Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or protection to the holders of a civil post."*

18. Rule 14 of CCS(CCA) Rules clearly provides that whenever departmental proceedings are held against the government servant under rule 14 or Rule 15, Disciplinary Authority shall draw up or cause to be drawn up the charge-sheet. Rule 14(4) clearly mandates that the Disciplinary Authority shall deliver or cause to be delivered to the government servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehavior and the supporting documents including a list of witnesses by which each article of charge is proposed to be proved. Procedure as provided under Article 14 of CCS(CCA) Rules is strictly in conformity with the provisions contained under Article 311 (2) of the Constitution of India and as such, if same is not followed, it would be violative of provisions contained under Section 311 (2) of the Constitution of India, which clearly provides that

no public servant is dismissed, removed or suspended without following fair procedure in which he/she is to be given a reasonable opportunity to meet the allegations contained in the charge sheet.

19. Since on two occasions, inquiry officer failed to adhere to the observations made by higher authorities i.e. respondent No.1 vide orders dated 27.5.2017 and 18.12.2017 with regard to non-compliance of provisions contained in Section 14 of the Rules, respondent No.1 while passing order dated 18.12.2017 had no occasion to remand the case, but ought to have quashed the inquiry proceedings being conducted in violation of the provisions contained under Rule 14 of the CCS(CCA) Rules, 1965 and Sexual Harassment Act. In such like proceedings, which may have an adverse impact on the career of an employee, cannot be allowed to run for an indefinite period. No doubt, in terms of order dated 18.12.2017, inquiry officer issued fresh memorandum vide order dated 25.11.2018 and inquiry is pending but since this court is of definite view as has been discussed in detail herein above, that no action, if any, could be taken on the anonymous complaint containing allegation of sexual harassment by the petitioner, prayer made by the petitioner for quashing complaint as well as inquiry report submitted by respondent No.3 deserves to be accepted.

20. Reliance is also placed upon judgment passed by the Hon'ble Apex Court in ***State of Tamil Nadu Rep. By Secretary to Govt. (Home) v. Promod Kumar IPS & Anr, in Civil Appeal No. 8427-8428 of 2018***, relevant paras whereof read as under:-

> *"15. Rule 8 of the All India Service (Discipline and Appeal) Rules, 1969 prescribes a procedure for imposing major penalties. A major penalty specified in Rule 6 cannot be imposed except after holding an enquiry in the manner prescribed in Rule 8. Where it is proposed to hold an enquiry against a member of the service under Rule 8, the disciplinary authority shall "draw up or caused to be drawn up" the*

*substance of the imputation of misconduct or misbehavior into definite and distinct article of charge. The Rule further provides for an opportunity to be given to the delinquent to submit his explanation, the appointment of an inquiring authority and the procedure to be followed for imposition of a penalty with which we are not concerned in this case. The disciplinary authority as defined in Rule 2 (b) is the authority competent to impose on a member of the service any of the penalties specified in Rule 6. Rule 7 provides that the authority to institute proceedings and to impose penalty on a member of All India Service is the State Government, if he is serving in connection with the affairs of the State. There is no doubt that the Government of Tamil Nadu is the disciplinary authority. The authority to act on behalf of the State Government as per the Business Rules is the Minister for Home Department. There is no dispute that the Hon'ble Chief Minister was holding the said department during the relevant period (2011-2016). Matters pertaining to disciplinary action against IPS, IAS and IFS officers had to be dealt with by the Chief Minister as per Standing Order No.2 dated 09.01.1992 issued by the Chief Minister of Tamil Nadu under Rule 35 (4) of the Business Rules which reads as follows "Paragraph 18. Disciplinary Action:-*

*Files relating to disciplinary action against I.A.S./I.P.S./I.F.S. Officers in the senior-grade and above at the stage of issue of charge memo/show cause notice to the above officers alone should be circulated to the Chief Minister. In the case of Secretaries to Government where action is contemplated under Rule 17 (a) or 17 (b) of the Tamil Naidu Civil Services (CC &A) Rules such files should be circulated to the Chief Minister. In the case of Heads of Department files where action is contemplated under Rule 17 (b) of the T.N.C.S. (CC &A) Rules, alone should be circulated to the Chief Minister.*

*In the case of District Revenue Officers, the files should be circulated to the Chief Minister only at the stage of imposition of penalty after obtaining the explanation of the officers.*

*In the case of Joint Secretary Deputy Secretary where action is contemplated under Rule 17(b) of the T.N.C.S. (CC &A) Rules such cases should be circulated by the Chief Secretary to the Chief Minister.*

*In respect of all other officers files should be circulated to the Chief Minister as per Business Rules."*

*16. By an order dated 19.04.2018, we directed the Chief Secretary, State of Tamil Nadu to file an affidavit explaining the position pertaining to the Business Rules and the standing orders. The affidavit filed by the Chief Secretary, Government of Tamil Nadu dated 14.05.2018 discloses that the first Respondent was arrested on 02.05.2012. He was placed under suspension on 10.05.2012 under Rule 3 (2) of the All India Service (Discipline and Appeal) Rules, 1969 after obtaining the approval of the Hon'ble Chief Minister on the note for circulation dated 09.05.2012. It was further stated in the affidavit that regular departmental action for a major penalty was initiated against Respondent No.1 under the All India Service (Discipline and Appeal) Rules, 1969 on 05.04.2013 after obtaining the approval of the Hon'ble Chief Minister.*

*17. It is clear that the approval of the disciplinary authority was taken for initiation of the disciplinary proceedings. It is also clear from the affidavit that no approval was sought from the disciplinary authority at the time when the charge memo was issued to the delinquent officer. The submission made on behalf of the Appellant is that approval of the disciplinary authority for initiation of disciplinary proceedings was sufficient and there was no need for another approval for issuance of charge memo. The basis for such submission is that initiation of disciplinary proceedings and issuance of charge memo are at the same stage. We are unable to agree with the submission in view of the judgment of this Court in B.V. Gopinath (supra). In that case the charge memo issued to Mr. Gopinath under Rule 14(3) of the Central Civil Service*

*(Classification, Control and Appeal) Rules, 1965 was quashed by the Central Administrative Tribunal on the ground that the Finance Minister did not approve it. The judgment of the Tribunal was affirmed by the High Court. The Union of India, the Appellant therein submitted before this Court that the approval for initiation of the departmental proceedings includes the approval of the charge memo. Such submission was not accepted by this Court on an interpretation of Rule 14(3) which provides that the disciplinary authority shall " draw up or cause to be drawn up" the charge memo. It was held that if any authority other than the disciplinary authority is permitted to draw the charge memo, the same would result in destroying the underlying protection guaranteed under Article 311 (2) of the Constitution of India.*

*18. Rule 8 (4) of the All India Service (Discipline and Appeal) Rules, 1969 also mandates that the disciplinary authority shall "draw up or cause to be drawn up" the charge memo. We see no reason to take a view different from the one taken by this Court in B.V. Gopinath (supra). We also see no substance in the submission made by the Senior Counsel for the State that the said judgment needs reconsideration. Assuming that Mr.Giri is right in his submission that the initiation of disciplinary proceedings and issuance of charge memo are at the same stage, the mandatory requirement of Rule 8 which provides for the charge memo to be drawn by the disciplinary authority cannot be ignored. We reject the submission on behalf of the Appellant that Gopinath's case can be distinguished on facts. We are not in agreement with the contention of the Appellant that the business rules and standing orders of the State of Tamil Nadu are quite different from the office orders and circulars issued by Union of India which formed the basis of the judgment in Gopinath's case. A close reading of the said judgment would disclose that reliance on the office note was only in addition to the interpretation of the Rule."*

*19. It is also settled law that if the rule requires something to be done in a particular manner it should be done either in the same manner or not at all- Taylor v. Taylor (1875) 1 Ch.D. 426, 431. In view of the mandatory requirement of Rule 8 (4) and the charge memo being drawn up or cause to be drawn up by the disciplinary authority is not complied with, we are of the considered opinion that there is no reason to interfere with the judgment of the High Court on this issue. The only addition we would like to make is to give liberty to the disciplinary authority to issue a charge memo afresh after taking approval from the disciplinary authority."*

21. Consequently, in view of the detailed discussion made herein above, present petition is allowed and complaint (Annexure A-1), orders dated 21.5.2017 (Annexure A-10) & 18.12.2017 (Annexure A-11) and memorandum dated 20.4.2018 (Annexure A-13) are quashed and set-aside. Accordingly, present petition is disposed of alongwith pending applications if any.

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

Between:-
JAGMOHAN MEHTA
S/O SH. LAHASNU RAM
AGED 62 YEARS,
PRESENTLY RETIRED GOVERNMENT SERVANT,
R/O VILLAGE GADHERI,
P.O.GHOOND, TEHSIL THEOG,
DISTRICT SHIMLA, H.P.

.....PETITIONER

(BY MR. R.L.VERMA, ADVOCATE VICE MR. PREM P.CHAUHAN, ADVOCATE)

AND

1. STATE OF H.P. THROUGH
SECRETARY (AGRICULTURE) TO GOVERNMENT
OF H.P. SHIMLA, H.P.

2. DIRECTOR OF AGRICULTURE,
H.P. SHIMLA HP.

3. DEPUTY DIRECTOR OF AGRICULTURE,
DISTT. SHIMLA HP.

.....RESPONDENTS

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER SINGH THAKUR, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.3406 OF 2020
Decided on: 13.06.2022

**Constitution of India, 1950**- Article 227- GPF- Payment of withheld amount of GPF along with interest- Held- Retiral benefits due to the employee are not bounty to be distributed by the government to its employees on their retirement, but is a valuable right and property in their hands- That any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of current interest rate till actual payment to the employee – The action of the respondents cannot be sustained and petitioner is entitled to refund of withheld amount of GPF- Petition allowed. [Para 4(i)(ii)(iii)]

**Cases referred:**

D.D. Tewari vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others, (2004) 8 SCC 894;

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

**O R D E R**

Petitioner has preferred the instant writ petition, seeking a direction to the respondents to pay him the withheld amount of his General Provident Fund (GPF in short) alongwith interest, with effect from the date of his retirement, till its realization.

2. **Admitted factual position** is that the petitioner retired on 30.06.2013. The respondents-department deducted a sum of Rs.52195/- from final payment of his GPF.

The **respondents** have **sought to justify** their impugned action on account of recovery of cost of Plant Protection Material amounting to Rs.7695/-, Potato seed of Rs.31500/- and Rajmah seed of Rs.13000/-. According to the respondents, this recovery was pointed out by the Public Accounts Committee. The amount ofPlant Protection Material was deposited in the Government Treasury on 01.03.2016 and balance amount was deposited in the bank through FDR. According to the respondents, the petitioner was repeatedly asked to deposit the amount in question in the Government Treasury, but he failed to do so. Therefore, the amount was deducted from the final payment of GPF subscription of the petitioner.

**3. Contentions:-**

Learned Deputy Advocate General submitted that petitioner remained posted as Incharge Potato Development Station (PDS) Shilaroo, District Shimla during the period 4/2010 to 30.06.2013. He was responsible for 15 Qtls Seed Potato valuing Rs.31500/-, one Qtl Rajmah Seeds Valuing Rs.13000/- and Plant Protection Material valuing Rs.7695/-. Pecuniary loss of Rs. 52195/- caused to the respondents department was rightfully recovered by the department from petitioner's GPF subscription.

Learned counsel for the petitioner argued that the petitioner was not responsible for loss allegedly suffered by the respondents-department. The amount has been deducted from petitioner's GPF by the respondents on account of certain discrepancies discovered by them in the store items. The discrepancies do not pertain to the tenure of the petitioner as Incharge Potato Development Station Shilaroo, District Shimla, H.P. Learned counsel for the petitioner also submitted that para of the Public Accounts

Committee was never conveyed to the petitioner and that no inquiry was held into the matter before deducting the amount from petitioner's GPF.

**4. Observations**

**4(i).** It is well settled that retiral benefits due to the employee are not bounty to be distributed by the government to its employees on their retirement, but is a valuable right and property in their hands. That any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of current interest rate till actual payment to the employee. Reference in this regard can be safely made to (***2004) 8 Supreme Court Cases 894,*** titled ***D.D. Tewari (dead) through Legal Representatives Versus Uttar Haryana Bijli Vitran Nigam Limited and others***, relevant paragraphs of which are as under:-

> *"3 The retiral benefits of the appellant were withheld by the respondents on the alleged ground that some amount was due to the employer. The disciplinary proceedings were not pending against the appellant on the date of his retirement. Therefore, the appellant approached the High Court seeking for issuance of a direction to the respondents regarding payment of pension and release of the gratuity amount which are retiral benefits with the interest at the rate of 18% on the delayed payments.*
>
> *4. The learned Single Judge has allowed the writ petition vide order dated 25-08-2010, after setting aside the action of the respondents in withholding the amount of gratuity and directing the respondents to release the withheld amount of gratuity within three months without awarding interest as claimed by the appellant. The High Court has adverted to the judgments of this Court particularly, in State of Kerala V. M. Padmanabhan Nair, wherein this Court reiterated its earlier view holding that:-*

*"1. Thepension and gratuity are no longer any bounty to the distributed by the Government to its employees on their retirement by have become, under the decision of this Court, valuable right and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment [to the employee."*

4(ii). Respondents deducted an amount of Rs.52195/- from the GPF amount of the petitioner on the ground that the department suffered this loss on account of dereliction by the petitioner in discharging his duties. Petitioner disputes this fact. According to him, he was not responsible for the alleged pecuniary loss. In his pleadings, he has named another incumbent holding the charge of PDS Shilaroo at the relevant time, as the one responsible. The respondents have not disputed that the Public Accounts Committeepara was never conveyed to the petitioner. No disciplinary proceedings were ever initiated against the petitioner for recovery of the amount in question on account of alleged discrepancies noticed bythe Public Accounts Committee. The procedure contemplated under Rule 11 of CCS (CCA) Rules, 1962 was not followed by the respondents.No show-cause notice was ever issued to the petitioner in this regard.

**4(iii).** Petitioner superannuated on 30.06.2013. Respondents thereafter deducted a sum of Rs.52,195/- from his GPF without resorting to the procedure in accordance with law. The action of the respondents cannot be sustained. Petitioner is entitled to refund of his GPF amount wrongfully deducted by the respondents.

This writ petition is therefore allowed. The respondents are directed to release the withheld GPF amount of Rs.52,195/- to the petitioner

from the due date. The amount shall carry interest at the rate of 5% per annum from the due date till its actual payment.

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

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

Between:-

H.P. STATE ELECTION DEPARTMENT,
NON GAZETTED EMPLOYEES ASSOCIATION,
THROUGH ITS PRESIDENT VINOD SHARMA
S/O LATE SHRI SOM KRISHAN SHARMA,
R/O SOM NIWAS, MINI KUFTADHAR, SHIMLA

……PETITIONER

(BY MRS. RANJANA PARMAR, SENIOR ADVOCATE
WITH MR. KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (ELECTIONS)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2

2. SECRETARY FINANCE TO THE GOVERNMENT
OF HIMACHAL PRADESH, SHIMLA-2

3. CHIEF ELECTORAL OFFICER,
HIMACHAL PRADESH, KASUMPTI,
SHIMLA-9.

4. CHIEF ELECTION COMMISSIONER OF INDIA,
THROUGH ITS SECRETARY, NEW DELHI

……RESPONDENTS

(MR. ARVIND SHARMA, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER SINGH THAKUR, DEPUTY ADVOCATE GENERAL, FOR R-1 TO R-3,

MR. ANKUSH DASS SOOD, SENIOR ADVOCATE WITH MR. ARJUN LALL, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.640 of 2020
Reserved on:18.05.2022
Decided on: 02.06.2022

**Constitution of India, 1950**- Articles 227 & 324- Honorarium to the employees of State Election Department who perform duties in Vidhan Sabha elections- Held- The instructions issued by the Election Commission of India regarding payment of honorarium would be binding on the State Government- Finance Department of the State Government cannot sit over the instructions issued by the Election Commission of India source of which lies in Article 324 of the Constitution of India- Petition allowed. (Para 5 (i to v)

**Cases referred:**

Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405;

Public Interest Foundation and others vs. Union of India and another, (2019) 3 SCC 224;

Union of India vs. Association for Democratic Reforms and another, (2002) 5 SCC 294;

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

**O R D E R**

The employees working in different capacities in the State Election Department are members of the petitioner, a registered Association. The short and simple point being put forth by the petitioner is that the respondents are required to pay honorarium to such of the employees of State Election Department, who perform duties in Vidhan Sabha Elections.

**2. Pleadings**

**2(i). Pleadings of petitioner:-**

The petitioner has pleaded that its members have been working in the Election Department and performing election duties assigned to them, be it for the Parliamentary or the State Legislative Assembly Elections.

Honorarium for discharging election duties was paid by the respondent-State till 1998. In the year 1998, simultaneous elections were held for Parliament and Vidhan Sabha/State Legislative Assembly. Members of the petitioner-Association on election duty were paid honorarium for Parliamentary as well as State Legislative Assembly elections, but subsequently, the State stopped paying honorarium for duties performed by the members of the petitioner-Association (employees of the State Election Department) in State Legislative Assembly elections. Petitioner-Association pointed out its grievances regarding requirement to pay honorarium to its members for performing duties in State Legislative Assembly elections. These grievances though were considered by the respondents in various meetings, however, they have not been redressed till date.

**2(ii). Pleadings of respondents No.1 to 3:-**

The State of Himachal Pradesh through the Secretary (Elections), Secretary (Finance) to the Government of Himachal Pradesh and Chief Electoral Officer, Himachal Pradesh have filed a common reply. Their reply states that honorarium for Lok Sabha and Vidhan Sabha elections was being paid to the election staff since 1977. The Election Commission of India in its letter dated 23.06.1998, had directed all the States to pay honorarium to all Officers and Staff of Election Department at the rate of one month's pay for the conduct of all elections to Parliament and State Legislative Assemblies or simultaneous elections. With effect from the year 1998, in the State of Himachal Pradesh honorarium is being paid to the Election staff only for Lok Sabha general elections. Honorarium in connection with general elections to Vidhan Sabha was discontinued by the State Government w.e.f. 1998 owing to 100% liability on the State. 100% expenditure on account of Lok Sabha election is borne by the Government of India and in case of Vidhan Sabha election, 100% expenditure is borne by the respective State Government. In case of simultaneous elections to Lok Sabaha & Vidhan Sabha, the

expenditure is borne on the basis of 50:50 by Government of India & State Government. It has further been stated in the reply that the matter for paying honorarium to the officers and staff of the Election Department in connection with conduct of Vidhan Sabha elections was taken up many times with the State Finance Department, but the Finance Department regretted its inability to approve the proposals. Finance Department's view as expressed in office communication dated 30.06.2017 is that the Election Staff has little extra work during elections, but for the rest of the time, they have very little work, therefore, there is no justification to pay them honorarium.

**2(iii). Pleadings of respondent No.4:-**

Respondent No.4, i.e. Election Commission of India, has filed its separate reply to the writ petition. The stand therein is that anomalies, inconsistencies and discrepancies existed in matter of payment of honorarium to the officers appointed for the conduct of elections. In order to bring uniformity and for removing doubts pertaining to payment of honorarium in respect of elections held to Parliament and State Legislative Assemblies, the Election Commission of India issued letter dated 23.06.1998, directing the State Governments to pay honorarium to all Officers and employees directly connected with elections in the States not exceeding one month's pay of the concerned employees. It has further been submitted that vide letter dated 26.02.2014, respondent No.4 had informed all the States of its decision to increase the fixed component of remuneration to Booth Level Officers from Rs.3000/- per annum to Rs.5000/- per annum. Directions were accordingly issued to the State Governments to make necessary provision in the budget for meeting the expenditure on account of increased remuneration. The stand of Election Commission of India is that instructions issued in letter dated 23.06.1998 make no distinction between Parliamentary and State Legislative Assembly elections regarding payment of honorarium. It has further been informed that in States of Punjab, Haryana & Rajasthan and Union Territory

of Chandigarh, honorarium for general elections to State Legislative Assembly is being paid by the concerned State Government. Respondent No.4 has admitted the contention of the petitioner that honorarium is liable to be paid to the officers and staff of the Commission for the duties performed by them in Vidhan Sabha/State Legislative Assembly Elections.

**3.** I have heard the submissions advanced by learned counsel for the parties who have reiterated their respective stands taken in pleadings and also gone through the material available on record. With the assistance of learned counsel for the parties, I have also considered the applicable legal provisions and the law on the subject.

**4. Observations**

**4(i).** Petitioner's claim of honorarium for performing duties during State Legislative Assembly elections, is based upon letter dated 23.06.1998 issued by the Election Commission of India (respondent No.4). It will be apposite to reproduce the contents of this letter, which are germane for adjudicating the grievances raised in the writ petition:-

> *"The Chief Secretaries/Administrators,*
> *All States and Union Territories.*
>
> *Subject: General Elections-Payment of honorarium-regarding.*
>
> *It has been brought to the notice of the Commission that some anomalies exist in matter of payment of Honorarium to the officers appointed/designated as District Election Officers, Returning Officers, Assistant Returning Officers, etc. for the conduct of general elections in the State. On the one hand some of the States have been granting a minimum of one month pay as honorarium to non-gazetted staff for the conduct of elections, on the other, officers designated by the Commission as DEOs, ROs, AROs, etc. are being paid Rs.500/- to Rs.1200/-.*

*The above position has resulted in a situation where in some cases the staff in lower grades are getting more amount as honorarium than the DEOs, ROs etc.*

*Taking into account the ground realities and in order to bring uniformity and to clarify any doubts, the Commission has decided that –*

*(i) the payment of honorarium should be made equitable to all employees directly connected with elections in the States and Union Territories.*

*(ii) Payment of such honorarium should not exceed the total pay of one month of the concerned employees.*

*(iii) Such payments will be made in respect of all elections held to Parliament and Assemblies.*

*(iv) The categories of staff who shall be eligible for payment of honorarium will be decided by the State Government concerned in consultation with the Chief Electoral Officer of the State/UT concerned.*

*Kindly acknowledge.*

*Yours faithfully*
*Sd/-*
*Secretary"*

Respondent No.4 has admitted issuing the above extracted letter. It is the pleaded case of respondent No.4 that for removing the anomalies and inconsistencies existing in matter of payment of honorarium to the Officers appointed for the conduct of elections, letter dated 23.06.1998 was issued. The letter states that payment of honorarium should be made equitable to all employees not exceeding total pay of one month of the concerned employee, who is directly connected with the elections in the States and Union Territories. The letter also states that payments of honorarium are to be made in respect of elections held not only to the Parliament but also to the State Legislative Assemblies. It will also be worthwhile to extract relevant pleadings in verbatim from the reply filed to the writ petition by respondent No.4:-

*"2. That it is hereby submitted that it was observed by the Election Commission of India that anomalies, inconsistencies and discrepancies exist in matter of payment of Honorarium to the officers appointed for the conduct of elections. Therefore, Election Commission of India issued the letter dated 23rd June, 1998 in order to bring uniformity and remove doubts pertaining to the payment of honorarium in respect of all elections held to Parliament and Legislative Assemblies.*

*Parawise reply .....*

*6.IX. That the contents of the para are admitted to the extent that honorarium is liable to be paid to the officers and staff of the Commission for the duties performed by them in the Vidhan Sabha Elections.....*

*XII.B. That the contents are denied to the extent that actions of replying respondent in any manner against the relevant rules and instructions. In fact, the instructions dated 23.06.1998 issued by the Election Commission of India are equally applicable, and there is no distinction for both i.e. Parliamentary Elections as well as for the Legislative Elections....."*

From the pleadings of the parties, it is also borne out that in neighbouring States of Punjab, Haryana, Rajasthan and Union Territory of Chandigarh, the concerned State Government is paying honorarium for general elections to the Legislative Assembly. Respondent No. 4 has also submitted in para 6.X of its reply that from time to time, it has "raised the matter for allowing one month's basic pay equivalent honorarium for Vidhan Sabha Election. However, subject to the directions of this Hon'ble Court in the present matter, it is submitted that the replying respondent will again raise the matter and direct the Government of Himachal Pradesh to make necessary provisions in the budget for meeting the expenditure and for allowing one month's basic pay equivalent honorarium for Vidhan Sabha Elections."

In view of the pleadings of the parties, the core issue that arises for determination is whether the instructions issued by the Election Commission of India dated 23.06.1998 are binding upon the respondent-State. For deciding this issue, Article 324(1) of the Constitution of India may first be referred to, which reads as under:-

> *"324. Superintendence, direction and control of elections to be vested in an Election Commission.-(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)."*

By now, it is well settled that the words 'superintendence, direction, control' and 'conduct of all elections' have been used in Article 324 in broadest terms covering entire election process. The superintendence, direction, control and conduct of all elections to the Parliament & Legislative Assembly of every State vests in the Election Commission. The phrase 'conduct of elections' has been held to be of wide amplitude, which would include power to make all necessary provisions for conducting free and fair elections. In ***Union of India Versus Association for Democratic Reforms and another, (2002) 5 SCC 294***, one of the question that arose for consideration was whether the Election Commission was empowered to issue directions as ordered by the High Court. The Hon'ble Supreme Court considered various precedents including the decision in ***Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405.*** In para 20 of the judgment, the Hon'ble Apex Court observed that when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the

suitable law is enacted. The Hon'ble Apex Court summed up the legal and constitutional position in para 46 of the judgment. The principles relevant for the purpose of resolving present controversy, as summed up in para 46 of the judgment, are as under:-

> *"46. To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that:*
>
> *1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.*
>
> *2. The limitation on plenary character of power is when Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject. In Kanhiya Lal Omar case the Court construed the expression "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which many may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the Election Commission to issue such orders."*

The role of Election Commission and the extent to which it can exercise its power under the constitutional framework, again came up for consideration in ***Public Interest Foundation and others Versus Union of India and***

***another, (2019) 3 SCC 224***. Mohinder Singh Gill's case, supra, was noticed by the Hon'ble Apex Court in this judgment, wherein it was held that constitutionally appointed authority, the Election Commission, takes over the whole conduct and supervision of the mammoth enterprise involving a plethora of details and variety of activities and starts off with the notification of the timetable for the several stages of the election. An administrative machinery and technology to execute these enormous and diverse jobs is fabricated by the Act, creating officers, powers and duties, delegation of functions and location of polling stations. For holding free and fair elections, the Election Commission is vested with comprehensive responsibilities of superintendence, direction and control of conduct of elections covering powers, duties and functions that may be administrative or other, depending upon the circumstances. The directions issued in Mohinder Singh Gill's case, supra, regarding role of Election Commission were noticed in Public Interest Foundation's case as under:-

> *"66. Further, the Court observed in Mohinder Singh Gill that a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324 provided it is bona fide and necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. The Court ruled that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of a particular order. Having said that, the Court passed the following directions: (SCC p.452, para 92)*
>
> > *"92.… '… 2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This, responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.*

*(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt natural justice enlivens and applies to the specific case of order for total re-poll although not in full panoply but inflexible practicability. Whether it has been complied with is left open for the Tribunal adjudication."*

67. *In the concurring judgment in Mohinder Gill, Goswami, J., with regard to Article 324, observed thus in para 113 (SCC pp.459-60)*

*"113. ...Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules."*

Thus the superintendence, direction, control and conduct of all elections to parliament and legislature of every State vest in the Election Commission. The phrase 'conduct of elections' has been held to be of wide amplitude, which would include power to make all necessary provisions for conducting free and fair elections. Article 324 is a reservoir of power for Election Commission to act for the purpose of pursuing the goal of a free and fair election. The Election Commission has plenary power and its view has to be given weightage. It has power to supervise the conduct of free and fair election. However, the power has its limitations. The Election Commission has to act in conformity with law made by Parliament and it cannot transgress the same.

**4(iii).** It is not the case of respondents No.1 to 3 that there is any legislation on the subject, which debars the State Government from paying honorarium to the Election staff discharging duties in elections to Legislative Assembly. The field then would be governed by Article 324 of the Constitution of India. The instructions issued by the Election Commission of India regarding paying honorarium would then be binding on the State Government. Issuance of letter dated 23.06.1998 by the Election Commission of India is an admitted position. The genesis of instructions contained in this letter was the anomalies existing in different States in respect of payment of honorarium to the election staff discharging duties in elections to the Parliament as well as to State Legislative Assemblies. For removing the anomalies, the Election Commission of India circulated these instructions. The instructions are self-speaking that :- honorarium is payable to the election staff engaged in discharging election duties, be it for Parliamentary or for State Legislative Elections ; No distinction can be made for paying honorarium for the purpose of Parliamentary as well as for State Legislative Assembly Elections ; The instructions do not differentiate between the Parliament and State Legislative Assembly Elections for purpose of payment of honorarium.

Respondent No.4-Election Commission of India has taken a specific stand that honorarium at the rates fixed by it, is payable not only for performing election duties for the Parliamentary elections, but also for the elections to State Legislative Assemblies. For denying honorarium to the concerned staff for performing duties in State Legislative Assembly elections, the State Government cannot take shelter behind the view of the Finance Department that the "election staff may have little extra work during election but rest of the time they have very little work. Therefore, there is no justification to pay honorarium." It is not in dispute that honorarium for performing duties in Parliamentary Elections is being paid to concerned staff of State Election Department in terms of instructions issued by respondent No. 4. Nature of work and duties performed in Elections be it for Parliament or for the State Legislative Assembly, essentially remains the same. It is not for the Finance Department to decide the issue of payment of honorarium to the officers and employees of Election Department directly connected with elections to State Legislative Assembly. The superintendence, direction and control with respect to conduct of all elections to the Parliament and Legislature of the State vest with the Election Commission of India. The Finance Department of the State Government cannot sit over the directions/instructions issued by the
Election Commission of India, source of which lies in Article 324 of the Constitution of India.

In terms of Section 13 CC of the Representation of the People Act, 1950 (in short 'Act'), the Officers referred to in Part IIA of the Act and all other officers or staff employed in connection with the preparation, revision and correction of the electoral rolls for, and the conduct of, all elections are to be deemed to be on deputation to the Election Commission for the period, during which they are so employed. Such Officers and staff during that period

are subject to the superintendence, control and discipline of the Election Commission. Section 13CC of the Act reads as under:-

> *"13CC. Chief Electoral Officers, District Election Officers, etc., deemed to be on deputation to Election Commission.- The officers referred to in this Part and any other officer or staff employed in connection with the preparation, revision and correction of the electoral rolls, for and the conduct of, all elections shall be deemed to be on deputation to the Election Commission for the period during which they are so employed and such officers and staff shall, during that period, be subject to the control, superintendence and discipline of the Election Commission."*

Similar provision exists under Section 28A of the Representation of the People Act, 1951 is as under:-

> *"28A. Returning officer, presiding officer, etc., deemed to be on deputation to Election Commission.- The returning officer, assistant returning officer, presiding officer, polling officer and any other officer appointed under this Part, and any police officer designated for the time being by the State Government, for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officers shall, during that period, be subject to the control, superintendence and discipline of the Election Commission."*

**Conclusions & Directions**

**5.** From the above discussions, following conclusions are drawn :-

**(i).** The Officers performing election duties in terms of provisions of The Representation of the People Act are to be deemed to be on deputation to the Election Commission for the period during which they are so employed.

Such staff during that period is subject to the control, superintendence and discipline of the Election Commission of India.

**(ii).** The superintendence, direction, control and conduct of all elections to the Parliament and to the Legislature of every State vest in the Election Commission of India.

**(iii).** Article 324 of the Constitution of India is a reservoir of power to the Election Commission of India to act for the purpose of ensuring fair and free elections. The words 'superintendence, direction, control and conduct of all elections' used in Article 324 of the Constitution are of wide amplitude, which include the power to make all necessary provisions for conducting free and fair elections including issuing instructions to cope up with some situations, which may not be provided for in the enacted laws and rules.

**(iv).** The Election Commission has to act in conformity with the laws made by the Legislature and it cannot transgress the same.

**(v).** Instructions dated 23.06.1998 issued by the Election Commission of India pertain to grant of honorarium to the staff of State Election Department performing duties in Elections. There is no law enacted by the respondent-State prohibiting grant of honorarium to the staff of State Election Department engaged for performing duties in Elections to State Legislative Assembly. The instructions issued by Election Commission of India on 23.06.1998 have binding effect upon the respondents-State. These instructions are equally applicable, providing no distinction between the honorarium to be paid for the Parliamentary as well as for the State Legislative Assembly Elections. Nature of work and duties performed in Elections be it for the Parliament or for the State Legislative Assembly, essentially remains the same. Honorarium for performing duties in Parliamentary elections is being paid to the concerned staff of State Election Department in terms of instructions issued by the Election Commission of India. The honorarium in terms of instructions issued by Election Commission of India to the concerned

staff for performing duties in State Legislative Assembly cannot be denied on account of untenable view of the State Finance Department.

In view of the aforesaid discussion, this writ petition is allowed. Respondents No.1 to 3 are directed to henceforth pay honorarium to all the Officers and employees of the State Election Department performing election duties for the conduct of elections to the State Legislative Assembly, in terms of instructions dated 23.06.1998 (Annexure R-1) issued by respondent No. 4-Election Commission of India.

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

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

**Between:-**

SH. SUNNY THAKUR, SON OF SHRI BABU RAM, RESIDENT OF MOHALLA SULTANPUR, TEHSIL AND DISTRICT CHAMBA, H.P.

.....PETITIONER

(BY MR. SAT PRAKASH, 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. SUPERINTENDENT OF POLICE, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.

.....RESPONDENTS

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. KAMAL KISHORE SHARMA, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)

NO.6508 of 2019
Decided on: 19.10.2021

**Constitution of India, 1950**- Article 227- Appointment to the post of constable under category of General Home Guard- Held- No illegality and infirmity in the action of respondent- Petition dismissed. (Para 3, 4)

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

**ORDER**

Precisely, the facts as emerge from the record are that in the year 2015, respondents-State advertised 504 posts of Constables (Male) in Police Department. Aforesaid 504 vacancies were further distributed District-wise on the basis of ratio of population of District and roster points for the purpose of recruitment. Respondents advertised 38 posts of Constables(Male) for Chamba District (Annexure A-1). Out of 38 posts, one post was reserved for Home Guard. Petitioner being fully qualified, applied for the post of Constable (Male) from the Home Guard quota and was called for Physical Efficiency Test. Petitioner scored 60 marks in ground test and written test and as such, was placed at number one in the merit list of candidates (Annexure A-2), whereas, person namely, Rakesh Kumar, son of Sh. Piar Chand, who scored 58 marks, was kept at Sl. No.2 in the merit list. After circulation of aforesaid merit list of candidates, candidates as per their merit were called for Personality Test. Petitioner was awarded 6.50 marks in Personality Test, as a consequence of which, his total score came out to be 66.50 marks, whereas, person namely Rakesh Kumar, son of Sh. Piar Chand, was awarded 9 marks in Personality Test, as a result of which, his total score came to be 67 marks and he being higher in merit was offered appointment against the post of Constable reserved for Home Guard. Being aggrieved and dissatisfied with the selection of Rakesh Kumar, son of Sh. Piar Chand, against the post kept reserved for

the Home Guard quota, petitioner approached erstwhile H.P. State Administrative Tribunal by way of Original Application bearing No.5436 of 2015, which is now stand transferred to this Court and registered as CWPOA No. 6508/2019, praying therein following main relief:-

> 1. "That respondents may be directed to offer appointment to the post of Constable (Male) from Chamba District under category of General Home Guard from the date other persons have been appointed, with all consequential benefits of pay, seniority, arrears etc."

2. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that precise grouse of the petitioner, as has been raised in the instant petition, is that since petitioner stood first in overall merit, there was no occasion for Interview Committee to grant marks, if any, in the name of Personality Test. Further grievance of the petitioner is that since 3 posts were reserved for the Home Guard quota, respondents ought to have offered appointment to the petitioner being second in the merit list. Reply filed on behalf of respondents clearly reveals that though out of 38 posts, 3 posts were kept reserved for Home Guard quota, but since, two persons namely Sh. Kewal Singh and Sh. Manoj Kumar were to be accommodated against two posts reserved for Home Guard, in terms of directions contained in the judgment dated 04.08.2014, passed by this Court in CWPOA No.6608 of 2010, (Annexure A-3), only one post was kept reserved for Home Guard quota, in the selection process initiated by the respondents. Careful perusal of the aforesaid judgment dated 04.08.2014, passed by this Court reveals that persons namely Sh. Kewal Singh and Sh. Manoj Kumar had approached this Court against their non-selection in the selection process held during the year 2010 against 15% quota meant for the category of Home Guard. In the aforesaid proceedings, this Court while allowing the petition having been filed by persons named hereinabove, directed

respondents No.1 & 2 to offer appointment to the petitioners as police constables in the respondent-department against existing vacancies, if any, latest by 31.10.2014 and in case no such vacancies are presently available, then against the first two available vacancies likely to occur in the department in near future. Since there was no existing vacancies available on 31.10.2014, respondents while initiating fresh process for selection of Constables, kept two posts reserved for petitioners as mentioned in the case i.e. CWP No.6608 of 2010.

3. Bare perusal of Annexure A-1, whereby as per distribution, 38 posts were to be filled up from District Chamba on population percentage basis out of 504 posts of Constables (Male), itself suggests that though 3 posts were shown to be kept reserved for Home Guard category, but only selection process qua one post was initiated. There is specific note given in the aforesaid Annexue that two posts of Police Constables (Male) from Home Guard quota have already been earmarked vide letter dated 27.01.20215, for providing employment to Sh. Kewal Singh and Sh. Manoj Kumar, in terms of directions contained in judgment dated 04.08.2014, passed by this Court in CWP No.6608 of 2010. Once, there was specific note with regard to appointment of two persons namely Sh. Kewal Singh and Sh. Manoj Kumar against two posts out of three posts kept reserved for Home Guard quota, there is otherwise no occasion for petitioner to agitate, at this stage that respondents while initiating process for 38 posts of Constables (Male) in District Chamba could not earmark two posts for persons namely Sh. Kewal Singh and Sh. Manoj Kumar. Since, petitioner despite having taken note of aforesaid note given in (Annexure A-1), participated in the selection process, he cannot be permitted to raise plea at this stage that department could not have alloted two seats to persons namely Sh. Kewal Singh and Sh. Manoj Kumar without their having participated in the selection process initiated in the year 2015 vide (Annexure A-1). Since, there was positive directions issued

by this Court in CWP No. 6608 of 2010 to the respondents-State to offer appointment to the petitioners in that case against first two available vacancies likely to occur in the department in near future, no fault, if any, can be said to have committed by respondents while offering appointment against two posts of Constables out of three posts kept reserved for Home Guard category to the persons namely Sh. Kewal Singh and Sh. Manoj Kumar. Similarly, this Court finds that though petitioner had scored 60 marks in total, i.e. 5 marks in height and 55 marks in written test and as such, he was shown at number one of the merit list compiled by the department for inviting candidates for interview, but since, he could only score 6.50 marks in Personality Test, his overall marks came to be 66.50, which were admittedly less than other candidate namely Rakesh Kumar, son of Sh. Piar Chand, who though scored 58 marks before interview, i.e. two marks in height and 56 marks in written test, but in interview/physical personality test, he was awarded 9 marks. As per instructions contained in Para-1 of Recruitment procedure laid down in the Rule appendix 12. 12-A, notified vide H.P. Government Notification dated 11.03.2011 (Annexure R-2), there is provision for conducting Personality Test of the candidates, who clear the ground test and written test. As per Rule 12.1, All Committee Members shall award marks to each candidate and thereafter average of the marks awarded to a candidate (up to 2 decimal points) will be treated as marks awarded in the Personality Test.

4. Consequently, in view of the detailed discussion made hereinabove, this Court finds no illegality and infirmity in the action of respondents while selecting person namely Rakesh Kumar, son of Sh. Piar Chand against one post kept reserved for Home Guard quota. Similarly, action of respondents in offering appointment against two posts out of three posts kept reserved for Home Guard quota to the persons namely Sh. Kewal Singh and Sh. Manoj Kumar cannot be said to be illegal, especially, when it

stands duly established on record that such procedure was adopted by the department with a view to implement the judgment dated 04.08.2014, passed by this Court in CWP No.6608 of 2010, whereby, specific direction was granted to respondents to offer appointment to above-named persons Sh. Kewal Singh and Sh. Manoj Kumar against the existing vacancies, if not possible, then against first two available vacancies likely to be occurred in the department in near future.

Present petition fails and dismissed, accordingly, so also pending application(s), if any.

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

Between:-

SHRI BHIM SEN S/O SH. GANGA RAM
R/O VILLAGE AJOG POST OFFICE PURTHI,
TEHSIL PANGI & DISTRICT CHAMBA,
RETIRED AS FOREST WORKER FROM
THE OFFICE OF DIVISIONAL FOREST OFFICER,
PANGI FOREST DIVISION AT KILLAR,
DISTRICT CHAMBA, H.P.

.....PETITIONER

(BY SH. D.K. KHANNA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
PRINCIPAL SECRETARY (FORESTS) TO
GOVERNMENT OF HIMACHAL PRADESH,SHIMLA171002.

2. PRINCIPAL CHIEF CONSERVATOR OF

FOREST (HOFF), H.P. SHIMLA-1, H.P.

3. DIVISIONAL FOREST OFFICER AT PANGI,
KILLAR DISTRICT CHAMBA, H.P.

.....RESPONDENTS

(BY SH. NARENDER THAKUR, DEPUTY
ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO. 4374 OF 2021
Decided on: 16.06.2022

**Central Civil Services (Pension) Rules, 1972**- **H.P. Civil Services Contributory Pension Rules, 2006**- Petitioner a forest worker served 26 years but denied pension- Held- It becomes crystal clear that respondent-department is itself very well aware that period of work charge service followed by regular service is to be considered for the purpose of grant of pension- That being so, respondent-department cannot take contrary plea to defeat the pension claim of the petitioner- Petti6ioner entitled for pension- Petition allowed. (Para 4(v) (vi) (vii)]

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

**O R D E R**

The petitioner superannuated on 20.8.2018 after rendering 26 years of service in different capacities. Respondents have denied him pension, compelling him to file this writ petition.

2. **Facts :-**

2(i) Petitioner was appointed as a Forest Worker at Pangi Forest Division Killar on 1.1.1992. An original application No. 342/2001 filed by him before the erstwhile H.P. Administrative Tribunal seeking grant of work charge status w.e.f. 1.1.2002 on completion of ten years of service with 240 days in each calendar year was allowed on 19.6.2007. The respondents were directed

to confer work charge status upon the petitioner w.e.f. 1.1.2002 with all consequential benefits.

2(ii) The judgment dated 19.6.2007 passed by learned Tribunal was implemented and work charge status was assigned to the petitioner w.e.f. 1.1.2002 vide order dated 20.7.2011.

2(iii) Vide order dated 15.3.2008 service of the petitioner was regularized w.e.f. 12.10.2007.

2(iv) Petitioner superannuated on 20.8.2018. He has not been paid pension by the respondents.

3. During hearing of the case, learned counsel for the petitioner confined his submission only for the grant of pension to the petitioner.

4. **Observations :-**

I have heard learned counsel for the parties and with their assistance, considered the material on record as well as the applicable legal position. On consideration of the entire material on record and the legal position, I am of the considered view that this petition deserves to be allowed for the following reasons:

4(i) Petitioner has rendered more than 26 years of service. He rendered 10 years of daily waged service w.e.f. 1.1.1992 to 1.1.2002, 5 years 9 months of work charge service w.e.f. 1.1.2002 to 12.10.2007 and 11 years of regular service w.e.f. 12.10.2007 to 20.8.2018. Even after rendering more than 26 years of service, the petitioner is still waiting for his pension.

4(ii) The stand of the respondent-State for denying pension to the petitioner is based on three grounds. Firstly that conferment of work charge status is not included under CCS (Pension) Rules and is not on a post. Therefore, such service cannot be counted as qualifying service for pension. Secondly, that the petitioner was regularized on 15.3.2008. His date of regularization falls beyond the cut off date of 15.5.2003 indicated in new Pension Scheme 2006. The petitioner, therefore, is to be construed as an

appointee subsequent to the cut off date of 15.5.2003. The CCS (Pension) Rules, 1972 will not be applicable to the case of petitioner in view of H.P. Civil Services Contributory Pension Rules, 2006 which came into force w.e.f. 15.3.2003. Third ground urged is that the respondent-department does not have any work charge establishment. Therefore, the petitioner is not entitled for the grant of pension by counting the work charge service rendered by him prior to his regularization.

4(iii) The issue whether work charge service is to be counted towards qualifying service for the purpose of pension and other retiral benefits is no more *res integra.* Hon'ble Division Bench of this Court in *CWP No. 2384 of 2018,* titled ***State of Himachal Pradesh & Others*** versus Sh. ***Matwar Singh & Another,*** decided on 18.12.2018 has held that the work charge status followed by regular appointment has to be counted as a component towards qualifying service for the purpose of pension and other retiral benefits. Executive instructions to the contrary, are liable to be ignored. Matwar Singh's was a case where the writ petitioner, a daily waged worker in the Forest Department was retrospectively conferred work charge status w.e.f. 1.5.2002. His services were regularized w.e.f. 6.9.2007. Pension was declined to him on the ground that he did not possess the requisite qualifying service. In the backdrop of these facts, the Hon'ble Bench observed as under:

> "3. It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/struck down, in the light of view taken by this Court in CWP No.6167 of 2017, titled Sukru Ram vs. State of H.P. & others, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in Keshar Chand vs. State of Punjab through the

> Secretary P.W.D. B & R Chandigarh and others, (1988) 94(2) PLR 223, also dealt with an identical issue where Rule 3.17(ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."

The judgment in Matwar Singh's case supra has admittedly been implemented by the respondents. The petitioner in the instant case was also an employee of the Forest department. He is similarly situated as the petitioner in Matwar Singh's case. The petitioner, therefore, cannot be discriminated vis-a-vis Matwar Singh's case regarding grant of pension.

4(iv) In CWP No.6167 of 2017, titled ***Sukru Ram*** vs. ***State of H.P. & others,*** decided on 6th March, 2013, the petitioner was an employee of Forest department. He was aggrieved by non-grant of pension to him on the ground that time spent by him as work charge employee cannot be counted for the purpose of grant of pension. The writ petition was allowed. Direction was issued to the respondents to count the service rendered by the petitioner (therein) as work charge employee towards qualifying service and then to calculate the payable pension. The Special Leave Petition (civil), diary No. 32680/2018 filed by the State against the judgment in Sukru Ram's case supra was dismissed by the Hon'ble Apex Court on 10.12.2018. The judgment stands implemented as of now.

4(v) After the judgment passed in Sukru Ram's case supra, the respondent-Forest department issued general instructions on 22.7.2014, placed on record as Annexure P-7. In these instructions the approval of the

Government has been conveyed to the Principal Chief Conservator of Forests, H.P.:-

"to combine the period of work charge service with regular service for pension purpose as per the judgment of the Hon'ble High court passed in CWP No. 6167/2012 titled as Sh. Shukru Ram vs. State of H.P. You are, therefore, requested to decide all the representations at your level on the analogy of this judgment whether the representationist has filed the writ petition or not. So far as the matter regarding decision in the case of retires and Jai Devi Gupta's case is concerned, all such cases be sent to the Government with full justification for approval."

It becomes crystal clear that respondent-department is itself very well aware that period of work charge service followed by regular service is to be considered for the purpose of grant of pension. That being so, respondent-department cannot take contrary plea to defeat the pension claim of the petitioner.

4(vi) The objection that the petitioner was regularized subsequent to the cut off date of 15.5.2003 will also not advance the case of the respondents for denying pensionary benefits to the petitioner. This for the reason that pension is being claimed by the petitioner not on the strength of the date of his regularization but from the date of confirment of work charge status upon him. The work charge status was conferred upon the petitioner w.e.f. 1.1.2002 i.e. much prior to the cut off date of 15.5.2003 when the Contributory Pension Scheme 2006 came into force.

4(vii) The next objection about the Forest department not having work charge establishment is also misconceived. The petitioner was conferred the status of work charge w.e.f. 1.1.2002 by the respondent-Forest department. Original petitioners in Matwar Singh and Sukru Ram's cases supra were also conferred work charge status and were employees in the Forest department. Both these judgment were implemented by the respondent and the original

petitioners therein were granted pension. The respondent-department on its own has issued the instructions dated 22.7.2014 for counting the period of work charge service with regular service for the purpose of grant of pension.

4(viii) In a judgment passed by this Court on 17.11.2021 in CWP(OA) No. 7492 of 2019, titled ***Door Singh*** versus ***State of H.P. & Others,*** instructions issued by the State on 1.6.2016 regarding counting work charge service rendered by Class-III and Class-IV employee of Public Works and IPH department for purpose of grant of pensionary benefits were noticed as under:

> "In the instant case, admittedly, the petitioner was granted work charge status/regularization w.e.f. 01.01.2002. Since petitioner's regularization/grant of work charge status is prior to the cut-off date of 15.05.2003 for the applicability of Contributory Pension Scheme (New Pension Scheme) and he is still stated to be in service of respondent department, therefore, he falls under the Old Pension Scheme, i.e. CCS (Pension) Rules, 1972. Instructions issued by the State on 01.06.2016 placed on record alongwith reply of the respondents are also to the effect that "All Class-III & Class-IV employees of PWD and IPH Departments who had been given the work charged status prior to 15.5.2003 shall be entitled to pensionary benefits as per the CCS (Pension) Rules, 1972 and they shall also be eligible to subscribe towards GPF under the GPF Rules, 1960. However, those employees who had been given the work charged status after 15.5.2003 shall be covered under the CPS or New Pension System because Central Civil Services (Pension) Rules, 1972 and GPF Rules, 1960 ceased to operate w.e.f. 15.5.2003"

Learned Deputy Advocate General, on instructions, submitted that this judgment has also been implemented and further that the instructions noted in the judgment are still holding the field.

Thus, looking from any angle, petitioner has to be held entitled for the grant of pension.

For the foregoing reasons, this petition is allowed. The respondents are directed to treat the petitioner eligible for grant of pension alongwith due and admissible arrears under Central Civil Service (Pension) Rules, 1972 and to take all required steps in that regard within a period of six weeks from today. Pending miscellaneous application(s), if any, shall also stand disposed of.

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

Between:-
KHEM RAJ
S/O SH. GURU SEWAK, AGED 51 YEARS,
R/O VILLAGE TELANGI,
TEHSIL KALPA, DISTRICT KINNAUR,
HIMACHAL PRADESH.

.....PETITIONER

(BY MR. ATUL KUMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (TRANSPORT)
TO THE GOVERNMENT
OF HIMACHAL PRADESH,
SHIMLA-2

2. DIRECTOR TRANSPORT
HIMACHAL PRADESH, SHIMLA

3. REGISTERING AND LICENSING
AUTHORITY, KALPA AT RECKONG PEO,
DISTRICT KINNAUR,
HIMACHAL PRADESH

.....RESPONDENTS

(BY MR. ARVIND SHARMA AND MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATES GENERAL WITH MR. NARENDER SINGH THAKUR, DEPUTY ADVOCATE GENERAL, FOR THE RESPONDENTS)

CIVIL WRIT PETITION
No.4860 of 2020
Reserved on: 30.05.2022
Decided on: 03.06.2022

**Constitution of India, 1950**- Article 227- **Motor Vehicle Act, 1988**- Section 206, 19, 185- Petitioner sought release of his driving licence retained by respondent 3- Challenged for drunken driving- Held- Respondent No. 3 ignored all the provisions of Motor Vehicle Act and no steps for disqualifying the petitioner from holding the driving licence and retained the driving licence unauthorizedly after 1.6.2019- Writ petition allowed with the direction to respondent 3 to return the driving licence to petitioner . (Para 5(iii & iv)

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

**O R D E R**

Respondent No.3 has retained the driving licence of the petitioner w.e.f. June 2019. The petitioner seeks a direction to the respondents for releasing his driving licence.

**2.** Following **facts** come out from the pleadings of the parties.

**2(i).** Petitioner was holder of driving licence bearing No. HP-25-20160000019. The driving licence was issued on 12.05.2016 and was valid upto 08.12.2019.

2(ii) Petitioner was challaned on 10.03.2017 by the police for drunken driving. His licence was suspended by respondent No.3-Registering and Licensing Authority, Kalpa at Reckong Peo, District Kinnaur, H.P. on 12.04.2017 for a period of three months, that is, w.e.f. 10.03.2017 to 09.06.2017.

The petitioner was challaned second time by the police on 19.06.2017 for the same offence of drunken driving. Respondent No.3, on 24.06.2017, suspended petitioner's licence for a period of three months w.e.f. 19.06.2017 to 18.09.2017.

The petitioner was challaned once again for the same offence by the police and his licence was suspended the third time on 10.04.2019 by respondent No.3 for a period of three months w.e.f. 1.03.2019 to 31.05.2019.

**2(iii)**. The respondent No.3retained the driving licence of the petitioner w.e.f. 01.06.2019. It is still lying with the respondents. The driving licence was valid up to 08.12.2019. The petitioner could not take any steps for its renewal as it was lying with the respondents.

In the backdrop of the above factual submissions, petitioner has prayed for a direction for the respondents to release his driving licence.

**3.** The respondent No.3 in its reply has admitted that the petitioner was challaned three times by the police for drunken driving and for suspending his licence for a period of three months in three different spells [(a) 10.03.2017 to 09.06.2017; (b) 19.06.2017 to 18.09.2017; and (c) 01.03.2019 to 31.05.2019]. The respondent has defended retaining petitioner's driving licence on the ground that he was challaned by the police for the same offence thrice within a period of two years. It has further been submitted that on 10.04.2019, a letter was written by respondent No.3 to the Director Transport, Government of Himachal Pradesh, seeking clarificationin the matter. The clarification was still awaited. For want of clarification the order in accordance with law has not been passed.

**4. Legal provisions: -**

Learned counsel for the parties, apart from stating the factual position, have also assisted on the legal provisions applicable. In view of the nature of controversy, it will be appropriate to first take note of the applicable legal provisions. **4(i).** Section 206 of the Motor Vehicles Act, 1988

(in short MV Act) gives the powers to the police officer to impound the documents, sub-section (4) thereof provides for seizing the driving licence of the driver of a motor vehicle as under:-

**206. Power of police officer to impound document.—**

*"(1) Any police officer or other person authorised in this behalf by the State Government may, if he has reason to believe that any identification mark carried on a motor vehicle or any licence, permit, certificate of registration, certificate of insurance or other document produced to him by the driver or person in charge of a motor vehicle is a false document within the meaning of section 464 of the Indian Penal Code, 1860 (45 of 1860) seize the mark or document and call upon the driver or owner of the vehicle to account for his possession of or the presence in the vehicle of such mark or document.*

*(2) Any police officer or other person authorised in this behalf by the State Government may, if he has reason to believe that the driver of a motor vehicle who is charged with any offence under this Act may abscond or otherwise avoid the service of a summons, seize any licence held by such driver and forward it into the Court taking cognizance of the offence and the said Court shall on the first appearance of such driver before it, return the licence to him in exchange for the temporary acknowledgment given under sub-section (3).*

*(3) A police officer or other person seizing a licence under sub-section (2) shall give to the person surrendering the licence a temporary acknowledgment therefor and such acknowledgment shall authorise the holder to drive until the licence has been returned to him or until such date as may be specified by the police officer or other person in the acknowledgment whichever is earlier:*

*Provided that if any Magistrate, police officer or other person authorised by the State Government in this behalf is, on an application made to him, satisfied that the licence cannot be, or has not been, returned to the holder thereof before the date specified in the acknowledgment for any reason for which the holder is not responsible, the Magistrate, police officer or other*

*person, as the case may be, may extend the period of authorization to drive to such date as may be specified in the acknowledgment.*

*(4) A police officer or other person authorized in this behalf by the State Government shall, if he has reason to believe that the driver of a motor vehicle has committed an offence under any of Sections 183, 184, 185, 189, 190, 194C, 194 D, or 194E seize the driving licence held by such driver and forwarded it to the licensing authority for disqualification or revocation proceedings under Section 19.*

*Provided that the person seizing the licence shall give to the person surrendering the licence a temporary acknowledgement therefore, but such acknowledgement shall not authorize the holder to driver until the licence has been returned to him."*

Section 206 (4) of MV Act authorizes the competent officer to seize the driving licence of the driver of the motor vehicle, who had committed any of the offences under Sections 183, 184, 185, 189, 190, 194C, 194 D or 194E of the Act. The seized driving licence is to be forwarded to the licensing authority for disqualification or revocation proceedings under Section 19 of MV Act.

**4(ii).** Section 19 of the MV Act pertains to the powers of the licensing authority to disqualify from holding the driving licence or revoking suchlicence. Such power is to be exercised by the licensing authority after granting an opportunity of hearingto the holder of the driving licence. The licensing authority can either discharge the holder of driving licence or for the reasons to be recorded in writing,may make an order disqualifying the concerned person for a specific period from holding or obtaining any driving licence to drive any class or description of the vehicles specified in the licence. The licensing authority can also make an order for revoking the driving licence. The period for disqualification from holding or obtaining licence has also been specified under sub-section 19(1A) of the Act which is three months for the first

offence and for the second or subsequent offence with revocation of the driving licence of the person concerned. Section 19 of the MV Act is extracted hereinafter:-

> *"**19. Power of licensing authority to disqualify from holding a driving licence or revoke such licence**.-(1) If a licensing authority is satisfied, after giving the holder of a driving licence an opportunity of being heard, that he-*
>
> *(a) is a habitual criminal or a habitual drunkard; or*
>
> *(b) is a habitual addict to any narcotic drug or psychotropic substance within the meaning of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or*
>
> *(c) is using or has used a motor vehicle in the commission of a cognizable offence; or*
>
> *(d) has by his previous conduct as driver of a motor vehicle shown that his driving is likely to be attended with danger to the public; or*
>
> *(e) has obtained any driving licence or a licence to drive a particular class or description of motor vehicle by fraud or misrepresentation; or*
>
> *(f) has committed any such act which is likely to cause nuisance or danger to the public, as may be prescribed by the Central Government, having regard to the objects of this Act; or*
>
> *(g) has failed to submit to, or has not passed, the tests referred to in the proviso to sub-section (3) of section 22; or*
>
> *(h) being a person under the age of eighteen years who has been granted a learner's licence or a driving licence with the consent in writing of the person having the care of the holder of the licence and has ceased to be in such care,*
>
> *it may, for reasons to be recorded in writing, make an order-*
>
> *(i) disqualifying that person for a specified period for holding or obtaining any driving licence to drive all or any classes or descriptions of vehicles specified in the licence; or*

*(ii) revoke any such licence.*

*'(1A) Where a licence has been forwarded to the licensing authority under sub-section (4) of section 206, the licensing authority, if satisfied after giving the holder of the driving licence an opportunity of being heard, may either discharge the holder of a driving licence or, it may for detailed reasons recorded in writing, make an order disqualifying such person from holding or obtaining any licence to drive all or any class or description of vehicles specified in the licence-*

*(a) for a first offence, for a period of three months;*

*(b) for a second or subsequent offence, with revocation of the driving licence of such person:*

*Provided that where a driving licence is revoked under this section, the name of the holder of such driving licence may be placed in the public domain in such manner as may be prescribed by the Central Government.*

*(2) Where an order under sub-section (1) or sub-section (1A) is made, the holder of a driving licence shall forthwith surrender his driving licence to the licensing authority making the order, if the driving licence has not already been surrendered, and the licensing authority shall,-*

*(a) if the driving licence is a driving licence issued under this Act, keep it until the disqualification has expired or has been removed; or*

*(b) if it is not a driving licence issued under this Act, endorse the disqualification upon it and send it to the licensing authority by which it was issued; or*

*(c) in the case of revocation of any licence, endorse the revocation upon it and if it is not the authority which issued the same, intimate the fact of revocation to the authority which issued that licence:*

*Provided that the driving licence shall be returned to the holder at the end of the period of disqualification only if he successfully completes the driverrefresher training course.*

*(2A) The licence holder whose licence has been suspended shall undergo the driver refresher training course*

*from a school or establishment licenced and regulated under section 12 or such other agency, as may be notified by the Central Government.*

*(2B) The nature, syllabus and duration of the driver refresher training course shall be such as may Le prescribed by the Central Government.*

*(3) Any person aggrieved by an order made by a licensing authority under sub-section (1) for sub-section (1A) may, within thirty days of the receipt of the order, appeal to the prescribed authority, and such appellate authority shall give notice to the licensing authority and hear either party if so required by that party and may pass such order as it thinks fit and an order passed by any such appellate authority shall be final."*

**5. Observations:-**

**5(i).** In the instant case, petitioner was admittedly challaned thrice by the police for drunken driving i.e. for the offence under Section 185 of MV Act. The police exercising powers under Sections 206(4) of the Act, seized petitioner's driving licence. Criminal action was not initiated but the seized driving licnece was forwarded to respondent No.3 i.e. Registering and Licensing Authority, Kalpa at Reckong Peo, District Kinnaur, H.P.

**5(ii)** The driving licence wassuspended by respondent No.3-Registering and Licensing Authority Kalpa at Reckong Peo, District Kinnaur, H.P. thrice for three different spells, each for the period of three months. Thereafter, the driving licnece was retained by respondent No.3. Admittedly, action in accordance with Section 19 of theMV Act was not taken by the respondent No.3. No opportunity of hearing was granted to the petitioner as is envisaged under Section 19(1) of theMV Act. No order was passed by respondent No.3 for disqualifying the petitioner from holding or obtaining any driving licence or for revoking such licence. Had any order been passed by respondent No.3 under Section 19(1) or 19(1)(A) of theMV Act, the same would have been appealable in terms of Section 19(3) of the Act.

**5(iii).** Respondent No.3 has retained the driving licence of the petitioner without passing any order under Section 19 of the MV Act. The petitioner's licence is lying with respondent No.3ever since 01.06.2019 without there being any order of retention, disqualification for holding the driving licnece or regarding revocation of the licnece. Obviously, in absence of any order, the period of disqualification/retention etc. of the driving licence also cannot be gathered from the record. Section 19(2) provides for returning the driving licence to the holder at the end of period of disqualification, removal of disqualification in case of successful completion of Driver Refresher Training Course of the holder of the driving licence.

**5(iv).** From the record, it appears that respondent No.3 has ignored all the provisions of the MV Act. Instead of taking action in accordance with law, respondent No.3 chose to solicit some clarification from the Director Transport H.P. on 10.04.20219. In its reply filed to the writ petition, respondent No.3 has pleaded that the aforesaid clarification was as to whether the driving licence of the petitioner should be cancelled or not. It is not understandable as to why should respondent No.3 seek clarification from the Director Transport with respect to the action required to be taken by it. Respondent No.3 was the Registering and Licensing Authority Kalpa at Reckong Peo, Distract Kinnaur, H.P. It was for respondent No.3 to act in accordance with law and in accordance with the applicable provisions of the MV Act. Had respondent No.3 taken action in accordance with the applicable provisions of the Act in respect of the driving licence of the petitioner, the present situation would not have arisen. It cannot be ignored that this writ petition was instituted on 25.10.2020, whereas, driving licence was retained by the respondent without passing any order whatsoever w.e.f. 01.06.2019. The validity period of the driving licence expired on 08.12.2019. The committee constituted by Hon'ble Supreme Court on road safety has also emphasized for suspending the driving licence for a period not less than three months under Section 19 of the MV Act

read with Rule 21 of the Central Motor Vehicles Rules, 1989. It will be appropriate to extract hereinafter the directions issued on 17.11.2015 by the Hon'ble Supreme Court on Road Safety Laws to the States/UTs for implementation:-

> *"Subject: Directions to the States/UTs to implement road safety laws-*
>
> *Sir/Madam,*
>
> *The Supreme Court Committee on Road Safety, vide its letter of even number dated 18th August, 2015 had inter-alia, issued the following direction to all States/UTs and their concerned Departments for taking action by them:*
>
> *Suspension of the Driving License for a period of not less than 3 months under Section 19 of the Motor Vehicle Act, 1988 read with Rule 21 of the Central Motor Vehicles Rules, 1989 for:-*
>
> *(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.*
>
> *2. During discussions, the Committee had with the Central Ministries and Delhi Traffic Police on 6th November, 2015. It was brought to the notice of the Committee that the Traffic Police has been implementing the directions issued by the Committee on 18th August, 2015 vigorously and is forwarding the cases to the Transport Deptt. For suspension of Driving Licenses in case of above traffic violations. However, any action taken by the Transport Deptt. could not be effective as the Driving License would remain with the violator who can use it with impunity and also evade the process of law.*
>
> *3. This has been considered by the Committee in detail. The Committee directs that in case of above traffic violations, the Traffic Police should take possession of the Driving License of the violator and forward it to the Transport Deptt. of the*

*concerned State/UT, who would suspend the License for a period of not less than 3 months under Section 19 of the Motor Vehicle Act, 1988 read with Rule 21 of the Central Motor Vehicles Rules, 1989. The Transport Deptt. would return the Driving License to the violator after expiry of said period.*

*4. All States/UTs are requested to comply with the above directions of the Committee strictly."*

The submissions made by learned Additional Advocate General to permit respondent No.3 to pass an ordernow under Section 19 of the MV Act regarding petitioner's licence, cannot be accepted at this stage. No doubt, the petitioner was challaned thrice for drunken driving and his licence was suspended each time for three months within a period of two years, but the fact remains that respondent No.3 took no steps for disqualifying the petitioner from holding the driving licence or for revoking his driving licence. In case of disqualification, period was also required to be mentioned in the order that was tobe passed in accordance with law. Respondents had retained the driving licence of the petitioner unauthorizedly after 01.06.2019 and in the interregnum, petitioner's driving licence expired on 08.12.2019.

In view of the above discussions, this writ petiton is allowed. Respondent No.3 is directed to forthwith return petitioner's driving licence to him. Taking into consideration the manner in which respondent No.3 has dealt with the matter; in retaining the driving licence of the petitioner without passing any order and; also taking note of the fact where respondent No.3-Registering and Licensing Authority has shown complete ignorance of the provisions of the MV Act regarding its powers and duties under Section 19 of the MV Act, there shall be a direction to respondents No.1 and 2 to apprise all Registering andLicensing Authorities in the State about their duties and powers as envisaged under Sections 206 and 19 of the Motor Vehicles Act, 1988 within a period of four weeks from today. A copy of this judgment be also forwarded by

respondents No.1 and 2 to all the Registering and Licensing Authorities in the State.

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

For compliance, list on **12.07.2022.**

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

Between:-

SH. YASH PAUL SINGH KATOCH, SON OF SH. HARNAM SINGH KATOCH, R/O VPO SAKNI, TEHSIL BAIJNATH, DISTRICT KANGRA, H.P., PRESENTLY POSTED AS JUNIOR OFFICE ASSISTANT (IT) PALAMPUR DEPOT, HRTC, DISTRICT KANGRA, H.P.

.....PETITIONER

(BY MR. PEEYUSH VERMA AND AJAY KUMAR, ADVOCATES)

AND

1. HIMACHAL ROAD TRANSPORT CORPORATION, SHIMLA- 171 002, H.P. THROUGH ITS MANAGING DIRECTOR.

2. THE DIVISIONAL MANAGER, HRTC, DHARAMSHALA, DISTRICT KANGRA, H.P.

.....RESPONDENTS

(BY MS. SHUBH MAHAJAN, ADVOCATE)

CIVIL WRIT PETITION
NO.2092 of 2021
Decided on: 11.11.2021

**Constitution of India, 1950**- Article 226 & 227- Quashing the order whereby the contractual services of the petitioner have been cancelled- JOA (IT) on contract basis- Held- Petitioner besides having qualification of 10+2 from a recognized Board of Education, also possesses "O" or "A" level Courses from Institutions accredited from National Institute of Electronics and Information Technology (NIELIT), his contract could not have been cancelled by the respondent-Corporation on the ground that he is not qualified, in terms of essential qualification, as provided in (R & P), Rules- Petition allowed. (Para 6, 7, 8)

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

**ORDER**

By way of instant petition filed under Articles 226 & 227 of the Constitution of India, petitioner has prayed for following substantive reliefs:-

i) "This Court may be pleased to quash and set-aside the orders dated 18.03.2021, Annexure P-1, of respondent No.2, whereby the contractual services of the petitioner have been cancelled.

ii) This Court may be pleased to direct the respondent-HRTC to regularize the services of the petitioner on completion of three years of contractual service with all consequential benefits of pay and seniority."

2. Vide Advertisement dated 23.07.2016, Annexure P-3, respondent- Himachal Road Transport Corporation, invited on-line applications from the desirous bonfide Himachali candidates for recruitment against 134 posts of Junior Office Assistants (IT), on contract basis, on monthly consolidated salary of Rs.7,860/-. Petitioner in terms of aforesaid Advertisement, applied for the post in question and on the basis of his

performance in the written examination (Typing Test) was offered appointment against the post of Junior Office Assistant (IT) on contract basis, on 28.12.2016, Annexure P-7. Subsequently, vide communication dated 19.06.2020, Managing Director/respondent-Corporation, on the recommendation of Screening Committee and in-consonance with the instructions of the Government of H.P., Department of Personnel, ordered regularization of number of Jr. Office Assistants (IT), working in the HRTC after their having completed three years continued service on contract basis as on 31.03.2020, but, fact remains that the case of the petitioner was not considered for regularization on the ground that he doesn't possess computer diploma certificate in accordance with the diploma qualification, mentioned in the (R & P), Rules for the post of Jr. Office Assistant (IT). On 19.11.2020, respondent-Corporation issued Show Cause Notice to the petitioner, stating therein that on proper verification of education certificate, it has been found that computer diploma certificate is not in accordance with the requisite qualification in (R& P), Rules, as required for the post of Jr. Office Assistant (IT) and as such, why disciplinary action be not taken against him. Petitioner vide communication dated 24.11.2020, filed reply to the aforesaid Show Cause Notice, specifically stating therein that he possesses requisite qualification, as per (R & P), Rules and as such, his case deserves to be considered for regularization like other similar situate persons. However, fact remains that vide order dated 18.03.2021, Annexure P-1, respondent-Corporation cancelled the contract of petitioner and in this background, he has approached this Court in the instant proceedings, praying therein reliefs, as reproduced hereinabove.

3. Having heard learned counsel representing the parties and perused the pleadings adduced on record by respective parties, especially, reply filed on behalf of respondents-Corporation, this Court finds that there is no dispute *inter se* parties that pursuant to Advertisement dated 23.7.2016,

Annexure P-3, petitioner was offered appointment against the post of Jr. Office Assistant (IT) on contract basis and at that time, he besides having possessed 10+2 Certificate from a recognized Board of School Education, also possessed "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT). It is not in dispute that essential qualification, as prescribed in (R & P) Rules for the post of Jr. Office Assistant (IT), stood duly incorporated in Advertisement dated 23.7.2016, Annexure P-3, which reads as under:-

" **(a) Essential Qualification:**

(i) 10+2from a recognized Board of School Education/University.

(ii) One year diploma in Computer Science/Computer Application/Information Technology from a recognized University/Institution OR "O" of "A" level Diploma from National Institute of Electronics & Information Technology (NIELIT) OR Diploma in Information Technology (IT) from a recognized ITI/Institution.

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi."

4. As per aforesaid clause of essential qualification, candidate apart from having possessed 10+2 Certificate from a recognized Board of School Education, is/was required to possess either one year Diploma in Computer Science/Computer Application/ Information Technology from a recognized University/Institution OR "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT) or Diploma in Information Technology (IT) from a recognized ITI/Institution. It is not in dispute that petitioner besides his having possessed 10+2 Certificate from a

recognized Board of School Education, also possessed "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT), meaning thereby that he was duly qualified to be considered against the post of Jr. Office Assistant (IT), as far as educational qualification is concerned.

5. Ms. Shubh Mahajan, learned counsel, representing the respondents while making this Court to peruse the reply filed on behalf of the respondents-Corporation, vehemently argued that since petitioner only undertook Diploma from 25 days, same could not be equated with one year Diploma in Computer Science/Computer Application and as such, no illegality and infirmity can be said to have been committed by respondents-Corporation while cancelling the contract of the petitioner. However, this Court is not convinced with the aforesaid submission made on behalf of the respondents-Corporation by Ms. Shubh Mahajan. Once, it stands duly mentioned/provided in the essential qualification, as provided under (R&P), Rules that candidate desirous of being appointed as Jr. Office Assistant (IT) apart from his having possessed 10+2 Certificate from a recognized Board of School Education should possess one year Diploma in Computer Science/Computer Application or "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT), "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT) cannot be ignored on the ground that same is imparted merely from 25 days. Bare perusal of Diploma as well as Certificate adduced on record by the petitioner, which was otherwise, submitted by him at the time of his initial appointment on contract basis, clearly reveals that petitioner did "O" or "A" level Diploma from Future Soft Technology/Institution, which Institution was duly accredited from National Institute of Electronics and Information Technology (NIELIT), Government of India. It stands duly mentioned in the aforesaid Certificate that same was awarded for "O" or "A" level courses. Petitioner has been awarded Grade 'O' after his having successfully completed

the course on computer concepts. Once, essential qualification, as provided in (R & P), Rules for the post of Junior Office Assistant itself enables the person having possessed "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT) apart from his having possessed 10+2 Certificate from a recognized Board of School Education to apply for the post of Jr. Office Assistant (IT), the candidature/contract of the petitioner, could not be cancelled on the ground that "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT) is not equivalent to one year Diploma in Computer Science/Computer Application/Information Technology. As per (R & P), Rules, candidate desirous of being appointed against the post of Jr. Office Assistant (IT) should possess one of the qualifications amongst following:-

> "1. One year Diploma in Computer Science/Computer Application/ Information Technology from a recognized University;
>
> 2. "O" or "A" level Diploma from National Institute of Electronics and Information Technology (NIELIT);
>
> Or
>
> 3. Diploma in Information Technology (IT) from a recognized ITI/Institution."

6. Since, as per aforesaid (R & P), Rules, candidates having qualification of three different courses are entitled to apply for the post in question, period spent by them for doing such courses is not relevant, rather it is Certificate/Diploma which is required to be taken into consideration while considering the candidature of the person concerned. Since, it stand duly established on record that petitioner besides having qualification of 10+2 from a recognized Board of Education, also possesses "O" or "A" level Courses from Institutions accredited from National Institute of Electronics and Information

Technology (NIELIT), his contract could not have been cancelled by the respondent-Corporation on the ground that he is not qualified, in terms of essential qualification, as provided in (R & P), Rules.

7. Leaving everything aside, once respondent-Corporation itself on the basis of qualification possessed by petitioner, proceeded to give him contractual appointment against the post of Jr. Office Assistant (IT) and thereafter, permitted him to continue in the service for three years, it is not permissible, at this stage, to cancel his contract and deny him regularization on the ground of his having not possessed requisite qualification. At this stage, it would be apt to take note of judgment passed by Hon'ble Apex Court in *Bhagwati Prasad and Ors. Vs, Delhi State Mineral Development*, wherein Hon'ble Apex Court has held as under:-

> "The main controversy centres round the question whether some petitioners are possessed of the requisite qualification to hold the posts as a to entitle them to 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 period/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 40 of the senior-most workmen should be regularized with immediate effect and the remaining 118 petitioners should be regularized in a phased manner, before April 1, 1991 and promoted 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 allowance 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 Rs.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."

8. In the aforesaid judgment, Hon'ble Apex Court has ruled that though initial minimum educational qualification prescribed for the post in question is undoubtedly a factor to be reckoned with, but it is so at the time of initial engagement/entry in the service. Regularization cannot be denied on the ground of essential qualifications.

9. Consequently, in view of detailed discussion made hereinabove as well as law taken note of, this Court finds merit in the present petition and accordingly, same is allowed. Order dated 18.03.2021, Annexure P-1, is quashed and set aside and respondent-Corporation is directed to regularize

the petitioner from the date, as has been done in the cases of other similar situate persons.

Pending application(s), if any, also stands disposed of.

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

Between:-

MOHAN GHARATI, AGED 56 YEARS, SON OF SH. JUDH GHARATI, RESIDENT OF VPO ANJI DHARAMPUR, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

……PETITIONER

(BY MR. AJAY SIPAHIYA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

……RESPONDENT

(BY MR. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARINDER THAKUR AND MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERALS)

CRIMINAL MISC.PETITION (MAIN)
NO.2075 of 2021
Decided on:15.11.2021

**Code of Criminal Procedure, 1973**- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 18 & 29- 2.930 Kg. opium- Held- Object of the bail is to secure the attendance of the accused during trial- Bail is not to be withheld as a punishment- Bail application allowed subject to conditions. (Para 7, 11)

**Cases referred:**

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

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

**ORDER**

Bail petitioner, namely, Mohan Gharati, who is behind the bars since 02.01.2020, has approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in case FIR No. 02/2020, dated 02.01.2020, under Sections 18 & 29 of the Narcotic Drugs and Psychotropic Substances Act (in short "the Act") registered at Police Station Dharampur, District Solan, H.P.

2. Pursuant to order dated 29.10.2021, respondent-State has filed status report. ASI Manohar Singh, Police Station Dharampur, District Solan, has also come present alongwith record. Record perused and returned. Close scrutiny of record/status report clearly reveals that on 02.01.2020, at about 9.30 P.M., police party on patrol duty after having noticed suspicious activities of three persons near Jawala Mata Temple, Dharmpur, deemed necessary to cause their search. Since accused after having seen police, made an attempt to flee away from the spot, police apprehended them and carried out their search. They allegedly recovered 1.460 kgs and 1.470 kgs, of opium each, from the rucksacks (Pithu bags) of the persons, namely, Shashi Ram Pun and Suresh Gharti, whereas, nothing was recovered from the conscious possession of the present bail petitioner. Since, no plausible explanation, if any, ever came to be rendered on record qua the possession of aforesaid quantity of contraband from the conscious possession of two persons named hereinabove, police after completion of necessary codal formalities, lodged FIR detailed hereinabove and arrested accused including present bail petitioner. Since, bail petitioner was alongwith persons from whose conscious possession contraband came to be recovered, police also registered case against him.

Both the accused, namely, Shashi Ram Pun and Suresh Gharti, from whose conscious possession intermediate quantity of opium came to be recovered, already stand enlarged on bail, whereas, present bail petitioner is behind the bars. Since, challan stands filed in the competent court of law and nothing remains to be recovered from the present bail petitioner, he has approached this Court in the instant proceedings for grant of regular bail.

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting the factum with regard to filing of challan in the competent court of law and enlargement of other co-accused on bail, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency and as such, prayer having been made on his behalf for grant of bail may be rejected. Mr. Bhatnagar, further submits that though nothing came to be recovered from the conscious possession of the present bail petitioner, but there is overwhelming evidence adduced on record suggestive of the fact that present bail petitioner alongwith other co-accused indulged in illegal trade of narcotics and as such, it cannot be said that he has been falsely implicated. Lastly Mr. Bhatnagar, learned Additional Advocate General, states that since two accused came to be apprehended together by police, alleged contraband of 2.930 kgs. (1.460 kgs + 1.470 kgs), can be said to be recovered from the conscious possession of the accused named in the FIR and as such, rigours of Section 37 of the Act are attracted; and prayer made on behalf of the present bail petitioner for grant of bail, deserved outright rejection.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on the date of alleged incident, police without associating independent witnesses, allegedly recovered 1.460 kgs and 1.470 kgs of opium each, from two bags allegedly carried out by two accused, namely, Shashi Ram Pun and Suresh Gharti. It

is not in dispute that nothing came to be recovered from the conscious possession of present bail petitioner, rather he only came to be named in the FIR on account of his presence alongwith other accused at the time of recovery. As per own case of Investigating Agency, 1.460 kgs of opium was recovered from the rucksack of accused, namely, Shashi Ram Pun and 1.470 kgs of opium was recovered from the rucksack of accused, namely, Suresh Gharti and as such, it cannot be said that commercial quantity of opium came to be recovered from the conscious possession of the accused named in the FIR . As per NDPS Act, commercial quantity of opium is more than 2.5 kg and as such, contraband recovered in the instant case, cannot be said to be of commercial quantity. Though, Mr. Sudhir Bhatnagar, learned Additional Advocate General, tried to carve out a case that since both the accused named hereinabove, obtained opium from one source, contraband came to be recovered from them, is required to be clubbed while determining the weight of the same and if it is so done, quantity came to be recovered from the conscious possession of two accused, namely, Shashi Ram Pun and Suresh Gharti, can be said to be of commercial in nature and as such, rigours of Section 37 of the Act are attracted. However, this Court finds no force in the aforesaid submission made by learned Additional Advocate General for the reason that as per own case of the prosecution, 1.460 kgs and 1.470 kgs of opium each, came to be recovered from two rucksacks being carried out by two accused, namely, Shashi Ram Pun and Suresh Gharti and as such same cannot be weighed together, merely, on the ground that both the accused named hereinabove, purchased the same from the same source.

5. Leaving everything aside, this Court finds that nothing came to be recovered from the present bail petitioner and as such, it is not understood that how on account of his mere presence alongwith other accused, that too, on the road, he came to be named in the FIR. At this stage, learned Additional Advocate General, submits that as per evidence collected on record, accused,

namely, Shashi Ram Pun and Suresh Gharti were handed over the quantity of contraband recovered from them in the presence of present bail petitioner, but such fact, if any, is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence. Whether present bail petitioner, from whose conscious possession nothing came to be recovered, was involved in the alleged commission of offence punishable under Sections 18 & 29 of the Act, is a question needs to be determined in totality of evidence collected on record by Investigating Agency and his mere presence at the time of purchase by other two accused from third party, cannot be made basis to conclude his complicity in the offence. As has been observed hereinabove, contraband recovered from the conscious possession of other two accused, is of intermediate quantity and as such, rigours of Section 37 of the Act, are not attracted. Since, both the two main accused, from whose conscious possession contraband came to be recovered already stand enlarged on bail, there is no justification to let present bail petitioner incarcerate in jail for indefinite period during trial, especially when he has already suffered more than one and half year. Hon'ble Apex Court as well as this Court in a catena of cases have repeatedly held that one is deemed to be innocent till the time, his/her guilt is not proved in accordance with law and as such, it would be in the interest of justice to curtail the freedom of the bail petitioner for indefinite period during the trial. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting him to the stringent conditions.

6. The Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain

whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***

***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***

***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is***

***enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

7. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

8. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** **(**2012)1 Supreme Court Cases 49; held as under:-

***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should***

***be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

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

***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal***

***against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

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

(i) ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
(ii) ***nature and gravity of the accusation;***
(iii) ***severity of the punishment in the event of conviction;***
(iv) ***danger of the accused absconding or fleeing, if released on bail;***
(v) ***character, behaviour, means, position and standing of the accused;***
(vi) ***likelihood of the offence being repeated;***
(vii) ***reasonable apprehension of the witnesses being influenced; and***
(viii) ***danger, of course, of justice being thwarted by grant of bail.***

11. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, bail petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of

Rs. 50,000/- with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

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

12. 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.

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

Copy **dasti.**

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

Between:-

HET RAM, SON OF SH. SES RAM, RESIDENT OF VILLAGE KUNDA KOD, P.O. JADOLI, TEHSIL NIRMAND, DISTRICT KULLU, H.P., OCCUPATION PAINTER/PLUMBER, AGED 32 YEARS.

……PETITIONER

(BY MR. VINOD KUMAR SUMAN AND MR. SANJEEV KUMAR, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH.

……RESPONDENT

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. KAMAL KISHORE SHARMA, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
NO.1961 of 2021
Decided on:21.10.2021

**Code of Criminal Procedure, 1973**- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 & 29- 1.135 Kg. charas- Held- Object of the bail is to secure the attendance of the accused during trial- Bail is not to be withheld as a punishment- Bail application allowed subject to conditions. (Para 7, 11)

**Cases referred:**

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

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

**ORDER**

Bail petitioner, namely Het Ram, who is behind the bars since 21.08.2021, has approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in case FIR No. 80/2021, dated 18.08.2021, under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act (in short "the Act") registered at Police Station Kumarsain, District Shimla, H.P.

2. Respondent-State has filed status report, in terms of order dated 08.10.2021 and ASI Jai Singh, Police Station Kumarsain, District Shimla, H.P., has also come present with record. Record perused and returned. Close scrutiny of status report/record, reveals that on 18.08.2021, police stopped Car bearing No.TO821-HP1210G being driven by person namely Tikkam Ram for checking and allegedly recovered one bag containing 1.135 kg. Charas, in the presence of independent witnesses. Since, no plausible explanation came to be rendered on record by person namely Tikkam Ram qua the possession of commercial quantity of contraband, police after completion of necessary codal formalities, lodged FIR, detailed hereinabove, against him and since then, he is behind the bars. During investigation, above-named Tikkam Ram disclosed to the police that he runs ready-made garments shop at Nirmand, Disrict Kullu and therefrom he earns sufficient money. He stated that person namely Nitu, came to his shop for buying clothes and told to him that whenever, he requires charas, he can contact him He further disclosed to the police that since he had suffered losses on account of COVID-19, he gave telephonic call to person namely Nitu for purchase of charas, so that he could make his losses. He stated that person namely Nitu asked him to pay sum of Rs. 1 lac in advance but since on that day, his Googlepay account was not working, he requested his cousin brother Het Ram, i.e. present bail petitioner to transfer amount in the bank account of above-named person Nitu. Present bail petitioner namely Het Ram, on the askance of Tikkarm Ram, transferred sum of Rs. 72,000/- in total in the account of person namely Nitu through Googlepay account. As per investigation, present bail petitioner Het Ram after transferring sum of Rs. 72,000/- in the account of Nitu, also went alongwith main accused Tikkam Ram to Village Baga Sarahan on 16.08.2021 for procuring charas. After reaching Baga Sarahan, main accused Tikkam Ram, went to meet Nitu and present bail petitioner kept on sitting in the car. When recovery of charas was effected from the car of the main accused

Tikkam Ram on 18.08.2021, present bail petitioner was not found sitting in the car. In the aforesaid background, present bail petitioner also came to be named in the FIR and since 21.08.2021, he is also behind the bars. Since, investigation in this case is complete and nothing remains to be recovered from the bail petitioner, he has approached this Court in the instant proceedings for grant of bail.

3. Mr. Desh Raj Thakur, learned Additional Advocate General, while fairly admitting factum with regard to filing of challan in the competent court of law, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency and as such, prayer having been made on his behalf for grant of bail may be rejected. While referring to status report, Mr. Thakur, further contends that there is sufficient material available on record suggestive of the fact that bail petitioner after having transferred sum of Rs. 72,000/- in the bank account of person namely Nitu, also accompanied main accused Tikkam Ram on 16.08.2021 to Baga Sarahan for procuring charas and as such, it cannot be said that he has been falsely implicated.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on 18.08.2021, 1.135 Kg charas was recovered from the car being driven by main accused Tikkam Ram and at that time, present bail petitioner was not present in the car. Bail petitioner has been named in the FIR on the basis of disclosure made by main accused Tikkam Ram that on his askance, bail petitioner had transferred sum of Rs. 72,000/- in the bank account of person namely Nitu from whom, he had procured commercial quantity of charas. As per own statement of main accused Tikkam Ram, he after having contacted person namely Nitu for purchase of charas had requested present bail petitioner Het Ram, who happens to be his first cousin, for transferring money in the bank

account of Nitu. Main accused TikkamRam, told present bail petitioner that since his Googlepay account is closed, he is unable to make transaction and as such, on his askance, present bail petitioner transferred sum of Rs.72,000/- from his bank account to person namely Nitu through Googlepay account and thereafter, allegedly, he accompanied main accused Tikkam Ram to Baga Sarahan, from where, main accused Tikkam Ram purchased charas from the person namely Nitu. Allegedly, charas was purchased on 16.08.2021 and thereafter, the same was recovered from the conscious possession of main accused Tikkam Ram on 18.08.2021 while he was alone in the car.

5. It is quite apparent from the disclosure made by the main accused Tikkam Ram that at no point of time, present bail petitioner had prior meeting of mind with main accused Tikkam Ram for sale and purchase of charas, rather, he on the askance of his cousin i.e., main accused Tikkam Ram, transferred sum of Rs. 72,000/- in the account of person namely Nitu. Main accused Tikkam Ram, has nowhere stated that he had disclosed factum with regard to purchase of charas by him from Nitu to present bail petitioner, rather he has simply stated that since his Googlepay account was closed, he could not transfer money, which he otherwise was urgently required to transfer to Nitu. Otherwise also, there is no material available on record suggestive of the fact that present bail petitioner had any kind of connivance with main accused Tikkam Ram from whose, conscious possession, charas came to be recovered. Though. Police in its status report has claimed that present bail petitioner had gone to Baga Sarahan on 16.08.2021, with main accused Tikkam Ram for purchase of charas, but such fact is yet to be proved in accordance with law by leading cogent and convincing evidence. Since, present bail petitioner is first cousin of main accused Tikkam Ram, there is a reason to presume and believe at this stage, that present bail petitioner may have accompanied main accused Tikkam Ram on his request without knowing the purpose of his visit to Baga Sarahan. His call details report adduced on

record by Investigating Agency, nowhere suggests communication, if any, *inter se* present bail petitioner and supplier Nitu, rather same clearly reveals that main accused Tikkam Ram was in constant touch of supplier Nitu. No doubt, in the case at hand, financial transaction, adduced on record suggests that sum of Rs.72,000/- came to be transferred from the Googlepay account of present bail petitioner, but since, accused Tikkam Ram has categorically disclosed to the police that transaction was made at his behest, it would be too premature, at this stage, to conclude the complicity, if any, of present bail petitioner in the alleged commission of offence punishable under Sections 20 and 29 of NDPS, Act. Though, aforesaid aspects of the matter are to be decided by the Court below in totality of evidence collected on record by prosecution, but keeping in view the aforesaid glaring aspects of the matter, this Court sees no reason to let the bail petitioner incarcerate in jail for indefinite period, especially when nothing remains to be recovered from him. Though, quantity of contraband recovered in the case at hand is commercial and as such, rigours of Section 37 are attracted, but bare perusal of Section 37 of the Act, clearly suggests that there is no complete bar/prohibition to grant bail to the accused found in possession of commercial quantity of contraband, rather court after having afforded due opportunity of being heard to the public prosecutor can proceed to grant bail even in the cases of commercial quantity, if it is satisfied that there are reasonable ground for believing that the accused is not guilty of offence under the Act and there is no likelihood of his being indulged in such like activities again during trial. In the peculiar facts and circumstances of the case, as have been discussed hereinabove, this Court deems it fit to enlarge bail petitioner on bail, at this stage, during trial. Hon'ble Apex Court as well as this Court have held in catena of judgments, that till the time, guilt of a person is not proved in accordance with law, he/she is deemed to be innocent and as such, no fruitful purpose would be served by keeping the bail petitioner behind the bars for an

indefinite period during trial. Apart from this, this Court finds that no case in past stands registered against the present bail petitioner which fact otherwise, indicates that petitioner is not involved in illegal trade of narcotic and as such, his prayer for grant of bail, deserves to be considered sympathetically being first offender. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting him to the stringent conditions.

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

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a***

***prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***

***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***

***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general***

> ***conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
>
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

7. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

8. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** **(**2012)1 Supreme Court Cases 49; held as under:-

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of***

***bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

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

***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a***

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

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

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

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

11. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, bail petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 2,00,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

***a. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***

***b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
***c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and***

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

12. 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.

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

Copy **dasti.**

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

Between:-

RAJAT RANA
S/O SH. SUBHASH CHAND,
AGED 23 YEARS,
RESIDENT OF VILLAGE AND POST OFFICE BEHDALA,
TEHSIL AND DISTRICT UNA, HIMACHAL PRADESH

PETITIONER

(MR. TARA SINGH CHAUHAN, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(MR. SUHDIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL WITH
MR. NARINDER THAKUR,
DEPUTY ADVOCATE GENERAL)

2. CRIMINAL MISC. PETITION (MAIN) NO. 1819 OF 2021

PARKASH CHAND,
S/O SH. SATINDER MANKOTIA,
AGED 28 YEARS,
RESIDENT OF VILLAGE AND POST OFFICE PANJAWAR,
TEHSIL HAROLI, DISTRICT UNA,
HIMACHAL PRADESH

PETITIONER

(MR. TARA SINGH CHAUHAN, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(MR. SUHDIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL WITH
MR. NARINDER THAKUR,
DEPUTY ADVOCATE GENERAL)

3. CRIMINAL MISC. PETITION (MAIN) NO. 1820 OF 2021

AMAN
S/O SH. MEHAR SINGH,
AGED 23 YEARS,
RESIDENT OF VILLGAE LAM POST OFFICE JHAMBER,
TEHSIL AND DISTRICT UNA,
HIMACHAL PRADESH

PETITIONER

(MR. TARA SINGH CHAUHAN, ADVOCATE)

AND
STATE OF HIMACHAL PRADESH

RESPONDENT

(MR. SUHDIR BHATNAGAR,ADDITIONAL ADVOCATE GENERAL WITH MR. NARINDER THAKUR,DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
Nos.1817, 1819 & 1820 of 2021
Decided on: 27.09.2021

**Code of Criminal Procedure, 1973**- Section 439- Bail- **Indian Penal Code, 186**0- Sections 307, 323, 324, 147, 148, 149 & 506- Arms Act- Sections 52, 54 & 59- Held- Object of the bail is to secure the attendance of the accused during trial- Bail is not to be withheld as a punishment- Bail application allowed subject to conditions. (Para 8, 10, 11, 12)

**Cases referred:**

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

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

**ORDER**

Since all the petitions arise out of same FIR, same wee taken up together for hearing and are being disposed of vide this common judgment.

2. Bail petitioners, namely Rajat Rana, Parkash Chand and Aman, who are behind the bars since 06.08.2021, have approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in FIR No. 284/2021, dated 28.07.2021, under Sections 307, 323, 324, 147, 148, 149 & 506 of IPC and 52, 54, 59 of Arms Act, registered at Police Station Sadar, District Una, H.P.

3. Respondent-State has filed status report, in terms of order dated 20.09.2021 and SI Jagbir Singh, P.S. Sadar, District Una, H.P., has also come present with record. Record perused and returned. Close scrutiny of status report/record, reveals that on 28.07.2021, police after having received information, reached Regional Hospital, Una and found that two persons namely, Vikas Saini and Sumit Dogra had been given severe beatings, as a consequence of which, they were under treatment at the hospital, referred hereinabove. Complainant, namely Satnam, got his statement recorded under Section 154 Cr.P.C, alleging therein that he works as a mechanic in HRTC Una and Lakhvinder Singh is his friend. He disclosed to the police that on 27.07.2021, Lakhvinder Singh had posted one photograph of his workout at Diamond Gym, Una on the instagram. In the aforesaid photo, persons namely, Lakhvinder, Rakesh Kumar, Shubham Patiyal and Sumit Dogra, were also present. Prakash Mankotia, resident of Panjavar Tehsil and District Una, responded to aforesaid post by sending one Immoji of laughter. He alleged that thereafter he along with persons Rakesh Kumar, Lakhvinder and Vikas Saini, went to the shop of Honey, and asked the reasons for ridiculing them. Honey advised Prakash not to indulge in such activity, on phone, but

thereafter on 27.07.2021, Prakash had extended threats to Vikas that he would shot him dead. He further alleged that on 28.07.2021, at 12/12.30 in the night, Prakash Mankotia, started kicking the gate of house of Vikas and hurled abuses. He alleged that he informed with regard to aforesaid incident to police in the morning. However, on 28.07.2021, at 10 A.M., in the morning, Vikas received call from Honey that now lets forget the incident and as such, they all went towards Palika Bazar, Una for talks, where persons namely Honey, Prakash, Sumit, Rohit, Rajat, Mudit,Aman and Gurpreet, were also present with sharp edged weapons, i.e. sword, sickle and stick, etc. He alleged that all the persons named hereinabove, attacked him and persons namely, Vikas and Sumit, as a consequence of which, they suffered serious injuries. On the basis of aforesaid complaint, FIR as detailed hereinabove,came to be lodged against the present bail petitioners along with co-accused Mudit Rana and Sumit. At the first instance, all the bail petitioners approached this Court for anticipatory bail by way of filing application under Section 438 Cr.P.C, but same was dismissed as withdrawn and thereafter, all the accused surrendered before the police on 6.8.2021. All the persons named in the FIR save and except Rohit and Arun Rana are behind the bars. Person namely Aman has been ordered to be enlarged on bail by learned Sessions Judge, Una. Since, investigation in this case is complete and nothing remains to be recovered from the bail petitioners, they have approached this Court in the instant proceedings for grant of bail.

4. Mr. Sudhir Thakur, learned Additional Advocate General, while fairly admitting factum with regard to completion of investigation, contends that though nothing remains to be recovered from the bail petitioners, but keeping in view the gravity of offences alleged to have been committed by them, they do not deserve any leniency and as such, prayer having been made on their behalf for grant of bail may be rejected. Learned Additional Advocate General, while referring to the record, further submits that all the bail petitioners are

hardened criminals and many cases stand registered against them and as such, it is not in the interest of justice to enlarge them on bail because in the event of theirs being enlarged of bail, they may again indulge in such activities. Learned Additional Advocate General further submits that the victims as detailed in FIR, have suffered serious injuries on their persons and had they not escaped themselves by fleeing from the spot, all the persons named in the FIR including present bail petitioners would have killed them and as such, prayer made on their behalf, deserves outright rejection.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on 27.07.2021, some dispute arose inter se victims and accused named in FIR, on account of some remarks given by accused as narrated in the FIR on the photograph of their workout in Diamond gym loaded by complainant on the instagram. It is not in dispute that victims firstly themselves went to the shop of some person namely Honey to know reason for ridiculing them qua the post of their in the instagram and thereafter, though both the parties had agreed to resolve their dispute amicably, but allegedly on 28.07.2021, accused named in FIR, attacked the victims while they had come to talk to them near Palika Bazar, Una, as a consequence of which, persons namely Vikas and Sumit, suffered serious injuries on their persons. Record/status report clearly reveals that all the accused named in the FIR, were present on the spot, but allegedly beatings on the persons namely Vikas and Sumit, were given by accused namely Mudit Rana and Sumit Dogra. As per complainant, accused Sumit attacked persons namely Vikas and Sumit Dogra with sword, as a consequence of which they suffered grievous injuries on their persons. It has come in investigation that another accused Mudit gave blow of sword on the head of victim namely Vikas as a consequence of which he also suffered serious injuries on his person. Doctor attending aforesaid persons termed some of injuries to be simple caused by sharp edged weapon and some

injuries to be grievous caused by blunt weapon. In total four injuries each have been reported on the persons of victims namely Vikas and Sumit Dogra. Though, in the status report, it has been reported that all the accused named in the FIR gave beatings to the victims but as has been taken note above, there is no specific allegation against all accused as far as infliction of injuries on the vital parts of persons namely Vikas and Sumit Dogra are concerned, rather it has been stated in the status report that the accused alongwith Sumit and Mudit gave blow of sword on the head and other parts of bodies of persons namely Vikas and Sumit Dogra and as such, there appears to be no reason at this stage to keep all the accused, save and except Sumti and Mudit behind the bars during trial, especially when guilt, if any of them is yet to be established on record. This court finds from status report that the victims have recovered from their injuries and at present they are out of danger. Since another accused, Arun Rana was not seen actively participating in the alleged offence, as such, learned Sessions Judge, Una has already enlarged him on bail. Similarly, another person, Rohit Kumar, who was alleged to have participated in the alleged incident, was not found to have actively participated in the incident, and as such was enlarged on bail by this Court. It has been stated in the status report that all the accused named in the FIR with prior intention to kill the victims, as named herein above, had attacked upon them but such allegations are yet to be proved in accordance with law, by leading cogent and convincing evidence. The question that whether the bail petitioners, had come on the spot with intention to kill victims as named herein above and they had inflicted injuries on their person, is yet to be established on record and as such, this court sees no reason to let the bail petitioners incarcerate in jail for an indefinite period during trial. Apprehension expressed by learned Deputy Advocate General that in the event of bail petitioners being enlarged on bail, they may flee from justice, can be best met by putting them to the stringent conditions.

6. Otherwise also Hon'ble Apex Court as well as this Court have held in catena of judgments, that till the time, guilt of a person is not proved in accordance with law, he/she is deemed to be innocent.

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

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer***

***periods. This does not do any good to our criminal jurisprudence or to our society.***

***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***

***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft***

> ***approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal***

***respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

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

***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be***

***innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

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

(i) ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
(ii) ***nature and gravity of the accusation;***
(iii) ***severity of the punishment in the event of conviction;***
(iv) ***danger of the accused absconding or fleeing, if released on bail;***
(v) ***character, behaviour, means, position and***

***standing of the accused;***

(vi) ***likelihood of the offence being repeated;***

(vii) ***reasonable apprehension of the witnesses being influenced; and***

(viii) ***danger, of course, of justice being thwarted by grant of bail.***

11. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, bail petitioners have carved out a case for grant of bail, accordingly, the petitions are allowed and the petitioners are ordered to be enlarged on bail in aforesaid FIR, subject to their furnishing personal bond in the sum of Rs. 1,00,000/- each with two local sureties, in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

a. ***They shall make themselves 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. ***They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

c. ***They 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. They shall not leave the territory of India without the prior permission of the Court.***

12. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

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

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

Between:

PRITIKA,
WIFE OF SHRI ASHWANI KUMAR,
RESIDENT OF WARD NO.2, NURPUR,
DISTRICT KANGRA, HIMACHAL PRADESH.

.....PETITIONER/TENANT

(MR. NITIN THAKUR,
ADVOCATE)

AND

PARSHOTTAM KUMAR,
S/O SHRI THURU RAM,
RESIDENT OF WARD NO.3
NURPUR TEHSIL NURPUR,
DISTRICT KANGRA,
HIMACHAL PRADESH.

....RESPONDENT/LANDLORD

(MS. REKHA MAHAJAN AND
MR. ASHOTAM MAHAJAN,
ADVOCATES)

CIVIL RIVISION
NO. 85 of 2022
Decided on:13.06.2022

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Revision- Eviction on the ground of arrears of rent- Tenant failed to pay the rent as ordered by the Ld. Rent Controller- Held- Ordering eviction- In the case at hand, tenant was

directed to pay arrears of rent vide order dated 1.10.2020, on or before the next date of hearing i.e. 29.10.2020, but interestingly, tenant instead of doing the needful in terms of order himself chose to file appeal before the appellate authority, wherein admittedly, no stay ever came to be granted against the aforesaid order dated 1.10.2020, and as such, no illegality and infirmity can be said to have been committed by the appellate authority while passing order dated 30.4.2022, whereby order dated 29.4.2021 passed by the learned Rent Controller, ordering eviction on the ground of non-payment of interim arrears of rent as assessed by the learned Rent Controller came to be upheld. (Para 7)

**Cases referred:**

Rakesh Wadhawan v. M/s Jagdamba Industrial Corporation, 2002 (1) RCR 514;

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

**O R D E R**

Being aggrieved and dissatisfied with judgment dated 30.4.2022, passed by the learned appellate authority-II Kangra at Dharamshala, HP, whereby rent appeal No. 03-N/XIV/2022 having been filed by the appellant-tenant (hereinafter referred to as the *"tenant"* ), came to be dismissed, tenant has approached this Court in the instant proceedings filed under Section 24 (5) of the HP Urban Rent Control Act, 1987 (hereinafter referred to as the *"Act"*), praying therein to set-aside aforesaid judgment as well as order dated 29.4.2021, whereby prayer made by the respondent-landlord (herein after referred to as "*the landlord*") for causing eviction of the tenant on the ground of non-payment of arrears of rent, came to be allowed.

2. Precisely, the facts of the case as emerge from the record are that landlord filed petition under Section 14 of the Act before the Rent Controller-I, Nurpur, District Kangra, HP, for the eviction of tenant from shop No. 1152/3 on the ground of arrears of rent and personal bonafides. During the pendency of the aforesaid petition, landlord filed an application under Section 151 CPC,

praying therein for assessment of arrears of rent alongwith interest. In the aforesaid application, landlord claimed that w.e.f April, 2016, tenant has not paid any rent till date and as such, he be directed during the pendency of the eviction proceedings to pay the rent on the basis of assessment made by the court. Aforesaid prayer made on behalf of the landlord came to be resisted by the tenant, who in his reply, disputed the factum with regard to arrears of rent. He stated that he had been regularly paying the rent, but w.e.f. April, 2016, landlord refused to receive the rent and as such, he was compelled to send the rent through money orders, but same were also not accepted by the landlord. In the reply, respondent expressed his readiness and willingness to deposit the rent assessed by the court. On the basis of aforesaid pleadings adduced on record by the respective parties, learned Rent Controller-I, Nurpur, District Kangra, vide order dated 1.10.2022 (Annexure P-1) proceeded to assess the arrears of rent @ Rs.1000/-pm alongwith interest @12% p.a. and accordingly, directed the tenant to pay sum of Rs. 68850/- as arrears of rent w.e.f. April, 2016 till passing of the order dated 1.10.2020. Besides, above, court also awarded costs to the tune of Rs. 2,000/- in favour of the landlord.

3. Being aggrieved and dissatisfied with aforesaid order, tenant preferred an appeal in the court of learned appellate authority-II Kangra, at Dharamshala, but same was also dismissed vide judgment dated 9.4.2021. Since despite having failed in appeal, tenant failed to make the arrears of rent as assessed by the learned Rent Controller-I, Nurpur, District Kangra, vide order dated 1.10.2020, landlord preferred an application under Section 151 CPC, in the pending rent petition, praying therein for eviction of tenant on account of non-payment of arrears of rent in terms of order dated 1.10.2020. Afore prayer made on behalf of the landlord came to be contested by the tenant on the ground that since he had filed appeal before the appellate authority, laying therein challenge to order dated 1.10.2020, he had no opportunity to tender the rent in terms of aforesaid order. However, learned

Rent Controller-I, Nurpur, District Kangra, having taken note of the fact that at no point of time order dated 1.10.2020, passed by the learned Rent Controller-I, Nurpur, District Kangra, ever came to be stayed by the appellate authority-II Kangra at Dharamshala, in the appeal No. 04-N/XIV/2022, allowed the application and ordered eviction of tenant on the ground of non-payment of interim rent as assessed by the Rent Controller-I, Nurpur, District Kangra, vide order dated 1.10.2020.

4. Being aggrieved and dissatisfied with order dated 29.4.2021 passed by the Rent Controller-I, Nurpur, District Kangra, tenant filed rent appeal bearing 03-N/XIV/2022 in the court of appellate authority-II Kangra at Dharamshala, however, same was also dismissed vide judgment dated 30.4.2022 (Annexure P-4). In the aforesaid background, tenant has approached this Court in the instant proceedings.

5. Precisely the ground as has been highlighted/raised in the instant petition and as has been further canvassed by Mr. Nitin Thakur, Advocate, appearing for the tenant is that learned Rent Controller-I, Nurpur, District Kangra, could not have assessed the interim rent, if any, on the application made by the landlord during the pendency of the eviction proceedings, especially when there is no such provision in the Act. Mr. Nitin thakur, further argued that otherwise also, Rent Controller-I, Nurpur, District Kangra, before making the assessment of arrears of rent, if any, ought to have afforded an opportunity of leading evidence, but since in the case at hand, such opportunity was never afforded to either of the parties, order dated 1.10.2020, which specifically came to be upheld in appellate proceedings is nonest in the eyes of law and is not binding upon the parties.

6. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the impugned judgment dated 30.4.2022 (Annexure P-4), passed by the learned Appellate Authority-II Kangra, at Dharamshala, this court finds no merit in the aforesaid

submissions of Mr. Nitin Thakur, learned counsel appearing for the tenant. Hon'ble Apex Court in case titled ***Rakesh Wadhawan v. M/s Jagdamba Industrial Corporation, 2002 (1) RCR 514***, has categorically held that it is obligatory on the Rent Controller to make assessment of the arrears of rent, interest and cost of litigation and fix provisional rent to be paid by the tenant on the first date of hearing. In the case at hand, application under Section 151 CPC, came to be filed at the behest of landlord, requesting therein the court to make assessment of arrears of rent. Landlord categorically stated in the application that w.e.f. April, 2016, tenant has not paid any rent. Aforesaid submission made on behalf of the landlord never came to be disputed by the tenant, who in his reply categorically stated that w.e.f. April, 2016, landlord purposely and intentionally stopped receiving payments and as such, he was compelled to send the same by way of money order, but same was also not accepted. Apart from above, tenant himself in his reply to the application stated that he is ready and willing to make the payment, if any, qua the arrears of rent on the basis of assessment made by the court. Once tenant himself admitted in reply to the application that he has not been able to deposit the rent w.e.f. April, 2016, there was no occasion, if any, for the Rent Controller to afford opportunity to the parties to lead evidence for proving the aforesaid factum. Similarly, this Court finds that though in the case at hand, landlord claimed that tenant had agreed to pay rent @ Rs. 3500/-, but Rent Controller having taken note of the claim of the tenant that he was paying rent @ Rs. 1000/- p.m., proceeded to make the assessment of arrears of rent on the basis of Rs. 1000/- only. Once there was no dispute with regard to arrears of rent w.e.f. April, 2016 , there was no requirement for the Rent Controller-I, Nurpur, District Kangra, to afford an opportunity to the parties to lead the evidence. Had tenant not made any admission with regard to arrears to rent w.e.f. April, 2016, tenant would have been right in contending that

before making assessment of arrears of rent he ought to have been afforded opportunity of leading evidence by the court below.

7. In the case at hand, tenant was directed to pay arrears of rent vide order dated 1.10.2020, on or before the next date of hearing i.e. 29.10.2020, but interestingly, tenant instead of doing the needful in terms of order himself chose to file appeal before the appellate authority, wherein admittedly, no stay ever came to be granted against the aforesaid order dated 1.10.2020, and as such, no illegality and infirmity can be said to have been committed by the appellate authority while passing order dated 30.4.2022, whereby order dated 29.4.2021 passed by the learned Rent Controller, ordering eviction on the ground of non-payment of interim arrears of rent as assessed by the learned Rent Controller came to be upheld.

8. Consequently, in view of the detailed discussion made herein above, this Court finds no illegality and infirmity in the impugned orders dated 30.4.2022 and 29.4.2021, and as such, same are upheld. As a consequence of which, present petition fails and dismissed accordingly.

All pending miscellaneous applications also stand disposed of accordingly.

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

Between:-

1. MOTI LAL SON OF SHRI KHINDU RAM, SON OF SHRI RAM DAYAL, RESIDENT OF VILLAGE AND PO JHOGIPUR, AT PRESENT SHOPKEEPER, TEHSIL CHOWK, KANGRA, TEHSIL AND DISTRICT KANGRA H.P.

2. SHRI PURSHOTTAM LAL SON OF SHRI KHINDU RAM,

3. LATE SHRI OM PRAKASH (DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:

3(a) NISHA DEVI, WIDOW
3(b) SHWATI, DAUGHTER
3(c) ALKA, DAUGHTER

3(d) SHAILJA, DAUGHTER
3(e) SAJAN, SON

OF LATE SHRI OM PRAKASH, SON OF SHRI KHINDU RAM, ALL RESIDENT OF VPO JHOGIPUR, AT PRESENT SHOPKEEPERS, TEHSIL CHOWK, KANGRA, TEHSIL AND DISTRICT KANGRA HP

PETITIONERS NO. 3(b) TO 3(d) STAND DELETED VIDE ORDER DATED 13.12.2019.

....PETITIONERS

(BY SHRI ASHOK KUMAR THAKUR, ADVOCATE)

AND

SHRI SHANKAR KUMAR, SON OF SHRI
KISHAN CHAND, RESIDENT OF UP-MOHAL
GUPT GANGA, MAUZA UJJAN, TEHSIL
AND DISTRICT KANGRA H.P. .....RESPONDENT
1. DILA RAM S/O SH.SUDHAMA RAM

2. PAWAN KUMAR, S/O SH.DILA RAM HAZRI.

3. NARINDER KUMAR S/O DILA RAM HAZRI.

ALL RESIDENT OF VILLAGE KONSAL,
ILLAQA NER, TEHSIL JOGINDERNAGAR,
DISTRICT MANDI H.P.

4(a)SH.GAURAV HAZARI ALIAS NARIN,SON

4(b) KM.GUNJAN, DAUGHTER

4(c) SMT. SARLA DEVI (WIDOW)

ALL RESIDENT OF VILLAGE KHUDDER,
P.O. BASSI, TEHSIL JOGINDERNAGAR, DISTRICT MANDI H.P.

5. SMT. NEENA, D/O SHRI DILA RAM HAZARI, RESIDENT OF VILLAGE KONSAL, ILLAQA NER, TEHSIL JOGINDERNAGAR, DISTRICT MANDI H.P.

...RESPONDENTS

(BY SHRI ATUL JHINGAN, ADVOCATE)

CIVIL REVISION NO. 9 OF 2019
Reserved on: 31st May, 2022
Decided on :14th June, 2022

**H.P. Urban Rent Control Act, 1987**- Section 24(5)- Revision- Eviction on the ground of rebuilding and arrears of rent- Held- Section 18 of the Act not attracted- No illegality, infirmity or perversity in the impugned order- Petition dismissed. (Para 4, 20)

**Cases referred:**

Amarjeet Singh vs. Anju Rani AIR 1997 H.P. 64; 1997(1) Shim.L.C. 492;

Jagat Pal Dhawan vs. Kahan Singh (Dead) by LRs and others (2003)1 SCC 191;

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*This Writ Petition coming on for pronouncement this day, the Court passed the following:*

O R D E R

Petitioners have approached this Court invoking the revisional jurisdiction under Section 24(5) of H.P. Urban Rent Control Act, 1987 (in short "the Act"), against order dated 24.10.2018 passed in Rent Appeal No. 1-D/XIV/2018 titled Moti Lal and others vs. Shankar Kumar by learned Appellate Authority-II, Kangra at Dharamshala whereby order dated 5.7.2018 passed in Rent Case No. 3 of 2007 titled Shankar Kumar vs. Moti Lal and others by the Rent Controller-cum-Civil Judge, Court No. II, Kangra, District Kangra evicting the petitioners has been affirmed.

2 Petitioners have been ordered to be evicted from demised premises for arrears of rent w.e.f. 1.7.1987 till passing of order as well as on the ground that demised premises are required by petitioners bonafide for the purpose of rebuilding the same, which cannot be carried out without eviction of petitioners therefrom, with further observations that if petitioners would pay the arrears of rent calculated in the order within a period of 30 days from passing of order, they shall not be liable to be evicted from demised premises on the ground of non-payment of arrears of rent.

3 Learned counsel for petitioners has submitted that petitioners have deposited the arrears of rent, calculated by Rent Controller, within a period of 30 days as ordered by the Rent Controller and therefore, said ground for eviction does not survive.

4 Learned counsel for petitioners has submitted that Rent Petition was not maintainable on the ground that respondent is not landlord as he is not owner of demised premises, and further that earlier also a Rent Petition titled as Mansha Devi etc. vs. Khindu Ram etc. bearing Rent Petition No. 9 of 1983 filed by predecessors-in-interest of respondent seeking eviction of predecessors-in-interest of petitioners on the same ground was dismissed and dismissal of the said Rent Petition was upheld by the High Court of Himachal Pradesh and, therefore, successive petition, in view of Section 18 of the Act, on the same ground is not maintainable. It has been further contended on behalf of petitioners that shops, in reference, are in good condition and bonafide requirement for rebuilding and reconstruction has not been established on record and further that respondent, for not having permission for construction and approved sanctioned plan for re-construction and rebuilding, is not entitled to seek eviction of petitioners.

5 Learned counsel for petitioners has submitted that despite framing of issue with respect to previous litigation, the Courts below have not returned findings in that regard, whereas, respondent was not having any locus to maintain his eviction petition. Further that actual owner of premises in question is the Government and mutation attested in favour of respondent has been assailed by petitioners before the concerned Authority which is pending adjudication before the Additional District Magistrate, Kangra.

6 Learned counsel for respondent has controverted the submissions made on behalf of petitioners and has supported findings returned by the Courts below for the reasons assigned in impugned orders. In response to contentions that respondent is not landlord, he has also referred

judgment dated 6.1.2011 passed in Civil Revision No. 149 of 2010, titled Moti Ram vs. Shankar Kumar, which was filed by petitioner Moti Lal against order dated 2.11.2010 passed by Rent Controller in Rent Petition, in reference, in present lis. Vide order dated 2.11.2010, the Rent Controller had dismissed the application filed by petitioners seeking amendment to the reply on the ground that State of H.P. was true owner of land and shops and mutation of proprietorship of shops in question had been wrongly attested in favour of respondent/predecessors-in-interest of respondent and further that no sanction had been accorded by State of HP for construction and reconstruction. The aforesaid Revision Petition No. 149 of 2010 preferred by petitioners was dismissed by this High Court. Therefore, petitioners are not entitled to raise this issue again in present petition.

7 Section 2 (d) of the Act defines landlord, which reads as under:-

> "(d) "landlord" means any person for the time being entitled to receive rent in respect of any building or rented land whether on his own account or on behalf, or for the benefit, of any other person, or as a trustee, guardian, receiver, executor or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner hereinafter authorized, a specified landlord, and every person from time to time deriving title under a landlord;"

8 Definition of landlord in the Act clearly depicts that landlord need not be the owner of tenanted premises. In present case, in Rent Petition in Column No. 3(a), respondent has claimed that respondent Shankar Kumar is landlord. In reply, in response thereto, petitioners have stated that column No. 3(a) of petition is admitted to be correct. It is also an admitted fact of petitioners that they were paying rent to the respondent and they have also deposited the rent depicting the respondent as landlord.

9 Section 18 of Act reads as under:-

> **"18. Decisions which have become final not to be reopened-** The Controller shall summarily reject any application under sub-section (2) or sub-section (3) of Section 14 which raises substantially issues as have been finally decided in a former proceeding under this Act."

10 In case of ***Amarjeet Singh vs. Anju Rani*** reported in ***AIR 1997 Himachal Pradesh 64; 1997(1) Shim.L.C. 492,*** it was held that where earlier petition was dismissed by Rent Controller observing that evidence led by landlord, regarding condition of premises, was of general nature without any expert substantiating the same and landlord had failed to prove resources and produce proper estimate, in the subsequent petition by landlord proving bonafide requirement as well as sanctioned plan and resources, tenant cannot improve his case on account of bar of Section 18 of the Act.

11 In present case, previous Rent Petition was filed by predecessor-in-interest of respondent in the year 1983, whereas, subsequent Rent Petition has been filed in the year 2007.

12 In present petition, span of time between two petitions is considerably long and in previous Rent Petition, eviction was sought for arrears of rent since December 1973 till filing of petition, whereas in present petition, eviction has been sought for non-payment of arrears of rent for period subsequent to the period involved in earlier petition and earlier petition was rejected on the ground that landlord had failed to explain the manner in which shops were to be put in use and business to be run in shops and there was no evidence on record to substantiate the claim of landlord regarding collection of building material and sanctioned plan from competent Authority, and also to disclose the intention to rebuild and reconstruct and capacity for doing so, and also to prove financial position of landlord showing the capability of reconstruction and rebuilding. Whereas, in present case, respondent has placed on record the plan sanctioned/approved by Executive Officer of

Municipal Council as Ext.PW1/A and has also proved on record financial status of landlord/respondent by examining PW2 V.K. Sharma, Assistant Manager of UCO Bank and PW3 R.S. Chauhan, Branch Manager of Union Bank of India, who have produced Fixed Deposit receipts of respondent/landlord and his family and have also submitted that according to policy of Bank, respondent shall also be entitled for loan and in case filing of application, Bank shall provide loan to him.

13 In his own statement, respondent appearing as witness as PW4 has also proved on record the facts and circumstances which were not proved in previous Rent Petition.

14 In aforesaid circumstance, coupled with pronouncement of this High Court in ***Amarjeet Singh's case***, Section 18 of Act cannot apply to reject the claim of respondent.

15 Section 14(c) of Act provides as under:-

> "(c) in the case of any building or rented land, if he requires *it* to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation or is required bona fide by him for carrying out repairs which cannot be carded out without the building or rented land being vacated or that the building or rented land is required bona-fide by him for the purpose of building or re-building or making thereto any substantial additions or alterations and that such building or re-building or addition or alteration cannot be carried out without the building or rented land being vacated;

16 The aforesaid provision entitles the landlord to seek eviction if the rented building is required bonafide by landlord for the purpose of building or rebuilding or making thereto any substantial additions or alterations which cannot be carried out without building or rented land being vacated.

17 In present case, condition of rented premises is evident from photographs placed and proved on record as Ext.PW4/1 to Ext.PW4/14.

18 The Supreme Court in ***Jagat Pal Dhawan vs. Kahan Singh (Dead) by LRs and others*** reported in ***(2003)1 SCC 191*** has held that the fact that demolition and reconstruction would result into modernization, making additional space available and/or would augment the earning of landlord are relevant factors for determining the bonafides of requirement for demolition and reconstruction and bonafides of such requirements could not have been doubted solely on the ground that structure of building though old and outdated, had not gone so weak as was needed to be demolished immediately.

19 Though, in present case, respondent has proved on record the sanctioned and approved plan for reconstruction and rebuilding, however, it is also settled law that there is no statutory requirement to have sanctioned/approved plan to seek eviction on the ground of rebuilding and reconstruction, as provided under the Act.

20 I have perused the impugned orders and have also gone through record. In the light of discussion herein-above and reasonings assigned for ejectment of petitioners, in the impugned orders, I find no irregularity, illegality, infirmity or perversity in impugned orders passed by Courts below.

Accordingly, present petition is dismissed being devoid of any merit. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:-

1. MOHD ARIF, SON OF SH. YUNAS ALI, RESIDENT OF VILLAGE AND P.O. MISERWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

2. YUNAS ALI, SON OF SH. ISHAK MOHAMMAD, RESIDENT OF VILLAGE AND P.O. MISERWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

3. RIHANA, WIFE OF SH. MANSOOR ALI, RESIDENT OF VILLAGE AND P.O. MISERWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

4. SALMA BEGUM, WIFE OF SH YUNAS ALI, RESIDENT OF VILLAGE AND P.O. MISERWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

……PETITIONERS

(BY MR. VARUN CHANDEL AND MR. RAMAN JAMALTA, ADVOCATES)

AND

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

2. IMRAN, SON OF AJEJUDEEN, RESIDENT OF VILLAGE BHIMAWALA, TEHSIL VIKASNAGAR, DISTRICT DEHRADUN (UTTRAKAHAND)

……RESPONDENTS

(MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERALS WITH MR. KAMAL KISHORE THAKUR, DEPUTY ADVOCATE GENERAL FOR R-1

MR. ASHISH VERMA, ADVOCATE, FOR R-2)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NO.476 of 2021
Decided on:20.10.2021

**Code of Criminal Procedure, 1973**- Section 482- Quashing of FIR- **Indian Penal Code, 1860**- Section 306 read with Section 34- Held- Though, offence alleged to have been committed is serious in nature but, definitely, it cannot be said to be heinous – No impediment in quashing the FIR- Petition allowed. (Para 11, 12)

**Cases referred:**

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

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

**ORDER**

By way of instant petition filed under Section 482 Cr.P.C, prayer has been made on behalf of the petitioners for quashing of FIR No.0058, dated 19.05.2021, under Section 306 read with Section 34 IPC, registered at Police Station Majra, Tehsil Poanta Sahib, District Sirmour at Nahan, H.P. as well as consequent proceedings, if any, pending adjudication before the learned Trial Court, on the basis of compromise (Annexure P-2).

2. Precisely, the facts of the case as emerge from the record are that marriage *inter se* petitioner Mohd. Arif and deceased Ms. Reshma was solemnized on 21.10.2018, as per Muslim Rights and Rituals and out of their wedlock, one son was born. On 18.05.2021, allegedly, some altercation took place *inter se* deceased Reshma and her sister-in-law, petitioner No.3, Rihana, whereafter, deceased Reshma locked herself inside the room and consumed poison. Subsequently, respondent No.2, Imran, who happens to be father of deceased Reshma, lodged FIR sought to be quashed in the instant proceedings, alleging therein that her deceased daughter Reshma was constantly tortured and harassed by petitioners for bringing less dowry and as such, she was compelled to commit suicide. Investigation in the case is complete, but before challan could be presented in the competent court of law, petitioners have entered into compromise with complainant/respondent No.2, Imran, vide compromise deed (Annexure P-2), whereby both the parties have resolved to settle their dispute amicably *inter se* them and as such, petitioners have approached this Court in the instant proceedings, praying therein for quashing of FIR as well as consequent proceedings, if any, pending in the competent court of law.

3. Vide order dated 27.09.2021, this Court while issuing notice to respondents, deemed it necessary to cause presence of complainant/respondent No.2, so that factum with regard to genuineness and correctness of compromise place on record could be ascertained. Pursuant to order dated 27.09.2021, complainant/respondent No.2, has come present in person and is being represented by Mr. Ashish Verma, Advocate.

4. Though, no reply has been filed on behalf of respondent-State despite sufficient opportunities, learned Additional Advocate General has vehemently opposed to the prayer made in the instant petition on the ground that since police after completion of investigation is in process of filing challan in the competent court of law coupled with the fact that petitioners have allegedly committed heinous crime, they are not entitled to any kind of leniency and as such, their prayer made in the instant petition may kindly be rejected.

5. Complainant/respondent No.2, states on oath that he of his own volition and without any external pressure has entered into compromise (Annexure P-2) with the petitioners, whereby both the parties have resolved to settle their dispute amicably *inter se* them. He states that since on the date of death of his daughter, he was not in a fit state of mind and had no clarity with regard to reason for committing suicide by his daughter, he in the rage of anger lodged the complaint against the petitioners, alleging therein that they used to maltreat his daughter on account of bringing less dowry. He states that after some time, he came to know from the Pradhan of Gram Panchayat that his daughter was not meted any kind of cruelty by the petitioners and as such, he does not wish to prosecute the case further lodged at his behest and shall have no objection, in case, prayer made in the instant petition for quashing of FIR as well as consequent proceedings, if any pending in the competent court of law, is accepted. His statement is taken on record.

6. Mr. Desh Raj Thakur, learned Additional Advocate General, though while making this Court to peruse FIR (Annexure A-1), sought to be quashed in the instant proceedings, vehemently argued that there is overwhelming evidence that deceased Reshma was compelled to commit suicide on account of constant maltreatment and cruelty meted to her by the petitioners for brining less dowry, but interestingly, no case under Section 498-A of IPC has been registered against the petitioners, rather they have been booked under Section 306, read with Section 34 IPC.

7. Since the petition has been filed under Section 482 Cr.PC, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in Narinder Singh and others versus State of Punjab and another (2014) 6 Supreme Court Cases 466, whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be

liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

"32. We find from the impugned order that the sole reason which weighed with the High Court in refusing to accept the settlement between the parties was the nature of injuries. If we go by that factor alone, normally we would tend to agree with the High Court's approach. However, as pointed out hereinafter, some other attendant and inseparable circumstances also need to be kept in mind which compels us to take a different view.

33. We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute

> between the parties, though nature of dispute, etc. is not stated in detail. However, a very pertinent statement appears on record viz. "respectable persons have been trying for a compromise up till now, which could not be finalized." This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conduced medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010 registered with police station Lopoke, District Amritsar Rural be quashed. We order accordingly."

8. The Hon'ble Apex Court in case Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in Narinder Singh's case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc.

However subsequently, the Hon'ble Apex Court in Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013( 11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special

statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506

of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed.

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

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

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

prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

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

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

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

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

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new

powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

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

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

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

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact

upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

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

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

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

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

10. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove, Hon'ble Apex

Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C., must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriately be quashed though the victim or the family of the victim have settled the dispute, but it has also observed that while exercising its powers, High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in State of Tamil Nadu supra, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

11. No doubt, allegations against the petitioners, as have been levelled in the FIR, sought to be quashed, are of very serious nature and as such, prayer made on their behalf for quashing of FIR cannot be accepted mechanically, rather material available on record needs to be scrutinized minutely. FIR sought to be quashed came to be instituted at the behest of respondent No.2/complainant, i.e. father of deceased Reshma, who in his statement given before this Court on oath, has categorically stated that FIR

was lodged by him against the petitioners in the rage of anger, but now it has come to his notice that her deceased daughter was not being maltreated or meted any kind of cruelty by the petitioners. Since, entire case of the prosecution is based upon the statement of complainant/respondent No.2, there is otherwise very remote/bleak chances of conviction of the petitioners, on account of statement made by complainant/respondent No.2, Sh. Imran, on oath, before this Court, wherein, he has given complete clean chit to all the petitioners. During proceedings of the case, he disclosed to the Court that his real sister namely Ms. Sanjeeda is married to real uncle of petitioner No.1, Mohd. Arif, (husband of deceased Reshma) and they all are living in close vicinity. Even otherwise, bare perusal of FIR sought to be quashed in the instant proceedings, clearly suggests that few hours before alleged incident, respondent/complainant No.2, gave telephonic call to his deceased daughter Reshma, but since, she did not pickup call of his father, he gave telephonic call to petitioner No.1,Mohd.Arif, husband of deceased Reshma, who in turn, made deceased Reshma to talk to his father, i.e. respondent/complainant No.2, Imran. Though, contents of FIR, suggest that deceased Reshma was being constantly harassed since her marriage by petitioners for bringing less dowry, but there is nothing specific contained in the FIR suggestive of the fact that on the date of alleged incident, petitioners instigated or maltreated deceased Reshma for committing suicide. Though, offfence alleged to have been committed is serious in nature, but definitely, it cannot said to be heinous, as has been defined in the judgment passed by Hon'ble Apex Court in ***Narinder Singh and Others vs State of Punjab and another (2014) 6 Supreme Court Cases 466***, and such, there appears to be no impediment in accepting the prayer made in the instant petition for quashing of FIR, especially, when complainant/respondent No.2 has categorically stated before this Court that at the time of filing of FIR, he was not aware about the true facts and he in the rage of anger, lodged FIR against the petitioners, who are

otherwise innocents. Since complainant/respondent No.2, has entered into compromise with the petitioners, who otherwise his relatives and there is one minor children to be taken care of by the petitioners, this Court is of the view that no prejudice would be caused to either of the parties, if prayer made on behalf of the petitioners for quashing of FIR as well as consequent proceedings, is accepted. Complainant/respondent No.2, has already stated before this Court that FIR instituted by him, is a result of misunderstanding and petitioners are innocents, no fruitful purpose would be served in case FIR as well as consequent proceedings, sought to be quashed, are allowed to sustain. Otherwise also, chances of conviction of petitioners are very remote/bleak and in case, prayer made in the instant petition is not accepted, they would suffer endlessly on account of protracted trial and as such, this Court deems it fit to exercise power under Section 482 Cr.P.C for quashing of FIR as well as consequent proceedings pending adjudication, if any, before the competent court of law.

12. Since, the matter stands compromised between the parties and respondent No.2, is no more interested in pursuing the criminal proceedings against the petitioners, no fruitful purpose would be served in case proceedings initiated at the behest of respondent No.2, are allowed to continue, as such, prayer made in the petition at hand can be accepted.

13. Consequently, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised and keeping in mind the well settled proposition of law as well as the compromise being genuine, FIR No.0058, dated 19.05.2021, under Section 306 read with Section 34 IPC, registered at Police Station Majra, Tehsil Poanta Sahib, District Sirmour, H.P. as well as consequent proceedings, if any, pending adjudication before learned Sessions Judge, District Sirmour at Nahan, H.P., are ordered to be quashed and set-aside.

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

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

Between:-

1. SH. SURAJ KANT SON OF SHRI DALJEET SINGH, RESIDENT OF VILLAGE AND POST OFFICE DHAMETA, TEHSIL FATEHPUR, DISTRICT KANGRA (HIMACHAL PRADESH).

2. SH. TILAK RAJ SON OF SHRI JALLA RAM RESIDENT OF VILLAGE VASA, POST OFFICE CHHATTAR, TEHSIL NURPUR, DISTRICT KANGRA (HIMACHAL PRADESH). …PETITIONERS

(BY SH. RAJAN KAHOL, ADVOCATE.)

AND

1. CENTRAL BUREAU OF INVESTIGATION, SHIMLA BRANCH, RAILWAY BOARD BUILDING, THE MALL ROAD, DISTRICT SHIMLA-3 (HIMACHAL PRADESH), THROUGH ITS DIRECTOR.

2. SHRI DESH RAJ SHARMA, SON OF SHRI KHUSHI RAM SHARMA, RESIDENT OF VILLAGE & POST OFFICE GOLWAN, TEHSIL NURPUR, DISTRICT KANGRA (HIMACHAL PRADESH).

3 SHRI C.K. SHARMA SON OF LATE SHRI JAGNATH SHARMA RESIDENT OF

HOUSE NO. A-55, KARNI NAGAR, PAWAN PURI, DISTRICT BIKANER (RAJASTHAN).

4. SHRI DWARKESH BHARDWAJ SON OF LATE SHRI MADAN LAL RESIDENT OF HOUSE NO. B-68, HAVELI GYAN DWAR, ARJUN LAL SETH NAGAR, DISTRICT JAIPUR (RAJASTHAN). …RESPONDENTS

(BY SH. ANSHUL BANSAL & SH. ANSHUL ATTRI, ADVOCATES, FOR RESPONDENT NO.1.)

(NOTICE NOT ISSUED TO RESPONDENTS NO. 2 TO 4).

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 400 of 2019
Reserved on:26.5.2022
Decided on:31.05.2022

**Indian Penal Code, 1860**- Section 420, 467, 468, 471 read with Section 120-B- **Code of Criminal Procedure, 1973**- Section 311- Trial Court dismissed the application- Held- The documents sought to be placed on record are related to omissions and commissions of the petitioners, for which prosecution has been launched against them and have been tendered in evidence, but have not been exhibited for want of original record- Rejection of application not sustainable. (Para 13)

**Cases referred:**

Ashoo Surendranath Tewari Vs. Deputy Superintendent of Police, EBW, CBI and another, (2020) 9 SCC 636;

State (NCT of Delhi) Vs. Ajay Kumar Tyagi (2012) 9 SCC 685,;

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

**O R D E R**

Petitioners have been charged under Sections 420, 467, 468, 471 read with Section 120-B of the Indian Penal Code (for short 'IPC'), in trial in case No. 4/2 of 2011, titled as CBI Vs. Suraj Kant and others pending before Chief Judicial Magistrate-Special Judicial Magistrate for CBI, Shimla.

2. Petitioners have approached this Court, by way of present petition, being aggrieved by order dated 15.6.2019 passed by the trial Court, whereby an application under Section 311 Cr.P.C., filed on behalf of the accused persons to examine witness, i.e. concerned Clerk from the office of Superintending Engineer alongwith original record of the documents sought to be proved and exhibited by the petitioners/accused persons, has been rejected.

3. In the trial, after closing of evidence of prosecution on 30.6.2016, statements of accused persons under Section 313 Cr.P.C. were recorded on 24.12.2016.

4. On 4.5.2019, counsel for the petitioners had tendered in evidence original copy of Memorandum of Articles of Charge dated 27.6.2011 alongwith Annexures I to IV, certified copy of report of Departmental inquiry dated 25.11.2018 obtained under Right to Information Act, and Letter/Memorandum dated 31.1.2012, on behalf of accused Tilak Raj with request to grant of permission to prove these documents (Mark A to Mark C) in accordance with law. Statement of the counsel, to this effect, was recorded on that day and thereafter vide even dated order, time as prayed for moving appropriate application for further defence evidence was granted, as last opportunity and case was adjourned for 13.6.2019.

5. In furtherance to aforesaid order, petitioners preferred an application under Section 311 Cr.P.C. seeking permission to summon Clerk of the Office of Superintending Engineer alongwith complete record, referred in the application pertaining to the Departmental Inquiry initiated against

petitioners with respect to the misconduct for omissions/commission on the basis of which Criminal Case has been launched against the petitioner.

6. The application was opposed by respondent-CBI on the ground that it was filed to delay the trial and further that there was no reference of these documents in the statement of accused recorded under Section 313 Cr.P.C. and further that report of Departmental Inquiry was not relevant for adjudication of criminal proceedings and thus their production, exhibition and proof was not essential for just and fair decision of the case.

7. Accepting the plea of respondent-CBI, learned Magistrate rejected the application of the petitioner, on the ground that Criminal Proceedings were initiated against the petitioner by submitting final report in the Court on 5.1.2011, whereas Departmental Inquiry was initiated on 27.6.2011 and, therefore, outcome of Departmental Inquiry was not relevant to decide the criminal proceedings and thus proposed witness was not necessary and essential to be examined for proper adjudication of the case.

8. To substantiate the view taken by the trial Court, reliance has been placed on ***State (NCT of Delhi) Vs. Ajay Kumar Tyagi (2012) 9 SCC 685***, wherein three Judges Bench of the Supreme Court has held as under:-

> *"25. We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result in the quashing of the criminal prosecution. We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further, they are not in the same hierarchy."*

9. Learned counsel for the petitioner has placed reliance upon pronouncement of the Supreme Court on ***Ashoo Surendranath Tewari Vs.***

***Deputy Superintendent of Police, EBW, CBI and another,*** reported in (2020) 9 SCC 636, to substantiate his claim that result of Departmental Inquiry shall have an impact on the criminal proceedings and on the basis of findings in the Departmental Inquiry, Criminal Proceedings can be closed and accused persons can be discharged from the offences.

10. Undisputedly, documents sought to be produced in the Court are related to Departmental Inquiry conducted regarding the omission and commission on the part of accused persons, resulting into commission of offence as alleged in Criminal Proceedings and these documents were placed on record in statement of Advocate representing the petitioner as Mark A to Mark C in evidence in defence, but could not be exhibited for want of original record. For that purpose, trial Court had granted time to file appropriate application vide order dated 4.5.2019.

11. Admissibility, relevancy and evidentiary value of a piece of evidence are three different things, which are to be considered and decided at different levels, on the basis of nature of evidence, impact thereof and with respect to the issue involved in the proceedings. Whereas, evidentiary value is to be considered at the time of final adjudication of the case with reference to entire evidence on record. An accused cannot be deprived from leading evidence in defence by producing it in accordance with law which is related to the issue involved in the Criminal Proceedings, however, impact as well as evidentiary value thereof is to be considered at the time of final adjudication of Criminal Proceedings.

12. So far as pleas of respondent and findings returned by the trial Court, with respect to relevancy and effect of these documents on charges framed against the petitioners, are premature because relevancy of the documents and impact of contents thereof on the prosecution case in the trial is to be considered only after documents are exhibited and proved on record in

accordance with law. Before that the documents cannot be looked into by the trial Court but it can be certainly considered, by looking into documents/evidence, that proposed evidence is related to and relevant to lis and for adjudication of the trial or not.

13. The documents sought to be placed on record are related to omissions and commissions of the petitioners, for which prosecution has been launched against them and have been tendered in evidence, but have not been exhibited for want of original record. Therefore, I am of the considered opinion that rejection of application of the petitioners is not sustainable and, therefore, order dated 15.6.2019 is set aside and parties are directed to appear before the trial Court on 15th June, 2022 and petitioners are directed to take appropriate steps to summon the witness within one week thereafter and thereafter witness shall be summoned and examined on a date fixed by the trial Court. It is made clear that it would be responsibility of the petitioners to ensure summoning, service and presence of the witness alongwith original record on the date fixed by the trial Court.

14. Before parting with the case, it would be necessary and relevant to observe that impact of the documents sought to be proved and exhibited in defence evidence for adjudication and deciding Criminal proceedings on merits shall be considered by the trial Court at the time of final adjudication of the trial on its merit in accordance with law, and any observation made by this Court in this order shall not have any impact thereon, as this Court has not considered and decided this issue on merits.

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

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

Between:-

DEVI RAM SON OF SHRI BALBIR SINGH, RESIDENT OF VILLAGE BHANDERI, PO AND TEHSIL GOHANA, P.S. BARODA, DISTRICT SONEPAT, HARYANA

....PETITIONER

(BY MR. PEEYUSH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (HOME), GOVERNMENT OF H.P. SHIMLA

...RESPONDENT

(BY MR. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NO. 140 OF 2022
Decided on:14.06.2022

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- 22 Kg. 8 gm Charas- Bail- petitioner has assailed order of Ld. Special Judge, Sunder Nagar whereby bail graned to petitioner has been cancelled- Held- Needless to say that petitioner has right to file bail application and successive bail applications for enlarging him on bail on valid ground in accordance with law including the ground taken in present petition but not on the grounds which are contrary to judgment of Full Bench in **Mehboob Khan's case** and Division Bench in **Bhavan Kumar's case**, and therefore, petitioner is at liberty to file appropriate fresh application for bail if advised and desired so and such application, if so filed, shall be considered by the Court on the basis of its merits considering material placed before the Court- Petition dismissed. (Para 18, 19)

**Cases referred:**

E. Micheal Raj vs. Intelligence Officer, Narcotic Central Bureau, r (2008)5 SCC 161;

Ms. X vs. The State of Telangana and another, (2018)16 SCC 511;
State of HP vs. Mehbood Khan, 2013(3) Him.L.R. (FB) 1834;
Vipan Kumar Dhir vs. State of Punjab 2021 AIR 2021 SC 4865;

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

O R D E R

Petitioner, by way of present petition, has assailed order dated 15.2.2022, passed in Cr.MA No. 190 of 2021, titled as State of H.P vs. Devi Ram by learned Special Judge, Sundernagar, District Mandi H.P. whereby bail granted to petitioner vide order dated 22.4.2019 passed in Bail Application No. 137 of 2019, titled Devi Ram vs. State of HP, has been cancelled.

2 Petitioner is an accused in FIR No. 279 of 2017 dated 8.12.2017, registered in Police Station Sundernagar, under Section 20 of Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act'), for alleged recovery of 22 Kg. 8 grams charas from him, wherein, as per State Forensic Science Laboratory Report, resin was found to be 27.91% w/w.

3 Petitioner was arrested on 8.12.2017 and at the time of consideration of Bail Application No. 137 of 2019 in April 2019, he was in judicial custody.

4 A Single Bench of this High Court vide order dated 15.3.2019 passed in Cr.MP(M) No. 138 of 2019, titled Nasir Mohammad vs. State of HP, had granted bail to petitioner therein where quantity of charas, alleged to have been recovered from possession of accused, was 2 Kg. 10 grams, but percentage of resin reported by FSL was 18.76% w/w and, thus, by taking quantum of contraband recovered, on the basis of percentage reported by State FSL, to be less than commercial quantity.

5 The aforesaid order was passed by learned Single Judge by distinguishing the judgment passed by Full Bench of this Court in case titled as ***State of HP vs. Mehbood Khan, reported in 2013(3) Him.L.R. (FB) 1834.*** On the same analogy, bails were granted by some Courts in other cases also, on the basis of percentage of resin, treating the commercial quantity of charas as less than commercial quantity.

6 In Cr.MP(M) No. 332 of 2019, titled Roshan Lal Bhardwaj vs. State of HP, decided on 15.3.2019, learned Single Judge has granted bail on the same ground and had also passed the following binding direction to the Subordinate Courts:-

> "It is made clear that in future all the Special Courts/Sessions Courts concerned, who deal with an application under Section 439 Cr.P.C., in respect of the offences, constituted, under the Narcotic Drugs and Psychotropic Substance Act shall bear in mind the verdict recorded by this Court, upon Cr.M.P.(M) No. 138 of 2019, and, pass orders, in accordance with law."

7 Bound by aforesaid direction in large number of cases, bails were granted to accused persons by treating commercial quantity as non-commercial quantity on the basis of percentage of resin of charas found in recovered contraband.

8 Petitioner herein vide order dated 22.4.2019 passed in Bail Application No. 55 of 2019, titled Devi Ram vs. State of HP was enlarged on bail by Special Judge-II, Mandi in furtherance to directions issued by learned Single Judge in ***Cr.MP(M) No. 138 of 2019, titled Nasir Mohammad vs. State of HP and Cr.MP(M) No. 332 of 2019, titled Roshan Lal Bhardwaj vs. State of HP***, by treating the quantity recovered from petitioner as less than commercial quantity on the basis of percentage of resin reported by Forensic Science Laboratory.

9 Aforesaid issue was placed before the Division Bench of this High Court in case ***Cr.MP(M) No. 613 of 2018 titled Bhavan Kumar vs State of HP,*** which was decided on 29.02.2020. The Division Bench overruled the version of learned Single Judge taken in ***Nasir Mohammad, Roshan Lal Bhardwaj's cases,*** referred supra and other similar cases, whereby bail was granted on the basis of percentage of resin found in charas and it was observed that law laid down by High Court in Mehbood Khan's case is binding upon all and with regard to persons already enlarged on bail by following Nasir Mohammad and Roshan Lal Bhardwaj's cases, following observations were made:-

> "15. Since the Single Bench, which has decided Cr.M.P (M)No.138 of 2019, titled Nasir Mohammad versus State of Himachal Pradesh has granted bail to Nasir Mohammad and also Roshan Lal Bhardwaj in Cr.M.P(M) No. 332 of 2019 and also to the petitioner in several other petitions mentioned in Dilbar Singh's case and also in para 7 of this judgment, while taking a view contrary to the one taken by Full Bench of this Court in Mehboob Khan's case supra and by a Division Bench of this Court in Nirmal Singh's case also followed by one of us (Justice Vivek Singh Thakur, J.) in Dilbar Singh's case supra, therefore, we will be failing in our duty, if not, pass appropriate directions in this regard. Though show cause notice should have been issued straightway to the accused persons hereinabove, who have been ordered to be admitted on bail by not appreciating the law laid down in Mehboob Khan's case in its right perspective, however, we leave it open to learned Advocate General, State of Himachal Pradesh to consider the desirability of filing of appropriate application(s) for cancellation of the liberty of bail so granted by learned Single Judge by taking a contrary view in Nasir Mohammad's case supra. Similarly, the Additional Chief Secretary (Home) to the Government of Himachal Pradesh also to examine the desirability to consider the filing of application(s) before the Sessions Judges (Special Judges) in the State for cancellation of bail granted to the

> accused persons in the cases registered under the NDPS Act while placing reliance on the judgment in Nasir Mohammad's case and Roshan Lal Bhardwaj's case referred to hereinabove."

10 In furtherance to aforesaid directions passed by Division Bench, Application No. 190 of 2021 for cancellation of bail was preferred by State of HP in the present case. The said application was allowed by learned Special Judge vide impugned order dated 15.2.2022 by following the directions/findings returned by Division Bench in Bhavan Kumar's case. Hence present petition has been filed.

11 Learned counsel for petitioner has submitted that petitioner was enlarged on bail vide order dated 22.4.2019 and, thereafter, till cancellation of his bail, he has not violated any of the conditions imposed upon him at the time of granting bail and he regularly attended the Court during trial after grant of bail and, therefore, there was no ground available with respondent/State as well as learned Special Judge to cancel the bail of petitioner.

12 To substantiate the aforesaid plea, learned counsel has placed reliance upon pronouncement of the Supreme Court reported in ***Ms. X vs. The State of Telangana and another,*** reported in ***(2018)16 SCC 511*** and ***Vipan Kumar Dhir vs. State of Punjab*** reported in ***2021 SCC Online SC 854: AIR 2021 SC 4865.***

13 Learned counsel for petitioner has submitted that Division Bench of this High Court in Bhavan Kumar's case, had directed the Additional Chief Secretary (Home) to examine the desirability of filing application before Sessions Judges/Special Judges in the State for cancellation of bail granted to accused persons by placing reliance on judgments in Nasir Mohammad, Roshan Lal Bhardwaj's cases but not to file application in each and every case. Further he has contended that in present case, application has been filed by Public Prosecutor that too without any affidavit in support thereto and

without placing any directions/instruction issued by the Additional Chief Secretary after examining the desirability of filing application in present case. Referring ***E. Micheal Raj vs. Intelligence Officer, Narcotic Central Bureau,*** reported in ***(2008)5 SCC 161,*** he has submitted that at the time of grant of bail, pronouncement of the Supreme Court in ***E Micheal Raj's case*** directing to consider the quantum of recovered contraband, on the basis of percentage of resin, was in existence and, therefore, learned Special Judge had rightly enlarged the petitioner on bail vide order dated 22.4.2019.

14 Learned Additional Advocate General has submitted that Public Prosecutor is representative of State in Court and, therefore, application filed by Public Prosecutor is an application filed by State of HP, as directed by Division Bench of this High Court. He has submitted that order of granting bail to petitioner was based on the judgment passed in contradiction to Full Bench's judgments of this High Court in Mehboob Khan's case and, therefore, such grant of bail, particularly in view of order/direction passed by Division Bench, was liable to be interfered with and bail granted to petitioner has, thus, rightly been cancelled by passing impugned order.

15 Learned counsel for petitioner, in response, has submitted that procedure is a handmade instrument for doing substantial justice and in present case, if circumstances, in totality, are taken into consideration, petitioner is entitled for bail and, thus, cancellation order deserves to be quashed.

16 Perusal of order dated 22.4.2019 clearly depicts that Special Judge-II, Mandi had enlarged the petitioner on bail solely on the basis of binding directions issued by learned Single Judge in Nasir Mohammad and Roshan Lal Bhardwaj's cases. The Division Bench has overruled the decision of learned Single Judge in aforesaid cases and in addition, has issued the mandatory directions to State to examine the desirability to consider filing of application for cancellation of bail granted to persons on the basis of direction

issued by learned Single Judge, referred supra. Learned Public Prosecutor has acted in accordance with direction passed by Court, who is representative of State in Court.

17 Petitioner may or may not be entitled for bail under Section 439 Cr.PC on grounds other than the ratio laid down by Single Judge in Nasir Mohammad and Roshan Lal Bhardwaj's cases, but vide order dated 22.4.2019 he was granted bail on the basis of directions of Single Judge on the basis of judgment in aforesaid two cases and as per direction issued by Division Bench in Bhavan Kumar's case that bail so granted was liable to be cancelled on application of State and, therefore, in present case, learned Special Judge has not committed any illegality, irregularity, infirmity or perversity in canceling the bail so granted to petitioner.

18 Needless to say that petitioner has right to file bail application and successive bail applications for enlarging him on bail on valid ground in accordance with law including the ground taken in present petition but not on the grounds which are contrary to judgment of Full Bench in ***Mehboob Khan's case*** and Division Bench in ***Bhavan Kumar's case***, and therefore, petitioner is at liberty to file appropriate fresh application for bail if advised and desired so and such application, if so filed, shall be considered by the Court on the basis of its merits considering material placed before the Court, but without being influenced by rejection of present petition.

Petition is dismissed in aforesaid terms.

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

Between:-

LAXMAN PATEL, AGED 21 YEARS, SON OF SHRI MANNA PATEL, RESIDENT OF HIRANANPUR,
P.S. SARNATH, DISTT BARANASI (U.P.).

....APPELLANT

(BY MS. SHEETAL VYAS, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 304 of 2018
Reserved on:18.5.2022
Decided on:01.06.2022

**Indian Penal Code, 1860**- Section 302- Appeal against conviction- Circumstantial evidence- Held- The cardinal principle of criminal jurisprudence has remained impassive. The prosecution has to prove its case beyond all reasonable doubts. Appearance of serious doubt in the prosecution case only helps the case of accused. More serious the offence, more arduous is the duty cast upon prosecution to discharge its burden strictly in accordance with law. In absence of direct evidence, circumstances relied upon by the prosecution have to satisfy the same standard of proof i.e. beyond all reasonable doubts. Once this barrier is successfully crossed, it is to be shown that all the circumstances form a complete chain of facts suggesting only one hypothesis i.e. the guilt of the accused- Appeal allowed- Conviction set aside. (Para 24, 25)

**Cases referred:**

Anjan Kumar Sarma v. State of Assam, (2017) 14 SCC 359;

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This appeal coming on for hearing this day, **Hon'ble Mr. Justice Satyen Vaidya**, delivered the following:

J U D G M E N T

By way of instant appeal, appellant has assailed his conviction recorded by learned Sessions Judge, Kullu, H.P. *vide* judgment dated 7.12.2013 and consequent sentence order of the same day, passed in Sessions Trial No. 42 of 2011 (107 of 2012),

whereby, the appellant has been convicted for commission of offence under Section 302 IPC and sentenced to undergo imprisonment for life with payment of fine of Rs. 10,000/-. In default of payment of fine to further undergo rigorous imprisonment for six months.

2. The case as set up by prosecution was that the appellant and deceased belonged to Varanasi and were engaged in business of selling of cloth as hawkers from place to place. On 21.2.2011, deceased along with appellant had left Varanasi for Dehradun. After staying for two days at Dehradun, appellant came to Manali and deceased went to Dharmshala, District Kangra, Himachal Pradesh. On 3.3.2011 deceased also joined appellant at Manali. They stayed together in Siyali Mahadev Temple Inn (hereinafter referred to as the Inn).

3. It was alleged against the appellant that he murdered the deceased in Room No.3 of the Inn by striking his head with a stone. Appellant thereafter cut the body of deceased into parts and disposed it off at different places. The lower part of the body was allegedly thrown in River Beas from a bridge at Bhuntar in District Kullu and the remaining upper part of the body was packed in a plastic bag and blanket etc. and was thereafter thrown at a place "Kirad Bridge" near Jukhala within the jurisdiction of Police Station Barmana, District Bilaspur, H.P.

4. Initially PW-27, father of the deceased reported the matter to police at Varanasi, on the basis of which FIR Ext. PW-27/A was registered. On 7.3.2011, the upper part of the body of deceased was recovered by the officials of Police Station Barmana and an FIR No. 53 of 2011, dated 7.3.2011 was registered. Investigation was initiated by the police. Body of deceased was sent for post-mortem to Civil Hospital, Bilaspur. The post-mortem was

conducted at Civil Hospital, Bilaspur in the first instance and for further detailed forensic investigation, the body was sent to IGMC, Shimla where again the post- mortem on the body of the deceased was conducted and reported *vide* PMR No. 54 of 2011, Ext. PW-36/A. The cause of death was opined to be fracture of skull and subdural subarachnoid hemorrhage following ante-mortem head injuries. The injuries found on head region were found to be ante-mortem and rests of the injuries were found post-mortem.

5. On, 10.4.2011, PW-27 Ram Asre accompanied by PW-26, Ram Pujan reached Manali and reported the matter to police. FIR Ext. PW-26/A was registered. Investigation was initiated. On 13.4.2011, the evidence collected by Police of Police Station Barmana in relation with FIR No. 53 of 2011 dated 7.3.2011 was handed over to the officials of Police Station, Manali, District Kullu, H.P. The belongings found on the person of deceased were identified by PW-26 Ram Pujan to be those of the deceased. The body found near Kirad Bridge on 7.3.2011 was also identified by PW-26 to be that of the deceased Sanjay Patel from the photographs preserved by police.

6. On 14.4.2011, appellant suffered a disclosure statement under Section 27 of the Indian Evidence Act and got recovered the weapon of offence i.e. Stone with which, he allegedly had killed the deceased. Police collected the abstract of Visitors Register of the Inn and found that appellant had stayed there w.e.f. 25.2.2011 to 9.3.2011. Police also found blood-stained articles in Room No.3 of the Inn and on 14.4.2011, collected samples with the help of forensic team of RFSL Gutkar, District Mandi.

7. Police also collected the evidence in the shape of statement of various shopkeepers/vendors from whom appellant,

during the relevant period, had purchased articles viz. shaving blade, hexa-blade, cotton, empty plastic bag, empty gunny bag, deodorant, chemical and sickle etc., which according to prosecution were used by the appellant to cut the body of deceased into pieces and to dispose it off.

8. On forensic examination of the incriminating articles, it was opined by SFL Junga that the blood on the stone recovered from the premises of the Inn and the blood collected from various articles from Room No.3 of the Inn and the radius bone of the deceased preserved after post-mortem generated the identical DNA.

9. Police further relied upon statements of employees of the Inn and Hotel Vikrant Manali. Another piece of evidence relied upon by prosecution was the statement of PW-18, Jagbir Ram, Conductor employed with HRTC. According to him the appellant had travelled in a bus from Manali to Jukhala in District Bilaspur with luggage loaded on the roof of the bus in the month of March, 2011. This witness identified the appellant to be the same person, who had travelled in the bus.

10. On completion of investigation, challan was filed.

Appellant was charged for commission of offence under Section 302 IPC. He pleaded not guilty. Prosecution examined total 35 witnesses. Appellant was examined under Section 313 Cr.P.C. He did not lead any defence evidence. On conclusion of trial, learned Sessions Judge, Kullu convicted and sentenced the appellant, as noticed above.

11. We have heard Ms. Sheetal Vyas, learned counsel for the appellant as well as Mr. Kamal Kant, learned Deputy Advocate General at length and have also gone through the record

carefully.

12. The investigating agency did not find any direct evidence against the appellant. It was only on the basis of circumstantial evidence that the appellant was prosecuted. The circumstances relied upon by the prosecution against the appellant can be culled as under:-

**(i)** Appellant and deceased had left Varanasi for Dehradun together on 21.2.2011. Both of them stayed at Dehradun for two days and thereafter appellant came to Manali and deceased went to Dharmshala

**(ii)** Deceased joined the appellant at Manali on 3.3.2011

**(iii)** Appellant stayed in Siyali Mahadev Temple Dharmshala (the Inn) w.e.f. 25.2.2011 to 9.3.2011

**(iv)** Stay of deceased in the Inn with appellant. (v)Deceased was seen in the company of appellant atManali

(vi) appellant travelled in HRTC bus from Manali toJukhala

(vii) appellant had purchased various articles viz. shaving blade, hexa-blade, cotton, deodorant, plastic bags, sickle etc. from various shopkeepers/vendors:

(viii) disclosure statement suffered by appellant and recovery of weapon of offence (stone):

(ix) recovery of incriminating articles with blood stains from room number 3 of the Inn:

(x) matching of DNA profile of deceased with theincriminating articles viz. blood on stone, blood found on mattress, quilt, pillow etc. recovered from room number 3 of the Inn:

13. In ***Anjan Kumar Sarma v. State of Assam, (2017) 14 SCC 359*** Hon'ble Supreme Court held as under:

"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency; they should exclude every possible hypothesis except the one to be proved; and

(4) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

14. Analyzing the evidence on record in the backdrop of aforesaid legal position, we are not inclined to concur with the findings recorded by learned Sessions Judge, Kullu, for the reasons detailed hereinafter.

**15. CIRCUMSTANCES:**

**(i) Appellant and deceased had left Varanasi for Dehradun together on 21.2.2011. Both of them stayed at Dehradun for two days and thereafter appellant came to Manali and deceased went to Dharmshala**

**(ii) Deceased joined the appellant at Manali on 3.3.2011**

**Evidence and Analysis**

PW-26, uncle of deceased, stated that deceased Sanjay Patel had left his house for Dehradun on 21.2.2011. Appellant had also accompanied him. They remained at Dehradun for two days. Thereafter appellant left for Manali and deceased left for Dharamshala. Deceased was in regular contact with him on telephone. On 3.3.2011 deceased had reached Manali and had informed that he was staying with the appellant in room number 3 of the Inn.

PW-27, father of deceased, also stated that his son and appellant had left for Dehradun on 21.2.2011 for selling cloth. On 3.3.2011 the deceased had informed that he was at Manali.

From the statements of PWs 26 and 27 it can be inferred, at the most, that deceased and appellant had left their homes together for Dehradun on 21.2.2011. Rest has been left in the realm of guess work. There is no evidence that deceased or appellant had visited Dehradun. There is nothing on record to suggest that deceased visited Dharamshala.

The investigating officer did not bother at all to collect evidence regarding mobile phone call details of PWs 26, PW- 27, deceased and the appellant. Firstly, such evidence would have provided credence to the version of PWs 26 and 27 and secondly mobile locations of the deceased and appellant, during relevant period, could have been ascertained easily. When confronted with this omission, PW-35/ I.O responded that he did not find it necessary to collect such evidence. This conduct of the Investigating Officer

definitely is unprofessional. His omission to collect best evidence cannot be brushed aside simply.

The circumstances (i) and (ii), in our considered view, cannot be said to have been proved in accordance with law.

**16. (iii) Appellant stayed within Siyali Mahadev Temple Dharmshala (the Inn) w.e.f. 25.2.2011 to 9.3.2011**

**Evidence and Analysis**

To establish this circumstance, prosecution relied upon document Ext. PW-1/A which is stated to be abstract of the visitor's register maintained at the Inn.

Document Ext. PW-1/A cannot be considered in proof of the factum of stay of appellant and the deceased in the Inn at Manali for the reasons firstly that the original of the document Ext. PW-1/A has not seen light of the day. No explanation has been rendered for such omission. Secondly, perusal of document reveals that there is no acknowledgement of the appellant in respect of entry in relation of his stay madein the visitors register. The column meant for signatures of visitors/customers is blank. Further, there is a clear interpolation by overwriting on the date of departure. Though, it is mentioned as 9.3.2011 but even to the naked eye it is visible that figure 9 denoting the date has been overwritten on figure 26 and figure 3 denoting the month has been overwritten onfigure 2. Again, no explanation has been provided with respect to such overwriting. Apparently, figure 26.02.2011 has been overwritten as 09.03.2011. In these circumstances, this document cannot be said

to be a proof of the fact regarding the stay of appellant in the Inn from 25.2.2011 to 9.3.2011. Even after most lenient interpretation, only appellant can be stated to have stayed in the Inn for a single day. Further, production of such type of evidence creates grave suspicion regarding veracity of prosecution case.

Prosecution has examined PWs 1, 4, 8 and 9 as prosecution witnesses, who were stated to be the employees of the Inn. Except the statements of these witnesses there is no evidence to corroborate that these witnesses were employees of the Inn.

PW-1 Des Raj stated that on 25.2.2011, he booked Room No.3 for the appellant. Appellant was alone. This witness has not been able to explain the overwriting in Ext. PW-1/A and also the reason for blank column meant for signatures of the visitors/customers. This witness evidently had no prior acquaintance with appellant.

PW-4 Pratap Singh also stated that the appellant stayed in the Inn at Manali from 25.2.2011 to 9.3.2011 in Room No.3.

PW-8 Ajay Kumar stated that appellant stayed in the Inn with another boy. This witness was declared hostile by the Public Prosecutor and was cross examined. This witness did not identify the deceased to be that another boy.

Another witness PW-9 Lal Chand stated that appellant stayed in Room No.3 of aforesaid Inn along with another boy. He also did not identify the deceased to have stayed with appellant. In cross-examination on behalf of the defence, this witness admitted that as per entry Ext. PW-1/A only one person stayed in the Inn.

When the stay of appellant in the Inn

w.e.f.25.2.2011 to 9.3.2011 has been rendered doubtful keeping in view the production of suspicious document Ext. PW-1/A, it becomes more onerous on the Court to scan the evidence of these witnesses with extreme care.

The appellant was already a suspect even before registration of FIR at Police Station Manali. He was brought from Varanasi by Uttar Pradesh Police in the company of PW-26 and PW-27. Document Ext. PW-26/B reveals that appellant was handed over to Inspector/SHO, Police Station, Manali on 11.4.2011, by in charge, Police Station Badagaon Varanasi. This official has been examined as PW-30. As per this witness, PW-27 Ram Asre had lodged a report on 25.3.2011 at Police Station Badagaon, Varanasi, raising suspicion that the appellant might have committed murder of Sanjay Patel. FIR No. 137 of 2011 was registered under Section 364 IPC. Thereafter, this witness along with PW-26 and PW-27 visited Manali. SHO, Police Station, Manali was contacted. The photograph of deceased Sanjay Patel was shown to SHO, Manali and after making search on internet, it was found that one dead body with same identification was found at Police Station Barmana. From this statement, it is clear that though the appellant was handed over by PW-30 to PW-35 on 11.4.2011 but PW-30 and appellant were at Manali even on 10.4.2011 in the company of PW-26 and PW-27, as the FIR was registered on the said date.

At this juncture a reference to the statement of Investigating Officer/SHO, Police Station Manali, Mastan Singh PW-35, will not be out of place. He stated that immediately after recording of FIR on 10.4.2011, he visited Room No.3 of the Inn and locked it. He mentioned this room to be a place where the deceased

was murdered. It has not been explained by this witness as to how he immediately concluded that the murder was committed in Room No.3. There is no document on record to show that police had carried any proceedings to preserve Room No.3 of the Inn on 10.4.2011 or at any time thereafter.

Now, looking at the version of PW-35 that after recording FIR, he immediately visited the Inn and locked the room gains importance. Police had the information that the body of deceased Sanjay Patel was recovered by Barmana Police. The factum of death of Sanjay Patel was confirmed. Appellant was in their custody and the entire trail appears to have been imaged on illegal confession extracted from appellant. It will be relevant to notice that PW-4 had also stated that on 11.4.2011, police had visited room number 3 of the Inn and had collected some evidence and that the appellant had made confessional statement before police in his presence. None of the witnesses PWs 1, 4, 8 and 9 had any prior acquaintance with the appellant. It is not the case that appellant was brought muffled from Varanasi to Manali or that he was kept muffled after registration of FIR. He was never subjected to Test Identification Parade after his arrest.

Thus, the conduct of investigating agency is not beyond suspicion and it will not be safe to believe the testimonies of PWs 1, 4, 8 and 9 regarding stay of appellant in the Inn.

**(iv) Stay of deceased in the Inn with appellant.**

**Evidence and Analysis**

PW-4 has been examined to state that the

deceased was identified by him through photograph Ext. P-3. He had seen deceased as the deceased had visited the office of the Inn at Manali with appellant for receipt. In cross-examination, when confronted with his previous statement made to the police, he stated that he had not disclosed to the police about the factum of deceased having accompanied appellant to the office for obtaining receipt. He did not even remember the date when he identified the deceased from photograph.

PW-8 Ajay Kumar and PW-9 Lal Chand stated that appellant stayed in the Inn with another boy. However, none of these witnesses identified the deceased to be that another boywho had stayed with appellant in the Inn.

As per PW-1 appellant had stayed alone in the Inn.

Had the deceased stayed in the Inn with appellant, how could it be that PWs 8 and 9 were able to identify the appellant but not the deceased. Similarly, if deceased stayed in the Inn with appellant, how it could escape the notice of PW-1.

In the given circumstances of the case, it will not be safe to rely upon statement of PW-4 as he had made substantial improvement while deposing before the court to his earlier version given to the Police. Had this witness seen deceased, he definitely would have disclosed this fact to the Police during investigation and that too in the first instance. As per this witness, Police had associated him on 11.4.2011 itself.

Thus, it cannot be said to have been proved beyond doubt that deceased had stayed with appellant in the Inn.

**(v) Deceased was seen in the company of**

**appellant at Manali.**

**Evidence and Analysis**

Prosecution examined PW-24 Amit Kumar, a waiter of hotel Vikrant at Manali. According to this witness on 2.3.2011, appellant came to hotel Vikrant at about 7.00 p.m.for inquiry for a room for the stay of his friend and his wife. At about 9.00 p.m. appellant along with his friend and his wife visited the hotel and stayed in Room No. 104. Next morning, appellant and his friend left the hotel at 11.00 a.m. On 19.4.2011, he was called in Police Station, Manali and he then identified the appellant. Police also showed him photographs of the deceased and PW-24 identified the deceased as the same friend of appellant, who had stayed with him on the night of 2.3.2011 in hotel Vikrant.

PW-26 and PW-27 have been very categoric that deceased had reached Manali on 3.3.2011. If deceased reached Manali on 3.3.2011, how could he be seen by PW-24 at Manali on the night of 2.3.2011 that too with his wife, who never existed.

Viewed from another perspective, it can again be seen that appellant was not subjected to TIP before this witness. It was not a case where appellant was already known to PW-24.

Similarly there is no evidence that PW-24 was shown the photograph of the deceased along with some other photographs to ascertain veracity. No record from Hotel Vikrant, Manali was producedin evidence to corroborate the version of PW-24.

This circumstance also does not stand proved.

**19. (vi) appellant travelled in HRTC bus from Manali to Jukhala**

**Evidence and Analysis**

PW-18 Jagbir Sharma stated that he was working as bus conductor with Himachal Road Transport Corporation (foe short, "HRTC"). In the month of March 2011, he was deputed on Bus number HP-03B-6037 en-route from Manali to Shimla. On 9.3.2011 appellant had boarded the bus from Manali along with his baggage loaded on the roof and had got down at Jukhala with the baggage. However, the date of incident was corrected as 6.3.2011 by the witness while answering the questions during cross-examination. He had disclosed these facts to the Police when he was called by officials of Police Station Manali for investigation.

As regards the statement of PW-18, Conductor of HRTC Bus, it again remains unexplained that how the Investigating Officer came to know about the fact that the appellant had carried the body of deceased in bus from Manali to Jukhala. It will not be inapt to assume that scores of buses leave Manali daily to different destinations. The Investigating Officer has not made even a whisper as to how he came to know about such an important fact. PW-18 states that he was called at Police Station by the police. Meaning thereby, that PW-18 himself had no idea about the conduct of appellant or the contents of baggage carried by him. This part of evidence is also shrouded with mystery.

There was no such occasion for PW-18 to have remembered one of his numerous customers/passengers and especially the date on

which appellant had travelled in his bus. Appellant was not previously known to PW-18 and admittedly there was no TIP in this case also.

**20. (vii) appellant had purchased various articles viz. shaving blade, hexa-blade, cotton, deodorant, plastic bags, sickle etc. from various shopkeepers/vendors:**

**Evidence and Analysis**

According to prosecution case, the appellant had purchased various incriminating articles from different shops/ vendors. Shaving blade was purchased from PW-2 Ishwar Dass, hexa-blade from PW-3 Surender Kumar, cotton from PW-11 Sanjeev Kumar, two plastic bags from PW-12 Chandan Ahuja, scent from PW-13 Rakesh Awasthi and sickle from PW-14 Tule Ram. All these witnesses stated that after some days appellant was brought by the police to their respective shops for identification and they had accordingly identified him.

The fact remains that none of the articles which the appellant had allegedly purchased from different shops were either recovered or identified. Hence, to say that any of such article was used in commission of offence or for any other purpose linked to the offence will be nothing short of surmise. Prosecution has not been able to prove on record the specific use of such articles by the appellant.

The identification of the appellant by aforesaid witnesses again has to be seen with circumspection for the sole reason that the mode and

manner adopted by police in getting the appellant identified was not beyond shadow of doubt. None of these witnesses were known to appellant as appellant was not resident of Manali. No special reason has been assigned by any of the witnesses to have identified one of their several customers who had visited their respective shops only once. Manali or Kullu are towns with considerable population and more importantly both the places are regularly frequented by huge number of tourists. Had it been some isolated place or remote village, where the stranger customer was a rare commodity, the matter would have been different.

**21. (viii) disclosure statement suffered by appellant and recovery of weapon of offence (stone):**

**Evidence and Analysis**

The disclosure statement of appellant has been placed on record as Ext. PW-1/C. The statement is stated to have been made on 14.4.2011 in presence of PW-1 Des Raj and PW-8 Ajay Kumar. PW-1 stated that appellant had made such statement to police in the temple of Siyali Mahadev, Manali where he was brought after few days after the day when Police had taken abstract of visitor register of the Inn in possession. PW-8 however did not state anything about Ext. PW-1/C. Even the learned Public Prosecutor did not confront him with the factum of making of disclosure statement by appellant. In reply to a question put to PW-8 in cross examination in defence he stated that he did not remember appellant having made any such statement.PW-34 ASI Daya Ram stated that appellant made disclosure statement Ext. PW-1/C on 14.4.2011

but he does not mention the place of making such statement. Regarding recovery of weapon of offence PW-1 Des Raj stated that on the demarcation of appellant stone was recovered which he had hidden near the bathroom/toilet of the Inn.PW-8 Ajay Kumar again remained silent about this aspect in his examination in chief. In cross examination by learned Public Prosecutor, he stated that the appellant had also given demarcation of recovery of stone.

The place where appellant made statement Ext. PW- 1/A is not known. From the statement of PW-1 it appears to have been made in the Siyali Mahadev Temple complex. PW-8 and PW-34 have remained silent in this respect. However, recovery memo Ext.PW-1/D recites that the appellant, immediately after reaching the place of incidence, alighted from the vehicle and lead the police party and the witnesses to the place of recovery. In this manner, prosecution has not been able to place on record consistent evidence. PW-1 stated that statement was made by appellant at the place of incidence, whereas no such fact is recorded either in Ext PW-1/C or Ext. PW-1/D, rather Ext PW-1/D records that appellant immediately after alighting from the vehicle lead the police party to place of recovery. It means that statement was not made on spot. Thus, there is complete uncertainty as to when and where the statement was made.

It was not the case that the place of recovery of stone was such which was inaccessible to others and was known to the appellant only. In this view of this matter as also other evidence available on record these circumstances cannot be said to be proved beyond reasonable doubts.

**22. (ix) recovery of incriminating articles with blood**

**stains from room number 3 of the INN:**

**Evidence and Analysis**

PW-35 stated that immediately after recording of FIR, he visited Siyali Mahadev Temple and locked room number
3. PW-4 stated that it was on 11.4.2011 that police had takenin possession incriminating articles from room number 3. Whereas, as per PW-9 such proceedings were undertaken on 14.4.2011

Firstly, there is no document on record to prove the preservation of room number 3 of Siyali Mahadev temple by police, as stated by PW-35. Secondly there is no consistency in evidence as to when the incriminating evidence was collected from said room and lastly, it is not understandable that police could get such incriminating evidence from the room after more than one month of its alleged vacation by appellant. The room was part of an Inn and it was not the case that none else used the room after 9.3.2011.

We cannot ignore yet another fact that the FIR was registered on 10.4.2011. PW-35 had visited Dharmshala and locked the Room on the same day, no effort was made to collect the evidence from such room till 14.4.2011, when the police had no chance to manipulate the evidence. It is also not understandable that room in a Dharmshala, which was left by the appellant on 9.3.2011 was not cleaned for more than a month and the blood stains were still available not only on the floor and walls but on the quilt, pillow and mattress etc. Coming to the story propounded by prosecution, in case the deceased was murdered in the suggested manner in the roomat Dharmshala and then his body was cut into pieces by using sickle and hexa-blade etc. one can imagine the quantum of blood

that would have appeared. In such situation, it would not have been in bits and parts on various articles as alleged.

In case PW-35 had reached room number 3 of the Inn on 10.4.2011 itself, why the material was not collected from said room immediately again remains unanswered. This circumstance also fails the test of requisite proof.

**23. (x) matching of DNA profile of deceased with the incriminating articles viz. blood on stone, blood found on mattress, quilt, pillow etc. recovered from room number 3 of the Inn:**

**Evidence and Analysis**

The circumstance which weighed with learned Sessions Judge was that the blood stains were found on the stone recovered from the premises of the Inn and the blood- stained articles recovered from Room No.3 thereof generated the same DNA as that of the deceased. At the first sight, this circumstance appears to nail the appellant but again on deep exploration into the material on record mystery shrouds even this circumstances.

PW-36 Dr. A. K. Sharma had conducted post- mortem on the body of deceased at IGMC, Shimla. He stated on oath while appearing as PW-36 that two blood vials of deceased along with sample were sealed in a cloth parcel and handed over to the police. To similar effect there is a mention in PMR Ext. PW-36/A that two different blood vials were handed over to the police after post-mortem. It is evident from Ext. PW-5/A i.e. an abstract of Malkhana register of Police Station, Barmana, wherein vide entry No. 1013/27 dated 13.3.2011 various articles were deposited in

Malkhana, which includes two vials containing blood of the deceased, sealed with seal DKG. This document further reveals that one vial of blood was sent for scientific analysis to RSFL, Gutkar on 15.3.2011. The report Ext. P-27 prepared by RFSL Gutkar also affirms the fact that one vial containing blood was received from Police Station, Barmana in relation with FIR No. 53 of 2011 vide RC No. 50/11 dated 15.3.2011. To track the second vial, reference can be made to document Ext. PW-5/A, which is a memo prepared on 13.4.2011, whereby the proceedings for handing over of evidence collected by Police Station, Barmana to Police Station Manali were recorded. This document includes the handing over of one vial of blood with two seals of DKG. Thus, on 13.4.2011, the second vial containing blood of deceased came in the hands of officials of Police Station, Manali. The seal DKG also comes into the possession of the police of Police Station, Manali and the same was deposited in "*Malkhana*" of Police Station, Manali on 18.4.2011 by PSI, Sunil Kumar. PSI Sunil Kumar has not been examined as a witness. There is no connecting evidence as to how sample seal came into possession of said police official and why it was not deposited along with other case property on 13.4.2011 itself. An entry in Malkhana register Ext. PW-29/A reveals that on 13.4.2011, one cloth parcel containing vial sealed with two seals of DKG was also deposited along with sample seal 'M', as noted above, the sample seal of seal DKG was deposited at much later date i.e. 18.4.2011. Prosecution has also shown that vide road certificate Ext. PW-29/B the cloth parcel containing blood vial with two seals of DKG was sent to FSL, Junga for scientific analysis along with other case property. Perusal of report prepared by SFL Junga, Ext. PX, revealed that the blood found in the above noted vial had

yielded highly degraded DNA, making examination impossible. In these circumstances, the tampering with case property cannot be ruled out. Cloth parcel with two seals DKG deposited in Malkhana on 13.4.2011, cannot be treated as an absolute proof that the blood as preserved and sealed by PW-36 and handed over to the police was in the same position. There could be easy manipulation as the sample seal was in the hands of the police.

24. In light of above material, this circumstance again cannot be said to carrying requisite standard of proof. The cardinal principle of criminal jurisprudence has remained impassive. The prosecution has to prove its case beyond all reasonable doubts. Appearance of serious doubt in the prosecution case only helps the case of accused. More serious the offence, more arduous is the duty cast upon prosecution to discharge its burden strictly in accordance with law. In absence of direct evidence, circumstances relied upon by the prosecution have to satisfy the same standard of proof
i.e. beyond all reasonable doubts. Once this barrier is successfully crossed, it is to be shown that all the circumstances form a complete chain of facts suggesting only one hypothesis i.e. the guilt of the accused.

25. We are governed by rule of law. No conviction can be recorded on assumption. Prosecution has to discharge its burden by proving the guilt of accused beyond all reasonable doubts and for such purposes, it has to prove the fact in issue on the basis of relevant and admissible evidence. Merely, because police gets knowledge about the culprit either from illegal confession extracted from him or from any other source will not absolve the prosecution from its duty to prove the guilt of the accused in accordance with

law.

26. The facts considered hereinabove have escaped the attention of learned Sessions Judge, which have led to the conviction of appellant on the material which in our considered opinion is not sufficient to hold him guilty.

27. A close scrutiny of the material on record would disclose that the circumstances relied upon by the prosecution to prove the guilt of the appellant were not complete and do not lead to the conclusion that in all human probability the murder must have been committed by the appellant.

28. In light of above discussion, there is merit in the appeal and the same is accordingly allowed. The judgment dated 7.12.2013 and consequent sentence order of the same day, passed in Sessions Trial No. 42 of 2011 (107 of 2012), whereby, the appellant has been convicted and sentenced for commission of offence under Section 302 IPC is set aside. The appellant is acquitted of all charges and is directed to be set free forth with, if not required in any other case.

29. In view of the provisions of Section 437-A of Code of Criminal Procedure, 1973, appellant is directed to furnish his personal bonds in the sum of Rs.25,000/- with one surety in the like amount, before the learned Registrar (Judicial) of this Court, which shall be effective for the period of six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of leave, the appellant, on receipt of notice thereof, shall appear before the Supreme Court.

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

Between:-

SH. RAM CHAND, SON OF SH. JAI DEV, RESIDENT OF VILLAGE DHARA, P.O. GARSA, TEHSIL BHUNTER, DISTRICT KULLU, H.P., AGED 45 YEARS.

……PETITIONER

(BY MR. NAVEEN K. BHARDWAJ, ADVOCATE)

AND

SH. DHIAN SINGH, SON OF SH. DAULAT RAM, RESIDENT OF VILLAGE AND P.O. SAINJ, SUB TEHSIL SAINJ, DISTRICT KULLU, H.P.

……RESPONDENT

(MR. MAAN SINGH, ADVOCATE)

CRIMINAL REVISION
NO. 36 of 2020
Decided on: 23.09.2021

**Code of Criminal Procedure, 1973**- Sections 397, 401- Judgment of conviction and order of sentence under Section 138 of Negotiable Instruments Act- Held- once factum with regard to issuance of cheque as well as signatures thereupon are admitted by accused, presumption as available under Section 118 and 139 of the Act, is applicable in favour of complainant. No doubt, aforesaid presumption is rebuttable, but for that purpose accused is to raise probable defence either by leading some positive evidence or to refer to the evidence led on record by the complainant. However, in the case at hand, no probable defence has been raised by the accused to rebut the presumption of issuance of cheque for discharge of lawful liability by him in favour of complainant- No probable defence has been raised by the accused to rebut the presumption of issuance of cheque for discharge of lawful liability by him in

favour of complainant- No infirmity in judgment passed by Ld. Trial Court and upheld by Ld. Appellate Court and as such same are upheld- Revision dismissed. (Para 12, 20)

**Cases referred:**

Basalingappa v. Mudibasappa (2019) 5 SCC 418;
K. Subramani v. K. Damodara Naidu (2015) 1 SCC 99;
Krishna Janardhan Bhat vs Dattatraya G. Hegde, (2008) 4 SCC 54;
Krishnan and another vs. Krishnaveni and another, (1997) 4 SCC 241;
M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal);
Rohitbhai Jivanlal Patel v. State of Gujarat, (2019) 18 SCC 106;
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri" (1999) 2 SCC 452;

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

**ORDER**

Instant criminal revision petition filed under Sections 397, 401 of Cr.P.C, lays challenge to judgment dated 21.12.2019, passed by learned Sessions Judge, Kullu, District Kullu, H.P. in Criminal Appeal No.37(51)/2019, titled *Sh.Ram Chand vs. Sh. Dhian Singh*, affirming the judgment of conviction and order of sentence dated 22.08.2019, passed by Chief Judicial Magistrate, Kullu, Lahaul and Spiti at Kullu, in case No. 1071-1/2015, whereby court below while holding petitioner-accused (hereinafter referred to as 'accused') guilty of having committed an offence punishable under Section 138 of Negotiable Instruments Act, (hereinafter referred to as 'Act') convicted and sentenced him to undergo simple imprisonment for a period of six months and to pay compensation to the tune Rs. 12,00,000/- to the complainant.

2. Precisely, the facts as emerge from the record are that respondent-complainant (hereinafter referred to as 'complainant') instituted a complaint under Section 138 of the Act in the Court of learned Chief Judicial

Magistrate, Kullu, Lahaul and Spiti at Kullu, alleging therein that he had received compensation on account of acquisition of his house and land in the year 2015. In April, 2015, accused approached him with the request to lend him Rs. 10 lac to run the business. Complainant alleged that he on the request of accused paid Rs.10 lac to the accused, who with a view to discharge his lawful liability, issued cheque Ext. CW-1/B, dated 27.07.2015, amounting to Rs.10 lac, payable at PNB, Bajaura Branch, in favour of the complainant. However, fact remains that aforesaid cheque on its presentation was dishonoured on account of 'insufficient funds' and same was returned to him vide memo dated 01.08.2015, i.e. Ext. CW-1/C. After receipt of aforesaid memo, complainant issued legal notice Ext.CW-1/D to the accused asking him to make the payment good within a period of 15 days, but since, he failed to make the payment good within the time stipulated in the legal notice, he was compelled to institute proceedings under Section 138 of the Act.

3. Complainant in support of his complaint, examined as many as three witnesses, whereas, despite opportunity, accused failed to lead any defence, but in his statement recorded under Section 313 Cr.P.C, he pleaded his innocence and took plea that he had only borrowed Rs. 3 lac from the complainant and out of which he had repaid Rs.1,70,000/- lac. He also stated that , he had given blank cheque in question to the complainant as security, which was misused by him.

4. Learned trial court on the basis of pleadings as well as evidence adduced on record by the complainant, held accused guilty of having committed offence punishable under Section 138 of the Act and accordingly convicted and sentenced him as per description given hereinabove. Being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence, accused preferred an appeal in the Court of learned Sessions Judge, Kullu, District Kullu, which also came to be dismissed vide judgment dated 21.12.2019. In the aforesaid background, accused has approached this

Court in the instant proceedings, praying therein for his acquittal after setting aside the judgments of conviction and order of sentence recorded by courts below.

5. Vide order dated 14.1.2020, this Court while suspending the substantive sentence imposed by courts below, directed the accused to deposit balance compensation amount within a period of four weeks, but fact remains that aforesaid order never came to be complied with despite repeated opportunities granted by this Court and as such, this Court has no option, at this stage, but to decide the instant petition on its own merit.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds no illegality and infirmity in the judgment of conviction and order of sentence recorded by courts below and as such, no interference is called for.

7. It is not in dispute that factum with regard to issuance of cheque as well as signatures thereupon of accused has not been denied by the accused, rather in his statement under Section 313 Cr.P.C, he has stated that he had only borrowed sum of Rs. 3 lac from the complainant and out of which, he had paid Rs. 1, 70,00/-. Accused has categorically stated in his statement under Section 313 Cr.P.C that he had issued blank cheque as security to the complainant, but he has misused the same. Since, issuance of cheque as well as signatures thereupon are not disputed by accused, there is a presumption of issuance of cheque in favour of complainant by the accused for discharge of his lawful liability.

8. With a view to prove his case, complainant besides stepping himself in the witness box also examined Somawati as CW-1 and Sh. Rahul Negi as CW-2. Complainant tendered his evidence by way of affidavit Ext. CW-3/A, whereby he stated the case verbatim as has been stated in the complaint filed under Section 138 of the Act. While admitting that accused is brother-in-law (Behnoi) of his son-in-law, this witness categorically denied

that he used to lend money on interest. He also denied that accused had only borrowed sum of Rs. 3 lac in the year 2015 and out of such money, he had repaid Rs.1,70,000/-. This witness categorically stated that accused borrowed sum of Rs. 10 lac from him and till date he has not repaid single penny. This witness specifically denied suggestion put to him that he had obtained blank cheque from the accused as security. He also denied that he himself filled up rupees 10 lac on the blank cheque, rather self-stated that accused had given cheque to him after filling it well. This witness denied that he had not issued any notice to accused.

9. CW-2, Sh. Rahul Negi, Assistant Manager deposed that complainant Dhian Singh is having account in their bank. The cheque Ex.CW1/B was submitted in the bank for collection, which was sent by them for collection to PNB, but the said cheque was returned by the PNB unpaid on account of insufficient funds in the account of the accused with memo Ex.CW1/C. He deposed that statement of account of complainant and copy of cheque returning register are Ex.CW2/A and Ex.CW1/B respectively. In cross-examination this witness denied that cheque Ex.CW1/B was not received for collection in the bank. He also denied that memo Ex.CW1/C was also forged one.

10. In the case at hand, evidence led on record by the complainant, if read in conjunction, it clearly suggests that accused had issued cheque amounting to Rs. 10 lac to the complainant for discharge of his lawful liability, but same was dishonoured on account of 'insufficient funds'. It is also not in dispute that after receipt of memo, Ext. CW-1/C, complainant issued legal notice Ext. CW-1/D, which fact is substantiated by postal receipt placed on record Ext.CW-1/E. However, aforesaid legal notice was refused to be received by accused, as is evident from acknowledgment Ext. CW-1/F. At this stage, Mr. Naveen K. Bhardwaj, learned counsel representing the petitioner argued that since legal notice was issued one day after expiry of statutory period of

30 days, issuance of statutory notice, if any, has no relevance and on this sole ground, case of the complainant deserves to be dismissed.

11. However, having carefully perused the aforesaid legal notice Ext. CW-1/E, this Court finds that complainant issued notice on 31.08.2015, which was well within the statutory period of one month from receiving information as to dishonouring of the cheque. Information with regard to dishonouring of cheque was received by the complainant on 1.8.2015 and on 30th day of said information, legal notice was issued to accused and as such, it cannot be said that legal notice was issued beyond statutory period of 30 days.

12. Leaving everything aside, once factum with regard to issuance of cheque as well as signatures thereupon are admitted by accused, presumption as available under Section 118 and 139 of the Act, is applicable in favour of complainant. No doubt, aforesaid presumption is rebuttable, but for that purpose accused is to raise probable defence either by leading some positive evidence or to refer to the evidence led on record by the complainant. However, in the case at hand, no probable defence has been raised by the accused to rebut the presumption of issuance of cheque for discharge of lawful liability by him in favour of complainant. Since, in the instant case, factum with regard to issuance of cheque and signatures thereupon stands duly admitted by accused, learned courts below rightly took no cognizance of his statement recorded under Section 313 Cr.P.C that cheque issued by him was towards security and not for the discharge of his lawful liability.

13. Reliance in this regard is placed upon judgment rendered by Hon'ble Apex Court in **Rohitbhai Jivanlal Patel** v. **State of Gujarat**, (2019) 18 SCC 106, wherein, it has been held as under:

> "18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the

accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.

19. In order to discharge his burden, the accused put forward the defence that in fact, he had had the monetary transaction with the said Shri Jagdishbhai and not with the complainant. In view of such a plea of the accused-appellant, the question for consideration is as to whether the accused-appellant has shown a reasonable probability of existence of any transaction with Shri Jagdishbhai? In this regard, significant it is to notice that apart from making certain suggestions in the cross-examination, the accused- appellant has not adduced any documentary evidence to satisfy even primarily that there had been some monetary transaction of himself with Shri Jagdishbhai. Of course, one of the allegations of the appellant is that the said stamp paper was given to Shri Jagdishbhai and another factor relied upon is that Shri Jagdishbhai had signed on the stamp paper in question and not the complainant.

19.1 We have examined the statement of Shri Jagdishbhai as also the said writing on stamp papers and are unable to find any substance in the suggestions made on behalf of the accused-appellant.

19.2 The said witness Shri Jagdishbhai, while pointing out his acquaintance and friendship with the appellant as also with the respondent, asserted in his examination-in-chief, inter alia, as under:

"Accused when he comes to our shop where the complainant in the matter Shashimohan also be present that in both the complainant and accused being our friends, were made acquaintance with each other. The accused had necessity of money in his business, in my presence, had demanded Rs.22,50,000/- (Rupees twenty two lacs fifty

thousandly) on temporary basis. And thereafter, the complainant from his family members by taking in piecemeal had given to the accused in my presence. Thereafter, on demanding the money by the complainant, the accused had given seven (7) cheques to the complainant in our presence but such cheques being washed out in rainy water and on informing me by the complainant I had informed to the accused. Thereafter, Rohitbhai had given other seven (7) cheques to the complainant in my presence and the deed was executed on Rs. 100/- stamp paper in there is my signature."

19.3 This witness was cross-examined on various aspects as regards the particulars in the writing on the stamp paper and the date and time of the transactions. In regard to the defence as put in the cross-examination, the witness stated as under:

> "I have got shop in National Plaza but in rain no water logging has taken place. It is not true that there had been no financial dealings between me and the accused today. It is not true that I had given rupees ten lacs to the accused Rohitbhai on temporary basis. It is not true that for the amount given to the accused, I had taken seven blank duly cheques also blank stamp paper without signature. It is not true that there was quarrel between me and the accused in the matter of payment of interest. It is not true that even after the payment of Rs. ten lacs and the huge amount of the interest in the matter of interest quarrel was made. It is not true that due to the reason of quarrel with the accused, in the cheques of the accused lying with me by making obstinate writing has filed the false complaint through Shashimohan Goyanka. It is not true that no financial dealings have taken place between the complainant and the accused. therefore I also the complainant both at the time of evidence the accused at what place, on what date at what time, the amount taken has not been able to make clearly. (sic) It is not true that the blank stamp paper duly signed were lying in which obstinate writing has been made therefore the same has not been registered through sub registrar. It is not true that the dealings have been made between me and accused therefore there is my

> signature and the signature of the accused and the complainant has not signed. It is not true that any types of dealings between the accused and the complainant having not been done in my presence therefore in my statement no clarification has been given. It is not true that the accused in my presence as mentioned in the complaint any cheque has not been given. It is not true that I in collusion with the complainant to usurp the false amount the false complaint has been filed through Shashimohan Goyanka. It is not true that in support of the complaint of Shashimohan Goyanka is giving false statement."

19.4 The statement of Shri Jagdishbhai does not make out any case in favour of the accused-appellant. It is difficult to say that by merely putting the suggestion about the alleged dealing to Shri Jagdishbhai, the accused- appellant has been able to discharge his burden of bringing on record such material which could tilt the preponderance of probabilities in his favour.

19.5 The acknowledgement on the stamp paper as executed by the appellant on 21.03.2007 had been marked with different exhibit numbers in these 7 cases. In Complaint Case No. 46499 of 2008, the same is marked as Ex. 54 and reads as under :

> "Today the executor I Rohit Patel Ranchhodray Masala is a partner. Due to the financial difficulties having been arised, I have taken Rs.22,500,000/- (Rupees twenty two thousand fifty thousand only- sic) from my group which are to be paid to Shashimohan Goyanka.

With reference to that today I have given seven (7) cheques of Corporation Bank, Alkapuri Branch bearing No. 763346 to 762252 amounting to Rs. 22,50,000/- (Rupees twenty two lacs fifty thousand only) Dates : (1) 01/4/08, (2) 01/05/08 (3) 01/07/08, (4) 01/08/08 (5) 01/10/08 (6) 01/11/08 (7) 01/12/08 the account of which is 40007.

Earliest these cheques were given but due to rainy water logging the said cheques having been washed out (7) cheques have again been given which is acceptable to me."

19.6 The fact of the matter remains that the appellant could not deny his signatures on the said writing but attempted to suggest that his signatures were available on the blank stamp paper with Shri Jagdishbhai. This suggestion is too remote and too uncertain to be accepted. No cogent reason is available for the appellant signing a blank stamp paper. It is also indisputable that the cheques as mentioned therein with all the relevant particulars like cheque numbers, name of Bank and account number are of the same cheques which form the subject matter of these complaint cases. The said document bears the date 21.03.2007 and the cheques were post- dated, starting from 01.04.2008 and ending at 01.12.2008. There appears absolutely no reason to discard this writing from consideration.

19.7 One of the factors highlighted on behalf of the appellant is that the said writing does not bear the signature of the complainant but and instead, it bears the signatures of said Shri Jagdishbhai. We find nothing unusual or objectionable if the said writing does not bear the signatures of the complainant. The said writing is not in the nature of any bi partite agreement to be signed by the parties thereto. It had been a writing in the nature of acknowledgement by the accused-appellant about existence of a debt; about his liability to repay the same to the complainant; about his having issued seven post-dated cheques; about the particulars of such cheques; and about the fact that the cheques given earlier had washed away in the rain water logging. Obviously, this writing, to be worth its evidentially value, had to bear the signatures of the accused, which it does. It is not unusual to have a witness to such a document so as to add to its authenticity; and, in the given status

and relationship of the parties, Shri Jagdishbhai would have been the best witness for the purpose. His signatures on this document, therefore, occur as being the witness thereto. This document cannot be ruled out of consideration and existing this writing, the preponderance of probabilities lean heavily against the accused-appellant.

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

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

***confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.***

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

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

***unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."***

15. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability. Similarly, Section 118 of the Act provides that unless contrary is proved , that the holder of the cheque received the cheque in discharge, in whole or in part, of a debt or liability. True, it is that to rebut aforesaid presumption accused can always raise probable defence either by leading some positive evidence or by referring to the material, if any adduced on record by the complainant. But in the case at hand, accused has miserably failed to raise probable defence much less sufficient to rebut the presumption applicable in favour of the complainant under Section 118 and 139 of the Act.

16. Reliance was also placed on following judgments i.e. **K. Subramani** v. **K. Damodara Naidu** (2015) 1 SCC 99, **Basalingappa** v. **Mudibasappa** (2019) 5 SCC 418 and **Krishna Janardhan Bhat** vs **Dattatraya G. Hegde**, (2008) 4 SCC 54, perusal of aforesaid judgments reveals that in all the cases before Hon'ble Apex Court, transactions were of huge amount and in all those cases, accused were able to raise probable defence that the cheques were not issued in discharge of legally enforceable liability. However, the complainant has advanced only Rs.10 Lakh in the case at hand, coupled with the fact there is no denial on the part of the accused

that the cheque does not bear his signatures, as such, there is presumption in favour of complainant that the cheque was issued for law.

17. Having carefully examined the evidence available on record, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below, which otherwise appear to be based upon the correct appreciation of evidence and as such, same need to be upheld. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** (1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

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

18. Since after having carefully examined the evidence in the present case, this Court is unable to find any error of law as well as fact, if any, committed by the courts below while passing impugned

judgments, and as such, there is no occasion, whatsoever, to exercise the revisional power.

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

20. Consequently, in view of the detailed discussion made hereinabove, this Court finds no illegality and infirmity in the impugned judgment of conviction and order of sentence passed by learned trial Court and further upheld by learned Appellate Court and as such, same are upheld.

21. Accordingly, present petition is dismissed alongwith pending applications, if any. Interim directions, if any, stand vacated. Petitioner is directed to surrender forthwith to serve the sentence imposed by the trial court vide judgment of conviction and order of sentence, dated 22.08.2019.

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

Between:-

OMP No. 85 of 2022 in COMS No. 07 of 2022

1) BOEHRINGER INGELHEIM PHARMA GMBH & CO. KG, D-55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER.

2) BOEHRINGER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, 2ND FLOOR, GODREJ 2, PIROJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, THROUGH ITS POWER OF ATTORNEY HOLDER

..PLAINTIFFS/APPLICANTS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, ARPITA SAWHNEY, DHANANJAY SINGH, PRIYANK SHARMA, ABAY TANDON, AND PRIYANK SHARMA, ADVOCATES)

AND

1) MSN LABORATORIES PRIVATE LIMITED 22-23, INDUSTRIAL AREA, MEHATPUR, UNA, HIMACHAL PRADESH, 174315 THROUGH ITS MANAGING DIRECTOR.

ALSO AT

MSN LABORATORIS PRIVATE LIMITED MSN HOUSE, PLOT NO. C-24, SANATH NAGAR INDUSTRIAL ESTATE SANATH NAGAR, TELANGANA 500018.

ALSO AT

MSN CORPORATE, H. NO. 2-91/10 & 11/MSN WHITEFIELDS, KONDAPUR, HYDERABAD 500084 TELANGANA.

2) ERIS LIFESCIENCES LIMITED AF-10 KANCHAN PHARMA HOUSE NATIONAL HIGHWAY NO. 8, ASLALI, AHMEDABAD-382 427, GUJARAT THROUGH ITS MANAGING DIRECTOR.

.....DEFENDANTS/NON-APPLICANTS

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S GURU NATRAJ & SHRADHA KAROL, ADVOCATES FOR DEFENDANT/RESPONDENT NO.1.

M/S MIHIR THAKORE & NEERAJ GUPTA, SENIOR ADVOCATES, WITH M/S RAJESHWARI, SWAPNIL GAUR, ABHINEETA CHATURVEDI, ANUJ GUPTA,

ZAINAB BHARMAL, SAINAB BHARMAL ADVOCATES, FOR DEFENDANT/RESPONDENT NO. 2).

OMP No. 89 of 2022 in COMS No. 08 of 2022

1) BOEHRINGER INGELHEIM PHARMA GMBH & CO. KG, D-55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER.

2) BOEHRINGER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, 2ND FLOOR, GODREJ 2, PIROJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, THROUGH ITS POWER OF ATTORNEY HOLDER

..PLAINTIFFS/APPLICANTS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, ARPITA SAWHNEY, DHANANJAY SINGH, PRIYANK SHARMA, ABAY TANDON, AND PRIYANK SHARMA, ADVOCATES)

AND

1) MSN LABORATORIES PRIVATE LIMITED 22-23, INDUSTRIAL AREA, MEHATPUR, UNA, HIMACHAL PRADESH, 174315 THROUGH ITS MANAGING DIRECTOR.

ALSO AT

MSN LABORATORIS PRIVATE LIMITED MSN HOUSE, PLOT NO. C-24, SANATH NAGAR INDUSTRIAL ESTATE SANATH NAGAR, TELANGANA 500018.

ALSO AT

MSN CORPORATE, H. NO. 2-91/10 & 11/MSN WHITEFIELDS, KONDAPUR, HYDERABAD 500084 TELANGANA.

.....DEFENDANT/NON-APPLICANT

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S GURU NATRAJ & SHRADHA KAROL, ADVOCATES).

OMP No. 93 of 2022 in COMS No. 09 of 2022

1) BOEHRINGER INGELHEIM PHARMA GMBH & CO. KG, D-55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER.

2) BOEHRINGER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, 2ND FLOOR, GODREJ 2, PIROJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, THROUGH ITS POWER OF ATTORNEY HOLDER

..PLAINTIFFS/APPLICANTS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, ARPITA SAWHNEY, DHANANJAY SINGH, PRIYANK SHARMA, ABAY TANDON, AND PRIYANK SHARMA, ADVOCATES)

AND

1) MSN LABORATORIES PRIVATE LIMITED 22-23, INDUSTRIAL AREA, MEHATPUR, UNA, HIMACHAL PRADESH, 174315 THROUGH ITS MANAGING DIRECTOR.

ALSO AT

MSN LABORATORIS PRIVATE LIMITED MSN HOUSE, PLOT NO. C-24, SANATH NAGAR INDUSTRIAL ESTATE SANATH NAGAR, TELANGANA 500018.

ALSO AT

MSN CORPORATE, H. NO. 2-91/10 & 11/MSN WHITEFIELDS, KONDAPUR, HYDERABAD 500084 TELANGANA.

2) EMCURE PHARMACEUTICALS LIMITED SHOP NO. 15, 2ND FLOOR, CO. DUTTA MARKETINGS, SANJAULI, SHIMLA, THROUGH ITS MANAGING DIRECTOR.

ALSO AT:
PLOT NO. P2, IT-BT PARK, PHASE II, MIDC HINJAWADI, PUNE 411057.

.....DEFENDANTS/NON-APPLICANTS

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S GURU NATRAJ & SHRADHA KAROL, ADVOCATES).

OMP No. 97 of 2022 in COMS No. 10 of 2022

1) BOEHRINGER INGELHEIM PHARMA GMBH & CO. KG, D-55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER.

2) BOEHRINGER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, 2ND FLOOR, GODREJ 2, PIROJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, THROUGH ITS POWER OF ATTORNEY HOLDER

..PLAINTIFFS/APPLICANTS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, ARPITA SAWHNEY, DHANANJAY SINGH, PRIYANK SHARMA, ABAY TANDON, AND PRIYANK SHARMA, ADVOCATES)

AND

1) OPTIMUS PHARMA PRIVATE LIMITED C/O CURETECH SKINCARE, PLOT NO. 3-33/34, PHASE IV, HIMUDA, BHATOLIKALAN, SOLAN, HIMACHAL PRADESH-173205, THROUGH ITS MANAGING DIRECTOR.

ALSO AT

SECOND FLOOR, SY. NO. 37/A & 37/P, PLOT NO. 6P, SIGNATURE TOWERS, KOTHAGUDA, KONDAPUR, HYDERABAD 500 084, TELENGANA.

.....DEFENDANT/NON-APPLICANT

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S GURU NATRAJ & SHRADHA KAROL, ADVOCATES).

OMP No. 85 of 2022
IN COMS No. 07 of 2022
Decided on:02.06.2022

**Code of Civil Procedure, 1908-** Order 39 Rule 1 & 2- Section 151- Suit for permanent prohibitory injunction along with application for interim injunction Restraining the respondents from infringing the patent rights of Applicant No. 1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product, Linagliptin in any form whatsoever- Held- Prima facie case and balance of convenient in favour of plaintiffs- If an infringer is not restrained from infringing the patent of patent holder, then, but of course, the patent holder will suffer from irreparable loss and it cannot be said that the infringer stands on the same pedestal on which the patent holder is- Applications under Order 39 Rule 1 & 2 CPC allowed. (Para 31, 32)

**Cases referred:**

AIIMS vs. Sanjiv Chaturvedi and others, (2020) 17 SCC 602;
Astrazeneca AB and Another vs Intas Pharmaceuticals Ltd., 2021 SCC Online Del 3746;
Dalpat Kumar and Another Vs. Prahlad Singh and Others, (1992) 1 SCC 719;
Dhanpat Seth & Ors. Vs. M/s. Nil Kamal Plastic Crates Ltd., AIR 2008 HP 23;
Dhanpat Seth & others Vs. Nil Kamal Plastic Crates Ltd., 2006 SCC OnLine HP 98;
F. Hoffmann-LA Roche Ltd. & Anr. Vs. Cipla Ltd. 2009 (110) DRJ 452 (DB);
Glaverbel S.A. vs Dave Rose & Ors. 2010 SCC Online Del 308;
M/s Bishwanath Prasad Radhey Shyam Vs. Hindustan Metal Industries, (1979) 2 SCC 511;
Merck Sharp and Dohme Corporation and Anr. vs. Glenmark Pharmaceuticals, 2015 SCC Online Del 8227;
Mumbai International Airport Private Limited Vs. Golder Chariot Airport and another, (2010) 10 SC 422;
Novartis AG Vs. Natco Pharma Ltd., 2021 SCC Online Del 5340;

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*These applications coming on for pronouncement of order this day, Hon'ble Mr. Ajay Mohan Goel, passed the following:-*

**O R D E R**

This order shall dispose of applications preferred under Order XXXIX, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 by the applicants/plaintiffs, praying for interim directions during the pendency of the suits, i.e., OMP No. 85 of 2022 in COMS No. 07 of 2022, OMP No. 89 of 2022 in COMS No. 08 of 2022, OMP No. 93 of 2022 in COMS No. 09 of 2022 & OMP No. 97 of 2022 in COMS No. 10 of 2022. The prayers made in the said applications in the respective suits are as under:-

***OMP No. 85 of 2022 in COMS No. 07 of 2022***

> *"a) Restrain the respondents, by themselves, their directors, partners, licensees, stockists and distributors, agents and/or anyone claiming through any of them, jointly and severally from infringing the patent rights of Applicant No. 1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product, Linagliptin in any form whatsoever including Linagliptin API, Linagliptin formulation, "Linagliptin Tablet" and/or "Linagliptin + Metformin Hydrochloride Tablets" or any "generic version" thereof or any product sold under the trade marks/brand names "LINARES" and "LINARES M" or any other trade mark(s)/brand name(s), whatsoever, or any other product covered by the subject patent granted by the Controller of Patents on October 5, 2010 in favour of Applicant No. 1 subsists;"*

***OMP No. 89 of 2022 in COMS No. 08 of 2022***

> *"a) Restrain the respondent, by itself, its directors, partners, licensees, stockists and distributors, agents and/or anyone claiming through any of them, jointly and severally from infringing the patent rights of Applicant No. 1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or*

*exporting the medicinal product, Linagliptin in any form whatsoever including Linagliptin API, Linagliptin formulation, "Linagliptin Tablet" and/or "Linagliptin + Metformin Hydrochloride Tablets" or any "generic version" thereof or any product sold under the trade marks/brand names "LINANEXT" and "LINANEXT-M" or any other trade mark(s)/brand name(s), whatsoever, or any other product covered by the subject patent granted by the Controller of Patents on October 5, 2010 in favour of Applicant No. 1 subsists;"*

***OMP No. 93 of 2022 in COMS No. 09 of 2022***

*"a) Restrain the respondents, by themselves, their directors, partners, licensees, stockists and distributors, agents and/or anyone claiming through any of them, jointly and severally from infringing the patent rights of Applicant No. 1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product, Linagliptin in any form whatsoever including Linagliptin API, Linagliptin formulation, "Linagliptin Tablet" and/or "Linagliptin + Metformin Hydrochloride Tablets" or any "generic version" thereof or any product sold under the trade marks/brand names "EMLINZ 5" and "EMLINZ M 500" or any other trade mark(s)/brand name(s), whatsoever, or any other product covered by the subject patent granted by the Controller of Patents on October 5, 2010 in favour of Applicant No. 1 subsists;"*

***OMP No. 97 of 2022 in COMS No. 10 of 2022***

*"a) Restrain the respondent, by itself, its directors, partners, licensees, stockists and distributors, agents and/or anyone claiming through any of them, jointly and severally from infringing the patent rights of Applicant No. 1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product, Linagliptin in any form whatsoever including Linagliptin*

*API, Linagliptin formulation, "Linagliptin Tablet" and/or "Linagliptin + Metformin Hydrochloride Tablets" or any "generic version" thereof or any trade mark(s)/brand name(s), whatsoever, or any other product covered by the subject patent granted by the Controller of Patents on October 5, 2010 in favour of Applicant No. 1 subsists;"*

***2.*** The suits of the plaintiffs are for passing of a decree of restraint and permanent injunction against the defendants/non-applicants by themselves or through their directors, partners licenses, stockiest and distributors, agents etc. from infringing the patent rights of plaintiff No.1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product Linagliptin in any from whatsoever or any other product covered by the subject patent granted by the Controller of Patents on October 05, 2010, in favour of plaintiff No 1. In addition, the plaintiffs are also praying for a decree of damages. According to the plaintiffs/applicants, plaintiff No. 1 is a company incorporated under the laws of Germany and plaintiff No. 2 is a company registered under the Companies Act. Plaintiff No. 1 is the owner of plethora of patents worldwide, including Indian Patent No. 243301 (hereinafter to be referred as 'subject patent or IN' 301 for short). The subject patent was granted in favour of plaintiff No. 1 on 05.10.2010 as per Section 43 of the Indian Patents Act 1970, under IN' 301 for pharmaceuticals product titled "8 (3-AMINOPIPERDIN-1YL)-XANTHINE COMPOUNDS", for a term of 20 years from the date of filing.

***3.*** The arguments on behalf of the plaintiffs/applicants were advanced by M/s Ashok Aggarwal and Vinay Kuthiala, learned Senior Counsel. Arguments on behalf of the defendant/non-applicant No. 1 in all the suits were advanced by Mr. Bipin Chander Negi, learned Senior Counsel and Mr. Guru Natarajan, learned counsel and in COMS No. 7 of 2022 arguments

on behalf of defendant/non-applicant No. 2 were addressed by M/s Mihir Thakore & Neeraj Gupta, learned Senior Counsel.

***4***. Learned Senior Counsel appearing for the plaintiffs/applicants argued that for the purpose of grant of interim relief, three primary ingredients, i.e., *prima facie* case, balance of convenience and irreparable loss are all in favour of the plaintiffs/applicants. In addition, they argued that as the defendants/non-applicants have not been able to lay any credible challenge to the 'subject patent', therefore, this application be allowed by granting ad-interim injunction in favour of the plaintiffs/applicants.

***5.*** On the other hand, learned counsel for the defendants/non-applicants have submitted that as the defendants/non-applicants have laid a credible challenge to the 'subject patent' therefore, the application filed under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure be dismissed.

***6.*** To substantiate their contention that all ingredients exist in favour of the plaintiffs/applicants for grant of interim order, learned Senior Counsel argued that in the present case, the patent in issue, i.e. Indian Patent No. 243301 (hereinafter to be referred as 'IN' 301') was granted to the applicants on 5th October, 2010 and as its international date of filing was 18th August, 2003, the term of the patent being 20 years, the patent is still alive and is to expire on 18th October, 2023. As per learned counsel, the patent was granted to the applicants after following the procedure prescribed in the Patents Act, 1970, as amended from time to time and the Rules framed thereunder. There was no opposition to the grant of patent at any stage after the application was filed for the grant of the patent and after the patent was granted on 5th October, 2010, by anyone, including the respondents in terms of statutory provisions of the Patent Act, 1970. The patent in issue is a commercially successful patent. The medicinal product "Linagliptin Tablet and Lenagliptin + Metformin Hydrochloride Tablets" covered by the said patent were introduced and launched in the Indian market under the brand name "Trajenta/Trajenta Duo" on 27.05.2012 and 21.06.2014, respectively. Learned Senior Counsel stressed that no party, including the respondents have filed any pre-grant opposition, post-grant opposition or a revocation petition against the subject patent especially against the quality and strength of the

subject patent. They further submitted that the respondent-Company is an Indian Pharmaceutical Company and it had recently come within the knowledge of the applicants that the respondents-Companies have made preparation to launch and thereafter had launched infringing product Linagliptin 5mg tablets under the respective brand names. As per learned Senior Counsel, the product Linagliptin tablets now being offered for sale by the respondents, are covered by the subject patent and manufacturing of the said product by the respondent-Company is an act of infringement of the exclusive rights of the subject patent of applicant No. 1. It was argued that as admittedly the respondent-Company neither has any patent nor it has got a licence to manufacture and sell the products covered by the subject patent from the applicants nor the respondents have applied for or have been granted compulsory licence to manufacture and sell the product, therefore, during the pendency of the suit, the respondents be restrained from manufacturing and selling the product in issue which are covered by the subject patent. According to the plaintiffs/applicants, the following points demonstrate that there exists a good case in their favour for grant interim order:-

> *"(a) 'subject patent' is old and well established;*
> *(b) 'subject patent' is commercially highly successful and extensively useful;*
> *(c) admittedly, no party, including the defendant, raised any pre-grant opposition, post-grant opposition, including against the quality and strength of the 'subject patent';*
> *(d) the patent was granted in favour of the plaintiffs after following the substantive provisions of the The Patents Act, 1970;*
> *(e) the patent has had a successful commercial run in India for more than eleven years, without any challenge, including that from the defendant;*
> *(f) the Central Government has not filed any revocation for the 'subject patent' in terms of Section 64 of the Patents Act, 1970;*

*(g) the Central Government has not made any declaration for revocation of the 'subject patent' in public interest in terms of Section 67 of the Patents Act;*
*(h) none, including the defendant, applied under Section 84 of the Patents Act for grant of compulsory licence of the 'subject patent' on the grounds as mentioned therein;*
*(i) no challenge was ever put forth by the defendants to the 'subject patent' except immediately before the commercial launch of its infringing product in the month of February 2022, when a revocation petition was filed by the defendants under Section 64 of the Patents Act."*

***7.*** It was argued that above facts clearly and categorically demonstrate that there exists a *prima facie* case in favour of the plaintiffs/applicants and balance of convenience is also in their favour and in this backdrop, in case, ad-interim order is not granted and the defendants/non-applicants are permitted to infringe the 'subject patent' of the plaintiffs/applicants, then, the plaintiffs/applicants shall suffer irreparable loss, which cannot be compensated monetarily as all the hard work that has gone into the invention of the product in issue and getting it patented would be washed away. Learned Senior Counsel further stressed that admittedly the defendants/non-applicants neither have any patent in their name nor did they lay any challenge at the time when the plaintiffs/applicants had applied for the 'subject patent' or even after the patent was granted in favour of the plaintiffs/applicants. They also submitted that the filing of a revocation petition by the defendants/non-applicants in COMS No. 7 of 2022, in close proximity with the launch of the infringing product was nothing but an afterthought to hold out that in lieu of their having filed a revocation petition, they have laid a credible challenge to the 'subject patent'.

***8.*** Opposing the application, learned Counsel for the non-applicant/defendant No. 1 Sh. Bipin Chander Negi, Senior Advocate and Mr. Guru Natrajan, Advocate, argued that the applicants, in fact, have not approached the Court with clean hands as fact of the matter is that the applicants had obtained two patents, i.e. Patent No. 227719 (hereinafter to be referred as 'IN' 719') for the "Markush" formula being the 'genus' patent, which expired on 21st February, 2022 and subject patent IN' 301, which is a 'species' patent and both patents were granted for the same invention as it is nowhere disclosed either in the plaint or in the application as to what was the inventive step capable of industrial application, which distinguished patent IN301 from IN719. The Court was apprised by them that the non-applicants MSN Laboratories had filed a revocation petition against the patent in issue under Section 64 of the Patents Act, 1970 in this High Court, in which, notices to the present applicants have been issued. It was argued that the non-applicants have rightly challenged the 'species' after the 'genius' has expired and as the plaint is conspicuously silent with regard to the difference between the 'genius' patent and the 'species' patent, therefore, the applicants are not entitled for any relief. It was argued that as a credible challenge stood made to the patent in issue by the respondent, therefore, no interim relief be granted. As per them, it is settled law that mere grant of patent does not lend a presumption of validity to the patent. The scheme of the Patents Act is to provide multi-layer challenges, which are available to a non-patentee to challenge and question the validity of a patent at any time and such validity has to be tested on the anvil of the provisions of the The Patents Act, 1970. It was argued that the provisions of Section 13(4) of the The Patents Act expressly set out the absence of any presumption of validity due to mere grant. It was also argued that in the case of pharmaceutical patents, which have been recognized as a specific species of patent infringement litigation, the overwhelming factor is that of public interest-namely the need to provide for affordable and accessible

healthcare products. It was argued that in addition to the settled principles of *prima facie* case, balance of convenience and irreparable loss, the plaintiffs also have to satisfy that there is no **credible challenge** to the 'subject patent' which in the present case, the plaintiffs have not been able to demonstrate and in this view of the matter, prayer of the applicants/plaintiffs for interim injunction is liable to be dismissed. Learned Counsel have submitted that the genus patent 'IN 719' has expired on 21st February, 2022, whereas the specie patent 'IN301'is to expire on 18th August, 2023. According to them, it is apparent and evident from the record that the plaintiffs/applicants themselves have held out on more than one occasions that the 'genus' patent and 'species' patent are the same. Learned Counsel drew the attention of the Court to the order passed by Hon'ble High Court of Delhi in Civil Suit (Comm.) No. 239 of 2019 with I.A. No. 6797 and I.A. No. 6798/2019, titled as *Boehringer Ingelheim Phara GMBH & Co. KG vs. Vee Excel Drugs and Pharmaceuticals Private Ltd. & Ors.*, dated 10.05.2019 and by referring to para-10 thereof, they have argued that the plaintiffs/applicants cannot wriggle out from the admissions which have been made by them, as are borne out from the said order that the plaintiffs themselves have claimed to be owners of two patents, the first patent being IN719 and the second patent being IN301 and it stood submitted on behalf of the plaintiffs/applicants before the said Court that these two patents both cover Linagliptin and all its forms. It was argued that in the entire plaint, the plaintiffs/applicants have very conveniently concealed this fact that except a vague and short reference somewhere in between has been made that the plaintiffs were also holding patent ÍN719', which as per defendants in fact was for the same product for which subsequently the plaintiffs obtained patent ÍN'301. The difference between the same has not at all been explained by the plaintiffs/applicants in the plaint. Learned Counsel for the defendant also submitted that the defendants are not infringing the suit patent as the product of the defendants is based on the teaching of IN'

719 after the expiry of the term of said patent and therefore, their act does not amount to an act of infringement. As per them, in terms of the provisions of Section 146(2) of the Patents Act, 1970, read with Rule 131 of the Patents Rules 2003, the plaintiffs/applicants have filled in Form-27, perusal whereof would demonstrate that the same product was being reflected in the said statutory Form under both genus patent and specie patent. Thus, they prayed that the interim order be not granted in favour of the plaintiffs/applicants. Learned Senior Counsel have further argued by referring to paras-30 & 33 to 41 of the reply filed to the application by non-applicant/defendant No. 1 that descriptions of IN' 719 and IN719 are identical in large portions and according to them, the averments so made in the reply were not controverted in the rejoinder. They have further submitted that the stand taken by the plaintiffs/applicants in the present suit was totally contrary to the stand which was taken by them in the suits filed in the High Court of Delhi. Learned Senior Counsel also relied upon the following judgments:-

1. *Dhanpat Seth & others Vs. Nil Kamal Plastic Crates Ltd., 2006 SCC OnLine HP 98*
2. *Dhanpat Seth & Ors. Vs. M/s. Nil Kamal Plastic Crates Ltd., AIR 2008 Himachal Pradesh 23.*
3. *AIIMS Vs. Sanjiv Chaturvedi and others (2020) 17 Supreme Court Cases 602*
4. *Mumbai International Airport Private Limited Vs. Golden Chariot Airport and another, (2010) 10 Supreme Court Cases 422.*

***9.*** Shri Mihir Thakore, learned Senior Counsel appearing for non-applicant/defendant No. 2, in addition, while referring to the present plaint and the plaints filed by the plaintiffs/applicants before the Delhi High Court and the Gujarat High Court submitted that in other cases, plaintiffs/applicants never claimed IN' 301 as an improvement of IN'719. As

per learned Senior Counsel, the subject patent was never claimed as an advancement of the genus patent and further the research was not pleaded in the earlier suits and this pleading was introduced in the present suit for the first time in para-15 thereof. By referring to the provisions of Section 10(4) of the Patents Act, 1970 learned Senior counsel argued that only part specifications were given in the application of subject patent by the plaintiffs/applicants, which violated Section Section 10(4) of the Patents Act, 1970. Linagliptin was squarely covered by IN' 719, but the genus patent was neither disclosed nor volunteered at the time of applying for the subject patent and this was also evident from the objections which were raised by the Examiner of the Patent Controller. Learned Senior Counsel also submitted that IN'719 was never claimed by the plaintiffs/applicants as a 'prior art' and product covered by the suit patent IN' 301 was squarely covered/disclosed by a prior granted patent IN'719, which expired on 21.02.2022. He further submitted that suit patent IN' 301 was invalid due to anticipation by prior claiming in IN' 719. By referring to the averments made in para-9 of the preliminary submissions/objections to the reply filed to the application under Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure, learned Senior Counsel argued that comparing the same with para-10 thereof clearly proved and demonstrated that the subject matter (Linagliptin), which was claimed by IN'719 was once again been claimed by IN'301. Learned Senior Counsel by referring to pages No. 918, 920 onwards, 962, 964 onwards, 998, 1013, 1062, 1064, 1065, 1066 onwards up to 1070 of the documents filed by defendant No. 2, which included copy of First Examination Reports of IN' 719 and IN' 301, argued that the same clearly demonstrated that Linagliptin was claimed under IN' 719 also by the plaintiffs/applicants, especially in Claim 3. In addition, Mr. Neeraj Gupta, learned Senior Counsel appearing for defendant No. 2 argued that taking into consideration the fact that there is public interest involved in the matter, as defendants are making available a drug to

the public at large at a much lower price, on this count also, the plaintiffs are not entitled for any injunction. Learned Senior Counsel also relied upon the following judgments:-

1. *F. Hoffmann -LA Roche Ltd. & Anr. Vs. Cipla Ltd.* 2009 (110) DRJ 452 (DB).

2. Astrazeneca AB and another Vs. Intas Pharmaceuticals Ltd. 2021 SCC OnLine Del 3746.

***10.*** In rejoinder, learned Senior Counsel appearing for the plaintiffs argued that there was no concealment of any fact either from the Patent Authorities or from the Courts. It was argued that in terms of Section 64(1)(a) of the Patents Act, a revocation petition was maintainable on the ground that invention, so far as claimed in any claim of the complete specification, was claimed in a valid claim of earlier priority date contained in the complete specification of another patent granted in India. It was stressed that what was important was the 'priority date'. Learned Senior Counsel for the plaintiffs/applicants argued that if one day before the filing of the application for the grant of IN' 301, a person trained in the art without knowing the disclosures and teachings of IN' 301 could say on the basis of disclosures of IN' 719 that he can solve the problem solved by IN' 301, then evergreening could be claimed, but this, the defendants had failed to demonstrate. He submitted that the onus is to prove what was being alleged by the defendants/non-applicants by assessing the fact situation as it existed one day prior to the 'priority date' of IN' 301, which in this case was 21.02.2022. Learned Senior Counsel further argued that provisions of Section 64(1)(a) of the Patents Act were supreme and contents thereof were the touchstone for seeking revocation of a patent and not the contents of the pleadings of the parties or Form 27. As per him, the innovative steps which were taken and

the scientific research which was undertaken while claiming IN' 301 were placed on record and queries whatever raised by the Patent Authorities were duly answered to their satisfaction, resulting in the grant of IN' 301. He further submitted that here was a case where the genus patent had millions and trillions of compound, which was not in dispute and IN' 301 was a result of further inventive steps as well as scientific research. Learned Senior Counsel further argued that in the present suit, it was clearly mentioned in para-15 that Indian Patent No. 227719, i.e., IN' 719 granted to plaintiff No. 1, titled "XANTHINE COMPOUNDS" for the "Markush" formula being the 'genus' patent, the term thereof expired on February 21, 2022 and IN' 301 is the 'species' patent covering the specific commercial embodiments being marketed by plaintiff No. 1 through plaintiff No. 2 in India. In this para of the plaint, it stood specifically mentioned that the compound Linagliptin **"covered and claimed"** by the subject patent was invented upon further research carried out subsequent to the filing date of IN' 719 being the 'genus' patent and before the earliest priority date of the subject patent. Learned Senior Counsel has also placed reliance upon the affidavit deposed by Dr. Matthias Eckhardt, being the co-inventor of the inventions covered by IN' 719 and IN' 301, which is available on record with the documents of the plaintiffs/applicants, as Annexure-E. He submitted that whereas in the present case, the plaintiffs/applicants clearly stated that 'compound Linagliptin was covered and claimed' by the subject patent, whereas in the earlier suit, for example the suit filed by the plaintiffs in the High Court of Delhi, i.e., CS(COMM) No. 240 of 2019, it was clearly mentioned that Linagliptin, as mentioned in the carton of the infringing product is a compound claimed and covered in Claim 1 of IN' 301, whereas, with regard to IN' 719, it was mentioned that Linagliptin, as mentioned in the carton of the infringing product was a compound **"claimed and encompassed"** in Claim 1 of IN' 719. Learned Senior Counsel by taking the Court through the plaint, which has been filed by defendant/non-

applicant No. 2 stated that in more than 10 places, it was averred by the plaintiffs/applicants that whereas Linagliptin was a compound **"claimed and encompassed"** in Claim 1 of IN' 719, the same, i.e., Linagliptin was a compound claimed and covered in Claim No. 1 of IN' 301. On these bases, it was submitted that it was never held out at any stage by the plaintiffs that Linagliptin was a compound "covered in Claim of IN' 719" and plaintiffs/applicants have always claimed Linagliptin to be covered in Claim 1 of IN' 301. On these bases, he submitted that as there was no merit in the contentions of the defendants/non-applicants, the interim prayer being prayed for, be granted. Learned Senior Counsel has also relied upon the following judgments:-

1. *Novartis AG and another Vs. Natco Pharma Limited, 2021 SCC OnLine Del. 5340.*

2. *Merck Sharp and Dohme Corporation and another Vs. Glenmark Pharmaceuticals, 2015 SCC On Line Del. 8227.*

***11.*** I have heard learned Counsel for the parties and I have also gone through the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure as well as response(s) filed thereto.

***12.*** Before proceeding further, I will refer to, two judgments of the Hon'ble Supreme Court and some of the case law that has been relied upon by learned Counsel for the parties.

***13.*** In ***M/s Bishwanath Prasad Radhey Shyam*** Vs. ***Hindustan Metal Industries***, (1979) 2 Supreme Court Cases 511, Hon'ble Supreme Court has been pleased to hold that grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. Hon'ble

Supreme Court further held that the 'validity of a patent is not guaranteed by the grant', was also expressly provided in Section 13(4) of the Patents Act, 1970.

***14.*** Hon'ble Supreme Court of India in ***Dalpat Kumar and Another*** Vs. ***Prahlad Singh and Others***, (1992) 1 Supreme Court Cases 719 has held that it is settled law that the grant of injunction is a discretionary relief and exercise thereof is subject to the Court satisfying that (1) there is a serious disputed questions to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the Court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial' and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. In para-5 of the judgment, Hon'ble Apex Court has been further pleased to hold as under:-

> *"5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does*

*not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."*

***15.*** In ***F. Hoffmann-LA Roche Ltd. & Anr.*** Vs. ***Cipla Ltd.*** 2009 (110) DRJ 452 (DB), Hon'ble Division Bench of High Court of Delhi was dealing with an appeal filed by the plaintiffs against the judgment passed by learned Single Judge whereby the prayer for grant of interim injunction to restrain the defendant from manufacturing, offering for sale etc. the drug in issue was rejected. In the said judgment, Hon'ble Division Bench held as under:-

*"53. The plea of the plaintiff that since there is a multi-layered, multi-level examination of the opposition to the grant of patent it should accorded the highest weightage, is not entirely correct. The contention that there is a heavy burden on the defendant to discharge since it has to establish that it has a stronger prima facie case of the plaintiff is contra indicated of the decisions in the context of Section 13(4). Reference may be made to the decisions in Biswanath Prasad Radhey Shyam v. M/s Hindustan Metal Industries AIR 1982 SC 1444, Standipack Pvt. Ltd. v. Oswal Trading Co. Ltd. AIR 2000 Del 23, Bilcare Ltd. v. Amartara Pvt. Ltd. 2007 (34) PTC 419(Del), Surendra Lal Mahendra v. Jain Glazers (1979) 11*

*SCC 511. In BeechamGroup Ltd. v. Bristol Laboratories Pty Ltd. (1967-68) 118 CLR 618 and Australian Broadcasting Corporation v. O'Neill (2006)229 ALR 457 it was held that the defendant alleging invalidity bears the onus of establishing that there is "a serious question" to be tried on that issue. In Hexal Australai Pty Ltd. v. Roche Therapeutics Inc. 66 IPR 325 it was held that where the validity of a patent is raised in interlocutory proceedings, "the onus lies on the party asserting invalidity to show that want of validity is a triable question." In Abbot Laboratories v. Andrx Pharmaceuticals Inc. (decision dated 22 nd June 2006 of the U.S.Court of Appeals for the Federal Circuit 05-1433) the Court of Appeals followed its earlier ruling in Helifix Ltd. v. Blok-Lok Ltd. 208 F.3d 1339 where it was held (at 1359): "In resisting a preliminary injunction, however, one need not make out a case of actual invalidity. Vulnerability is the issue at the preliminary injunction stage, while validity is the issue at trial. The showing of a substantial question as to invalidity thus requires less proof than the clear and convincing showing necessary to establish invalidity itself." (emphasis supplied) In Erico Int'll Corprn v. Vutec Corprn (U.S.Court of Appeals for the Federal Circuit, 2007-1168) it was held that the "defendant must put forth a substantial question of invalidity to show that the claims at issue are vulnerable."*

*54. In the present case, the grant of a patent to the plaintiffs for Erlotinib Hydrochloride as a mixture of Polymorphs A and B will not ipso facto entitle them to an interim injunction if the defendant is able to satisfy the court that there is a serious question to be tried as to the validity of the patent. The use by the learned Single Judge of the expressions "strong credible challenge", "arguable case" or that the defendants claim being not unfounded, cannot be termed as vague and inconsistent since they convey the same meaning in the context of the strength of the defendant's challenge.*

*55. The question before this Court is when can it be said that the defendant has raised a credible challenge to the validity of a patent held by the plaintiff in an infringement*

*action? During the course of the argument it was suggested by counsel that the challenge had to be both strong and credible. Also, the defendant resisting the grant of injunction by challenging the validity of the patent is at this stage required to show that the patent is "vulnerable" and that the challenge raises a "serious substantial question" and a triable issue. Without indulging in an exercise in semantics, the Court when faced with a prayer for grant of injunction and a corresponding plea of the defendant challenging the validity of the patent itself, must enquire whether the defendant has raised a credible challenge. In other words, that would in the context of pharmaceutical products, invite scrutiny of the order granting patent in the light of Section 3(d) and the grounds set out in Section 64 of the Patents Act 1970. At this stage of course the Court is not expected to examine the challenge in any great detail and arrive at a definite finding on the question of validity. That will have to await the trial. At the present stage of considering the grant of an interim injunction, the defendant has to show that the patent that has been granted is vulnerable to challenge. Consequently, this Court rejects the contentions of the plaintiffs on this issue and affirms the impugned judgment of the learned Single Judge."*

***16.*** It is pertinent to mention herein that in the above matter, the Court was dealing with a life saving drug relating to the treatment of Cancer. In this context, in para-84 of the judgment, Hon'ble Division Bench further held as under:-

*"84. Even while considering this aspect, the Court is conscious that the defendant has been able to demonstrate prima facie that the plaintiffs do not hold a patent yet for the drug Tarceva, which is the Polymorph B form of the substance for which they hold a patent. Secondly, the defendant has raised a credible challenge to the validity of the patent held by the plaintiffs. In such circumstances, the public interest in greater public access to a life saving drug will have to outweigh the public interest in granting an injunction to the patent holder."*

***17.*** Learned Single Judge of Hon'ble High Court of Delhi in ***Glaverbel S.A.*** versus ***Dave Rose & Ors***. 2010 SCC Online Del 308, while dealing with an application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, held as under:-

> *"68. There is no res integra to the question that the grounds of challenge of the patent which are available to the defendant in revocation of the patent are also available to the defendant by way of challenging the validity of the same in an infringement suit. The same exposition of law has been discussed in Bishwanath Prasad Radhey Shyam"s case (supra) which has been the authority on the point and also discusses in detail the tests of patentability.*
>
> *69. There are other authorities which reiterate the said exposition of law from time to time and discuss the grant of injunction at the interlocutory stage, however, the recent one which encapsulates the law on the subject and lays down the parameters within which this court has to scrutinize the patents and the challenge thereto is decided by a Division Bench of this Court in F. Hoffmann- La Roche Ltd Vs. Cipla Ltd; 159(2009)DLT243 wherein the division bench while dealing with a similar issue of the grant of injunction laid down the extent of examination by the court for the grant of injunction which is stated as under :*
>
> *" Notwithstanding the above, assuming that the plaintiff held a valid patent for the product which has been subject matter of the suit for infringement, the grant of such patent to the plaintiffs will not ipso facto entitle them to an interim injunction if the defendant is able to satisfy the court that there is question to be tried as to the validity of the patent. In the present case, the defendant has raised a credible challenge to the validity of the patent by raising the serious triable and substantial question that renders it vulnerable to challenge."*
>
> *70. Thus, this court has to examine the challenge made to the patent as to whether there is any serious, triable*

*dispute which is made out and the same renders the patent vulnerable to challenge or not.*

*71. The another thing which requires discussion at this juncture is that novelty, inventive step and industrial application are the three trinity tests of patentability and the same are to be satisfied independently of each other although it is separate issue that they may be interdependent upon each other as novelty promotes invention which enhances its applicability in the industry. Thus, the challenge which in the present case is raised has to be looked into from the perspective of novelty or newness as well as inventive step or obviousness wherein the criterion is that the same invention cannot be known to the person skilled in the art. Discussion on submissions by the parties"*

***18.*** Hon'ble Division Bench of High Court of Delhi, in ***Astrazeneca AB and Another*** versus **Intas Pharmaceuticals Ltd.**, 2021 SCC Online Del 3746, held as under:-

*"41. During the hearing, we also enquired from the counsel for the appellants/plaintiffs, that if DAPA was not disclosed in IN 147 and was in fact not known to the appellants/plaintiffs also, what would have been the situation if someone other than the appellants/plaintiffs had discovered DAPA, even if from IN 147, before the appellants/plaintiffs.*

*46. In our opinion, a single formulation as DAPA, is incapable of protection under two separate patents having separate validity period. The appellants/plaintiffs, in their pleadings, are not found to have pleaded the difference, save for pleading that DAPA was discovered by further research. From the field of the invention subject matter of the two patents being verbatim same, at this stage, it also appears that there is no enhancement of the known efficacy, within the meaning of Section 3(d) of the Act, between the product subject matter of IN 147 and the product subject matter of IN625."*

***19.*** In ***Novartis AG*** Vs. ***Natco Pharma Ltd.***, 2021 SCC Online Del 5340, after taking into consideration the authorities referred to therein on the

principles of grant of interim injunction in the patents matter, learned Single judge, *inter alia,* held as under:-

> *"173. Several stellar principles emanate from a reading of the afore- quoted judicial authorities. So pivotal are these principles to assessment of infringement, and the aspect of vulnerability of the "(5) The claim of claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept, shall be clear and succinct and shall be fairly based on the matter disclosed in the specification." Patent alleged to be infringed, that, at the cost of repetition, I deem it appropriate to enumerate the principles, thus:*
>
> *(i) On patentability*
>
> *a) Inventions, alone, are entitled to patents.*
>
> *b) An invention must (i) be new, i.e. not anticipated,*
>
> *(ii) involve an inventive step, (iii) be capable of industrial application, i.e. of being made or used in the industry and (iv) entail technical advance over existing knowledge, or have economic significance, rendering the invention not obvious to a person skilled in the Art.48*
>
> *(c) The triple test of patentability is, therefore, novelty, the existence of an inventive step and industrial applicability. In Merck v. Glenmark16, it was held that these tests stood satisfied by the SFB disclosed in the Markush patent.*
>
> *(d) The claim in a patent could conceivably encompass embodiments to be invented in future without particularly advantageous properties, provided such inventions employ the technical contribution made by the invention.49*
>
> *(e) "Patentability" requires that the product (a) must be an invention within the meaning of Section 2(j) and*
>
> *(b) must not fall within the exceptions in Section 3.50*

*(f) Section 3(d) is not an exception to Section 2(1)(j). While assessing patentability of a claim for grant of patent, it had to be examined, in the first instance, whether the product was disentitled to patent on any of the grounds envisaged by Section 3(d). The patentability of products would then have to be assessed, for determination of their patentability on the basis of Section 2(1)(j) read with Section 2(1)(j)(a).51*

*(g) A mere claim, without enabling disclosure, as would enable a person skilled in the art to work the invention, is not patentable.52*

*(h) The role of the complete specification accompanying a patent application is to teach what the invention was, how it was to be made, and how it was to be used.53*

*(i) One invention is entitled only to one patent. One patent may, however, cover more than one invention, provided all inventions involved the same inventive steps.*

*(j) Grant of repeated patents for the same invention results in the malaise of evergreening of a patent beyond its life, which is impermissible.55*

*(ii) Mere grant of a patent is not necessarily a prima facie indicator of its validity.56*

*(iii) Infringement:*
*(a) Examination of any claim of infringement requires*
*(i) determination of the meaning and scope of the claims in the suit patent and (ii) comparison of the claim so interpreted with the allegedly infringing product of the defendants. The comparison has to be of the defendants' product vis-a-vis the plaintiffs' patent and not product-to- product.57*
*(b) This has to be determined on the basis of claim construction. The plea of a defendant that the plaintiff may have itself applied for grant of patent in respect of the allegedly infringing product, and abandoned the claim later, was held,*

*in Merck v. Glenmark16, to be irrelevant. In a visible departure, however, where the claim of the plaintiff was rejected, Roche v. Cipla held this to be an indicator, prima facie, that the defendant's product infringed the suit patent.*

*(iv) Section 3(d)*

*(a) Once a patent was granted to an Active Pharmaceutical Ingredient (API), Section 3(d) protects all products of such API, in any form, from grant of a subsequent patent. The manufacture or marketing by any third party of any product-derivative of a patented API would amount to infringement.58 The API is the molecular entity which exerts the therapeutic effect of medicine and is biologically active. Patent protection is ordinarily granted to the API59.*

*(b) In the case of pharmaceutical products, the derivatives envisaged by Section 3(d) would include (a) prodrugs, which are not active, but are metabolized in the body so as to result in pharmaceutically active substances, (b) combinations of more than one APIs or the combination of an API with an inert carrier and (c) drug delivery systems, which are compositions enabling the constituents to be administered in a particular fashion.60*

*(c) In Novartis9, examining the vulnerability of Imatinib Mesylate to invalidity on the ground of Section 3(d), the Supreme Court held that (i) the obtaining of Refer Roche v. Cipla Ltd17 Refer Roche v. Cipla Ltd17 Refer Roche v. Cipla Ltd17 approval for Imatinib Mesylate on the basis of Zimmerman patent, (ii) the obtaining of patent term extension for the Zimmerman patent on the ground of pendency of regulatory approval for Imatinib Mesylate,*

*(iii) the obtaining, by Novartis, of injunction against marketing of Imatinib Mesylate by any third party on the basis of the Zimmerman patent and (iv) the view of the Board of Patent Appeals that the Zimmerman patent had the teaching to convert Imatinib to Imatinib Mesylate, in conjunction, indicated*

*that Imatinib Mesylate was not a "new product", within the meaning of Section 3(d), vis-à- vis the Zimmerman patent, but merely a "known substance".*

*(d) "Efficacy" in Section 3(d) refers to the function, utility and purpose of the product under consideration. Hence, for pharmaceutical products, "efficacy" would mean "therapeutic efficacy". "Therapeutic efficacy" was required to be judged strictly and narrowly.61*

*(e) Enhanced properties, which were inherent to the forms of the known substance, visualized in the explanation to Section 3(d) would not imply enhanced efficacy. Enhanced therapeutic efficacy was a must.62*

*(f) "Enhanced solubility" is no indicator of enhanced efficacy in pharmaceutical products.63*

*(g) Applying this principle, the admission, by Novartis, that "all indicated inhibitory and pharmacological effects of the β-crystalline form of Imatinib Mesylate are present in the free base", was held by the Supreme Court in Novartis9, to indicate that the β- crystalline form of Imatinib Mesylate did not possess enhanced efficacy vis-à-vis the Imatinib free base.*

*(h) As no research data had been placed by Novartis on record to indicate enhanced therapeutic efficacy of the β-crystalline form over the Zimmerman patent, except in respect of properties already possessed by the Zimmerman patent, the Supreme Court, in Novartis, that the β-crystalline form of Imatinib Mesylate did not possess enhanced therapeutic efficacy vis-à-vis the free base or the non crystalline form of Imatinib Mesylate.*

*(i) Whether increased bioavailability would or would not, result in enhanced therapeutic efficacy had to be decided on the basis of research data, and had to be specifically claimed.64*

*(v) Coverage, claim construction and disclosure*

*(a) The coverage of a claim, for the purposes of determination the scope of protection under Section 48 of the Patents Act65 had to be determined by claim construction. Claim construction involved reading of the wording of the claim with its enabling disclosures as contained in the complete specifications, as understood by a person skilled in the art, acquainted with the technology in question. A product could be treated as covered by the claim, for the purposes of patent protection if, on the basis of the wording of the claim read with the enabling disclosures in the complete specifications, the person skilled in the art would be in a position to work the invention so as to make it available to the public by the expiry of the patent term.66*

*(b) The qualities of an enabling disclosure were well delineated in the Wands tests33. They involved (i) the quantity of experimentation necessary, (ii) the amount of guidance available in the patent, (iii) the presence/absence of working examples, (iv) the nature of invention, (v) the state of prior art, (vi) the related skill of those in the art, (vii) the predictability/unpredictability of*

*48. Rights of patentees -*
*Subject to the other provisions contained in this Act and the conditions specified in section 47, a patent granted under this Act shall confer upon the patentee -*
*(a) where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have this consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;*
*(b) where the subject matter of the patent is a process the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India."*

*ReferMerck v. Glenmark16 the art and (viii) the breadth of the claims.67*

*(c) Some of the principles of claim construction are that (I) the claim defines the scope and territory of the patent, (ii) claims in a patent may be dependent or independent, (iii) different claims in one patent define different embodiments of the same inventive concept,*

*(iv) invalidation must be of each claim separately and independently, (v) where the claim was worded using the expression "comprising of" various elements, the addition of another element would infringe the patent, (f) where, however, the claim was "consisting of" various elements, infringement would require the subsequent patent to have all the elements in the claim and non other, with the addition of any other element defeating infringement and (g) claims were not to be construed on the basis of prior material or subsequent conduct68.*

*(d) In this context, in my opinion, demystification of the concept of "coverage", when used in the concept of claim construction and claim protection in patent law, is essential, as there is considerable debate on this issue in nearly every case, with Counsel, relying on the same decisions, adopting near irreconciliable stances. There is, in my view, a distinction between the "broad coverage"of a claim in a patent, and the "protected coverage", i.e. Refer Merck v. Glenmark16 Refer Roche v. Cipla Ltd17 the coverage which would be entitled to patent protection under Section 48. The following passage from Merck v. Glenmark16 is important in this regard:*

*"Construction of the patent by this court, to verify its coverage is fundamental. This coverage depends on the nature of the claims made (and enabling disclosures specified) by MSD in its 'Complete Specification' under Form 2 of the Act. The words used to describe the claims - as read by a person of ordinary skill in the art - determine the breadth of the monopoly granted by the patent, for which the substantive (and indeed, substantial) rights under Section 48 of the Act are triggered."*

*(Emphasis supplied) Judgements are not to be read like statutes.69 While referring to a precedent, it is necessary to discern, with care, what exactly the court seeks to convey. The reference to "coverage", in the afore-extracted passage from Merck v. Glenmark16, is, in my view, to be understood as referring not to the "broad coverage" of the claim, but to that coverage which would be entitled to patent protection under Section 48. The Division Bench holds that the coverage encompassed by the claim, as worded, read with the enabling disclosure, would be entitled to protection under Section 48. A case in point is SPM, which was subject matter of consideration in Merck v. Glenmark16. The claim in IN 816, as worded, encompassed "Sitagliptin with its pharmaceutically acceptable salts". Sitagliptin Hydrochloride was specifically exemplified in the complete specifications in Bharat Petroleum Corporation Ltd v. N.R. Vairamani, (2004) 8 SCC 579. The SFB, and Sitagliptin Hydrochloride, therefore were, on a plain reading, entitled to patent protection. Paras 38 and 39 of the report in Merck v. Glenmark16 goes on to suggest that, possibly, enabling disclosure, in respect of SPM, was also to be found in IN 816 (though, later, the judgement leaves this issue open for more detailed analysis). The paragraphs (to the extent relevant) read thus:*

*"38. ... The section 'Detailed Description of the Invention', which discloses Formula 1 (reproduced below), corresponds to claim 1 of the patent specification, discloses the following compound structure:*

*39. This is the Sitagliptin free base. Each element of this structure, and selection of particular elements to reach this structure, is further detailed at pages 5 and 6 of the specification. Page 10 further details the separation of racemix mixtures of the compound to isolate individual enantiomers, including the R form of the compound that is ultimately used in Januvia and Janumet. The term "pharmaceutically acceptable salts"*

*- it is stated - "refers to salts prepared from pharmaceutically acceptable non-toxic bases or acids including" inter alia*

*phosphoric acid, which is the second element in SPM (i.e. the P in SPM). The M - or monohydrate - is indicated by stating that "salts... may also be in the form of hydrates" (page 10 of the Form 2 filing)."*

*If, thus, the disclosure contained in IN 816 enabled the person skilled in the cart to arrive at SPM, SPM would also be covered by IN 816 so as to be entitled to patent protection under Section 48." This, then, would, as held in para 38 of Merck v. Glenmark16, be the "coverage" which would trigger the protection provided by Section*

*(e) As against this, the "broad coverage" of the claim in the patent, as worded, may include products for which there is no enabling disclosure. For example, in IN 816, all pharmaceutically acceptable salts of Sitagliptin are within the "broad coverage" of the claim as worded. Assuming, however, that there is, in the complete specifications in IN 816, no enabling disclosure (arguendo) except in respect of SPM - excepting Sitagliptin Hydrochloride, which is claimed by exemplification, such pharmaceutically acceptable salts, which are not disclosed in IN 816, but are, nonetheless, within the coverage of the claim as worded, would not be entitled to patent protection under Section 48. "Coverage", in this sense, is, therefore, wider than "disclosure".*

*(f) While this distinction between "coverage" of a claim, as understood in absolute terms, and the "disclosures" in the complete specifications relating thereto does exist, the gap between coverage and disclosure could not be so wide as to enable an artful draftsman to so draft a claim as to escape coverage by the prior art70.*

*(g) Applying this principle, the contention of Novartis that the Zimmerman patent covered, but did not disclose Imatinib Mesylate, was rejected by the Supreme Court in Novartis9. The Supreme Court held that (a) as the Imatinib free base was covered and disclosed in the Zimmerman patent, (b) the*

*Zimmerman patent also claimed pharmaceutically acceptable salts of the Zimmerman free base, (c) Imatinib Mesylate was a "known substance" from the Zimmerman patent and (d) Imatinib Mesylate was a pharmaceutically acceptable salt of the Imatinib free base, Imatinib Mesylate was claimed and disclosed in the Zimmerman patent.71*

*(h) Similarly, in Merck v. Glenmark16, even while expressing no final opinion in that regard, it was observed that (a) the disclosure, in the prior art, of the method of isolation of the Sitagliptin free base, (b) the identification of pharmaceutically acceptable salt of Sitagliptin, in the prior art, as including salts made from phosphoric acid and (c) the suggestion, in the prior art, that pharmaceutically acceptable salts of the Sitagliptin free base may also be in the form of hydrates, indicated that SPM was disclosed in the prior art.*

*(i) Where the attached salt radical was a mere inert Refer Novartis9 career, and pharmaceutical activity was attributable to the free base, the disclosure of the free base in prior art would imply disclosure of the salt, as novelty existed in the free base, even if the combination with the inert salt radical was useful for effective administration of the drug72.*
*(vi) Obviousness:*
*(a) "Prior disclosure", for the purposes of obviousness,*

*meant disclosure which, if performed, would infringe the patent73.*

*(b) Prior art, for the purposes of obviousness, was required to have been published before the priority date of the suit patent74.*

*(c) The test of obviousness was whether, if the prior art document was placed in the hands of a competent draftsman endowed with common general knowledge at the priority date, faced with the problem which the patentee solved in the suit patent, but not endowed with the knowledge of the patented*

*invention, the draftsman would have said "this gives me what I want."75*

*(d) In Roche v. Cipla-I17, various combination tests have been approved by the Division Bench, to assess "obviousness". These are the following:*

*(i) The first is the triple test of obviousness, involving determination of the scope and content of the prior art, difference between the prior art and the claims and issue and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or non-obviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.*

*(ii) The second test involves the following four steps:*

*(a) identifying the inventive concept embodied in the patent;*

*(b) imputing to a normally skilled but unimaginative addressee what was commongeneral knowledge in the art at the priority date;*

*(c) identifying the differences if any between the matter cited and the alleged invention; and*

*(d) deciding whether those differences, viewed without any knowledge of the alleged invention, constituted steps which would have been obvious to the skilled man or whether they required any degree of invention.*

*(iii) The third test involves the following five steps:*

*"Step No. 1 - To identify an ordinary person skilled in the art, Step No. 2 - To identify the inventive concept embodied in the patent, Step No. 3 - To impute to a normal skilled but unimaginative ordinary person skilled in the art what was common general knowledge in the art at the priority date.*

*Step No. 4 - To identify the differences, if any, between the matter cited and the alleged invention and ascertain whether*

*the differences are ordinary application of law or involve various different steps requiring multiple, theoretical and practical applications, Step No. 5 - To decide whether those differences, viewed in the knowledge of alleged invention, constituted steps which would have been obvious to the ordinary person skilled in the art and rule out a hideside (sic hindsight) approach."*

*(e) The reason or motivation for making the choices which would lead the persons skilled in the art to arrive at the suit patent from the prior art, must be apparent in the prior art, i.e. in the claim in the prior art read with its enabling disclosure, for "obviousness" to exist. The "motivation" must include the motivation to select and the motivation to combine.76*

*(f) The suit patent is obvious from the prior art if the invention claimed in the suit patent, as a whole, would have been obvious, prior to the priority date of the suit patent, to a person skilled in the art, from the claim in the prior art read with its enabling disclosures. In this, the first step is the selection of the prior art as the lead compound.*

*(g) Clear differences in molecular structure would militate against any inference of obviousness77.*

*(h) In assessing obviousness, hindsight analysis is impermissible. In other words, while assessing whether the suit patent is vulnerable to invalidity on the ground of obviousness, the teachings in the suit patent cannot be used as a guide. If the teachings in the suit patent are required to be referred, it would imply that the exercise is one of hindsight analysis.78*

*(i) The simple test to ascertain whether the suit patent is obvious from the prior art, is, therefore, to arm the mythical person skilled in the art with the complete specifications of the prior art, and the objective which the suit patent ultimately achieved. If the person is able to use the teaching in the prior art to arrive at the suit patent, the suit patent is obvious. If he is not able to do so, it is not.*

*(j) The "person skilled in the art" is "a person who practices in the field of endeavor, belongs to the same industry as the invention, possesses average knowledge and ability and is aware of what was common general knowledge at the relevant date".79*

*(k) A claim of infringement, by the product of the defendant, of the suit patent as well as the prior art, would itself defeat, prima facie, the allegation of infringement, as it would imply that the suit patent is obvious from the prior art80.*

*(l) In the case of a Markush patent, and a subsequent patent for a specific entity, where the Markush does not contain any precise enabling disclosure teaching the way to the subsequent patent, the question to be addressed while examining the vulnerability of the subsequent patent as obvious from the Markush, would be as to how far the subsequent patent is subsumed in the earlier Markush patent81.*

*(m) Where the inventor of the prior art and the suit patent is the same, the appropriate test to be applied would be that of "a person in know, rather than a person skilled in the art.82"*

*(vii) Industrial applicability and commercial utility:*
*(a) On the aspect of industrial applicability, in Merck v. Glenmark16, it was held that, once the SFB had been disclosed, alongwith disclosure of its usefulness in treating diseases and the mode of administration of the drug resulting from the free base, the SFB was capable of industrial application.*
*(b) Capability of industrial application has to be decided on the basis of the API, not on the basis of the particular salt. The requirement of combination of the API with an inert career, for its administration, was irrelevant to the issue of industrial application83.*
*(c) The inert career is not the crux of the invention, as the therapeutic efficacy is attributable to the API alone84.*

*Refer Astrazeneca v. Intas20 Refer Merck v. Glenmark16 Refer Merck v. Glenmark16*

*(d) The criteria to assess industrial application are (i) that the patent must disclose its practical application and be of profitable use, (ii) the use of the patent in industrial practice must be derivable directly from the description in the complete specifications read with common general knowledge, (iii) speculative use is insufficient in this regard and (iv) the complete specification, read with common general knowledge, was required to be sufficient to enable a person skilled in the art to exploit the invention without undue burden and without having to carry out a research programme85.*

*(e) In pharmaceutical compounds, generally, a patent is capable of industrial application if (i) the function of the entity is disclosed in the patent and (ii) the function disclosed relates to usefulness of the entity in the medical industry86.*

*(f) Breakthrough inventions, even if not commercially viable at the time of their conceptualization, or invention, are nonetheless useful and industrially applicable. In this context, "commercial utility" must be distinguished from "patentable utility". "Commercial utility" is not a sine qua non for patentability.87 Refer Merck v. Glenmark16 Refer Merck v. Glenmark16 Refer Roche v. Cipla Ltd17*

*(g) Any challenge to the validity of a patent on the ground of want of commercial utility, in order to succeed, would require the challenger to show that the later commercially successful patent owed nothing to the original patent88.*

*(h) A patent could be treated as lacking commercial utility only if, even if worked as suggested by the complete specifications, it would not yield the promised result. If it does, commercial utility is established.89*

*(viii) Section 8:*

*(a) The requirement of compliance with Section 8 of the Patents Act is mandatory.*

*(b) As violation of Section 8 renders the patent vulnerable to revocation, the provision is required to be strictly construed.90*

*(c) Section 8 is applicable only to foreign patents.91*

*(d) The use of the word "may" in Section 8 indicates that, breach does not automatically result in revocation of the patent and that revocation is discretionary.*

*(e) At the interlocutory stage, it is normally not advisable to reject a request for injunction on the ground of violation, in obtaining the suit patent, of Section 8.93*

*(f) The failure, by the plaintiff, to disclose the earlier application filed by the plaintiff for the patent in respect of the allegedly infringing product later released by the defendant, would not be fatal where, at the time of applying for the suit patent, the plaintiff was of the opinion that the allegedly infringing product was a separate invention. This principle was applied in Roche17, in the context of Erlotinib Hydrochloride vis-à-vis polymorph B thereof.*

*174. Infringement admitted: The defendant acknowledges the fact that it is manufacturing and dealing in Eltrombopag Olamine. If the suit patent is valid, therefore, infringement is admitted. What is required, therefore, to be seen, is whether the defendant has set up a credible challenge of vulnerability of the suit patent to invalidity. The grounds urged by Mr. Sai Deepak in this regard would have to be examined in the light of the principles delineated hereinabove.*

*175. It is made clear that the observations/findings that follow are prima facie, and intended only for deciding the application for interlocutory injunction under Order XXXIX Rules 1 and 2 of the CPC. The Supreme Court has, time and again,*

*cautioned Courts, especially in intellectual property matters, not to give detailed findings on merits, as would exhibit a final opinion regarding the rival contention of the parties."*

***20.*** In ***Merck Sharp and Dohme Corporation and Anr.*** vs. ***Glenmark Pharmaceuticals***, 2015 SCC Online Del 8227, Hon'ble Division Bench of Delhi High Court in paras 84 to 89 held as under:-

*"84. At this stage, the Court must address the issue of public interest in respect of access to drugs. In the Hoffman La Roche case (supra) at the interlocutory stage, both at the stage of the Single Judge and the Division Bench, considerable attention was given to the nature of the drug and the price differential. The Court also concluded prima facie that the defendant, a generic manufacturer, had made out a credible defence and a credible challenge to the validity of the patent. The Court located the public interest concern in the debate on balance of convenience and noting that the price differential was about 300% in relation to a life-saving drug (one which treated lung cancer), held that balance of convenience did not lie in favour of grant of injunction as the possibility of several thousands using the generic product being denied access, and consequently their lives, was real. Such consequence was an in-compensable eventuality. Here, no such startling consequences are discernible. Diabetes is more of a lifestyle disorder, which requires management and treatment. The new line of treatment offered by MSD improves efficient management of the condition FAO (OS) 190/2013 Page 74 which cannot be termed as life threatening, so as to characterize the patented product as a life-saving drug (without going into what are life-saving drugs, because of an element of subjectivity and fact dependence, but recognizing a broad distinction which is sufficient for the purposes of this case). In this context, it would be useful to notice that in the World Health Organization's (WHO's) Model list of Essential medicines, besides three forms of insulin, "Glibenclamide Tablet: 2.5 mg; 5 mg" and "Metformin Tablet: 500 mg*

*(hydrochloride)" no other drug- including none with any Sitagliptin combination has been shown.15*

*85. This leads us to the second principle, which is whether the Court can overlook the public interest in maintaining the integrity of the patent system itself, so that a legitimate monopoly is not distorted. As this Court noted in Bayer Corporation and Ors. v. Cipla, Union of India (UOI) and Ors., 162 (2009) DLT 371 "[i]f, after a patentee, rewarded for his toil - in the form of protection against infringement - were to be informed that someone, not holding a patent, would be reaping the fruits of his efforts and investment, such a result would be destructive of the objectives underlying the Patents Act.".*

*The Court must be mindful - especially in a case where a strong case of infringement is established, as here - there is an interest in enforcing the Act. It may be argued that despite this no injunction should be granted since all damages from loss of sales can be compensated monetarily ultimately if the patentee prevails. This argument though appealing, is to be rejected because a closer look at the market forces reveal that the damage can in some cases be irreparable. This in turn leads to the third principle, which is where an infringer is allowed to operate in the interim during the trial, it may result in a reduction in price by that infringer since it has no research and development expenses to recoup - most revenue becomes profit. The patentee however can only do so at its peril. Importantly, prices may not recover after the patentee ultimately prevails, even if it is able to survive the financial setback (or "hit") during the interim, which may take some time. The victory for the patentee therefore should not be pyrrhic but real. This irreparable market effect in cases of a sole supplier of a product has also triggered the decisions in SmithKline Beecham v. Generics, (2002) 25(1) IPD 25005 and Smithkline Beecham Plc (2) Glaxosmithkline UK Ltd v. Apotex, [2003] EWCA Civ L37, where in granting an interim injunction, it was held that damages would not be an adequate remedy for the*

*plaintiff since it was the sole supplier of the product. New entrants to the market would be likely to cause its prices to go into a downward spiral, and Smith Kline"s prices may not recover even if it wins eventually. Equally, granting the injunction would not prejudice Glenmark to an equal extent since - if the suit is dismissed - it may return to a market that is largely variable.*

*86. In the present case, given the size of the diabetes drug market in India, and the sheer number of patients, from all economic strata of society, the demand for low-priced medicines will remain, rather than any distortion of demand due to brand loyalty or a first mover"s advantage to MSD. As noticed earlier, the price differential between MSD"s drug and the infringing products is 30%, a significant portion of which is due to the customs duty paid by MSD. Learned senior counsels appearing for MSD had stated that it FAO (OS) 190/2013 Page 76 would compensate Glenmark for loss of earnings if the suit were to be dismissed. Thus this arrangement not only ensures that Glenmark will - if successful - be able to return to the market without any handicap, but moreover, it will be compensated at market value for the period for which it was excluded. The balance of convenience thus clearly lies in favour of MSD.*

*87. A related concern that this Court heeds - the fourth principle operative in this case - is that of the chronology of events and Glenmark"s decision to release Zita without first challenging Januvia or Janumet. Undoubtedly, the Act creates a right to oppose patents even after grant. There is no obligation to only utilize the pre or post grant opposition mechanisms. Neither does a patent benefit from a presumption of validity if it is challenged in the course of an infringement suit. However, if a defendant is aware that there may be a possible challenge to its product, but still chooses to release the drug without first invoking revocation proceedings or attempting to negotiate, that is surely a relevant factor. The defendant"s legal right to challenge the patent at any point in time is intact, but that does not mean that this factor cannot determine the interim*

*arrangement. This is more so where Glenmark today argues that MSD ought to have disclosed international patent applications for SPM and Sitagliptin plus Metformin since they were the "same or substantially the same" as the suit patent under Section 8. That is Glenmark"s stated position. Such being the state of things, it is surely reasonable for Glenmark to detect the possibility to challenge, when a US patent application for SPM filed by it was opposed by MSD. Despite this, Glenmark released the drug without initiating revocation proceedings under the Act, which is also a right vested FAO (OS) 190/2013 Page 77 in Glenmark that would have obviated the need for the interim arrangement we are today considering. This does not mean that Glenmark"s right to question the validity of the patent in an infringement is affected, but the manner of challenge is a relevant factor against it at the interim stage. As Justice Jacob noted in both Smithkline Beecham cases (supra):*

*"I remain of the same opinion that I was in the Generics case. Where litigation is bound to ensue if the defendant introduces his product he can avoid all the problems of an interlocutory injunction if he clears the way first. That is what the procedures for revocation and declaration of non-infringement are for."*

*Similarly, in the Australian decision of Pharmacia Italia S.p.A v. Interpharma Pty Ltd, [2005] FCA 1675, the Court noted the fact that Inter- pharma had acted in full knowledge of Pharmacia"s patent and the possible consequences flowing from that. This consideration that the patentee is already in the market and has been operating the patent has found favour in Indian Courts as well. In K. Ramu v. Adayar Ananda Bhavan and Muthulakshmi Bhavan, 2007 (34) PTC 689 (Mad), Bajaj Auto Ltd. v. TVS Motor Company Ltd., 2008 (36) PTC417 (Mad) and National Research Development Corporation of India v. The Delhi Cloth and General Mills Co. Ltd. and Others, AIR 1980 Del 132, the fact that the patentee was already dealing in the market on the basis of the patent weighed in as a factor in granting the interim injunction.*

*88. Ultimately, the Court must look to the combination of the three primary factors. A strong case can in some instances offset an equal balance of conveniences between parties. In this case, MSD has established a prima facie case of infringement, an interim arrangement that secures the interests of both parties and which maintains the public interest involved is available, FAO (OS) 190/2013 Page 78 which also ensures that the possibility of irreparable harm to the patentee is removed.*

*89. Accordingly, for the above reasons, this Court holds that the order of the learned Single Judge dismissing the application for grant of an interim injunction is liable to be and is set aside. The interim injunction claimed for by the plaintiff MSD in IA 5167/2013 is granted. Additionally, the following directions are issued:*

*i) MSD shall furnish an affidavit undertaking (to be filed by its director duly authorised by its Board of Directors) in the pending suit, that in the event the suit is dismissed, it would compensate Glenmark for the damage or loss caused, including but not limited to loss of earnings. The affidavit shall be filed in two weeks.*

*ii) Glenmark shall furnish an undertaking to comply with the injunction within two weeks from today in the suit.*

*iii) Glenmark shall file a detailed account of its earnings (including gross turnover figures) from the products, from the date of the filing of the present suit; the account shall be accompanied by an affidavit of one of its Board of Directors authorized directors, which shall also undertake to pay such damages, if any- which may be decided by the court if the ultimate result of the suit is a decree in favour of the plaintiff MSD. The statement shall be filed with a supporting affidavit of its duly authorized director, within four weeks. The statement of account shall be accompanied by the certificate of a chartered accountant verifying its genuineness.*

*iv) It is clarified that the defendant Glenmark is permitted to sell the products in question which are already in the market (i.e.*

*with its FAO (OS) 190/2013 Page 79 distributors, retailers etc.). However, in compliance with the injunction granted in favour of the plaintiff/MSD - it shall not henceforth further sell, distribute or in any manner take any steps towards placing in the market the drug in question, Zita and Zitamet and such of the pharmaceutical products which are covered by the claim for interim injunction in the suit. If any stocks of such goods are in its factory premises or awaiting the distribution channel, a true and correct account thereof shall be given to the Court along with the affidavit to be filed in compliance with directions (iii) above. Likewise, Glenmark shall also indicate in the said affidavit details of the drug Zita and Zitamet (and such of the pharmaceutical products which are covered by the claim for interim injunction in the suit) which are in the market and have been permitted to be sold.*

*v) The parties are directed to appear before the Single Judge in the suit on 10th April, 2015.*

*This Court was informed during the hearing that the suit is at the stage of trial. The learned Single Judge shall endeavour to ensure that parties agree to limited oral evidence of experts and shall also endeavour to appoint a technical expert in consultation with parties under Section 115 of the Patents Act for better appreciation of the technical nature of the evidence. All these are aimed at expediting the final hearing of the trial."*

***21.*** In ***AIIMS*** Versus ***Sanjiv Chaturvedi and others***, ***(2020) 17 Supreme Court Cases 602***, Hon'ble Supreme Court held as under:-

*"65. It is true that the interim order passed by a Court does not operate as a precedent and the law declared by the Supreme Court with regard to the precedential value of judgments of Benches of larger strength may not operate as a binding precedent in the facts and circumstances of this case. The judgments referred to in the preceding paragraphs lay down the norms of judicial decorum and propriety which give 11 (1976) 3 SCC 677 12 (2001) 4 SCC 448 precedence to Benches*

*of higher strength. There is no reason at all why the same principles should not apply even to interim orders in pending proceeding."*

***22.*** In ***Mumbai International Airport Private Limited*** Vs. ***Golder Chariot Airport and another***, ***(2010) 10 Supreme Court 422,*** Hon'ble Supreme Court has held that a contesting party cannot be permitted to take a complete volte-face of its previous stand taken before the Court of law. A litigant cannot be permitted to change and choose its stand to suit its convenience.

***23.*** The principles which could be culled out on the basis of various pronouncements which have been made by the Courts while dealing with applications filed under Order 39, Rules 1 and 2 of the Civil Procedure Code in patents cases are as under:-

*"(i) The registration of a patent per se does not entitle the plaintiffs to an injunction. The certificate does not establish a conclusive right.*

*(ii) There is no presumption of validity of a patent, which is evident from the reading of Section 13(4) as well as Sections 64 and 107 of the Patents Act.*

*(iii) The claimed invention has to be tested and tried in the laboratory of Courts.*

*(iv) The Courts lean against monopolies. The purpose of the legal regime in the area is to ensure that the inventions should benefit the public at large.*

*(v) The plaintiff is not entitled to an injunction if the defendant raises a credible challenge to the patent. Credible challenge means a serious question to be tried. The defendant need not make out a case of actual invalidity. Vulnerability is the issue at the preliminary injunction stage whereas the validity is the issue at trial. The showing of a substantial question as to invalidity thus requires less proof than the clear and convincing showing necessary to establish invalidity itself.*

> *(vi) At this stage, the Court is not expected to examine the challenge in detail and arrive at a definite finding on the question of validity of the patent. That will have to await at the time of trial. However, the Court has to be satisfied that a substantial, tenable and credible challenge has been made.*
> *(vii) The plaintiff is not entitled to an injunction, if the patent is recent, its validity has not been established and there is a serious controversy about the validity of the patent."*

***24.*** Let's apply these decisions vis-a-vis the respective contentions of the parties to decipher as to whether the defendants have laid a credible challenge which has rendered the patent of the plaintiffs to be vulnerable at this stage to refuse the grant of interim relief or not.

***25.*** This Court is not oblivious to the fact that vulnerability is the issue at the primary injunction stage while validity is the issue at the stage of trial and all that this Court has to see at this stage is as to whether the defendants have raised a credible challenge to the validity of the patent held by the plaintiffs and whether the patent is vulnerable. The principal ground which has been urged by the defendants is that subject patent is evergreening of IN719, and in this view of the matter, there is indeed a credible challenge to the subject patent which renders the same vulnerable. All other contentions raised hover around this principal contention of the defendants. To substantiate their contention, much stress was laid upon the pleadings of the plaintiffs in the civil suit, which stands filed by them in the High Court of Delhi, reference of which has already been made hereinabove, in which suit, as per defendants, the plaintiffs were claiming the infringement of IN719 and IN301 qua Linagliptin, and which as per the defendants, makes it amply evident that IN301 was nothing but evergreening of IN719. Learned Senior Counsel at length took the Court through the documents filed by the respective parties to substantiate their contentions. It was also urged that the factum of IN301 to be evergreening of IN719 was also evident from the queries

which were raised by the Patents Office at the time of the consideration of the application of the plaintiff qua the subject patent.

***26.*** Now, when one peruses the plaint which has been filed by the plaintiffs in the High Court of Delhi, one finds that what has been pleaded by the plaintiffs in the said suit, is that whereas Linagliptin is a compound "**claimed and covered**" in Claim No. 1 of IN301, Linagliptin was a compound "**claimed and encompassed**" in Claim No. 2 of IN719. Thus, whereas on one hand the plaintiffs claimed Linagliptin as a compound to have been claimed and encompassed in Claim No. 2 of IN719, the said compound was stated to be claimed and covered in Claim No. 1 of IN301. This demonstrates that Linaglipin compound was not claimed to be covered in patent IN719, as has been urged by the defendants. In this background, when one peruses the averments, which have been made in the present plaints, one finds that in these cases the stand of the plaintiffs is that Linagliptin is a compound covered by the subject patent IN301. In this backdrop, now the Court would like to refer to the queries which were raised by the Patent's Office while processing the application of the plaintiffs for the grant of subject patent. These documents have been placed on record by defendant No. 2 in COMS No. 7 of 2022. There is on record a communication dated 06.09.2007 issued by the Patents Office to the plaintiffs on the subject "Examination Report" of the application of the plaintiffs qua IN301, relevant portion whereof is quoted herein below:-

> *"To,*
> *REMFRY & SAGARREMFRY HOUSE, MILLENNIUM PLAZASECTOR 27, GURGAON 122 002, INDIA*
> *SUB:* ***Examination Report***
> *APPLICATION NUMBER: 01092/DELNP/2003*
> *DATE OF FILING 14/07/2003*
> *DATE OF REQUEST FOR EXAMINATION: 16/12/2005*
> *DATE OF PUBLICATION: 12/01/2007*

*a. With reference to request no.5624/RQ-DEL/2005 dt.16/12/2005 by you for examination, the above quoted application has been examined under section 12 of the Patent Act, 1970 as amended and the First Examination Report containing a statement of objection is forwarded herewith for compliance thereof.*

*The documents enclosed shall be resubmitted within 12(Twelve) months from the date of issue of the said report together with your observation if any, in connection with the compliance of the requirements of this First Examination Report.*

*The application referred to will be deemed to have been abandoned under section 21(1) unless all the requirements imposed by the said Act and the rules there under are complied with within the above said prescribed period.*

*The pages of the complete specification should be freshly typed wherever corrections of interpolation are made. The typed pages in duplicate should be on white pages in order that clear photocopies of the specification can be prepared. The original pages in that case should be returned to this office duly cancelled.*

*It is in the interest of the applicant to comply with the requirements at the earliest.*

*a. Encl:*

*1. Form-1-Application for Grant of Patent*

*2 Form-2-Provisional/Complete Specification*

*3. Form-3-Statement & Undertaking*

*4. Form-5-Declaration as to Inventorship*

*NOTE: All Communications to be sent to the Controller of Patents at the above address.*

*a Observations:*

*1. Claims I and 18 define a plurality of Distinct inventions.*

*2 Claim 16 neither process nor product hence does not constitute an invention u/s 2(1) of Indian Patents Act 3. Claims not clear in respect of the expression as indicated therein.*

*4. Claims are not clearly worded as indicated therein. 5. Claims do not sufficiently define the invention as indicated therein.*

*Form 5 should be corrected as indicated therein 7. Abstract should be prepared in accordance with the instructions contained in the Rule 13(7) of the Patent Rules, 2003(as amended in 2006).*

*8 International application number given on form-1 incorrect. 9. Extraneous matter should be deleted from complete specification and fresh retyped pages should be filed.*
*10. Pages of complete specification should be renumbered. 11. Form 3 should be corrected as indicated therein."*

***27.*** Response thereto dated 13.06.2008 is also on record filed by defendant No. 2 in COMS No.7 of 2022 and relevant portion thereof is reproduced as under:-

*"DDB/Ivs/IP: 1092/DELNP/2003*
*June 13, 2008*
*THE CONTROLLER OF PATENTS*
*THE PATENT OFFICE*
*DELHI*
*Examiner: Sh. Rohit Rathore Final date: September 06, 2008*
*Dear Sirs,*
*Re:BOEHRINGER INGELHEIM PHARMA GMBH & CO. KG., Indian Patent Application No. 1092/DELNP/2003 Filing date: July 14, 2003*
*Reference is made to the official letter dated September 06, 2007. Documents received with the official letter are returned duly amended to meet the objections raised.*
*Regarding paragraphs 1 to 5, the claims have been thoroughly revised in light of the objection of the learned Examiner and in accordance with the claims as allowed in the corresponding application in EP Le. EP 1368349. It is submitted that the revised claims are all directed to the compound of claim 1 and do not relate to distinct inventions. It is respectfully submitted that the original PCT claim set has been restricted by deleting original claims 1 to 6. Present revised claim 1 results from original claim 7, in which the definition of heteroaryl in RI is replaced by the respective definition from original claim 1.*

*Present claim 2 results from original claim 7. Present claims 3 to 9 result from original claims 8 to 14, in which the back references have been adapted accordingly. Original composition claim 15, use claim 16 and process claims 17 and 18 have been removed form the present claim set.*

*In light of the submission provided and the revisions carried out in the claims, the learned Examiner is requested to reconsider and withdraw the respective objections.*

*As regards the objection of the learned Examiner on the compound claims under Section 3(d), it is respectfully resisted and submitted that the claimed compounds are novel and may accordingly not be rejected as mere derivatives of known substances, In this regard, the kind attention of the learned Examiner is respectfully invited to the positive opinion of the International Searching Authority. Further, we have the honour to enclose a list of 371 additional compounds supporting the scope of the present claims. All of these 371 compounds show an IC50 value even below 100nM measured on the assay originally described in the present application: The learned Examiner is accordingly requested to waive the objection under Section 3(d).*

*The amendments carried out to the specification have necessitated retyping of pages 289 to 362 as fresh pages 290 and 327 respectively. The retyped pages are submitted herewith in duplicate along with the former pages duly cancelled. The pages of the specification have been correspondingly numbered.*

*Regarding paragraph 7, we have the honour to submit an abstract of the invention fin duplicate) in accordance with Rule 13(7) Patent Rules, 2006, Regarding paragraph 8, we have corrected the International application no. in Form 1.*

*Regarding paragraph 12, we have already submitted the details of corresponding foreign applications vide our letter dated December 27, 2007. Further, we have the honour to submit the petitions under Rules 137 and 138 for obviating irregularity and condoning delay in submitting the details of corresponding foreign applications.*

*Regarding paragraph 13, we have already submitted the prosecution details of corresponding applications vide our letter dated February 28, 2008. As and when we received any further details, we shall submit the same.*
*We have the honour to submit a substitute power of authority in favour of our attorneys.*
*All the remaining requirements have been complied with.*
*Grant of a patent on this application within the final and in-extendible period expiring an September 06, 2008, is respectfully requested.*
*Before taking any adverse decision on this case, the Controller is respectfully requested to give an opportunity to the applicants to be officially heard in this matter.*
*Yours faithfully,".*

***28.*** The fact that subsequently subject patent was granted to the plaintiffs demonstrates that the Patents Office was satisfied with the response so submitted to its queries by the plaintiffs. That being the case, it cannot be said that by highlighting these very facts or the pleadings of plaint filed before the Delhi High Court, the defendants could be said to have had laid credible challenge to the subject patent so as to make it vulnerable to deny interim relief to the plaintiffs at this stage.

***29.*** This Court hastens to add that the contention of the defendants that the subject patent is bad cannot be construed so as to render the subject patent vulnerable at the threshold stage. In other words, vulnerability of a patent cannot be concluded simply on the assertions/defence of the defendants which is yet to be proved as per law. To elaborate it, grant of patent in favour of the plaintiffs is a matter of record. Though, mere grant of the patent does not means that challenge cannot be laid to it as per the provisions of the Patents Act, yet, fact of the matter is that a challenge, which is yet to be proved, cannot be placed at a higher pedestal than the statutorily granted patent until and unless the challenging party can demonstrate in

terms of the provisions of the Patents Act that the patent is vulnerable so as to refuse grant of interim relief. This test obviously has to be in terms of grounds of challenge. Coming back to the facts of these cases, the ground of challenge of the defendants to the subject patent is in terms of the provisions of Section 64(1)(a) of the Patents Act, 1970. As of now, nothing has been placed on record from which it can be inferred that the invention claimed in IN301 of the complete specifications was also claimed in the complete specifications of IN719 and this was evident a day before the priority date of IN301, the subject patent to a person skilled in the art.

***30.*** In the case in hand, the patent in issue, i.e. 'IN301' was granted in favour of the plaintiffs in India on 5th October, 2010 and the terms of the patent is 20 years, which is to expire on 5th October, 2023 as the international filing date of the patent application in the present case is August 18, 2003.

***31.*** On the other hand, admittedly, the defendants do not have any patent qua the infringing product and no challenge, either to the application filed by the plaintiffs for grant of patent was laid by the defendant nor any post patent challenge was laid by it. Of course, in light of law laid down by Hon'ble Supreme Court in M/s Bishwanath Prasad Radhey Shyam (supra), grant of patent does not guarantee the validity of a patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings, but the factum of a patent being there in favour of the plaintiffs and the factum of no pre or post grant challenge to the same by anyone, including the defendant, except recently by way of a revocation petition which was filed in close proximity to the launch of the infringing product, does creates a *prima facie* case and balance of convenience in favour of the plaintiffs. The Court is observing so for the reason that as per the plaintiffs, since the patent was granted on 5th October, 2010, the same has had a successful commercial run till date which continues and there is no serious dispute qua the same. The patent is an old patent and it has not been granted

recently to the plaintiffs. Therefore, these facts do create *prima facie* case and balance of convenience in favour of the plaintiffs vis-a-vis the defendant, who admittedly does not has any patent qua the infringing product.

***32.*** In the light of what has been discussed hereinabove, if an infringer is not restrained from infringing the patent of patent holder, then, but of course, the patent holder will suffer from irreparable loss and it cannot be said that the infringer stands on the same pedestal on which the patent holder is. Of course, the patent of the plaintiffs is vulnerable. It is open to challenge and now it has also been challenged by the defendant by way of a revocation petition. But mere filing of revocation proceedings cannot be treated to be a "credible challenge" to the old and successful patent of the plaintiffs. As far as the element of public interest is concerned, it may be observed that in the present case, the Central Government has not invoked the provisions of Section 66 of the Patents Act and after following the procedure referred to therein, made a declaration in the Official Gazette to the effect that the patent of the plaintiffs stand revoked in public interest. Not only this, the defendant has not approached the competent authority under Section 84 of the Patents Act after the expiry of three years from the grant of the patent for grant of compulsory licence of patent on the conditions enumerated therein.

***33.*** At this stage, it is relevant to refer to Section 48 of the Patents Act as it stood prior to the amendment and also post amendment, which amendment was carried out in the said section w.e.f. 20.05.2003.

***34.*** Section 48 of the Patents Act, which deals with rights of the patentees, before amendment provided as under:-

> "**Section 48. Rights of patentees**
>
> *(1) Subject to the other provisions contained in this Act, a patent granted before the commencement of this Act, shall confer on the patentee the exclusive right by*

*himself, his agents or licensees to make, use, exercise, sell or distribute the invention in India.*

*2) Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted after the commencement this Act shall confer upon the patentee--*

*(a) where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India;*

*(b) where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India."*

After amendment, said Section now reads as under:-

"***Section 48: Rights of patentees***.

*Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted under this Act shall confer upon the patentee--*

*(a) where the subject-matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;*

*(b) where the subject-matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India:"*

***35.*** It is evident that though subject to other provisions contained in the Patents Act, including Section 47 thereof, a patent granted under the Patents Act does confers upon the patentee, where the subject matter of the patent is a product, the exclusive right to prevent a third party, who do not

have his consent, from the act of making, using, offering for sale etc. of that product in India. Thus, a statutory right, which has been conferred upon the patentee, clothes the patentee with an umbrella of safety qua the infringement of its patent by a third party.

***36.*** Now this Court will refer to the two judgments of this Court which have been relied upon by the plaintiffs as well as defendants.

***37.*** In ***Dhanpat Seth & others*** Vs. ***Nil Kamal Plastic Crates Ltd.***, 2006 SCC OnLine HP 98, learned Single Judge of this Court while dealing with an application filed under Order XXXIX, Rules 1 and 2 of the Code of Civil procedure for grant of temporary injunction with regard to the infringement of the Patent granted to the plaintiffs therein in respect of a device of manual hauling of an agricultural produce, after perusing the Patent device in the Court, observed that the the basket got patented by the plaintiffs was not a hauling device and the device was made of synthetic polymeric material, which had been invented long back and that the process by which the substance was moulded into various articles like baskets, buckets, mugs, jugs, furniture and so many other articles was also well known and there was nothing new about the so called device. On these findings, leaned Single Judge rejected the prayer for grant of interim relief.

***38.*** In appeal, Hon'ble Division Bench of this Court while up-holding the order passed by the learned Single Judge in ***Dhanpat Seth & Ors***. Vs. ***M/s. Nil Kamal Plastic Crates Ltd.***, AIR 2008 HP 23 has held as under:-

> ***"****11. A bare perusal of the definition of invention clearly shows that even a process involving an inventive step is an invention within the meaning of the Act. It is, therefore, not necessary that the product developed should be a totally new product. Even if a product is substantially improved by an inventive step, it would be termed to be an Invention. The definition of 'inventive step' provides that when technical advances as compared to existing*

*knowledge take place in an existing product or there is improved economic significance in the development of the already existing device and the invention is not obvious to people skilled in the art, it would amount to an inventive step.*

*12. The learned single Judge had seen the products of the plaintiffs, the defendant and the traditional Kilta. We also called upon the parties to produce their respective devices as well as the traditional Kiltas.*

*13. A Kilta is a traditional product which has been used since time immemorial for carrying produce including agricultural produce in hill areas especially in the State of Himachal Pradesh. The traditional Kilta is made of bamboo. The shape of a kilta is conical having a wider circular opening on the top and it tapers and narrows down at the bottom. There is virtually no difference in the overall design of the tradition Kilta or the 'devices' developed by the plaintiffs and: the defendant. A visual comparison of the' three items prima facie establishes that the articles manufactured by the plaintiffs and the defendant are virtual copies of the traditional Kilta. The only difference is that the Kilta is made of bamboo and the Kilta made by the plaintiffs is made of polypropylene copolymer (PP). The Kilta made by the defendant is also made of polymeric material. The Kilta manufactured by the defendant is made of high density polyethylene (HDP). In actual fact, both the materials are polymers in common parlance known as plastic. The only visible difference is that device now being manufactured is having detachable nylon straps with buckles. The question which arises for consideration is whether this change of material from bamboo to plastic and the development of adjustable nylon straps with buckles is an inventive step falling within the meaning of Section 2(ja).*

*14. Shri Vinay Kuthiala, contended that by changing the material from bamboo to plastic there is a great economic gain and there is technical advance of economic significance. Though the cost of Kilta made of plastic may be higher than that of Kilta made of bamboo, its life is much longer making it more economic. He further submits that the Kilta is designed in such a manner as to make it easy to carry heavy load and, therefore, this is an inventive step.*

*15. After having seen the traditional Kijta and the devices of the parties and having examined the same, we are prima facie of the view that the devices being manufactured by the parties are only imitations of the traditional Kilta. Shri Vinay Kuthiala has contended that the traditional Kilta was only supported by rope on the forehead. This assertion is in fact incorrect. The traditional Kilta used in Himachal Pradesh is by and large supported by adjustable ropes going over the shoulders. In some cases, the supporting strap goes over the forehead. Both types have been in existence for times immemorial.*

*16. The Apex Court in M/s. Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, while dealing with the meaning of the words 'inventive step' held as follows:*

*21. It is important to bear in mind that in order to be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an "inventive step". To be patentable the improvement or the combination must produce a new result or a new article or a better or cheaper article than before. The combination of old*

*known integers may be so combined that by their working inter-relation21. It is important to bear in mind that in order to be patentable an improvement on something known before or a combination of different matters already known, they produce a new process or improved result. Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent.*

*17. The device being manufactured by the plaintiffs is basically a Kilta but made out of synthetic polymeric material which is commonly known as plastic. The process of making traditional items out of such polymers is a well known and well established process. This Court can take judicial notice of the fact that much prior to the device being manufactured by the plaintiffs, traditional items made out of woods, steel, brass, leather and other natural materials have been replaced by plastic. In this regard reference may be made to chairs, tables, Jugs, baskets, shoes and numerous other items which were traditionally made of natural material but are now made of plastic. Therefore, in our opinion, the mere fact that the device is made of polymeric material instead of bamboo is not an inventive step involving any novelty. There is nothing new about the process of manufacturing the traditional Kilta made of natural material from synthetic material. Even nylon straps now added are virtually copies of the ropes used in the traditional Kilta. The ropes in the Kilta can also be adjusted by the user keeping in view the height of the person using the Kilta and the weight being carried by him. The mere introduction of buckles would not amount to a new device being called an invention or an inventive step.*

*18. Shri Vinay Kuthiala has laid great emphasis on the order dated 2-7-2007 passed by the Assistant Controller, Patents and Designs, whereby he has rejected the application for revocation filed by the defendant.*

*19. At the outset, it would be pertinent to mention that the Controller before dealing with the matter did not even take the traditionally built Kilta into consideration as a citation. His reasoning in this regard is as follows:*

*"Exhibit A is a Bamboo made Kilta with a strap but there is no proof of date of its publication. Hence the said document cannot be taken into consideration as a citation."*

*20. We fail to understand the reasoning given by the Assistant Controller, Patents and Designs in not taking into traditionally built Kilta into consideration. Even the case set up by the plaintiffs was not that he had invented an entirely new product but his case was that he had developed a traditional Kilta by means of inventive steps in such a fashion that it amounts to a new invention. The contentions of both the parties could not have been appreciated without first taking into consideration the traditional Kilta. On this short ground alone we feel that much reliance can be placed on the aforesaid order.*

*21. Mere grant of patent in favour of the plaintiffs by itself does not mean that the plaintiffs are entitled to any injunction. This is a factor which may be taken into consideration and would be a relevant factor but the grant of patent would not ipso facto entitle the plaintiffs to grant of an injunction without taking into consideration other relevant factors. In fact Section 107 of the Patents Act clearly provides that in any suit for infringement of a patent every ground on which it*

*may be revoked under Section 64 shall be available as a ground for defence. Therefore, the defendant is entitled to argue before this Court that the patent granted is not valid. Reliance placed upon by the plaintiffs on the judgment of the Apex Court in Midas Hygiene Industries (P) Ltd. and Anr. v. Sudhir Bhatia and Ors. is totally misconceived. The action in the case was under the Trade Marks Act where the provisions are different. It may be true that Section 28 of the Trade Marks Act is similar to Section 28 of the Patents Act but under the various provisions of the Patents Act, such as Sections 64 and 107(2) even after the patent is granted, the same can be challenged in appropriate proceedings.*

*22. We also find that the device manufactured by the plaintiffs has been termed as hauling device. The learned single Judge is absolutely right in holding that the so-called-device is not a device of hauling but basically a device for carrying the produce.*

*23. The House of Lords, in (1975) All England Law Reports 504, American Cyanamid Co. v. Ethicon Ltd., clearly laid down that the governing principle with regard to grant of injunction is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should*

*normally be granted, however, strong the plaintiffs claim appeared to be at that stage. If, on the other hand, damages would not be an adequate remedy to the plaintiff in the event of the success in the trial, the Court can grant injunction in favour of the plaintiff by ensuring that the defendant is adequately compensated in case the trial culminates in his favour. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.*

*24. It also held that where other factors appear to be evenly balanced the rule of prudence would be to preserve the status quo. In the case before the House of Lords, the defendant had not started manufacturing of absorbable surgical sutures and it is in these facts that relief of temporary injunction was granted. In the present case, the defendant has already started manufacturing and selling the Kiltas and has been doing so for a number of years. In our opinion, at this stage it would not be appropriate to put the clock back.*

*25. In respect of the arguments addressed on the doctrine of anticipation, even if we discount the production of the device by the plaintiffs prior to 24-5-2002, it is clear that prior to this date, the defendant had sent the drawing for production of the Kilta to Taiwan. At this stage of the suit when evidence is still to be recorded, the said material cannot be discarded.*

*26. Keeping in view the aforesaid discussion, we are clearly of the view that the device developed by the plaintiffs is in fact the result of traditional knowledge and aggregation*

*/duplication of known products such as polymers and, therefore, cannot be said to be an invention. The plaintiffs are, therefore, not entitled to any injunction."*

***39.*** A perusal of the above mentioned judgments of this Court as well as the judgment of the Hon'ble Supreme Court in *Bishwanath Prasad Radhey Shyam* Vs. Hindustan Metal Industries, AIR 1982 SC 1444, which stands taken note by the Hon'ble Division Bench of this Court demonstrates that in the said two cases, the Patent article was physically seen by the Court and the same was of such nature that the Hon'ble Judges were in a position to *prima facie* conclude as to whether there was any inventive step involved in the Patent product, as defined in the Patents Act or not. However, in my considered view, the above mentioned judgments are of no assistance in the present case, for the reason that here the Patent is of a drug and infringement is also alleged by way of a drug being marketed and sold by the defendants based on the Patent of the plaintiffs. Unlike in the cases referred to above, by no stretch of imagination this Court by comparing the tablet of the plaintiffs/applicants with the tablet of the defendants/non-applicants with a naked eye can conclude as to whether any inventive step was involved in the Patent of the plaintiff or not.

***40.*** Similarly, by referring to the applications and documents appended therewith, which were submitted by the plaintiffs/applicants for grant of IN' 719 and IN' 301, this Court cannot conclude even prima facie that IN' 301 is evergreening of IN'719. Therefore, this Court has no hesitation in holding at this stage that it cannot be said that the defendants/non-applicants have been able to lay any credible challenge to the Patent of the plaintiffs or that they have been able to convince the Court that the said Patent is vulnerable so as to refuse the grant of interim protection.

***41.*** There is one more aspect of the matter. Wheras on the one hand, the plaintiffs/applicants do have a Patent in their favour with regard to the

compound Linagliptin, the defendants/non-applicants do not have one. Yet knowing fully well that the drug they intended to introduce in the market was duly covered by the subject Patent, they took a calculated risk to do so. It is not in dispute that the defendants/non-applicants do admit that the drug in issue, which is being manufactured by them is covered by the subject Patent, because if that was not the case, then there was no occasion for them to have had taken the plea of plaintiffs' evergreening Patent IN' 719. Now, Patent IN' 719, which has recently expired, was in public domain, yet before manucaturing their respective products and before marketing the same, the defendants/non-applicants did not seek revocation of the Subject Patent well in time during the validity of Patent IN' 719. This also in the considered view of the Court, tilts the balance of convenience in favour of the plaintiffs.

***42.*** Accordingly, the applications filed by the plaintiffs/applicants under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure are allowed and the defendants/non-applicants in the respective Civil Suits are restrained either themselves or through their directors, partners licenses, stockiest and distributors, agents etc., jointly and severally from infringing the subject Patent, i.e., IN'301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product, Linagliptin in any form whatsoever including Linagliptin API, Linagliptin formulation, "Linagliptin Tablet" and/or "Linagliptin + Metformin Hydrochloride Tablets" or any "generic version" thereof or any other product sold under the trade marks/brand names "LINARES" and "LINARES M" in COMS No. 07 of 2022, "LINANEXT" , "LINANEXT-M" in COMS No. 08 of 2022, "EMLINZ 5" and "EMLINZ M 500" in COMS No. 09 of 2022 and generic version of subject patent in COMS No. 10 of 2022 or any other trade mark(s)/brand name(s), whatsoever, or any other product covered by the subject patent granted by the Controller of Patents on October 5, 2010 in favour of applicant/plaintiff No. 1 in all the suits. The applications stand disposed of.

A copy of this order be placed in each of the Files.

**BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.**

Between:-

BABU RAM
S/O LATE SH. SIHNOO RAM
VILLAGE BARNAHAN, P.O. LOHARGHAT,
TEHSIL RAMESHEHER,
DISTRICT SOLAN, H.P. PIN 174 102
PRESENTLY POSTED AT
G.M.S. (TGT ARTS) MACHHOON,
U/S G.S.S.S. LAEDAGHAT,
DISTRICT SOLAN, PIN 174 102

PETITIONER

(BY MUNISH DATWALIA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH THE SECRETARY (EDUCATION)
TO THE GOVT. OF HIMACHAL PRADESH,
SHIMLA 2.

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

3. THE DIRECTOR, ELEMENTARY EDUCATION,
HIMACHAL PRADESH, SHIMLA-1.

RESPONDENTS

(MR.. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

2. LETTERS PATENT APPEAL NO. 70 OF 2020

1. STATE OF HIMACHAL PRADESH
THROUGH THE PRINCIPAL SECRETARY (EDUCATION)
TO THE GOVERNMENT OF HIMACHAL PRADESH

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

3. THE DIRECTOR OF HIGHER EDUCATION
LALPANI, SHIMLA-01, H.P.

4. THE DIRECTOR OF ELEMENTARY EDUCATION
LALPANI, SHIMLA-01

APPELLANTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

AND

1. JEET RAM S/O SH. BIDHU RAM, R/O VILLAGE JHARET THAKRAN, P.O. JHARET JAGGIAN, TEHSIL PALAMPUR, DISTT. KANGRA, PRESENTLY WORKING AS TGT (ARTS) AT GSSS RAJHOON, TEHSIL PALAMPUR, DISTT. KANGRA, H.P.
2. SH. DINESH KUMAR S/O SH. KISHORI LAL R/O VILLAGE & POST OFFICE KHURWAN, TEHSIL BANGANA, DISTT. UNA, PRESENTLY WORKING AS TGT (ARTS) AT GHS KIARIAN, DISTT. UNA, H.P.
3. SH. ANIL KUMAR S/O SH. SUNIT CHAND R/O V&PO LAHAT, TEHSIL JAISINGPUR, DISTT. KANGRA, PRESENTLY WORKING AS TGT(ARTS) AT GSSS PAHRA, TEHSIL PALAMPUR, DISTT. KANGRA, H.P.
4. SH. MEEN CHAND S/O SH. CHUNI LAL, R/O VILLAGE SANAUR, P.O. GHALNI, TEHSIL SUNNI, DISTT. SHIMLA, PRSENTLY WORKING AS

TGT(ARTS) AT GHS BANOT, U/C GSSS PAHAL, SUB TEHSIL DHAMI, DISTT. SHIMLA, H.P.

PERFORMA RESPONDENTS

5. SH. UDAI SINGH S/O SH. UTTAM SINGH DHADWAL, R/O V&PO LOWER KHERA, TEHSIL PALAMPUR, DISTT. KANGRA, PRESENTLY WORKING AS LECTURER ENGLISH AT GSSS PUNNER, DISTT. KANGRA, H.P.
6. SH. KEWAL SINGH S/O SH. SURJAN RAM, R/O V& PO SHAHPUR, TEHSIL SHAHPUR, DISTT. KANGRA, PRESENTLY WORKIGN AS LECTURER POLITICAL SCIENCE AT GSSS TUNDI, DISTT. CHAMBA, H.P.

RESPONDENTS

7. SH. JASBIR SINGH KATOCH S/O SH. RANDHIR SINGH KATOCH, R/O V&PO INDORA, DISTT. KANGRA, PRESENTLY WORKING AS TGT(ARTS) AT GSSS KALIARA, TEHSIL DHARAMSHALA, DISTT. KANGRA, H.P.
8. SH. PARVEEN KUMAR S/O SH. RIKHI RAM, R/O V&PO HAR JALARI HAR, TEHSIL & DISTT. KANGRA, PRESENTLY WORKING AS TGT(ARTS) AT GMSSS KOTHAR RANITAL, DISTT. KANGRA, H.P.
9. SH. RAJESH GULERIA, S/OS SH. KAMER CHAND GULERIA, R/O V &PO SHAMIRPUR, TEHSIL & DISTT. KANGRA, PRESENTLY WORKING AS TRAINED GRADUATE TEACHER (ARTS) AT GSSS TIARA, TEHSIL PALAMPUR, DISTT. KANGRA, H.P.
10. SH. BALDEV SINGH, S/O SH. RAVAN, R/O V&PO DOLE, TEHSIL JAWALI DISTT. KANGRA, PRESENLTY WORKING AS TGT(ARTS) AT GOVT. MIDDLE SCHOOL DHEWA, U/C GHS NANAHAR, TEHSIL JAWALI, DISTT. KANGRA, H.P.
11. SH. KIRHSAN DEV S/O SH. INDER PAL, R/O VILLAGE SEKHAL, P.O. BHARMAR, TEHSIL JAWALI, DISTT. KANGRA, PRESENTLY WORKING AS TGT(ARTS) AT GSSS BHARMAR, TEHSIL JAWALI, DISTT. KANGRA, H.P.

12. SH. MANJEET SINGH S/O SH. RAJMAL, R/O VILLAGE MUNDLA, P.O. LADWARA, TEHSIL SHAHPUR, DISTT. KANGRA, PRESENLTY WORKING AS TGT(ARTS) AT GHS PREI, TEHSIL SHAHPUR, DISTT. KANGRA, H.P.
13. SH. SURENDER KUMAR S/O SH. KISHORE CHAND, R/O V&PO SAKOH, TEHSIL DHARAMSHALA, DISTT. KANGRA, PRESENTLY WORKING AS TGT(ARTS) AT GOVT. MIDDLE SCHOOL, MANOH, U/C GSSS REHLU, TEHSIL SHAHPUR, DISTT. KANGRA, H.P.
14. SH. KARNAIL SINGH S/O SH. NATHU RAM, VILLAGE TADHO, P.O. FATHU-KA-BAGH, TEHSIL NURPUR, DISTT. KANGRA, PRESENLTY WORKING AS TGT(ARTS) AT GOVT. MIDDLE SCHOOL MAKROLI, TEHSIL NURPUR, DISTT. KANGRA, H.P.
15. SH. PARVEEN SINGH S/O SH. FAQUIR SINGH, R/O VILLAGE RAROH, P.O. SUNET, TEHSIL FATEHPUR, DISTT. KANGRA, PRESENTLY WORKING AS TGT(ARTS) AT GOVT. MIDDLE SCHOOL LARHOON, U/C GGSSS FATEHPUR, DISTT. KANGRA, H.P.
16. SH. SWARN KUMAR S/O SH. SALIG RAM, R/O V&PO SAROTRI, TEHSIL BAROH, DISTT. KANGRA, PRSENLTY WORKING AS TGT(ARTS) AT GOVT. MIDDLE SCHOOL CHANETA, U/C GSSS DARANG, TEHSIL PALAMPUR, DISTT. KANGRA, H.P.
17. SH. SATISH KUMAR S/O SH. NIDHI RAM, R/O V& PO DAGOH, TEHSIL JAISINGPUR, DISTT. KANGRA, PRESENTLY WORKING AS GSSS(ARTS) AT GHS KHAJURNOO, DISTT. KNGRA, H.P.
18. SH. ASHOK KUMAR S/O LATE SH. GIAN CHAND, R/O VILLAGE CHARJEHI, P.O. MEHAL, TEHSIL BHORANJ, DISTT. HAMIRPUR, PRESENTLY WORKIGN AS GSSS(ARTS) GSSS BHORANJ, DISTT. HAMIRPUR, H.P.
19. SH. KAMLESH KUMAR, S/O SH. VIDYA SAGAR, R/O V&PO ANDRAD, TEHSIL SALOONI, DISTT. CHAMBA, PRESENTLY WORKING AS GSSS(ARTS) AT GSSS BANIKHET, DISTT. CHAMBA, H.P.

20. SH. SOM DUTT S/O SH. DHANI RAM, R/O V& PO CHAKMOH, TEHSIL BIJHARI, DISTT. HAMIRPUR, PRESENTLY WORKING AS GSSS(ARTS) AT GOVT. MIDDLE SCHOOL, NAIN RAPPER U/C GSSS GHANGOT, TEHSIL BIJHARI, DISTT. HAMIRPUR, H.P.
21. SH. PARAMJIT THAKUR S/O SH. GODHAM RAM, R/O VILLAGE GULEHI, P.O. BHARARI, TEHSIL BHARMOUR, DISTT. CHAMBA, PRESENTLY WORKING AS GSSS(ARTS) AT GHS NAYARAN, TEHSIL BHARMOUR, DISTT. CHAMBA, H.P.
22. SH. SARWAN KUMAR S/O SH. MOTI RAM, R/O V&PO YOUL, TEHSIL DHARAMSHALA, DISTT. KANGRA, PRESENTLY WORKING AS GSSS(ARTS) AT GSSS DHULAUA, H.P.
23. SH. RAMESH KUMAR S/O SH. DHARAM SINGH,R/O VILLAGE CHAMYOLA, P.O. BANI, TEHSIL BARSAR, DISTT. HAMIRPUR, PRESENTLY WORKING AS GSSS(ARTS) AT GSSS DHANET, UNA, DISTT. UNA, H.P.
24. SH. VARJEET MANKOTIA S/O SH. MILAP SINGH MANKOTIA, R/O V&PO TEARA, TEHSIL & DISTT. KANGRA, H.P. PRESENTLY WORKING AS TGT(ARTS) AT GSSS NANDHER, TEHSIL & DISTT. KANGRA, H.P.
25. SH. VIKAS SOOD, S/O SH. HEM RAJ R/O V&PO SHAMSHI, DISTT. KULLU, PRESNTLY WORKING AS TGT(ARTS) AT GHS SHAT, DISTT. KULLU,H.P.
26. SH. RAM PAL, S/O SH. MANSHA RAM, R/O VILLAGE KOT, P.O. CHAMIARI, TEHSIL BANGANA, DISTT. UNA, PRESENTLY WORKING A TGT(ARTS) AT GHS KOT, U/C GSSS SAROH, DISTT. UNA, H.P.
27. SH. MANOJ KUMAR S/O SH. RAM DASS, R/O VILLAGE GANOH, P.O. BANI, TEHSIL BARSAR, DISTT. HAMIRPUR, PRESENTLY WORKING AS TGT(ARTS) IN GOVT. MIDDLE SCHOOL NARI, U/C GSSS CHALOLA, TEHSIL & DISTT. UNA, H.P.

PERFORMA RESPONDENTS

(BY MR. ONKAR JAIRATH, ADVOCATE)

3. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 5641 OF 2020

AMARJEET SINGH RANA S/O SH. SOHANLAL, VILLAGE & P.O. BARI KALAN, TEHSIL KHUNDIAN, DISTRICT KANGRA, H.P. (THROUGH LEGAL REPRESENTATIVES)

1.A SUNITA RANA W/O LATE SH. AMARJEET SINGH RANA

1.B ABHISHEK RANA S/O LATE SH. AMARJEET SINGH RANA

1.C POONAM RANA D/O LATE SH. AMARJEET SINGH RANA

1.D POOJA RANA D/O LATE SH AMARJEET SINGH RANA

(RESIDENT OF BAR KHURAD, P.O. BARI KALAN, TEHSIL KHUNDIAN, DISTRICT KANGRA, H.P.)

APPLICANT

(BY MR. VIKAS RAJPUT, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH-171002.
2. THE DIRECTOR, ELEMENTARY EDUCATION, HIMACHAL PRADESH SHIMLA-H.P.
3. THE DEPUTY DIRECTOR, ELEMENTARY EDUCATION, KANGRA AT DHARAMSHALA, HIMACHAL PRADESH.
4. BLOCK ELEMENTARY EDUCATION OFFICER LAMBAGAON, TEHSIL JAISINGPUR, DISTRICT KANGRA, H.P.

RESPONDENTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

4. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 5644 OF 2020

SURESH KUMAR CHADHA S/O AMAR CHAND CHADHA VILLAGE AND P.O. BAIJNATH, TEHSIL BAIJNATH, DISTRICT KANGRA, H.P.

APPLICANT

(BY MR. VIKAS RAJPUT, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH-171002.
2. THE DIRECTOR, ELEMENTARY EDUCATION, HIMACHAL PRADESH SHIMLA-H.P.
3. THE DEPUTY DIRECTOR, ELEMENTARY EDUCATION, KANGRA AT DHARAMSHALA, HIMACHAL PRADESH.
4. HEAD MASTER, GHS JHIKLI BHETH, TEHSIL BAIJNATH, DISTRICT KANGRA, H.P.

RESPONDENTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

5. CIVIL WRIT PETITION NO. 6358 OF 2021

MANJEET KUMAR S/O LATE SH. NATHU RAM, VILLAGE BHATLOG, P.O. DHARMANA, TEHSIL RAMESHEHER, DISTRICT SOLAN, H.P. PIN 174 102 PRESENTLY POSTED AT GAHC SAI CHAROG, AS AYURVEDIC PHARMACIST, PIN 174102

PETITIONER

(BY MR. MUNISH DATWALIA, ADVOCATE.
AND

1. STATE OF HIMACHAL PRADESH THROUGH THE PRINCIPAL SECRETARY (AYURVEDA) TOT EH GOVT. OF HIMACHAL PRADESH, SHIMLA 2
2. THE STATE OF HIMACHAL PRADESH THROUGH THE PRINCIPAL SECRETARY (PERSONAL) TO THE GOVERNMENT OF HIMACHAL PRADESH.
3. THE DIRECTOR AYURVEDA TO THE GOVERNMENT OF HIMACHAL PRADESH, BLOCK NO 26, SDA COMPLEX SHIMLA-1.

RESPONDENTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL).

6. LETTERS PATENT APPEAL NO. 16 OF 2021

1. STATE OF HP THROUGH SECRETARY (GAD) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA, HIMACHAL PRADESH
2. DIRECTOR, SAINIK WELFARE, DIRECTORATE OF SAINIK WELFARE, HP AT HAMIRPUR, HP

APPELLANTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

AND

1. SHRI GULWANT KUMAR S/O LATE SHRI JAMIT SINGH WORKING AS CLERK IN ZILA SAINIK WELFARE OFFICE, KANGRA AT DHARAMSHALA R/O VILL GHORAB, PO & TEH NAGROTA BAGWAN, DISTT KANGRA (HP)

RESPONDENT

(BY MR. PREM P. CHAUHAN, ADVOCATE)

7. LETTERS PATENT APPEAL NO. 34 OF 2021

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH.
2. STATE OF HIMACHAL PRADESH THROUGH THE PRINCIPAL SECRETARY (PERSONNEL) TO THE GOVERNMENT OF HIMACHAL PRADESH.
3. THE DIRECTOR OF HIGHER EDUCATION, LALPANI, SHIMLA-01.
4. THE DIRECTOR OF ELEMENTARY EDUCATION, LALPANI, SHIMLA-01

APPELLANTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

AND

1. SH. AMAR NATH SON OF SH. BUDHI RAM, R/O VILLAGE BARWALA, P.O. GHAINA KALAN, TEHSIL DHARAMSHALA DISTRICT KANGRA, HIMACHAL PRADESH PRESENTLY WORKING AS ART AND CRAFT TEACHER AT GOVERNMENT SENIOR SECONDARY SCHOOL, GANGROTI, DISTRICT KANGRA, H.P.
2. SH. MANOJ KUMAR S/O LATE SH. PURSHOTTAM SINGH, R/O VILLAGE GARHBADSI, P.O. MALKHER, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS LT AT GOVERNMENT SENIOR SECONDARY SCHOOL BARWALA, DISTRICT KANGRA.
3. SH. SATISH CHAND R/O SAINIK WELFARE COLONY, NEAR RAMNAGAR COLONY, RAIPUR TEA ESTATE, THAKIRDWARA, P.O. MARANDA TEHSIL PALAMPUR, DISTRICT KANGRA.

RESPONDENTS

(BY MR. ONKAR JAIRATH, ADVOCATE)

8. CIVIL WRIT PETITION NO. 412 OF 2022

ANIL S/O LATE ROSHAN LAL VILLAGE V.O.O. DOHB, TEHSIL SHAHPUR, DISTRICT KANGARA, H.P. PRESENTLY POSTED AT G.S.S. SCHOOL REHLU, DISTRICT KANGRA, AT P.E.T.

PETITIONER

(BY MR. MUNISH DATWALIA, ADVOCATE )

AND

1. STATE OF HIMACHAL PRADESH THROUGH THE SECRETARY (EDUCATION) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-2.
2. THE STATE OF HIMACHAL PRADESH THROUGH THE PRINCIPAL SECRETARY (PERSONAL) TO THE GOVERNMENT OF HIMACHAL PRADESH.
3. THE DIRECTOR, ELEMENTARY EDUCATION, HIMACHAL PRADESH, SHIMLA-1.

RESPONDENTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

9. CIVIL WRIT PETITION NO. 455 OF 2022

RAM SINGH, S/O SH. AMAR SINGH, AGED ABOUT 52 YEARS, PRESENTLY WORKING AS DRAWING MASTER IN GSSS DEHAR, R/O V&PO. NAGCHALA, TEH: BALH, DISTT: MANDI; HP

PETITIONER

(BY MR. PREM P. CHAUHAN, ADVOCATE )

AND

1. STATE OF HP THROUGH SECRETARY (EDUCATION) TO THE GOVERNMENT OF HP, SHIMLA, HP

2. DIRECTOR OF ELEMENTARY EDUCATION, HP, SHIMLA, HP
3. DEPUTY DIRECTOR OF ELEMENTARY EDUCATION, MANDI, DISTT: MANDI, HP

RESPONDENTS

(BY MR. VIKAS RATHORE,
ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO. 6443 OF 2021 AND CONNECTED MATTERS
DECIDED ON: 09.05.2022

**Constitution of India, 1950**- Article 226- The Demobilized Armed Forces Personnel (Reservation of Vacancies in The Himachal State Non-Technical Services) Rules, 1972- Rule 3 & 5- Petitioner who is an ex-serviceman after being returned from the armed forces joined as a Trained Graduate Teacher (Arts) with Education Department of H.P. in the year 2016 on contract basis and thereafter regularized in the year 2019- Held- Amendment carried out in sub-rule 1 of Rule 5 vide Notification dated 29.1.2018, otherwise does not affect rights of the petitioners, who are claiming benefit of counting of approved military service towards fixation of pay. Government of Himachal Pradesh with a view to bring 1972 Rules in harmony with judgment of this Court in **V.K. Behal** supra has amended aforesaid rules providing therein that the approved military service shall be counted only for the period, when such Ex-serviceman acquired the minimum age and educational qualification. However, this court is of the view that provision of grant of benefit of approved military service for fixation of pay was very much in 1972 Rules and the same has not been altered /amended even by the amendment carried out vide Notification dated 29.1.2018 and as such, this court has no hesitation to conclude that the Notification dated 29.1.2018 does not affect the right of the Ex-serviceman for counting of approved military service towards fixation of pay- Petition dismissed. (Para 23, 24, 25)

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These appeals/petitions coming for orders this day, **Hon'ble Mr. Justice Sandeep Sharma**, delivered the following:

J U D G M E N T

Since common question of law is involved in all the above captioned appeals and petitions and facts of the case are almost similar, this court after having clubbed all the cases heard them together and same are now being disposed of vide this common judgment. However, for the sake of clarity, facts of CWP No. 6443 of 2021 are being discussed herein below.

2. The petitioner who is an Ex-serviceman. after being retired from the armed forces, joined civil employment in the State of Himachal Pradesh as a Trained Graduate Teacher (Arts) with Education Department on 28.6.2016, on contract basis and thereafter his services were regularized on 23.11.2019.

3. State of Himachal Pradesh framed the Demobilised Armed Forces Personnel (Reservation Of Vacancies In The Himachal State Non-Technical Services) Rules, 1972 (hereinafter, 'Rules 1972') in order to provide benefits to the Ex-servicemen. Primarily we are concerned with rules 3 (1) and 5(1), which read as under:

> "3. Reservation of vacancies: (1) [Fifteen percent of the vacancies in respect of all post viz. Class I, II, III and IV to be filled up through direct recruitment shall be reserved for being filled up by the Released Indian Armed Forces Personnel or ex-servicemen who joined service or were commissioned on or after the 1st day of November, 1962 and are released any time thereafter. This 15% reservation in Class III and IV post will also include appointment of one dependent each of the family of those Defence Services Personnel who were killed in action or were disabled in action and rendered unfit for civil employment. Such dependent shall have to fulfil the requirements of the Recruitment and Promotion Rules of the post (s) to which they will be appointed, but they shall not be entitled for other benefits/concessions such as fixation of pay and seniority under rule 5(1):
>
> Provided that whatever vacancies are left over due to non-availability of suitable ex-servicemen who joined service or were commissioned on or after 1st day of November, 1962, and the dependents a as provided above will be filled by suitable ex-servicemen who joined service or were commissioned before 1st day of November, 1962. The concession such

as relaxation in age as provided in these rules shall also be admissible to such ex-servicemen. However, the benefit of counting the period of approved military service for the purpose of fixation of seniority and pay as provided in rule 5(1) of these rules, shall not be admissible to such ex-servicemen.

5. Seniority and pay: (1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant Rules, shall count towards fixation of pay and seniority in that service. (This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under State/Central Govt. against reserved posts)."

4. As per rule 3(1), fifteen percent of the vacancies in respect of all posts viz. Class I, II, III and IV to be filled up through direct recruitment shall be reserved for being filled up by the Released Indian Armed Forces Personnel or ex-servicemen who joined service or were commissioned on or after the 1st day of November, 1962.

5. Rule 5(1) further provides that period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant Rules, shall count towards fixation of pay and seniority in that service. However, such benefit shall be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under State/Central Govt. against reserved posts.

6. It is pertinent to take note of the fact that some of the persons working in Prosecution Department of State of Himachal Pradesh, laid challenge to constitutional validity of Rule 5(1) in this court by way of CWP No. 488 of 2001

titled Shri V.K. Behal and other v. State of H.P. and others, on the ground that those Ex-servicemen, who had not joined service in the armed force during emergency are not entitled to benefits in terms of the aforesaid rule 5(1). They contended before this court that the persons, who joined armed forces when situation in the country was normal do not do anything extraordinary, as such, there is no rationale for giving benefit to them of approved military service for the purpose of pay and seniority. Aforesaid writ petition subsequently came to be allowed vide judgment dated 29.12.2008 passed by Division Bench of this court, wherein rule 5(1) of the rules came to be read down to the extent it provides benefit of counting of past service rendered in armed forces for the purpose of counting their seniority in the civil service, which they joined in the category of posts reserves for Ex-servicemen. However, Division Bench held that in case rule 5(1) is to be upheld, entire benefit of same should be made available to those Ex-servicemen only, who joined the armed forces during emergency.

7. As a consequence of aforesaid finding, the Ex-servicemen, who did not participate or join armed forces during emergency, were held entitled to avail the benefit of reservation and fixation of pay but not counting of service towards seniority in the civil service. Besides above, Division Bench also held that benefit of such service cannot be given from a date prior to the date when the ex-serviceman attains the minimum educational eligibility criteria, prescribed in the rules. Relevant para of aforesaid judgment is reproduced herein below:

> "In view of the above discussion, the writ petition is allowed. the Provision of Rule 5(1) of the Rules are read down and they are held to be unconstitutional in so far as they give benefit of counting the past army service towards seniority in civil employment in case of ex-servicemen who have not joined the Armed forces during the period of emergency. It is also held that the benefit of such service cannot be given from a date prior to the date when the ex-serviceman attains the

> minimum educational eligibility criteria prescribed in the rules. Consequently, the seniority list Annexure P-3 is held to be illegal and is accordingly quashed and the respondents are directed to re-frame the same in accordance with the directions issued hereinabove. There shall be no order as to costs."

8. Though aforesaid judgment passed by Division Bench of this court was laid challenge before Hon'ble Apex Court in Civil Appeal No. 011060 of 2017, titled R.K. Barwall and other v. The State of Himachal Pradesh and others, but the same was dismissed on 25.8.2017 and as such, as of today, judgment passed in **V.K. Behal** supra has attained finality. After dismissal of SLP in R.K. Barwal's case, State of Himachal Pradesh, vide notification dated 29.1.2018 made certain amendments to rule 5(1) of the the Rules, 1972 to the following effect:

> "For sub-rule (1) of the rule 5 of the Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal State Non-Technical Services) Rules, 1972, for the existing provisions of Sub rule (1), the following shall be substituted, namely:-
> "Only the period of approved military service rendered after attaining the minimum age and qualification prescribed for appointment to the service concerned, by the candidate (s) appointed against reserved vacancy under the relevant rules, shall count towards fixation of pay in that service at the time of first civil appointment against reserved vacancy. This benefit shall not be admissible in subsequent appointment (s) of Ex-Servicemen who are already employed under the State/Central Government, against reserved post(s).
> Provided that such fixation of pay will be in accordance with the instructions issued by the Finance Department from time to time."

9. As per aforesaid amendment in Rule 5, only the period of approved military service rendered after attaining the minimum age and qualification prescribed for appointment to the service concerned, by the candidate (s) appointed against reserved vacancy is to be counted towards fixation of pay

whereas in unamended rule 5 (1) there was no provision with regard to acquisition of qualification prescribed for the post in question. It appears that aforesaid amendment came to be effected in the Rules, pursuant to direction issued by Division Bench in **V.K. Behal** (supra), wherein court ordered that in all cases, past service with Armed Forces shall be counted from the date, when Ex-serviceman acquired the minimum educational qualification and no benefit can be given for army service rendered prior to date of attaining such qualification.

10. With the issuance of aforesaid Notification dated 29.1.2018, whereby rule 5 of the Rules came to be amended, Ex-servicemen who though stood appointed against a civil post in the State of Himachal Pradesh, prior to issuance of aforesaid Notification, are being denied benefit of counting of military service rendered by them, before their appointment under the Ex-serviceman quota for the purpose of pay fixation on the ground of qualification and as such, petitioners herein are compelled to approach this Court in the instant proceedings praying therein to set aside impugned Notification and communication dated 29.1.2018 and 30.1.2018. (Annexures P-5 and P-6 of CWP No. 6443 of 2020).

11. Prior to filing of the afore petitions, some of similar situate persons had approached erstwhile Himachal Pradesh Administrative Tribunal by way of Original Applications which subsequently on account of abolition of the Tribunal came to be transferred to this court and were registered as CWPOA Nos. 5478 of 2020 (LPA No. 16 of 2020) No. 231 of 2019 ( LPA No. 34 of 2021 and NO. 237 of 2019 (LPA No. 70 of 2020). In all the above petitions, challenge came to be laid to Notifications dated 29.1.2018/30.1.2018, wherein benefit of approved military service for the purpose of pay fixation came to be denied to those petitioners on the ground of qualification. In all the aforesaid cases, respondent-State, while placing reliance on judgment of Division Bench in **V.K. Behal** supra, argued that the benefit of approved military service in terms

of rule 5 (1) for the purpose of pay fixation can only be granted after attaining minimum age and educational eligibility criteria prescribed for appointment to the service concerned, by the candidates appointed under reserved vacancy under relevant rules. However, such plea of the State was not accepted by learned Single Judges of this Court. Learned Single Judges of this Court held the action of State in not giving benefit of approved military service towards fixation of pay bad in law and upheld that right by virtue of provision of sub-rule 1 of rule 5 of 1972 rules, which still exists. Learned Single Judges held that the Division Bench of this court in **V.K. Behal** supra has held grant of benefit of approved military service towards seniority in the cases of Ex-servicemen, who did not join armed force during emergency to be unconstitutional but at no point commented on that part of sub-rule (1) of rule 5, which deals with the grant of benefit of approved military service towards fixation of pay. Learned Single Judges further held that Notification 29.12.2018 does not adversely affect right of the petitioners for counting of approved military service towards fixation of pay and as such, such benefit cannot be refused to the petitioners on the ground of qualification.

12. Being aggrieved and dissatisfied with aforesaid judgments rendered by learned Single Judges in cases detailed herein above, State has filed Letters Patent Appeals captioned herein above, praying therein to set aside judgments passed by learned Single Judges and uphold its action in denying benefit of approved military service for the purpose of fixation of pay, to those persons, who had not attained minimum age and educational qualification prescribed for the service concerned, while being appointed to the posts reserved for that category.

13. Moot question, which needs to be determined /adjudicated in the cases at hand is that, whether the benefit of approved military service for the purpose of pay fixation in terms of sub-rule 1 of rule 5 of Rules, 1972, can be denied to the Ex-servicemen in terms of amendment carried out in aforesaid

rule 5 vide Notification dated 29.1.2018, wherein it has been provided that only the period of approved military service rendered after attaining minimum age and educational qualification prescribed for the service concerned by the candidate against reserved vacancy shall count towards fixation of pay in that service at the time of first civil employment against reserved vacancy.

14. Mr. Vikas Rathore, learned Additional Advocate General representing the State, while inviting attention of this court to the judgment rendered by Division Bench in **V.K. Behal** supra, which has been further upheld by Hon'ble Apex Court, argued that in all cases, benefit of past service can only be available from the date, when Ex-serviceman acquired age and minimum educational qualification and as such, no benefit can be given for the army service rendered prior to the date of acquiring educational qualification. Mr. Vikas Rathore, learned Additional Advocate General further argued that the Division Bench in **V.K. Behal** supra has held that Ex-servicemen though may avail benefit of fixation of but cannot be given benefit of past service towards their seniority in the civil service and such benefit can only be available from the date, when they acquired age and minimum educational qualification prescribed for the post in question. Learned Additional Advocate General further argued that Notification dated 29.1.2018 amending thereby rule 5 is strictly in conformity with the judgment passed by Division Bench in **V.K. Behal** supra and as such, same cannot be interfered with.

15. Per contra, learned counsel representing the respondents in the appeals and petitioners in the Civil Writ Petition/Civil Writ Petition (Original Application)s,, who are beneficiaries of provisions contained under rule 5 of the Rules 1972, contended that at no point of time, part of sub-rule 1 of rule 5 which deals with the relevant benefit, ever came to be dealt with by Division Bench while delivering decision in **V.K. Behal** and as such, observation, if any, made in the aforesaid judgment with regard to acquisition of qualification for availing benefit of approved military service cannot be attracted in those

cases, where employees appointed against the posts reserved for this category are only seeking benefit of approved military service towards fixation of pay. While inviting attention of this court to judgment of Division Bench in **Avtar Singh Dyal** v. **H.P. State Electricity Board Ltd.** CWP No. 4654 of 2013 and connected matter, decided on 26.11.2014, learned counsel for the petitioners argued that Ex-servicemen were held entitled for grant of benefit of counting the approved military service, towards fixation of pay. In support of their submissions, learned counsel for the petitioners also invited attention of this court to judgment passed by learned Single Judge dated 15.7.2020 in CWPOA No. 231 of 20119 titled **Amar Nath and others** v. **State of Himachal Pradesh and others** and connected matter, which has been otherwise laid challenge in above captioned appeals, by the State.

16. Having heard learned counsel for the parties and perused material available on record, this court finds that there is no dispute amongst the parties that the petitioners in the writ petitions as well as respondents in the Letters Patent Appeals having been filed by the State are Ex-servicemen and they all have been appointed against the posts reserved for Ex-servicemen in various Departments of State of Himachal Pradesh.

17. Though, initially this category was getting benefit of approved military service in terms of Rule 5 (1) of the Rules, 1972, for counting seniority in service apart from fixation of pay but Division Bench of this Court in **V.K. Behal** supra, which has been further upheld by Hon'ble Apex Court, has read down rule 5(1) of the Rules, 1972, to the extent, it provided for counting of the approved military service towards seniority in the subsequent service of the State. It is also not in dispute that in V**.K. Behal** supra, Division Bench held that the benefit of past service can only be available from a date when Ex-serviceman acquired the age and minimum educational qualification and no benefit can be given for the army service rendered prior to the date of acquisition of such qualification.

18. In compliance to aforesaid observation made by Division Bench of this Court in **V.K. Behal** supra, rule 5 was amended vide Notification dated 29.1.2018 providing therein that only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant Rules, shall count towards fixation of pay and seniority in that service.

19. Now drawing strength from the aforesaid amendment carried out in the said rule, benefit of approved military service towards fixation of pay is being restricted to the period of approved military service, rendered after attaining the minimum age and educational qualification prescribed for the post, on which such Ex-serviceman is appointed.

20. Since it is quite apparent from the judgment in **V.K. Behal** supra, that rule 5(1) has been read down to the extent it had provided benefit of counting approved military service towards seniority in the service, there cannot be any dispute qua the entitlement of Ex-serviceman for counting of approved military service towards fixation of pay. However, in the cases at hand, State by way of issuing Notifications dated 29.1.2018 and 30.1.2018 has attempted to deny benefit of approved military service to the Ex-serviceman for the purpose of pay fixation. Vide communication dated 30.1.2018, issued by Additional Chief Secretary to the Government of Himachal Pradesh to various officers of the State, it has been conveyed that in terms of judgment of this court in **V.K. Behal,** benefit of seniority as per 1972 Rules and the Ex-servicemen.. (Reservation of Vacancies in the Himachal Pradesh Technical Services) Rules, 1985 are to be reviewed and seniority lists in all cadres are to be reframed accordingly showing position as on 29.12.2008, when this Court had read down and declared the rule 5(1) of the Rules, 1972 unconstitutional, insofar as it gives benefit of counting of past army service towards seniority in civil employment in the case of ex-servicemen, who have

not joined the Armed forces during the period of emergency. However, the ex-servicemen appointed against the vacancies reserved for ex-servicemen in civil employment shall be entitled to avail the benefit of fixation of pay from a date when the ex-servicemen attain minimum age and educational qualification eligibility criteria prescribed in the rules. The fixation of pay will be in accordance with the instructions issued by the Finance Department from time to time. The above referred instructions dated 17.5.2013 were rescinded accordingly.

21. There cannot be any quarrel with the fact that now Ex-servicemen who did not join the Armed Forces during period of emergency are not entitled to have benefit of approved military service for the purpose of seniority but the action of the State, in not giving benefit of approved military service towards fixation of pay of the ex-servicemen is not sustainable in the eye of law being arbitrary. Once aforesaid right stands conferred upon Ex-serviceman in terms of provisions of sub-rule 1 of rule-5 of f1972 rules, which still exists in the rule book, amendment if any, carried out in the aforesaid rules after passing of judgment in **V.K. Behal** supra cannot be otherwise made applicable retrospectively qua those Ex-servicemen, who otherwise stand appointed against the posts reserved for this category prior to issuance of Notification dated 29.1.2018. Perusal of aforesaid Notification which has been extracted herein above, clearly reveals that these amended rules were to come into force from the date of publication in *Rajpatra*/E-gazette of Himachal Pradesh i.e. 29.1.2018, meaning thereby that the Ex-servicemen who stood appointed prior to issuance of aforesaid Notification against the posts reserved for this category, otherwise cannot be denied benefit of approved military service towards fixation of pay, on the ground of minimum age and educational eligibility criteria.

22. Otherwise also, this issue is no more *res integra* in terms of judgment of this court in **Avtar Singh Dyal** case supra, wherein it has been held that

right of Ex-serviceman to avail the benefit of counting approved military service towards fixation of pay in terms of sub-rule (1) of rule 5 of 1972 rules cannot be denied/defeated even if an Ex-serviceman had not joined Armed Forces during emergency. Relevant paras of the aforesaid judgment are reproduced herein below:

> "Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972, reads thus:
>
> > "(1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant rules, shall count towards fixation of pay and seniority in that service. This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under the State/Central Govt. against reserved posts."
>
> 8. In case the aforesaid rule is minutely analyzed, it would be seen that it comprises of two parts, 1st pertains to counting of service for the purpose of fixation of pay and 2nd pertains to counting of service for the purpose of seniority.
>
> 9. The question therefore, required to be determined is as to whether this court while deciding V.K.Behal's case (supra) declined all the benefits provided under Rule 5(1) (supra) to those exservicemen, who admittedly had joined the Armed Forces as a career. In our humble and considered opinion the court has only adjudicated upon the benefit of counting of past army service towards seniority in civil employment and has not adjudicated upon the conferment of benefit of past army

service in so far it pertains to fixation of pay. In fact this claim was neither agitated by the petitioners therein nor adjudicated upon by this court. Rather what appears from the perusal of judgment is that even the petitioners therein had no objection in case financial benefit like fixation of pay was granted to the ex-servicemen, as would be clear from para-3 of report, which reads as follows:-

> "3. The main contention raised on behalf of the petitioners by Sh.Dalip Sharma is that the Rules are unconstitutional because they give benefit of even those ex-servicemen who had not joined service in the armed forces during the period of emergency. According to the petitioners, the persons who join the armed forces when the situation in the Country is normal do not do anything extra-ordinary and they join the armed forces like any other career and therefore, there is no rationale for giving them benefit of the service rendered by them in the armed forces for the purposes of pay and seniority. Sh. Dalip Sharma, learned counsel for the petitioners had urged that he is not in any manner arguing that the ex-servicemen do not form a separate class. He submits that to satisfy the tests of Article 14 not only should the classification be justified but there should be a reasonable nexus with the object sought to be achieved. It is his submission that if the object is to rehabilitate the ex-serviceman this object is served by providing reservations to them. However, according to him, there is no justification in granting them the benefit of seniority by adding the period of service rendered by them in the Army. He submits that once the persons are recruited from various sources and become members of one service no further distinction can be made between them on the ground of the past service rendered in a totally unrelated employment. In the alternative he submits that the benefit, if any, should be restricted to grant of financial benefits like fixation of pay only and the rights of other individuals who joined service much before the ex-servicemen cannot be jeopardized by giving the ex-servicemen benefit of adding the service rendered by them in the armed forces for reckoning their seniority. According to him, the case of ex-servicemen who joined armed

> forces during the period of emergency when the Nation was facing foreign aggression or when the sovereignty and integrity of the Country was at stake, stands on a completely different footing and the exservicemen who joined during emergency have to be treated as a different class. The benefit given to such ex-servicemen who joined during emergency cannot be extended to the person who joined service during normalcy. In the alternative it is urged that even if the Rule is held to be valid the deemed date of appointment cannot be from a date prior to such persons acquiring the minimum educational eligibility criteria prescribed in the Rules."

10. Notably even this court did not find any illegality in so far as the pay of ex-servicemen was protected, as would be clear from the following observations:-

> "10. There may exist an intelligible criteria for providing reservation to ex-servicemen. The object is also reasonable i.e.. to rehabilitate the ex-servicemen but this object can be achieved by providing reservations to them.Nobody is against such reservation. Their pay can also be protected. The problem arises when there is a conflict between persons from the civil society who have joined service much earlier than the ex-servicemen but then they are placed lower when the ex-servicemen who are given benefit of their past service regardless of the fact whether they have joined during emergency or not."

11. Once this is the position, the respondents cannot under pretext of judgment in V.K.Behal's case (supra), being sub-judice before the Hon'ble Supreme Court, deny to the petitioners the benefit of approved military service for counting the same towards fixation of pay.

12. In so far as the question of counting the same towards the seniority is concerned, the same shall essentially have to abide by the decision of the apex court in V.K.Behal's case. In the event of the

Hon'ble Supreme Court ultimately deciding in favour of the exservicemen, then needless to say that the same benefit shall also have to be extended to the petitioners.

13. With these observations, the petitions are partly allowed. The respondents are directed to grant the benefit of approved military service towards fixation of pay after considering their cases against the vacancies of ex-servicemen, which have arisen in the year 2012. The Registry is directed to place a copy of this judgment on the file of connected matter."

23. Amendment carried out in sub-rule 1 of Rule 5 vide Notification dated 29.1.2018, otherwise does not affect rights of the petitioners, who are claiming benefit of counting of approved military service towards fixation of pay. Government of Himachal Pradesh with a view to bring 1972 Rules in harmony with judgment of this Court in **V.K. Behal** supra has amended aforesaid rules providing therein that the approved military service shall be counted only for the period, when such Ex-serviceman acquired the minimum age and educational qualification. However, this court is of the view that provision of grant of benefit of approved military service for fixation of pay was very much in 1972 Rules and the same has not been altered /amended even by the amendment carried out vide Notification dated 29.1.2018 and as such, this court has no hesitation to conclude that the Notification dated 29.1.2018 does not affect the right of the Ex-serviceman for counting of approved military service towards fixation of pay

24. Learned Additional Advocate General vehemently argued that in terms of Notification dated 29.1.2018, ex-servicemen would be entitled to grant of benefit of approved military service towards fixation of pay prospectively from 29.1.2018 but such plea of him deserves outright rejection being devoid of

merit. Service conditions of Ex-servicemen who joined civil employment are to be determined in terms of 1972 Rules, as it existed at the time ex-servicemen joined their services. When the ex-servicemen joined their services, they were very much entitled for grant of approved military service towards fixation of pay. It cannot be disputed that aforesaid right of availing benefit of approved military service towards fixation of pay was very much in the rule book, which otherwise never came to be tinkered/quashed and set aside by Division Bench of this court while delivering judgment in **V.K. Behal** supra.

25. Consequently, in view of detailed discussion made herein above, we find merit in the writ petitions and accordingly the same are allowed and the respondents are directed to give benefit of approved military service to the ex-servicemen towards fixation of pay, from the time, they joined the civil employment, ignoring amendment carried out in provision of rule 5(1) of the rules, 1972 which otherwise can be said to have come into operation from the date of Notification dated 29.1.2018.

26. In view of above, Letters Patent Appeals Nos. 70 of 2020, 16 of 2021 and 34 of 2021 are dismissed. Judgments passed by learned Single Judge laid challenge to in the aforesaid appeals are upheld. CWPOA's Nos. 5641 and 5644 of 2020, CWP No. 6443 of 2021 and CWP's Nos. 412, 455 of 2022 and 6358 of 2021 are accordingly allowed in the afore terms.

Pending applications, if any, in all the appeals and petitions stand disposed of.

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

Between:-

CHAMAN LAL, S/O SH. BACHITTAR SINGH, RESIDENT OF UP MOHAL CHAUGAN, MAUZA NURPUR SHEHAR, TEHSIL NURPUR, DISTRICT KANGRA, H.P.

...PETITIONER/JUDGMENT-DEBTOR

(BY SHRI AJAY SHARMA, SENIOR ADVOCATE, WITH SHRI ATHARAV SHARMA, ADVOCATE)

AND

1. KULBIR SINGH, SON OF

2. SMT. CHANDER KANTA, WIFE OF SH. CHAIN SINGH, SON OF RASAL SINGH.

BOTH RESIDENTS OF WARD NO. 9, NURPUR TOWN, TEHSIL NURPUR, DISTRICT KANGRA, H.P.

...RESPONDENTS/DECREE-HOLDERS

(BY SHRI R. K. GAUTAM, SENIOR ADVOCATE, WITH SHRI SAHIL DIXIT, ADVOCATE)

CIVIL REVISION
No. 139 of 2019
Decided on: 13.06.2022

**Code of Civil Procedure, 1908-** Section 115- Revision- Order 21 Rule 32- Execution- Executing Court ordered for the attachment of immovable property of judgment debtor as well as detention of the judgment debtor in civil imprisonment- Held- No demonstrated by the petitioner that the findings returned by the Ld. Executing Court were perverse- Judgment debtor has been found to have encroached upon the suit land during demarcation- No infirmity in the order of Ld. Executing Court- Revision dismissed. (Para 10, 11)

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

**J U D G M E N T**

By way of this petition filed under Section 115 of the Code of Civil Procedure, the petitioner/Judgment Debtor has assailed order dated 03.09.2019, passed by the learned Executing Court (Court of learned Senior Civil Judge, Nurpur, District Kangra, H.P.) in Execution Petition No. 55/2015, titled as *Kulbir Singh and another Vs. Chaman Lal*, in terms whereof, an Execution Petition preferred under Order 21 Rule 32 of the Code of Civil Procedure by the respondents/Decree-Holders against the present petitioner/Judgment Debtor has been allowed and the Executing Court has ordered the execution of the decree by way of attachment of immovable property of Judgment Debtor as also by way of detention of the Judgment Debtor in civil imprisonment.

***2.*** Brief facts necessary for the adjudication of the present petition are that an Execution Petition under Order 21 Rule 32 of the Code of Civil Procedure for execution of the judgment and decree dated 30.07.2011, passed in Civil Suit No. 152/2008, titled as *Kulbir Singh and another Vs. Chaman Lal* was filed by the respondents/Decree Holders, copy whereof is appended with the present petition as Annexure P-1. It was averred in the petition that the suit filed by the Decree Holders was decided by the learned Court in their favour on 30.07.2011 and in terms of the judgment and decree passed in Civil Suit No. 152/2008, the defendant/Judgment Debtor was restrained permanently from interfering, dispossessing and changing the nature of the land comprised in Khata No. 25, Khatauni 27, Khasra No. 1297/195, measuring 478-00 sq. metres, situated in Up Mohal Chougan, Mouza Nurpur Shaher, Tehsil Nurpur, District Kangra, H.P. It was further averred in the petition that the judgment and decree was passed in the presence of Judgment Debtor/his counsel and despite the Judgment Debtor having sufficient time to obey the same, he had not obeyed the decree willfully and the same was still not being obeyed by him. It was further averred in the

petition that Judgment Debtor was threatening w.e.f. 04.10.2015 to raise construction by way of erecting building etc. and for this purpose, he had collected building material with intent to dispossess the Decree Holders from vacant portion of Khasra No. 1207/195, i.e., the suit land and was continuously interfering by tethering cattle etc., throwing wooden logs and cattle dungs as also dirty water on the suit land. It was further stated in the petition that in this manner, the Judgment Debtor was interfering by threatening not only to raise construction but also by throwing dirty water etc. which amounted to disobedience of the judgment and decree passed by the learned Court dated 30.07.2011. According to the Decree Holders, the Judgment Debtor was asked to desist from interfering in the above mentioned manner and to obey and abide by the judgment and decree, but as he failed to do so, therefore, the petition was being filed under Order 21 Rule 32 for attachment of the property and detention of the Judgment Debtor in Civil imprisonment.

***3.*** Reply to the said petition was filed by the Judgment Debtor, which is on record as Annexure P-2. The passing of the decree in favour of the Decree Holders was admitted by the Judgment Debtor, however, the other allegations made in the petition were denied, as being false. It was further mentioned in the reply that on 04.10.2015, the Decree Holders under the garb of stay order, started interfering in the land owned and possessed by the Judgment Debtor, whereupon, the Judgment Debtor made a request to the Police, i.e., Police Station Nurpur, District Kangra, H.P. and in order to save their skin, the Decree Holders have filed the Execution Petition.

***4.*** The petition so filed by the Decree Holders has been allowed by the learned Executing Court vide order dated 03.09.2019, which stands impugned by way of present petition.

***5.*** Learned Senior Counsel appearing for the petitioner has argued that a perusal of the order passed by the learned Executing Court in general

and para-9 thereof in particular would demonstrate that except for the statement of AW-3 Rajinder Singh, Field Kanungo, there was no material on record, from which it could be inferred that the Judgment Debtor was disobeying the decree passed by the learned Trial Court and reliance placed upon the said statement by the learned Executing Court renders the order *per se* to be bad in law, because by doing so, learned Executing Court dis-regarded the well settled law laid down by this Court that in proceedings initiated under Order 21 Rule 32 of the Code of Civil Procedure, Local Commissioners cannot be appointed for the purpose of demarcation. On the strength of the said contention, learned Senior Counsel argued that the present petition be allowed and the order in issue be set aside.

***6.*** Learned Senior Counsel appearing for the respondents/Decree Holders submitted that there is no infirmity in the order under challenge, for the reason that it stood substantiated before the learned Executing Court that the decree which was passed by the learned Trial Court was being flouted with impunity by the Judgment Debtor. Learned Senior Counsel while drawing the attention of the Court to the contents of order impugned in general and paras-16 and 17 thereof in particular submitted that in fact there was no Local Commissioner appointed in the case and it was on the basis of a complaint which was made by the Decree Holders to the Police with regard to unauthorized interference by the Judgment Debtor upon the suit land and also that demarcation of the suit land was carried by the Revenue Authorities, in which, the Judgment Debtor was also associated and this demarcation clearly demonstrates that there was encroachment by the Judgment Debtor on the spot. Learned Senior Counsel also submitted that besides this fact, here was a case where on one hand, the Judgment Debtor admits passing of the judgment and decree in favour of the Decree Holder, but he denies the factum of the Decree Holders being owners of the suit land. In the course of execution proceedings, he also denied the carrying out of any demarcation by

AW-3, despite the fact that the record clearly and categorically demonstrates that the Judgment Debtor was duly associated with the said demarcation. On these basis, learned Senior Counsel submitted that as there is no infirmity with the order impugned and learned Executing Court correctly allowed the Execution Petition, this petition being devoid of any merit be dismissed.

***7.*** I have heard learned Senior Counsel for the parties and have also gone through the pleadings as well as the documents appended with the petition.

***8.*** In exercise of its powers so conferred under Section 115 of the Code of Civil Procedure, this Court interferes in matters where the Court below either exercises jurisdiction not vested in it or fails to exercise the jurisdiction so vested in it; or exercises jurisdiction vested in it with material irregularity. Here it is not the contention of the petitioner that the learned Court below has either exercised the jurisdiction not vested in it or has not exercised the jurisdiction vested in it. Therefore, the order impugned has to be examined by the Court from the prism as to whether the learned Court below has exercised the jurisdiction vested in it with material irregularity or not.

***9.*** The grounds on which the Execution Petition was filed by the Decree Holders have already been elaborated by me hereinabove. Response thereto by the Judgment Debtor has also been referred to by me hereinabove. Passing of decree by the learned Court below in Civil Suit No. 152/2008 on 30.07.2011 in favour of the Decree Holders and against the Judgment Debtor has not been denied by the Judgment Debtor. In para-2 of the Execution Petition, it has been categorically mentioned that the decree passed by the Court was to permanently restrain the Judgment Debtors from interfering, dispossessing and changing the nature of the land comprised in Khata No. 25, Khatauni 27, Khasra No. 1297/195, measuring 478-00 sq. metres, situated in Up Mohal Chougan, Mouza Nurpur Shaher, Tehsil Nurpur, District Kangra, H.P. A perusal of the reply filed to para-2 of the Execution Petition

demonstrates that the contents thereof have been admitted by the Judgment Debtor. To be more precise, in response to what was pleaded in para-2 of the Execution Petition, the reply filed by the Judgment Debtor thereto reads as under:-

> *"2. Reply to para No. 2:- It relates to judicial record, needs no reply."*

This demonstrates that the factum of the Judgment Debtor having been restrained from interfering, dispossessing and changing the nature of the suit land was admitted by the Judgment Debtor. Now, when one peruses the order under challenge, one finds that while allowing the Execution Petition, learned Execution Court took into consideration the fact that there was a demarcation report Ex. PW3/G and this demarcation report was duly proved on record by the Field Kanungo, Tehsil Office Nurpur, District Kangra, H.P., who appeared in the Court as AW-3 and deposed in the Court on 15.12.2016 that he had demarcated the suit land in accordance with law and found that the suit land belonging to the Decree Holders was encroached upon by the Judgment Debtor to the extent of 146.20 sq. metres, as shown in Khasra No. 1207/195/1 by way of fencing and stacking stones, bricks, fire wood and cattle dung.

***10.*** Now, during the course of arguments, it could not be demonstrated by the petitioner that the findings returned by the learned Executing Court were perverse findings. The contention of learned Senior Counsel for the petitioner that the statement of AW-3 was erroneously relied upon by the learned Executing Court is without any merit. Herein, it is not as if an application filed under Order 26, Rule 9 of the Code of Civil Procedure by the Decree Holders before the learned Executing Curt was allowed by it and thereafter demarcation of the suit land was carried out. As is evident from the record, the demarcation was carried by the revenue authorities independently

and not on account of any application filed under Order 26, Rule 9 of the Code of Civil Procedure/order passed by the Court on the said application. In this view of the matter, the judgments of the Hon'ble Co-ordinate Benches relied upon by the learned Senior Counsel for the petitioner, i.e., judgments in *Liaquat Ali Vs. Amir Mohammad & Ors.*, Latest HLJ 2016 (HP) 831 and in *Ved Parkash Vs. Mool Raj Padha*, CMPMO No. 19 of 2013, decided on 8th September, 2016 are not applicable to the facts of the case. A perusal of the impugned order further demonstrates that the Judgment Debtor in the course of cross-examination in fact had denied the demarcation having been conducted at the spot. The denial of demarcation by the Judgment Debtor speaks volumes of his conduct, because it could not be denied during the course of arguments that the Judgment Debtor was duly associated in the course of demarcation, which was undertaken by the field agencies, resulting in the culmination of demarcation report Ex. AW3/G. Incidentally, record does not demonstrates that this demarcation was challenged by the Judgment Debtor. This means that the demarcation report with which the Judgment Debtor was associated, was accepted by the Judgment Debtor and it attained finality, in terms whereof, the Judgment Debtor has been found to be encroacher of the suit land even after the passing of the decree.

***11.*** In view of what has been held hereinabove, this Court finds no infirmity in the order which has been passed by the learned Executing Court, vide which, it has ordered the execution of decree dated 30.07.2011, passed in Civil Suit No. 152/2008 by way of attachment of immovable property of Judgment Debtor and also by way of detention of the Judgment Debtor in civil imprisonment. Further, a careful perusal of the order passed by the learned Executing Court demonstrates that it cannot be said that it has exercised the jurisdiction vested in it with material irregularity. Therefore, as

this Court finds no merit in the petition, the same is dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

SH. RAKESH KUMAR, S/O LATE KHAJANA RAM, R/O VILLAGE DHAR JATTA, P.O. BHUMTI, TEHSIL ARKI, DISTT. SOLAN, H.P.

...PETITIONER

(BY SHRI V.D. KHIDTTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (PW) TO THE GOVT. OF H.P., SHIMLA-2.

2. THE ENGINEER-IN-CHIEF, HP PUBLIC WORKS DEPARTMENT, NIGAM VIHAR, SHIMLA-2.

3. THE EXECUTIVE ENGINEER (HP PWD), DIVISION ARKI, SOLAN, H.P.

...RESPONDENTS

(M/S SUMESH RAJ & DINESH THAKUR, ADDITIONAL ADVOCATE GENERALS & MR. J.S. BAGGA, ASSISTANT ADVOCATE GENERAL).

CIVIL WRIT PETITION
(ORIGINAL APPLICATION)
No.6065 of 2019
Decided on 02-06-2022

**Constitution of India, 1950-** Article 226- Compassionate appointment- Petitioner applied for job under the policy of the Government regarding

employment on compassionate ground after the death of his father serving as Beldar in H.P.P.W.D. on regular basis- Application was rejected by the department- Held- Ignoring the daughter of the deceased which taking into consideration the number of the family members is arbitrary and mandamus is issued to offer appointment to petitioner on compassionate basis as per his qualification. (Para 6, 7)

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

**J U D G M E N T**

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

> "(i) That the impugned order of rejection dated 10.11.2014 which was received by the applicant under RTI in the year 2015 may kindly be quashed and set aside.
>
> (ii) That the respondents may kindly be directed to consider the case of the applicant for compassionate appointment on the post of Clerk for which he is legally entitled."

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

Father of the petitioner, namely, Shri Khajana Ram, was serving as a Beldar in Arki Division of Himachal Pradesh Public Works Department on regular basis. He died in harness on 17.05.2007. After the death of his father, the petitioner applied for job under the Policy of the Government regarding

employment on compassionate grounds. The application was submitted by the petitioner in the year 2008. Initially, the case of the petitioner was rejected by the Government on the ground that the same did not meet the financial income criteria so fixed by the Government in terms of the Department of Personnel's instructions dated 24.08.2002 and 02.09.2002. This was followed again by a representation made to the authorities by the mother of the petitioner, wherein a request was made to consider her case for appointment on compassionate grounds in the circumstances. Record demonstrates that thereafter the petitioner again applied for appointment on compassionate basis in terms of application A-6, but through the information which was obtained by the petitioner under the Right to Information Act, i.e., Annexure A-7, the petitioner came to know that his application was again rejected and it is in these circumstances that present petition has been filed.

***3.*** In the reply filed to the petition, it stands averred therein that after the death of Shri Khajana Ram, the petitioner applied for job on compassionate grounds in the year 2008 for the post of Clerk. The deceased had left behind four family members, i.e., his wife, two sons and a daughter. The daughter was stated to be married. The annual family income of the applicant/petitioner at the relevant time was found to be Rs.95,122/- in terms of the income certificate issued by the office of Tehsildar on 11.09.2013. Annual income fixed as per Government/Finance Department w.e.f. August, 2013 was Rs.1,25,000/- for a family of four or more dependents with individual income of Rs.31,250/- per annum. In the case of the petitioner, the individual annual income come to Rs.31,707/- and therefore in these circumstances, the family of the deceased Government servant was not found to in indigent condition and this has led to the rejection of the claim of the petitioner.

***4.*** In terms of the last order passed by the Court, the record vide which the case of the petitioner was considered by the Department for grant of

compassionate appointment stands produced. Perusal thereof demonstrates that after the death of the father of the deceased, when the petitioner applied for job, then as per the income certificate issued by the Sub-Divisional Magistrate, Arki, dated 19.12.2008, the annual income of the family of the deceased from all sources was shown as Rs.33,800/-. To this, the amount which the family started getting as pension was also added and the annual income of the family thus went to Rs.53,280/-. As per the Notings, the annual income of the family of the deceased was thus found to be within the prescribed limit of Rs.75,000/- per annum, by taking the family of the deceased consisting of three members at the relevant time, i.e., wife and two sons. On these bases, the case was recommended for the approval of the Finance Department. The rejection of the case of the petitioner in terms of the communication received from the Finance Department was for the reason that grant of compassionate appointment to the petitioner did not meet the financial/income criteria fixed by the Government. Thereafter, the case was re-submitted, as has been mentioned hereinabove, but in terms of the reply filed by the State, in view of the individual income of the family of the deceased being assessed to be Rs.31,707/- , the case of the petitioner has been rejected.

***5.*** Having heard learned counsel for the petitioner as well as learned Additional Advocate General and having perused the pleadings as well as the documents on record as also the record produced by the learned Additional Advocate General, this Court is of the considered view that the decision of the respondents of denying appointment to the petitioner on compassionate grounds is harsh. The Court is making this observation for the reason that it is the case of the respondent-Department itself that had the income of the individual member of the deceased family been assessed at Rs.31,250/- or less, then the petitioner would have been eligible for appointment on compassionate basis, but as the income was found to be

Rs.31,707/-, i.e., about Rs.450/- more than the cut off limit per member, therefore, the case of the petitioner stands rejected.

***6.*** This Court wants to make an observation that when the deceased was survived by his wife, two sons and a daughter, then not considering the daughter to be a part of the family of the deceased so as to assess as to whether the per person annual income of the family members of the deceased falls within the prescribed limit or not, is arbitrary. Simply because the daughter is married, this does not means that she loses her identity as member of the family of her father. The Court is making this observation for the reason that it is not as if on account of the marriage of the sons of the deceased, the wives of the sons of the deceased stand included as family members for this purpose. In case the criteria fixed by the Government is taken to its logical conclusion, then the factual position is that a girl by virtue of marriage loses her identity both as a daughter of her father as well as a member of her husband's family, for the purpose of being counted as a family member to assess the income of the members of the deceased family for compassionate appointment. This in the considered view of the Court is arbitrary and discriminatory. There is no rationale as to why a daughter after marriage should not be counted as member of the family for the purpose of assessing the annual family income for compassionate appointment. In case the criteria so fixed by the Government is given the stamp of approval by the Court, then the Court will also become a party to this gender inequality, being practised by the State. Therefore, in these circumstances, this Court is of the considered view that the annual family income of the deceased in the present case has to be assessed by considering the strength of the family to be four, i.e., wife, two sons and a daughter. The Policy has to be read down as such. Now, if the number of the family is taken to be as four, then if a sum of Rs.1,25,000/- is divided by four, there is no dispute that individual annual income per family member comes to less than Rs.31,250/-.

***7.*** Accordingly, this petition is allowed by holding that the act of the respondent-State considering the income of the individual family member of the deceased to be Rs.31,707/- by ignoring the daughter of the deceased, while taking into consideration the number of the family members/dependents is arbitrary and mandamus is issued to the respondents to offer appointment to the petitioner on compassionate basis as per his qualification, as from the date of filing of the petition. The appointment of the petitioner from the said date shall be deemed to be notional for all intents and purposes, including monetary and actual benefits thereupon shall accrue to the petitioner as from the date of appointment, which shall be offered to the petitioner not later than 15th July, 2022.

With these observations, the petition stands disposed of, so also pending miscellaneous applications, if any.

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

Between:-

ICICI LOMBARD GENERAL INSURANCE COMPANY LIMITED,
SCO 24-25, SECTOR 8-C, CHANDIGARH,
THROUGH ITS
MANAGER (LEGAL)
ICICI LOMBARD GENERAL INSURANCE COMPANY LIMITED,
4TH FLOOR, PLOT NO. 149, 2ND FLOOR,
THE STATESMAN, INDUSTRIAL AREA,
PHASE-I, NEXT TO HOMETAL HOTEL,
CHANDIGARH (UT)

... APPELLANT

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. ADITYA S/O SH. ANIL KUMAR,

2. SUNNY S/O SH. ANIL KUMAR

3. SH. ANIL KUMAR S/O PALA RAM,

ALL RESIDENT OF VILLAGE AND
POST OFFICE PANDOH, TEHSIL SADAR,
DISTRICT MANDI, HP

RESPONDENTS/PETITIONERS

4. HARYANA STATE ROADWAYS TRANSPORT
DELHI DEPOT
THROUGH ITS GENERAL MANAGER

5. SH. DHARAMVIR S/O NOT KNOWN,
DRIVER OF BUS NO. HR-69-A-6158,
HARYANA STATE ROADWAYS TRANSPORT,
DELHI DEPOT

RESPONDENTS

(BY MR. ASHOK KUMAR VERMA,
ADVOCATE
FOR R-1 TO R-3

NONE FOR R-4 AND R-5)

FIRST APPEAL FROM
ORDER NO. 5 OF 2016
Decided on 03-03-2022

**Motor Vehicle Act, 1988-** Section 173- Motor Accident Claims Tribunal ordered to pay compensation of Rs.41,29,259/- along with interest at the rate of 7.5% per annum- Death case – Annual income of the deceased has been taken as Rs.2,16,427/- as per income tax return- Held- Deduction on account of income tax- Ld. Tribunal below has awarded excessive amount under the heads of loss of estate and funeral expenses which ought to have been Rs.15000/- each only- Appeal partly allowed. (Para 16, 17, 18, 19, 20)

**Cases referred:**

National Insurance Co. Ltd. v. Pranay Sethi, (2017)16 SCC 680;
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;
Shyamwati Sharma v. Karam Singh, (2010) 12 SCC 378;

This appeal coming on for orders this day, the court delivered the following:

**J U D G M E N T**

Instant appeal filed under S. 173 of the Motor Vehicles Act (hereinafter, 'Act') lays challenge to award dated 3.10.2015 passed by learned Motor Accident Claims Tribunal (II), Mandi, District Mandi, H.P. in MAC Petition No. 642/2013, whereby learned Tribunal below, while allowing claim petition having been filed by respondents Nos. 1 to 3/claimants, (hereinafter, 'claimants') saddled the appellant-insurance company with the liability to pay compensation to the tune of Rs. 41,29,259/- alongwith interest at the rate of 7.5% per annum, to the claimants, from the date of filing of petition, till realization.

2. Precisely, the facts of the case, as emerge from the record, are that the claimants filed a claim petition under S.166 of the Act, averring therein that on 26.12.2010, deceased Seema Devi, alongwith claimants was going from Mandi to Delhi in Bus bearing registration No. HR-69-A-6158, being driven by respondent No. 5 herein, in a rash and negligent manner, due to which it collided with truck bearing registration No. HP-19-A-2268. Seema Devi, expired in the accident. It is averred that the accident took place due to rash and negligent driving on the part of respondent No.5 herein. It is further averred that the deceased Seema Devi was in network marketing with RMP Info-Tech Pvt. Ltd. and was earning Rs. 40,000/- per month. It is also averred that claimants No.1 and 2 were being looked after by the deceased, as such, entitled for the compensation on account of death of the deceased.

3. Claim put forth by claimants came to be resisted by respondent No.4 by filing reply, wherein preliminary objections of locus-standi and maintainability have been taken. It is averred in the reply that the accident had not taken place due any fault of the driver of the bus. Respondent No.1

also stated in the reply, that since the bus in question was insured with respondent No.3, as such, it was liable to indemnify the claimants.

4. Respondent No. 5, while filing separate reply, took preliminary objections of maintainability, locus-standi, non-joinder and mis-joinder of necessary parties. On merit, he stated that the case has been wrongly registered against him and the accident had taken place due to rash and negligent driving on the part of the driver of the truck bearing registration No. HP-19-A-2268.

5. Appellant-Insurance Company, respondent No.3 before learned Tribunal below, while filing its reply, took preliminary objections of maintainability, non-joinder and mis-joinder of necessary parties. It is averred by the appellant-Insurance Company in its reply that the insurer of the Truck has not been made party in the petition. On merit, factum of accident has not been denied, but it is averred by the appellant-Insurance Company in its reply that the same was the result of rash and negligent driving on the part of the driver of the truck.

6. On the basis of pleadings of parties, learned Tribunal below framed following issues on 23.9.2011:

"1. Whether the deceased had died in a Motor Vehicles Accident involving vehicle bearing registration No. HR-69-A-6158 and vehicle bearing registration No. HP-19-A-2268 on dated 26.12.2010? OPP

2. Whether respondent No. 2 was driving the vehicle in a rash and negligent manner which led to the accident? OPP

3. Whether the petitioners are entitled for compensation to the extent of Rs.20,00,000/-? OPP

4. Whether the petition is not maintainable? OPR

5. Whether the petition is bad for non-joinder and mis-joinder of necessary parties? OPR

6. Whether the petitioner has no locus-standi to file the present petition?OPR

7. Relief"

7. Subsequently vide impugned Award dated 3.10.2015, learned Tribunal below allowed the claim petition and awarded sum of Rs. 41,29,259/- as compensation in favour of claimants Nos. 1 and 2 only, alongwith interest at the rate of 7.5% per annum from the date of petition till realization. Since the appellant-insurance company, being insurer, came to be fastened with liability to pay compensation, it has approached this court in the instant proceedings.

8. Having heard learned counsel for the parties and perused material available on record, vis-à-vis the reasoning assigned by learned Tribunal below in the impugned Award, this court finds that appellant-insurance company has laid challenge to award primarily on following grounds.

(a) Learned Tribunal below has failed to take note of the fact that as per tax slabs prevalent at the time of accident, income upto Rs. 1,60,000/- was tax free and thereafter, from 1,60,001-5,00,000/- income tax at the rate of 10% was liable to be deducted, as such, the net income of the deceased should have been assessed after deducting the amount of income tax payable by the deceased.

(b) Learned Tribunal below wrongly awarded compensation under the heads of funeral and cost of litigation as Rs.50,000/- and under loss of estate at Rs. 1,00,000/-, whereas, Rs. 15,000/- only under each head could have been awarded by learned Tribunal below. Similarly, no amount could have been awarded under the head of loss of expectation of life.

(c) Learned Tribunal below has wrongly granted 50% of addition on account of loss of future prospects, since the deceased was not in regular employment and as per Pranay Sethi's case, only 40% addition on account of loss of future prospects, could have been awarded.

9. Learned counsel for the appellant, while inviting attention of this court to judgment of Hon'ble Apex Court in **Shyamwati Sharma** v. **Karam Singh**, (2010) 12 SCC 378, argued that where the income of the deceased is in taxable range, appropriate deductions should be made towards income tax/surcharge, while calculating his net income and as such, in the case at hand, net income of the deceased ought to have been assessed after deducting the tax payable.

10. Learned counsel for the appellant-Insurance Company, also invited attention of this Court to judgment rendered by Hon'ble Apex Court in **National Insurance Co. Ltd.** v. **Pranay Sethi**, (2017)16 SCC 680, to buttress his argument qua the fact that the learned Tribunal below could have awarded amount of Rs. 15,000/- each under the heads of funeral expenses and loss of estate and no amount could have been awarded on account of loss of expectation of life, as such, impugned award deserves to be modified on this count also. Learned Counsel appearing for the appellant-Insurance Company further argued that as per Pranay Sethi (supra), only 40% addition on account of loss of future prospects could have been awarded since the deceased was not in regular employment and impugned award needs modification on this count also.

11. Mr. Ashok Kumar Verma, learned counsel for the claimants, contended that the learned Tribunal below has rightly assessed the income of the deceased based on the Income Tax Returns and no deduction is required to be made from the assessed income of the deceased. Mr. Verma, further argued that the learned Tribunal below has not awarded any amount under the heads of loss of consortium, since claimants Nos.1 and 2 have lost care and guidance of a mother and similarly, claimant No.3 has also lost the love and care of his spouse, as such, impugned award deserves to be enhanced on these counts. Learned Counsel appearing for the appellant-Insurance

Company further argued that keeping in view the prevalent rate of interest, same is on lower side and the same is required to be enhanced.

12. Since, there is no dispute qua the income of the deceased as such, this court need not go into that aspect of the matter. So far contention of the Learned Counsel appearing for the appellant-Insurance Company qua the deduction to be made from the assessed income, on account of income tax, is concerned, reference may be made to **Shyamwati Sharma** (supra), wherein Hon'ble Apex Court has held as under:

"7. As noticed above, the gross salary was Rs.13,794/- per month or Rs.1,65,528/- per annum. By adding 50% towards future prospects (as the deceased was less than 40 years of age), the deemed gross income would have been Rs.20,691/- per month or Rs.2,48,292/- per annum. The percentage of deduction towards income-tax and surcharge, taken as 30% by the High Court, does not require to be disturbed, having regard to the income. On such deduction, the net annual income of the deceased would have been Rs.1,73,800/-. From the said sum, one-fourth (25%) had to be deducted towards the personal and living expenses of the deceased. Thus the contribution of the deceased to his family would have been Rs.1,30,350/- per annum. By applying the multiplier of 15, the total loss of dependency will be Rs.19,55,250/-. By adding a sum of Rs.5,000/- each under the heads of loss of consortium, loss of estate and funeral expenses, the total compensation is determined as Rs.19,70,250/-.

8. The submission of the respondents that the deduction of 30% from the salary is not warranted in view of the decision in Sarla Verma, is not sound. In Sarla Verma, the monthly salary of the deceased was only Rs.4004/- and the annual income even after taking note of future prospects was Rs.72072/-. The income was in a range which was exempt from tax, if the permissible deductions were applied. Therefore, this Court did not make any deduction towards income-tax. But this Court made it clear that where the annual

income is in the taxable range, appropriate deduction should be made towards tax.

9. In this case as the annual income has been worked out as Rs.2,48,292/-, appropriate deduction has to be made towards income-tax. The rate of income tax is a varying figure, with reference to taxable income after permissible deductions and the year of assessment. The High Court has assessed the deduction as 30% and on the facts, we do not propose to disturb it. We however make it clear that while ascertaining the income of the deceased, any deductions shown in the salary certificate as deductions towards GPF, life insurance premium, repayments of loans etc., should not be excluded from the income. The deduction towards income tax/surcharge alone should be considered to arrive at the net income of the deceased."

13. Hon'ble Apex Court in the judgment (supra), has upheld the decision of the High Court in deducting income tax payable out of the assessed income to arrive at the net income. In the case at had, annual income of the deceased has been taken as Rs. 2,16,427/- as per assessment made for the year 2010-11. Hon'ble Apex Court in **Pranay Sethi** (supra) has also held that the words "actual salary" should be read as "actual salary less tax. Before coming to the issue of income tax deduction, reference may be made to **Pranay Sethi** (supra), wherein Hon'ble Apex Court has held as under:

"47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted ` 5,000/- for transportation of the body, ` 10,000/- as funeral expenses and ` 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted ` 5,000/- under the head of loss of estate, ` 5,000/- towards funeral expenses and ` 10,000/- towards loss of Consortium. In Rajesh, the

Court granted ` 1,00,000/- towards loss of consortium and ` 25,000/- towards funeral expenses. It also granted ` 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-

"17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. 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 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 ` 15,000/-, ` 40,000/- and ` 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

14. As per Pranay Sethi (supra), an addition of 40% is required to be made in case the deceased was in self employment or on fixed salary and if age of deceased is below 40 years. Here, the deceased was 28 years of age at the time of death and was in private employment, as such, Learned Counsel appearing for the appellant-Insurance Company is right in contending that addition of only 40% to the assessed income of the deceased ought to have been made on account of loss of future prospects.

15. Applying above ratio to the extant case, the loss of dependency qua the deceased would be calculated thus:

Rs.2,16,427+40% of 2,16,427 = 2,16,427+86,570= 3,02,997/-

16. Now, coming back to the question of deduction on account of income tax, Learned Counsel appearing for the parties are ad idem that at the relevant time, the annual income upto Rs. 1,60,000/- was tax free and thereafter, income from Rs. 1,60,001 to 5,00,000/- was liable to income tax at the rate of 10%. Thus, the taxable income of the deceased would be 3,02,997-1,60,000= 1,42,997 and the tax component would 10% of 1,42,997 which comes to Rs. 14,299/-. Thus, the net income after deducting the tax component would be thus: 3,02,997=14,299= 2,88,698/-. Similarly, since the deceased had three family members i.e. claimants, as such, 1/3rd of income is liable to be deducted towards self expenses of the deceased, qua which again the parties are at agreement. Thus the loss of dependency for the claimants would be 2,88,698-1/3x2,88,698 or 2,88,698-96,233 =1,92,465/-

17. Since there is no dispute qua application of multiplier of 17, keeping in view the age of the deceased, the total loss of dependency would be, 1,92,465x17=32,71,905/-.

18. Similarly, learned Tribunal below has awarded excessive amounts under the heads of loss of estate and funeral expense at the rate of Rs.1,00,000/- and Rs. 50,000/- respectively, which ought to have been Rs. 15,000/- each only. Also, no amount could have been awarded under the head loss of expectation of life. However, as per **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018, claimants Nos. 1 and 2 are entitled to parental consortium and claimant No.3 being husband is entitled to spousal consortium, all at the rate of Rs.40,000/- each.

19. 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."

20. Consequently in view of above, award passed but learned Tribunal below needs to be modified in following manner.

| **Head** | **Amount (Rs.)** |
|---|---|
| Loss of dependency | 3271905 |
| Funeral charges | 15000 |
| Loss of estate | 15000 |
| Amount payable to claimants Nos. 1 and 2 each in equal shares | **3301905** |
| Consortium at the rate of Rs.40,000/- each to all the claimants | 120000 |

| | |
|---|---|
| **Total compensation** | **3421905** |

21. So far interest rate awarded by learned Tribunal below is concerned, same calls for no interference.

22. 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.

23. All pending miscellaneous applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Between:-

STATE OF HP
THROUGH
DIRECTOR, DIRECTORATE OF ENERGY,
SHANTI BHAWAN, PHASE-III, SECTOR-6, NEW SHIMLA-09

PETITIONER

(BY MR. SUDHIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL)

AND

M/S BMD PVT. LTD., LNJ NAGAR, VILLAGE MORDI,
DISTRICT BANSWARA-327001, RAJASTHAN
THROUGH ITS
VICE PRESIDENT

RESPONDENT

(BY MR. MANISH KUMAR AND
MR. VISHAL VERMA, ADVOCATES)

2. ARBITRATION CASE NO. 6 OF 2020

Between:-

STATE OF HP
THROUGH
DIRECTOR, DIRECTORATE OF ENERGY,
SHANTI BHAWAN, PHASE-III, SECTOR-6, NEW SHIMLA-09

PETITIONER

(BY MR. SUDHIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL)
AND

M/S BMD PVT. LTD.,
LNJ NAGAR, VILLAGE MORDI,
DISTRICT BANSWARA-327001,RAJASTHAN
THROUGH ITS
VICE PRESIDENT

RESPONDENT

(BY MR. MANISH KUMAR AND
MR. VISHAL VERMA, ADVOCATES)

ARBITRATION CASE NO. 5 OF 2020 and
ARBITRATION CASE NO. 6 OF 2020
Decided on 02-06-2022

**Arbitration and Conciliation Act, 1996**- Section 11(6)- Appointment of Arbitrator- Held- Where in terms of the agreement, arbitration clause has already been invoked by one of the parties thereto, provisions of sub-section (6) of S.11 cannot be invoked and in that case, the aggrieved party has remedy to file petition under S.13 of the Act before arbitrator laying therein challenge to the appointment of arbitrator by the other party in terms of the agreement- Petition not maintainable. (Para 26)

**Cases referred:**

Antrix Corporation Limited v. Devas Multimedia Private Ltd. (2014) 11 SCC 560;

Dattar Switchgrears Ltd. v. Tata Finance Ltd. & anr. (2000) 8 SCC 151;

Indian Oil Corpn. V. Raja Transport (P) Ltd. (2009)8 SCC 520;

Perkins Eastman Architects Dpc v. Hscc (India) Limited, 2019 (SCC Online 1517);

SP Singla Construction v. State of Himachal Pradesh (2019) 2 SCC 488; Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G., v. Municipal Corporation of Great Mumbai and another, (2015) 3 SCC 800 (2017);
TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377;

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

**O R D E R**

Since common questions of law and facts are involved in both the petitions, same were heard together and are being disposed of by this common order.

2. By way of instant petitions, filed under sub-section (6) of S.11 of the Arbitration and Conciliation Act 1996, (hereinafter, 'Act'), prayer has been made on behalf of petitioner for appointment of an arbitrator to adjudicate the dispute in respect of Pre-Implementation Agreement (hereinafter, 'PIA') dated 26.5.2011 entered into between the respondent and the petitioner.

3. For having bird's eye view, certain undisputed facts, as emerge from the record, are that on 26.5.2011, a PIA (Annexure P-1) was signed between the petitioner and the respondent for execution of Malana-III Hydro Electric Project(30 MW) in Kullu District, Himachal Pradesh. Respondent deposited upfront premium of Rs. 6.00 Crore with the petitioner in terms of the PIA (Annexure P-1). Respondent, vide letter dated 26.8.2013, submitted a Detailed Project Report (hereinafter, 'DPR') with the petitioner as per terms of the PIA within the stipulated period but since the project was found technically and financially unviable, respondent in terms of Clause 12 of the PIA sought refund of upfront premium paid by it vide communication dated 21.1.2019, however, the petitioner on 3.10.2019 (Annexure P-2) i.e. nine months after the date of request for refund made by petitioner, terminated and cancelled

the PIA, as a consequence of which upfront premium of Rs. 6.00 Crore deposited by respondent came to be forfeited.

4. Vide legal notice dated 30.10.2019 (Annexure P-3), respondent, while requesting the respondent for refund of upfront premium alongwith interest clearly stated that in case amount is not refunded within 15 days, notice be treated as invocation of Clause 53 of PIA. Aforesaid legal notice was duly served upon the petitioner on 5.11.2019, as is evident from Annexure R-2 annexed with the reply filed by the respondent. Since no reply/objection ever came to be given/raised by the petitioner to the aforesaid legal notice served by respondent, respondent sent a request to Justice S.N. Jha, retired Chief Justice, High Courts of Rajasthan and Jammu & Kashmir, to proceed with arbitration (Annexure P-4).

5. On 13.12.2019, petitioner sent communication to respondent, annexure P-5, raising objection to constitution of arbitral tribunal. In the aforesaid communication, petitioner apprised the respondent that neither Directorate of Energy has given its consent for the name of Justice S.N. Jha, former Chief Justice, Rajasthan and Jammu and Kashmir as sole arbitrator nor it should be taken as an implied consent on its behalf and also advised petitioner to act in accordance with provisions of Arbitration and Conciliation Act, 1996, as amended from time to time.

6. Vide notice dated 19.12.2019(Annexure P-6), above named arbitrator gave notice to both the parties in arbitration proceedings, calling upon them to cause their presence for preliminary hearing to be held on 21.1.2021 at 2.00 pm at his office, C/43, Lower Ground Jangpura Extension, New Delhi.

7. As has been taken note herein above, on 19.12.2019, Justice S.N. Jha had already taken cognizance of matter after being nominated as an Arbitrator by respondent in terms of Clause 53 of PIA and had issued notice to both the parties on 19.12.2019, calling upon them to appear before on 21.1.2020, however, vide communication dated 30.12.2019, annexure P-7, petitioner

while admitting receipt of notice issued by the arbitrator, Justice S.N. Jha (retired), apprised the respondent that it has no other option but to approach this court against unilateral appointment of arbitrator by the respondent and also for appointment of independent and an impartial arbitrator by this court in exercise of power under S.11 (6) of the Act.

8. On 8.1.2020, though, the petitioner filed petition at hand under Section 11(6) praying therein for appointment of an arbitrator and notice in the instant petition was issued on 10.1.2020 but on 21.1.2020, petitioner appeared before arbitrator and filed an application under S.13(3) and **13(2)** of Arbitration and Conciliation Act annexing therewith a copy of order dated 10.1.2020, whereby notices were issued to the respondent in the instant proceedings.

9. Though, there was no order staying proceedings before arbitrator, yet with a view to maintain judicial propriety, arbitrator restrained from holding further proceedings awaiting outcome of the instant proceedings.

10. Mr. Sudhir Bhatnagar, learned Additional Advocate General, representing the petitioner, while fairly admitting factum with regard to dispute inter se parties, on account of forfeiture of upfront Premium deposited by petitioner in terms of PIA signed on 26.5.2011 for execution of Malana III, Hydro Electric Project in Kullu District, contended that as per clause 53 of PIA, (Annexure P-1), dispute inter se parties out of PIA/or interpretation thereof, is/was to be resolved by parties to agreement by mutual negotiations, failing matter is/was to be referred to arbitrator as per provisions of Arbitration and Conciliation Act and as such, action of the respondent inasmuch as unilateral appointment of Justice S.N. Jha, former Chief Justice, Rajasthan and Jammu and Kashmir as an arbitrator is not sustainable in the eye of law being contrary to the very provisions of the arbitration contained in PIA and same is not binding upon the petitioner. He further argued that the petitioner vide notice dated 30.12.2019, annexure P-7, having taken note of

dispute inter se parties, itself apprised respondent with regard to its intention to approach this court under S.11(6) of the Act, for appointment of arbitrator. Mr. Bhatnagar, further submitted that once there is no dispute between parties that dispute has arisen inter se them, out of PIA, petitioner State being one of parties to the agreement has right to approach this court under S.11(6) of the Act, praying therein for appointment of independent and impartial arbitrator. While terming the appointment of Justice S.N. Jha, retired Chief Justice as an arbitrator to be contrary to provision of arbitration clause in PIA, Mr. Bhatnagar, submitted that since very appointment of arbitrator named above is not in accordance with law, notice issued by him dated 19.12.2019 (Annexure P-6) is of no consequence. Lastly, learned Additional Advocate General argued that once appointment of arbitrator unilaterally made by the respondent is/was in violation of provisions contained under the Act, petitioner is well within its right to file application under S.11(6) of Act, seeking appointment of arbitrator by High Court. To substantiate his aforesaid claim, he placed reliance upon judgment passed by Hon'ble Apex Court dated 26.9.2019 in case **Perkins Eastman Architects Dpc** v. **Hscc (India) Limited,** 2019 (SCC Online 1517)

11. Mr. Manish Kumar and Mr. Vishal Verma, learned counsel for the respondent, while referring to reply filed by respondent, vehemently argued that once petitioner approached arbitrator in application under S. 13(3) and 13(2)of the Act, laying therein challenge to appointment of arbitrator, it is estopped from filing the petition at hand, seeking appointment of an arbitrator. He argued that till the time application filed under S. 13(3) is decided by the arbitrator, present petition under S.11(6) cannot be entertained. He further submitted that order if any passed under S. 13(3) can be laid challenge by aggrieved party under S.34 of Act but definitely not under S.11(6) of Act, which empowers Hon'ble Chief Justice to appoint arbitrator in terms of agreement if any arrived inter se parties. He argued that when

petitioner itself by way of an application under S.13(3) has prayed for termination of mandate of the arbitrator, which is pending adjudication, present application deserves outright dismissal being not maintainable at this stage. While inviting attention of this Court to S.11(4) and 11(5) of the Act, learned counsel for the respondent argued that since the petitioner failed to respond within a period of thirty days, from the date of receipt of notice from the respondent with regard to appointment of arbitrator, appointment is required to be made on application of parties as per provisions contained in Sub-section (4), which clearly provides that if a party fails to appoint an arbitrator, within 30 days on receipt of other party, appointment shall be made on the application of the party. In support of his submission, learned counsel for the respondent placed reliance upon judgment rendered by Hon'ble Apex Court in **SP Singla Construction** v. **State of Himachal Pradesh** (2019) 2 SCC 488 and **Perkins Eastman Architects Dpc** Supra. Besides above, learned counsel for the respondent also invited attention of this court to latest judgment of Hon'ble Apex Court in **Swadesh Kumar Agarwal** v. **Dinesh Kumar Agarwal**, Civil Appeal Nos. 2935-2938 of 2022, decided on 5.5.2022, whereby Hon'ble Apex Court placing reliance upon its earlier judgment in SP Construction supra, reiterated that application under S.11 (6) of the act is not maintainable if party seeking appointment of arbitrator has subjected itself to jurisdiction of the arbitrator by filing application under S.13(3) of the Act, praying therein for termination of mandate of the arbitrator.

12. Having heard learned counsel for the parties and perused material available on record, this court finds that the facts as taken note herein above are not disputed rather, stand admitted by both the parties and as such, need not be discussed again.

13. Clause 53 of PIA (Annexure P-1) arrived inter se parties, clearly reveals that parties to PIA /IA (implementation agreement) are to make effort at first instance to resolve dispute out of PIA/IA by mutual negotiations, failing which

matter is/was was to be referred to arbitrator in terms of Arbitration and Conciliation Act, 1996. As per aforesaid clause, all the dispute shall be settled within the jurisdiction of State of Himachal Pradesh.

14. In the case at hand, respondent after having remained unsuccessful in mutual negotiations, sent legal notice dated 30.10.2019 (Annexure P-3) to the petitioner intimating therein decision of respondent to invoke arbitration clause in terms of Clause 53 of the PIA. In the aforesaid notice, in para-5, respondent specifically put the petitioner to notice that in case it fails to refund the amount of upfront Premium of Rs. 6.00 Crore, then it may treat the notice as a notice invoking arbitration clause 53 of PIA dated 26.5.2011. In the aforesaid para, it also proposed name of Justice S.N. Jha, retired Chief Justice, Rajasthan, Jammu and Kashmir as an arbitrator.

15. It is not in dispute that said legal notice never came to be replied by the petitioner within a period of thirty days of its receipt rather, it having received notice on 5.11.2019, kept on sitting over the matter, till the time, Justice S.N. Jha appointed as arbitrator in terms of legal notice served upon petitioner by the respondent, issued notice to both the parties to appear before him on 21.1.2020.

16. On 13.12.2019 for the first time, petitioner wrote to the respondent that it has not given its consent for the name of Justice S.N. Jha, retired Chief Justice, as proposed by the respondent and it should not be taken as an implied consent on its behalf. Admittedly first communication after receipt of legal notice dated 5.11.2019, was sent by petitioner on 13.12.2019, objecting therein to the appointment of arbitrator. At this stage, it would be apt to take note of S.11 of the Act. S. 11(4) of the Act clearly provides that if the appointment procedure in sub-section (3) applies and a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the

appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. S. 11(5) provides that failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, on an application of the party in accordance with the provisions contained in sub-section (4). S. 11(6) provides that where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

17. Having carefully perused aforesaid provision contained under S.11(5) of the Act, this court finds force in the submission of learned counsel for the respondent that since it had proposed the name of Justice S.N. Jha as an arbitrator and the petitioner failed to respond/object to the same within 30 days, as such, there was deemed consent of the State qua aforesaid arbitrator and as such, it could not have any objection to the appointment of aforesaid arbitrator at a later stage.

18. Admittedly, in the case at hand, careful perusal of Clause 53 of PIA reveals that in the event of dispute if any inter se parties, matter is to be referred to an arbitrator to be appointed as per provisions of Arbitration and Conciliation Act, meaning thereby in case, parties are unable to reach some consensus with regard to name of the arbitrator, one of the party could approach High Court under S.11(6) of the Act seeking appointment of

arbitrator but since in the case at hand, respondent had appointed Justice S.N. Jha as an arbitrator and communicated the same to the petitioner, which failed to object/respond to the same within 30 days, as such, petitioner estopped itself from laying challenge to the appointment of an arbitrator, once it has given deemed consent to the same, by not responding/objecting within 30 days from the receipt of communication from the respondent.

19. Another question for determination in the case at hand is that whether application under S.11(6) of Act by petitioner during pendency of application under S.13(3) and 13(4) before arbitrator appointed unilaterally by the respondent is maintainable before this Court or not?

20. Hon'ble Apex Court in **Perkins Eastman** supra, while considering application under S.11(6) formulated two basic questions for consideration i.e.

(a) Whether the arbitration in the present case would be an International Arbitration Commercial Arbitration or not?

(b) Whether a case is made out for exercise of power by the Court to make an appointment of an arbitrator?"

21. While first question is not relevant for the present case but second question has been dealt by Hon'ble Apex Court in para-14 onwards which read as under:

> "14. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No.3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under: -
>
> > "7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an

> arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

The issue was discussed and decided by this Court as under:-

> 50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5)of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator

depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement7. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

> "25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab8. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4)to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate." (emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P.9, which followed the decision in Roop Chand v. State of Punjab8. It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran10.

52. Mr Sundaram has strongly relied on Pratapchand Nopaji11. In the said case, the three-Judge Bench applied the maxim "qui facit per alium facit per se". We may profitably reproduce the passage: (SCC p. 214, para 9)

> "9. … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate

> an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

15. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited4 where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited4, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

16. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have

any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited

17. We must also at this stage refer to the following observations made by this Court in para 48 of its decision in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.12, which were in the context that was obtaining before Act 3 of 2016 had come into force: -

> "48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:
>
> > (i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three- member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub- section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

> (i) a party failing to act as required under the agreed appointment procedure; or
>
> (ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.
>
> (iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.
>
> (vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.
>
> (vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

18. Sub para (vii) of aforesaid paragraph 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its report No.246. Paragraphs 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the Judgment of this Court in Voestapline Schienen Gmbh v. Delhi Metro

Rail Corpn. Ltd.13, while paras 59 and 60 of the report stand extracted in the decision of this Court in Bharat Broadband Network Limited v. United Telecoms Limited14. For the present purposes, we may rely on paragraph 57, which is to the following effect:-

> "57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes." 14 (2019) 5 SCC 755 Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.

22. In para 16 reference is made to previous decision in **Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G.,** v. **Municipal Corporation of Great Mumbai and another**, (2015) 3 SCC 800 (2017) and **TRF Limited** v. **Energo Engineering Projects Limited**, (2017) 8 SCC 377 and while discussing the said judgment, emphasis was made to para 53, which was reproduced in para 18 to record that the ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee. In para 23 Hon'ble Apex Court discussed another case **Indian Oil Corpn.** V. **Raja Transport (P) Ltd.** (2009)8 SCC 520 and observed that if there are justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

23. Next question as put was whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. It was observed that similar issue was gone into by Hon'ble Apex Court in **Walter** supra, wherein discussion for appointment was made as under:

> "9. While it is correct that in Antrix (supra) and Pricol Limited (supra), it was opined by this Court that after appointment of an Arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix (supra), appointment of the Arbitrator, as per ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Limited (supra), the party which had filed the

application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the Arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. (supra) may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of Arbitrators by ICADR, which the parties had agreed to abide in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by the ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non- est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd. (supra), is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by the ICADR. The said appointment, therefore, is clearly invalid in law."

24. Learned counsel for the respondent while relying upon aforesaid judgment stated that no such ground came to be urged in application under

S. 11(6) as such, this judgment is of no help to the case of the petitioner. Hon'ble Apex Court in **S.P. Singla** supra held that when if any party is dissatisfied or aggrieved by the appointment of arbitrator in terms of the agreement by other party/parties, his remedy would be by way of petition under Section 13 of the 1996 Act, and, thereafter while challenging the award under Section 34 of the 1996 Act.

> "18. The High Court placed reliance upon the judgment in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 and held that when the Superintendent Engineer, Arbitration Circle was appointed as the Arbitrator in terms of the agreement (or arbitration clause), the provisions of sub-section (6) of Section 11 cannot be invoked again. The High Court further observed that in case, the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his remedy would be by way of petition under Section 13 and thereafter while challenging the award under Section 34 of the 1996 Act.
>
> 19. The High Court in the impugned judgment placed reliance upon the judgment in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 wherein the Supreme Court held as under:-
>
> "31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding

under Section 11of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement." .....

33. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act." In the present case, the Arbitrator has been appointed as per clause (65) of the agreement and as per the provisions of law. Once, the appointment of an arbitrator is made at the instance of the government, the arbitration agreement could not have been invoked for the second time.

20. As pointed out earlier the Arbitrator has already entered upon reference on 11.11.2013. The Arbitrator had first hearing on 07.12.2013; on which date appellant-contractor was absent. For the next date of hearing on 13.03.2014 the Arbitrator has recorded the finding that the appellant-claimant-contractor was absent without any intimation to the Tribunal. In this regard, Mr. Maninder Singh, the learned Senior Council for the appellant has drawn our attention to the letter dated 12.03.2014 sent by the appellant requesting for adjournment. Similarly, in the next date of hearings before the arbitrator namely, 03.04.2014, 25.04.2014 and 06.08.2014 the appellant-contractor did not appear; but only sent the letters requesting for adjournment. On 03.04.2014, the matter was adjourned to 25.04.2014 directing that both parties to come prepared for the next date of hearing on 25.04.2014. Similar was the order passed on 25.04.2014 that both parties have to come prepared for the next date of hearing on 06.08.2014. Since the appellant-claimant did not appear

before the Arbitrator, the Arbitrator terminated the proceedings on 06.08.2014 under Section 25(a) of the 1996 Act."

25. Recently Hon'ble Apex Court in **Swadesh Kumar Agarwal** v. **Dinesh Kumar Agarwal**, Civil Appeal Nos. 2935-2938 of 2022, decided on 5.5.2022, while placing reliance upon judgment rendered by apex court in **S.P. Singla**, supra, reiterated that once parties have invoked arbitration proceedings and arbitrator has been appointed, subsequent application under S.11(6) of the Act, 1996, shall not be maintainable. Relevant paras of the judgment are extracted herein below:

"8. Even otherwise, once the arbitrator was appointed by mutual consent and it was alleged that the mandate of the sole arbitrator stood terminated in view of section 14(1)(a) of the Act, 1996, the application under section 11(6) of the Act, 1996 to terminate the mandate of the arbitrator in view ofsection 14(1)(a) of the Act shall not be maintainable. Once the appointment of the arbitrator is made, the dispute whether the mandate of the arbitrator has been terminated on the grounds set out in section 14(1)(a) of the Act, shall not have to be decided in an application under section 11(6) of the Act, 1996. Such a dispute cannot be decided on an application under section 11(6) of the Act and the aggrieved party has to approach the concerned "court" as per subsection (2) of section 14 of the Act. In the case of Antrix Corporation Limited (supra) in para 31 and 33, it is observed and held as under:

"31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner

was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.

33. Subsection (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of subsection (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of subsection (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act."

9. Following the aforesaid decision in the subsequent decision of this Court in the case of S.P. Singla Constructions Private Limited (supra), it is observed and held by this Court that once the arbitrator had been appointed as per clause 65 of the agreement (in that case) and as per provisions of the law, the arbitration agreement could not have been invoked for second time.

9.1 Now so far as reliance being placed upon the decisions of this Court by learned counsel appearing on behalf of respondent No. 1 in the cases of ACC Limited (supra) and Uttar Pradesh State Bridge Corporation Limited (supra) are concerned as such there cannot be any dispute with respect to the position of law laid down by this Court in the aforesaid decisions to the effect that in case of any of the eventualities occurring as mentioned in section 14 and 15 of the Act, 1996, the mandate of the arbitrator shall

stand terminated. However, the question is in a case where there is a dispute/controversy on the mandate of the arbitration being terminated on the ground set out in section 14(1)(a) of the Act, whether such a dispute shall have to be raised before the concerned "court" defined under section 2(e) of the Act or such a dispute can be considered on an application under section 11(6) of the Act? Before this Court in the aforesaid decisions such a controversy was not raised. Therefore, the aforesaid decisions shall not be of any assistance to respondents and/or the same shall not be applicable to the facts of the case on hand, while deciding the issue, whether termination of the mandate of the arbitrator on the ground mentioned under section 14(1)(a) of the Act, 1996 can be decided under section 14(2) or under section 11(6) of the Act, 1996.

10. It is to be noted that as such in the present case the proceedings before the concerned court under section 14(2) of the Act, 1996 at the instance of respondent No. 1 and 3 herein to terminate the mandate of the sole respondent under section 14(1)(a) of the Act were already pending before the concerned court when respondent No. 1 moved an application under section 11(6) of the Act and such a dispute was at large before the court in a proceeding under section 14(2) of the Act.

11. In view of the aforesaid discussion and for the reasons stated above, it is observed and held as under:

(i) That there is a difference and distinction between section 11(5) and section 11(6) of the Act, 1996;

(ii) In a case where there is no written agreement between the parties on the procedure for appointing an arbitrator or arbitrators, parties are free to agree on a procedure by mutual consent and/or agreement and the dispute can be referred to a sole arbitrator/arbitrators who can be appointed by mutual consent and failing any agreement referred to section 11(2), section 11(5) of the Act shall be attracted and in such a situation, the application for appointment of arbitrator or arbitrators shall be maintainable under section 11(5) of the Act and not under section 11(6) of the Act;

(iii) In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under section 11(6) (a) to (c) of the Act;

(iv) Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the arbitrator/arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time;

(v) In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in section 14(1)(a), such a dispute has to be raised before the "court", defined under section 2(e) of the Act, 1996 and such a dispute cannot be decided on an application filed under section 11(6) of the Act, 1996.

26. Hon'ble Apex Court in S.P. Singla, while placing reliance upon earlier judgment passed in **Antrix Corporation Limited** v. **Devas Multimedia Private Ltd.** (2014) 11 SCC 560, reiterated that where the parties fail to act in terms of the procedure agreed upon by them, provisions of sub-section (6) of S.11 of the Act can be invoked by any of the parties, praying therein for appointment of arbitrator. However, where in terms of the agreement, arbitration clause has already been invoked by one of the parties thereto, provisions of sub-section (6) of S.11 cannot be invoked and in that case, the aggrieved party has remedy to file petition under S.13 of the Act before arbitrator laying therein challenge to the appointment of arbitrator by the other party in terms of the agreement. Order passed in the petition under S.13 thereafter can be laid further challenge by way of petition under S.34 of the Act.

27. In the case at hand, it is not in dispute that the respondent by way of legal notice (Annexure P-3), dated 30.12.2019, expressed its intention to

invoke arbitration clause i.e. Clause 53 of the PIA. While doing so, it specifically stated in para-15 that in case the noticee did not refund the sum of Rs. 6.00 Crore deposited by it as upfront premium, legal notice may be treated as a notice invoking arbitration clause in terms of PIA dated 26.5.2011. In the aforesaid para, respondent proposed the name of Justice S.N. Jha, retired Chief Justice, Rajasthan and Jammu & Kashmir. Though in para-16 of the legal notice, respondent stated that in case the noticee i.e. the petitioner fails to concur/agree with its proposal to appoint S.J. Jha as sole arbitrator within 30 days from the date of receipt of notice, it shall be constrained to take appropriate steps for appointment and constitution of arbitral tribunal, but, in the case at hand, petitioner kept on sleeping over the matter after expiry of 30 days. Though, in the case at hand, vide communication dated 13.12.2019, addressed to the respondent, petitioner objected to unilateral action of the respondent in as much as appointment of Justice S.N. Jha as sole arbitrator is concerned, but after having received notice dated 19.12.2019, Annexure P-6, from the sole arbitrator, it subjected itself to the jurisdiction of the above named arbitrator by filing an application under S.13 of the Act, laying therein challenge to appointment of the arbitrator. Though, none of the parties to the lis, placed on record petition filed under S.13 of the Act by the petitioner before learned arbitrator, laying therein challenge to the appointment of the arbitrator, but factum with regard to filing of an application under aforesaid provisions of law never came to be refuted by the petitioner.

28. Though, in the case at hand, petitioner specifically admitted the factum with regard to its having received notice dated 19.12.2019 Annexure P-6 from the arbitrator intimating therein factum with regard to listing of arbitration case on 21.1.2020, but at no point of time, disclosed that after having received aforesaid notice, it fled an application under S.13 of the Act, laying therein

challenge to appointment of arbitrator and it is only during proceedings of the case at hand the factum with regard to initiation of proceedings under S.13 of the Act by the petitioner before learned arbitrator came to the notice of the Court. Learned counsel appearing for the respondent vehemently argued that once the proceedings under S. 13 of the Act are pending before learned arbitrator, petitioner is estopped from filing instant petition seeking therein appointment of arbitrator, as has been taken note herein above.

29. Hon'ble Apex Court in **Antrix** supra has categorically held that after appointment of the arbitrator, remedy available with the aggrieved party is not under S.11(6) of the Act but under different provision of the Act i.e. Ss. 12 and 13. In the case at hand, as per procedure agreed between the parties, petitioner was under obligation to appoint an arbitrator within 30 days of receipt of the notice from first party i.e. respondent. Though, Mr. Sudhir Bhatnagar, learned Additional Advocate General, while inviting attention of this Court to case decided by Hon'ble Apex Court in **Dattar Switchgrears Ltd.** v. **Tata Finance Ltd. & anr**. (2000) 8 SCC 151 argued that once appointment of arbitrator is clearly contrary to the provisions of the law governing appointment of arbitrator, application, if any, filed under S. 13(3) before the arbitrator unilaterally appointed by the respondent for termination of mandate of the arbitrator, is of no relevance.

30. This court, however, is not impressed with the aforesaid argument because, facts in **Dattar** supra were totally different from the facts of present case. In the aforesaid case, very appointment of arbitrator was found to be contrary to the provisions of the Rules governing appointment of arbitrator at ICADR which the parties had agreed to abide by in such matters. The option given to the respondent Corporation to go beyond the panel submitted by the ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties, as such, Hon'ble Apex Court rightly found appointment of above named arbitrator to be nonest in law. Since the

appointment of the arbitrator was found to be nonest in law, Supreme Court held that the party aggrieved by appointment of arbitrator is not estopped from invoking jurisdiction of this Court by filing an application under S.11(6) of the Act.

31. In the case at hand, no such ground ever came to be urged in the application filed under S.11(6) of the Act, while seeking appointment of another arbitrator, rather, the petitioner concealed material fact of its having filed application under S. 13(3) read with S.13(2) of the Act before arbitrator praying therein to terminate the mandate of the arbitrator.

32. At this stage, it would be apt to take note of S.13(2) and (3) of the Act, which read as under:

> (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
>
> (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge."

33. Provisions of S.13(3) clearly provides that the challenge if any made to the appointment of the arbitrator shall be decided by the arbitral tribunal and in case challenge under procedure agreed by the parties under sub-section (2) is not successful, arbitral tribunal shall continue arbitration proceedings and shall made an arbitral award.

34. In the case at hand, petitioner in communication dated 13.12.2019 addressed to the respondent, copy whereof was also marked to the arbitrator, nowhere assigned reason, if any, for not concurring with the proposal of the respondent for appointment of arbitrator but only stated it never consented for appointment of arbitrator.

35. S.13(2) provides that a party who intends to challenge appointment of an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12 shall send a written statement of the reasons for the challenge to the arbitral tribunal. In the case at hand, on one hand, the petitioner subjected itself to the jurisdiction of the learned arbitrator by way of an application under S.13 of the Act, praying therein for termination of the mandate of the arbitrator and, on the other hand, approached this Court in the instant proceedings, under S. 11 of the Act, praying therein for appointment of another arbitrator, which is not permissible, as has been discussed in detail herein above.

36. Consequently, in view of detailed discussion made herein above as well as law taken into consideration, this court does not find present petitions under S.11(6) of the Act to be maintainable and the same are accordingly dismissed. All pending applications in both the petitions stand disposed of. Interim directions, if any, also stand vacated.

**BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C. J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.**

Between:-

THE H.P. STATE ELECTRICITY BOARD,
THROUGH ITS EXECUTIVE DIRECTOR (PERSONNEL)
VIDYUT BHAWAN, SHIMLA, H.P.

.. APPELLANT

(BY MR. TARA SINGH CHAUHAN, ADVOCATE)

AND

1. HPSEB SUPERVISORY ACCOUNTS SERVICES ASSOCIATION
THROUGH ITS PRESIDENT,

SH. H.S. GARG,
ASSISTANT ACCOUNTS OFFICER,
H.P. STATE ELECTRICITY BOARD,
VIDYUT BHAWAN,
SHIMLA 171004

2. SHRI H.S. GARG,
S/O SHRI KIRPA RAM,
R/O VPO RAMPURI KENTHAL,
SHIMLA 171011

RESPONDENTS

(NEMO)

Letters Patent Appeal No. 30 of 2022
Decided on 23-06-2022

**Delhi High Court Original Side Rules**, **2018** - Section 10- Letters Patent Appeal- Ld. Single Judge quashed and set aside the communication dated 3.7.2001 issued by the Secretary, Himachal Pradesh State Electricity Board to its Chief Accounts Officer to grant benefit of time bound promotional scale on completion of 9/16 years of regular service- Held- Appellant Board, in principle, follows PSEB pattern in the matter of pay scales and other career progression schemes like TBPS to its employees- Appellant Board has deviated from PSEB pattern, as such, Ld. Single Judge has rightly passed the order- Appeal dismissed. (Para 10, 11, 12)

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This appeal coming on for orders this day, **Hon'ble Mr. Justice Sandeep Sharma,** delivered the following:

**J U D G M E N T**

Instant Letters Patent Appeal filed under Section 10 of the Delhi High Court Original Side Rules, as applicable to the State of Himachal Pradesh, lays challenge to order dated 27.8.2021 passed by learned Single Judge of this Court in CWPOA No. 3782 of 2019, titled HPSEB Supervisory Accounts Services Association v. H.P. State Electricity Board, whereby learned

Single Judge, while quashing and setting aside communication dated 3.7.2001 issued by the Secretary, Himachal Pradesh State Electricity Board (hereinafter, 'Board') to its Chief Accounts Officer, directed the appellant-Board to grant benefit of Time Bound Promotional Scale (hereinafter, 'TBPS') on completion of 9/16 years of regular service, to those members of the petitioner-Association, who were eligible and were left out as a consequence of issuance of communication dated 3.7.2001, from the date of their eligibility alongwith arrears and interest at the rate of 7% per annum.

2. For having bird's eye view of the matter, certain undisputed facts, which may be relevant for the adjudication of the case at hand are that vide office order No. 80 dated 14.11.1990, the appellant-Board revised the scales of pay of certain categories of its employees with effect from 1.1.1986. The SAS Superintendents (NG) were placed in the pay scale of Rs. 2000-3500 with initial start of Rs. 2100/-. On 30.1.1991, the appellant-Board introduced a Scheme providing for the benefit of TBPS to its employees after completion of 9/16 years of regular service in the Board, having a maximum scale upto Rs. 3500/-. On 20.5.1992, the SAS Superintendents (NG) were also declared eligible for the benefit of TBPS, as a consequence of which, aforesaid category of employees also became entitled to pay scale of Rs. 2400-4250 after nine years of service and Rs. 3000-4500 after sixteen years of service. However, aforesaid benefit of TBPS was to be made available to those employees, who did not get promoted to the next higher post on completion of requisite period of 9 or 16 years, as the case may be.

3. Vide communication dated 5.1.1995, the appellant-Board revised the pay scales of SAS Superintendents (NG) to Rs. 2100-3700 with effect from 1.1.1986. On 12.5.1995, benefit of TBPS granted to SAS Superintendents (NG) was ordered to be withdrawn by the appellant-Board with immediate effect. The posts of SAS Superintendents (NG) in the appellant-Board were redesignated as Assistant Accounts Officers in the pay scale of Rs. 2200-4000

plus Rs.200/- as special pay, vide order dated 6.6.1996. On 4.12.1996, the appellant-Board sought options from the SAS Superintendents (NG) to the effect that those who wanted to opt for the initial pay scale of Rs. 2000-3500 with initial start of Rs. 2100/- would be entitled for the benefit of TBPS and those, who opted for improved pay scale of Rs. 2100-3700/- would not be so entitled. Pursuant to issuance of aforesaid order, two different categories of SAS Superintendents (NG) came to be formed, one which opted for initial pay scale of Rs. 2000-3500 with initial start of Rs. 2100/- and second, who opted for improved pay scale of Rs. 2100-3700/-.

4. On 3.7.2001, Secretary of the appellant-Board circulated a clarification to its Chief Accounts Officer to the effect that only those SAS Superintendents (NG), who have completed 9/16 years of service on the induction post of SAS Superintendents (NG) prior to their re-designation as Assistant Accounts Officers, i.e. 6.6.1996, are entitled for the benefit of TBPS on Punjab State Electricity Board (hereinafter, 'PSEB') pattern, as the posts of Assistant Accounts Officers do not exist in the PSEB.

5. As a natural corollary to the aforesaid communication dated 3.7.2001, further classification came to be drawn by the appellant-Board between SAS Superintendents (NG) having opted for the scale of Rs. 2000-3500, first, those who had become eligible for TBPS before re-designation as Assistant Accounts Officers and the second, those who became eligible for TBPS after re-designation as Assistant Accounts Officers.

6. Being aggrieved and dissatisfied with the aforesaid communication, the petitioner-Association made a detailed representation to the Member (Finance and Accounts) of the appellant-Board. The meeting between the Board and the representatives of the petitioner-Association was held on 26.7.2002, wherein it was decided to examine the demand afresh and thereafter to submit the case in detail to the Whole Time Members of the Board for their consideration and decision after obtaining views of the Member

(F&A). Since no action, whatsoever, came to be taken by the appellant-Board on the aforesaid representation of the petitioner-Association, in terms of the decision taken in the meeting held inter se representatives of the petitioner-Association on 26.7.2002, it approached erstwhile Himachal Pradesh Administrative Tribunal by way of an Original Application, which subsequently, on abolishment of the Tribunal, came to be transferred to this Court and was re-registered as CWPOA No. 3782 of 2019, praying therein for the following reliefs:

> "i) That the impugned Annexure A-14, dated 3.7.2001 may be quashed and set aside.
>
> ii) That the respondent Board may be directed to grant the members of the applicant Association, the Time Bound Promotional Scales on completion of 9/16 years of service from the date of their joining the induction post of SAS Superintendents (NG) with all consequential benefits and to pay arrears along with interest @ 18% per annum."

7. Appellant-Board though contested the claim of the petitioner-Association on the ground that it, in principle, follows PSEB pattern in the matter of pay scales and other career progression schemes like TBPS etc. to its employees but it deviated from the pattern adopted by the PSEB, while granting improved pay scale of Rs. 2100-3700/- to SAS Superintendents (NG) and also while re-designating them as Assistant Accounts Officers. Appellant-Board also claimed that the PSEB did not maintain the category of Assistant Accounts Officers, hence, the employees with such designation in the Board could not be granted the benefit of TBPS.

8. Learned Single Judge, on the basis of pleadings of the respective parties, allowed the petition having been filed by the petitioner-Association and quashed and set aside communication dated 3.7.2001 issued by the appellant-Board to its Chief Accounts Officer, whereby it was clarified that only those SAS Superintendents (NG), who have completed 9/16 years of

regular service on the induction post of SAS Superintendents (NG), prior to their re-designation as Assistant Accounts Officer i.e. 6.6.1996, are entitled for the benefit of TBPS on PSEB pattern and directed the appellant-Board to grant the benefit of TBPS to those members of the petitioner-Association after completion of 9/16 years of service, who are eligible and were left out as a consequence of communication dated 3.7.2001. In the aforesaid background, appellant-Board has approached this court in the instant appeal, praying therein to set aside the judgment passed by learned Single Judge.

9. Having heard learned Counsel appearing for the appellant-Board and perused the grounds taken in the appeal vis-à-vis the reasoning assigned by learned Single Judge, while allowing the petition filed by the petitioner-Association, this Court finds no illegality or infirmity in the same, as such, no interference is called for. Precise grouse of the appellant-Board, as has been raised in the instant appeal and as further canvassed by Mr. Tara Singh Chauhan, Learned Counsel appearing for the appellant-Board, is that since it, while having deviated from PSEB pattern, proceeded to grant improved pay scale of Rs. 2100-3700/- to the SAS Superintendents (NG), such employees have rightly not been held entitled for the benefit of TBPS. Besides above, it is also claimed by the appellant-board that PSEB does not maintain the category of Assistant Accounts Officer, hence, employees with such designation in the appellant-Board cannot be granted benefit of TBPS.

10. It is not in dispute that the appellant-Board, in principle, follows PSEB pattern in the matter of pay scales and other career progression schemes like TBPS to its employees. It is also not in dispute that the appellant-Board, of its own, on 30.1.1991, introduced the scheme providing for benefit of TBPS to those employees, who have completed 9/16 years of regular service in the Board, having maximum scale of Rs.3500/-, as a consequence of which, SAS Superintendents (NG) also came to be declared eligible for the benefit of TBPS. Appellant-Board, of its own, vide

communication dated 5.1.1995, revised the pay scale of the SAS Superintendents (NG) to Rs. 2100-3700/- with effect from 1.1.1986, as a consequence of which, on 12.5.1995, benefit of TBPS granted to SAS Superintendents (NG), was ordered to be withdrawn by the appellant-Board, without there being any plausible reason. The appellant Board, of its own, re-designated SAS Superintendents (NG) as Assistant Accounts Officers in the pay scale of Rs. 2200-4000/- with special pay of Rs. 200/- , vide order dated 6.6.1996 and thereafter, sought options from the said category to the effect that those, who wanted initial pay scale of Rs. 2000-3500 with initial start of Rs. 2100/-, would be entitled to TBPS and those, who wanted improved pay scale of Rs. 2100-3700/-, would not be so entitled, as a consequence of which, two different classes of SAS Superintendents (NG) came to be formed. Once, options were sought from the employees, after re-designation of the post, it is not understood, how the appellant-Board could subsequently turn-around and claim that the benefit of TBPS would be restricted to a specific class of SAS Superintendents (NG) that too, on the ground that the PSEB did not have category of Assistant Accounts Officers.

11. Though, in the case at hand, appellant-Board claimed that PSEB did not have the category of Assistant Accounts Officers, but, such claim of the appellant-Board is totally contrary to the records. Petitioner-Association specifically claimed in its pleadings and its representation made to the Member (F & A) of the Board, that the PSEB had the posts of Assistant Accounts Officers since 1997 as per PSEB order No. 8025, dated 24.4.1997. Aforesaid plea of the petitioner-Association never came to be specifically rebutted by the appellant-Board, as such, aforesaid defence set up by the appellant-Board, rightly came to be rejected by the learned Single Judge, while passing the impugned order.

12. Since the appellant-Board has not only deviated from PSEB pattern, while granting improved pay scale of Rs. 2100-3700/- to the category of SAS

Superintendents (NG) but it also re-designated them as Assistant Accounts Officers, it cannot be permitted at this stage to claim that the PSEB does not allow such benefit. Learned Single Judge rightly recorded that denial of benefit of TBPS to SAS Superintendents (NG) on the ground that after re-designation as Assistant Accounts Officers, such employees were not entitled for the benefit, is clearly prejudicial to such class of employees, because, it is evident from the record that the SAS Superintendents (NG) having pre-revised pay scale of Rs.2000-3500 were given pay scale of Rs. 2200-4000/- with special pay of Rs. 200/- on re-designation, the equivalent of which on revision of pays scales with effect from 1.1.1996 was Rs. 7750-13300. After getting benefit of TBPS, if any, aforesaid category would be placed in the pre-revised pay scale of Rs. 2400-4250 after nine years, equivalent of which in revised pay scale after 1.1.996 was Rs.8275-13700.

13. Otherwise also, classification made by the appellant-Board after issuance of communication dated 3.7.2001 is not reasonable one and if permitted to sustain, would treat equals as unequals. It is also not in dispute that once appellant-Board itself decided to introduce TBPS to its employees, after completion of 9/16 years of regular service in the Board and called upon those employees to exercise option to either opt for initial pay scale of Rs.2000-3500/- with initial start of Rs. 2100/- or for improved pay scale of Rs. 2100-3700/-, there was no plausible reason available for it to issue communication dated 3.7.2001, thereby clarifying that only those SAS Superintendents (NG), who had completed 9/16 years of service in the induction post of SAS Superintendents (NG), prior to their re-designation as Assistant Accounts Officers, are entitled to benefit of TBPS on PSEB pattern, as the posts of Assistant Accounts Officers do not exist in PSEB, which claim of the appellant-Board is otherwise contrary to the record, as has been taken note herein above. There is no nexus between the classification so made with object, if any, sought to be achieved, as such, order dated 3.7.2001, being

totally unreasonable, rightly came to be quashed and set aside by learned Single Judge.

14. There is yet another aspect of the matter that TBPS provides for benefit after completion of 9/16 years of service to a particular category of employees, having maximum pay scale of Rs. 3500/-, which benefit otherwise could not have been withdrawn by the appellant-Board with the issuance of communication dated 12.5.1995, that too, on the ground that the pay scale of SAS Superintendents (NG) has been revised to Rs. 2100-3700/- with effect from 1.1.1986.

15. Consequently in view of above, we find no merit in the appeal and the same is dismissed. Order dated 27.8.2021 passed by learned Single Judge of this Court in CWPOA No. 3782 of 2019, titled HPSEB Supervisory Accounts Services Association v. H.P. State Electricity Board, is upheld.

Pending applications, if any, stand disposed of.

**BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C. J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.**

Between:-

SH. LACHMAN
SON OF SH. POSHU RAM,
RESIDENT OF VILLAGE CHALWNI,
P.O. KARSOG, DISTRICT MANDI,
H.P.

APPELLANT/PLAINTIFF

(BY MR. G.D. VERMA, SENIOR ADVOCATE
WITH MR. B.C. VERMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH THE SECRETARY (REVENUE),
H.P. GOVERNMENT, SHIMLA-2

2. THE DISTRICT COLLECTOR,
MANDI, DISTRICT AT MANDI,
H.P.

3. THE COLLECTOR,
KARSOG, SUB DIVISION AT
KARSOG, DISTRICT MANDI, H.P.

RESPONDENTS/DEFENDANTS

4. SH. MANDI RAM, SON OF NAJKU,
RESIDENT OF VILLAGE MATETH,
TEHSIL KARSOG, DISTT. MANDI

5. SH. DAYA CHAND, SON OF MASSADI,
RESIDENT OF VILLAGE JOHRU,
P.O. KARSOG, DISTRICT MANDI,
H.P.

6. SH. NANANK CHAND, SON OF MASSADI,
RESIDENT OF VILLAGE DOGRI,
P.O. KARSOG, DISTRICT MANDI,
H.P.

7. SH. BHAG SINGH, SON OF SH. DHARI,
RESIDENT OF VILLAGE MATHET,
P.O. KARSOG, DISTRICT MANDI,
H.P.

8. SOM KRISHAN, SON OF MASADDI,
RESIDENT OF VILLAGE JOHRU,
P.O. KARSOG, DISTRICT MANDI,
H.P.

9. SH. BEGI RAM (DIED), SON OF MASSADI,
RESIDENT OF VILLAGE JOHRU,
P.O. KARSOG, DISTRICT MANDI, H.P.

THROUGH LEGAL REPRESENTATIVES:
(I) SH. DINESH KUMAR
SON OF LATE SH. BEGI RAM,
R/O VILLAGE DOGHARI-MATAL,
P.O. KARSOG, TEH. KARSOG,
DISTT. MANDI, H.P.

(II) SMT. NEELAM
D/O LATE SH. BEGI RAM AND
W/O SH. KHOOB RAM,
R/O MATAL P.O. KATOUCHI
TEH. KARSOG, DISTT. MANDI, H.P.

(III) SMT. NISHA
D/O LATE SH. BEGI RAM &
W/O SH. PREM DASS
R/O VILLAGE GARCHAR, P.O. BAKROT,
TEH. KARSOG, DISTT. MANDI, H.P.

(IV) SMT. PUNAM
D/O LATE SH. BEGI RAM AND
W/O SH. CHET RAM
R/O VILLAGE NAGALNI P.O. BAKHROT
TEH. KARSOG, DISTT. MANDI, H.P.

(V) SMT. KAMLESHWARI
WIDOW OF LATE SH. BEGI RAM
R/O VILLAGE DOGHARI,
P.O. AND TEH. KARSOG,
DISTT. MANDI, H.P.

10. SH. NAR SINGH DASS
SON OF SH. MASSADI,
RESIDENT OF VILLAGE JOHRU,
TEHSIL KARSOG, DISTRICT MANDI,
H.P.

11. SH. LAL MAN
SON OF SH. DHAGARI
RESIDENT OF VILLAGE MATEHAT,
P.O. KARSOG, TEHSIL KARSOG,
DISTRICT MANDI, H.P.

12. SH. PAWAN KUMAR (DELETED)
SON OF DINA NATH

13. SH. MAHINDER KUMAR
SON OF DINA NATH

14. SMT. KUNTI DEVI
WIDOW OF LATE SH. DINA NATH,
RESIDENTS OF VILLAGE MATEHAT,
P.O. KARSOG, TEHSIL KARSOG,
DISTRICT MANDI, H.P.

RESPONDENTS

(MS. RITTA GOSWAMI,
ADDITIONAL ADVOCATE GENERAL
FOR R-1 TO R-3)

(NONE FOR R-4 TO 7, 9(I) TO 9(V), 10 & 11)

(R-12 DELETED)

FIRST APPEAL FROM
ORDER NO. 101 OF 2011
DECIDED ON 12-05-2022

A. **H.P. Grant of Nautor Land to Landless Persons and Other Eligible Persons Scheme, 1975**- Where jurisdiction of Civil Court can be held to barred in matters arising out of Nautor Scheme, 1975 which is a non-statutory scheme- Held- 'A' ordinarily Civil Court has jurisdiction to decide all

matters of civil nature, save and except where its jurisdiction is expressly or impliedly barred. (Para 23)

**B. Jurisdiction of Civil Court cannot be said to be barred in matters arising out of Nautor Scheme, 1975, which is admittedly a non-statutory scheme and this scheme cannot be** equated with other two schemes i.e. the Himachal Pradesh Utilisation of Surplus Area Scheme, 1975 and the Himachal Pradesh Village Common Land Vesting and Utilisation Scheme, 1975, because both have sanction of law/Act passed by State Legislature- Reference is accordingly answered. (Para 43, 45)

**Cases referred:**

Dhruv Green Field v. Hukam Singh (2002) 6 SCC 416;
Dhulabhai v. State of M.P. AIR 1969 SC 78;
Duglu Ram and others versus State of H.P. and others, 1998 (2) Shim. L.C. 98;
Nahar Industrial Enterprises Limited v. Hong Kong & Shanghai Banking Corpn. (2009) 8 SCC 646;
Robust Hotels (P) Ltd. v. EIH Ltd. (2017) 1 SCC 622;
Secretary of State v. Mask and Company, AIR 1940 PC 105;
Unichem Laboratories v. Rani Devi (2017) 13 SCC 509;

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This appeal coming for orders this day, **Hon'ble Mr. Justice Sandeep Sharma**, passed the following:

**O R D E R**

While finding it difficult to concur and agree with the ratio laid down by learned Single Judge of this Court in **Duglu Ram and others** versus **State of H.P. and others**, 1998 (2) Shim. L.C. 98, whereby it came to be held that civil court has no jurisdiction in matters arising out of '*Nautor* Scheme' 1975 which admittedly is a non-statutory scheme, learned Single Judge of this Court vide order dated 11.9.2018 passed in instant appeal i.e. FAO No. 101 of 2011 referred following question of law for adjudication by larger bench:

"whether the jurisdiction of the Civil Courts can be held to be barred in matters arising out of '*Nautor* Scheme' 1975 which admittedly is a non-statutory scheme?"

2. Before answering the reference, this court, with a view to have a bird's eye view of the matter, finds it necessary to take note of certain facts, which may be relevant for the adjudication/determination of the question referred to it

3. Late Dina Nath was granted *Nautor* land under the Himachal Pradesh Grant of *Nautor* Land to Landless Persons and Other Eligible Persons Scheme, 1975 (hereinafter, 'Scheme') in the year 1980. Factum with regard to afore grant stands duly recorded in the record of rights. Since above named Dina Nath died and as such, on 31.12.1984, land in question came to be mutated in favour of his legal representatives. As per para-11 of the Scheme, grantee Dina Nath or his legal heirs could not transfer the land received by them under *Nautor* Rules within a period of twenty years of date of grant, failing which the State Government was empowered to resume the same. Similarly, aforesaid provision in the Scheme further provides that in case the grantee or his legal heirs fail to break up the land within two years of taking possession, grant shall be liable to be resumed. Allegedly, in the case at hand, neither late Dina Nath nor his legal heirs were able to break the land within a period of two years from the date of grant and they sold the land to Lachhman, appellant-plaintiff in the case at hand, on 29.8.2005.

4. Having found violation of provisions contained under Clause 11 of the Scheme, a revision petition under Clause 9A of the Scheme came to be instituted before the Deputy Commissioner, who after having issued notice to the parties, got an enquiry conducted from Sub Divisional Officer(Civil) and Divisional Forest Officer. In the enquiry, it transpired that the grantee, late Dina Nath failed to break up the land within a period of two years from the

date of taking possession of the grant and as such, learned Deputy Commissioner passed the following order on 14.5.2007:

> "while the grantee was covered under clause 2(b) for grant of land from the various reports discussed above and statements of local residents/complaints, the land was never put to use by the grantee for the purpose for which it had been granted i.e. agriculture. Even, the Girdawari pertaining to the years 1986 and 1987 also indicates that Nautor land was never put to use for the purpose for which it was sanctioned. It is apparent that the grantee have violated the conditions of the grant and hence the original grant vide File No. 80, dated 1.11.1980 stands rescinded. The land under dispute shall now stands reverted back to the Revenue Department, Government of Himachal Pradesh."

5. Being aggrieved and dissatisfied with the aforesaid order of resumption of land passed by learned Deputy Commissioner, Lachman filed Civil Suit No. 2 of 2008 in the court of learned Civil Judge (Senior Division). However, learned Civil Judge (Senior Division), Karsog, vide judgment dated 14.1.2011, dismissed the suit on the ground of jurisdiction. While returning aforesaid finding, learned Civil Judge placed reliance upon judgment passed by learned Single Judge of this Court in **Duglu Ram** (supra), wherein it was held that the civil court has no jurisdiction to entertain the suit, until and unless, it is shown that the impugned order is without jurisdiction or sufficient cause is shown that the remedy provided under the Statute could not be availed of. Learned Civil Judge held that it was not having jurisdiction to grant declaration sought by the plaintiff to the effect that he is absolute owner-in-possession of suit land and order of Deputy Commissioner dated 14.5.2007 in petition titled Mani Ram vs. Pawan Kumar etc. is without jurisdiction.

6. In the aforesaid background, appellant-plaintiff Lachman, being aggrieved and dissatisfied with dismissal of his suit, as detailed above, approached learned Single Judge of this Court by way of FAO No. 101 of 2011.

7. Learned Single Judge, while dealing with the case at hand, after having found that learned Single Judge in **Duglu Ram** (supra) equated/considered the non-statutory scheme of the year 1975, as if the same were a statutory scheme, formed an opinion that the view taken by learned Single Judge in **Duglu Ram** may not be the correct law and as such, on 21.8.2018, passed detailed order calling upon the counsel representing the parties to assist the Court on the point. After having heard parties at length, vis-à-vis proposition of law formulated by learned Single Judge passed a detailed order on 11.9.2018, whereby question for adjudication by larger bench, as detailed herein above, came to be referred.

8. Ms. Ritta Goswami, learned Additional Advocate General, while making this court peruse the Scheme in its entirety, vehemently argued that the Scheme is framed under the Himachal Pradesh *Nautor* Land Rules, 1968 (hereinafter, 'Rules') and power to frame such Rules/Scheme has been derived by the State under Art. 162 of the Constitution of India and as such, it cannot be said that the Scheme is non-statutory. Ms. Goswami further argued that the Scheme is self-contained, wherein remedy of review, revision and appeal has been provided to the aggrieved persons for redressal of their grievance. She further submitted that the Scheme is formulated with main objective to grant land to poorest of poor person and remedy is provided so that the person should not be dragged into prolonged litigation and in case, submission made on behalf of learned counsel for the appellant that the civil court has jurisdiction in such cases, is accepted, very purpose and object of the Scheme would be defeated. While placing reliance upon a few judgments, which shall be taken note of herein after, Ms. Goswami vehemently argued that it has been repeatedly held by courts of law that *Nautor* Scheme/Rules prescribe a complete code of conduct and detailed procedure of enquiry at every stage and as such, it has all characteristics of a law. She further submitted that where statute gives finality to the orders of special tribunal, jurisdiction of civil court

must be held to be excluded. Lastly, supporting the impugned judgment passed by civil court, Ms. Goswami placed heavy reliance upon judgment rendered by Hon'ble Apex Court in **Dhulabhai** v. **State of M.P.** AIR 1969 SC 78, wherein it has been held that jurisdiction of civil court stands ousted where revenue court officer or authorities are empowered under the Act to determine; to question the legality of any action taken or any matter decided by revenue courts subordinate to it.

9. While refuting aforesaid submission made by learned Additional Advocate General, Mr. G.D. Verma, learned Senior Counsel duly assisted by Mr. B.C. Verma, Advocate vehemently argued that a bare perusal of the Scheme suggests that it is a non-statutory Scheme and as such, it cannot be said to have all the characteristics of law, as argued by learned Additional Advocate General. Mr. Verma, learned Senior Counsel further argued that though perusal of the Scheme itself leaves no scope of doubt that the civil courts have the jurisdiction to entertain civil suit against the order passed by revenue authorities under the Scheme, if same has been passed without jurisdiction. Mr. Verma, learned Senior Counsel also placed reliance upon judgment rendered by Hon'ble Apex Court in **Dhulabhai** (supra) to contend that where there is no express exclusion of the jurisdiction of civil court in the Scheme or a Statute, there would be fundamental presumption under statutory interpretation that the civil courts have jurisdiction to decide all matters of civil nature. Mr. Verma, further argued that since in the case at hand, order dated 14.5.2007 passed by learned Deputy Commissioner came to be passed in exercise of revisionary power under Clause 9A of the Scheme, same rightly came to be laid challenge by way of Civil Suit in the competent court of law because, under Clause 9A of the Scheme, aforesaid authority had no occasion to order for resumption of land on the ground that grantee failed to break the land within a period of two years from the date of its allotment rather, action if any on account of aforesaid default made by the grantee could

be initiated in terms of provisions contained under Clause 11 of the Scheme, which prescribe certain prohibitions on transfer. Mr. Verma argued that the revisionary power, if any, under Clause 9A could be exercised by Commissioner itself or on the basis of application made by any person otherwise, that the allotment of land under the Scheme was made to a person who was not eligible/entitled for such allotment or allotment was wrong or any other ground but, definitely the order of resumption of land, on the ground that grantee failed to break the land within a period of two years from the date of its allotment, could not be passed by Deputy Commissioner while exercising power under Clause 9A of Scheme i.e. revision, as such, order passed by Deputy Commissioner being without jurisdiction rightly came to be laid challenge before civil court. Lastly Mr. Verma argued that though perusal of impugned order passed by Civil Judge clearly reveals that all contentions raised by parties to lis were dealt on merit by it, yet in the last, it proceeded to dismiss the suit on the ground of jurisdiction, which finding is totally illegal and contrary to law.

10. Before ascertaining correctness of submissions and counter-submissions made by learned counsel for the parties vis-à-vis the reference made by learned Single Judge, this court deems it fit to take note of the Scheme, which is reproduced herein below, in its entirety:

"**Government of Himachal Pradesh**

'**Revenue Department**'

**No. 9-14/75-Revenue A.** - The Governor, Himachal Pradesh, is pleased to make the following, special scheme for grant of Nautor land to landless persons in the State.

1. **Short title and commencement.**- (1) This scheme shall be called the Himachal Pradesh Grant of Nautor Land to Landless persons, other Eligible persons scheme, 1975.

(2) It shall come into force at once.

2. **Definition.**- In the scheme-

(a) Landless person means a person who holding no land for agricultural purposes, whether as an owner or a tenant, earns his livelihood principally on manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally.

(b) other eligible persons' means persons who hold land less than one acre in the State of Himachal Pradesh as a landowner or a tenant and earns his livelihood principally on manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally and includes those land-owners who were either rendered landless or whose holdings were reduced to less than one acre as a result of implementation of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953.

[Provided that notwithstanding any thing contained in this scheme, a person who hers completed training under the Trysem Programme and is certified as eligible by the Project Officer/A.D. Agency of the Distt. concerned for allotment of land for construction of a shop or other business premises shall also be deemed clause and land of the area sufficient for construction of a shop or other business premises, but not exceed 2 biswas as the case may be, may be granted to him by the S.P.O.(C) concerned."]

3. **Application of Scheme.**- The scheme shall apply to Government waste land outside the Reserved and Demarcated Protected Forest.
4. **Survey of culturable land.**- (1) A survey of culturable land in each estate shall be made immediately by the Tehsildar/Naib-Tehsildar concerned and plots of land in each estate which can

be granted as nautor land to the landless persons, other eligible persons marked on the ground.

(2) A register of landless persons in each Patwar circle has already been maintained village-wise under the instructions issued by the State Government. These registers will be verified by the Tehsildars according to the instructions already issued by the Government in this behalf.

(3) In case of other eligible persons a register in each Patwar circle shall be maintained in form 'A' appended to this Scheme.

5. **Grant of Nautor Land.**- (1) Nautor Land upto I acre for the purpose of Agriculture/Horticulture shall be granted to a landless person on a simple application in the Revenue estate in which ordinarily resides or in a nearby revenue estate as far as possible in the following order: -

(i) in the revenue estate;

(ii) in the Patwar circle if no land is available in the Revenue estate;

(iii) in the Kanungo circle if no land is available in the Patwar circle;

(iv) in the Tehsil, if no land is available in the Kanungo circle.

[(2) The allotment of land to eligible persons under the scheme shall be made in the following order of preference.]

(i) members of Scheduled castes/Scheduled Tribes, ex-servicemen, Freedom fighters and Ex-INA personnel,covered under the Government, of India scheme and also those freedom fighters who have been awarded commendation certificates' by the State Government;

(ii) landowners or tenants whose holdings as a result of implementation of section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 are reduced below one acre; and

(iii) to remaining eligible persons;

Provided that no land containing more than 40 trees of valuable species per acre shall be granted under this scheme,

(3) If there are trees on the land granted under this scheme and the grantee is not in a position to pay the price of the trees at market rate, the trees shall be cleared by the Forest Department within a month from the date of grant of the land.

6. **Delimitation of land.**- The nautor land to be granted to a landless person or other eligible persons under, this scheme shall be delimited in his presence and also in the presence of the members of the Gram Panchayat as may be available at the time of delimitation.
7. **Sanctioning Authority.**- [The Sub-Divisional Officer (Civil) of the Sub-Division and the Tehsildar of the Tehsil in which the land is situated shall be the sanctioning authority for the purpose of this scheme. The sanction order of nautor land shall be made by the Tehsildar on the application and its operative partentered in the register to be maintained for the purpose in the Tehsil. Issue of Patta under the scheme will not be necessary.]
8. **Nazarana and mode of its payment.**- (1) The grant of nautor land under this scheme shall be made against payment of nazarana by: -

(a) a grantee belonging to Scheduled Tribes @ rupees five per bigha;

(b) a grantee belonging to Scheduled caste @ rupees twenty five per bigha;

(c) other grantees @ rupees fifty per bigha.

[(2) The payment of nazarana shall be in lump sum or in ten equal half yearly instalments. The possession of the land shall be given to the grantee immediately after the sanction of land. In case of payment in instalments, the first instalment can be paid within one year of the delivery of possession.]

(3) If the grantee fails to pay the total amount of nazarana within a period of five years, the same shall be recovered as arrear of land revenue.

9. There shall be no right of appeal against the grant of nautor land to a landless person or to other eligible persons under this scheme.

**[9A. Revision.** - If at any time, it comes to the notice of the Commissioner either through an application made by any person or otherwise, that the allotment of any land under this scheme was made to a person who was not entitled or eligible for such allotment or the allotment was wrong on any other grounds, he may call for the record of the case and after making such enquiries as he thinks proper in person or through a Revenue Officer subordinate to him and after giving an opportunity to the parties concerned, he may cancel the grant of land and make such other orders in connection therewith as he deems necessary in the circumstances of the case.]

10. **Mutation.**- The mutation of the land to be granted under this scheme to a landless person or to other eligible persons shall be attested immediately after the payment of nazarana by the grantee either in lump sum or on payment of 1st instalment of the nazarana as the case may be.

11. **Restriction on transfer.**- The grantee shall not transfer the land granted under this scheme to any person within a period of [20 years]from the date of taking over possession of the land by him. In the event of contravention of the provisions of this para the grant shall be liable to be resumed by the State Government and no further allotment of land should be made to him thereafter. [Similarly] if he fails to break up the land within a period of 2

years from the date of taking over of the possession the grant shall be liable to be resumed.

Provided that the land granted under this scheme shall not be subject to fragmentation by way of partition, transfer or by any other mean. The Revenue Officer shall record these conditions in the mutation orders to be passed by him. His orders shall further be recorded in the remarks column of the jamabandi in which the mutation pertaining to the land is incorporated.

Provided the allottee may transfer the land by way of mortgage without possession in favour of Primary Agricultural Cooperative Credit Society, a Bank as defined in the H.P. Agricultural Credit Operations and Miscellaneous provisions (Banks) Act 1972 (Act No. 7 of 1973) for the purpose of raising loans for development of such land, raising of crops,purchase of bullocks, seed and fertilizers etc. for bringing the land under cultivation.

12. No legal practitioner shall appear, plead or act on behalf of any party before any revenue officer in any case under this scheme."

11. Clause 9A of the Scheme provides for revision, in case of any discrepancy in allotment of Nautor land and Clause 11 prohibits transfer of land granted by way of Nautor, for a period of twenty years, but none of the clause bars jurisdiction of the Civil Courts.

12. Record reveals that after having received aforesaid proposition of law formulated by learned Single Judge, this court vide order dated 20.11.2018, called for original record to see from where Scheme has emanated. On 25.3.2019, learned Additional Advocate General, while placing on record communication dated 15.3.2019 received from the Additional Chief Secretary (Revenue) to the Government of Himachal Pradesh apprised this court that despite best efforts, their officers have not been able to trace out the original

record pertaining to the Scheme. Besides above, it was also claimed that record is 40 years old and efforts are being made to locate the same. However, this Court, granted further time specifically observing in the order that the Scheme is being implemented by the Courts as well as Government on the premise that it is statutory in character, as such, it is imperative to know how this Scheme originated.

13. On 11.6.2019, affidavit of Secretary (Revenue) to the Government of Himachal Pradesh came to be filed, which revealed that file bearing No. 9-14/75 (Rev.-A), wherein decision qua framing of the Scheme in the year 1977 was taken, stood consigned to record room of Himachal Pradesh Secretariat on 8.8.1981 under Category III.

14. Though, a bare perusal of the Scheme itself suggests that the same is non-statutory because, admittedly same never came to be framed under any statute but even otherwise, factum with regard to its being non-statutory can be inferred from perusal of communication dated 21.1.1987 addressed by Secretary (Revenue) the Government of Himachal Pradesh to various revenue authorities in the State of Himachal Pradesh, which reads as under:

"No. Rev. 2A(3) 11/77 IMMEDIATE

Government of Himachal Pradesh

Revenue Department

From

1. The Secretary (Revenue) to the
   Government of Himachal Pradesh.

To

1. The Divisional Commissioner Kangra at Dharamshala/ Mandi/Shimla.
2. The Settlement Officers Kangra at Dharamshala/Shimla-6.
3. The Director of Land Records, Himachal Pradesh, Shimla.

4. The Director Consolidation of Holdings, Himachal Pradesh, Shimla.
5. All the Deputy Commissioners in Himachal Pradesh.
6. All the Sub Divisional Officers (Civil) in Himachal Pradesh.
7. All the Tehsildars in Himachal Pradesh.

Dated Shimla-171002, the 21st January, 1987.

Subject:-Allotment of land to landless and other eligible persons-Jurisdiction of Civil Courts to entertain suits arising therefrom.

Sir,

I am directed to say that at present land is being allotted to the landless or other eligible persons under the following three Schemes:-

1. The Himachal Pradesh Utilization of Surplus Area Scheme, 1975.
2. The Himachal Pradesh Village Common Land Vesting and Utilization Scheme,1975.
3. The Himachal Pradesh Grant of Land to Landless and Other Eligible Persons Scheme, 1975.

2. In this behalf, as you know, the first two Schemes are statutory schemes and have been framed under the Acts passed by the Himachal Pradesh State Legislature. However, the third, namely the Nautor Scheme is an independent one and does not derive sanction from any other law. You are also aware that these Acts contain a provision barring the jurisdiction of the Civil Courts. It is, therefore, implied that a dispute arising out of the allotment of land or cancellation thereof by the competent authority is not subject to adjudication by the Civil Courts whose jurisdiction stands barred in the Acts. It has, however, been noted by the Government that cases are being taken to Civil Courts by the interested parties and the courts are entertaining them

for decision totally disregarding the bar contained in the Acts. As you know, the very purpose of launching the programme of allotment of land is defeated once a case goes to the court since it takes a lot of time there and the person concerned who often not eligible for allotment of land, continues in possession of the land erroneously alloted to him.

3. It appears that the District Attorney or other Officers are not well posted of this provision do not often raise this point before the Courts at the time of admission of the suits. It should be brought home to all concerned that the civil Courts have no jurisdiction to try the cases arising out of the H.P. Ceiling on Land Holdings Act, 1972, or the H.P. Village Common Lands Vesting and Utilization Act, 1974 and those cases where the land has been allotted under the two schemes namely The Himachal Pradesh Utilization of Surplus Area Scheme and the Himachal Pradesh Village Common Land Vesting and Utilization Scheme. A copy of these schemes should be made available to all Law Officers who are concerned with the defence of the cases arising out of the above two Schemes and they should be instructed to take the plea of jurisdiction in the Courts invariably. Where however the courts still entertain the cases, an appeal should be filed in the next court against this decision until the issue has been finally settled once for all.

4. As regards the cases of allotment of land under the third scheme, namely the Himachal Pradesh Grant of Land to Landless and Other Eligible Persons Scheme, suitable arrangements are being made to strengthen the hands of the authorities concerned in this behalf also.

Please acknowledge receipt.

Yours faithfully,

sd/- Secretary (Revenue) to the Government

of Himachal Pradesh.

(Copy with 10 spare copies to the Superintendent Incharge, allotment of land to landless and other eligible persons in Revenue Branch-B, for record)."

15. Perusal of aforesaid communication clearly reveals that two schemes i.e. the Himachal Pradesh Utilization of Surplus Area Scheme, 1975 and the Himachal Pradesh Village Common Land Vesting and Utilization Scheme 1975 were framed under the Acts passed by Himachal Pradesh State Legislature, whereas, the Himachal Pradesh Grant of Land to Landless and Other Eligible Persons Scheme, 1975 is an independent one and does not derive sanction from any law. In the aforesaid communication, authority concerned, while directing District Attorneys and other officers to raise question of jurisdiction before civil courts in the cases arising out of aforesaid Schemes, has categorically concluded that for the management of cases of allotment of land under third Scheme, suitable arrangements are being made to strengthen the hands of the authorities concerned.

16. At this juncture, it would be apt to take note of provisions contained under Art. 162 of the Constitution of India, which reads as under:

"162. Extent of executive power of State:

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws;

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof."

17. Ms. Ritta Goswami, learned Additional Advocate General, while placing reliance upon aforesaid provision of law, strenuously argued that the power to frame Rules 1968 has been derived by the State under Art. 162 of the Constitution of India and thereafter the 1975 Scheme has been framed under the Rules, 1968, but there is no material available on record to substantiate aforesaid claim of hers. Mere availability of executive power of State in terms of Art. 162 is not sufficient to conclude that *Nautor* Rules, 1968 and thereafter the Scheme thereunder came to be framed by the Executive in exercise of power under Art. 162 of the Constitution of India. Bare perusal of the Scheme nowhere reveals that same ever came to be framed by the Executive in exercise of the power under Art. 162. Otherwise also, bare perusal of provisions contained Art. 162 though suggests that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws, provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. Once, Legislature in its wisdom under an enactment/statute proceeded to frame two statutory Schemes, as has been taken herein above, i.e. the Himachal Pradesh Utilisation of Surplus Area Scheme, 1975 and the Himachal Pradesh Village Common Land Vesting and Utilisation Scheme, 1975, as is evident from the letter extracted herein above, it cannot be accepted at this stage that the third scheme i.e. Nautor Scheme, 1975 which is subject matter of present controversy, has all the characteristics of law and can be termed as a 'statutory scheme'.

18. Hence, in view of the aforesaid finding, we have no hesitation in concluding that the Nautor Scheme 1975 is a non-statutory Scheme and there is no provision, whereby jurisdiction of civil court stands excluded expressly or by necessary implication. Even if, for the sake of arguments, it is presumed

that the aforesaid Scheme is statutory, even then jurisdiction of civil courts cannot be excluded, even if the same is not specifically excluded in the Scheme itself. In this regard, it is necessary to take note of Section 9 CPC which reads as under:

> "9. Courts to try all civil suits unless barred
> The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
> Explanation: [1] [I] A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
> [2] [Explanation II: For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]"

19. Bare perusal of aforesaid provision clearly reveals that the courts shall have jurisdiction to try all suits of civil nature, except in those cases, where their jurisdiction is expressly or impliedly barred.

20. Reliance is placed upon decision of Hon'ble Privy Council in **Secretary of State** v. **Mask and Company,** AIR 1940 PC 105, wherein it has been categorically held that the exclusion of jurisdiction of civil court is not to be readily inferred but such exclusion either must be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine the cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

21. Reference is also made to judgment of Hon'ble Apex Court in **Robust Hotels (P) Ltd.** v. **EIH Ltd.** (2017) 1 SCC 622, wherein Hon'ble Apex Court has held that the jurisdiction of the Civil Court is plenary in nature, unless

the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits. Hon'ble Apex Court held as under:

> "31. The scope and ambit of Section 34 of Sarfaesi Act, 2002 have been considered by this Court in several cases. It is sufficient to refer the judgment of this Court in Nahar Industrial Enterprises Limited Versus Hong Kong & Shanghai Banking Corporation (2009) 8 SCC 646. This Court held that the jurisdiction of the Civil Court is plenary in nature, unless the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits."

22. Constitution Bench of Hon'ble Apex Court in **Dhulabhai** v. **State of M.P.** AIR 1969 SC 78, specifically discussed ambit of S.9 CPC and laid down following principles:

> "32. Neither of the two cases of Firm of Illuri Subayya(1) or Kamla Mills(2) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-
>
> (1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the

determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional. or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund' of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for. the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

23. If the aforesaid principles culled out by Hon'ble Apex Court are read in their entirety, it can be safely inferred that ordinarily civil court has jurisdiction to decide all matters of civil nature, save and except where its jurisdiction is expressly or impliedly barred.

24. In **Unichem Laboratories** v. **Rani Devi (**2017) 13 SCC 509, Hon'ble Apex Court reiterated that the exclusion of jurisdiction of the Civil Court is not to be readily inferred and such exclusion has either to be explicitly expressed or clearly implied and burden to prove such exclusion lies on party, which raises such contention. Hon'ble Apex Court held as under:

> "23. It is a settled principle of law that exclusion of jurisdiction of the Civil Court is not to be readily inferred and such exclusion is either be "explicitly expressed or clearly implied". It is a principle by no means to be whittled down and has been referred to as a "fundamental rule". As a necessary corollary of this rule, provisions excluding jurisdiction of Civil Courts are required to be construed strictly. In other words, it is trite rule of interpretation that existence of jurisdiction in Civil Courts to decide questions of civil nature is a general rule whereas the exclusion is an exception. The burden is, therefore, on the party who raises such a contention to prove such exclusion. (See Interpretation of Statutes by G.P. Singh, 12th Edition, pages 747-748). It is not so in this case.
>
> 24. It is for these reasons, we are of the view that both the Courts below were right in holding that the suit is not hit by rigors of Section 13 of the Act."

25. Hon'ble Apex Court in **Dhruv Green Field** v. **Hukam Singh** (2002) 6 SCC 416, held that the bar against jurisdiction of civil court is not to be inferred unless statute provides for alternative and efficacious remedy. Most importantly, in the aforesaid judgment, Hon'ble Apex Court held that jurisdiction of civil court would be retained despite express or implied bar, if the order or action complained of is a nullity. Apex Court held as under:

> "8. The jurisdiction of the courts to try all suits of civil nature is very expansive as is evident from the plain language of Section 9 of the Code of Civil Procedure.* This is because of the principle 'ubi' jus ibi remedium. It is only where cognizance of a specified type of suit is barred by a statute either expressly or impliedly that the jurisdiction of the civil court would be ousted to entertain such a suit. The general principle is that a statute excluding the jurisdiction of civil courts should be construed strictly.
>
> 9. The question when and in what circumstances, can a suit of civil nature be said to be barred by a special statute, is no longer res Integra. Mis. Kamala Mills Ltd v. State of Bombay, AIR

(1965) SC 1942, a seven-judge Bench of this Court laid down the principle thus:

"The question about the exclusion of the jurisdiction of civil courts either expressly or by necessary implication must be considered, in every case, in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions, their object and their purpose.

Whenever a plea is raised before a civil court that its jurisdiction is excluded either expressly or be necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. Where the exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of remedies provided for by it may be relevant, it cannot, however, be decisive.

But when exclusion is pleaded as a matter of necessary implication. Such considerations would be very important, and in conceivable circumstances, might even become decisive. If a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it is pertinent to enquire whether remedies, normally associated with actions in civil courts are prescribed by the said statute or not"

That judgment was followed in Lala Ram Swarup and Ors. v. Shikar Chand and Anr., [1966] 2 SCR 553. There Gajendragadkar, CJ. speaking for a Constitution Bench of this Court formulated the following tests:

The two tests, which are often considered relevant in dealing with the question about the exclusion of civil courts' jurisdiction are (a) whether the special statute which excludes such jurisdiction has used clear and unambiguous wounds

indicating that intention, and (b) does that statute provide for an adequate and satisfactory alternative remedy to a party that may be aggrieved by the relevant order under its material provisions. Applying these tests the inference is inescapable that the jurisdiction of the civil courts is intended to be excluded.

The bar excluding the jurisdiction of civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity."

10. In the light of the above discussion, the following principles may be re- stated:

(1) If there is express provision in any Special Act barring the jurisdiction of a civil court to deal with matters specified thereunder the jurisdiction of an ordinary civil court shall stand excluded.

(2) If there is no express provision in the Act but an examination of the provisions contained therein lead to a conclusion in regard to exclusion of jurisdiction of a civil court, the Court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the civil court is barred, If however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of civil court cannot be inferred.

(3) Even in cases where the jurisdiction of a civil court is barred expressly or impliedly the court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity."

26. Now being guided by aforesaid law laid down on the subject by Hon'ble Apex Court and provisions contained under the Scheme, we would make an attempt to evaluate the findings of learned Single Judge while passing judgment in **Duglu Ram** (supra), wherein, in para-9 following observations /findings have been returned:

> "9. The matter can be examined from another angle. Although there is no such plea in the pleadings of the parties and no issue has been framed but the fact remains that admittedly the impugned order of the Collector could be challenged by way of revision under relevant rules. The same not having been done and the present suit having been filed. It was liable to be dismissed on that score alone. It is settled law that where a specific statute or rules provide for a remedy by way of appeal or revision, etc. then unless that remedy is exhausted, the party cannot approach the Civil court except in cases where the impugned action is without jurisdiction or sufficient cause being shown that the remedy thus provided could not be availed of. Neither of the two situations exist in the present case "

27. In the aforesaid judgment, learned Single Judge, while holding that the impugned order of collector could be laid challenge by way of revision under relevant rules, also ruled that where a specific statute or rule provides for remedy by way of appeal or revision, then unless that remedy is exhausted the party cannot approach civil court except in case, where action is without jurisdiction or sufficient cause is shown that the remedy thus provided could not be availed of.

28. Having found aforesaid finding returned by learned Single Judge in **Duglu Ram** (supra) to be contrary to very essence of the Scheme and law laid down by Hon'ble Apex Court with regard to exclusion of jurisdiction of civil court in terms of S. 9 CPC, learned Single Judge has made reference to this court as detailed herein above.

29. Facts as detailed in **Duglu Ram** (supra) reveal that in that case predecessor-in-interest of the appellants was granted land being a landless lady under the Scheme however, the grant came to be cancelled vide order dated 16.8.1982 passed by the Collector Kullu, on the ground that the deceased grantee failed to break the land for cultivation within a period of two years of date of grant. Being aggrieved with the aforesaid order passed by the

collector, legal representatives of grantee filed civil suit claiming that the order of the Collector is without jurisdiction. However, suit as well as appeal filed thereafter by legal representatives of grantee were dismissed. Being aggrieved with the dismissal of appeal by first appellate court, legal representatives of grantee filed Regular Second Appeal in that case i.e. **Duglu Ram** (supra), wherein this court held that the order passed by the Collector could be assailed by way of revision under the relevant rules. Court further held that where statutory rules provide for remedy by way of revision or appeal, party cannot approach civil court except in case where order is without jurisdiction.

30. No doubt, the Scheme, reproduced supra, provides for remedy of revision under Clause 9A, which empowers a commissioner to take *suo motu* action or on an application if any made by any person that the allotment of the land under the Scheme was made to a person who was not entitled or eligible for such allotment or allotment was wrong or on any other grounds. If the commissioner is satisfied that the allotment has been made to a person, who is not eligible, he can call for the records of case and after making enquiries, can proceed to pass order, if required, for cancellation of grant of land.

31. Though perusal of the Scheme nowhere provides for further appeal /revision, but the Rules i.e. Himachal Pradesh *Nautor* Land Rules, 1968, definitely provide for appeal, review and revision under Ss. 28, 29 and 30, respectively, which read as under:

> "**28.** An appeal from the order of the S.D O. (C) under rule 16 shall lie to the Deputy Commissioner within 60 days from the date of the order. A further appeal from the appellate order of the Deputy Commissioner shall lie to the Commissioner within 60 days from the date of the order.
> In the case of original grant made by the Deputy Commissioner, an appeal from his order shall lie to the Commissioner within 60 days from the date of order and a second appeal to the Financial Commissioner within 90 days from the date of order;
> Provided that no second appeal shall lie when the original order is confirmed on first appeal.

**29. Review.** - The Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (C) may either of his own motion or on application of any party interested review, and modify, reverse or confirm any order passed by himself or any of his predecessors in office, provided as follows: -

(a) when the sub-Divisional Officer (C) thinks it necessary to review any order, he shall first obtain the sanction of the Deputy Commissioner;

(b) when the Commissioner or the Deputy Commissioner think it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Financial Commissioner in the case of the Commissioner and the Commissioner in the case of the Deputy Commissioner;

(c) the application for review of an order shall not be entertained unless it is mode within 90 days from the passing of the order and unless the applicant satisfied the Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (Civil) as the case may be, that he had sufficient cause for not making the application within that period;

(d) an order shall not be modified or reversed in review unless reasonable notice has been given to the parties effected thereby to appear and be heard in support of the order;.

(e) an order against which an appeal has been preferred shall not be reviewed.

**30. Revision.** - (1) The Financial Commissioner may at any time call for the record of any case pending before, or disposed off by any officer subordinate to him.

(2) The Commissioner may at any time call for the record of any case pending before, or disposed off by any officer subordinate to him.

(3) If, in any case, in which the Commissioner has called for the record, he is of the opinion that the proceeding taken order made should be modified or reversed, be 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-rule (i) or reported to him under sub-rule [iii) pass such order as he thinks fit.

> Provided that he shall not under this rule pass any order reversing or modifying any proceedings or orders of the subordinate Revenue Officer without giving the parties concerned an opportunity of being heard."

32. An order of grant of *Patta* under *Nautor* rules, made by Sub Divisional Officer (Civil) under rule 16 can be laid challenge before Deputy Commissioner but if the grant is made by Deputy Commissioner, appeal will lie to the Commissioner within 60 days of order and thereafter to the Financial Commissioner within 90 days from the date of order.

33. Rule 29 enables aforesaid authorities to review their own orders on their own motion or on an application of any party interested in review.

34. Rule 30 enables Financial Commissioner and Commissioner to call for records of any case pending before or disposed of by any officer subordinate to them, if they are of the opinion that the order made should be modified or reversed.

35. Rule 25 empowers Deputy Commissioner to pass order regarding resumption of grant. Deputy Commissioner on receipt of report submitted to him under sub-rule (b) of Section 24 can order for resumption, if he is satisfied that the grant was not made in accordance with law or person to whom grant is made was not eligible under the Scheme. But such power definitely cannot be exercised under Clause 9A of the Scheme, which provides for revision.

36. In the case at hand, Deputy Commissioner exercising power under Clause 9A of the Scheme, proceeded to cancel the grant made in favour of late Dina Nath, whose legal representatives subsequently sold that land to the appellant herein-Lachman, on the ground that late Dina Nath or his legal representatives failed to break the land within a period of two years from the date of grant. Though, Deputy Commissioner has /had power to cancel the grant on account of aforesaid violation but not under Clause 9A of the scheme, rather such power could be exercised under Rule 25 of the Rules,

provided that he was satisfied with report called in terms of sub-rule (b) of Section 24 from the Sub Divisional Officer (Civil) that the grantee failed to put the land granted to him to use, within a period of two years from the date of such grant and no reasons have been shown for not putting such land to use. Provisions of said rule further enable Deputy Commissioner to extend the time to the grantee to put the land to use, if he is satisfied that for the reasons beyond the control of grantee, he/she was unable to put the land to use within the stipulated time.

37. Though, for the reasons stated herein above, the order passed by Deputy Commissioner exercising power under Clause 9A of the Scheme appears to be without jurisdiction but even otherwise, careful perusal of the Scheme as well as Rules nowhere suggests that there is any provision whereby jurisdiction of civil court has been excluded expressly or impliedly. Mere provision of appeal and revision if any under the Scheme or the Rules, may not be sufficient to exclude jurisdiction of the civil courts, because in any situations, where orders passed by authorities under aforesaid Scheme and Rules may be without jurisdiction, in that eventuality, aggrieved party may not have any option but to approach civil court by way of a civil suit.

38. Otherwise also, as has been repeatedly held by Apex Court, exclusion of jurisdiction of civil court is not to be readily inferred unless there is an express bar on the jurisdiction of the civil courts. Apex Court in **Dhulabhai** (supra) has held that where statute gives finality to order of special tribunal, civil courts' jurisdiction must be held to be excluded if appropriate remedy to do what normally a civil court would do in such suit, exists. However, it does not exclude jurisdiction of civil courts, where provisions of a peculiar Act have not been complied with as per fundamental principles of judicial procedure.

39. Though, learned Additional Advocate General has placed heavy reliance upon aforesaid judgment, but there is specific reference to the statutory tribunal. Though in the case at hand, exercise of power is by the authorities

appointed under law, but under a non-statutory Scheme and as such, jurisdiction of civil courts cannot be held to be excluded. Adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment, becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not? Where there is no express bar but statutory provisions imply exclusion of jurisdiction, yet exclusion of jurisdiction of civil courts cannot be inferred unless statute provides an adequate and efficacious alternative remedy. Otherwise also jurisdiction of civil courts would be retained if order or action complained of is nullity.

40. Otherwise also, it is well settled that the existence of jurisdiction of civil courts to decide civil dispute is a general rule, where there is exception, exclusion is either to be expressly expressed or clearly implied. Aforesaid principle by no means can be allowed to be whittled down and as such, has been rightly referred to as a fundamental rule by learned Single Judge while making reference to this court.

41. Hon'ble Apex Court in **Nahar Industrial Enterprises Limited** v. **Hong Kong & Shanghai Banking Corpn.** (2009) 8 SCC 646, while dealing with question of exclusion of jurisdiction of civil courts has categorically held that the jurisdiction of a civil court is plenary in nature. Unless the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits.

42. By now it is well settled that jurisdiction of civil courts to try suits of civil nature, is very extensive. It is only when, there is any provision in the statute, which excludes jurisdiction, that party can have exception to the rule that all suits shall be tried by civil courts, courts would lean in favour of construction which would uphold jurisdiction of civil courts. Even in case, where statute causes finality to order passed by tribunal, civil court has yet power to see whether tribunal has power to grant relief, which civil court would normally grant in suit filed before it. If the answer is in negative, exclusion of jurisdiction of civil courts would not be readily inferred.

43. In the case at hand, the Scheme as well as the Rules in question have no backing/sanction of law, as has been fairly admitted by the authorities in the letter reproduced herein above and as such, cannot be equated with other Schemes/Laws framed under some Act by the State Legislature. Otherwise also, in other Schemes/Rules, viz. Himachal Pradesh Utilisation of Surplus Area, 1975 and the Himachal Pradesh Village Common Land Vesting and Utilisation Scheme, 1975, there is specific bar on the jurisdiction of civil courts. However, in the case at hand, as has been discussed in detail, there is no provision contained under the Scheme/Rules, which expressly or impliedly bars the jurisdiction of civil courts.

44. Though, Mr. G.D. Verma, learned Senior Advocate vehemently argued that the order passed by Deputy Commissioner under Clause 9A of the Scheme is without jurisdiction and as such, could be laid challenge in a civil court but we purposely restrain ourselves from dealing with the aforesaid argument of Mr. Verma, learned Senior Counsel in these proceedings because, any finding by this court on the question supra, may have a bearing upon the merits of the FAO itself filed by appellant Lachman before learned Single Judge, which is yet to be decided on its own merit.

45. Consequently in view of the detailed discussion made and the law taken note of above, we hold that the jurisdiction of civil courts cannot be said to be

barred in matters arising out of Nautor Scheme, 1975, which is admittedly a non-statutory Scheme and this Scheme cannot be equated with other two schemes i.e. the Himachal Pradesh Utilisation of Surplus Area Scheme, 1975 and the Himachal Pradesh Village Common Land Vesting and Utilisation Scheme, 1975, because both have sanction of law/Act passed by State Legislature.

46. The reference is accordingly answered.

Registry to place the file before learned Single Judge.

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

BETWEEN:-

SHYAM LAL
S/O SHRI CHINGA RAM,
RESIDENT OF VILLAGE MUKRANA,
POLICE STATION SADAR,
TEHSIL & DISTRICT BILASPUR,
(HIMACHAL PRADESH)

.. PETITIONER

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE
WITH MR VINOD GUPTA, ADVOCATE)

AND

STATE OF HP THROUGH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARINDER THAKUR AND
MR. KAMAL KISHORE & GAURAV SHARMA,
DEPUTY ADVOCATES GENERAL)

CR. REVISION NO. 107 OF 2012

DECIDED ON 03-03-2022

**Code of Criminal Procedure, 1973**- Section 397- Criminal Revision- Petitioner assailed the conviction and sentenced passed by Ld. JMFC, Bilaspur affirmed by Ld. Sessions Judge, Bilaspur, whereby petitioner was held guilty of having committed offence under Section 409 IPC- Held- Having scanned the entire evidence available on record, this court finds no illegality or infirmity in the conclusion drawn by learned Courts below that the prosecution has successfully proved its case against the accused beyond reasonable doubt that the accused misappropriated the amount received by him as fine from PW-8, Sukh Dei and as such, committed criminal breach of trust qua said amount- Petition dismissed however benefit of the Probation of Offenders Act extended. (Para 27, 29)

**Case referred:**

Hari Kishan & Anr versus Sukhbir Singh & Ors, 1988 AIR (SC) 2127;
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858;
Yudhbir Singh versus State of Himachal Pradesh 1998(1) S.L.J. 58;

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

**O R D E R**

Being aggrieved and dissatisfied with judgment dated 4.10.2010 passed by learned Sessions Judge, Bilaspur, District Bilaspur,, Himachal Pradesh in Cr. Appeal No. 3 of 2008, affirming the judgment of conviction and order of sentence dated 26.12.2007 passed by learned Judicial Magistrate First Class, Bilaspur, Himachal Pradesh in case No. 131/2 of 1998/97 titled State vs. Shyam Lal, whereby learned trial Court, while holding the petitioner-accused(hereinafter, 'accused') guilty of having committed offence punishable under S. 409 IPC, convicted and sentenced him to undergo simple imprisonment for two weeks and pay fine of Rs.500/- and, in default of payment of fine, to further undergo simple imprisonment for two weeks.

2. In nut shell, the case of the prosecution is that, on 19.7.1995, accused, who was serving as a Process Server in the court of Naib Tehsildar,

was handed over summons Exhibit PW-3-/A to be served upon one Sita Ram son of Shri Pohlo Ram for recovery of Rs. 250/-. Though the accused, after having served above named person, collected fine of Rs. 250/- in the presence of person namely Gurnam Singh PW-7, and executed a receipt Exhibit PW-1/B in the presence of Ranjeet Singh, PW-13, however, he failed to deposit the amount in the Government treasury. Subsequently on 24.7.1995, another summon was given to the accused for serving upon PW-8 Sukh Dei, vide entry made in Register, Ext. PW-4/A, for recovery of Rs. 500/-. Accused served PW-8 Sukh Dei with the summons and after having collected fine of Rs. 500/-, executed a receipt Exhibit PW-1/D, in the presence of persons namely, Jai Singh PW-9, Nand Lal PW-10 and Hari Singh PW-11, however, such amount was never deposited in the Government treasury.

3. Since the accused, despite repeated reminders, failed to deposit the amount in Government treasury, an explanation was called from him by PW-2 Roshan Lal, the then Naib Tehsildar Swarghat, but yet accused failed to deposit the fine amount and as such, information was given to the Deputy Commissioner Bilaspur vide Ext. P-3, by Roshan Lal (PW-2). In the aforesaid background matter was reported to the police by PW-2 Roshan Lal, vide Ext. PW-2/A, on the basis of which, FIR Ext. 14/A came to be recorded at Police Station Sadar, Bilaspur.

4. PW-14 ASI Tara Singh, conducted investigation. The leave application, Ext. PW14/A and specimen handwriting of the accused were taken into possession vide memo Ext. PW-14/C. Specimen Handwriting and signatures of the accused were obtained by Shri Arun Bhardwaj, PW-15, the then Executive Magistrate Ghumarwin, which are Exts. PW-14/D-1 to PW-14/D-6 and disputed receipts alongwith aforesaid specimen writing and admitted signatures were sent to the handwriting expert, for comparison, who vide report Exhibit PW-14/E opined that the receipts in issue were issued by the accused and bears his signatures. Exhibit PW-6A and PW-6/B regarding

non-deposit of fine, were obtained from PW-6 Gulab Singh. Abstract of duty register Exts. PW-4/A and PW-4/B were also seized form PW-4 Desh Raj

5. After completion of investigation, police presented Challan in the competent court of law, which being satisfied that a prima facie case exists against the accused, charged him for commission of offence punishable under Ss. 420 and 409 IPC, to which he pleaded not guilty and claimed trial.

6. Prosecution, with a view to prove its case, examined as many as 15 witnesses, whereas, accused though in his statement recorded under S. 313 CrPC, denied the case of prosecution in toto but failed to lead any evidence in his defence despite adequate opportunity given to him.

7. Learned trial Court, on the basis of evidence, led on record by prosecution, though acquitted the accused of charge framed under S. 420 IPC but found him guilty for his having committed offence under S. 409 IPC and accordingly convicted and sentenced him, as per description given herein above.

8. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence recorded by learned trial Court, accused preferred an appeal before learned Sessions Judge Bilaspur but the same was also dismissed vide judgment dated 4.10.2010. In the aforesaid background, accused has approached this court in the instant proceedings, praying therein for his acquittal after setting aside judgment of conviction and order of sentence passed by learned court below

9. Mr. N.S. Chandel, learned counsel for the petitioner duly assisted by Mr. Vinod Gupta, Advocate, vehemently argued that the impugned judgment upholding the judgment of conviction and order of sentence passed by learned trial Court, thereby holding the accused guilty of having committed offence punishable under S. 409 IPC is not sustainable in the eye of law, as the same is not based upon proper appreciation of evidence, as such, same deserve to be quashed and set aside. Mr. Chandel, learned senior counsel vehemently

argued that since report of Handwriting Expert, Ext PW-14/E never came to be proved in accordance with law, learned courts below ought not have held the accused guilty of having committed offence punishable under S. 409 IPC, merely on the statement of PW-8 Sukh Dei and PW-9 Jai Singh, especially when both the independent witnesses, PW-10 and PW-11, turned hostile.

10. Mr. Desh Raj Thakur, learned Additional Advocate General, supported the impugned judgments of conviction and order of sentence passed by learned courts below and argued that the impugned judgments of conviction and order of sentence passed by learned courts below are based upon proper appreciation of evidence led on record by the prosecution, and as such, present petition deserves to be dismissed. While refuting the contentions/submissions made by learned counsel for the petitioner, learned Additional Advocate General, submitted that the judgment of conviction and order of sentence passed by learned court below is not solely based upon the report of the Handwriting Expert, rather, the same is based upon statements of material prosecution witnesses, who, in unison, have deposed before learned trial court that the accused after having served summons upon PW-8 Sukh Dei received Rs. 500/- as a fine from her and executed receipt Exhibit PW-1/D.

11. Lastly, learned Additional Advocate General argued that this court, while exercising power under S.397 CrPC has a very limited jurisdiction to re-appreciate the evidence, especially when learned counsel for the petitioner has not been able to point out any perversity in the same.

12. Having heard learned counsel for the parties and perused the evidence led on record by respective parties, vis-à-vis reasoning assigned by learned courts below in the impugned judgments of conviction and order of sentence, this court sees no reason to interfere in the impugned judgments of conviction and order of sentence passed by learned courts below, which

otherwise appear to have been passed on the basis of proper appreciation of the evidence, be it ocular or documentary.

13. With a view to constitute an offence under S.409 IPC, prosecution is required to prove that the accused was entrusted with property in the capacity of a public servant and he committed criminal breach of trust qua that property. Though, in the case at hand, learned senior counsel for the accused attempted to carve out a case that at no point of time, accused was entrusted with property in the capacity of a public servant and he also argued that the accused was not authorized to collect the fine, however, careful perusal of the evidence collected on record by prosecution, clearly reveals that the accused, who at the relevant time was working as a Process Server was entrusted with duty to serve summons upon PW-8 Sukh Dei and another person Sita Ram, who were imposed fine of Rs. 500/- and Rs. 250/- respectively on account of encroachment. Though the accused collected fine from both the persons, amounting to Rs. 500/- and Rs. 250/- respectively, but failed to deposit the same with the Government treasury.

14. If the statements of PW-1 and PW-2 are read in conjunction, they clearly prove the factum with regard to the duty given to the accused to serve summons upon PW-8 Sukh Dei (complainant). PW-1 Daya Krishan Thakur has categorically deposed that on the askance of the accused, he had deposited Rs. 250/- collected by accused from person namely Sita Ram in the Government treasury but he never returned that money to him. This witness also deposed that despite repeated reminders, accused failed to deposit Rs. 500/- recovered by him from Sukh Dei.

15. Leaving everything aside, accused himself in his statement recorded under S. 313 CrPC, admitted the factum with regard to his having been deputed to serve summons upon PW-8, complainant on the given date. In his statement he admitted that he was a public servant in the year 1995 and was working as a Process Server in the office of Naib Tehsildar Swarghat. PW-1

Daya Krishan and PW-2 Roshan Lal never came to be cross examined qua the question of posting and entrustment of duty to the accused to serve summons upon PW-8 and as such, it stands duly established on record that the accused, in his official capacity, had gone to residence of PW-8 Sukh Dei to serve summons on 24.7.1995.

16. Besides above, accused in his statement recorded under S.313 CrPC, while answering question No. 11, specifically admitted that on 24.7.1995, he was given summons vide entry No. 195 made in the Register Exhibit PW-4/A to be served upon PW-8 Sukh Dei for recovery of Rs. 500/-. Similarly, allegations with regard to collection of Rs. 500/- as fine from PW-8 by the accused stands duly proved on record. PW-8 Sukh Dei complainant deposed that she is known to the accused, who is deployed in Sub Tehsil Swarghat. She stated that about four years back, accused came to her house in the presence of PW-9, Jai Singh Pradhan, PW-10 Hari Singh and another person and she handed over Rs. 500/- as fine in respect of illegal encroachment. She also deposed that the accused issued receipt, Exhibit PW-1/D, which was handed over to the police. She deposed that the aforesaid receipt was issued in the presence of witnesses.

17. Cross-examination conducted upon this witness, nowhere suggests that the defence was able to extract anything contrary to what this witness stated in her examination-in-chief. In her cross-examination, she denied the suggestion that no such amount was handed over by her to the accused as fine. This witness also denied that Ext. PW-1/D(receipt) was forged by her in connivance with the police.

18. Afore version of PW-8 is duly corroborated by PW-9 Jai Singh, the then Pradhan, Gram Panchayat, who deposed that PW-8 handed over Rs. 500/- to the accused in his presence. He deposed that the accused was deployed in Tehsil Office, Swarghat four years back, when he was Pradhan of the Gram Panchayat. He deposed that the accused came to the house of SuKh

Dei and told her that she has been fined Rs. 500/- on account of encroachment. He deposed that the accused asked PW-8 Sukh Dei to hand over Rs. 500/- to him in his presence and two other witnesses. He deposed that PW-8 handed over Rs. 500 to the accused, who told that proper receipt would be issued by the office but himself issued receipt Ext. PW-1/D, which was prepared by him in the presence of PW-8 and other witness.

19. Cross-examination conducted upon this witness also nowhere suggests that the defence was able to extract anything contrary to what this witness stated in his examination-in-chief. Though, in the case at hand, accused set up a plea that he is innocent and has been falsely implicated in the case, but while making his statement under S. 313 CrPC, he never attributed any motive to PW-8 and P-9, qua his alleged false implication. Otherwise also, there is no evidence, if any, led on record by accused, suggestive of the fact that PW-8 and PW-9 were inimical towards him and to implicate him, falsely deposed against him.

20. True it is that the receipt Ext. PW-1/D does not bear signatures of PW-9 Jai Singh, but such fact is of no consequence, especially when perusal of receipt itself suggests that PW-9, was very much present on the spot at the time of its execution. It has been categorically stated in the receipt Exhibit PW-1/D that the fine amount was received in the presence of Pradhan, Gram Panchayat i.e. PW-9 and persons namely Hari Singh and Nand Lal, PW-10 and PW-11. PW-9 has admitted in his cross-examination that the receipt Exhibit PW-1/D does not bear his signatures but the presence of PW-9 at the time of execution of receipt Exhibit PW-1/D stands duly proved with bare reading of receipt, which confirms receipt of Rs. 500/- as fine by the accused from PW-8, complainant, Sukh Dei.

21. Though learned senior counsel for the accused argued that the independent witnesses namely PW-10 Nand Lal and PW-11 Hari Singh, have not supported the prosecution case, but cross-examination conducted upon

these witnesses, if read in entirety, clearly proves their presence on the spot at the time of execution of receipt Exhibit PW-1/D. Though these witnesses were declared hostile, on account of their failure to support the case of the prosecution, but both the witnesses admitted their signatures upon the receipt. No plausible explanation came to be rendered on record by these witnesses qua their signatures upon receipt, Ext PW-1/D. PW-10 admitted that he has studied upto 10th class and can read and write Hindi. Since Exhibit PW-1/D is in Hindi, it is not understood that how, without reading the contents of the receipt, this witness put his signatures upon the same.

22. Merely the fact that the afore witnesses PW-10 and PW-11 have not supported the prosecution case, would not render statements of PW-8 and PW-9 untrustworthy. Rather, if both are read in conjunction, clearly prove guilt of accused and as such learned courts below rightly placed heavy reliance upon same, while holding accused guilty of having committed offence punishable under S. 409 IPC. Otherwise also, denial if any on behalf of PW-11 that no money was paid in his presence by PW-8 Sukh Dei to the accused, is of no consequence, especially when there is no dispute that receipt Ext. PW-1/D does not bear signatures of this witness, which fact has been admitted by this witness in his cross-examination done on behalf of the accused. Though, PW-10 and PW-11 have not corroborated the version put forth by PW-8 and PW-9, but this will definitely not make version of PW-8 and PW-9 unreliable, in light of other evidence adduced on record by the prosecution.

23. Statements of PW-15 Shri Arun Bhardwaj, as well as that of the accused recorded under S.313 CrPC, clearly reveal that the specimen handwriting and signatures of the accused were obtained in writing during investigation. ASI Tara Singh i.e.PW-14 has deposed categorically that the same were handed over to the Handwriting Expert alongwith questioned documents. Though, the Handwriting Expert opined that the receipt in dispute bears signatures of the accused but definitely report never came to be proved

in accordance with law, because the prosecution failed to examine the Handwriting Expert.

24. True it is that, in the case at hand, Handwriting Expert was not examined to prove the result of comparison of specimen writing and signatures with questioned document including Ext. PW-1/D, however, overwhelming evidence apart from report of Handwriting Expert led on record by prosecution proves the guilt of the accused beyond reasonable doubt. Since it stands duly established on record that Ext. PW-1/D was issued by the accused under his hand, non-examination of the Handwriting Expert by the prosecution cannot be said to be fatal to the case of the prosecution. Report given by the Handwriting Expert duly corroborates the version of PW-8 and PW-9. Though the report of the Handwriting Expert was not proved in accordance with law, but the same can be duly read in corroboration of the version put forth by PW-8 and PW-9.

25. On the basis of statements of PW-8 and PW-9, which have been found to be confidence inspiring and worth credence, it stands proved that Exhibit PW-1/D was issued by accused under his hand and signatures, as such, learned courts below rightly arrived at a conclusion that it stands established on record, that the accused received Rs. 500 from Sukh Dei as fine, on 25.7.1995.

26. As has been discussed herein above, it stands established on record from the statements of PW-2 Roshan Lal, the then Naib Tehsildar Swarghat and PW-1, Daya Krishan Thakur, that in the year 1995, accused was a Process Server and he was assigned duty to serve PW-8 with the summons to pay the fine and he, after having unauthorizedly received fine of Rs. 500 from PW-8, failed to deposit the same in the Government treasury. It has come in the evidence of PW-2 that he called upon accused to explain vide Exhibit P.4 that, why he has not deposited the amount received by him from PW-8 with

Government treasury, but neither the accused replied to the notice nor deposited the said amount.

27. Having scanned the entire evidence available on record, this court finds no illegality or infirmity in the conclusion drawn by learned Courts below that the prosecution has successfully proved its case against the accused beyond reasonable doubt that the accused misappropriated the amount received by him as fine from PW-8, Sukh Dei and as such, committed criminal breach of trust qua said amount.

28. Consequently, in view of the detailed discussion made herein above, I find no merit in the present petition, which is accordingly dismissed. Impugned judgments of conviction and order of sentence passed by learned Courts below are upheld.

29. At this stage, Mr. N.S. Chandel, Senior Advocate, appearing for the accused submitted that since alleged offence was committed in the year 1995 i.e. 27 years back, and during the pendency of trial and thereafter during proceedings before appellate court, accused has already undergone mental trauma coupled with the fact that the accused has turned 65 years of age, this court may consider extending benefit of S. 4 of the Probation of Offenders Act.

30. In support of the aforesaid arguments, learned counsel for the accused also invited the attention of this Court to the judgment passed by this Court in **Yudhbir Singh** versus **State of Himachal Pradesh** 1998(1)S.L.J. 58, wherein it has been held as under:

> "9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the

benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons."

31. In this regard, reliance is placed upon judgment of the Hon'ble Apex Court in **Ramesh Kumar @ Babla** versus **State of Punjab** 2016 AIR (SC) 2858, wherein it has been held as under:

"7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.

8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be

released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one) year when called upon to do so and in the meantime to keep the peace and be of good behaviour."

32. Reliance is also placed upon judgment passed by Hon'ble Apex Court **Hari Kishan & Anr** versus **Sukhbir Singh & Ors**, 1988 AIR (SC) 2127, wherein it has been held as under:

"8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not showing to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to the first offenders cannot be said to be inappropriate.

9. This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs.2500/- as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to section 357 Criminal Procedure Code Section 357, leaving aside the unnecessary, provides:-

"357. Order to pay compensation:

(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the

Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

Xxxxxxxxxxxxx

Xxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this Section.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."

33. In view of the aforesaid law as well as submissions having been made by learned counsel appearing on behalf of the accused and after taking

into consideration the facts and circumstances of the present case, I am of the considered opinion that the present accused can be granted benefit of Section 4 of the Probation of Offenders Act, 1958.

34. Accordingly, Registry is directed to call for the report of the Probation Officer concerned on or before next date of hearing.

Registry to list this matter on **5.4.2022**.

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

Between:-

M/S EAGLE TOURS AND TRAVELS
THROUGH ITS PROPRIETOR
SHRI VARINDER KUMAR,
BAWA MARKET, AG CHOWK,
SHIMLA-3

... PETITIONER

(BY MR. SUMIT SOOD, ADVOCATE)

AND

JBS BAWA
S/O LATE SHRI RATTAN SINGH,
BAWA ESTTE,
AG CHOWK,
SHIMLA-3

.. RESPONDENT

(BY MR. Y.P. SOOD, ADVOCATE)

CIVIL REVISION NO. 198 OF 2018
DECIDED ON 17-03-2022

**H.P. Urban Rent Control Act, 1987**- Section 24- Revision- Petitioner assailed the order of eviction passed by Ld. Rent Controller (I), Shimla, on the ground of arrears of land affirmed by Ld. Appellate Authority (IV), Shimla- Held- Since this court does not find any glaring error in the appreciation of evidence by

both the learned Courts below, this court sees no occasion to exercise its revisionary powers in the case at hand- Petition dismissed. (Para 31, 32)

**Cases referred:**

E. Parashuraman (D) v. V. Doraiswamy (D), (2006) 1 SCC 658;

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452;

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

**O R D E R**

Instant civil revision petition filed under S.24 of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter, 'Act') lays challenge to judgment dated 27.4.2018 passed by Appellate Authority-(IV), Shimla, Himachal Pradesh in Rent Appeal No. 31-S/14 of 2017 titled M/s Eagle Tours and Travels v. Sh. J.B.S. Bawa, affirming the order of eviction dated 29.8.2017 passed by learned Rent Controller-(1), Shimla, whereby Rent Petition No. 10-2 of 2014/10 under S. 14 of the Act, titled JBS Bawa v. M/s Eagle Tour and Travel, having been filed by the respondent came to be allowed on the ground of arrears of rent.

2. Precisely, the facts of the case as emerge from the record are that the respondent filed a petition under S.14 of the Act against the petitioner-tenant (hereinafter, 'tenant') for eviction from the demised premises known as Eagle Tour and Travels, Bawa Market, AG Chowk, Kali Bari (hereinafter, 'demised premises'), claiming therein that the tenant was inducted as a tenant in March, 1992 by way of oral agreement on monthly rent o Rs. 1,000/- and since then he has not paid any rent of the shop in question. Respondent claimed that the tenant has not paid amount of rent with effect from 1992 and as such, he may be evicted from the premises on the ground of arrears of rent.

3. Tenant refuted the aforesaid claim of the respondent by filing a detailed reply, claiming therein that there exists no relationship of landlord-tenant inter se parties and the petition deserves to be dismissed for mis-joinder and non-joinder of necessary parties. On merit, tenant claimed that the ownership of the demised premises, which is a shop in ground floor of building situate on Khasra No. 18 and 21, Up Mohal Kali Bari, Tehsil and District Shimla, Himachal Pradesh, stands recorded in the name of Central Government, and the respondent has nothing to do with the demised premises. Tenant further claimed that the demised premises were let out in March, 2002 by one H.L. Sethi, who was earlier in possession of the demised premises. Besides above, tenant also claimed that the petition is bad for non-joinder and mis-joinder of necessary parties because, neither M/s Eagle Tours and Travels is tenant in the demised premises nor he has any concern with the same, rather, one Varinder Kumar is tenant in the demised premises. Tenant claimed that he has been inducted as tenant by one H.L. Sethi on monthly rent of Rs. 500/- and payment of rent has been acknowledged by said H.L. Sethi. Lastly, the tenant claimed that since for more than 19 years, respondent never claimed any rent, it can be well presumed that there is no relationship of landlord-tenant between the parties and petition has been filed with a view to oust him and extract rent, which otherwise is not payable to him.

4. Respondent filed rejoinder/replication to the reply, refuting the contentions made therein, and claimed that he was administrator appointed by learned District and Sessions Judge, Shimla vide order dated 30.6.1989, qua the building built upon Khasra Nos. 808/580(81-1), 581/1(330-18) and 794/581/A min 218-0 at Mohal Upper Kaithu. It is claimed by the respondent that said H.L. Sethi himself is tenant under him (respondent) as such, he cannot be said to be the landlord of the tenant.

5. On the basis of the aforesaid pleadings, learned Rent Controller, after having framed as many as six issues on 14.2.2011, ordered eviction of the tenant on the ground of arrears of rent. Learned Rent Controller held the respondent entitled to arrears of rent since April, 1992 amounting to Rs. 4,34,443/- alongwith enhancement and interest. While passing the order of eviction, learned Rent Controller specifically ordered that in case, arrears of rent cauclated by it are paid within the stipulated period of 30 days from the date of passing of the order, tenant would not be evicted from the demised premises.

6. Being aggrieved and dissatisfied with the aforesaid order of eviction passed by learned Rent Controller, tenant filed rent appeal under S.24 of the act before the appellate authority, which also came to be dismissed vide judgment dated 27.6.2018. In the aforesaid background, tenant has approached this court in the instant proceedings, praying therein to set aside the aforesaid judgment passed by learned appellate authority upholding the order of eviction passed by learned Rent Controller, further affirmed by the appellate authority.

7. I have heard the Learned Counsel appearing for the parties and perused the record of the case.

8. Mr. Sumit Sood, learned Counsel appearing for the tenant, vehemently argued that the impugned judgment passed by the appellate authority below affirming the order of eviction passed by learned Rent Controller is not sustainable in the eyes of law as the same is not based upon proper appreciation of facts as well as law as such, deserves to be set aside. He argued that since it stands established on record that the respondent is not the landlord of the demised premises and actual owner of the demised premises is the Central Government, courts below ought to have dismissed the eviction petition having been filed by the respondent on this ground alone. He further argued that while passing the eviction order, learned Rent Controller

below totally brushed aside the ocular and documentary evidence, especially Ext. RW-1/D, RW-2/A to RW-2/D and RW-3/A to RW-3/C, whereby it stood proved that the demised premises is owned by Custodian Department and the respondent is not the landlord or the administrator of the same. He further argued that the learned Courts below have failed to take note of the fact that as per Ext. AW-3/M, it stands proved on record that the respondent is not an administrator of the property as such, he has no right to hold the demised premises as landlord thereof. Mr. Sood further argued that learned Courts below gravelly erred by holding that the tenant is in arrears of rent with effect from 1992 because, the tenant had been occupying the rented premises at the rent of Rs.500/- per month since 2002.

9. Mr. Y.P. Sood, Advocate, while supporting the impugned judgment passed by learned appellate authority below, upholding the order of eviction passed by learned Rent Controller, argued that there is overwhelming evidence available on record suggestive of the fact that the respondent is owner of the property in question and, otherwise also, entry, if any, in the name of Custodian Department in the revenue record showing the Custodian Department to be owner of the property in question is of no relevance, especially in the proceedings under the Act ibid. He submitted that since it stands duly proved on record that learned District and Sessions Judge, Shimla, vide order dated 30.6.1989, had appointed the respondent as an Administrator of the property in question and he was collecting rent from the tenants in the premises, pleas raised by the tenant deserve outright rejection being devoid of merit. While referring to the definition of 'landlord' as provided under S.2(d) of the Act, Mr. Y.P. Sood, Advocate submitted that the definition not only includes the original owner, but also his agents, who are entitled to receive rent in respect of any building or rented land, whether on his own account or on behalf of the benefit, if any other person, or as a trustee, guardian, receiver, executor or administrator for any other person and

includes a tenant who sublets any building or rented land in the manner authorised, a specified landlord, and every person from time to time driving title under a landlord, as such, no illegality can be said to have been committed by the learned Courts below, while allowing the eviction petition having been filed by the respondent. Lastly, Mr. Sood, learned counsel for the respondent, argued that this court, while exercising revisionary power under S.24(5) of the Act, has very limited scope to re-appreciate the evidence, especially when there is no perversity in the order impugned in the proceedings at hand.

10. Having heard Learned Counsel appearing for the parties and perused the record vis-à-vis reasoning assigned in the impugned judgment passed by authority below, this court finds no illegality in the same and as such, no interference is called for. In the case at hand, claim of the tenant is that since the demised premises stands recorded in the name of the Central Government, as such, respondent has no authority to claim the eviction of the premises claiming himself to be the owner thereof.

11. Record reveals that the respondent placed on record Ext. AW-3/A to AW-3/F i.e. copy of order dated 30.6.1989 passed by learned District and Sessions Judge, Shimla on the petition of the respondent, for issuance of letter of probate. As per letter of administration, which came to be issued vide order dated 30.6.1989, Ext. AW-3/M, respondent was appointed as an administrator of the estate of deceased Bawa R. Singh and the immovable property i.e. Bawa Hotel with annexe land and shops, Bawa Niwas, Lower Kaithu, Shimla. Though, learned Counsel appearing for the tenant claimed that the demised shop is not the part of the property qua which the respondent claimed to be appointed as an administrator but the Ext. RW-1/A and RW-1/C placed on record by the tenant, reveals that the demised premises stands mentioned as Bawa Estate.

12. As has been taken note herein above, respondent vide order dated 30.6.1989 was appointed as an administrator qua Bawa Hotel, Annexe, land and building and shop, Bawa Niwas, Lower Kaithu, Shimla. Record further reveals that prior to passing of order dated 30.6.1989, Ext. AW-3/M, one compromise Ext RW2/D, dated 6.7.1987 was effected between JBS Bawa and Bawa Gurpartap Singh, Bawa Harparkash Singh and Manorama Bawa R. Singh, widow of Bawa Rattan Singh, , perusal whereof clearly reveals that deceased Manorma Bawa, step mother of H.L. Sethi also agreed to appoint the respondent as an administrator of the entire estate of deceased Bawa Rattan Singh, which fact further proves that H.L. Sethi was never given any such right. Demised premises was on Bawa Estaet. Perusal of order dated 30.6.1989, Ext. AW-3/M speaks as under:

> ""First party is hereby authorized and empowered to collect rent, arrears of rent monthly suits, prenote etc. from the tenants in the property known as Bawa Estate, Bawa Hotel, Shimla-3, against proper receipt and any amount paid to the 1st party shall be a valid discharge on behalf of all the heirs of deceased Dr. Bawa R. Singh on production of receipt. In case any tenant refused or neglected to pay the rent/arrears of rent to the 1st party, the 1st party shall call upon such tenants to deposit the same in the court of rent controller, Shimla."

13. Careful perusal of aforesaid para given in order dated 30.6.1989 reveals that the respondent was empowered to collect rent, arrears of rent monthly suits, prenote etc. from the tenants in the property known as Bawa Estate, Bawa Hotel, Shimla-3. Hence, it cannot be said that Bawa Market is not part of the Bawa Estate, rather, it is amply clear on record that Bawa Estate and Bawa Bhawan are names of one property and qua all these properties, respondent was appointed as an administrator.

14. Tenant set up a plea that the Custodian Department is the owner of the property but as per copy of Jamabandi, Ext. RW-1/E, this submission is not sustainable in light of the fact that the landlord may not be owner of the subject matter in question, which is subject matter of the controversy inter se

parties but, in case he is having right to collect/receive rent, he can always file proceeding for eviction on the ground of arrears of rent.

15. Though, by way of placing on record certificate, Ext. RW-1/G, issued by the revenue authorities, tenant made an attempt to carve out a case that since the property in question stood mutated in the name of Custodian Department, respondent being total stranger to the property, ought not have filed eviction proceedings against the tenant. However, such plea is of no help to the tenant as far as proceedings initiated by respondent under the Act are concerned. It is well settled that disputed questions of title of property cannot be determined in the proceedings under the Act. Moreover, S.2(d)) of the Act provides that an agent of the landlord is also entitled to receive rent from the tenant on behalf of the landlord. In view of this, the respondent also falls under the definition of 'landlord'.

16. This court in a catena of judgments has held that if a person collects rent and issues receipts thereof, for a very long period in respect of premises, can be called a landlord.

17. Even if for the sake of arguments, it is presumed that the respondent is not the owner of the demised premises, once it stands duly established on record that the respondent had been receiving rent from the tenant qua demised premises, tenant cannot raise objection with regard to title of the demised premises in the instant proceedings.

18. Leaving everything aside, in the case at hand, respondent was appointed as an administrator of Bawa Estate, wherein demised premises is situate, vide order dated 30.6.1989 (Ext. AW-3/M) passed by District and Sessions Judge, Shimla, as such, he was very much entitled to receive rent from the tenant housed in the demised premises.

19. Though, Mr. Sumit Sood, learned Counsel appearing for the tenant, while placing reliance upon certificate Ext. RW-1/G, vehemently argued that since the Custodian Department stood recorded as owner of the property in

question, case filed by respondent claiming himself to be the landlord, ought to have been dismissed outrightly by the court but, such plea is without any merit. Though, there is no material worth credence available on record, suggestive of the fact that the Custodian Department took steps, if any, for eviction of tenant and other tenants from the demised premises known as Bawa Estate after it having been recorded as landlord of the demised premises in the revenue record but even otherwise competence of the respondent/landlord to file eviction proceedings against the tenant housed in the demised premises could not be laid challenge by the Custodian Department or by the tenant herein, till the time, order dated 30.6.1989 Ext. RW-3/G appointing the respondent as an administrator is/was set aside by competent Court of law.

20. Mr. Sumit Sood was not able to point out order if any passed by competent Court of law, recalling/setting aside order dated 30.6.1989, Ext. AW-3/M appointing the respondent as an administrator of the Bawa Estate. As has been taken note herein above, person appointed as an administrator by virtue of letter of administration of court, have the rights of the landlord and the tenant cannot challenge letter of administration in the eviction proceedings. Reliance is placed upon judgment passed by this Court in CR No. 37/2020, **Surjit Verma** v. **Bawa Jung Bahadur** (decided on 2.9.2002), wherein it has been held as under:

> "16. It is evident on a bare reading of the above provisions that a letter of administration granted by a competent Court is conclusive of the "representative title" of the Administrator thereby appointed until it is revoked. In view of the conclusiveness so attached to the letter of administration, no evidence can be admitted to impeach it except in the proceedings seeking revocation of the letter of administration. Otherwise the decision of the Court granting letter of administration is a judgment in rem and thus binding on the whole world.

17. There is nothing on the record to show that the letter of administration appointing the Respondent to be the Administrator of the concerned estate had been revoked.

18. Section 220 of the Indian Succession Act clearly and unambiguously provides that letter of administration entitles the Administrator to have all rights of the intestate as effectually as if the administration had been granted to him at the moment after the death of the testator.

19. On a combined reading of the provisions of Sections 273 and 222 of the Indian Succession Act, the representative title of the Respondent who has been granted the letter of administration by a competent Court, cannot be denied in eviction proceedings by the Petitioner being a tenant.

20. Section 2(c) of the Act includes an "Administrator" in the definition of a landlord for the purposes of the Act. Thus, the inescapable result is that the Respondent is the landlord of the premises in dispute.

21. It appears that the Respondent brought on record a few documents to show that she is owner of the demised premises by virtue of gift made in her favour. It is pertinent to mention that in her reply to the petition the case of the Petitioner is not that she has acquired ownership of the premises in dispute by way of gift but her case is that Smt. Manorama is the landlady thereof. A case set up by a party in the evidence when at variance with the pleadings is wholly unacceptable. There fore, the statement of the Petitioner that she had acquired the ownership of the demised premises by virtue of a gift allegedly made before the reply was filed by her, being at variance with the pleadings, is wholly unacceptable. Moreover, whatever documents she had brought on record, have not been proved in accordance with law and, therefore, have rightly been rejected as evidence by the learned Authorities below. In view of her admission in the reply that she is holding the premises in question as a tenant she has rightly been held a tenant.

21. Moreover, entry if any, in the name of Custodian Department though raises presumption in its favour but it is well settled that the entry in the revenue record may at times, raise presumption but it does not conclusively confer title. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **E. Parashuraman (D)** v. **V. Doraiswamy (D)**, (2006) 1 SCC 658, wherein it has been held as under:

> "It was submitted before us that in the facts and circumstances of this case the tenants were justified in challenging the claim of the respondent to be the landlord. It was argued that the tenancy, if any, was created at an earlier stage and thereafter certain developments took place which justified the appellants' challenge to the right of the landlord to seek their eviction. In this context it was submitted that after the court sale, though the name of Doraiswamy was added in the record maintained by the Corporation, his name was subsequently deleted. Doraiswamy, thereafter, filed a suit for declaration and also a decree for cancellation of the order deleting his name. The suit was dismissed on the ground of want of jurisdiction and the appeal preferred against the said judgment and order was also dismissed. Therefore, it was submitted, that the order of the Civil Court dismissing the suit filed by Doraiswamy attained finality. On the basis of these facts it was contended that Doraiswamy ceased to be the owner of the property and consequently could not exercise the rights conferred upon a landlord by the statute. The submission must be rejected firstly, for the reason that the landlord under the Karnataka Rent Control Act need not be the owner of the premises. Secondly, the mere dismissal of the suit did not, as a consequence, confer title on the Corporation in respect of the property in question. In fact we have noticed that a subsequent suit filed by the Corporation for a declaration that the sale deed executed in favour of Doraiswamy was null and void was also dismissed. In these circumstances whatever may be the dispute between the Corporation and the respondent, the appellants certainly cannot take advantage thereof, once having admitted that they were inducted as tenants by Doraiswamy, the predecessor-in-interest of the respondent. It is also interesting to note that in the suit filed by the Corporation a prayer was made for a direction to the respondent as well as to the appellants herein to handover vacant possession of the

> premises to the Corporation. The appellants derive their right to continue in possession of the premises only through the respondent. The judgment relied upon by the appellants in D. Satyanarayana vs. P. Jagdish : (1987) 4 SCC 424 is clearly distinguishable on the facts of the case. In our view there was no extinguishment of title of the respondent, even though there may be some dispute about it with the Corporation. It is well settled that entries in the revenue record may, at times, raise a presumption, but do not conclusively confer title."

22. It is not on record that after issuance of certificate Ext. RW-1/G, steps if any ever came to be taken at the behest of the Custodian Department to get the order dated 30.6.1989 passed by District and Sessions Judge, Shimla, appointing the respondent as an administrator of the property in question, annulled/vacated, as such, entry, if any in the revenue record to that extent in the column of possession qua the property in question has no relevance especially when the respondent led cogent and convincing evidence to prove that he in the capacity of an administrator appointed by the competent Court of law, had been collecting rent from the various tenants including the present tenant housed in the property in question. Tenant, claimed that the demised premises was rented to him by H.L. Sethi, in March, 2002 and since then, he had been paying rent to H.L. Sethi. With a view to substantiate his aforesaid plea, he also placed on record receipt Ext. RW-1/A, RW-1/B, dated 11.5.2003 and 24.11.2001, receipt Ext. RW-1/D dated 25.3.2011 and no objection certificate Ext. RW-1/C allegedly issued by H.L. Sethi. He further claimed that H.L. Sethi expired in 2011 and since then he was paying rent to Smt. Sukhwarsh Sethi. He also placed on record rent receipt paid to Smt. Sukhvarsha Sethi, Ext. RW-1/D but, interestingly, neither H.L. Sethi nor Smt. Sukhvarsha Sethi ever came to be examined by the tenant. None of the legal heirs of deceased H.L. Sethi were ever examined by the tenant to prove that he being tenant of H.L. Sethi was paying rent to them.

23. Most importantly, tenant in his cross-examination, feigned ignorance as to in what capacity, shop in question was rented by H.L. Sethi to him. He feigned ignorance qua the fact that whether respondent is also an administrator in respect of Bawa Market and Bawa Estaet, in which demised premises /shop is situate.

24. AW-1, Smt. Champa Thakur, Clerk Tax Department, Municipal Corporation, Shimla produced record, according to which inspection list of Municipal Corporation, Shimla, (Ext. AW-1/A) was found to be correct and as per this list, H.L. Sethi is shown to be in possession of the premises at Ward No.4 and 5 on payment of rent of Rs. 500/- and Rs. 1200/- per month. Since H.L. Sethi himself stood recorded as tenant, it is not understood how he could induct the tenant in the demised premises.

25. Plea of the tenant, that he was inducted as tenant in 2002 by H.L. Sethi on the monthly rent of Rs. 500/-, rightly came to be rejected by learned Courts below because such fact never came to be proved in accordance with law. Tenant admitted in his cross-examination that he has not paid any rent to respondent since 1992. In the case at hand, tenant claimed that he was inducted as a tenant in March, 2001 by way of Ext. RW-1/B, and has paid Rs. 6500/- to H.L. Sethi on 24.11.2001, which plea of him clearly belies the stand of the tenant that he took demised premises in March, 2001 from H.L. Sethi.

26. No doubt, rent receipts placed on record as Exts. RW-1/A, RW-1/B and RW-1/D. reveal that the rent was being paid by the tenant to H.L. Sethi and Smt. Sukhvarsha Sethi, but since none of the legal representatives of H.L. Sethi stepped into witness box to prove actual rent if any received by them, learned Courts below rightly did not place reliance upon the same.

27. Tenant examined none from the vicinity to prove that he had paid rent in their presence to any person other than the respondent. Since the tenant specifically denied relationship of landlord-tenant with the respondent,

plea having been taken that he was inducted as tenant in March, 2001, rightly came to be rejected by learned Courts below.

28. Perusal of Ext. RW-1/a reveals that the tenant paid a sum of Rs. 6500/-on 24.1.2002. If the tenant was inducted in March, 2002, then why he paid rent on 24.11.2001 through Ext. RW-1/A, which renders entire case of the tenant false.

29. At this stage, learned counsel for the respondent submitted that while exercising revisionary powers, this court has very limited jurisdiction to re-appreciate the evidence adduced by respective parties.

30. Learned counsel for the respondent has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala versus Puttumana Illath Jathavedan Namboodiri** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

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

31. Since this court does not find any glaring error in the appreciation of evidence by both the learned Courts below, this court sees no occasion to exercise its revisionary powers in the case at hand.

32. Having scanned entire evidence available on record, this court sees no reason to interfere with the judgment passed by Appellate Authority-IV, Shimla, upholding the order of eviction passed by learned Rent Controller-II, Shimla, which otherwise appear to be based on proper appreciation of the facts as well as law.

33. Accordingly, the present petition is dismissed so also the pending applications. Interim directions, if any, stand vacated.

**BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C. J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.**

Between:-

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (EXCISE & TAXATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. COMMISSIONER EXCISE & TAXATION, HIMACHAL PRADESH, KASUMPTI, SHIMLA-9.
3. ADDITIONAL EXCISE & TAXATION COMMISSIONER, REVENUE DISTRICT NURPUR, AT JACHH, DISTRICT KANGRA, H.P.

.. PETITIONERS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

AND

GIRDHARI LAL
SON OF SHRI SADU RAM,
RESIDENT OF VILLAGE CHUHARPUR,
POST OFFICE CHANOUR, TEHSIL INDORA,
DISTRICT KANGRA,
H.P.

RESPONDENT

(BY MR. VIJAY BIR SINGH
ADVOCATE)

CIVIL WRIT PETITION
NO. 248 OF 2017
DECIDED ON 19-05-2022

**Constitution of India, 1950**- Article 226- Petitioner has challenged the order of H.P. Administrative Tribunal granting daily wage status to the respondent and work charge status after completion of eight years of service- Held- Since the respondent had become eligible to be conferred daily wage status on 1.4.1998, learned Tribunal below rightly directed the respondents to confer daily wage status after completion of ten years and thereafter work charge status /regularization after completion of eight years thereafter- Petition dismissed. (Para 9)

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

**O R D E R**

Instant petition filed under Art. 226 of the Constitution of India lays challenge to order dated 29.10.2015 passed by erstwhile Himachal Pradesh Administrative Tribunal in Original Application No. 1890 of 2015 titled Girdhari Lal vs. State of Himachal Pradesh and others, whereby learned Tribunal below disposed of the Original Application detailed hereinabove, with a direction to petitioner No.2 to issue appropriate order granting daily wage status to the respondent from 1.4.1998 and work charge status after completion of eight years service with effect from 1.4.2006.

2. Precisely the facts of the case as emerge from the record are that the respondent Girdhari Lal was appointed as a part time worker in the year 1988. Though prior to 27.2.2004, there was no policy for conferment of daily wage status to the part time workers but subsequently State Government framed a

policy in the year 2004 and circulated the same vide letter dated 27.2.2004 (Annexure P-1) making therein provision for bringing those part time workers on daily wage establishment, who have completed ten years of service as on 31.12.2003 in all the departments except Education and Ayurveda Departments. Respondent, who had completed ten years as part time worker was conferred daily wage status with effect for 17.7.2004. Being aggrieved and dissatisfied with grant of work charge status after 16 years, respondent preferred Original Application before Himachal Pradesh Administrative Tribunal seeking therein direction to the petitioner-Department to accord him daily wage status from 1.4.1998 and work charge status from 1.4.2006.

3. The claim of the respondent came to be resisted by petitioner Department on the ground that since policy with regard to conferment of work charge status was circulated in the year 2004, specifically containing therein condition that part time workers who have competed 10 years as on 31.12.2003 would be made daily wager subject to observance of conditions contained in the polic.y wherein it was also stipulated that conversion was to be given with prospective effect. Petitioner admitted that though respondent completed ten years in the year 1998 but as per policy of 2004, he could only be given daily wage status prospectively i.e. from 2004 as such, there is no illegality and infirmity in the decision of the petitioner Department in conferring daily wage status on respondent with effect from 17.7.2004.

4. Learned Tribunal below ignoring aforesaid plea made on behalf of the petitioner Department allowed the Original Application having been filed by the respondent and directed the department to issue appropriate order for according daily wage status to the respondent from 1.4.1998 and work charge status from 1.4.2006, after eight years.

5. Having heard Learned Counsel appearing for the parties and perused the material available on record vis-à-vis the reasoning assigned in the order

impugned in the instant proceedings, we do not find any illegality and infirmity in the order passed by learned Tribunal below.

6. Mr. Ajay Vaidya, learned Senior Additional Advocate General representing the petitioner Department argued that since in the year 1998, there was no scheme for conferring daily wage status on the part time workers who had completed ten years, there was no occasion if any, for the department to confer daily wage status upon the respondent in the year 1998.

7. However, we find it difficult to agree with the contention of learned Senior Additional Advocate General, for the reason that very purpose of formulating the policy, dated 27.2.2004 was to ensure that the persons, who were working on part time basis are brought on daily wage establishment and permanency is attached to their status. As per Scheme itself, part time workers who had completed 10 years continuous service as on 31.12.2013 in all departments except Ayurveda and Education were to be conferred daily wage status, meaning thereby all the part time class IV employees, who had completed ten years continuous service on or before 31.12.2003 had become eligible to have benefit of conversion of their services from part time to daily wages in terms of policy dated 27.2.2004. If it is so, condition No.3, wherein it is stipulated that conversion to daily wage is to be made from prospective effect, loses its significance. The very intention of policy makers was to grant daily wage status to part time workers after completion of ten years.

8. If the argument advanced on behalf of the State that benefit in terms of aforesaid policy is to be given from prospective date is accepted, injustice will be caused to the employees, who may have completed ten years or more than that on the cut off date i.e. 31.12.2003. If such situation is allowed to prevail, unequals would become equal. Otherwise also, in other scheme formulated by State of Himachal Pradesh for regularizing services of daily wage employees, services are being regularised from the date of completion of requisite years of service.

9. Since the respondent had become eligible to be conferred daily wage status on 1.4.1998, learned Tribunal below rightly directed the respondents to confer daily wage status after completion of ten years and thereafter work charge status /regularisation after completion of eight years thereafter.

10. In view of above, we don't find any illegality in the order of learned Tribunal below, which is upheld, as a result whereof, the petition is dismissed.

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

Between:-

1. SH. PARKASH, SON OF SH. KASRU MAL,
R/O VILLAGE DASHALNI,
POST OFFICE AND TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

2. SMT. PRABHA DEVI, W/O SH. DHARMENDER,
R/O VILLAGE DHUNGSA,
P/O SAMARKOT, TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

3. SH. DEVI DUTT, S/O S/O LATE SH. KASRU MAL,
R/O VILLAGE DASHALNI,
POST OFFICE AND TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

APPELLANTS

(BY MS. MEERA, ADVOCATE)

1. SH. MOHINDER SINGH, S/O LATE SH. NARIAN DASS,
R/O VILLAGE SHAKTINAGAR (ROHRU)
EHSIL ROHRU, DISTRICT SHIMLA, H.P.

RESPONDENT

2. SH. BANKA RAM, S/O SH. GOTKHU,
R/O VILL. DASHLANI,P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P

3. SH. RAMESH, S/O SH. KHINDU,
R/O VILL. GANGTLOLI, P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P

4. SH. NEETU, S/O SH. KHINDU,
R/O VILL. GANGTLOLI, P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P

5. SMT. BALMA DEVI, D/O SH. KHINDU,
R/O VILL. GANGTLOLI, P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P

6. SMT. BIGONI, W/O SH. KHINDU,
R/O VILL. GANGTLOLI, P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P

7. SMT. GEETA, W/O SH. PREM PARKASH
S/O SH. KHINDU, R/O VILL. GANGTLOLI,
P/O & TEHSIL ROHRU, DISTRICT SHIMLA, H.P

8. SMT. GAINU, W/O LATE SH. SHOBAN DAS,
R/O VILL. P/O KALOTI, TEHSIL CHIRGAON,
DISTRICT SHIMLA, H.P.

9. SH. RAJENDER, S/O SH. JETHU,
R/O VILLAGE DASHLANI, P/O & TEHSIL
ROHRU, DISTRICT SHIMLA, H.P.

10. SMT. CHAMPA DEVI, W/O SH. JETHU,
R/O VILLAGE DASHLANI, P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

11. SH. SHYAM LAL, S/O SH. KATHU,
R/O VILLAGE DASHLANI, P/O & TEHSIL
ROHRU, DISTRICT SHIMLA, H.P.

12. SH. RAM LAL, S/O SH. KATHU,

R/O VILLAGE DASHLANI, P/O & TEHSIL
ROHRU, DISTRICT SHIMLA, H.P.

13. SH. GULAT RAM, S/O LATE SH. PIPLU
R/O VILLAGE VILLAGE DASHLANI,
P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

14. SH. BALAK RAM, S/O LATE SH. PIPLU,
R/O VILLAGE VILLAGE DASHLANI,
P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

15. SMT. TARA DEVI, D/O SH. PIPLU,
W/O SH. MURKI LAL,
R/O VILLAGE JHARAG, TEHSIL JUBBAL
DISTRICT SHIMLA, H.P.

16. SMT. PURNA, W/O SH. AMAR CHAND,
R/O VILLAGE DASHLANI,
P/O & TEHSIL ROHRU,
DISTRICT SHIMLA, H.P.

(R-2 TO R-16 DELETED)

PERFORMA RESPONDENTS

(BY MR. BHUPENDER GUPTA, SENIOR ADVOCATE
WITH MR. JANESH GUPTA, ADVOCATE
FOR R-1)

REGULAR SECOND APPEAL
NO. 310 OF 2019
DECIDED ON 15-12-2021

**Code of Civil Procedure, 1908**- Section 100- Regular Second Appeal- Indian Evidence Act, 1872- Section 91- Suit for redemption was dismissed- Appeal was also dismissed- Mortgage deed claimed to be written but not produced during the trial- Held- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document,

and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself- Findings not perverse- Appeal dismissed. (Para 18)

**Cases referred:**

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264;

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This appeal coming on for orders this day, the court delivered the following:

**J U D G M E N T**

Instant Regular Second Appeal under Section 100 CPC lays challenge to judgment and decree dated 14.3.2019 passed by learned Additional District Judge-(II), Shimla, H.P. in Civil Appeal No. 7-R/13 of 2016, affirming judgment and decree dated 22.3.2016 passed by learned Civil Judge (Junior Division), Court No. 2, Rohru, District Shimla, Himachal Pradesh in Civil Suit No. 6/71 of 2010/09, whereby suit for redemption with respect to land denoted by Khasra no. 32, measuring 0-21-48 Hectares situate in Chak Jakhar, Tehsil Rohru, District Shimla, Himachal Pradesh (hereinafter, 'suit land') came to be dismissed.

2. Precisely, the facts of the case as emerge from the record are that the appellants-plaintiffs (hereinafter, 'plaintiffs') filed a suit for redemption with respect to suit land, claiming therein that in the year 1985, defendant No.1 approached the predecessor-in-interest of the plaintiffs and asked him to mortgage some portion of the land comprising of Khasra No. 32 with possession, to which the predecessor-in-interest of the plaintiffs agreed and handed over possession to defendant No.1. He also claimed that the aforesaid document qua mortgage was also written. Plaintiffs claimed that subsequently, when plaintiffs asked defendant No.1 to hand over possession of the land after receipt of the mortgage consideration, defendant No.1 avoided

him on one pretext or the other and as such, he had no option but to get the land redeemed through the process of law.

3. Aforesaid claim of the plaintiffs came to be resisted and contested by defendant No.1, who besides taking preliminary objections of pecuniary jurisdiction and limitation, averred that the suit land was previously mortgaged to him with possession but thereafter, plaintiff and his sisters Smt. Jhapti Devi and Smt. Bigoni Devi executed a sale deed in favour of wife of defendant No.1 on 2.2.1983. It is averred by the defendant No.1 that the suit land was mortgaged with defendant No.1 but not in 1985, as claimed by the plaintiff(s), but prior to that and on 2.2.1983, a sale deed has been executed in favour of wife of defendant No.1.

4. Plaintiff(s) filed replication, reiterating the contents of plant and controverting those of the written statement.

5. On the basis of pleadings of the parties, learned trial Court, framed following issues on 6.10.2010:

"(1) Whether the plaintiff is entitled for a decree of possession in respect of the suit land by way of redemption, as prayed for? OPP

(2) Whether the suit has not been properly valued for the purpose of court fees and jurisdiction, as alleged? OPP

(3) Whether this court has no pecuniary jurisdiction to entertain and try the present suit as alleged? OPP

(4) Whether the suit is barred by limitation, as alleged? OPD

(5) Whether no cause of action has accrued to the plaintiff to file the present suit, as alleged? OPD

(6) Whether the plaintiff has not come to the court with clean hands. If so, its effect? OPD

(7) Whether the plaintiff is estopped by his own act and conduct to file the present suit, as alleged? OPD

(8) Whether the suit is not maintainable in the present form, as alleged? OPD

(9) Whether the suit is bad for non-joinder of necessary parties, as alleged? OPD

(10) Relief."

6. Learned trial Court, on the basis of evidence led on record by respective parties, dismissed the suit of the plaintiffs on three grounds, viz. (1) plaintiff has not brought on record mortgage deed executed between him and defendant No.1, which is the basis of the suit and no other evidence in order to prove the mortgage deed is admissible except the mortgage deed itself in terms of S.91 of the Indian Evidence Act. (2) the General Power of Attorney cannot depose on behalf of the principal about the facts which are/were in the personal knowledge of the principal and (3) defendant No.1 has clearly proved on record sale deed dated 2.2.1983 Ext. DW-1/C, which clearly reveals that the suit property was transferred by the plaintiff and his sisters in favour of wife of defendant No.1.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiffs preferred an appeal in the court of learned Additional District Judge-II, Shimla, Himachal Pradesh, which also came to be dismissed vide judgment and decree dated 14.3.201. In the aforesaid background, appeal at hand came to be instituted at the behest of the plaintiffs, praying therein to decree their suit after setting judgments and decrees passed by learned Courts below.

8. Though, vide order dated 10.9.2019, this court ordered that till the next date of hearing, defendant No.1 will not change the nature of suit land nor encumber the same in any manner, whatsoever, but admission of the appeal came to be hotly contested by defendant No.1. Learned counsel for the defendant No.1, vehemently argued that no question of law, much less substantial one, arises in the case at hand, for consideration of this Court, as such, appeal deserves to be dismissed. In view of above, appeal came to be listed for final hearing /disposal at admission stage with the consent of the parties.

9. Ms. Meera, Advocate, appearing for the plaintiffs, argued that once defendant No.1 categorically admitted his status in mortgage in his written statement, suit of the plaintiff for redemption could not have been dismissed on account of non-production of the mortgage deed. She further argued that learned Courts below erred in observing that title of defendant No.1 is proved by Ext. DW-1/C, sale deed, especially when the same was not proved in accordance with law. While referring to the pleadings as well as evidence led on record by respective parties, Learned Counsel appearing for the plaintiffs strenuously argued that both the learned Courts below have failed to appreciate the evidence as well as law, in right perspective, as such, judgments and decrees rendered by both the learned Courts below are not sustainable in the eye of law.

10. Mr. Bhupender Gupta, learned senior counsel, duly assisted by Mr. Janesh Gupta, Advocate, while appearing for defendant No.1, supported the judgments and decrees passed by both the learned Courts below. He argued that once the plaintiffs failed to place on record documents, if any, reduced in writing, with regard to mortgage, suit having been filed by them rightly came to be dismissed. He also argued that though perusal of statement made by PW-4, Devi Dutt, General Power of Attorney of the original plaintiff, is of not much relevance, but otherwise also, statement made by him rightly was not taken into consideration by learned Courts below, in terms of provisions contained under S.91 of the Indian Evidence Act, which clearly provides that a General Power of Attorney cannot depose for the principal, about the facts, which are/were in the personal knowledge of the principal.

11. I have heard Learned Counsel appearing for the parties and perused the material available on record minutely.

12. Having heard learned counsel for the parties and perused the material available on record vis-à-vis the reasoning assigned by both the learned Courts below, while dismissing the suit of the plaintiffs, this court is

not persuaded to agree with learned senior counsel for the plaintiffs that both the learned Courts below have failed to appreciate the evidence in its right perspective, rather, both the learned Courts below have dealt with each and every aspect of the matter meticulously and as such, there is no scope left for interference by this Court. Moreover, this court finds that no question, much less a substantial one, is involved in the appeal at hand, for determination by this court, as such, present appeal deserves to be dismissed on this sole count.

13. Precisely, in the case at hand, the original plaintiff, Kasru Mal (since deceased) filed the suit for decree of redemption, claimed to be mortgaged with defendant No.1, for a sum of Rs.3300/-. Though defendant No.1 by way of written statement, specifically admitted factum with regard to mortgage of suit land by the plaintiff but further claimed that subsequently, plaintiff and his sisters, Jhapti Devi and Bigoni Devi, executed sale deed in favour of his wife on 2.2.1983. Interestingly, aforesaid factum with regard to execution of sale deed in favour of wife fo defendant No.1 never came to be specifically repudiated by the plaintiff(s), in the replication filed to the written statement of defendant No.1. In the case at hand, record reveals that though at the time of recording of evidence of the plaintiffs, original plaintiff, Kasru Mal was alive but yet he did not enter into the witness box, rather, Shri Devi Dutt, who is son of the original plaintiff, appeared as General Power of Attorney. Above named witness denied that his father and sisters of his father, namely Jhapti Devi and Bigoni Devi, had executed sale deed dated 2.2.1983 but such statement of this witness may not be sufficient to refute the factum with regard to execution of sale deed, especially, when plaintiff failed to specifically refute the aforesaid claim of defendant No.1 in the replication filed by him to the written statement of defendant No.1.

14. PW-3, Surat Singh, though corroborated the version of the plaintiff that land was mortgaged by plaintiff for Rs.3300/- and plaintiff had offered

Rs.3300/- for redemption of mortgage deed, but such offer was not accepted by defendant No.1, but in his cross-examination, he admitted that there is an orchard and fruit plants thereupon are grown by Mohinder Singh, defendant No.1 and his wif, smt. Sarla Devi. Since this witness specifically admitted in his cross-examination that on the suit land, there is an orchard and fruit plants were grown by defendant No.1 and his wife, Sarla Devi, statement made by this witness to the extent that suit land was mortgaged by plaintiff, may not be of much relevance.

15. DW-1 Mohinder Singh, tendered his evidence by way of affidavit, Ext. DW-1/A. In his cross-examination, he admitted that in the year 1982, land was mortgaged but categorically deposed that in the year 1983, Kasru sold land by way of registered sale deed in favour of his wife, Sarla Devi.

16. True it is that in the case at hand, sale deed, Ext. DW-1/C was not entertained by revenue officials for sanctioning mutation, as is evident from document, Ext. DW-1/B dated 29.12.1984, but if the reasons recorded in that document are perused, it clearly reveals that mutation on the basis of aforesaid document, could not be recorded for the reason that there was some discrepancy in the description and measurement of the land. Mere refusal on the part of revenue authorities to enter mutation on the basis of sale deed may not be sufficient to discard claim of defendant No.1 with regard to purchase made by him vide sale deed, Ext. DW-1/C, especially when at no point of time, challenge, if any, ever came to be laid on behalf of the plaintiff(s) to the aforesaid sale deed. Vide aforesaid sale deed, rights of the plaintiff in the suit were purchased by Sarla Devi, wife of defendant No.1, as such, plaintiff could not claim to have any right of redemption. Admittedly, in the case at hand, plaintiff(s) in the plaint claimed that the document qua mortgage was written but yet he/they failed to produce the same during trial for the reasons best known to him/them. Once, the document, with regard to mortgage was with the plaintiff(s) he/they could not have withheld it, rather, it being the best

piece of evidence, ought to have been placed on record, enabling learned trial Court to adjudicate the controversy in an effective manner.

17. Once, mortgage deed was the basis of the suit, and it was claimed to be reduced into writing, no other evidence led on record could be held sufficient to prove the mortgage deed, as has been specifically provided under S.91 of the Indian Evidence Act. S.91 of the Indian Evidence Act is reproduced as under:

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—
> When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
> —When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."
>
> Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
>
> Exception 2.—Wills 2[admitted to probate in 3[India]] may be proved by the probate.

> Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.
>
> Explanation. 2.—Where there are more originals than one, one original only need be proved. Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact."

18. Aforesaid provision of law clearly provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself.

19. Order III, rules 1 and 2 CPC, empowers holder of a Power of Attorney to act on behalf of the principal but the question which is of paramount consideration in the case at hand, is whether a Power of Attorney/General Power of Attorney can give testimony on behalf of the principal.

20. By now, it is well settled that provisions contained in Order III, rules 1 and 2 CPC empower the holder of Power of Attorney to 'act' on behalf of the principal but the word, 'act' employed in Order III, rules 1 and 2 CPC, confines only in respect of 'acts' done by the Power of Attorney holder in exercise of power granted by the instrument. The word, 'acts' would not include deposing in place and instead of principal. Holder of Power of Attorney may depose for the principal, in respect of such acts but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, Power of Attorney

holder cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

21. In the case at hand, as has been taken note herein above, though, at the time of commencement of the plaintiff's evidence, original plaintiff Kasru Mal was alive, but yet he was not produced and instead his son, Devi Dutt, being Power of Attorney deposed as PW-4. PW-4 in his evidence denied that his father and sisters of his father namely Jhapti Devi and Bigoni Devi had executed a Will on 2.2.1983. Such statement of PW-4 may not be sufficient to disprove execution of sale deed. Since aforesaid sale deed was allegedly executed by the original plaintiff Kasru Mal, factum with regard to its execution/non-execution could only be stated by Kasru Mal, the original plaintiff but, definitely not by the General Power of Attorney, who being Power of Attorney holder, had only authority to appear on behalf of the original plaintiff, Kasru Mal and, in no circumstance, he could depose in the court about the acts which were not in his personal knowledge.

22. Since no specific challenge, if any, ever came to be laid to sale deed, Ext. DW-1/C, coupled with the fact that the defendant No.1 successfully proved on record execution of sale deed dated 2.2.1983, suit for redemption of the property having been filed by the plaintiff(s) qua the property which was subject matter of the sale deed, rightly came to be dismissed.

23. In view of above no substantial question of law arises for determination in the present appeal.

24. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendant with regard to maintainability and jurisdiction of this Court, while examining concurrent findings of law and facts returned by both the Courts below. Learned counsel for the respondents, invited the attention of this Court to the judgment passed

by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, wherein the Hon'ble Supreme Court has held:

> "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)

25. Perusal of the judgment, referred hereinabove, suggests that 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. There can be no quarrel (dispute) with regard to aforesaid observation made by the Apex Court and true it is that in normal circumstances High Court, while exercising powers under Section 100 CPC, is restrained from re-appreciating the evidence available on record.

26. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

> "14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on

this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal."

27. It is quite apparent from the aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not 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 learned Courts below, rather same are based upon correct appreciation of evidence as such, deserve to be upheld.

28. Consequently, in view of detailed discussion made herein above, I find no merit in the appeal at hand, which is accordingly dismissed. Judgments and decrees passed by learned Courts below are upheld.

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

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

Between:-

M/S. ADANI POWER LIMITED
A COMPANY INCORPORATED UNDER
THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
ADANI HOUSE, NEAR MITHAKALI CIRCLE,
NAVRANGPURA, AHMEDABAD 380 009
THROUGH ITS AUTHORIZED SIGNATORY
MR. MALAV DELIWALA
SON OF SHRI RAJENKUMAR
AT PRESENT POSTED AS
DEPUTY GENERAL MANAGER
LEGAL ADANI POWER

... PETITIONER

(BY MR. VIKRAM NANKANI AND
MR. NEERAJ GUPTA,
SENIOR ADVOCATES
WITH
MR. MALAV DELIWALA AND
MR. AJEET JASWAL,
ADVOCATES)

AND

THE STATE OF HIMACHAL PRADESH
THROUGH
SECRETARY,
MINISTRY OF POWER,
GOVERNMENT OF HIMACHAL PRADESH

RESPONDENT

(MR. ASHOK SHARMA,
ADVOCATE GENERAL WITH
MR. SUDHIR BHATNAGAR,
MR. ARVIND SHARMA AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
AND MR. NARINDER THAKUR
MR. GAURAV SHARMA AND
MR. KAMAL KISHORE,
DEPUTY ADVOCATES GENERAL)

CIVLI WRIT PETITION
NO. 406 OF 2019
DECIDED ON 12-04-2022

**Constitution of India, 1950**- Article 226- Petitioner being aggrieved and dissatisfied with issue of communication issued by the Special Secretary (Power) to the Government of Himachal Pradesh has sought to issue writ of certiorari in order to quash the findings leading to the issuance of impugned communication and further writ of mandamus directing the respondents to refund the sum of Rs. 288.96 crore to petitioner- Held- Retaining the money of

the petitioner by the respondent-State, when project has been allotted to SJVNL, amounts to unjust enrichment of the State, which is not permissible in law. It is another aspect of the matter that the said project could never be executed on the ground, in view of the objections raised by the general public- State cannot be allowed to take advantage of its own wrongs- Petition allowed- Communication dated 30.11.2017 (p.368) whereby decision of the Cabinet regarding implementation of Jangi-Thopan HEFP(480 MW) and Thopan-Powari HEP (480 MW) was approved and further the communication dated 7.12.2017 (Annexure-R), whereby decision of Council of Ministers to review decision dated 4.9.2015 was conveyed to the petitioner, are hereby quashed. Respondent-State is directed to pay the amount of Upfront Premium to the petitioner in terms of the decision of the Council of Ministers dated 4.9.2015, within a period of two months from today, failing which, the State shall be liable to pay interest on the amount in question, at the rate of 9% per annum, from today, till realization. (Para 114, 115, 116)

**Cases referred:**

B.L. Sreedhar v. K.M. Munireddy, (2003) 2 SCC 355;
Canbank Financial Services Ltd. v. Custodian, (2004) 8 SCC 355;
Fakir Chand Seth v. Dambarudhar Bania, AIR 1987 Orissa 50;
Hari Bansh Lal v. Sahodar Prasad Mahto, (2010) 9 SCC 655;
Jal Mahal Resorts (P) Ltd. v. K.P. Sharma, (2014) 8 SCC 866;
Mahabir Kishore v. State of M.P., AIR 1990 SC 313;
Mulamchand v. State of M.P., AIR 1968 SC 1218;
State of Maharashtra v. Swanstone Multiplex Cinema (P) Ltd., (2009) 8 SCC 235;
State of West Bengal v. B.K. Mondal & Sons, AIR 1962 SC 779;
Town Area Committee v. Rajendra Kumar and another, AIR 1978 All 103;
Urban Improvement Trust, Bikaner v. Mohan Lal, (2010) 1 SCC 512;
Vikram Cement v. State of M.P., (2015) 11 SCC 708;

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This petition coming on for pronouncement of the order this day, the court passed the following:

**O R D E R**

Being aggrieved and dissatisfied with issuance of communication dated 7.12.2017 (Annexure-R)(page-187), issued by the Special Secretary (Power) to the Government of Himachal Pradesh, whereby the petitioner came to be apprised that due to various legal intricacies and contractual complications involved in the matter, the Council of Ministers has reconsidered and reviewed the decision taken in its meeting held on 4.9.2015, to refund the amount of upfront premium deposited by the petitioner for Jangi-Thopan-Powari Power Project, petitioner has approached this Court in the instant proceedings filed under Art. 226 of the Constitution of India, praying therein for the following main reliefs:

"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or direction, calling for the records and proceedings leading to the issuance of the impugned letter dated 7th December, 2017 (Annexure-R hereto) and after going into the legality, validity and propriety thereof, to quash and set aside the same.

(b) that this Hon'ble Court be pleased to issue a Writ of Certiorari, or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or direction calling for the records and proceedings leading to the issuance of the impugned letter dated 10th October, 2017 (Annexure-N hereto) and after going into the legality, validity and propriety thereof, to quash and set aside the same.

(c) That this Hon'ble Court be pleased to issue a Writ of Mandamus, or a Writ in the nature of Mandamus, or any other appropriate Writ, Order or direction, directing the Respondents by themselves, their servants, agents, officers and subordinates to forthwith refund the sum of Rs.280.969 crores together with interest thereon @ 18% p.a. from the date of receipt of the payment until refund to the petitioner.

(d) that pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to direct the Respondents by themselves, their servants, agents, officers and subordinates to forthwith pay a sum of Rs.280.969 crores to the Petitioner."

**History of the case**

**2.** For having bird's eye view of the matter, certain undisputed facts, which may be relevant for the adjudication of the case at hand, are as under.

**3.** In October, 2005, State of Himachal Pradesh floated global tender in respect of two Hydro-Electric Projects Jangi-Thopan-Powari Power Project of 980 MW (hereinafter, 'JTP Projects'). Though, initially, last date of submission of bid was 21.1.2006, but on account of issuance of corrigendum, dated 27.12.2005 whereby a condition was incorporated in the tender that the State of Himachal Pradesh shall have the right of equity participation to the extent of 49% in the Hydro-Electric Project on selective basis, the last date of submission of bids was extended to 16.3.2006, Tender Inviting Bids provided that the bidders should have strong financial and technical pre-investment resources for development of Hydro-Electric Project. As per tender, 50% of upfront premium was to be paid immediately on the issuance of Letter of Intent (hereinafter, 'LoI'). One M/s Brakel Corporation NV (hereinafter, 'Brakel') participated in the bidding process alongwith another company namely Reliance Infrastructure Limited (hereinafter, 'RIL'). Though, before opening of the bids, certain queries were raised by Himachal Pradesh State Electricity Board Limited (hereinafter, 'HPSEBL') but on 5.9.2006, all the shortlisted bids were opened and Brakel was found to be the highest bidder for the projects. On 16.11.2006, RIL offered to match its bid to that of Brakel, but on 1.12.2006, the Letter of Intent (hereinafter, 'LoI') was issued by the State in favour of Brakel, awarding therein both the contracts being the highest bidder, having bid of Rs.36.00 Lakh/MW. After issuance of LoI, Brakel was directed to sign a Pre-implementation Agreement (hereinafter, 'PIA') and deposit the upfront premium. Brakel accepted the LoI and informed the Government of Himachal Pradesh that they are going through the draft PIA. In the meantime, on 11.12.2006, State of Himachal Pradesh notified the Himachal Pradesh

Hydro Power Policy (hereinafter, 'Policy') permitting the investment by third party to the extent of 49% of the paid up capital of the lead member, which in the case at hand was Brakel, who otherwise as per terms and conditions of the LoI as well as the Policy also set up an Indian subsidiary namely Brakel Kinnaur Power Private Limited (hereinafter, 'BKPPL'). Since Brakel did not deposit the upfront premium qua the projects awarded in its favour within the stipulated time, RIL on 20.8.2007, sent a letter to the Government that it was willing to match the bid of Brakel, but since no heed was paid to the aforesaid request of RIL, it filed CWP No. 2074 of 2007 in this Court. However, during the pendency of the aforesaid writ petition, respondent-State issued a show cause notice on 7.1.2008, to Brakel, asking it to show cause that, why the allotment made in its favour of two projects, be not cancelled on account of the fact that neither it paid the upfront premium, nor took any steps to implement the projects.

**4.** However, on 29.1.2008, BKPPL offered to deposit sum of Rs.173.43 Crore on behalf of Brakel. RIL filed a miscellaneous application in CWP No. 2074 of 2007, seeking therein direction to the respondent-State not to accept the upfront premium being offered by BKPPL. Besides above, RIL also filed an application for amendment of writ petition.

**5.** State of Himachal Pradesh, while permitting the BKPPL to deposit Rs. 173.43 Crore, issued another show cause notice to Brakel, directing it to pay interest on delayed payment of upfront premium. Though, interest was paid by BKPPL, however, on 1.5.2008, respondent-State apprised the Court that they will not enter into the PIA.

**6.** On 3.6.2008, the Division Bench of this Court, after hearing the matter, passed the following order:

> "The respondent-State has filed various affidavits during the pendency of this petition. We have noticed the contents of the affidavits filed from time to time by the State. We are of the prima facie opinion that the pleadings are contradictory though they are supposed to be precise and

concise besides being consistent. Confronted with this, the learned Advocate General prays for and is granted four weeks time to explain the stand of the State in the present case. Consequently, the State shall take a decision duly supported by reasons. The decision of the State will be placed on record of this case on the affidavit of the Chief Secretary to the Government of Himachal Pradesh. it is clarified that this exercise has been undertaken by the court to adjudicate upon the case effectively and to arrive at a just conclusion. The decision taken by the State Government will be without prejudice to the rights of all the parties."

**7.** Pursuant to aforesaid direction issued by Division Bench of this Court, a memorandum was prepared for consideration of the Council of Ministers. Relevant portion of the same is reproduced herein below:

"34. In nutshell, the following important points concerning this Company are required to be noted in this case before proceeding further with any conclusion

1. Mis-statement of fact that the Company is incorporated on 13.2.2005 when it seems that it was actually incorporated on 13.2.2006.
2. Claim that M/s SNC-Lavalin is an equity partner of 30% made in the bid documents (Pre Contract JV Agreement dated 13.3.2006 supplied by Brakel NV), a fact which is denied by the said company during inquiry.
3. Claim that M/s Standard Bank is an equity partner of 45% made in the bid documents (Pre Contract JV as mentioned above), a claim that is denied and asserted false by the Standard Bank in their response to the SV and ACB.
4. As per Pre Contract JV Agreement dated 13.3.2006 supplied by the Company as clarification, the Company M/s Brakel has no Equity in the Company/JV. The entire equity of the Company is divided to others as SNC Lavalin (30%), M/s Standard Banka (45%), Eco Securities (5%) and Energy Infrastructure Overseas (10%) and M/s Halcrow Consulting the balance (10%). In effect this means that the allottee firm is nothing but a simple name for an association of diverse companies which was sought to be presented as a Joint Venture Company. As is now coming out

from the scrutiny of documents submitted as also from the inquiries made, these constituents of the JV never agreed to pay any equity stake in the Joint Venture and all claims made in this regard by Brakel NV seem false.

5. Brakel NV have accepted in their response to the Department of Power (Letter dated 21.5.2008) that they have agreed to transfer 49% equity to M/s Adani Power. This is against the terms of allotment and the clauses of PIA prescribed for signing.
6. While taking shelter behind their Company of Foreign Origin status all the time for delay in payment of Upfront Premium, finally deposited the UFP amount from Indian sources only.
7. Claims of being a Netherlands based company highly doubtful. Company's Incorporation in Curacao, an island (Tax Heaven -?) in the pacific raises serious doubts. Netherlands address is just a P.O. Box Number.
8. Paid up Capital of M/s Brakel Corp. NV is only (one) Dollar at the time of incorporation and at the time of bidding for a project that is likely to cost Rs.6000 crores ($ 1.5bn).
9. Paid up capital of the Indian company created by M/s Brakel Corporation NV in the name and style of M/s Brakel Kinnaur Power Pvt. Ltd. is INR 1 lakh only. Company registered at ROC Jalandhar (Punjab) on 9.3.2007.
10. There are no common Directors or Promoters in the 2 companies above.
11. Contrary to the claims made in the bid documents, M/s SNC-Lavalin, M/s Standard Bank, M/s Eco Securities and M/s Halcrow Consulting are not partners of share holders in the Indian JV Company M/s Brakel Kinnaur Power Pvt. Ltd.
12. Amount of Upfront Premium deposited under the letter head of Brakel Corp. NV whereas the money has actually come from the account of M/s Brakel Kinnaur Power Ltd. a fact ascertained and admitted by Brakel during our inquiry.
13. Inquiry Report dated 23.5.2008 received from the Income-tax (Inv) department suggests that the Company appears to be a paper company only with no capacity or expertise to develop the Project allotted.

14. Inquiry Report of the Vigilance Department of Himachal Pradesh also suggests that the matter of allotment to this Company needs further probe and a prima facie case under Section 420 is made out in the allotment of this Project to the Company.
15. All claims of Technical and Financial strengths of the company (based on the tie ups made with other companies) at the time of bidding for the projects seems doubtful in view of the denials already received from M/s SNC Lavalin and M/s Standard Bank."

**8.** Record reveals that before preparation of aforesaid Cabinet memorandum, an enquiry was got conducted through the Police and Income-Tax Department qua the source of investment /payment made by Brakel, wherein it clearly transpired that the entire sum deposited as upfront premium was given from the Companies managed/controlled by the petitioner. In the aforesaid background, following points were put up for consideration before the Cabinet:

"1. Whether the allotment of Jangi-Thopan Powari HEP (960 MW) made in favour of M/s Brakel Corporation NV vide Government letter dated 1.12.2006 may be cancelled?
2. If the (1) above is approved, whether the request dated 25.9.2007 of M/s Reliance Energy for allotment of the project to them on their matching the Upfront Premium amount quoted by M/s Brakel Corp. NV Project be rejected and the project be re-advertised for development in Private Sector on BOOT basis in terms of the present Hydro Power Policy of the State.
3. Whether a case under Section 420 of the IPC may be registered against M/s Brakel Corporation NV as has been recommended by the State Vigilance and Anti Corruption Bureau in their preliminary Inquiry Report?
4. Whether M/s Brakel Corporation be issued a notice subsequent to cancellation of the allotment as to why the amount of Rs.193.98 crores received from them may not be forfeited to compensate the State Government for the loss caused to it due to the delay that may be caused in the development of the Project?

> This would, however, not absolve the Company from its liability to compensate the State Government for such losses as may be assessed as a result of appropriate civil proceedings that the State may initiate against the Company"

**9.** On 7.7.2008, Cabinet ordered that the show cause notice be issued to Brakel that, why the allotment should not be cancelled and the upfront premium money be not forfeited for misrepresenting the facts to the State Government, with regard to its technical and financial competence. Besides above, while directing action to be taken against the officials, who evaluated the bids in HPSEBL, Cabinet also ordered for fresh advertisement calling for bids.

**10.** On 19.7.2008, a show cause notice was issued pursuant to the aforesaid decision of Cabinet to Brakel specifically stating therein that it misrepresented to the State of Himachal Pradesh about its incorporation and about the equity participation of the so called 'members of consortium'. It also alleged that Brakel transferred 49% equity to the petitioner without taking prior approval of the Cabinet. In the show cause notice, respondent alleged that there was a delay in payment of upfront premium as such, Department contemplates to withdraw the LoI. Since the respondent-State had already issued show cause notice to Brakel for cancellation of allotment of the projects in its favour and had taken a decision to re-advertise the same, the earlier petition having been filed by RIL i.e. CWP No. 2074 of 2007 was rendered infructuous and accordingly, the same was disposed of vide order dated 31.7.2008.

**11.** Brakel filed a reply on 4.8.2008 to the show cause notice dated 19.7.2008, besides making written submissions to the Principal Secretary (Power) on 4.10.2008 and 9.10.2008. In these communications, Brakel, while furnishing explanation and replying to the allegations levelled against it, admitted that it had identified the petitioner as a partner for 49% equity. It

also disclosed that the individual consortium members shall hold shares in it (Brakel).

**12.** On the other hand, being aggrieved and dissatisfied with the decision of the respondent-State to call for fresh bids in respect of Jangi-Thopan-Powari Hydro-Electric Projects, RIL, filed another writ petition i.e. CWP No. 1803/2008, but the same was disposed of being premature, because, admittedly, by that time, final decision, if any, pursuant to show cause notice dated 19.7.2008, issued against Brakel was pending. However, while disposing of the aforesaid writ petition, Division Bench of this Court directed the State Government to take a final decision with regard to show cause issued to Brakel, expeditiously, preferably within a period of eight weeks. In the aforesaid background, a memorandum was prepared on 1.11.2004 for consideration of the Council of Ministers. In the aforesaid memorandum, main points put up for consideration of the Council of Ministers, were that, whether allotment of two projects in favour of Brakel be cancelled; whether the order of cancellation should be in terms of the draft order attached and, whether the matter should be referred to the Vigilance Department for further investigation.

**13.** Cabinet considered the matter and took a decision to constitute a Committee under the Chairmanship of the Chief Secretary to decide the issues on merit, by taking note of all the aspects of the matter and submit the proposal in the next meeting of the Cabinet to be held on 12.11.2008.

**14.** Record clearly reveals that representative of the petitioner was also present during the course of hearing before the Committee constituted pursuant to the direction of the Cabinet. Committee after having considered the representation of Brakel, arrived at a conclusion that since suppression of material information by Brakel and its consortium partners cannot be established and Government is legally considered to be a perpetual entity

irrespective of change of political party, it would be therefore, legally difficult to sustain cancellation of allotment made by the previous Government.

**15.** Besides above, the Committee also resolved that though the evaluation process made by the previous Government can be considered to be vitiated on the ground that the lead member (Brakel) had no financial strength and the partner of the consortium, whose financial strength was used for the bidding purpose had made no definite commitment of its equity participation in projects and this aspect having been consciously over looked by the previous Government, the blame thereof cannot be now at this belated stage be laid on Brakel.

**16.** Most importantly, the Committee recorded in its finding that it has come to its notice that the evaluation had been consciously overlooked by the then Whole Time Members of the HPSEB on the premise that enlarging the competition would be in the interest of the State Government for getting better choice of financial bids. Committee recorded that since suppression of material information by Brakel and its partners, cannot be established, the allotment already made in favour of Brakel cannot sustain the test of legal issues now involved in cancellation at this stage, because the blame for infirmity in the financial strength evaluation cannot be attributed to Brakel, based upon the records in the notice of the Committee. Having taken note of the aforesaid report submitted by the Committee headed by the Chief Secretary, Council of Ministers in its meeting held on 25.11.2008, took the following decision:-

> ""The recommendations of the Committee of Secretaries were perused by the Cabinet and the following was noted in this context by the State Cabinet:-
>
> (a) The previous Government had created infirmities in the bid document whereby the lead member of the bidding consortium was not required to have any substantial financial standing.

(b) When M/s Brakel Corporation NV made the tender bid alongwith its consortium partner, the previous government knew that M/s Brakel as the lead partner, did not have any financial strength. Even then, it overlooked this aspect and on the basis of one partner in the consortium i.e. Standard Bank, the financial strength marks were awarded even though no definite commitment of equity participation was made by the Standard Bank.

(c) Cabinet further noted that the previous Government continuously allowed M/s Brakel to delay the required deposit of UpFront premium. Further, contrary to the State Policy, the previous Government agreed to subject the proposed implementation Agreement to International Arbitration which was completely against State interest.

(d) Cabinet noted that the present Government firstly got M/s Brakel to agree that dispute would not be subject to international Arbitrations. Secondly, it imposed penalty of interest on M/s Brakel for delay in payment of the required Up-Front Premium of Rs.173.42 crore. Thus alongwith this Up-Front Premium of Rs.173.42 crore the company was also made to deposit Rs.20.64 crore as interest for delay payment.

(e) Cabinet further noted the advise of the Law Department and the views of the Committee of the Secretaries that because the previous Government had consciously overlooked the infirmities in the bidding process of M/s Brakel, and because legally a successor Government cannot put the blame for said infirmities now on M/s Brakel, it would now not be legally possible to back out from the allotment made by the previous Government, especially since in the eyes of law the contract has been established with the payment by M/s Brakel of the Up-Front and penal interest imposed by the present Government.

(f) Keeping in view therefore the specific view of the Law Department and the views of the Committee of Secretaries constituted by the Cabinet in the matter, it was decided not to cancel now the allotment of the project made by the previous Government. However, Cabinet desired that HPSEB would need to change its bid document as well as technical evaluation procedure in future

so that it does not allow financial bids to be opened of such parties which cannot display the required financial strength."

**17.** As a consequence of above, the show cause notice issued to Brakel was withdrawn, against which RIL approached this Court by way of CWP No. 2748 of 2008, alleging therein that since the upfront premium was not paid by Brakel within the time stipulated in the bid document, allotment should have been cancelled. RIL, further claimed that firm commitment of equity participation and confirmation of liability/responsibility of each consortium member was an essential feature of the consortium and the failure of the members of the consortium to confirm their participation in the consortium should result in rejection of the bid. Besides above, RIL also claimed that Brakel misrepresented various facts, which misrepresentation constitutes fraud and therefore vitiates all actions and the allotment is bound to be cancelled.

**18.** In these proceedings, respondent-State vehemently argued that since the Government has taken a view, which is possible and plausible, this court cannot substitute its opinion for the decision of the Government. It also claimed that it has the power to relax the tender conditions and since the tender conditions were relaxed in the case of RIL also, it could not lay challenge to the award of contract in favour of highest bidder. It was further stated by the State that since the decision to award the contract in favour of Brakel was taken by experts i.e. whole time members of the HPSEB on three occasions as well as by the H.P. Infrastructure Development Board (hereinafter, 'HPIDB') and it had been approved by the Cabinet, as such, same cannot be set aside.

**19.** Having taken note of the aforesaid pleadings/submissions made on behalf of the parties to the aforesaid lis, Division Bench vide judgment dated 7.10.2009, quashed the decision of the Council of Ministers dated

25.11.2008, being arbitrary, illegal and irrational. Division Bench also held that in view of the misrepresentations made by Brakel, allotment of Jangi-Thopan and Thopan-Powari Projects (480 MW each) was illegal and is bound to be cancelled. However, the Division Bench in that case declined prayer of RIL to award the project in its favour being second highest bidder and directed the respondent-State to take a fresh decision as to whether it wants to re-advertise the said project or wants to act on the basis of old tender. (Annexure-B, p. 26)

**20.** Being aggrieved and dissatisfied with the aforesaid judgment passed by Division Bench of this Court, Brakel filed SLP No. 888/2010 in the Hon'ble Apex Court, wherein respondent State reiterated the stand, which was taken by it in CWP No. 2748 of 2008. Since, during the pendency of the proceedings before Hon'ble Apex Court, respondent-State issued show cause notice to Brakel on 28.3.2014, calling upon it to show cause as to why the amount mentioned in notice, be not forfeited and damages recovered from it, Brakel withdrew its SLP with liberty to challenge the forfeiture, if any, made by respondent-State pursuant to show cause notice, as is evident from Annexure-C, order dated 1.4.2014. RIL also filed SLP No. 29135/2014 but the same was dismissed as withdrawn on 7.10.2009 (Annexure-D, p.94). Record further reveals that the petitioner herein had also gone to Hon'ble Apex Court by filing an application for impleadment as an intervener in SLP having been filed by Brakel, but the same was also withdrawn on account of withdrawal of SLP filed by Brakel.

**21.** It also emerges from record that while the SLP's having been filed by Brakel and RIL were pending adjudication before Hon'ble Apex Court, petitioner herein made a representation to Hon'ble Chief Minister, Himachal Pradesh (Annexure-E, p.95) stating therein that it being the largest independent power producer in the country, with aggregate capacity of 9280 MW, decided to invest in 980 MW Jangi-Thopan and Thopan-Powari Projects,

believing that the bid made by Brakel was wholly compliant and in accordance with law, because of the LoI dated 1.12.2006 issued by the Governor, Himachal Pradesh. Petitioner also claimed that since the letter of acceptance dated 1.12.2006 issued by the Government of Himachal Pradesh in favour of Brakel and conditions contained in PIA, enclosed with LoA, revealed that Brakel can transfer/ sell 49% equity in Special Purpose Vehicle (hereinafter, 'SPV') to be incorporated for the execution of the project, it decided to invest huge amount in the project(s). Petitioner also claimed that relying upon the representations, assurances and promises flowing out of the LoA, which was at that time valid and the covenants in the draft PIA, it decided to invest in the above project. Petitioner also submitted in the aforesaid representation that the show cause notice dated 7.1.2008, was issued to Brakel, calling upon it to show cause that, why the LoA should not be cancelled on account of delay in payment of 50% of upfront premium, but there was no allegation in the show cause that Brakel did not quality for the bid as such, petitioner found it appropriate to pay 50% upfront premium. Petitioner claimed that it was fortified in its decision to invest as the Government of Himachal Pradesh granted approval for withdrawal of show cause notice in April, 2008 and soon thereafter, further amount of Rs. 20.50 Crore was paid to Brakel towards payment of interest on delayed payment. Besides above, petitioner also claimed that under Clause 4.2 of the Bid conditions, Government of Himachal Pradesh has the power to allow change in the consortium structure and clause 39(ii) provided for setting up of an SPV, in which 49% share holding could be held by any person other than the lead consortium member who together with other members of the consortium, could hold an aggregate 51% equity in the SPV. Petitioner also claimed in the aforesaid representation that after dropping of the second show cause notice by the Special Committee constituted by the Government, it further advanced loan to Brakel to make

payment of 25% of upfront premium, although such payment was not due at that time according to LoA.

**22.** Pith and substance of the aforesaid representation made by the petitioner is/was that, it bona fidely advanced a sum of Rs. 280.00 Crore for payment of upfront premium and since, at no point of time, any misrepresentation was made by it and it had invested huge amount expecting it to have 49% share holding in terms of Hydro Power Policy and provisions contained under PIA, sum of Rs. 280.00 Crore alongwith upto date interest be refunded to it. (Annexure-E, p.95).

**23.** Since no action, if any, came to be taken on the aforesaid representation made by the petitioner, it repeatedly reminded the respondent vide several communications, which have been placed on record as Annexure-E (collectively) (Pp.95-126). Since the State Government decided to go for re-bidding of the projects in question, after rejection of the representation made by Brakel as well as RIL, Brakel vide communication dated 24.8.2013 (Annexure-F, p.127), informed and requested the Government of Himachal Pradesh to refund the upfront premium of Rs. 280.00 Crore with upto date interest to the petitioner. In the aforesaid communication, Brakel categorically stated that the petitioner is a bona fide investor and was not involved at the evaluation and award stage, as such, it has no objection, if the money is paid to the petitioner and it shall have no right or claim on the same in future. (Annexure-F, p.127).

**24.** Finally, pursuant to repeated requests having been made by the petitioner, Chief Engineer (Energy), Directorate of Energy, vide communication dated 10.9.2015 (Annexure-G, p.128), conveyed to the petitioner the decision taken by the Government of Himachal Pradesh/Cabinet in its meeting held on 4.9.2015, which reads as under:

"(i) show cause notice served upon M/s Brakel Corporation NV has been decided to be dropped on the basis of the facts that the Project indeed got embroiled in litigation since 2007.

(ii) The amount of Upfront Premium received from M/s Brakel Corporation NV be refunded to M/s Adani Power Limited, without interest and the payment be made on receipt of Upfront Premium from M/s Reliance Infrastructures Limited."

**25.** Vide aforesaid communication, it was also informed that the Government of Himachal Pradesh has offered Jangi-Thopan and Thopan-Powari Projects (480 MW each) in favour of RIL vide LoI dated 10.8.2015, upon which RIL has conveyed its in-principle consent and further requested to extend the period of LoI so that legal formalities with respect to the pending Special Leave to Petition (SLP) before the Hon'ble Supreme Court of India, be fulfilled.

**26.** Since, despite the decision taken by Cabinet in its meeting held on 4.9.2015, amount of upfront premium received from the petitioner, was not refunded to it, it (petitioner) sent a communication dated 17.1.2017 (Annexure-H, P.129), specifically stating therein that almost one year has passed since the decision of the Government of Himachal Pradesh but despite repeated requests and reminders, neither RIL has deposited upfront premium to the Government nor has it (petitioner) received the amount from Government of Himachal Pradesh. Petitioner claimed that since Government of Himachal Pradesh had agreed to refund amount to it, inaction, if any, on the part of RIL to deposit the amount, is arbitrary, unreasonable and cannot be made a ground to deny refund of payment/investment made by it.

**27.** It also emerges from the record that though offer was given to RIL to go ahead with the project but it expressed its inability vide communications dated 1.7.2016 and 4.8.2016, as a consequence of which, Council of Ministers, in its meeting held on 21.9.2016, decided to allot Jangi-

Thopan and Thopan-Powari Projects for execution to any Central Public Sector Undertakings as per provisions of the Policy by imposing the negotiated Upfront Premium and authorized the Administrative Department to negotiate with Central Public Sector Undertakings.

**28.** Pursuant to aforesaid decision, Central Public Sector Undertakings i.e. NTPC, NHPC and SJVNL involved in the implementation of Hydro-Electric Projects in the State of Himachal Pradesh were requested to submit their proposals/offers for implementation of aforesaid projects on terms and conditions of prevailing Policy. While taking aforesaid decision, Administrative Department i.e. Directorate of Energy expressed its inability vide communication dated 13.7.2017 (Annexure–K, p.161) to refund the upfront premium to the petitioner, as per decision of the Council of Ministers, since RIL backed out from its proposal. However, vide aforesaid communication, Directorate of Energy, Government of Himachal Pradesh observed that since the matter with regard to refund of amount to the petitioner was dealt by the Government, so above issue may be processed at Government level.

**29.** Since the Public Sector Undertakings expressed their inability to take project on Build, Own, Operate and Transfer (BOOT) basis, matter again came to be placed before Cabinet, as is evident from communication dated 6.10.2017 (Annexure-M, P.181), issued from the office of Additional Chief Secretary (Power) to the Director of Energy, which is reproduced hereunder:

> "I am directed to refer to your letter No. HPDOE/CE(Energy)/JTP HEP (960MW)/2017-3326, dated 13.07.2017 on the subject cited above and to say that the proposal regarding implementation of Jangi-Thopan HEP (480 MW) and Thopan-Powari HEP (480MW)(in integrated scheme Jangi Thopan Powari HEP (960MW) in District Kinnaur, H.P. was placed before the CMM in its meeting held on 04.10.2017 and the CMM has approved as under:
>
> > "Possibility may be explored to re-bid the project stipulating the condition of a minimum guaranteed deposit of upfront premium

> to give effect to the decision taken in CMM on 04.09.2015. This would be in addition to the obligations spelt out in the Power Policy of the State and further bidding of premium over and above notified in the policy. This would also be applicable in the case of Central PSU's who have evinced interest in the project."
>
> A copy of memorandum placed before the CMM is enclosed. You are, therefore, requested to take further necessary action and send compliance report to this department immediately."

**30.** Perusal of the aforesaid communication reveals that the Council of Ministers, while directing the Administrative Department to explore the possibility to rebuild the project as per conditions of earlier tender, and accordingly deposit the upfront premium, to give effect to the decision taken in the meeting of Council of Ministers, dated 4.9.2015, also observed that this condition of depositing Upfront Premium would not be applicable in the case of Central Public Sector Undertakings, who have evinced interest in the project.

**31.** Simultaneously, vide communication dated 10.10.2017 (Annexure-N, p. 182), Special Secretary (Power) to the Government of Himachal Pradesh, apprised the petitioner that the Council of Ministers on 4.9.2015, after reconsideration of its request for refund of upfront premium deposited by Brakel in respect of the projects in question had decided that the show cause notice issued to Brakel be dropped in view of the fact that the project got embroiled in litigation since 2007 and amount of upfront premium received from Brakel be refunded to the petitioner. Vide aforesaid communication, Government apprised the petitioner that on account of refusal of RIL to execute the project, it has now decided to give effect to decision dated 4.9.2015.

**32.** After having received aforesaid communication, petitioner vide communication dated 11.10.2017 (Annexure-O, p. 183), addressed to the

Special Secretary (Power) to the Government of Himachal Pradesh, requested to issue refund order. While making request to issue refund order, it stated that it is ready to accept Rs.280.06 Crore by post-dated GoHP Bonds or any other phased manner from GoHP's resources. In this communication, petitioner also stated that it is suffering huge loss on account of unforeseen circumstances and it has affected its financial condition of the day to day operations and therefore, until and unless, principal amount of Rs. 280.06 Crore is paid forthwith to it, grave and irreparable loss, harm and injury shall be caused to it. The petitioner also reserved its right to recover damages from Government of Himachal Pradesh, if the request is not acceptable. But, while acknowledging aforesaid communication sent by the petitioner, Special Secretary (Power) to the Government of Himachal Pradesh, vide communication dated 6.10.2007 (Annexure-P, p. 184), conveyed that the State Government through Council of Ministers has decided to implement its decision dated 4.9.2015.

**33.** After receipt of aforesaid communication, petitioner vide communication dated 27.10.2017 (Annexure-Q, p.186), addressed to the Special Secretary (Power) to the Government of Himachal Pradesh stated that it understands that refund to the petitioner is not linked with awarding the said project to Reliance Energy Ltd., who has declined the LoI and not deposited Upfront Premium to Government of Himachal Pradesh and also not linked with any other receivables to the Government of Himachal Pradesh. It again reiterated its readiness to accept Rs.280.06 Crore in a time bound manner by cheque or GoHP bonds. However, Government of Himachal Pradesh, vide communication dated 7.12.2017 (Annexure-R, p.187), apprised the petitioner that due to various legal intricacies and contractual complications involved in the matter, Council of Ministers has reviewed its decision taken in its meeting held on 4.9.2015 and as such, decided to withdraw its decision, accordingly, letter dated 26.10.2017, may be treated as

withdrawn. In the aforesaid background, petitioner has approached this court in the instant proceedings, praying therein for the reliefs, as have been reproduced herein above.

**34.** Before taking note of the rival contentions of the parties, it would be relevant to take note of the fact that on 19.3.2019, Division Bench of this Court, while issuing notice to respondent-State, specifically asked it to apprise the court, as to what decision has been taken with regard to allotment (by auction or through any other transparent mode) of the Project, so that amount earlier promised to the petitioner can be refunded.

**35.** On 26.4.2019, learned Advocate General, on instructions, sought some more time to enable the Council of Ministers to reconsider the matter and take appropriate decision. Accordingly, Division Bench of this Court adjourned the matter to 20.6.2019, observing in the order that the matter may be reconsidered by Council of Ministers in terms of the statement made by learned Advocate General for taking appropriate decision, in accordance with law, regardless of the previous consideration by same competent authority.

**36.** Order passed on 11.7.2019 reveals that as per order dated 20.6.2019, Council of Ministers held its meeting on 3.7.2019 and decided not to grant refund. After passing of the aforesaid order, case came to be adjourned repeatedly and vide order dated 28.9.2020, Division Bench, while admitting the petition, ordered listing of the petition before Single Judge having roster. In the aforesaid background, matter came to be listed before this Court.

**37.** Though on 25.8.2021, Mr. Vikram Nankani, learned Senior Counsel appearing for the petitioner, concluded his arguments on that day, but matter could not be concluded since learned Advocate General was preoccupied in some other matter before Hon'ble Principal Division Bench.

**38.** On 6.9.2021, an application under Order I, rule 10 CPC, seeking implement of one Anil Vahal, came to be filed but the same was ultimately

withdrawn on 23.11.2021 and thereafter, on 2.12.2021, this court, after having heard learned counsel for the parties, reserved the order, but, while dictating the same, this court felt it necessary to seek clarification on certain points, specifically with regard to subsequent allotment of the Project in question to Central Public Sector Undertaking i.e. SJVNL.

**39.** On 4.3.2022, the requisite clarification was placed on record in the shape of instructions dated 23.2.2022, issued under the signatures of Special Secretary (Power) to the Government of Himachal Pradesh, stating therein that after refusal of RIL to execute the project, same has been awarded to Sutlej Jal Vidyut Nigam Limited, but no upfront premium has been received from SJVNL. Since no response to the aforesaid communication was intended to be placed on record by the petitioner, this court again reserved its judgment on 14.3.2022.

**Submissions on behalf of the petitioner**

**40.** Precise grouse of the petitioner in the case at hand is that since the Council of Ministers having taken note of the fact that, at no point of time, petitioner misrepresented to the State and had bonafidely invested huge amount, expecting itself to be equity partner to the extent of 49% in terms of the Policy and terms and conditions of the PIA, coupled with the fact that the delay in execution of project was on account of pendency of litigation, had taken a decision in its meeting held on 4.9.2015, to refund money, refund could not be linked with deposit, if any, made by RIL pursuant to LoI issued in its favour, after cancellation of tender in favour of Brakel. While making this court to peruse various documents placed on record as well as order dated 7.10.2009 Passed by Division Bench of this Court in CWP No. 2748 of 2008, Mr. Nankani, learned senior counsel, vehemently argued that, at no point of time State of Himachal Pradesh took a plea in the writ petition filed by RIL that Brakel misrepresented facts with regard to its financial capability and technical expertise, rather specific stand of the State before Division Bench

and thereafter before Hon'ble Apex Court was that the financial as well as technical capabilities of Brakel were duly evaluated/assessed by the whole-time members of HPSEB on three occasions as well as by HPIDB, as such, at this stage, amount deposited by the petitioner at the behest of Brakel, cannot be forfeited on account of misrepresentation, if any, by Brakel and in terms of the provisions of PIA.

**41.** Mr. Nankani, learned senior counsel, while making this court peruse the memorandum prepared for approval of the Cabinet on two occasions, made a serious attempt to persuade this court to agree with his contention that repeatedly, Administrative Department as well as Law Department categorically opined that Brakel cannot be held liable for the delay, if any, caused on account of litigation. He also made this court peruse the opinion rendered by Law Department on two occasions to the effect that Brakel cannot be said to have misrepresented with regard to its financial and technical viability, especially when documents furnished by it were duly evaluated and processed by whole-time members of HPSEB on three occasions. Lastly, Mr. Nankani argued that once the Council of Ministers, taking note of the opinion rendered by Law Department, that the State Government cannot retain upfront premium for the same project from two different parties, decided to drop the show cause notice dated 28.3.2014 served upon Brakel and refund the upfront premium to it (petitioner) without interest, there was no reason to change the aforesaid decision subsequently, on the ground that RIL has refused to undertake the project. He argued that otherwise also, order refunding upfront premium paid by the petitioner, could not be connected with payment, if any, by RIL, especially when enquiries conducted by the Committee constituted under the Chairmanship of Chief Secretary, pursuant to direction issued by the Cabinet categorically reported that the suppression of material information by Brakel cannot be established and since the Government is legally construed to be a perpetual entity,

irrespective of change in political party, it would be difficult legally to sustain cancellation of allotment made by previous Government. He also argued that the Council of Ministers on 25.11.2008, having taken note of recommendations of the Committee, specifically noted that the previous Government had created infirmity in the bid document, whereby, lead member of consortium was not required to have any substantial financial standing, so it cannot be said that Brakel misrepresented /concealed facts with regard to its financial and technical abilities. Mr. Nankani, learned senior counsel submitted that there is ample material available on record, especially the material collected on record by respondent itself through Police and Income-Tax Department that entire sum paid towards upfront premium was paid by the petitioner, who being a bona fide investor, invested huge sum, legitimately expecting itself to be an equity partner to the extent of 49% in terms of the provisions contained in the Policy and PIA. He argued that when an action of the State is declared to be void by Hon'ble Court, it cannot retain advantage or benefit received under the action, which was declared void, especially when it left no stone unturned to justify its action in awarding tender to Brakel, it cannot retain amount received in terms of Letter of Intent dated 1.12.2006, because such action would be hit by the principle of unjust enrichment as enshrined under S. 65 and 70 of the Contract Act.

**Submissions of the respondent-State**

**42.** Per contra, Mr. Ashok Sharma, learned Advocate General, impressed upon his solitary submission that since there is no privity of contract inter se State of Himachal Pradesh and the petitioner, it is not under any obligation to refund the amount, if any, paid on account of upfront premium by the petitioner. When this Court confronted learned Advocate General with the documents available on record suggestive of the fact that repeatedly the State acknowledged receipt of entire sum of money paid towards upfront premium from the petitioner and the decision of the Cabinet

dated 4.9.2015, to refund upfront premium to the petitioner, learned Advocate General, argued that it is not estopped from reviewing its earlier decision, if, subsequently, it is found to be incorrect and not in the interest of the State.

**43.** Learned Advocate General relied upon a judgment of Hon'ble Apex Court in **State of Maharashtra** v. **Swanstone Multiplex Cinema (P) Ltd.**, (2009) 8 SCC 235, wherein, their lordships have held as under:

> "33. We are passing this order keeping in view the peculiar situation as in either event it was cinema-goers who had lost a huge amount. It would be travesty of justice if the owners of the cinema theatre become eligible to appropriate such a huge amount for its own benefit. To the aforementioned extent, doctrine of unjust enrichment may be held to be applicable. A person who unjustly enriches himself cannot be permitted to retain the same for its benefit except enrichment. Where it becomes entitled thereto the doctrine of unjust enrichment can be invoked irrespective of any statutory provisions.
>
> 34. In Mafatlal Industries Ltd. (supra), Section 72 of the Contract Act providing for restitution may be taken recourse to. Doctrine of `unjust enrichment' was resorted to, observing :
>
> > "(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a

> case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

{See Union of India & Ors. v. Solar Pesticides Pvt. Ltd. & Ors. [(2000) 2 SCC 703]}.

35. In Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs [(2005) 3 SCC 738], this Court has held:

"45. From the above discussion, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11-B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11-B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in the absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner-appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss."

> 36. It may be true that hereat we are not concerned with refund of tax but then for enforcement of legal principles, this court may direct a party to divest itself of the money or benefits, which in justice, equity and good conscience belongs to."

**Analysis**

**44.** I have heard learned counsel for the parties and perused the records minutely.

**45.** Since it is not in dispute that the decision of respondent to award two power projects namely Jangi-Thopan and Thopan-Powari Projects (480 MW each), which were subsequently combined into one project, in favour of Brakel was found to be illegal by Division Bench of this Court In CWP No. 2748 of 2008, titled Reliance Infrastructure Limited vs. State of Himachal Pradesh, on account of misrepresentation made by Brakel, especially with regard to its financial and technical capabilities, there is no occasion for this court to go into that aspect of the matter, especially when such finding of Division Bench has attained finality.

**46.** The question falling for an adjudication by this court in the instant proceedings is that, "whether the action of the respondent-State in reviewing /recalling its earlier decision taken in the meeting of Council of Ministers held on 4.9.2015 to refund Rs. 280.00 Crore invested by petitioner on behalf of Brakel, pursuant to LoI issued in its favour, in respect of Jangi-Thopan and Thopan-Powari Projects, is justifiable or not?"

**47.** As has been observed herein above, this court has no occasion in the instant proceedings to go into the question of misrepresentation, if any, by Brakel with regard to its financial and technical capabilities in view of specific findings of Division Bench in this regard, but, whether the aforesaid finding with regard to misrepresentation by Brakel, rendered by Division Bench in CWP No. 2748 of 2008 can be made basis by respondent-State to deny refund of sum of Rs.280.06 Crore invested by the petitioner herein on behalf of

Brakel, is a question which this court can definitely go into in these proceedings, especially when the respondent-State defended its action in awarding projects in question to Brakel before Division Bench of this Court and thereafter before Hon'ble Apex Court in the SLP's having been filed by RIL and Brakel.

**48.** As has been noticed herein above, stand of the respondent-State from day one before Division Bench of this Court was that it has power to relax the tender conditions and decision to award contract in favour of Brakel has been taken by experts i.e. whole time members of HPSEBL on three occasions and the HPIDB, which was approved by the Cabinet, as such, same should not be set aside.

**49.** Though the record reveals that after dismissal of SLP's having been filed by Brakel and RIL, respondent-State served Brakel with show cause notice dated 28.3.2014, calling upon it to explain its position qua delay in commissioning of project due to inaction, misdeeds and omission and suppression of facts on the part of company and causing loss of Rs. 2713.73 Crore upon State Exchequer and why this amount be not recovered from the company, but subsequently the respondent-State, after having considered the reply to the show cause filed by Brakel and representation filed by petitioner herein to Hon'ble the Chief Minister, requesting therein to refund the Upfront Premium, decided to drop the aforesaid show cause notice and refund the Upfront Premium of Rs. 280.06 Crore to the petitioner, without any interest thereupon. If it is so, it is not understood that on what basis, order of forfeiture of Upfront Premium could be passed. Perusal of the memorandum prepared for consideration of the Council of Ministers by Department of Multi-Purpose Projects and Power (Annexure-I, p. 133) clearly reveals that Brakel raised following points, while filing reply to the show cause notice dated 28.3.2014:

i) There was due and proper application of mind by GoHP and its officers including officers of HPSEB including technical and commercial personnel over a period of time in Bids evaluation, submission of price bids by qualified bidders, presentation given by Brakel team to HP Infrastructure Board and while issuing Letter of Allotment/PIA"

ii) Board approvals have been obtained. Government approvals through Cabinet were also obtained and it is after following due process of law that GoHP issued Letter of Allotment (LOA). After the LOA also, and between the dates of payment of the first installment of 50% Upfront Premium. GoHP had several occasions to revisit the file.

iii) GoHP took conscious and mindful decisions at each and every stage in not cancelling the LOA and in demanding and accepting the funds and as such the first show cause notice was dropped and the PIA was signed on 09.04.2009.

iv) GoHP defended its own actions and allotment in favour of Brakel before the Hon'ble High Court and justified the correctness of LoA issued to Brakel. After the judgment of Hon'ble High Court, GoHP neither filed SLP nor went for rebid, though the option thereof was available to be exercised by GoHP in November 2009 itself.

v) GoHP has only itself to blame. GoHP has been a party to the decision in the evaluation of the bid and in the grant of the LOA. GoHP has been a party before the Hon'ble High Court which jointly defended the LOA with Brakel GoHP demanded and accepted the money unconditionally and without reserving any rights. GoHP was not prevented after October 2009 to go ahead with the rebid but still choose not to do so.

vi) The basis of alleged loss of Rs. 2700 Crores has not been disclosed and the calculation thereof seems to be based only on assumption and presumption and without proving of actual loss. In fact, the loss is attributed to Reliance who have engaged in continuous litigation after award of project, if at all some loss is duly proved by GoHP. There are many other instances where projects have not been claimed by GoHP

vii) In the Tender Terms and Conditions, there was no requirement of financial capacity of the lead bidder. Brakel did show ability to raise funds through APL. Brakel representation to the GoHP for approval of addition of APL to the consortium was pending from 30-03-2012 GoHP has not rejected this application which deemed to be approval. Neither APL nor Brakel can be responsible for the alleged loss, if any. Brakel have given No Objection for refund to M/s Adani Power Ltd. through. whom they have raised the funds, who were only innocent investors in the project investing only after due diligence conducted by them on documents/ agreements/ POA. (Annexure-III)

viii) Before cancellation of allotment by Hon'ble High Court vide judgment dated 09-10-2009, Brakel was implementing the Project in accordance with the preponed schedule and various milestones were achieved and after cancellation of allotment 09-10-2009, Brakel cannot held responsible for delay

ix) The decision to impose damages on Brakel is unprecedented and contrary to govt. Policy and the same ahs not been imposed to any developer even after delay in commissioning upto 20 or more years after allotment in some cases.

x) No new documents have been discovered by Hon'ble High Court. It is the same documents and information which have been differently interpreted and reviewed Hon'ble by the Hon'ble High Court but that does not mean that Brakel misrepresented to GoHP.

xi) GoHP has already decided to re-bid the project on same policy and will get the same amount or more as upfront premium from the successful bidder, it can’t take upfront premium for the same project from two companies/bidders.

xii) Brakel reserve their rights to avail such legal remedies including arbitration in terms of Clause 50 of the PIA, in the even any adverse view is proposed to be taken as per liberty granted by Hon'ble Supreme Court vide order dated 01-04-2014.

xiii) That the M/S Brakel Corpn. N.V. (Petitioner in SLP No.888 2010) is free to seek such redress as may be legally permissible in accordance with Order passed by Hon'ble Apex Court on 01.04.2014, as reproduced below:

*SLP(C) No. 888 of 2010:*

*Mr. Ranjit Kumar, Learned senior counsel for the petitioner today submits that he has instructions to withdraw this special leave petition. The special leave petition is accordingly dismissed as withdrawn.*

*Learned el counsel appearing for the applicant in IA No 5 also seeks leave to withdraw this application. IA. No 35 is also dismissed as withdrawn. .*

*Mr. Ranjit Kumar submits that the State Government has during the pendency of these proceedings issued a show cause notice to the petitioner- Brakel Corporation NV dated 28.03 2014 calling upon the petitioner to show cause why the amount mentioned in the said notice be not forfeited and damages recovered from the petitioner. He submits that the petitioner is suitably responding to that show cause notice but should the Government eventually decide to forfeit the amount in question, the petitioner may have the liberty to challenge the said forfeiture or such other redress in a separate writ petition by way of arbitration if otherwise permissible. We see no reason to decline that prayer especially when we find that the judgment impugned in these proceedings does not deal with the question of forfeiture and the show cause notice proposing to forfeit the amount has been issued during the pendency of the special leave petition. We make it clear that in case the Government eventually decide to forfeit any amount or direct recovery of any damages from the petitioner Corporation, the petitioner shall be free to seek such redress as may be legally permissible against any such direction. We express no opinion on the merits of any contention that may be open to the parties in any such proceedings. The parties are left to bear their own costs."*

The show cause notice dated 28-03-2014 served to the Company is based on the following grounds:

i) That a fact that pursuance the Cabinet decision dated 25.11.2008 was decided to withdraw Show Cause Notices dated 07.01 2008 and 19.07.2008 issued Brakel. (i) Not to cancel allotment in favour Brakel Corporation MV, (1) Brakul comply

with the terms and conditions imposed the Government and accepted by Brakel vide their dated 29.04.2008 and (iv) sign draft PIA. However, Cabinet decision dated 25.11.2008 quashed set aside the Hon'ble Court its judgment dated 09.10.2009 as being arbitrary,

"From aforesaid discussion it is apparent had filed incorrect Registration Certificate with the Bid Document. said certificate contained and erasures we had above were done with view fraudulently mislead the Government. It than that Standard had never committed 45% Equity participation. Joint Venture Agreement was signed by persons who were authorized same We clearly of view that Brakel was guilty of the mis-representation and suppression of facts. itself was ground allotment favour of Brakel."

ii) With regard to imposition or penalty, earlier was opined by the Law 02.08.2013 Govt under clause-48 read with clause 49 of PIA dated 09.04.2009 was competent impose penalty. As clause the PIA, any violations of the issue (i.e. misrepresentation the information supplied by Gary to the first party) concerning policy parameters. IPA / LA /may result into monetary penalty including cancellation of the Project. In view of misrepresentation of facts by the second party, the first party i.e. State: Government is empowered to invoke the provisions of clause 49 of PIA Admittedly, though the allotment of Project stands cancelled, Law Department was of the opinion that still the company is not absolved of it's misdeeds and misrepresentation and is, thus, liable for penalty as per Clause 49 of PIA and it appears that forfeiture of upfront premium is covered under Clause 49 and the State Government is competent to impose penalty under clause 48 read with Clause 49 of the PIA

iii) Ms. Adani Power Limited as consortium, no decision was taken by the State Government and therefore, it can not be construed that Government's approval was deemed approved in this regard. Hon'ble High Court in its judgment dated 07.10.2009 also observed that in the present case there is no prior approval of the State Government and our considered opinion Brakel could not have without prior approval virtually changed the membership of

> the consortium and later waited for ex-post facto sanction of the change. Resultantly application of M/s Adani Power Limited for refund of upfront premium and interest was rejected on merit vide this department letter No. MPP-F(2)6/2006-X. dated 25.03.2014 (Annexure-IV)

**50.** Though the aforesaid memorandum for consideration of Council of Ministers reveals that the Administrative Department i.e. Multi-Purpose Projects and Power, after having gone through the record and the reply filed by Brakel to the show cause notice submitted that the petitioner was not in picture when aforesaid sum was received by the Government as Upfront Premium as such, the amount is liable to be forfeited in terms of Clause 48 read with Clause 49 of the PIA dated 9.4.2009, but when said proposal was examined by Law Department, it opined that State Government has allowed equity partnership with prior written approval of Government and petitioner deposited the sum on behalf of Brakel and amount is deposited with State head or enchased as such. Law Department also opined that the project got embroiled in litigation somewhere in 2007 i.e. on 4.12.2007 and an interim order was passed on 1.5.2008. It is thus clear that the project was stalled due to court intervention and it is clear that since 2009 application of the petitioner for changing composition of the consortium is hanging fire for no good reason as such, Brakel cannot be blamed, in any manner, for any impasse, rather the same was on account of intervention of court and inaction on the part of State itself. Relevant portion of opinion rendered by Law Department is reproduced herein below:

> "In reply to query of the A.D., the Law Deptt. Opines that in case the State govt. had allowed the partnership of M/s Adani Power Ltd. as the equity partner with the prior written approval of the Govt. and further the M/s Adani Power Ltd. deposited the amount in question on behalf of M/s Adanl Ltd. and said amount has already been deposited in the State head or encashed by the govt., in that event, the A.D. may take an

independent decision for refunding the amount on merit of the case, if the entire blame is not attributable to M/s Adani Power Ltd., in the instant controversy and act accordingly.

As is inferable from the record, the project got embroiled in litigation somewhere in the year 2007, precisely 4-12-2007 and an interim order was passed on 1-5-2008. An interim stay also was passed by the Hon'ble High Court and finally on 7.10.2009 PIA with M/s Brakel came to be cancelled. It is thus clear that work on the project was stalled due to court intervention. As it emerges from record, it is also clear that since 2009(4-4-2009) the application of the applicant (Adani Power Ltd.) for changing the composition of consortium is still hanging fire, for no good reason. The applicant, admittedly cannot be blamed for the impasse in any manner, one was the intervention of the court and the others related to inaction on behalf of the state itself.

In any case, looked from another angle the state cannot retain upfront money from two different parties i.e. one from the applicant or Brakel (what so ever the case) or a new company in the process of re-bidding. Once the project again re-tendered the state can only retain the up-front money of the new bidder. In that case the upfront of the earlier bidders will have to be refunded. A.D. may thus, take a conscious decision in this behalf after rebidding, keeping in view the entirety of circumstances discussed above.

**51.** If the aforesaid opinion of Law Department is perused in its entirety, it is clear that it categorically opined that if project is being re-tendered, State can retain Upfront Premium of new bidder and in that case Upfront Premium of earlier bidder has to be refunded. Memorandum prepared for consideration of the Council of Ministers, as taken note herein above, further reveals that the aforesaid opinion rendered by Law Department was not agreed to by the Finance Department and it opined as under:

From p.147

i. The Power Department needs to first decide finally on the show cause notice dated 28.03.2014 w.r.t. forfeiture of premium and w.r.t. losses assessed by department to the tune of Rs.2713 crore w.r.t. replies of Brakel Company. In fact, Law Department advice

does not address this issue and it does not also examine the merits on otherwise of the reply of Brakel Company. Legally, it is evident that Law Department has erred by status at N-52 that AD cannot take upfront money from 2 different parties since the rationale for taking upfront premium from M/s Brakel and imposition of penalty and forfeiture of upfront money are entirely different from the reasons for taking upfront premium/earnest money as per terms of fresh agreement, when Jangi Thopan is fresh advertised and allotted.

ii. M/s Brakel by its action has delayed the project for over 9 years, has misrepresented and has caused loss to exchequer. Thus in view of Clause 49 of PIA, there is strong merit in forfeiture of upfront premium of Rs. 280.969 Crore and also to take action to recover damages of the tune of rs. 2713 crore through due process.

iii. In view of the Clause 39 of PIA and various affidavits filed by AD in Courts, it is evident that Adani Power Ltd. has no legal right to considered as a party to the matter. Thus, AD does not need to accept Adani Power Ltd. claim of refund, for reasons stated, also in Directorate of Energy, letter dated 19.09.2014.

iv. Law Department has erred as state has never allowed the partnership of Adani Power. AD has taken this stand in the court also. Hence, Adani Power has no locus standi in this case.

Department is therefore, advised to follow due process to initiate recovery of damages/revenue loss to the State of HP to the tune of Rs.2713 Crore due to misdeeds, misconduct and delay on part of Brakel Company, under Clause 48 & 49 of PIA. Besides steps be also taken to forfeit upfront premium alongwith interest deposited by the company in terms of letter of allotment/PIA.

7. The view of the Finance Department are more or less based on the earlier stand taken by this Department whereas the State Government had taken a different view in the Hon'ble High Court and in Hon'ble Apex Court through various affidavits. While defending the case in the Hon'ble Apex Court and in Hon'ble High Court of Himachal Pradesh, the Government

has strongly defended its action of allotment of the Project to M/s Brakel Corporation NV on the following grounds: ...(not relevant)"

**52.** It would be pertinent to take note of Clause 7 of aforesaid memo prepared for consideration of Council of Ministers, wherein Administrative Department, while recoding that the views of Finance Department are more or less based on earlier stand taken by the Department, also stated that the State Government had taken a different view in the High Court and Hon'ble Apex Court through various affidavits. Administrative Department also recorded in its opinion that, while defending the case in the Hon'ble Apex Court and in the High Court, the Government has strongly defended its action of allotment of the project to Brakel on the ground that the entire bidding process and allotment of the project has been done in a fair, transparent manner and decision making process in accordance with law and that there was inordinate delay in depositing 50% of Upfront Premium by Brakel and the State had time and again asked the company to deposit the same, which was finally deposited in January, 2008, together with interest for the delayed period. It also recorded that the State took stand before courts that Brakel sent some suggestion on 24.1.2007 with regard to draft of Pre-implementation Agreement (introduced by Hydro Power Policy 2006 notified on 11.12.2006), subsequent to which, discussions were held between the representatives of Brakel and officers of the State and finally the State Cabinet decision was conveyed on 11.10.2007 but, by that time, election code of conduct had come into force in the State of Himachal Pradesh. Relevant portion from p.148-149 is reproduced herein below:

"(a) That the entire bidding process and allotment of the Project has been done in a fair, transparent and decision making process in accordance with law.

(b) That there was indeed a delay in depositing of 50% of upfront premium by Brakel Corporation NV and the State had time and again

asked the Company to deposit the same which was finally deposited in January, 2008 together with interest for the delayed period.

(c) The Brakel Corporation has sent some suggestion on 24.1.2007 with regard to draft of Pre-implementation Agreement (PIA) (introduced by Himachal Pradesh Police, 2006 notified on 11.12.2006), subsequent to which discussions were held between the representatives of Brakel and the Officers of the State. Finally, the State Cabinet decision for amendment in the PIA was conveyed on 11.10.2007, but by which time Election Code of Conduct had come into force in the State of Himachal Pradesh. moreover, the State was in correspondence with the Reserve Bank of India with regard to formalities required to be completed for inward remittance of the amount towards 50% upfront premium.

(d) In fact the Brakel have in aggregate deposited approximately Rs.280 crores. The time extension granted by the Govt. for deposit of upfront amount etc. was in accordance with law. Thus, the action of the Govt. was just, valid, legal and after proper consideration and nothing arbitrary ahs been found therein by the Hon'ble High Court.

(e) “Brakel Kinnaur Pvt. Ltd.”, is the Special Purpose Vehicle (SPV) formed by the Company as per the requirement under the Himachal Pradesh Police. It was intended that the Project is ultimately transferred to an entity which has its domain within the State of Himachal Pradesh under the Himachal Pradesh Police-2006 and the concerned allottee of power projects are under obligation to achieve the milestones strictly in conformity with the provisions of the Himachal Pradesh Police-2006.

(f) Regarding the allegation raised by M/s Reliance, the State Government has immediately issued two show cause notices to M/s Brakel with a view to achieve clarity and transparency in the matters. Both the show cause notices were adjudicated independently by different authorities at different point of time and were dropped after satisfaction regarding credentials and bonafides of M/s Brakel Corporation. Moreover, independent enquiries/re-verification/re-evaluation was done by the HPSEB under the instructions of the Government in view of complaint received from a Member of Parliament. The Members of HPIDB after considering the matter, took a decision not to recommended setting aside the allotment to M/s Brakel.

(g) As regards allegations of receiving Bonds from Adani Group by way of loan are concerned, Brakel disclosed the details of the same to

the State. Immediately, on enquiry, Borrowing of money by an allottee is not prohibited under the bid document or under the Himachal Pradesh Police. However, M/s Brakel had clarified that they have not allotted and or transferred any equity to Adani nor will they do so without the permission of the State. This was considered a satisfactory explanation by the Govt.

(h) The entire matter was examined by High Level Committee of Secretaries chaired by the Chief Secretary. The committee of Secretaries made recommendations based on record, after hearing the affected parties and also seeking legal opinion from the law Department. The relevant part of the recommendations is as under:-

> "(8) The committee was thus unanimously of the view that through the evaluation process made by the previous Govt. can be considered to be vitiated on the ground that the lead member (M/s Brakel) of this consortium had no financial strength and the partner of the consortium whose financial strength was used for bidding purpose had made no definite commitment of its equity participation in projects bid for this aspect having been deliberately overlooked by the previous Govt., the blame thereof cannot now at this belated stage be laid on M/s Brakel NV.
>
> (9). In the light of the above chain of events, the committee is therefore of the view that the allotment already made of these projects to M/s Brakel by the previous govt. may not stand the test of legal issues now involved in cancellation at this state, because the blame for infirmity in the financial strength evaluation cannot be attributable to M/s Brakel Corporation NV, based upon records in the notice of this committee. It was decided that the proceedings of this Committee's deliberation and conclusion may be placed for further consideration and financial decision of the State Council of Ministers.

(i) The recommendation of the Committee of Secretaries was considered by the Cabinet in its meeting held on 25.11.2008, and on the basis of recommendations of the Committee of Secretaries, it was decided not to cancel the allotment already made in favour of M/s Brakel Corporation NV.

**53.** Had the allotment of the projects not been quashed by Division Bench of this Court, same would have been made to Brakel. Administrative Department also recorded in the memorandum for consideration of Council of Ministers that insofar as the question of depositing of Upfront Premium by the petitioner is concerned, this fact was brought to the notice of the State Government by Brakel. Further, the Secretary of the Company (petitioner) informed that various sums on different dates have been debited from Axis Bank account of the petitioner.

**54.** Law Department, in its opinion, as recorded in aforesaid memorandum for consideration of Council of Ministers, categorically opined that the developer is not to be punished as project was delayed due to pending litigation. It also opined that pursuant to cancellation of project by court, no penalty is leviable and no damages are recoverable and action/decision is to be taken independently by Administrative Department after considering all the facts at competent level. It is therefore, for the Administrative Department to take decision qua imposition of penalty and damages.

**55.** In the aforesaid background, Administrative Department placed the matter before Council of Ministers for taking decision as to whether to forfeit Upfront Premium or drop show cause notice. Precisely, following points came to be placed before Council of Ministers for decision:

> "i) Whether the show cause notice dated 28-03-2014 served upon M/s Brakel Corporation NV be dropped in view of the opinion of Law Department based on facts that the project indeed got embroiled in litigation since 2007.
>
> ii) If not, whether reply submitted by M/s Brakel Corporation NV (Annexure-II) forfeit Upfront Premium received from the Company and to initiate process for recovery of damages /revenue loss to the State of HP to the tune of Rs.2713.73 crore worked by DOE for violation fo provision of clauses 48 & 49 of Pre-implementation Agreement, as per decision of CMM, dated 4.9.2015.
>
> OR

iii) Whether in view of position stated above in para 12 & 13 of the memorandum the amount of upfront premium received from the M/s Brakel Corporation NV be refunded, without interest an the payment be made on receipt of upfront premium from M/s RIL in view of the opinion rendered by the Law Department as per para 5 and para 11 of the cabinet note.
(see Pp. 157 and 158 of paper-book)

**56.** Record reveals that the Council of Ministers, after going through the memorandum for consideration placed before it in its meeting held on 4.9.2015, decided that the show cause notice dated 28.3.2014 issued to Brakel be dropped and Upfront Premium be paid to the petitioner, without interest and payment be made on receipt of Upfront Premium from RIL, as is evident from communication dated 9.9.2015 (Annexure-J, p. 159)

**57.** Though, after withdrawal of SLP by RIL, decision was taken by the State Cabinet to offer project in question to RIL but it (RIL) vide letter dated 1.7.2016 and 4.8.2016, expressed its inability to go ahead with the project and as such, Department of Energy vide communication dated 13.7.2017 (Annexure-K, p. 161) addressed to Special Secretary (Power) to the Government of Himachal Pradesh expressed its inability to refund the Upfront Premium. Thereafter, with the approval of the Cabinet, Directorate of Energy started exploring possibility to get the project executed through Central Public Sector Undertakings i.e. NHPC, NTPC and SJVNL involved in Hydro Electric Project in the State of Himachal Pradesh. Though, as per Cabinet decision, project in question was to be offered to the Central Public Sector Undertaking on same terms and conditions as were offered to Brakel and RIL, but since the Public Sector Undertakings, while submitting their proposals pursuant to the offer made by State of Himachal Pradesh, refused to pay any Upfront Premium, Department of Energy, Himachal Pradesh vide communication dated 13.7.2017 (Annexure-K), while informing Special Secretary (Power) to

the Government of Himachal Pradesh, with regard to proposals received from Central Public Sector Undertakings, apprised that since no Upfront Premium has been realized so far and RIL has backed out from its proposal, Upfront Premium cannot be refunded back at present as per decision of Council of Ministers taken on 4.9.2015.

**58.** In the aforesaid backdrop, matter again came to be placed before Council of Ministers, vide memorandum for consideration by Multi-Purpose Projects and Power, Himachal Pradesh dated 3.10.2017 (Annexure-L, p. 163) wherein Administrative Department stated that since RIL has declined the offer of Government of Himachal Pradesh to execute Jangi-Thopan and Thopan-Powari Projects, it may not be tenable to refund Upfront Premium deposited by Brakel, which is liable to be forfeited.

**59.** On the basis of aforesaid finding /opinion rendered by Law Department, Administrative Department stated in the memorandum for consideration of Council of Ministers that the fact cannot be ignored that the project got embroiled in litigation since 2007 and Brakel cannot be blamed for impasse in any manner and State cannot retain Upfront Premium from two parties as the project is now allotted to RIL. It s also recorded that since the Cabinet on 5.8.2015 decided to award the project to RIL which was second highest bidder on same terms and conditions as were applicable to Brakel. Council of Ministers in meeting held on 4.10.2017, ordered that the possibility may be explored to re-bid the project stipulating the condition of a minimum guaranteed deposit of upfront premium to give effect to the decision taken in CMM on 04.09.2015. This would be in addition to the obligations spelt out in the Power Policy of the State and further bidding of premium over and above notified in the policy. This would also be applicable in the case of Central PSU's who have evinced interest in the project.

**60.** It appears that no decision with respect to refund of Upfront Premium as was taken on 4.9.2015 by the Council of Ministers could be

taken and as such, Special Secretary (Power) to the Government of Himachal Pradesh vide communication dated 10.10.2017 (Annexure-N, p.182), while responding to letter dated 12.5.2017 addressed to Hon'ble Chief Minister by the petitioner, stated that in view of refusal of RIL to execute the projects, Council of Ministers has directed the Department to explore other alternatives/possibilities to give effect to the decision taken on 4.9.2015, as referred to para 1 of communication, wherein specific reference was given to the decision of Council of Ministers taken on 4.9.2015 with regard to decision of cabinet to drop show cause notice issued against Brakel and to refund Upfront Premium deposited by Brakel to the petitioner, without interest. While responding to aforesaid communication, petitioner on 11.10.2017 (Annexure-O, p.183), requested the Special Secretary (Power) to the Government of Himachal Pradesh to issue refund order clearly mentioning the process Government of Himachal Pradesh proposed to adopt for the same. It also stated in the communication that it understand that its money is lying with State Government in suspense account and it is reedy to accept Rs.280.06 Crore by post-dated GoHP bonds or any other phased manner from GoHP's resources.

**61.** While responding to the same, Special Secretary (Power) to the Government of Himachal Pradesh, on 26.10.2017 (Annexure-P, p.184) again reminded the petitioner that the Council of Ministers in its meeting held on 4.9,2015 has decided to refund Upfront Premium of Jangi-Thopan and Thopan-Powari Projects to the petitioner.

**62.** Petitioner while responding to aforesaid communication, vide its communication dated 27.10.2017 (Annexure-Q, p.186) stated that it understands that refund to APL is not linked with awarding the said project to Reliance Energy Ltd. (REL) who has declined the LoI and not deposited Upfront Premium to Government of Himachal Pradesh and also not linked with any other receivables to the Government of Himachal Pradesh. Besides

this, it also reiterated that it is ready to accept 280.06 Crore in a time bound manner by cheque or Government of Himachal Pradesh bonds. However, respondent-State vide communication dated 7.12.2017 (Annexure-R, p.187), apprised the petitioner that due to various illegal intricacies and contractual complications involved in the matter, the Council of Ministers has reconsidered the matter and reviewed its decision dated 4.9.2015 and has decided to withdraw the same.

**63.** Once the Council of Ministers on 4.9.2015, after having taken note of detailed Cabinet note prepared by Administrative Department, had itself decided to refund the sum of Rs. 280.06 Crore to the petitioner, it is not understood that on what basis it reviewed decision taken on 4.9.2015. Though, it has been stated that due to legal intricacies and contractual complications involved in the matter, Council of Ministers has decided to review its decision taken in its meeting held on 4.9.2015 but, what are those legal intricacies and contractual complications, have not been spelt out in the impugned communication, Annexure-R.

**64.** It is not in dispute that Brakel itself wrote to the Government that sum of Rs. 280.06 Crore paid by it as Upfront Premium may be refunded to the petitioner and it shall have no claim of any kind over the same. Moreover, decision taken by Council of Ministers on 4.9.2015 is/was based upon the fact that the delay in execution of the project in question was not on account of any fault of Brakel, rather due to pending litigation. Cabinet, while taking decision dated 4.9.2015, was also aware of the fact that the entire payment of Upfront Premium was made by the petitioner, which admittedly having taken note of LoA, draft PIA and Hydro Power Policy, wherein there was provision to transfer equity to the extent of 49% to a third party, invested huge sum towards Upfront Premium. Moreover, two show cause notices issued to Brakel on account of delay in depositing Upfront Premium were withdrawn by the Government, which further emboldened the petitioner to invest money in

the power projects with a hope to acquire equity of 49%. Record clearly reveals that the respondent-State was aware from the day one that the entire payment of Upfront Premium has come from the accounts of the petitioner, but yet it did not question Brakel that since Adani Power Limited i.e. petitioner is not one of the members of consortium, how it could invest the money in the projects, rather, representative of the petitioner was time and again permitted by respondent to attend the meetings held inter se Brakel and Government to resolve the situation arising out of issuance of show cause notice against Brakel on account of delay in depositing Upfront Premium. It is also not in dispute that Brakel specifically wrote to Hon'ble Chief Minister with regard to its intention to transfer 49% equity in favour of the petitioner and to introduce it as one of the members of the consortium. (p. )

**65.** Though, no final decision, if any, could be taken on the aforesaid request made by Brakel, but plethora of communications placed on record by the petitioner itself reveals that repeatedly the Government acknowledged receipt of Upfront Premium from the petitioner. Division Bench in CWP No 2748 of 2008 has categorically recorded in its judgment dated 7.10.2009, that PIA was signed between the Government and Brakel and it is not understood how, without permission of Government, the petitioner was introduced as one of the members of consortium. It has been further recorded by Division Bench in its order (supra) that the discreet enquiry conducted by Government through Police and Income Tax Department clearly reveals that the entire sum deposited as Upfront Premium by Brakel was paid by the petitioner, whom Brakel later on attempted to introduce as member of the consortium, without permission of the Government. True it is that there is no formal order available on record suggestive of the fact that suggestion/proposal made by Brakel for introducing the petitioner as member of consortium was accepted, but there is ample material available on record suggestive of the fact that the

respondent-State accepted the petitioner to be one of the members of the consortium.

**66.** There is another aspect of the matter that though the respondent-State, after dismissal of SLP's having been filed by RIL and Brakel, issued show cause notice on 28.3.2014 to Brakel, calling upon it to show cause that why the amount deposited on account of Upfront Premium be not forfeited but, it cannot be disputed that the aforesaid show cause notice was withdrawn by the Government itself pursuant to the decision taken by the Council of Ministers in its meeting held on 4.9.2015 and as such, as of today, there is no ground otherwise available for the respondent to forfeit the amount deposited by Brakel on account of Upfront Premium. Decision dated 4.9.2015 taken by Council of Ministers in its meeting was very much in force till issuance of communication dated 7.12.2017 (Annexure-R), whereby petitioner was informed that due to various legal intricacies and contractual complications involved in the matter, the Council of Ministers has reviewed its decision taken on 4.9.2015.

**67.** Record reveals that on 27.11.2017, a fresh memorandum for consideration of the Council of Ministers (Annexure-R/H, p. 361) was prepared by the Additional Chief Secretary (Power) to the Government of Himachal Pradesh, requesting therein to review the whole issue afresh and withdraw the decisions taken in the meetings of the Council of Ministers on 4.9.2015 and 4.10.2017. Vide communication dated 30.11.2017 (p.368), Under Secretary (GAD) to the Government of Himachal Pradesh informed the Additional Chief Secretary (MPP & Power) to the Government of Himachal Pradesh that the proposal regarding implementation of Jangi-Thopan HEP(480 MW) and Thopan-Powari HEP (480 MW) in District Kinnaur was placed before the Cabinet and same stands approved, as a consequence of which, earlier decision taken by the Council of Ministers in its meeting held on 4.9.2015 to

refund the amount deposited by the petitioner on account of Upfront Premium has been recalled/reviewed.

**68.** Once show cause notice dated 28.3.2014 stood withdrawn pursuant to the decision taken by Council of Ministers in its meeting held on 4.9.2015, it is not understood how respondent can retain amount deposited as Upfront Premium, that too, in terms of Clauses 48 and 49 of the PIA.

**69.** Law Department has already opined that the Government cannot take advantage of decision of Division Bench canceling the projects, while taking decision to retain the Upfront Premium deposited by Brakel. especially when it took a specific stand before Hon'ble Apex Court that the allotment in favour of Brakel was strictly in accordance with law and there was no violation, if any, on the part of Brakel.

**70.** At this stage, it is apt to take note of Clauses 48 and 49 of PIA (Annexure-R/A annexed with reply of respondent, p.229), which read as under:

> From p.229
>
> "48. The Second Party assures the First Party that there is no misrepresentation in the information supplied by it to the First Party as a part of their Bid or during the subsequent selection process. The First Party reserves the right to cancel the Pre-implementation Agreement after giving an opportunity to the Second Party in case it is found that there was some such misrepresentation by the Second Party and/or in the event of breach of any of the provisions of this Pre-implementation Agreement.
>
> 49. Any violations of the above mentioned issues concerning policy parameters, PIA/ IA may results into monetary penalty including cancellation of the Project."

**71.** Bare reading of aforesaid clauses contained in PIA clearly reveals that the second party i.e. State has/had the right to cancel the PIA, if subsequently, it transpires that the first party misrepresented and supplied

wrong information to the Department. It further reveals that any violation of the policy parameters /PIA/ IA may result in monetary penalty including cancellation of the project.

**72.** True it is that the Division Bench of this Court in its judgment dated 7.9.2010 cancelled the projects awarded to Brakel on account of misrepresentation, but such plea is not available to respondent-State, while considering prayer made by petitioner to refund the Upfront Premium. As has been take note herein above, respondent-State vehemently justified its stand in awarding project in question to Brakel before the Division Bench of the Court and Hon'ble Apex Court. If the replies filed by respondent-State in the proceedings decided by Division Bench are perused in their entirety, respondent-State left no stone unturned to prove that the financial and technical viability/capability of Brakel was evaluated by whole-time members of HPSEB and HPIDB and there is no illegality therein. It also set up a stand that otherwise also, it has the power to change the conditions of tender. Once the respondent-State categorically stated before the court of law that there was no illegality committed by Brakel and its financial and technical viabilities/capabilities were assessed by the Department, does it lie in the mouth of the State to claim at this stage that the amount paid by Brakel on account of Upfront Premium deserves to be forfeited in terms of Clauses 48 and 49 on account of the fact that it misrepresented the facts while participating in the tender process initiated for the allotment of projects in question?

**73.** Solitary argument advanced by respondent-State that since there is no privity of contract between petitioner and the Government, it is not liable to refund amount deposited on account of Upfront Premium by Brakel to the petitioner though appears to be attractive but has no merit. Otherwise also, aforesaid plea set up by the State is not in consonance with the reasons set up by respondent-State in communication dated 7.12.2017 (Annexure-R), while

conveying decision of Council of Ministers, to review /recall its decision dated 4.9.2015. In communication dated 7.12.2017. it has been nowhere stated by the respondent-State that since there was no privity of contract between the petitioner and the State Government, it is not liable to refund the money, rather, it has been stated in the communication supra that due to various legal intricacies and contractual complications involved in the matter, Council of Ministers has reconsidered and reviewed decision taken on 4.9.2015.

**74.** No doubt, petitioner herein was not in picture when Brakel submitted its bid and was awarded LoI pursuant to it being the lowest bidder but, as has been discussed herein above in detail, entire money on account of Upfront Premium was actually paid by the petitioner and such fact was very much in the knowledge of the respondent-State. Though the respondent-State at first instance after filing of writ petition by RIL, issued show cause notice to Brakel, that why LoI be not withdrawn on account of its delay in paying the Upfront Premium but, after receipt of Upfront Premium on behalf of Brakel, it got a discreet enquiry conducted through Police and income Tax Department with regard to source of money, which revealed that the entire sum came from the companies owned and managed by the petitioner, but yet has not cancelled LoI and asked Brakel to pay more sum as interest on delayed payment, which was again paid by the petitioner.

**75.** Leaving everything aside, material on record, reveals that after issuance of second show cause notice, wherein issue with regard to inclusion of the petitioner as one of the members of consortium was also raised, Brakel made its intention clear to the Government to transfer 49% equity to the petitioner, but yet the respondent-State dropped the show cause notice and permitted Brakel to go ahead with the project. It is only after passing of order dated 7.10.2009, by the Division Bench of this court that the respondent-State changed its tone and held Brakel liable for entire impasse and thereafter, served show cause notice calling upon it to explain that why the

loss incurred by State, on account of delay in implementation of the projects, be not recovered from it, in terms of Clauses 48 and 49 of the PIA.

**76.** At this stage, for the first time, respondent-State asked Brakel that why the Upfront Premium deposited by it be not forfeited, that too on the ground of misrepresentation, which otherwise could not be taken by the respondent-State because of its consistent stand taken before Division Bench of this court and the Hon'ble Apex Court that the financial and technical viabilities/capabilities of Brakel were rightly assessed by whole-time members of HPSEB and HPIDB and there was no illegality in the same.

**77.** Once, the Council of Ministers, after being satisfied that the delay in implementation of project was on account of pending litigation, decided to withdraw the show cause notice issued to Brakel, it is not understood, how the money paid on account of Upfront Premium can be refused to be refunded to the petitioner, from whose accounts, entire sum towards Upfront Premium was paid. No doubt, as per the decision taken by the Council of Ministers in its meeting held on 4.9.2015, money on account of Upfront Premium was to be paid to the petitioner, after receipt of Upfront Premium from RIL, which otherwise being second lowest bidder was offered project, after its having withdrawn the SLP filed in the Hon'ble Apex Court, but, the decision of RIL to not accept the offer made by respondent-State definitely cannot be a ground to deny legitimate claim of the petitioner, which otherwise, at no point of time, misrepresented to the State of Himachal Pradesh, rather being a bona fide investor with a view to have 49% equity as per PIA and Hydro Power Policy invested huge amount. After having seen the bona fides of the petitioner and the fact that entire money on account of Upfront Premium was paid by it, Council of Ministers took a conscious decision to refund the money invested by it, without payment of any interest thereupon.

**78.** Once, the Council of Ministers, before taking decision dated 4.9.2015, recorded its satisfaction that there was no fault of the petitioner and delay in implementation of project was on account of pending litigation, subsequent decision taken by Council of Ministers to recall its earlier decision dated 4.9.2015, cannot be said to be justifiable, especially when no specific reason has been assigned in communication dated 7.12.2017 (Annexure-R), whereby decision of Council of Ministers to review/recall its decision dated 4.9.2015 came to be intimated to the petitioner. Loss, if any suffered by respondent-State, on account of delay in implementation of project, is not on account of any act and conduct of Brakel, rather, on account of pending litigation, as has been specifically opined by Law Department and as such, money received on account of Upfront Premium from Brakel/petitioner cannot be withheld.

**79.** Prior to passing of judgment dated 7.10.2009 by Division Bench of this Court, respondent-State issued show cause notices on 7.1.2008 and 19.7.2008 to Brakel, proposing to cancel LoI, but the same were dropped after detailed representation and recommendations of higher powered committee in the second notice. It is only in this background that the petitioner made investment in the project. Payment made by the petitioner as Upfront Premium was flowing out assurances and promises flowing out of the LoA, which was at that time valid and the covenants in the draft PIA.

**80.** Otherwise also, petitioner had a legitimate expectation to acquire 49% equity in SPV as per Hydro Power Policy and PIA and as such, action of respondent-State in withholding huge money invested by the petitioner is not sustainable in the eye of law. When action of respondent has been declared to be devoid of merit, it cannot claim benefit of said action which has been declared void, rather, no person can take advantage of its own wrong. State cannot retain amount received by it in terms of LoI dated 1.12.2006 as it

would be against principles of unjust enrichment as enshrined under Ss. 65 and 70 of the Contract Act, which are reproduced below:-

Page 174-178

65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. —When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

**Privity of contract and unjust enrichment**

**81.** In the case at hand, though there is no direct privity of contract between the petitioner and the State but a perusal of the facts narrated herein above, would go to show that at all times, the State was not only aware of participation of the petitioner in the project but it also allowed representative(s) of the petitioner to be present in various meetings, as such, there is deemed privity of contract between the petitioner and the State.

**82.** To have benefit of S. 70, three conditions must be satisfied i.e. (i) person must do lawfully something for another person (ii) such thing must not be done gratuitously and (iii) and other person must enjoy benefit thereof.

**83.** High Court of Orissa in **Fakir Chand Seth** v. **Dambarudhar Bania**, AIR 1987 Orissa 50, has held that any agreement which is ab initio void may fall under the description “agreement discovered to be void” within

the meaning of S.65, if it was not known to the parties that it was void at the time when it was entered into. S. 65 provides for restitution of any advantage received under an agreement, where the agreement is discovered to be void. S. 65 of course cannot be taken advantage of by the parties who knew from the beginning that the agreement was void. If the plaintiff had entered into an agreement under the belief that it was a legally enforceable agreement, without the knowledge that the same was forbidden by law, he can claim restitution of compensation under the Section. High Court of Orissa held as under:

> "7. Sections 65 and 70 of the Act, 1872 are in the following words :
>
> Section 65 : When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."
>
> Section 70 : Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."
>
> Section 65 deals both with 'agreement' and 'Contract'. Section 2(e) of the Act defines an 'agreement' as every promise or every set of promises forming the consideration for each other. Clause (h) of the said Section provides that an agreement enforceable by law is a contract. Section 65 of the Act, therefore, deals with (a) agreements which are enforceable by law and (b) agreements not so enforceable. By Clause (g) of the said Section an agreement not enforceable by law is said to be void. This is not a case where the agreement (Ext. 2) becomes subsequently void. The words "when a contract becomes void" in Section 65 of the Act pre-suppose the enforceability of the contract at the inception on the date of its execution which became illegal thereafter, It is, therefore, required to be seen as to whether Section 65 of the Act would embrace an agreement which was void ab initio. Any

agreement which is ab initio void may fall under the description "contract discovered to be void" within the meaning of Section 65of the Act, if it was not known to the parties that it was void at the time when it was entered into. Section 65 provides for restitution of any advantage received under a contract or agreement, where the agreement is discovered to be void, or where the contract becomes void.

8. Section 70 of the Act enables the court to do substantial justice where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, by directing the latter to make compensation to the former in respect of, or to restore, the thing so done or delivered. In order that Section 70 of the Act would apply, the necessary conditions are that: (1) a person should lawfully do something for another person or deliver something to him, (ii) in doing so he must not act gratuitously, and (iii) the person for whom it is done must have enjoyed the benefit thereof. Section 70 of the Act is not founded on contract but embodies the equitable principles of restitution and prevention of unjust enrichment.
It has, therefore, to be examined in this case as to whether the plaintiff was entitled to restitution of the money which he advanced under the void contract (Ext. 2) applying Section 65 of the Act and if he is entitled to the same relief u/s. 70 of the Act.

9. In the case of Kulu Collieries Ltd. v. Jharkhand Mines Ltd. reported in AIR 1974 SC 1892 the Hon'ble Supreme Court clearly defined the scope of Section 65 of the Act in the following words :

> "The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may

> be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which, was originally enforceable and was, therefore, a contract becomes void flue to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it."
>
> This, however, does not mean that Section 65 of the Act can be taken advantage of by the parties who knew from the beginning that the agreement was void. If the plaintiff had entered into an agreement under the belief that it was a legally enforceable agreement without the knowledge that the same was forbidden by law, he can claim restitution or compensation under the said Section. In this case there has been no pleading or proof that the plaintiff on the date of execution of Ext. 2 was aware that the agreement in question was in violation of law, namely the Orissa Rice and Paddy Control Order, 1965. It would therefore, be a case where the agreement was not known to the plaintiff to be one in violation of law and, which was subsequently discovered to be void."

**84.** Above law clearly reveals that though a contract may be declared void subsequently but when party has done something lawfully for the other party under the apprehension that the contract is void and legal, other party, for which such work has been done or it has received something in lieu of the contract, is under obligation to return the said benefits, thus, the amount of Upfront Premium received by the respondent is liable to be restituted/recouped to the petitioner, which paid it on behalf of Brakel.

**Fairness of Government in contract matters**

**85.** Hon'ble Apex Court in **Urban Improvement Trust, Bikaner** v. **Mohan Lal**, (2010) 1 SCC 512 has held that governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice. Hon'ble Apex Court held as under:

> "5. It is a matter of concern that such frivolous and unjust litigation by governments and statutory authorities are on the increase. Statutory Authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and highhanded manner. They can not behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment. They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts by their officers is brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/restoration to the extent possible with appropriate compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected.
>
> 6. This Court has repeatedly expressed the view that the governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice. We may refer to some of the decisions in this behalf."

**86.** Hon'ble Apex Court in **The Vice Chairman & Managing Director** v. **Shishir Realty Private Limited,** Civil Appeal Nos. 3956-3957 of 2017 and connected matter, decided on 29.11.2021, has held

> "67. Before we state the conclusions, this Court would like to reiterate certain well established tenets of law pertaining to Government contracts. When we speak of Government contracts, constitutional factors are also in play. Governmental bodies being public authorities are expected to uphold fairness, equality and rule of law even while dealing with contractual matters. It is a settled principle that right to equality under Article 14 abhors arbitrariness. Public authorities have to ensure

that no bias, favouritism or arbitrariness are shown during the bidding process. A transparent bidding process is much favoured by this Court to ensure that constitutional requirements are satisfied.

68. Fairness and the good faith standard ingrained in the contracts entered into by public authorities mandates such public authorities to conduct themselves in a non arbitrary manner during the performance of their contractual obligations.

69. The constitutional guarantee against arbitrariness as provided under Article 14, demands the State to act in a fair and reasonable manner unless public interest demands otherwise. However, the degree of compromise of any private legitimate interest must correspond proportionately to the public interest, so claimed.

70. At this juncture, it is pertinent to remember that, by merely using grounds of public interest or loss to the treasury, the successor public authority cannot undo the work undertaken by the previous authority. Such a claim must be proven using material facts, evidence and figures. If it were otherwise, then there will remain no sanctity in the words and undertaking of the Government. Businessmen will be hesitant to enter Government contract or make any investment in furtherance of the same. Such a practice is counterproductive to the economy and the business environment in general.

**87.** It is expected from the respondent, which is a 'State' to be fair in contractual matter, as otherwise the private entities would be reluctant to enter into business with the Government. Here, in the present case, the State has received Upfront Premium from the petitioner/Brakel and had the Division Bench of this Court not set aside the allotment of project to Brakel, it would have undertaken the same, but for the decision of the court, it was debarred from completing the same, as such, being a model employer, State is expected to be fair in its dealing.

**88.** In support of his aforesaid submissions, Mr. Nankani, learned senior counsel placed reliance upon **State of West Bengal** v. **B.K. Mondal & Sons**, AIR 1962 SC 779, wherein, Hon'ble Apex Court has held that where a claim for compensation is made by one person against another under S.70, it is not on the basis of any subsisting contract between the parties; it is on the basis of the fact that something as done by the party for another and the said work so done has been voluntarily accepted by the other party. Hon'ble Apex Court has held as under:

> "13. Section 70 reads thus:
>
> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."
>
> 14. It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied s. 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section it would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case s. 70 would not come in to operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again s. 70 would not apply. In other words, the person said to be made liable under s. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under s. 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse, for instance, it was

open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but; if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and s. 70 can be invoked. Section 70 occurs in chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract. That being so, reverting to the facts of the present case once again after the respondent constructed the warehouse it would not be open to the respondent to compel the appellant to accept it because what the respondent has done is not in pursuance of the terms of any valid contract and the respondent in making the construction took the risk of the rejection of the work by the appellant. Therefore, in cases falling under s. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that s. 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under s. 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by s. 70.

16. It is true that s. 70 requires that a person should lawfully do something or lawfully deliver something to another. The word "lawfully" is not a surplusage and must be treated as an essential part of the requirement of s. 70. What then does the word "lawfully" in s. 70 denote ? Mr. Sen contends that the word "lawfully" in s. 70 must be read in the light of s. 23 of the said Act; and he argues that a thing cannot be said to have been done lawfully if the doing of it is forbidden by law.

However, even if this test is applied it is not possible to hold that the delivery of a thing or a doing of a thing the acceptance and enjoyment of which gives rise to a claim for compensation under s. 70 is forbidden by s. 175(3) of the Act; and so the interpretation of the word "lawfully" suggested by Mr. Sen does not show that s. 70 cannot be applied to the facts in the present case.**"**

**89.** Hon'ble Apex Court in **Mulamchand** v. **State of M.P.**, AIR 1968 SC 1218, has held that provisions of S.70 can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied s. 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. Hon'ble Apex Court has observed in the judgment supra, as under:

"6. In our. opinion,, the reasoning adopted by the trial court and by the High Court for rejecting the claim of the appellant is not correct. It is now well-established that here a contract between the Dominion of India and a private individual is not in the form required by s. 175 (3) of the Government of India Act, 1935, it was void and could not be enforced and therefore the opinion f India cannot be sued by.a private individual breach of such contract (See the decision in Seth Bikhrai Jaipuria v. Union of India(1). It was stated in that case that under.s. 175(3) of the Government. of India Act, 1935, the contracts had (a) to be expressed to be made by the Governor-General, (b) to be executed on behalf of the Governor-General and (c) to be executed by offcers duly appointed in that behalf and in such manner as the Governor- General directed or authorised. The evidence in the case showed that the contracts were not expressed to be made by the Governor-General add were not executed on his behalf. It was held by this Court that the provisions of s. 175 (3) were mandatory and the contracts were therefore void and not binding on the

Union of India which was not liable for damages for breach of the contracts. The same principle was reiterated by this Court in a later case-State of West Bengal v. Mls. B. K. Mondal and ,Sons(2). The principle is that the provisions of s. 175(3) of the Government of India Act, 1935 or the corresponding provisions if Art. 299 (1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel Or ratification in such a case. The reason is that the provisions of section 175(3) of the Government of India Act and the corresponding 'provisions of Art. 299 ( 1 ) of the Constitution have not been enacted for the sake of mere form but, they have been enacted or safeguarding the Government against unauthorised contracts. 'he provisions are embodied in s.'175(3) of the Government of India Act and Art. 299(1) of the Constitution on the ground of public policy-on the ground of protection of general public and these formalities cannot be waived- or dispensed with. If the plea of the respondent regarding estoppel or ratification is admitted that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public. that is why the plea of estoppel or ratification cannot be permitted in such a case. But if money is deposited and goods are supplied r if services are rendered in terms of the void contract, the provisions of s. 70 of the Indian Contract Act may be applicable. In other words, if the conditions imposed by s. 70 of the Indian- Con-act Act are satisfied then the provisions of that section can be invoked by the aggrieved party ,to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that i doing the said thing or delivering the said thing Ike must, not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, s. 70 imposes upon the latter person the liability to make con sensation to the former in respect of, or to restore, the thing done or delivered. The important point to notice is that in a case falling under s. 70 the person doing something for another delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach the contract, for the simple reason that there is no contract between him and the other person for whom he does

something to whom he delivers something. So where a claim for compensation is made by one person against another under s. 70, it is not on the basis of any subsisting contract between the parties but a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution. 1' Fibrosa v. Fairbairn(1) Lord Wright has stated the legal position as follows "..... any civilised system of law is bound to provide remedies for cases of that has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi- contract or restitution."”

**90.** Hon'ble Apex Court in **Mahabir Kishore** v. **State of M.P.**, AIR 1990 SC 313 has held as under:

> “11. The principle of unjust enrichment requires: first, that the defendant has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.
>
> 12. Another analysis of the obligation is of quasi contract. It was said; "if the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt, and give this action rounded in the equity of the plaintiff's case, as it were, upon a contract (quasi ex contracts) as the Roman law expresses it." As Lord Wright in Fibrosa Spolka v. Fairbairn Lawson, [1943] AC 32--1942 2 All E.R. 122 pointed out, "the obligation is as efficacious as if it were upon a contract. Such remedies are quasi contract or restitution and theory of unjust enrichment has not been closed in English law."

13. Section 72 of the Indian Contract Act deals with liabil- ity of person to whom money is paid or thing delivered, by mistake or under coercion. It says:

> "A person to whom money has been paid, or anything delivered, by mistake or under coer- cion, must repay or return it."

Illustration (b) to the section is:

"A Railway Company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive."

**91.** Hon'ble Apex Court in **B.L. Sreedhar** v. **K.M. Munireddy**, (2003) 2 SCC 355, has held as under:

> “9. First we deal with the stand of the appellant that on re-grant benefit enures to the members of the family. Learned counsel for the respondents fairly accepted this legal position and in our view rightly because of what has been said by this Court in Nagesh Bisto Desai and Ors. v. Khando Tirmal Desai and Ors. (1982 (2) SCC 79), Kalgonda Babgonda Patil v. Balgonda Kalgonda Patil and Ors. (1989 supp.(1) SCC 246), and New Kenilworth Hotels (P) Ltd. v. Ashoka Industires Ltd. and Ors. (1995 (1) SCC 161). Therefore, indisputable legal position is that even if grant is made under the Act to any member of the family, the benefit enures to the whole family. Having cleared this legal position, the contentious issues need to be noted. First comes the question whether rule of estoppel is applicable. The factual background highlighted by the High Court to hold about its applicability is as follows.
> Though the plaintiff was not a party to several proceedings referred to by the parties, conduct of the plaintiff clearly shows in the background of evidence tendered that he was conscious of the proceedings. One instance in this regard would suffice. Defendant no.3 filed an application in Form-7 of the Karnataka Land Reforms Act, 1961 claiming occupancy rights in respect of particular items of agricultural land. Defendant nos. 1 and 2 claimed ownership on the land, they were duly notified and after

hearing both sides. Tribunal allowed claim of defendant no.3. It was brought to the notice of the High Court when challenge was made to the order of the Tribunal, that plaintiff was one of the members of the Tribunal. He had participated in the proceedings in question though he had retired in the middle. The Tribunal cannot be said to have not been influenced to some extent at least by his presence. High Court in writ petition No.4430 of 1978 referred to orders of the Tribunal and came to hold that on the date of hearing plaintiff was withdrawn from the proceedings. No definite material was placed before it to show as to what was done on the date when the petition had been heard and orders were pronounced. To meet the ends of justice, High Court quashed order passed by the Tribunal and directed further inquiry and further directed to render a decision in accordance with law. Undisputedly, the Tribunal re-heard the matter and held against the defendant No. 3. Attempts before the High Court did not bring any result.

**92.** Similarly, Hon'ble Apex Court in **Canbank Financial Services Ltd.** v. **Custodian**, (2004) 8 SCC 355, has held that a civilized society furthermore always provides for remedies for cases of what was been called unjust enrichment or unjust benefit derived from another which it is against conscience that he should keep. (See. Paragraph 52).

**93.** Hon'ble Apex Court in **Vikram Cement** v. **State of M.P.**, (2015) 11 SCC 708, has held as under:

> "15. It is possible, as was sought to be argued by the learned counsel for the State, that while adding this Explanation the Government had kept in mind the principle of unjust enrichment. Presumably because of this reason, the High Court also referred to the judgment in the case of Indian Oil Corporation (supra). However, on such a presumption alone, there cannot be any justification for adding the Explanation of the nature mentioned above. In order to determine as to whether a particular dealer is in fact entitled to refund or not, the Government can go into the issue of unjust enrichment while considering his application for refund. That would depend on the

facts of each case. It cannot be presumed that the burden was positively passed on to the buyers by these dealers and, therefore, they are not entitled to refund."

**94.** Allahabad High Court in **Town Area Committee** v. **Rajendra Kumar and another**, AIR 1978 All 103, has held as under:

"6. There is no dispute that the tax in question was imposed as far back as 1933. The right to collect the tax for the year 1962-1963 was auctioned in favour of the defendants who made the highest bid of Rs. 42,000/- and that the defendants started realising the tax claiming to be so entitled under the contract entered into between them and the plaintiff Town Area and they paid to the Town Area a sum of Rs. 21,500/- towards the contract money. The defendants made the realisations throughout the year 1962-1963. On these facts it was contended that even if it be accepted that the contract between the parties was void, the defendants who had received advantage under the contract were bound to pay the balance money due to the plaintiff. Reliance was placed on Section 65 of the Indian Contract Act which contains the principle of restitution after benefit has been received and the contract is later discovered to be void. The contention appears to be sound. The basis of this principle is the doctrine of 'restitio in integrum'. The section does not make a new contract between the parties but only provides for restitution of the advantage taken by a party under the contract. The obligation to pay compensation under this section is quite different from a claim under the contract itself. The remedy is treated as quasi-contractual. The nature of the remedy has been described by Lord Wright, in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. . 1943 A.C 32. in the following words:—

"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."

**95.** Allahabad High court in **Town Area Committee** vs. **Rajendra Kumar** supra further held that the principle of unjust benefit or unjust

enrichment according to the jurist presupposes three things: first, that the defendant has been enriched by the receipt as a benefit, secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit. Allahabad High Court held as under:

> "7. The principle of unjust benefit or unjust enrichment according to the jurist presupposes three things: first, that the defendant has been enriched by the receipt as a benefit, secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be Unjust to allow him to retain the benefit. The plaintiff may have paid money to the defendants in pursuance of a transaction which he thought to be a valid contract but which in truth, through the operation of some rule of law, is null and void. It appears logical and just that such money should be recoverable in quasi contract. As observed by Lord Mansfield the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. Equity also developed, independently of the common law remedy for unjustifiable enrichment, some principles which are aimed at the same result, viz., to force a man to disgorge property in his possession which rightly belongs to the plaintiff. This very principle is contained in **Section 65 of the Indian Contract Act**."

**96.** Law taken note herein above, clearly shows that no one can be unjustly enriched at the cost of a party, which is not at fault. In the case at hand, since the projects stood allotted to a Public Sector Undertaking, without payment of Upfront Premium, as such, the amount received by the respondent from the petitioner, on behalf of Brakel, cannot be allowed to be retained by it, as it would amount to unjust enrichment.

**97.** So far judgment relied upon by learned Advocate General in **State of Maharashtra** v. **Swanstone Multiplex Cinema (P) Ltd. (supra)** is concerned, issue before Hon'ble Apex Court in that case was entirely different i.e. with regard to collection of tax/duty from cinema owners, whereas, in the present, question is with regard to refund of upfront premium, qua which already Government has taken a decision on 4.9.2015 to refund the same to

the petitioner, as such, judgment relied upon by learned Advocate General is not applicable to the facts of the present case.

**98.** Hon'ble Apex Court in **Hari Bansh Lal** v. **Sahodar Prasad Mahto**, (2010) 9 SCC 655, has held as under:

> "35. Curiously, but unfortunately, the State Government which had defended the qualification, service and ultimate appointment of Mr. Lal (appellant herein) as Chairman of the Board before the High Court, changed their stand before this court for the reasons best known to them and supported the order of the High Court.
>
> 39. Though the appellant himself has filed a detailed counter affidavit denying all the allegations made by the writ petitioner and highlighted his qualifications and achievements in the State Government, more particularly, in the Electricity Board, there is no need to traverse the same in the light of the specific stand as well as encomium by the State Government and the Electricity Board. In view of the same, we hold that it is impermissible for the State to take a different view in the absence of any change of circumstance.
>
> 40. In fact, in spite of several queries from the Bench, Mr. K.K. Rai, who represented the State was unable to apprise this Court for changing their stand than that of the one asserted before the High Court. He is not in a position to put-forth any compelling circumstance to take such a stand except change of Government and persons in power. Accordingly, we reject his present stand which is contrary to their assertion before the High Court. For all these reasons, the impugned order of the High Court is liable to be set aside."

**99.** Hon'ble Apex Court in **Jal Mahal Resorts (P) Ltd.** v. **K.P. Sharma**, (2014) 8 SCC 866 has held as under:

> "4. However, in spite of withdrawal of the special leave petitions, if the petitioner State is taking a diametrically opposite stand which it had taken before the High Court as also before

> this Court when the arguments were concluded, we surely have reservations in permitting the learned Senior Counsel to take an opposite stand now and advance arguments exactly the opposite of what was submitted in the High court as also before this Court through the earlier counsel being the Attorney General.
>
> 6. There is no doubt that the impleaded respondent may advance his arguments before the Court as he has been impleaded as a party-respondent but under the garb of advancing arguments a stand which was taken before the High Court earlier is changed at the stage of special leave petition, cannot be permitted especially when the counsel, as already stated, has withdrawn the Special Leave to Petitions preferred by the State. He may, however, advance submissions as a respondent in other matters, which he is at liberty to make within a period of two weeks, which however, shall be subject to its acceptance."

**100.** In the case at hand the constant stand of the respondent in the petitions filed by RIl was that it has rightly allotted the projects to Brakel and in light of above law, it is clear that the respondent-State cannot take different stands on same subject, in different courts as such, otherwise also, now the respondent is estopped from taking a contrary stand that the projects were delayed due lapse of Brakel or the petitioner.

**101.** So far upfront premium is concerned, as per PIA, (Annexure R/A, p.218 onwards), clause 3, 50% of same i.e. Rs. 173,42,4,000/- was to be paid before signing the PIA and 25% i.e. Rs. 86,71,20,000/- at the time of signing of PIA and in the event of non-payment thereof, resultant action would be cancellation of the allotment. Further as per Clause 4, in case of breach of the PIA, upfront premium is to be forfeited. However, it may be noted here that since the respondent-State though issued show cause notice to Brakel, on account of non-payment of upfront premium but it accepted the same from BKPPL on behalf of Brakel that too alongwith interest on delayed payment. It is only after passing of the judgment dated 7.10.2009, when Division Bench of

this Court quashed the allotment made in favour of Brakel, the decision was taken to allot the projects in question to Central Public Sector Undertakings, after refusal of RIL to execute the project. Respondent-State has never attributed any violation /breach of the PIA to Brakel, as such, there is no occasion for the respondent-State to forfeit the upfront premium received from Brakel/BKKPL, which was paid by the petitioner.

**102.** Otherwise also, as per Clause 15 of the PIA, in the event, the Project is not found viable by the Second Party after the submission of DPR and the First Party is satisfied that the Second Party has sufficient ground to establish that the Project is not techno-economically viable, the Company will be permitted to withdraw from the Project without any compensation or liability of First party for the expenditure incurred by the Second Party before the expiry of this period. The 50% amount of the fixed upfront premium deposited at the time of allotment of the project shall be refunded without any interest and the balance 50% of the upfront premium shall be forfeited by the First Party. This will ensure the commitment of the Second Party towards the execution of the project and loss of time for revenues which could have otherwise occurred.

**103.** Above clause clearly stipulates that in the event of second party finding that the project is not feasible/economically viable, it may withdraw from the same, in which case, 50% of upfront premium shall be refunded to it. Here is a case, where it is not Brakel, which backed out from the project, rather, when Court set aside the allotment made in favour of Project, Brakel had to withdraw from the project, which fault cannot be attributed to it.

**104.** BKPPL and Brakel are two independent entities with no common directors or promoters, as has been confirmed by the report of the Deputy Director of Income Tax and further as per the provisions of the Policy and the PIA, the project was required to be executed and/or implemented by the SPV, in which, it was proposed that the petitioner would hold shares, as per the

structure proposed by Brakel in its written submissions made on 9.10.2008 to the second show cause notice, dated 19.7.2008.

**105.** It is not in dispute that BKPPL is Indian subsidiary of Brakel and as such, investment made by petitioner through BKPPL is legitimate. Brakel on 31.3.2009 sought change of consortium in terms of PIA**.** State neither rejected nor conveyed its approval as sought by Brakel on 31.3.2009 and as such, it stands duly established on record that respondent-State had definite knowledge that the petitioner was investor in equity to be invested by BKPPL for project and state tacitly approved the same and as such, it is estopped from challenging the petitioner's locus in claiming the refund.

**106.** Since respondent-State despite having specific knowledge at the time of issuance of second show cause notice that Brakel intends to introduce the petitioner as consortium partner not only dropped show cause notice but also permitted Brakel to go ahead with the work, it can be safely concluded that petitioner was induced by state's action which it thought was lawful and as such invested the funds.

**107.** Though there is no formal order of forfeiture of upfront premium deposited at the behest of Brakel at the time of issuance of LoI but the main ground as is sought to be set up for justifying the claim of the respondent-State for forfeiture of upfront premium is that Brakel made bid qua the projects in question, by misrepresenting the facts, especially with regard to its financial and technical capacity and respondent-State suffered huge loss on account of delay in execution of project but, as has been discussed herein above, aforesaid plea taken by the respondent-State is not available to the respondent-State, as has been repeatedly advised by the Law Department in its opinions, which in fact persuaded the Council of Ministers to take decision in its meeting held on 4.9.2015 to withdraw show cause notice issued to Brakel and refund the upfront premium to Adani Power Limited, petitioner herein. Even if for the sake of arguments, it is presumed and accepted that

Brakel misrepresented that it had financial and technical viability to bid for the projects in question, it is not in understood that when such factum with regard to financial and technical incompetence of Brakel had come to the knowledge of the respondent-State in the year 2008, after filing of CWP No. 2748 of 2008 by RIL and it issued show cause notice to Brakel after passing of order dated 3.6.2008 by Division Bench of this Court in the aforesaid writ petition, specifically alleging therein misstatement of facts by Brakel with regard to its incorporation and financial capacity and commitment of equity partners, what prevented it from cancelling allotment made in favour of Brakel, rather, at that stage, respondent-State constituted a committee and on the basis of report submitted by such committee, decided to withdraw the show cause notice against Brakel. While investigations were being made by the Committee, respondent-State also got discreet enquiry made from the Police as well as Income-Tax Department with regard to source of payment made by the petitioner pursuant to the show cause notice issued for payment of upfront premium. If the memorandums for consideration of Council of Ministers, prepared by the Administrative Department and recommendations made by the Committee are perused in their entirety, it clearly reveals that the respondent-State was fully convinced and satisfied that there is no misrepresentation by Brakel and it had the financial and technical capacity to bid for the projects in question.

**108.** Otherwise also, judgment delivered by the Division Bench of this Court dated 7.10.2019 in CWP No. 2748 of 2009, clearly reveals that the consistent stand of the respondent-State was that there is no misrepresentation by Brakel and all the documents at the time of bid were found to be correct by the whole-time members of HPSEB and HPIDB. Council of Ministers in its meeting held on 4.9.2015, having taken note of the fact that there was no fault of Brakel in delay in execution of the Projects, rather, it happened on account of pendency of litigation and entire sum towards

payment of upfront premium was made by Adani Power Limited, which was otherwise being proposed to be one of the members of the Consortium, decided to withdraw show cause notice issued to Brakel for forfeiture of amount deposited by it and refund the same to the petitioner herein. It is ample clear from the material available on record that the respondent-State itself was equally responsible for delay in execution of the projects in question and it was fully satisfied with the documents placed on record by Brakel at the time of making bid, as such, it is estopped at this stage from forfeiting the amount of upfront premium, deposited at the behest of Brakel by the petitioner after issuance of LoI.

**109.** Though, Mr. Ashok Sharma, learned Advocate General argued that, at no point of time, money, if any, was received from the petitioner herein, but as has been taken note herein above, there are ample documents available on record suggestive of the fact that the entire sum on account of upfront premium was paid by the petitioner and such, fact was very much in the knowledge of the respondent-State, as has been recorded by Division Bench of this Court in judgment dated 7.10.2009. Division Bench of this Court has categorically recorded that it is not understood that how the petitioner herein was made member of consortium but the letter available on record, written by Brakel to Hon'ble Chief Minister expressing its intention to include the petitioner as a member of the consortium, clearly reveals that the Government was in the know of the fact that the entire money towards upfront premium has been paid by the petitioner herein but before the aforesaid prayer made on behalf of Brakel for inclusion of the petitioner in the consortium could be considered, LoI issued in favour of Brakel came to be cancelled on account of judgment rendered by Division Bench of this court in CWP No. 2748 of 2008.

**110.** Though the submission made on behalf of the respondent-State that there is no privity of contract between the petitioner and the respondent-

State appears to be correct, ex facie, but if the material available on record is perused in its entirety, it clearly establishes on record that from day one, respondent-State had impliedly and tacitly approved the participation of the petitioner as one of the member of Consortium in the Project in question . From day one, the respondent-State was aware that the entire amount towards upfront premium has been paid by the petitioner, expecting itself to be an equity partner to the extent of 49% in terms of the Policy and the provisions of the PIA.

**111.** Leaving everything aside, once the Council of Ministers in its decision taken on 4.9.2015, decided to refund the upfront premium to the petitioner, subsequent decision conveyed vide communication dated 7.12.2017 (Annexure-R), is not at all tenable, especially when no specific reason, if any, has been spelt out in the same with regard to circumstances and reasons, which made Council of Ministers to review its earlier decision dated 4.9.2015. As has been stated herein above, though in the aforesaid communication dated 7.12.2017 (Annexure-R), it has been stated that on account of legal intricacies and contractual complications, respondent-State has decided to withdraw/recall its decision dated 4.9.2015 but, neither such 'legal intricacies and contractual complications' have been explained by respondent in its reply, nor learned Advocate General has been able to point out the same, while advancing his arguments in the court.

**112.** No party, other than Brakel, can have grouse, if any, for release of upfront premium in favour of the petitioner but, since Brakel has already written to the Government of Himachal Pradesh vide communication dated 24.8.2013 (Annexure-F, p.127) to release such money in favour of the petitioner, it is not understood what are the 'legal intricacies and contractual complications' which the respondent may encounter, in the event of releasing amount to the petitioner, pursuant to the decision taken by the Council of Ministers in its meeting held on 4.9.2015.

**113.** Viewing the matter from another angle, it may be noted here that ultimately the respondent awarded the project to SJVNL, though without insisting upon payment of Upfront Premium, as such, there is no loss suffered by the respondent-State, especially no loss has been suffered by it, attributable to Brakel or for that matter the petitioner herein. Otherwise also, the State has suffered loss on account of the fact that initially the project got embroiled in litigation and thereafter SJVNL has not been able to commence the work till date on account of the opposition of the general public, as such, it would be totally unjust to pass the burden of loss, if any, suffered by State, to the petitioner, which being bonafide investor had put in the amount, after being satisfied that there is no technical hitch in its investing money in the project.

**114.** Moreover, retaining the money of the petitioner by the respondent-State, when project has been allotted to SJVNL, amounts to unjust enrichment of the State, which is not permissible in law. It is another aspect of the matter that the said project could never be executed on the ground, in view of the objections raised by the general public.

**115.** It may also be noted here that after Brakel participated in the bidding process, it was the duty of the State to scrutinize financial and technical capabilities/strength of Brakel and once it was satisfied with the same, no fault can be attributed to Brakel, for the simple reason that if there was some shortcoming in the documents of Brakel, same either was ignored or went unnoticed due to fault of the State, as such, State cannot be allowed to take undue advantage of its own wrongs, by forfeiting the money deposited by the BKPPL, for Brakel, which was in fact provided by the petitioner herein.

**116.** Consequently, present writ petition is allowed. Communication dated 30.11.2017 (p.368) whereby decision of the Cabinet regarding implementation of Jangi-Thopan HEFP(480 MW) and Thopan-Powari HEP (480

MW) was approved and further the communication dated 7.12.2017 (Annexure-R), whereby decision of Council of Ministers to review decision dated 4.9.2015 was conveyed to the petitioner, are hereby quashed. Respondent-State is directed to pay the amount of Upfront Premium to the petitioner in terms of the decision of the Council of Ministers dated 4.9.2015, within a period of two months from today, failing which, the State shall be liable to pay interest on the amount in question, at the rate of 9% per annum, from today, till realisation.

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

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

Between:-

UNITED INDIA INSURANCE COMPANY LIMITED,
TIMBER HOUSE, BEMLOE, CIRCULAR ROAD,
SHIMLA,
THROUGH ITS SENIOR DIVISIONAL MANAGER

... APPELLANT

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. SMT. SARLA
   W/O OF LATE SH. DEV DUTT,

2. MR. HARSH
   S/O LATE SH. DEV DUTT

3. MS. KASHISH
   D/O LATE SH. DEV DUTT

4. SMT. REVTI DEVI
   M/O LATE SH. DEV DUTT

ALL RESIDENT OF VILLAGE HANAL, TEHSIL CHOPAL,
DISTRICT SHIMLA, H.P.
PRESENTLY RESIDING AT SATISH THAKUR BUILDING,
VILLAGE AND POST OFFICE CHAILLY,
SUMMER HILL, SHIMLA-5,
H.P.

RESPONDENTS/PETITIONERS

5. SH. AJAY SINGH THAKUR
S/O SH. NIRANJAN SINGH,
R/O VILLAGE AND POST OFFICE CHAILLY,
TEHSIL AND DISTRICT SHIMLA,
H.P.
(OWNER-CUM-DRIVER OF VEHICLE NO. HP-07C-1299)
MARUTI CAR

RESPONDENT

(BY MS. ANJALI SONI VERMA, ADVOCATE,
FOR R-1 AND R-2,
MR. ARUN K. VERMA, ADVOCATE
FOR R-5

FIRST APPEAL FROM
ORDER NO. 426 OF 2017
DECIDED ON 04-03-2022

**Motor Vehicle Act, 1988**- Section 173- Appeal- Appellant Insurance Company challenged the award passed by the Ld. Motor Accident Claims Tribunal-IV, Shimla, directing the appellant to pay compensation in the sum of Rs.26,44,200/- to the claimants along with interest @ 7.5% per annum- Deceased aged 35 was earning Rs.22,500/- per month as cook- Held- No cogent and convincing evidence with regard to income of deceased- Minimum wages payable to a cook in the Sate, under the Minimum Wages Act, ought to have been taken, as such, monthly income of deceased would be 180 X 30= 5400 per month- Overall income assessed as Rs.8000/- per month- Impugned award modified- Total compensation of Rs.18,02,800/- awarded. (Para 12 to 18)

**Case referred:**

National Insurance Co. Ltd. v. Pranay Sethi, (2017)16 SCC 680;
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;
Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121;

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This appeal coming on for orders this day, the court delivered the following:

**J U D G M E N T**

Instant appeal filed under S.173 of the Motor Vehicles Act (hereinafter, 'Act') lays challenge to award dated 30.6.2017 passed by learned Motor Accident Claims Tribunal-IV, Shimla, in MAC Petition RBT No. 54-S/2 of 2015, titled Smt. Sarla and others v. United India Insurance Company Limited and another, whereby, learned Tribunal below, while holding respondents Nos. 1 to 4 (hereinafter, 'claimants') entitled to compensation on account of death of late Dev Dutt, directed the appellant-Insurance Company to pay compensation in the sum of Rs. 26,44,200/- to the claimants, alongwith interest at the rate of 7.5% per annum, from the date of petition till its realization.

24. Precisely, the facts of the case are that the claimants, being dependents of the deceased Dev Dutt, filed a claim petition under S.166 of the Motor Vehicles Act before learned Tribunal below, claiming therein compensation to the tune of Rs. 50.00 Lakh on account of death of Shri Dev Dutt, in an accident involving vehicle bearing registration No. HP-07C-1299, owned and being driven by respondent No. 5. Claimants claimed that on 3.5.2015, deceased was traveling in the vehicle in question, being driven by respondent No.5 and the same met with an accident, due to rash and negligent driving on the part of its driver i.e. respondent No.5, in which, deceased Dev Dutt was injured. Unfortunately, Dev Dutt, succumbed to the injuries suffered by him. Claimants claimed that the deceased was working as

an attendant on casual basis from the year 2000 onwards in the residence of one Shri Anil Nanda at his home at Summer Hill, Shimla and used to earn Rs. 10,500/- per month. It is further claimed that besides above, the deceased was also working as a cook in P.G. at Aman Home Stay and Sparsh Guest House situate at Chailly, Shimla and was earning Rs. 12,000/- from there. Claimants claimed that they were solely dependent upon the earning of the deceased and as such, on account of his death, are entitled to Rs. 50.00 Lakh as compensation.

25. Aforesaid claim made on behalf of the claimants came to be refuted by respondent No.5, who, in his reply, besides taking preliminary objections of maintainability, claimed that he is not liable to pay any compensation because, at the time of accident, vehicle was duly insured with the appellant-Insurance Company.

26. Appellant-Insurance Company, in a separate reply, claimed that the driver of the vehicle was not holding a valid and effective driving licence, and vehicle was being plied in violation of the terms and conditions of the insurance policy, as such, it cannot be held liable to indemnify the claimants.

27. Learned Tribunal below, on the basis of evidence adduced on record by respective parties, framed following issues:

"1. Whether the deceased Dev Dutt died in a motor vehicle accident, took place on 3.5.2015 at 9.15 AM near PNB Chailly, Shimla-5, on account of rash and negligent driving of respondent No.2 while driving vehicle No. HP-07C-1299, as alleged? OPP

2. Whether the petitioners are entitled for compensation, if so, then what should be the quantum and from whom? OPP

3. Whether the petition is not maintainable in the present form? OPR

4. Whether the petitioner has not come to the court with clean hands, as alleged? OPR

5. Whether the petition is bad for non-joinder of necessary parties? OPR

6. Whether the vehicle was being driven in salient provision of M.V. Act, as alleged? OPR
7 Whether the vehicle was being driven in breach of terms and conditions of Insurance Policy? OPR
8. Whether the driver was not holding any valid and effective driving licence., as alleged?
9. Relief."

28. Subsequently vide impugned Award dated 30.6.2017, learned Tribunal below allowed the claim petition and awarded sum of Rs. 26,44,200/- as compensation in favour of the claimants, alongwith interest at the rate of 7.5% per annum from the date of petition till realization. Since the appellant-insurance company, being insurer, came to be fastened with liability to pay compensation, it has approached this court in the instant proceedings.

29. Having heard learned counsel for the parties and perused material available on record, vis-à-vis the reasoning assigned by learned Tribunal below in the impugned Award, this court finds that appellant-insurance company has laid challenge to award primarily on following grounds.

(a) Since no cogent and convincing evidence ever came to be adduced on record with regard to income of the deceased to the tune of Rs. 10,000/-, learned Tribunal below ought not have considered the income of the deceased as Rs. 10,000/- per month, rather ought to have computed the monthly income of the deceased on the basis of minimum wages payable at the relevant time.
(b) The amount awarded by learned Tribunal below under conventional heads is totally contrary to the law laid down by Hon'ble Apex Court in **National Insurance Co. Ltd.** v. **Pranay Sethi**, (2017)16 SCC 680.

30. Mr. Jagdish Thakur, Advocate appearing for the appellant-Insurance Company, submitted that with a view to prove the monthly income of the deceased, claimants placed on record salary slip but since the same never

came to be proved in accordance with law, learned Tribunal below, ought not have taken the monthly income of the deceased as Rs. 10,000/-. He further argued that in such like situations, learned Tribunal below, considering the deceased to be a cook, ought to have resorted to the wages payable to a Cook under Minimum Wages Act, at the relevant time i.e. Rs. 180/- per day. He further argued that it is amply clear from the ratio of **Pranay Sethi** (supra) that no amount could be awarded under the head of loss of love and affection and on account of consortium, only Rs. 40,000/- could be awarded. While referring to the impugned award, Mr. Thakur, contended that the learned Tribunal below has further erred in awarding Rs. 20,000/- on account of funeral chares whereas, as per **Pranay Sethi** (supra), only Rs. 15,000/- could be awarded under said head.

31. Ms. Anjali Soni Verma, Advocate, appearing for the claimants, while fairly admitting that as per **Pranay Sethi**, no amount could have been awarded under the head of loss of love and affection, submitted that since the appellant-Insurance Company failed to lead any evidence, suggestive of the fact that at the time of death, deceased was not working as a cook, learned Tribunal below, rightly placed reliance upon salary slip Mark-A. She further submitted that otherwise also, sum of Rs. 10,000/- cannot be said to be on higher side, especially when deceased has left behind his widow, two children and mother.

32. Having carefully perused the evidence, be it ocular or documentary, led on record by respective parties, this court finds that though the claimants while claiming that the deceased prior to his death was working as a care taker, on casual basis, from the year 2000 onwards at the residence of one Anil Nanda at Summer Hill, Shimla, placed on record salary slip suggestive of the fact that the deceased was in receipt of Rs. 10,500/- per month but since the person, namely Anil Nanda, from whom, deceased was getting salary, was

never examined, claim of the claimants with regard to monthly income of the deceased to be Rs. 10,500/- never came to be proved in accordance with law.

33. Similarly, claimants though claimed that the deceased apart from rendering services as a care taker at the residence of Anil Nanda, was working as a Cook in Aman Home Stay and Sparsh Guest House and was earning Rs. 12,000/-. Though, no cogent and convincing evidence ever came to be led on record qua aforesaid fact, but learned Tribunal below applying guess work, considered the income of the deceased to be Rs. 10,500/- per month.

34. By now, it is well settled that when there is no cogent and convincing evidence with regard to income of a deceased, courts, while assessing income of the deceased/injured, are required to refer to the provisions of Minimum Wages Act. In the case at hand, claim of the claimants is that the deceased, prior to accident/death was working as a care taker in the house of Anil Nanda and apart from that, he was also working as a Cook in Aman Home Stay and Sparsh Guest House, but they failed to prove the income of the deceased, as such, learned Tribunal below, while assessing his income ought to have taken recourse to the minimum wages payable to a Cook in the State, under the Minimum Wages Act. Though, as per material placed on record, minimum wages payable to a Cook in Himachal Pradesh in the year 2015, were Rs. 180/- per day and as such, his monthly income would be Rs. 5400/-, but having taken note of the fact that the deceased was also working as a care taker in the house of aforesaid Anil Nanda, it can be safely concluded that the deceased was earning well above Rs. 5400/- and as such, it would be apt to consider the income of the deceased as Rs. 8,000/- per month.

35. Since the deceased was not in regular employment, as per **Pranay Sethi,** only an addition of 40% on account of loss of future prospects would be permissible, keeping in view the fact that the deceased was 35 years of age, as such, impugned award deserves modification on this count also. Besides this,

learned Tribunal below has made deduction of 1/5th towards self expenses, while calculating the loss of dependency, whereas, as per **Sarla Verma** v. **Delhi Transport Corporation** (2009) 6 SCC 121, 1/4th deduction was to be made from the assessed income, since the deceased had four dependents i.e. present claimants.

36. In view of above, the total loss of dependency is to be calculated as under:

| Detail | **Amount (in Rs.)** |
|---|---|
| Monthly income of the deceased | **8,000** |
| Income after addition of 40% on account of loss of future prospects i.e. 10000x40/10=3200 | **11,200** |
| Net income after 1/4th deduction i.e. 11200/4=2800 | **8400** |
| Total loss of dependency after applying multiplier of 16<br>8400x12x16 | **1612800** |

37. Learned counsel for the appellant-Insurance Company, also invited attention of this Court to judgment rendered by Hon'ble Apex Court in **National Insurance Co. Ltd.** v. **Pranay Sethi**, (2017)16 SCC 680, to buttress his argument qua the fact that the learned Tribunal below could have awarded amount of Rs. 15,000/- each under the heads of funeral expenses and loss of estate and no amount could have been awarded on account of loss of expectation of life, as such, impugned award deserves to be modified on this count also. Learned Counsel appearing for the appellant-Insurance Company further argued that as per **Pranay Sethi** (supra), only Rs. 40,000/- could be awarded as consortium to claimant No. 1, being wife of the deceased.

38. At this stage, learned counsel for the claimants, while fairly conceding that only Rs. 15,000/- on account of loss of estate and funeral expenses could have been awarded and only Rs. 40,000/- could be awarded to

claimant No.1, as consortium, being wife of the deceased, made a reference to **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018, to show that claimants Nos. 2 to 4, being children and mother, respectively, of the deceased are also entitled to parental and filial consortium, respectively, at the rate of Rs.40,000/- each.

39. 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."

40. Consequently in view of above, award passed but learned Tribunal below needs to be modified in following manner.

| **Head** | **Amount (Rs.)** |
|---|---|
| Loss of dependency | 1612800 |
| Funeral charges | 15000 |
| Loss of estate | 15000 |
| Amount payable to claimants | **1682800** |
| Consortium at the rate of Rs.40,000/- each to all the claimants | 160000 |
| **Total compensation** | **1802800** |

41. So far interest rate awarded by learned Tribunal below is concerned, same calls for no interference. So far apportionment of the award amount is concerned, same shall be as awarded by learned Tribunal below i.e. sum of Rs. 16,82,800/- shall be disbursed to claimants No.1, claimants Nos. 2 and 3 and claimant No. 4, in the ratio of 50:20:20:10 and consortium shall be payable to all the claimants at the rate of Rs.40,000/- each.

42. 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.

43. All pending miscellaneous applications, if any, are disposed of. Interim directions, if any, are vacated.

**BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C. J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.**

Between:-

SH. NAGENDER KUMAR
S/O LATE SH. JAGDISH CHAND
P.R.O. VILLAGE RIRI,
POST OFFICE JUKHALA,

TEHSIL & DISTT. BILASPUR, H.P.

.. PETITIONER

(BY MR. DUSHYANT DADWAL, ADVOCATE)

AND

1. HIMACHAL PRADESH STATE ELECTRICITY BOARD LTD.
THROUGH ITS EXECUTIVE DIRECTOR (PERSONNEL)
KUMAR HOUSE, SHIMLA,
DISTT. SHIMLA, H.P.

2. SENIOR EXECUTIVE ENGINEER
ELECTRICAL DIVISION, BILASPUR,
HPSEBL, DISTT. BILASPUR, H.P.

RESPONDENTS

(BY MR. VIKRANT THAKUR, ADVOCATE)

CIVIL WRIT PETITION
NO. 1762 OF 2021
DECIDED ON 23-04-2022

**Constitution of India, 1950**- Article 226- The Rights of Persons with Disabilities Act, 2016- Section 20- Appointment on compassionate grounds in lieu of the services rendered by petitioner's father to H.P. State Electricity Board on the post of T-Mate, who died in harness on 06.11.2020- Application of petitioner was not considered- Held- The manner in which the case of the petitioner for grant of compassionate appointment has been dealt with by the respondents leaves men to be desired impression that they have no compassion for an employee, who was rendered 100% disabled, while discharging duties on 13.7.2005- Petition allowed. (Para 15, 16)

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

**O R D E R**

This writ petition has been filed by Nagender Kumar, praying for a direction to the respondent-Himachal Pradesh State Electricity Board Limited (hereinafter, 'Board') to consider his case for grant of appointment on compassionate grounds in lieu of the services rendered by his father-Jagdish Chand to the said Board on the post of T-Mate, who died in harness on 6.11.2020.

2. According to the facts of the case, Jagdish Chand, father of the petitioner met with an accident on 13.7.2005, while he alongwith other employees of the Board was replacing rotten electrical poles. When the pole jerked, father of the petitioner fell on the rocky surface and instantaneously became unconscious. He was instantly shifted to hospital at Bilaspur and thereafter referred to PGI Chandigarh, where he remained hospitalized for a very long time. Even the respondents conducted an enquiry and found that the petitioner's father had received severe head injury and other injuries, while on duty, and he was rendered 100% disabled and was permanently bed-ridden. Father of the petitioner continued to be in service of the respondents till 31.8.2020, and was paid salary but, unfortunately, he died on 6.11.2020. Even the case of father of the petitioner was considered for promotion and he was promoted to the post of Lineman but, unfortunately, Deputy Chief Engineer (Operation) Circle, HPSEBL, Bilaspur on 12.8.2016 (Annexure P-4), later withdrew the order of his promotion, without assigning any reason. Copies of various documents regarding treatment of the petitioner's father including MRI report of PGI Chandigarh duly signed by the Board of Doctors on 8.4.2015 (Page-25) is placed on record, which indicates that even after ten years of accident, it was opined to be a case of *'diffuse atrophy of bilateral cerebral hemispheres and cerebellum with prominent ventricular system and extra-axial CSF spaces;* and the impression that was gathered was '*diffuse*

*cerebral atrophy with communicating hydrocephalus'*. Enquiry was conducted by the Assistant Engineer (Electrical) Sub Division-III, HPSEB Bilaspur as Chairman with Assistant Engineer (Electrical), Division No. I, HPSEB Bilaspur and Assistant Engineer (Electrical), Sub Division HPSEB Namhol as members. Copy of the departmental enquiry report (Annexure P-2) is on record. The Committee, after inspecting the site of accident, reported that the statements of the staff at Sub Division Namhol were recorded on 25.8.2005. Committee clearly recorded that they could not record statement of the victim as he was under medical treatment. The committee was fair enough in stating that the victim was not in a position to give his statement as per medical discharge slip annexed with the report. Committee has given finding in the report that after the spot inspection and checking PTW No. 448, dated 13.7.2005 and going through the statements of the staff, they came to the conclusion that the rotten pole was positioned with the support of line conductor and accessories/fitting were provided on the pole but when all the supports i.e. conductor/fittings were removed, the pole tilted and Jagdish Chand, who was holding a ladder with the pole, got a jerk and fell down on rocky land with ladder and got severe head injury.

3. In that situation, the petitioner sometime in 2018, submitted an application for his appointment on compassionate grounds through his mother, Premi Devi. The application was forwarded by the Senior Executive Engineer, Electrical Division HPSEBL Bilaspur to the Executive Director (Personnel), HPSEBL, Shimla. After going through the narration of the entire incident, the Senior Executive Engineer, Bilaspur has categorically recorded that Shri Jagdish Chand, father of the petitioner, who was an employee of the Board, was still in a comma, as reported by the Assistant Engineer concerned, vide office letter dated 4.4.2018 to the said office. The application of the petitioner was not processed further but according to the petitioner, he was advised by the Board authorities that until and unless he makes an

application seeking voluntary retirement of his father, he could not be given appointment on compassionate grounds.

4. In between, the Secretary of the Board issued a circular (page-37) addressed to all the Chief Engineers that it has been brought to the notice of his office that the instructions issued vide office letter dated 22.6.2004, are not being implemented in letter and spirit and emphasized that in the event of accident on duty, the officials will be treated on duty instead of leave for the period of their treatment and the medical reimbursement and monthly salary may be released immediately and all possible help may also be rendered by the Executive Engineers concerned in such cases.

5. Compelled, as he was, the petitioner had to submit an application through his mother to the Executive Director (Personnel), HPSEBL, Vidyut Bhawan, Shimla on 15.1.2020 (page-41). This application makes an interesting reading. It is stated that the husband of the applicant (Jagdish Chand) met with an accident while working on line on 13.7.2005 and that due to head injury sustained by him, he became unconscious and was referred to PGI Chandigarh. The doctors have opined that it will take long period of time for recovery and that he (Jagdish Chand) is unconscious since the date of non-fatal accident and there is no hope of his regaining consciousness. It was difficult for him to perform his duties in such unconscious position. The application further stated that the son of the said employee Jagdish Chand and applicant-Premi Devi, Nagender Kumar, having his date of birth 24.6.1996, is possessing academic qualification of 10+2 with ITI diploma in Electrician trade and as per present position of the Government Rules, permission to engage him on regular/contract basis as Helper Sub Station/T-mate may kindly be accorded in his favour on compassionate grounds. In the last para of the application, applicant has requested that her husband, Jagdish Chand, ALM, may be permitted to retire on voluntary basis on medical grounds, taking into consideration his medical condition, at the

earliest. Application was submitted on 15.1.2020 and the husband of the applicant, Jagdish Chand, who was otherwise due to retire on attaining the age of superannuation on 31.10.2020 but surprisingly, the respondents acting upon said application, took him as voluntarily retired with effect from 1.9.2020.

6. The respondents have contested the writ petition by filing reply thereto, in which they have stated that during maintenance work, where two wooden poles were already replaced and third one was being replaced on 13.7.2005, Shri Babu Ram and Shri Mast Ram, ALM were dismantling the conductor, victim, Jagdish Chand fell down on rocky land alongwith ladder and met with non-fatal accident, during the duty hours. Investigation report of the Chief Electrical Inspector, Kasumpti concluded that the probable cause of accident was the negligence on the part of the victim himself. Subsequently, the representation of the petitioner for providing employment on compassionate grounds to him and request of Jagdish Chand, ALM, for retirement on medical grounds was received in the office of the respondents on 30.5.2020. Both these applications were disposed of on 14.7.2020 (Annexure R-3) by the Deputy Secretary, Himachal Pradesh State Electricity Board Limited, Shimla. While the application of Jagdish Chand for retirement on medical grounds was processed, the petitioner was informed vide order dated 16.12.2020 (**Annexure P-14**) that his case was examined and it was informed that till retirement of Shri Jagdish Chand, his application for appointment on compassionate grounds cannot be considered.

7. Surprisingly, the respondents have placed on record application purported to have been submitted by father of the petitioner, Jagdish Chand sometime in 2018. This application is having lot of interpolations. The original application on behalf of the petitioner's father was typed out, in which it was stated that while working on line on 13.7.2005, he met with an accident. Due to head injury, he became unconscious and was referred to PGI Chandigarh.

After treatment the doctor advised that the patient will take long period for recovery. Thereafter, it is stated that he was unconscious from the date of non-fatal accident to date. Surprisingly, the words, "he was unconscious" in the sentence were replaced by hand with "I am unconscious". The application, which originally stated that, "it is very difficult for him to join/perform his duties in such unconscious position" has been changed/corrected by hand to read as, "it is very difficult for me to join/perform the duties in such unconscious position" and thereafter it is added in hand that, "& when I have been declared 100% mental disabled". The application contains thumb impression as obviously, an unconscious person could not have signed the application.

8. The respondents, in their reply have stated that Policy dated 20.5.2017 (Annexure R-4), which according to the respondents, would be applicable to this case, because the petitioner has applied for appointment on compassionate grounds in the year 2018 and thereafter again in the year 2020, provided that the employees, who meet with an accident and seek voluntary retirement within three years of accident, then only, wards of such employees shall be provided appointment on compassionate grounds. In the present case, since the voluntary retirement was sought in the year 2020 in relation of accident, which took place in 2005, therefore, case of the petitioner could not have been considered for appointment on compassionate grounds.

9. We are surprised to take note of the stand taken by the respondent Board. Moreover, we are also surprised to find that how a person who was throughout unconscious could apply for voluntary retirement. The application dated 15.1.2020 submitted by the mother of the petitioner makes reference to earlier application submitted in February, 2018, although, unfortunately, that application is not on record. Later application dated 15.1.2020 rightly has been signed by the mother of the petitioner i.e. wife of Shri Jagdish Chand. In this application, it is clearly mentioned that the petitioner's father was still

unconscious. In the application, she requested for appointment on compassionate grounds to the petitioner as Helper Sub-station/T-Mate, on the basis of his qualification of 10+2 and ITI diploma in electrician trade held by him and while stating that the respondents would not consider the case of the petitioner till the time, her husband is retired, she was compelled to request that her husband may be retired on voluntary basis on medical grounds taking into consideration the critical unconscious position of her husband. However, application of the petitioner was rejected vide order dated 16.12.2020 (Annexure P-14). Another application of which we have made reference to above and which is having a lot of interpolations/corrections also indicates that the father of the petitioner, Jagdish Chand, was still in an unconscious condition. It is mentioned in the originally typed out application that he was unconscious and that it was difficult for him to join/perform his duties in such unconscious position and that the permission may be accorded for engaging the petitioner as Helper or any other Class IV post, on compassionate grounds and that he (Jagdish Chand) may be retired on voluntary basis.

10. We, at this stage, may take note of the provisions of Section 20 of the Rights of the Persons with Disabilities Act, 2016, which reads as under:

> "20. (1) No Government establishment shall discriminate against any person with disability in any matter relating to employment;
>
> 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, exempt any establishment from the provisions of this section.
>
> (2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.
>
> (3) No promotion shall be denied to a person merely on the ground of disability.
>
> (4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service.

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall 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, whichever is earlier.
(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities."

11. Section 20 supra, *inter alia*, provides in sub-Section (3) that no promotion shall be denied to a person merely on the ground of disability. Sub-Section (4) of Section 20 provides that no Government establishment shall dispense with or reduce in rank an employee, who acquires a disability during his or her service and that, if an, employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits. Proviso to sub-Section (4) of Section 20 provides that if it is not possible to adjust the employee against the post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

12. In view of above, we find that the order of the respondents withdrawing promotion of father of the petitioner, even while he was in a state of unconsciousness or was rendered 100% disabled, while on duty, is wholly illegal. The petitioner is right in contending in para-4 of the writ petition that the attitude of the respondents shows that how an honest, poor, sincere and dedicated employee could have been harassed, when already he was facing the music at the hands of the God. Respondents, in para-4 of their reply have merely denied the averments of such para for want of knowledge and specifically stated that as of now, father of the petitioner has expired on 6.11.2020 but have not given any justification, in response to assertions made

by the petitioner, why the promotion orders of the petitioner's father were withdrawn.

13. In view of above, action of the respondents in withdrawing the promotion orders of the petitioner's father is wholly illegal and therefore unsustainable in law.

14. Coming now to the reasons given for rejecting the case of the petitioner for appointment on compassionate grounds, the same are faulty on two counts; firstly father of the petitioner being unconscious could not have submitted an application within three years of date of accident and secondly, the Policy dated 20.5.2017, could not have been retrospectively applied to the incident, which took place in the year 2005. In any case, father of the petitioner was due to retire on 31.10.2020, his date of birth being 1.10.1962 as per record, when he would have attained the age of 58 years, nonetheless, he died on 6.11.2020, six days after the deemed date of superannuation. Taking undue advantage of the crises in the family, respondents procured application of late father of the petitioner dated 9.5.2020, seeking therein voluntary retirement. On the application, as detailed hereinabove, thumb impression of the petitioner's father was obtained, though he was in comma. Subsequently, department made mother of the petitioner to write application seeking therein voluntary retirement of his husband on account of his illness. However, mother of the petitioner, while making such request, requested for compassionate appointment of his son in place of his father. These applications were made by the petitioner and his mother, in the desperate hope that the petitioner shall be at last granted appointment on compassionate grounds and he would ultimately be able to support the family, as the sole bread-earner of the family was in a vegetative state of life. But alas, that would not happen.

15. The manner in which the case of the petitioner for grant of compassionate appointment has been dealt with by the respondents leaves men to be desired impression that they have no compassion for an employee, who was rendered 100% disabled, while discharging duties on 13.7.2005.

16. In view of above discussion, present petition deserves to succeed and is hereby allowed with the following directions:

(i) Order of the respondents dated 12.8.2016, Annexure P-4, withdrawing the promotion of late Jagdish Chand as Lineman is declared illegal and quashed and set aside with the direction that he shall be deemed to have continued on such post till attaining the age of superannuation on 31.10.2020.

(ii) Order dated 31.8.2020 (Annexure P-10) issued by Senior Executive Engineer, Electrical Division, HPSEBL, Bilaspur, retiring the father of the petitioner, late Jagdish Chand on medical grounds with effect from 1.9.2020, is also declared illegal and set aside.

(iii) Order of the respondents dated 16.12.2020 (Annexure P-14), rejecting the application of the petitioner for grant of appointment on compassionate grounds is declared illegal and quashed and set aside.

(iv) Respondents are directed to re-compute the retiral/terminal benefits of the deceased Jagdish Chand by deeming him to have retired from the post of Lineman on 31.10.2020 and make payment of the same including revised family pension to his widow, within two months from the date of production of a copy of this order.

(v) Respondents are directed to reconsider the case of the petitioner for appointment on compassionate grounds as per the qualifications of the petitioner, by considering the father of the petitioner to have continued in service till 31.10.2020 and submit compliance of the order within two months of the production of a copy of this order.

The petition stands disposed of in the afore terms. All pending applications also stand disposed of.

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

Between:-

RAJAN KATOCH
S/O SH. HARI SINGH KATOCH
ASSISTANT SCIENTIST (BIO-CHEMISTRY)/
ASSISTANT ANALYTICAL CHEMIST,
CHAUDHARY SARWAN KUMAR
KRISHI VISHVAVIDYALAYA,
PALAMPUR, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.

... PETITIONER

(BY MR. DUSHYANT DADWAL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
   HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
   THROUGH ITS
   REGISTRAR AT PALAMPUR,
   TEHSIL PALAMPUR, DISTRICT KANGRA,
   H.P.

2. STATE OF HIMACHAL PRADESH
   THROUGH PRINCIPAL SECRETARY (AGRICULTURE)
   TO THE GOVERNMENT OF HIMACHAL PRADESH
   AT SHIMLA

.. RESPONDENTS

(BY MR. LOKENDER PAL THAKUR,
ADVOCATE
FOR R-1

MR SUDHIR BHATNAGAR AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARINDER THAKUR,

DEPUTY ADVOCATE GENERAL
FOR R-2)

CIVIL WRIT PETITION
(ORIGINAL APPLICATION)
NO. 2021 OF 2019
DECIDED ON 27-11-2021

**Constitution of India, 1950**- Article 226- Regularization of the services of the petitioner with all consequential benefits- Held- Though this court was unable to find any policy, introduced by the respondent-University, for regularization of employees appointed under the Schemes/Projects, but as has been taken note herein above, it clearly emerges from the record that respondent-University on its own whims and fancies adopted a pick and choose method, while ordering regularisation of some of those persons, who were initially given appointment on ad-hoc/co-terminus basis like the petitioner- Respondent University adopted pick and choose method for regularizing/ absorbing number of persons, whose initial appointment was on co-terminus/ad hoc basis- Petition allowed with the direction to respondent Unit to regularize/absorb the petitioner against the post in question. (Para 10, 11, 13, 15)

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

**O R D E R**

By way of instant petition filed under Art. 226 of the Constitution of India, petitioner has prayed for the following main reliefs:

(a) This Hon'ble Court may kindly be pleased to issue a writ of mandamus directing the Respondents to order the regularization of the services of the Petitioner as Assistant Analytical Bio-Chemist w.c.f. 24.6.2000 with all consequential benefits including Pensionary and Promotional Benefits and benefits accruable under Assured Career Progression Scheme etc.

(b) That this Hon'ble Court may be pleased to issue a writ of mandamus to directing the Respondents to grant four advance increments to the Petitioner from the date of his initial

appointment i.e. 24.6.2000 for possessing Ph.D. Degree with all consequential benefits.

34. For having bird's eye view of the matter, certain undisputed facts, as emerge from the record are that in the year 2000, respondent-University vide advertisement No. 3/2000 (Annexure P-5) advertised inter alia others, posts of Assistant Analytical Chemist (Biochemistry) to be filled on ad hoc basis under ICAR Scheme/project. Perusal of aforesaid advertisement reveals that the post in question was co-terminus with the project/scheme concerned. Petitioner being fully eligible, applied for the post and on his being declared successful in the selection process, he was appointed as Assistant Analytical Chemist (Bio-chemistry) vide appointment letter dated 23.6.2000 (Annexure P-6). Though aforesaid post in the year 2006 was advertised on regular basis alongwith other posts, but the fact remains that the interviews were not conducted qua the post of Assistant Analytical Chemist (Bio-chemistry), as a consequence of which, the petitioner continued to work/render service in the said capacity. Vide communication dated 9.10.2001 (Annexure P-13), respondent-University pursuant to decision of the Board of Management taken vide Item No. 7 of its 100th meeting held on 19.6.2001, deleted the word, "co-terminus with the Project" written in the appointment letters issued to the other similarly situate persons, in the year 2000. It would be apt to take note of relevant portion of Annexure P-13, which is reproduced as under:

"CSK Himachal Pradesh Krishi Vishvavidyalaya, Palampur

Establishment Section-I

No. 5-103/94(Co-terminus)/CSKHPKVV(Estt.)- 81504-39, dated, the 09.-10.2001

office order

in pursuance of the decision of the Board of Management taken vide item No. 7 of its 71st meeting held on 29.6.2001, the word "Co-terminus with the Project" inserted in the appointment letters of the following Assistant Professors/equivalent appointed against the advertised posts in different All India Coordinated Research Projects is hereby deleted from their appointment letters from the initial appointment with the condition that on the termination of the concerned Project, they will be adjusted in Plan/Non-loan schemes only if there is no additional financial liability on the budget of the concerned Plan/Non-Plan scheme: -

| Sr. No. | Name and designation | Office/order /letter No. & date vide which initially appointed | Name of the project against which appointment made on co-terminus basis. | Name of scheme in which actually posted/salary drawn. |
|---|---|---|---|---|
| 11. | Dr. Rajeev Rathour, Asstt. Scientist )Plant Pathology) | No. 5-103/2000-HPKV(Estt)/101461-72 dt. 23.12.2000 | ICAR-014-112 AICRP on MULLARP | ICAR-014-112 at Sangla upto 6.2.2001 and in Biotechnology Centre, Palampur w.e.f. 7.2.2001 in Scheem APL-007-12 |
| 12. | Dr. Kalyan K. Mondal (Asstt. Scientist(Plant Pathology) | No. 6-687/200-CSKKV(Estt.)/12105-16 | Do | ICAR-014-112 at RSS Sangla |

| | | | | |
|---|---|---|---|---|
| 13. | Dr. Ama Singh Asstt. Scientist (Plant Pathology) | No. 5-103/2000-CSKKV(Estt)/15007-19 | Do | APL-024-105 at RRS Kukumseri |
| 14. | Dr. Suman Kumar Asstt. Scientist (Plant Plathology) | No. 5-103/2000-CSKKV(Estt)/17056-68 dt. 24.2.2001 | Do | APL-033-114 at RSS Lari |
| 15. | Dr. R.K. Develash Asstt. Scientist (Plant Pathology) | No. 5-103/2000-CSKKV (Estt)/20705-18 dt. 8.3.2001 | Do | APL-029-109 at RSS, Salooni |
| 16. | Dr. Surinder K. Sharma Asstt. Entomologist | No. 5-103/2000-CSKKV(Estt)/11649-61 dt. 6.l2.2001 | AICRP on White Grubs | AICRP on White Grubs at EKRS Nagrota |
| 17. | Dr. Pankaj Sood Asstt. Entomologist | No. 5-103/000-CSKKV(Estt)/15034-46 dated 15.2.2001 | ICAR-014-112 AICRP on MULLARP | ICAR-014-112 at RSS, Sangla |

With the deletion of the word “Co-terminus with the project” the following additions may also be incorporated in the terms and conditions of the appointment letters/orders of the above incumbents:

ii) that they will be entitled to General Provident Fund-cum Pension-cum-Gratuity Scheme in accordance with the rules of CSK HPKV, as amended from time to time.”

35. Though, the words, “co-terminus with the project” mentioned in the orders issued to the other persons were deleted but the same were not deleted in case of the petitioner, as such, petitioner made representations (Annexure P-14, P-16, P-17 and A-45) to the worthy Vice-Chancellor of the respondent-University, who having found merit in the claim of the petitioner as well as other similarly situate persons, recommended to the Government of Himachal Pradesh, vide communication dated 9.9.2000 for regularisation of the persons appointed under Project/scheme on co-terminus basis (Annexure P-15). Most importantly, in this communication, worthy Vice-Chancellor of the respondent-University specifically informed respondent No.2, that since the technical/ministerial staff in the project is appointed after observing proper selection procedure and in accordance with the R&P Rules, request so made by the teachers, to the Hon'ble Chief Minister seems to be genuine. But the fact remains that no action, if any, ever came to be taken on behalf of the Government on the recommendation made by worthy Vice-Chancellor.

36. It is pertinent to take note here that in the year 2005, respondent-University again advertised the posts of Assistant Analytical Chemist (Bio-chemistry) alongwith other posts to be filled up on regular/ad hoc basis, but the fact remains that no regular appointment was made, as a result of which petitioner continued to work as Assistant Analytical Chemist (Bio-chemistry) on the strength of initial appointment made in the year 2000. It appears that in the year 2009, respondent-University instead of taking steps for filling up post on regular basis, again advertised the post in question to be filled up on ad-hoc basis under ICAR scheme/project. Petitioner being fully eligible, again came to be appointed against the post in question but on co-terminus basis, as was done in earlier selection process made in the year 2000.

37. Respondent-University has absorbed all the persons except the petitioner, who were given appointment on co-terminus basis under ICAR project/scheme observing the selection procedure and R&P Rules for the post

in question. Though the respondent-University kept on repeatedly recommending the matter to the Government of Himachal Pradesh for regularisation of the services of the petitioner, but for one reason or the other, case of the petitioner could not be considered.

38. Reply filed on behalf of the respondents, wherein factual position narrated herein above, has nowhere been disputed, reveals that the steps for absorption of the petitioner could not be taken on account of financial crunch, however, this court finds from the record that some of the persons who were either appointed alongwith the petitioner in the year 2000 on co-terminus basis or were appointed later to the petitioner have been absorbed, as has been taken not here in above. In the aforesaid background, petitioner had no option but to approach this Court for grant of reliefs, as have been reproduced herein above.

39. 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 the petitioner pursuant to his initial appointment made in the year 2000, has been regularly rendering his service on the post of Assistant Analytical Chemist (Bio-chemistry) on adhoc basis in ICAR project/scheme, till the time he was again subjected to interview in the year 2000 for the post in question, that too on adhoc basis. As has been taken note hereinabove, respondent-University though made repeated attempts to fill up the post in question on regular basis but every time, no one was appointed and petitioner was permitted to continue to work against the post in question on ad-hoc basis. Though, respondents in their reply have categorically admitted the factum with regard to petitioner's having possessed requisite qualification required for the post in question, but yet have not considered his case for regularization at par with other similarly situate persons on account of financial crunch, (paras-11 to 13 of the reply filed by the respondent-University)

40. Leaving everything aside, it is amply clear from the repeated recommendations made by Worthy Chancellor as well as Registrar of University, Annexures P-15, 16 & Annexure A-45, that the University having taken note of the fact that there are long term projects and the scientists as well as technical/ministerial staff were appointed in these projects after observing proper selection procedure and in terms of R&P Rules, repeatedly requested Government to consider the case of the petitioner and other persons appointed under the ICAR project/scheme for regularization, but yet no decision till date has been taken by the competent authority.

41. Having carefully scanned entire record, this Court finds that it is a classic case of hostile discrimination. Though respondent-University vide order dated 9.10.2001, Annexure P-13, in terms of decision of Board of Management taken in its 71st meeting decided to delete words 'Co-terminus with the Project' from the appointment orders of the Assistant Professors/equivalent, who were initially appointed on co-terminus basis, as a consequence of which, they all besides becoming eligible for regularization/absorption have also become entitled for GPF- cum –Pension-cum Gratuity Scheme in accordance with the rules of CSK HPKV, as amended from time to time. Perusal of aforesaid communication, which has been otherwise reproduced hereinabove, clearly reveals that persons, who were junior to the petitioner and were appointed on co-terminus basis were subsequently regularized/absorbed, but for no justifiable reasons, case of the petitioner never came to be considered for deletion of words 'Co-terminus with the Project' and thereafter for regularization/absorption. During the proceedings of the case, it transpired that apart from petitioner, some other similarly situate persons had also approached this Court by way of filing petition, claiming therein same reliefs as have been claimed in the instant petition, but since respondent-University granted them reliefs, as were prayed with effect from the year 2016, they all withdrew their cases, Aforesaid fact stands duly substantiated from the

contents of communication dated 5.5.2019, sent to the petitioner under the signatures of Deputy Registrar (Establishment)/respondent-University, which was made available to this court, during the proceedings of the case, and the same is taken on record. Perusal of aforesaid communication reveals that pursuant to decision taken by Finance Committee vide item No. 115(10) of its 115th meeting held on 9.2.2018, duly approved by the Board of Management, vide item No. 3.4 of its 113th meeting held on 9.9.2008, the committee constituted vide office order dated 12.3.2018 for the purpose of scrutiny the cases of co-terminus appointees working in the research projects/ other Government of India's project, who have completed ten years service on co-terminus basis under such KVK/Projects, were recommended for absorption/adjustment against the available vacant posts having identical pay scales/pay band in the respondent-University. Since vide aforesaid communication, petitioner was offered to be absorbed /regularized against the post in question with effect from decision 2016/2018, he refused to accept the aforesaid proposal because as per him, he had become entitled for regularisation/absorption from the date persons initially appointed alongwith him were given such benefits. It is not in dispute that two persons namely Pankaj Kumar and Sanjay Chadha, who were also appointed as Assistant Analytical Chemists (Bio-chemistry) in the year 2000 in terms of advertisement No. 3/2000 (Annexure P-5), as is evident from their appointment letters dated 23.6.2000, which are taken on record, were regularized within six months of their appointment on ad hoc basis, as is evident from order dated 23.12.2000.

42. Mr. Lokender Pal Thakur, learned counsel for the respondent University has not been able to dispute the documents as referred to herein aboveabove. Once the aforesaid documents are not disputed by the respondent-University, it is not understood that how the case of the petitioner could not be considered for absorption/regularisation in December, 2000, as

is/was done in the case of other persons, as detailed herein above. Though this court was unable to find any policy, introduced by the respondent-University, for regularization of employees appointed under the Schemes/Projects, but as has been taken note herein above, it clearly emerges from the record that respondent-University on its own whims and fancies adopted a pick and choose method, while ordering regularisation of some of those persons, who were initially given appointment on ad-hoc/co-terminus basis like the petitioner.

43. Though, Mr. Lokender Pal Thakur, learned counsel for the respondent University, made an attempt to carve out a case that before completion of requisite period, case of the petitioner could not be considered for regularisation but yet he was unable to place on record policy/ decision if any prescribing therein minimum period required for regularisation/absorption. Policy decision, if any taken by the respondent-University may not be of any relevance as far as case at hand is concerned, because it is quite apparent from record that two similarly situate persons appointed with the petitioner in the year 2000, on co-terminus basis were regularized/ absorbed in December, 2000.

44. At the cost of repetition, it may be taken note that vide communication dated 9.10.2001, Annexure P-13, respondent-University decided to delete the words, "Co-terminus with the Project' mentioned in the appointment letters of some of the Assistant Analytical Chemists (Bio-chemistry) but there is no explanation why at that time, case of the petitioner was not considered, especially when it stands duly established on record that the words, 'co-terminus with the project" from the appointment letters of the persons, who were junior to the petitioner, were ordered to be deleted vide aforesaid communication. In view of the detailed discussion as well as circumstances mentioned above, this court has no hesitation to conclude that the petitioner has been discriminated, as a consequence of which is suffering

till date. Reply filed by respondents is totally contrary to the documents available on record. In reply, respondent-University with the view to justify its action of not regularizing/ absorbing the petitioner, has stated that the petitioner was not appointed after following due process of selection but documents annexed with the petition, especially the communication sent by Registrar to the Government of Himachal Pradesh, clearly reveals that the petitioner was fully qualified to be appointed on the post in question and he possessed minimum qualification as required under R&P Rules for the post in question.

45. Apart from above, it has been further stated that the case of the petitioner could not be considered on account of financial crunch, but aforesaid plea of the University cannot be accepted for the reason that the respondent-University adopted pick and choose method for regularizing /absorbing number of persons, whose initial appointment was on co-terminus/ad hoc basis.

46. Leaving everything aside, plea with regard to the petitioner's not having possessed the requisite qualification or his having not undergone selection process, stands duly rebutted on account of own decision of the respondent-University. pursuant to which, it vide communication dated 5.3.2019, decided to absorb/adjust persons, who were working on co-terminus basis against available vacant posts having identical pay scale/pay band in the University, coupled with the fact that pursuant to aforesaid communication, proposal was made to the petitioner for his regularisation/absorption with effect from the year 2016.

47. Consequently, in view of the detailed discussion made herein, this court finds merit in the present petition and same is allowed and respondent-University is directed to regularize /absorb the petitioner against the post in question, from the date persons appointed alongwith him on coterminous /ad

hoc basis in the year 2000, were ordered to be regularized/absorbed, alongwith all consequential benefits.

48. Since the petitioner is waiting for his rightful claim for years together, this court hopes and trusts that the respondent-University would take necessary steps in this regard, expeditiously, preferably within four weeks. However, it is clarified that the petitioner though would be entitled for regularization/absorption from the date his two colleagues namely Pankaj Kumar and Sanjay Chadha as well as his juniors/counter parts were regularized/absorbed, but the financial benefits qua the same would be restricted to a period of three years prior to the date of filing the petition.

49. The petition stands disposed of in the afore terms, alongwith all pending applications.

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

Between:-

ANITA DEVI
WIFE OF SHRI RAJINDER,
RESIDENT OF GHANDAH,
TEHSIL SHILLAI, DISTRICT SIRMAUR,
H.P.

... PETITIONER

(BY MS. BIMAL GUPTA, SENIOR ADVOCATE
WITH MR. GURINDER SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (ELEMENTARY EDUCATION)
TO THE GOVERNMENT OF H.P.,
SHIMLA, H.P.

2. THE DIRECTOR (ELEMENTARY EDUCATION)

GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA.

3. THE DEPUTY DIRECTOR (ELEMENTARY EDUCATION),
SIRMAUR AT NAHAN,
H.P.

4. GRAM PANCHAYAT
KIYARI GHANDAH, TEHSIL SHILLAI,
DISTRICT SIRMAUR, H.P.
THROUGH ITS PRESIDENT

RESPONDENTS

(MR. SUDHIR BHATNAGAR,
MR. ARVIND SHARMA AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARINDER THAKUR
MR. GAURAV SHARMA AND
MR. KAMAL KISHORE,
DEPUTY ADVOCATES GENERAL,
FOR R-1 TO R-3

MS. ARUNA CHAUHAN, ADVOCATE,
FOR R-4)

CIVIL WRIT PETITION
(ORIGINAL APPLICATION)
NO. 3083 OF 2019
DECIDED ON 24-03-2022

**Constitution of India, 1950**- Article 226-Primary Assistant Teacher Scheme, 2003- Petitioner was appointed as Primary Assistant Teacher in the year 2006, however for dereliction of duty was removed in the year 2010- Held- In the inquiry conducted by the Gram Panchayat petitioner was not found guilty- Authority to remove the petitioner from the post of Primary Assistant Teacher lies with the Gram Panchayat being the appointing authority and as such,

there was no occasion for the Deputy Director Elementary Education to initiate Inquiry against the petitioner- Petition allowed. (Para 13, 14, 17, 18)

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

**O R D E R**

In the year 2002, respondents framed a Scheme namely "the Primary Assistant Teacher Scheme, 2003" (hereinafter, 'Scheme') for the recruitment of Primary Assistant Teachers. Very aim of Scheme was to provide free and compulsory education to all the children in the age group of 6-14 years. In terms of Scheme, Gram Panchayats were made competent to select a person to work as Primary Assistant Teachers in the schools situate in their respective jurisdictions.

2. In the year 2006, the petitioner was appointed as Primary Assistant Teacher by Gram Panchayat Kiari Gundhah, Tehsil Shillai, District Sirmaur, Himachal Pradesh after having been selected by the duly constituted Committee, to teach the students of Government Primary School Pab-III, Tehsil Shillai, District Sirmaur, Himachal Pradesh. After her initial appointment in the year 2006, petitioner was allowed to work as Primary Assistant Teacher continuously till the year 2009.

3. On 8.6.2009, Vigilance Officials, after having received complaints, regarding teaching in the schools by the persons, other than the Primary Assistant Teachers appointed by the Gram Panchayats concerned, visited various schools including Government Primary School Pab-III, Tehsil Shillai, District Sirmaur, Himachal Pradesh, where the petitioner stood appointed as a Primary Assistant Teacher. Vigilance officials during their visit found the petitioner absent from the school and in her place, a person namely Jangli Ram was found to be teaching the students in the school concerned. Vide

communication dated 10.6.2009, (Annexure P-6), Deputy Director Elementary Education, Sirmaur, while intimating the petitioner that an Inquiry is contemplated/pending against her for dereliction of duties, asked her not to come to school with immediate effect till further orders.

4. A memorandum of articles of charge (Annexures P-8 and P-9, Pp 51-56) was issued to the petitioner. Following charges came to be framed against the petitioner:

> Article-I
>
> That the said Smt. Anita Devi, Primary Assistant Teacher was found absent from her duties on 8th June, 2009, which is totally misconduct or mis-behaviour and sheer violation of clause 4(iii) of the agreement executed by her under PAT Scheme, 2003 & clause 5/j/(iii) of the H.P. Prathmik Sahayak Adhyapak/ Primary Assistant Teacher (PAT) scheme, 2003.
>
> Article-II
>
> That the said Smt. Anita Devi, PAT, GPS, Pab-III has not taught in the school for quite some time and has kept one Sh. Jangli Ram for teaching work in her place by paying Rs.1000-12000 per month by her, which tantamount to breach of trust and misconduct on the part of said Smt. Anita Devi and violation of various clauses of PAT scheme 2003 clause 5/j(iii) of the H.P. Prathmik Sahayak Adhyapak/ Primary Assistant Teacher (PAT) scheme, 2003.

5. Petitioner herein filed a detailed reply to the Articles of Charge (Annexure P-10), denying all the charges against her. However, the Department did not find the reply of the petitioner to be satisfactory and ordered for an Inquiry against her. Inquiry officer, vide Inquiry report (Annexure P-12), held the petitioner guilty of the charges framed against her and accordingly, recommended to the Disciplinary Authority for appropriate action against the petitioner. Additional Director Elementary Education, called

for reply from the petitioner against the Inquiry report vide communication dated 3.12.2009.

6. Petitioner, vide communication (Annexure P-13) filed a detailed reply to the show cause issued by the Disciplinary Authority, who subsequently vide order dated 16.3.2010 (Annexure P-14) directed Pradhan, Gram Panchayat Kiari Gundah, Development Block Shillai, District Sirmaur, Himachal Pradesh to cancel the contract of the petitioner. Pradhan, Gram Panchayat, Kiari Gundhah, while replying to communication dated 16.3.2010 (Annexure P-14) apprised Deputy Director Elementary Education, that the enquiries made by Gram Panchayat have revealed that the petitioner herein was sent for CRG teacher training at BRC Bakras with effect from 1.6.2009 to 6.6.2009 (Saturday). On 6.6.2009, evening, she found her infant child ill. The condition of the child aggravated on 7.6.2009 morning hence, she took him to Andheri, where her husband was residing, for treatment at Ayurvedic Dispensary and care alongwith her husband. Besides above, Gram Panchayat Pradhan also stated in the communication supra that clause 2(i) of Notification dated 27.8.2003, provides for one casual leave for every month put in service to the Primary Assistant Teachers. He claimed that the petitioner had sufficient leave to her credit. He also stated in the communication supra that clause 3 of the Scheme provides that if there is absence on the part of a teacher, in that case, said teacher shall not be entitled for remuneration for the period of absence. On the top of everything, Pradhan, Gram Panchayat vide communication supra claimed that being the appointing authority, it is domain of Gram Panchayat to initiate disciplinary proceedings against the Primary Assistant Teachers.

7. Apart from communication supra, Gram Panchayat concerned also passed resolution dated 5.7.2009 (Annexure P-15) resolving therein that the petitioner herein be re-appointed as Primary Assistant Teacher but since no decision ever came to be taken by the office of Deputy Director Elementary

Education, with regard to re-appointment of the petitioner, after issuance of communication dated 5.4.2010 (Annexure P-15) by the Gram Panchayat concerned in reply to communication dated 16.3.2010 sent by Deputy Director Elementary Education, (Annexure P-14), petitioner remained out of job.

8. Apart from the aforesaid disciplinary proceedings, an FIR was registered against the petitioner and police after completion of investigation, presented challan in the competent court of law against petitioner under S. 13 of Prevention of Corruption Act and S. 33 of the HP PSCP Act and Ss. 420, 467, 468, 471 and 120B IPC. Learned Special Judge, Sirmaur at Nahan, Himachal Pradesh vide judgment dated 31.8.2013, found the petitioner not guilty of the charges framed against her and accordingly acquitted her.

9. After termination of services, the petitioner approached this court in the instant proceedings, which was transferred to erstwhile Himachal Pradesh Administrative Tribunal and after abolishment of the Tribunal, petition was again transferred to this court, where it was re-registered as CWPOA No. 3083 of 2019, praying therein for the following main relief(s):

> "Order dated 10.6.2009 passed by respondent No.3, show cause notice dated 11.6.2009 issued by respondent No.2, memorandum of charge-sheet issued by respondent No. 2 and respondent No.3, inquiry report dated 3.12.2009, order dated 9.3.2010 passed by respondent No.2 and order dated 16.3.2010 passed by respondent No.3 may kindly be set aside and quashed and the petitioner may be allowed to work as Primary Assistant Teacher in Govt. Primary School, Pab-III (Bakras), District Sirmaur, H.P."

10. Having heard learned counsel for the parties and perused material available on record, this court finds that person namely Jangli Ram, who was allegedly found teaching the students in place of the petitioner, in the school concerned, stood already engaged in the school concerned, as a Remedial Teacher, at the time of inspection by Vigilance officials, as is evident from

paragraphs-9 and 12 of the reply filed by respondent No.4 (p. 128) PSince, the person Jangli Ram, already stood appointed in the school concerned, as a Remedial Teacher, it is not understood on what basis, Inquiry officer, arrived at a conclusion that during visit by the vigilance officials, said Jangli Ram was found to be teaching students, in place of the petitioner, who was appointed as Primary Assistant Teacher by the Gram Panchayat concerned.

11. Moreover, this court finds from the record that Gram Panchayat, which had appointed petitioner as Primary Assistant Teachers, while responding to communication dated 16.3.2010 issued by Deputy Director Elementary Education, whereby Gram Panchayat was directed to cancel the agreement of the petitioner, vide communication dated 5.4.2010, had categorically apprised Deputy Director Elementary Education with regard to Inquiry conducted by the Gram Panchayat, wherein it was revealed that on the date of alleged incident, petitioner was absent on 8.6.2009, because of illness of her infant child. Besides above, Gram Panchayat vide aforesaid communication also raised issue with regard to competence of the Deputy Director Elementary Education to order cancellation of contract inter se petitioner and the Gram Panchayat. Gram Panchayat categorically raised issue with regard to its competence to appoint the person as Primary Assistant Teacher as well as its authority to cancel the appointment but since no reply, if any, ever came to be given by Deputy Director Elementary Education to the aforesaid communication issued by the Gram Panchayat, petitioner was forced to remain out of job for no fault on her part. In the criminal case registered against the petitioner, learned Special Judge, Sirmaur at Nahan, specifically took note of the statement made by PW-20, Jangli Ram, who deposed that he was engaged as a Remedial Teacher in Government Primary School, Pab-III, for three months on 31.1.2009 and he was engaged by Pradhan, Gram Panchayat. Since the prosecution was unable to extract anything contrary to what this witness stated in her examination-in-chief, learned Special Judge,

on the basis of evidence led on record, concluded in judgment of acquittal that there is no evidence on record to show that services of Jangli Ram were hired by petitioner to teach in her place.

12. Though, learned Special Judge, while acquitting the petitioner recorded in para-24 of the judgment that the prosecution has failed to connect accused Rajinder and Anita with commission of the alleged offence beyond reasonable doubt but if entire judgment is perused in its entirety, it can be safely inferred/concluded that the learned court below, after being convinced and satisfied that there is no evidence to show that Jangli Ram was hired by petitioner to teach in her place, proceeded to acquit the accused/petitioner, meaning thereby that her acquittal was honorable and not on technical grounds.

13. Inquiry report clearly reveals that the witnesses adduced by the petitioner in her defence categorically deposed that she remained absent from school on 8.6.2009, but there is nothing in their statements suggestive of the fact that Jangli Ram was hired by her during this period, to teach the students in her place. No doubt, in cross-examination, Dharam Singh, stated that Jangli Ram was engaged as Remedial Teacher for 90 days, but Partap Chauhan, PW-1 stated that Jangli Ram, Remedial Teacher though was engaged upto 31.3.2009 for 90 days but continued to teach in school beyond that period. Though the perusal of Inquiry report reveals that prosecution was successful in proving that on 8.6.2009, petitioner remained absent from school, without getting leave sanctioned, but definitely there is no concrete evidence suggestive of the fact that during this period, petitioner hired Jangli Ram to teach students in her place and as such, direction given by the Deputy Director Elementary Education to the Gram Panchayat concerned to cancel the contract of the petitioner, cannot be said to be justifiable, more particularly, when concerned Gram Panchayat took a stand that in the Inquiry conducted by it, petitioner has not been found guilty.

14. Leaving everything aside, authority to remove the petitioner from the post of Primary Assistant Teacher lies with the Gram Panchayat being the appointing authority and as such, there was no occasion for the Deputy Director Elementary Education to initiate Inquiry against the petitioner

15. At this stage, learned counsel for the petitioner, while inviting attention of this court to judgment of Division Bench rendered in case titled as **Surender Singh Chauhan** vs. **State of H.P. and others**, LPA No. 392 of 2011 decided 23.4.2015, wherein it has been held that State Government at the most could ask Gram Panchayat to initiate disciplinary proceedings against petitioner but could not initiate the same itself.

16. Before referring to aforesaid judgment, it may be taken note of the fact that Shri Surender Singh Chauhan, petitioner in the case supra, was also Primary Assistant Teacher appointed by Gram Panchayat and was also found absent from duties by Vigilance Department from the School and precise allegation against him was that during his absence from the school, he had hired some person i.e. Inder Singh, to teach the students in her place. In that case also, Disciplinary proceedings were initiated by Deputy Director Elementary Education and direction was issued to Gram Panchayat to cancel agreement of the petitioner in that case. But as has been taken note herein-above, Division Bench in Surender Singh Chauhan (supra), held that though respondents are competent to exercise supervisory control but could not itself initiate disciplinary proceedings, rather, could have only asked Gram Panchayat concerned, to initiate disciplinary proceedings. Division Bench of this Court held in the judgment (supra) as under:

> "11. The writ-petitioner is admittedly an employee of the 3rd respondent. Of course, he was being paid out of the grant released by the respondent-State in favour of the said respondent. The Scheme Annexure P-1 framed by the State for recruitment of the Primary Assistant Teachers has been discussed in detail by learned Single Judge in the judgment under challenge, therefore, there is no need of

its elaboration here. Para 10 of the scheme makes it crystal clear that it is the Gram Panchayat concerned, the employer of Primary Assistant Teachers and also the disciplinary authority. True it is that the remuneration to Primary Assistant Teachers under the scheme is being paid by the Gram Panchayat out of the funds granted by the State Government. The release of funds, however, not authorize the Government to initiate the disciplinary action against a Primary Assistant Teacher, if he is found to have mis-conducted and failed to maintain discipline in discharge of her duties. Since the writpetitioner has been served with show cause notice by the 2nd respondent and even it is at the behest of the said respondent, disciplinary proceedings were ordered to be initiated against her and it is the said respondent, imposed upon the petitioner the penalty of cancellation of the agreement, he executed at the time of her appointment as Primary Assistant Teacher. In our considered opinion, such a course of action is dehors the provisions under the scheme, because as per the same appointing and disciplinary authority of the writ-petitioner is the Gram Panchayat. The 1st and 2nd respondents at the most could have recommended the action to be taken against the writ-petitioner by the Gram Panchayat.

12. Otherwise also, from the inquiry report Annexure P-10 (Colly.), it is only absence of the writpetitioner from duty on 08.06.2009 is proved and nothing beyond that. It is not proved nor Inquiry Officer concluded that the services of Shri Inder Singh were hired by the writ-petitioner to teach the students in her place on payment basis. Shri Inder Singh as per report rather was teaching the students in the school regularly for two hours w.e.f. September, 2008. The certificates Annexures A-2 and A-3 to the present appeal make it crystal clear that said Shri Inder Singh was working as an “Education Volunteer” in the village. He while appearing as PW-21 during the course of trial of Corruption Case No. 63-CC/7 of 2011, tells us that when Kumari Phulma, an Education Volunteer appointed in Government Primary School, Kuraya left the school, it is he who started imparting education to the students under an NGO, namely ‘Adhaar’. Thus, the services of Inder Singh were not hired by the petitioner to teach the students in her place and rather he was teaching the students in the school being “volunteer” of an NGO. The observations in the impugned judgment that said Shri Inder Singh

during the course of disciplinary inquiry and trial supported the petitioner, seem to be factually incorrect.

13. The writ-petitioner, no doubt, was found absent from duties on 08.06.2009. The OPD ticket of Community Health Centre, Shillai Annexure P-4, however, reveals that her daughter was ill and medically checked up on that day. The writ-petitioner can reasonably be believed to have accompanied her daughter to the hospital. Although, the application he allegedly sent to the school for sanction of one day's leave has not been produced on record and Shri Netar Singh, JBT, Incharge of the school during the course of disciplinary proceedings has stated that the writ-petitioner was not on duty on that day, however, for her absence that too only for a day, such a harsh and deterrent penalty should have been imposed is a question which heavily weigh with us. The alleged misconduct was not of such a nature warranting the punishment of cancellation of the agreement and ultimately removal from service. When the charge that the writ-petitioner was not attending the school and rather hired the services of Shri Inder Singh to teach the students in her place is not at all proved, a lenient view of the matter could have also been taken.

14. The criminal case registered against the writ petitioner and others stands decided by leaned Special Judge, Sirmour vide judgment dated 31.08.2013, a copy whereof has been placed on record of the present appeal. The charge has not been proved against either of the accused and they including the petitioner now stand acquitted. This development having taken place during the pendency of the present appeal also weigh with us and in our considered opinion, the writ-petitioner never hired the service of Shri Inder Singh on payment basis to teach the students in the school in her place.

15. The 3rd respondent is satisfied with the work and conduct of the writ-petitioner as Primary Assistant Teacher and even ready and willing to extend the contract entered upon with her further. A Resolution Annexure P-12/A to the writ petition has also been passed by the said respondent in this regard. In reply to the writ petition the said respondent has supported the case of the writ-petitioner. As a matter of fact, it is the 2nd respondent, who has directed the 3rd respondent to cancel the agreement executed with the writ-petitioner so that he can be removed from the school. Reference in this regard can be made to

the letters dated 16.03.2010 and 23.04.2010, Annexure P-12 to the writ petition. We have already said at the outset that the 1st and 2nd respondents being not the appointing or disciplinary authority of the writ-petitioner could have not initiated disciplinary proceedings against her nor to impose any penalty including the penalty of cancellation of the agreement he executed and ultimately removal from service.

16. True it is that Article 21-A of the Constitution casts a duty upon the State to provide education to all children below 14 years of age. Thus, it is also the duty of the State to ensure that adequate infrastructure is provided and efficient, dedicated and sincere faculty is deployed in the schools. It is to fulfill such constitutional goal; the respondent-State has framed the scheme for deployment of Primary Assistant Teachers in primary schools. Under the scheme, it is the duty of the State to grant funds for payment of remuneration etc., to the Primary Assistant Teachers and as regards their appointment, supervisory control and disciplinary action, if found to have mis-conducted, is a task assigned to the concerned Gram Panchayat under the scheme. Therefore, as already said, at the most, the respondent department could have only asked the Gram Panchayat to hold inquiry against the writ-petitioner so that if found guilty, punished that too by the Gram Panchayat.

17. We feel that learned Single Judge having own notions that in remote areas, the teachers did not function in the schools and rather used to engage the students or other teachers to teach in their place as well as swayed by the allegations leveled in the FIR against the writ-petitioner, which ultimately turned to be false and that it is the respondent-State which provides funds by way of grant to the Gram Panchyat for engagement of Primary Assistant Teachers has concluded that the respondent-State is competent to exercise supervisory control on them and to direct the Gram Panchayat concerned to terminate their services. But, our views are at variance with that of learned Single Judge, because in the case in hand, as we already said, the State Government at the most could have asked the Gram Panchayat to initiate disciplinary action against the petitioner, but could not have initiated the disciplinary action itself as well as by way of penalty and issued a direction to the 3rd respondent to cancel the agreement entered upon with her. The impugned communication Annexure P-12 demonstrates that the respondent-State has not left any option with the

3rd respondent except for resorting to the cancellation of the agreement and ultimately removal of the writ-petitioner from the school. It is a separate matter that the 3rd respondent has not yet cancelled the agreement as nothing to this effect has come on record.

18. We are, however, not in agreement with Mr. Dilip Sharma, learned Senior Advocate that from 11.07.2011, the writ-petitioner is regularly attending the school or teaching the students because nothing to this effect has come on record. Had it been so, the writ petitioner could have produced on record some contemporaneous record including certificate from the teacher incharge of the school in this regard. The bald assertions that too made during the course of arguments are not sufficient to hold that the writ-petitioner is regularly attending the school and teaching the students from 11.07.2011 onwards, hence entitled to the payment of remuneration.

19. The facts, therefore, remain that the writ petitioner was ordered not to attend the school vide letter dated 10th June, 2009 Annexure P-7. Therefore, it would not be improper to conclude that he is not on duty w.e.f. 11.06.2009 till date. Since the judgment under challenge, according to us, is not legally and factually sustainable and as such deserves to be quashed, therefore, the impugned order Annexure P-12 and also a direction issued to the petitioner vide letter dated 10th June, 2009 Annexure P-7 not to attend her duties in the school being illegal and unsustainable deserves to be quashed. However, the writ-petitioner is only entitled to regularization of the period w.e.f 11.06.2009 till joining of duties by her consequent upon this judgment notionally i.e. without payment of any remuneration. We, however, hold her entitled for reinstatement as Primary Assistant Teacher with all consequential benefits with immediate effect i.e. the day he joins her duties in the school.

20. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the judgment passed by learned Single Judge in Civil Writ Petition No. 3461/2010 is ordered to be quashed and set aside. The period w.e.f. 11.06.2009 till reinstatement of the writ-petitioner, consequent upon this judgment will be regularized by treating her in service notionally. The writ-petitioner will stand re-instated as Primary Assistant Teacher in Government Primary School, Kuraya, Tehsil Shillai, District Sirmour

with all consequential benefits on the day he produces a certified copy of this judgment before the 3rd respondent. The 2nd respondent shall ensure that the grant-in-aid is released regularly to the 3rd respondent for defraying the due and admissible remuneration to the writ-petitioner under the Scheme.

17. Since, in the case at hand, prosecution in disciplinary proceedings has not been able to prove that the petitioner herein had hired Shri Jangli Ram to teach students in her place, coupled with the fact that the petitioner stands acquitted in the criminal proceedings, initiated against her, prayer made in the instant petition deserves to be allowed.

18. Consequently in view of detailed discussion made supra, as well as law taken note supra, present petition is allowed and respondents are directed to reinstate the petitioner against the post of Primary Assistant Teachers with effect from 10.6.2009, when she was asked not to come to the School.

19. Consequent upon reinstatement of the petitioner in terms of judgment herein, petitioner shall be entitled to regularization in terms of Scheme framed by the Government in this behalf, from due date, but on notional basis.

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

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

Between:-

SIDDHARTH SHARMA
S/O SH. SHSHIL KUMAR
R/O VILLAGE RAIPUR SAHORAN HOUSE,
P.O. SAHORAN, P.O. MAJHAR,
TEHSIL AND DISTRICT UNA,
H.P.

.. PETITIONER

(BY MS. SUNITA SHARMA, SENIOR ADVOCATE
WITH MR. RANVIR SINGH, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY (HOME)
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. DIRECTOR-GENERAL OF POLICE,
HIMACHAL PRADESH,
SHIMLA-2.

3. INSPECTOR-GENERAL OF POLICE,
NR-CUM-CHAIRMAN,
DISTRICT COMMITTEE, NR, UNA

4. THE COMMANDANT,
2ND IRBBN SAKOH

5. SUPERINTENDENT OF POLICE,
UNA, DISTRICT UNA,
H.P.

6. ABHISHEK SHARMA
S/O SATISH KUMAR,
ROLL NO. 333377,
C/O S.P. UNA
(DELETED)

7. MANOJ THAKUR, S/O KUSHAL SINGH,
ROLL NO 332060, C/O S.P. UNA

8. HIMANSHU JASWAL, S/O NARESH KUMAR,
ROLL NO. 332507, C/O S.P. UNA

9. RAJAT KUMAR, S/O KAMAL KISHOR,
ROLL NO. 333244, C/O S.P. UNA

10. VIKAS KUMAR, S/O MOHINDER SINGH,
ROLL NO. 332591, C/O S.P. UNA

11 MANPREET SINGH, S/O SHINGARA SINGH,
ROLL NO. 332506, C/O S.P. UNA
(DELETED)

12. AMAN DEEP, S/O GURDIAL SINGH,
ROLL NO. 331143, C/O S.P. UNA

13. MANJEET, S/O KARAMA CHAND,
ROLL NO. 333228, C/O S.P. UNA

14. ROHIT, S/O RAVINER KUMAR,
ROLL NO. 332117, C/O S.P. UNA

15. DEEPANSHU KANT, S/O SHASHI KANT,
ROLL NO. 332142, C/O S.P. UNA

16. GOURAV, S/O RAJINDER PAL,
ROLL NO. 330796, C/O S.P. UNA

17. ANIL KUMAR, JAGJIWAN SINGH
ROLL NO. 333227, C/O S.P. UNA

18. DEEPAK KUMAR, S/O NARINDER KUMAR,
ROLL NO. 332497, C/O S.P. UNA

19. ROHIT NARYAL, S/O HOSHIAR SINGH,
ROLL NO. 330884, C/O S.P. UNA

20. SAHIL MINHAS, ROLL NO. 331238,
S/O KARNAL MINHAS

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARINDER THAKUR AND
MR. KAMAL KISHORE & GAURAV SHARMA,
DEPUTY ADVOCATES GENERAL
FOR R-1 TO R-5

MR. SANJAY PRASHAR, ADVOCATE
FOR R-7 TO R-10 AND R-12 TO R-20)

CIVIL WRIT PETITION
(ORIGINAL APPLICATION)
NO. 4354 OF 2020
DECIDED ON 11-03-2022

**Constitution of India, 1950**- Article 226- **Punjab Police (H.P. Amendment) Rules, 2011**- **H.P. Police Act, 2007**- Section 144- Recruitment in the Police Department- Petitioner appeared in the personality test after qualifying ground and written test but could not make it to the final merit list- Held- It is settled law that a process of selection cannot be challenged by an unsuccessful candidate by pointing to certain irregularities here and there in the process of which he was aware, once the result is not to his liking. Relief, in such a case, is to be declined by applying the principles of estoppel, acquiescence and/or waiver- Since it stands duly established on record that the petitioner before laying challenge to selection process had participated in selection process without any demur, now it is not open for him to lay challenge to selection process after having been declared unsuccessful that too on the bald and baseless allegations- Petition dismissed. (Para 18, 20, 21)

**Cases referred:**

Ashok Kumar and another vs. State of Bihar and others (2017) 4 SCC 357,
Madras Institute of Development Studies and another vs. K. Sivasubramaniyan and others (2016) 1 SCC 454;

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

**O R D E R**

Office of Director-General of Police, Himachal Pradesh vide communication dated 5.7.2017 (Annexure A-1) addressed to various offices of the Police Department, informed that the Government have accorded approval for filling up 1200 posts of Police Constables (1005 male, 195 female) through direct recruitment in the pay band of Rs. 59010-20200+Rs.190 Grade Pay. Besides this, 1500 posts of Constables (1200 male and 300 female) were also sought to be filled in through this recruitment process, which could not be filled in earlier due to non-availability of candidates. Annexure 'C' of said communication contains the schedule of recruitment process, Another document annexed with the Annexure A-1 by the petitioner reveals that under Clause 12. "personality test', it has been observed that the Government of Himachal Pradesh vide Notification No. Per(AP.B)(B)15)-5/2014 dated 17.4.2017 has discontinued/dispensed with the process of holding interviews in respect of direct recruitment for making recommendations for Class-III and IV posts/services under State Government with immediate effect. However, a note has been appended thereto stating that the conduct of personality test is subject to final decision of Himachal Pradesh Government and the candidates will be notified accordingly in due course.

35. Record reveals that the advertisement was issued on 1.7.2017 and last date for submission of applications was 21.7.2017 and in column No. 7, 'suitability-cum-personality test (interviews), it has been mentioned that subject to final decision of Himachal Pradesh Government, the candidates will be notified accordingly, in due course.

36. The petitioner belongs to Una District and for Una District, 59 posts were allocated in the general category. It is undisputed that the petitioner qualified the ground test, participated in the written test and secured 62 marks in total, as is reflected in Annexure A-2 and as such, having qualified the initial process, was called for personality test vide call letter dated 5.4.2018 (Annexure A-3). Petitioner appeared in the personality test but could

not make it to the final merit list, Annexure A-4. Though, the petitioner had secured 5th position, on the basis of ground and written tests, yet he was awarded 05 marks in the personality test with a view to accommodate some other person(s)., as such, he filed representation to the respondents Besides above, petitioner also claimed in the representation that it was brought to his notice that the personal interview has been dispensed with by the Government vide Notification dated 17.4.2017 (supra) (Annexure A-5). Since no heed, if any, was paid to the representation made by the petitioner and candidates selected in the final merit list were called for medical examination, petitioner approached the erstwhile Himachal Pradesh Administrative Tribunal at the first instance by filing OA No. 2304 of 2018, which, after abolishment of the Himachal Pradesh Administrative Tribunal, stands transferred to this Court and re-registered as CWPOA No. 4354 of 2020, praying therein for following main reliefs:

> "i. That the selections and appointment of any after filing of OA of the respondent no. 6 to 20, against the post of constable on the basis of personal interview is liable to be quashed.
> ii. That direction may be issued to the respondents re-draw the select on the basis of written as well as physical test not on the basis of personal interview.
> iii. That the respondents may be directed to select the candidates on the basis of physical test and written test while adhering the notification of the state government Annexure A -5.
> iv. That the respondents may very kindly be directed to consider the applicant for the post of constable keeping in view the merit of the applicant in the test.
> v. That the respondent no. 1 to 5 may be directed to place on record the roster point maintained by them, after perusal if found more than reservation is 50% may be quashed and set aside."

37. Precisely the grouse of the petitioner as emerges from the pleadings as well as submissions made by Ms. Sunita Sharma, learned senior counsel,

appearing for the petitioner, appears to be that since with the issuance of Notification dated 17.4.2017, (Annexure A-5) Government of Himachal Pradesh had dispensed with the procedure of conducting interview, final selection against posts in question, ought to have been made by the respondents on the basis of over all merit prepared on the basis of ground and written tests, wherein the petitioner was at Sr. No. 5. During arguments, learned senior counsel for the petitioner also invited attention of this court to the documents procured by the petitioner under Right to Information Act, which otherwise came to be placed on record as Annexure A-6 collectively alongwith rejoinder, to demonstrate that the entire selection process is a farce and selection committee had already decided to select certain persons. Learned senior counsel further argued that person at Sr. No. 49 of Annexure A-6 of rejoinder, namely Puneet Singh Dadwal though was absent but a bare perusal of award list prepared by the selection committee, at the time of selection clearly reveals that at the first instance, said person was awarded marks by all the members of the Committee, however after cutting, he was shown to be absent. Learned senior counsel for the petitioner further argued that it is not possible for all the members of the Committee to wrongly award marks to said person, while preparing the award list, as such, it is quite apparent from the perusal of Annexure A-6, that the selection process conducted pursuant to advertisement, was a total farce and same was conducted merely to attach legal sanctity to the selection process. Lastly, Ms. Sharma, learned senior counsel for the petitioner argued that seats of general category were allotted to candidates of reserved category and as such, general category candidates were left with 12 posts out of total seats allocated to them, as such, entire selection process stands vitiated on account of aforesaid illegality committed by the respondents, while making selection to the post in question.

38. Mr. Sudhir Bhatnagar, learned Additional Advocate General, supported the action of the official respondents and, while making this court peruse the reply filed by the State, contended that the entire selection was conducted strictly in accordance with law as well as Rules occupying the field and as such no interference is called for.

39. Having heard Learned Counsel appearing for the parties and perused the material available on record, this court finds that out of 778 posts of Constables (Male), 59 posts were allocated to Una District and petitioner being resident of Una, applied against the said posts. It is also not in dispute that the petitioner scored 62 marks in the ground test and written test but in the personality test, he was only awarded 5 marks, as a consequence of which, he could not find a place in the final merit list .

40. True it is that vide communication dated 17.4.2017 (Annexure A-5, Government of Himachal Pradesh ordered that selection to all Class III and IV posts of State Government would be made on the basis of merit of written examination or prescribed educational qualification followed by evaluation based on parameters contained in the Notification and there will be no interview, but the reply filed by the official respondents reveals that after issuance of aforesaid Notification, Director-General of Police, vide communication dated 22.6.2017 (Annexure R-2), sought certain clarification from the Government. It would be apt to take note of aforesaid communication, relevant portion of which is reproduced hereinbelow:

> "2. In this regard kind attention is invited to Govt. Notification No. PER(APB)B(15)-5/201 dated 17.4.2017 regarding discontinuing/ dispensing with the process of holding interviews in respect of direct recruitment for making recommendations for Class-III & Class-IV posts.
> 3. The post of Constable in Class-III in Police Department and its recruitment is governed under Punjab Police (Himachal Pradesh Amendment) Rules 2011. Clause 12 of Notification No. Home (A)A(3)1/2005-Part dated 11.3.2011 provides for Personality test consisting of 15 marks. Further Clause 12.2 provides that candidates

who poses NCC(C) Certificate & 2 additional marks for NCC (B) certificate.

4. In this regard it is submitted that the procedure for recruitment of Constables in the Police Department has been notified vide notification No. Home(A)A(3)1/2005 Part dated 11th Mar 2011 under Punjab Police Rules, 1934. It is further submitted that as per Section 144 (4) of the H.P. Police Act, 2007, the Punjab Police Rules are still applicable in the State of H.P. The Rules cannot be amended by way of executive instructions for which proper procedure has to be followed as various codal formalities are required to be completed which may take long time. Furthermore, the department had earlier moved a proposal for amendment in Punjab Police Rules and the Law Department had opined that further amendment in PPR 1934 is not advisable as such amendments made therein are per-se illegal and will not with stand the test of judicial scrutiny.

5. In view of above facts and time constraints, this department intends to carry out the recruitment as per existing provisions of Punjab Police (Himachal Pradesh Amendment) Rules 2011 unless the amendment is treated as ultra vires in view of the above opinion of law department. The proposed Recruitment Notice will carry a stipulation that "Interview will be subject to decision of the Government". However, in future the department shall conduct recruitment test as per the provisions contained in Notification No. Per(AP.B)B(15)-5/2014 dated 17.4.2017 after getting the above Rules amended, for which a separate proposal is appended as Annexure-A.

6. In view of above it is requested that this department may be allowed to conduct the recruitment of 1200 vacancies as sanctioned vide letter under reference on priority basis as per proposal indicated in para 5 above. So that the recruitment process can be initiated in a time bound manner. Therefore, an early decision in the matter is solicited.

7. It is further requested that the proposed amendment tin the Punjab Police (Himachal Pradesh Amendment) Rules 2011 as appended may kindly be considered and necessary amendment may kindly be carried out or clarification/decision issued at the earliest in larger public interest."

41. Careful perusal of aforesaid communication reveals that the Police Department apprised the Principal Secretary (Home) to the Government of Himachal Pradesh that the posts of Constables are Class III posts in the Police Department and its recruitment is governed under Punjab Police (Himachal Pradesh Amendment) Rules, 2011 and as per Clause 12.2 of the Notification dated 11.3.2011, personality test consisting of 15 marks is required to be conducted after ground test and written test.

42. In the aforesaid communication, Director-General of Police submitted that the procedure of recruitment to the posts of Constables in the Police Department has been notified in the Punjab Police Rules and, as per S.144 (4) of the Himachal Pradesh Police Act, Punjab Police Rules are still applicable in the State of Himachal Pradesh. He further submitted that the Rules cannot be amended by way of executive instructions, as such, till the time, Punjab Police Rules are amended, Department may be allowed to conduct recruitment to 1200 posts as per existing provisions of Punjab Police (Himachal Pradesh Amendment) Rules 2011 (Annexure R-2).

43. Vide communication dated 28.3.2018 (Annexure R-3), Secretary (Home) to the Government of Himachal Pradesh, advised the Director-General of Police to follow the earlier procedure and recruit Constables as per existing Rules and not as per Notification dated 11.3.2011 and thereafter, the Police Department conducted personality test of the persons, who had cleared ground and written test pursuant to selection process initiated pursuant to advertisement. Annexure 'C' of Annexure A-1 dated 5.7.2017, clearly reveals that the candidates applying against the post in question, were made aware with regard to suitability-cum-personality test (interviews) but it was subject to final decision of the Himachal Pradesh Government.

44. In the case at hand, respondent Department, after having conducted ground and written tests, put everything on hold till the time, clarification was received from the Government of Himachal Pradesh, vide communication

dated 28.3.2018 (Annexure R-3, page 50), whereby Department was permitted to conduct the selection process as per existing Rules notified vide Notification dated 11.3.2011.

45. In the aforesaid backdrop, grouse raised by the petitioner with regard to illegality committed by the respondent State by conducting suitability-cum-personality test (interviews), deserves outright rejection being devoid of any merit. No doubt, in terms of Notification dated 17.4.2017, selection to Class III and IV posts could be made on the basis of merit of written examination but even in that communication liberty has been reserved to the Department to conduct personality test/interview against the specific post(s), if same is absolutely essential, with prior concurrence of the Personnel and the Finance Departments. It is not in dispute that the post of Constable in the Police Department is a Class-III post and its recruitment is governed under the Punjab Police (Himachal Pradesh Amendment) Rules, 2011. Clause 12.2 of the Notification dated 11.3.2011 (Annexure R-3, Annexure A), provides for personality test consisting of 15 marks. As per S.144(4) of the Himachal Pradesh Police Act,, Punjab Police Rules are applicable in the State of Himachal Pradesh. Rules cannot be amended by way of executive instructions, rather, for that purpose, proper procedure is required to be followed.

46. Reply filed by the respondent-State reveals that the Police Department had earlier moved a proposal for amendment to Punjab Police Rules, but, at that time, Law Department opined that further amendment in Punjab Police Rules is not advisable as such, amendment made is per se illegal and will not withstand test of judicial scrutiny. In view aforesaid, respondent-Department had no option but to carry out recruitment process as per existing provisions of Punjab Police (Himachal Pradesh Amendment) Rules, 2011, which otherwise it could do in exceptional circumstances in terms of Clause 4 of Notification dated 17.4.2017 (Annexure A-5), with prior concurrence of the Personal and Finance Departments. Before conducting

personality test, respondent Department approached the Administrative Department, who, having examined the matter in light of the Rules, permitted the respondent Department vide communication 28.3.2018 (Annexure R-3) to fill up posts of Constables as per existing Rules notified vide Notification dated 11.3.2011, which clearly provided for personality test, as has been taken note herein above.

47. Since the Committee responsible for conducting interview/personality test, comprised of three members, it cannot be said that all of them were biased against the petitioner and purposely awarded lesser marks to ensure his ouster from the selection process. This Court, with a view to ascertain the correctness of the specific allegations of tampering in the record, summoned the original record, perusal whereof reveals that, at the first instance, candidate appearing at Sr. No. 49 Puneet Singh Dadwal, was awarded marks by the members of Selection Committee, but subsequently, he was shown absent. Though, learned senior counsel for the petitioner argued that bare perusal of mark list prepared by selection committee reveals that the selection list stood prepared in advance, wherein candidates, lower in merit, were awarded higher marks to ensure ouster of the candidates, who had secured more marks in the ground and written tests, but, having carefully perused the original record, this court finds that a specific note has been appended below the award/marks list that the person figuring at Sr. No. 49, Puneet Singh Dadwal, is absent and has been wrongly given marks.

48. However, this court need not go into that aspect of the matter since said Puneet Singh Dadwal was not selected for the post in question.

49. Another grouse raised by the petitioner is that candidates of reserve category have been selected against the posts meant for general category candidates. Respondent-State, in its reply has specifically stated that the selection has been made as per merit. Since the petitioner failed to specifically point out which of the candidates of reserved categories were selected against

posts meant for general category candidates, this court is unable to address that argument. However, the plea taken by learned Counsel appearing for the petitioner that a person is to be considered against the reserved category, under which he applies, is not in consonance with the latest law, wherein, a person of reserved category can be considered against general (un-reserved) category, if he is higher in merit. In view of above, this plea of the petitioner is also not tenable.

50. At this stage learned Additional Advocate General took an objection that the petitioner, having participated in the selection process, cannot be allowed to lay challenge to the selection process, after having remained unsuccessful.

51. It is settled law that a process of selection cannot be challenged by an unsuccessful candidate by pointing to certain irregularities here and there in the process of which he was aware, once the result is not to his liking. Relief, in such a case, is to be declined by applying the principles of estoppel, acquiescence and/or waiver. Reference in this regard can conveniently be made to the two recent judgments of the Hon'ble Supreme Court.

> "10. In **Madras Institute of Development Studies and another** vs. **K. Sivasubramaniyan and others**(2016) 1 SCC 454, the Hon'ble Supreme Court has held as under:
>
> > 12. The contention of the respondent no.1 that the short-listing of the candidates was done by few professors bypassing the Director and the Chairman does not appear to be correct. From perusal of the documents available on record it appears that short-listing of the candidates was done by the Director in consultation with the Chairman and also senior Professors. Further it appears that the Committee constituted for the purpose of selection consists of eminent Scientists, Professor of Economic Studies and Planning and other members. The integrity of these members of the Committee has not been

doubted by the respondent- writ petitioner. It is well settled that the decision of the Academic Authorities about the suitability of a candidate to be appointed as Associate Professor in a research institute cannot normally be examined by the High Court under its writ jurisdiction. Having regard to the fact that the candidates so selected possessed all requisite qualifications and experience and, therefore, their appointment cannot be questioned on the ground of lack of qualification and experience. The High Court ought not to have interfered with the decision of the Institute in appointing respondent nos. 2 to 4 on the post of Associate Professor.

13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment, turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.

14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.

15. In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC P.

591, para 15) "15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal vs. Prem Chand Singhvi, AIR 1957 SC 425 where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9) '9. ....It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of r raising the present technical point.' "

16. In Madan Lal & Ors. vs. State of J & K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p. 493, para 9) "9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview,

they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla 1986 Supp SCC 285, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, r the High Court should not have granted any relief to such a petitioner."

17. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16) "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p. 320, para 24) "24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had

waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

19. So far as the finding recorded by the Division Bench on the question of maintainability of the writ petition on the ground that the appellant Institute is a 'State' within the meaning of Article 12 of the Constitution, we are not bound to go into that question, which is kept open."

52. In **Ashok Kumar and another** vs. **State of Bihar and others** (2017) 4 SCC 357, a Bench of three Hon'ble Judges of the Hon'ble Supreme Court, has held as under:

"13. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla[4], this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar (2007) 8 SCC 100, this Court held that :

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same (See also Munindra Kumar v. Rajiv Govil (1991) 3 SCC 368 and Rashmi Mishra v. M.P. Public Service Commission (2006) 12 SCC 724)".

14. The same view was reiterated in Amlan Jyoti Borooah (2009) 3 SCC 227, where it was held to be well settled that

candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. In Manish Kumar Shah v. State of Bihar (2010) 12 SCC 576, the same principle was reiterated in the following observations: (SCC p.584, para 16) "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in Madan Lal v.State of J. and K. (1995) 3 SCC 486, Marripati Nagaraja v. State of Andhra Pradesh and Ors. (2007) 11 SCC 522, Dhananjay Malik and Ors. v.State of Uttaranchal and Ors.(2008) 4 SCC 171, Amlan Jyoti Borooah v. State of Assam (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (2009) 5 SCC 515."

16. In Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309, candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18) "18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

18. In Chandigarh Administration v. Jasmine Kaur[11], it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non- selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey (2015) 11 SCC 493,this Court held that: (SCC p.500, para17) :

"17. Moreover, we would concur with the Division Bench on one more point that the appellants had r participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

> This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subaramanyam's case (supra).".

53. Since it stands duly established on record that the petitioner before laying challenge to selection process had participated in selection process without any demur, now it is not open for him to lay challenge to selection process after having been declared unsuccessful that too on the bald and baseless allegations.

54. In view of the detailed discussion made herein above, this court finds no merit in the present petition and the same is dismissed. Interim directions, if any, stand vacated. Pending applications, if any, also stand dispose of.

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

Between:

1. SHIMLA COLLEGE OF EDUCATION, SHEETAL KUNJ, KAMLA NAGAR, SANJAULI, SHIMLA THROUGH ITS CHAIRMAN DR. R.K. SHANIL.
2. RAMESHWARI TEACHER TRAINING INSTITUTE SARABAI,KULLU DISTRICT KULLU, THROUGH ITS CHAIRPERSON DR. USHA SHARMA.
3. TRISHA COLLEGE OF EDUCATION, THAIN (JOL SAPPAR), DISTT. HAMIRPUR, THROUGH ITS CHAIRMAN, MR. RAJIV SHARMA.
4. ABHILASHI D.EL.ED. TRAINING INSTITUTE, NER CHOWK, DISTT. MANDI, THROUGH ITS SECRETARY, MR.NARENDER KUMAR.
5. KRISHMA EDUCATION CENTRE, NER CHOWK,DISTT. MANDI THROUGH ITS SECRETARY MR. LALIT PATHAK.
6. SVN COLLEGE OF EDUCATION, TARKWARI (BHORANJ), DISTT. HAMIRPUR, THROUGH ITS CHAIRMAN SH. N.K. SHARMA.
7. HAMIRPUR COLLEGE OF EDUCATION, RAM NAGAR, HAMIRPUR, DISTT. HAMIRPUR THROUGH ITS CHAIRMAN SH. KARNAL JAI CHAND.
8. VAID SHANKAR LAL MEMORIAL COLLEGE OF EDUCATION, CHANDI, DISTT. SOLAN, THROUGH ITS CHAIRMAN MR. CHANDER MOHAN.

9. JAI BHARTI COLLEGE OF EDUCATION, LOHARIAN, DISTT. HAMIRPUR, THROUGH ITS CHAIRMAN MR. J.K. CHAUHAN.
10. JAGRITI TEACHER TRAINING COLLEGE DEODHAR, MANDI, DISTT. MANDI THROUGH ITS CHAIRMAN DR. VEENA RAJU.
11. VIJAY MEMORIAL COLLEGE OF EDUCATION BHANGROTU, DISTT. MANDI, THROUGH ITS CHAIRMAN MR. GAURAV MARWAH.
12. RAJ RAJESHWARI COLLEGE OF EDUCATION, CHORAB (BHOTA) HAMIRPUR, THROUGH ITS CHAIRMAN SH. MANJEET DOGRA.
13. KSHATRIYA COLLEGE OF EDUCATION, KATHGARH ROAD, CHANOUR, INDORA,DISTRICT KANGRA, THROUGH ITS CHAIRMAN SH. SHATRUJEET.
14. KLB DAV COLLEGE FOR GIRLS, PALAMPUR, DISTT. KANGRA, THROUGH ITS DIRECTOR DR. N.D. SHARMA.
15. KULLU COLLEGE OF EDUCATION, VILLAGE BOHGANA P.O. GARSA, DISTT. KULLU THROUGH ITS CHAIRMAN MR. SURENDER SOOD.
16. R.C. COLLEGE OF EDUCATION, DHANOTE, P.O. ADHWANI (DEHRA) DISTT. KANGRA THROUGH ITS CHAIRMAN MR. JEEVAN.
17. SHIKHA BHARTI INSTITUTE OF EDUCATION, TRAINING & RESEARCH, SAMOOR KHURD (UNA) THROUGH ITS CHAIRMAN MR. NIRMAL.
18. SHANTI COLLEGE OF EDUCATION KAILASH NAGAR, NAKROH (UNA) THROUGH ITS CHAIRMAN SH. VED PRAKASH.

…PETITIONERS

(BY MR. SHRAWAN DOGRA, SENIOR ADVOCATE WITH MR. HARSH KALTA AND MS. SUMAN THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002, H.P.
2. DIRECTOR, ELEMENTARY EDUCATION, GOVERNMENT OF HIMACHAL PRADESH SHIMLA-171001.
3. H.P. BOARD OF SCHOOL EDUCATION, DHARAMSHALA, DISTRICT KANGRA,H.P. THROUGH ITS SECRETARY.

…RESPONDENTS

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL WITH MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, MR. VINOD THAKUR, MR. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALs, MR. YUDHVIR SINGH THAKUR, DY. ADVOCATE GENERAL, FOR THE RESPONDENTS-STATE)
(BY MR. V.B. VERMA, ADVOCATE, FOR RESPONDENT NO. 3.)

CIVIL MISCELLANEOUS APPLICATION
NO. 4734 OF 2022 IN CIVIL WRIT PETITION
NO. 4113 OF 2019
DECIDED ON 02-05-2022

**Constitution of India, 1950-** Article 226- Application for recalling order dated 10.01.2020 to protect the career of students already admitted to their respective courses- Held- The interest of the students who have been admitted pursuant to the interim order passed by this Court, needs to be protected specially when the students have, on the basis of interim order pursued more than two years of the courses- Application allowed. (Para 16, 17)

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

**O R D E R**

The instant application has been filed for the grant of following relief(s):

"*It is therefore humbly prayed that this application may kindly be allowed and the order dated 10.1.2020 passed in the present petition may be recalled and modified to the extent that the admissions of the students who have already been admitted to their respective courses by virtue of the said interim order may be protected in light of the subsequent directions issued by the Hon'ble Supreme Court.*"

2. The applicant/petitioner has filed this application for recalling order dated 10.1.2020, passed in CMP No. 14645 of 2019 and for seeking necessary directions in view of the subsequent developments in the interest of justice.

3. During the pendency of the instant petition, the petitioner moved an application for interim directions bearing CMP No. 14645 of 2019, seeking following reliefs:

> (i) *Pending final adjudication of the present petition the respondent Authorities may be directed to conduct the third round of counselling forthwith;*
> *(ii) In case of any seats still remaining vacant after the third round of counselling the petitioner institution may kindly be allowed to fill the remaining vacant seats from amongst candidates eligible as per NCTE regulations in consonance with the judgment dated 20.9.2010 of this Hon'ble Court in CWP No. 5728 of 2010 and commence the current academic session without further delay subject to the outcome of the present petition;*
> *(iii) The applicant/petitioner institutes may be allowed to fill up management quota up to the extent 20% to 40% of the sanctioned seat strength of each institute and such admissions may be allowed to be made from any source and not insisting upon qualifying the entrance test for such candidates being considered against management quota in peculiar situation, subject however, that such candidates possess essential qualifications as prescribed by NCTE Norms."*

4. The application came up for consideration before this Court on 10.1.2022 when the following order came to be passed:

> "Heard. This application has been filed for the following reliefs :
>
> 1. ***Pending final adjudication of the present petition the respondent Authorities may be directed to conduct the third round of counseling forthwith;***

2. ***In case of any seats still remaining vacant after the third round of counseling the petitioner Institutions may kindly be allowed to fill the remaining vacant seats from amongst candidates eligible as per NCTE regulations in consonance with the judgment dated 20.9.2010 of this Hon'ble Court in CWP No.5728 of 2010 and commence the current academic session without further delay subject to the outcome of the present petition;***

3. ***The applicant/petitioner Institutes may be allowed to fill up management quota up to the extent 20% to 40% of the sanctioned seat strength of each Institute and such admissions may be allowed to be made from any source and not insisting upon qualifying the entrance test for such candidates being considered against management quota, in peculiar situation, subject however, that such candidates possess essential qualifications as prescribed by NCTE Norms.***

**2.** It appears that earlier in similar circumstances, a Coordinate Bench of this Court in CWP No.5728 of 2019, titled H.P. B.ED. College Association and ors. vs. State of H.P. & anr, decided on 20.9.2010 (Annexure P-5) has passed the following directions :

***"The learned counsel for the petitioners submits that since the admissions are made in respect of vacant seats and since despite all efforts taken by the University, there are no candidates, there may not be further restriction in terms of the prospectus in the matter of admission in the college. The learned standing counsel for the University vehemently contends that the admission can be made only in terms of the prospectus and whatever restriction imposed in the prospectus should be followed by the College concerned as well. We are afraid that the stand taken by the University cannot be appreciated. Once admission has been closed in terms of the prospectus and since the efforts taken by the University itself for filling-up the vacant seats not yielding any fruits and still seats remaining vacant, there is no point in putting any rigor or restriction in the matter of admission. This does not mean that Institutions should not comply with statutory requirements in terms of the qualification and age. Hence, it will be open, in the above circumstances to make admission to any slot subject to the fulfillment of the statutory condition regarding qualifying and age. In the above circumstances, we dispose of the writ petition as follows :-***

***It will be open to the petitioners to admit any student in respect of the seats subject to the candidate fulfilling the required qualifications and age limit.***

> ***However, we make it clear that above process shall be completed on or before 8.10.2010, since it is submitted that even if the students start the first day on 8.10.2010, they will be in a position to complete the required number of teaching days prior to their examination. The matter will be duly processed by the concerned College as well as the University. As soon as the admission is made, the matter will be duly intimated by the College concerned to the University. At any rate, we further make it clear that the intimation shall be given to the University on or before 20.10.2010 and it will be certainly open to the University to verify the application forms of the students to satisfy as to whether the students have fulfilled the requirements in terms of their qualification and age limit."***

**3.** A coordinate Bench of this Court in CMP No.10419 of 2019, in CWP No.2664 of 2019, titled ***Abhilashi Ayurvedic College and Research Institute vs. Union of India and others***, decided on 27.11.2019, in identical circumstances, after relying upon the judgments of Hon'ble High Courts of Karnataka, Punjab and Haryana and also placing reliance on certain directions of Hon'ble High Courts
of Uttrakhand, Allahabad and Rajasthan, have permitted the institutes to carryout the admissions, subject to the candidates' possessing essential qualifications, as prescribed under the norms. However, when similar issue came up before this Court in CWP No.7688 of 2013 in case titled ***H-Private Universities***

***Management Association (H-PUMA) vs. State of Himachal Pradesh and others***, decided on 23.7.2014, this Court did not accede to the request of the institutions for permitting them to carryout admissions at their own level and it was observed that as under :

> **"It is in this background that this Court is required to consider as to whether the CET in this case violates the freedom of the institutions under Article 19 (1) (g) or whether such regulatory control is permissible. It is not disputed that the CET prescribes a fair equitable standard for judging the merit of the students. The only difficulty which the petitioners express is that in this regulatory process, the seats in their respective colleges are lying vacant due to non-availability of the students because it is claimed that the total number of sanctioned seats for B. Tech courses in the country (government as well as private including IIT and NITs) is 65 lakh : 20 thousand, total number of All India applicants for JEE Test 2014 is 13 lakh : 67 thousand, total number of sanctioned seats for B Tech courses in Himachal (Government and HPU) is 540 and 120 respectively, total number of sanctioned seats for B Tech Courses in Himachal (Private Institutions) is 7680 in Private Engineering Colleges and 7820 in Private Universities, total approx. 15,000 and admissions made in B Tech Courses in Himachal (Private Colleges like petitioners) year 2012-13 through JEE 1049, year 2013-14 through JEE 429 and year 2014-15 less than 500 students have registered themselves with H.P. Technical University for admission in institutions in the State of H.P. i.e. Government B Tech Courses offering Colleges and Private B Tech Courses offering Colleges out of which also many may finally not opt for the seats available in**

**Himachal. Therefore, in this background, it is pleaded that the petitioners cannot be asked to perform the impossible and, therefore, should be permitted to devise a merit based process themselves rather than permitting the State to impose its determination of merit. This according to the petitioners in fact amounts to an unreasonable interference in its right to administer the institutions.**

**23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in Visveswaraiah Technological University (supra) and reiterated in Mahatma Gandhi University (supra).**

**24. The learned counsel for the petitioners have strenuously argued that the complete answer to the proposition involved in the case has been answered in its favour vide recent decision in Christian Medical College (supra) and, therefore, the petitions ought to be allowed as prayed for. He particularly relied upon the following observations:**

**"……. However, in cases of unaided institutions, the position is that except for laying down standards for maintaining the excellence of education, the right to admit students into the different courses could not be interfered with. In the case of aided minority institutions, it has been held that the authority giving aid has the right to insist upon the admission**

**of a certain percentage of students not belonging to the minority community, so as to maintain the balance of Article 19 (2) and Article 30 (1) of the Constitution. Even with regard to unaided minority institutions, the view is that while the majority of students to be admitted should be from the minority community concerned, a certain percentage of students from other communities should also be admitted to maintain the secular character of education in the country in what has been described as a "sprinkling effect".**

**25. The aforesaid observations cannot be read out of context because the Hon'ble Supreme Court in this case was dealing with the validity of regulations framed by the MCI which mandated the Combined Entrance Test (CET) for all medical colleges i.e. aided as well as unaided. The Hon'ble Supreme Court was primarily concerned with a situation where the parent enactment did not provide for or enable such regulation to be framed and in this background, the Hon'ble Supreme Court held that such regulations were not permissible and that any regulation which had the effect of take-over of seats, or reserving some part of unaided college's intake, would be an impermissible nationalization. This is not the fact situation obtaining in the present case.**

**26. Unlike in Christian Medical College, where the rights of minorities were involved, the present case is confined to the applicability to the scope and ambit of Article 19 (1) (g) and for this purpose, we have to fall back to the law laid down by the larger Bench decisions of the Hon'ble Supreme Court in T.M.A. Pai Islamic Academy and P.A. Inamdar which have recognized the State's power to direct a joint**

> **entrance examination, so long as it does not nationalize the intake "and result in imposition of a reservation policy". The equity and excellence in academic institutions have to be maintained and what better way can it be maintained than by ensuring that each students competes in the same examination i.e. CET so as to ensure that in terms of the access to education (equity) and merit of students (excellence) a common platform is that for admissions in to professional colleges."**

**4.** Evidently, there is a conflict in various judgments, more particularly the judgments rendered in CWP No.5728 of 2010, titled ***H.P. B.ED. College Association and ors. vs. State of H.P. & anr*** (Annexure P-5) with that of the judgment rendered by another Bench in CWP No.7688 of 2013, titled ***H-Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh*** and others alongwith CWP No.840 of 2014, titled ***Private Technical Institution's Association Himachal Pradesh and others vs. State of Himachal Pradesh and others.***

**5.** At this stage, we are only concerned about the admissions and there is also an order governing the field passed by the coordinate Bench in CMP No.10419 of 2019 in CWP No.2664 of 2019, titled Abhilashi Ayurvedic College and Research Institute vs. Union of India and others, therefore, we deem it proper to adopt the course that has been so taken by the coordinate Bench in Abhilashi Ayurvedic College and Research Institute's case (supra) and in *interim* direct that it shall be open to the petitioners-institutes to fill up the unfilled seats, but only from the candidates who possess the essential qualifications, as prescribed by NCTE norms.

**6.** This order shall not only be subject to the final outcome of the petition and any such further orders, which the appropriate Bench may pass from time to time.

> **7.** In addition to the aforesaid, it will be the sole responsibility of the petitioners-institutes to apprise each and every student about the pendency of the petition and admissions being made, subject to further orders that may be passed in the matter.
>
> **8.** Needless to say, the same principle will apply to the management seats also.
>
> **9.** Since there is an apparent conflict between the various judgments rendered by two different Benches of this Court, therefore, the Registry is directed to place the matter before Hon'ble the Chief Justice for constituting a larger Bench to resolve the issue.
>
> **10.** It is made clear that the students, so admitted on the basis of the order passed by this Court, shall not be entitled to claim any equity, much less any right, in the eventuality of admissions are set aside."

5. Since the petitioner-Institutes were permitted to fill up unfilled seats, but only from the candidates who possessed the essential qualifications, as prescribed by NCTE norms, they proceeded to fill up such seats.

6. Likewise, a Coordinate Bench of this Court in CMP No. 10419 of 2019 in CWP No. 2664 of 2019, titled as **"Abhilashi Ayurvedic College and Research Institute vs. Union of India and others"**, decided on 27.11.2019, in identical circumstances and after placing reliance on the orders passed by Punjab and Haryana High Court in CWP No. 23710 of 2019, case titled as, **"Federation of Pvt. Self Financial Ayurvedic Colleges Association Vs. Union of India"**, decided on 18.12.2019 and order passed by Karnataka High Court in W.P. No. 41486 of 2018, case titled as, **"Karnataka State Ayush Med.Colleges Fed. Versus Union of India"** decided on 11.12.2020, permitted the institutes to carry out admissions, subject to the candidates' possessing essential qualifications, as prescribed under the norms.

7. As regards the interim orders passed by Punjab & Haryana High Court, the same was set aside at the time of final adjudication and the Court dismissed the claim of the petitioners therein and consequently the admissions of the students, which were given on the basis of interim order were held to be illegal and unsustainable vide judgment dated 18.12.2019.

8. The aggrieved parties appealed against the judgment dated 18.12.2019 before the Hon'ble Supreme Court in Civil Appeal No. 603 of 2020, which was finally adjudicated on 20.2.2020 by the Hon'ble Supreme Court whereby it dismissed the appeal and affirmed the decision of the High Court partly, but after taking into consideration the number of the students, who had already been admitted to the Courses, based upon interim directions passed by the High Courts, the interest of such students was protected and it was directed that the students be permitted to continue with their courses.

9. Placing reliance on the directions issued by Hon'ble Supreme Court, the High Court of Karnataka also disposed of WP No. 41485 of 2018, vide judgment dated 11.12.2020, protecting the admissions of similarly situated students, admitted on the basis of interim orders passed by that Court.

10. It is vehemently argued by Mr. Shrawan Dogra, Senior Advocate assisted by Mr. Harsh Kalta, Advocate that the order passed by this Court, whereby students were permitted to be admitted made clear that no equity muchless right would accrue in favour of the students, so admitted on the basis of interim order, was earlier to the order passed by Hon'ble Supreme Court on 20.2.2020.

Now that the Hon'ble Supreme Court has itself protected the interest of students who were given admissions on the basis of interim orders of the various high Courts, it would be just, fair and equitable that same indulgence is also shown by this Court in the present case.

11. We have heard learned counsel for the parties and gone through the findings recorded by the various Courts.

12. At the outset, it needs to be noticed that this Court vide its order dated 10.1.2020 after noticing the conflict of decision in the judgment rendered by this Court, it referred the matter to the Full Bench and till such decision permitted the institutes to fill up the unfilled seats, but only from the students possessing/fulfilling the essential qualification, as prescribed by the NCTE norms.

13. The question before Full Bench was whether the university was authorized to conduct the counseling and allocate the students to B.Ed. Colleges, if seats remain vacant, where the candidates are available otherwise than by counseling. A Division Bench of this Court in CWP No. 5728 of 2010, titled as "H.P. B.Ed. College Association and others versus State of H.P. and another" had held that there is no point in putting any rigor or restriction in the matter of admission. However, another Division Bench of this Court in CWP No. 7688 of 2013, titled as "H.P. Private Universities versus State of H.P. and others, in its judgment, authored by one of us (Justice Tarlok Singh Chauhan) held to the contrary as follows:

> "The equity and excellence in academic institutions have to be maintained and what better way can be maintained than by ensuring that each students competes in the same examination i.e. CET so as to ensure that in terms of the access to education (equity) and merit of students (excellence) a common platform is that for admissions into professional colleges."

14. The Hon'ble Full Bench, vide its judgment dated 6.4.2022 held the judgment rendered in CWP No. 5728 of 2010 as not laying down good law, whereas the judgment rendered in CWP No. 7688 of 2013 was held to be in tune with the settled proposition of law on the subject and further held to be correctly decided.

15. It is because of the decision of the Full Bench that the admission of the students made on the basis of interim order is in jeopardy as these admissions admittedly had been carried out on the basis of judgment rendered in CWP No. 5728 of 2010, which has now been held to be not laying down the correct law.

16. Having considered the issue minutely, we are of the considered opinion that in view of the orders passed by Hon'ble Supreme Court and also by Karnataka High Court, the interest of the students who have been admitted pursuant to the interim order passed by this Court, needs to be protected. More especially when the students have, on the basis of interim orders passed by this Court, pursued more than two years of the courses. Not showing indulgence at this stage will cause extreme hardship to such students, apart from irreperable loss and injury and their entire careers will be at stake.

17. In view of the given facts and circumstances of the case, We deem it proper to recall para-10 of the order dated 10.1.2022 and modify the same to the extent that the students, who have already been admitted to their respective courses by virtue of interim order dated 10.1.2022, are ordered to be protected. Consequently, the application is allowed and the same is disposed of.

**CWP No. 4113 of 2019**

18. The instant petition has been filed for the grant of following relief(s):

i)That decision No. 2 and Decision No. 3 taking in the impugned meeting dated 22.10.2019 (Annexure P-4) may be quashed and set aside;

ii) That respondents may be directed to implement judgment dated 20.9.2010 in CWP No. 5278 of 2010 in letter and spirit by applying the same to the admission to the present course of D.EI.Ed. for the current session and in future also;

iii) That the petitioner Institutes may be permitted to fill up the vacant seats remaining after holding of third counselling out of the candidates fulfilling the essential eligibility conditions as prescribed by NCTE, without insisting for qualifying the entrance test held by respondents in peculiar situation;

iv) That petitioner institute may be allowed to fill up to 20% to 40% of the sanctioned seats for the course of D.Ei.Ed. as Management seats subject to fulfilling the essential eligibility conditions as prescribed by NCTE, without insisting for qualifying the entrance test held by respondents in peculiar situation."

19. Since the petition has otherwise served its purpose, therefore the same is disposed of accordingly in view of the orders passed in CMP No. 4734 of 2022, making it once again clear that the admissions of the students, who have been admitted on the basis of interim order dated 10.1.2020, shall remain protected and they shall be allowed to pursue their respective courses without any further hindrance.

20. Further, it is made clear that since this order is being passed in view of the peculiar facts and circumstances of the instant case, therefore the same shall not be treated as a precedent. The pending application(s), if any, are also disposed of.

**BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C. J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.**

Between:-

1. STATE OF H.P.
THROUGH PRINCIPAL SECRETARY (AGRICULTURE)
WITH HEADQUARTERS AT SHIMLA-2
(H.P.)

2. THE DIRECTOR OF AGRICULTURE

WITH HEADQUARTERS AT
SHIMLA, H.P.

.. APPELLANTS

(BY MS. RITTA GOSWAMI,
ADDITIONAL ADVOCATE GENERAL)

AND

SMT. AKALMANI
WIFE OF SH. SUKH SEN,
RESIDENT OF BRAILING, P.O. KOTHI,
TEHSIL KALPA, DISTRICT KINNAUR,
H.P.
PRESENTLY SERVING UNDER
AGRICULTURE OFFICER
RECKONG PEO, DISTRICT KINNAUR,
H.P.

RESPONDENT

(NEMO)

Letters Patent Appeal No. 68 of 2022
Decided on 19-0-2022

**Letters Patent Appeal** - Ld. Single Judge while allowing petition filed by the respondent directed the State to grant work charge status to respondent from the date of completing ten years of work- Held- Daily wage employee, who has completed requisite period in terms of policy framed by the Government for conferment of work charge status shall be entitled for such benefit, even in those departments, where work charge establishment has ceased to exist- No illegality or infirmity in judgment passed by Ld. Single Judge- Appeal dismissed. (Para 8, 9)

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This appeal coming on for orders this day, **Hon'ble Mr. Justice Sandeep Sharma**, delivered the following:

**J U D G M E N T**

Instant letters patent appeal lays challenge to judgment dated 3.8.2021 passed by a learned Single Judge of this court in CWPOA No. 6159 of 2019 titled Akalmani v. State of H.P. and another, whereby learned single Judge, while allowing the petition having been filed by the respondent-herein directed the appellant-State to grant work charge status to the respondent from the date of her completing ten years of work subject to completion of 240 days in each calendar year in terms of policy dated 6.5.2000 and in terms of judgment passed by a Division Bench of this court in **Gauri Dutt** v. **State of HP**, CWP No. 778 of 2006, decided on 29.12.2007.

11. Precisely, the facts of the case as emerge from the record are that respondent was appointed on daily wage basis in the appellant Department with effect from 11.4.1990 and thereafter she continued to work uninterruptedly to the entire satisfaction of the appellant Department for more than 30 years with 240 days in each calendar year and as such, became entitled to be granted work charge status in terms of policy framed by the appellant State from time to time. Since despite repeated requests, department failed to do the needful, respondent was compelled to approach erstwhile Himachal Pradesh Administrative Tribunal by way of Original Application, which on abolition of learned Tribunal below came to be transferred to this court and re-registered as CWPOA No. 6159 of 2019, seeking grant of work charge status from the date of completion of ten years service as daily wager with 240 days in each calendar year.

12. Aforesaid prayer made on behalf of respondent came to be denied by appellant on the ground that no work charge cadre is available with the Department. Learned single Judge of this court after having scanned entire record and perused judgment rendered by Division Bench of this court in **Gauri Dutt** supra allowed the writ petition and directed the appellant to confer work charge status upon the respondent from the date she completed ten years service on daily wage basis with 240 days in each calendar year. Since the respondent filed the petition after an inordinate delay i.e. 21.12.2015, learned single Judge restricted the arrears to three years prior to filing of the petition.

13. Having heard Ms. Ritta Goswami, learned Additional Advocate General and perused the material available on record vis-à-vis reasoning assigned in the impugned judgment passed by learned Single Judge, we do not see any illegality or infirmity in the judgment and no interference is called for.

14. Though, Ms. Ritta Goswami, learned Additional Advocate General, while contesting the impugned judgment passed by learned single Judge, vehemently argued that since there was no work charge establishment in the Agriculture Department, there was no occasion if any, for the Department concerned to confer work charge status upon the respondent from the date she completed ten years service on daily wage basis, but it is not in dispute that the respondent before claiming work charge status had completed ten years service as Beldar by working for 240 days in each calendar year.

Otherwise also, pleadings adduced on record by appellant nowhere suggests that it was able to dispute that respondent worked continuously for ten years as Beldar with 240 days in each calendar year and as such, she had become entitled for conferment of work charge status from the date she had completed ten years daily wage service in the year 2000. As per scheme dated 6.5.2000, work charge status was to be conferred upon a person having completed ten years daily wage service with 240 days in each calendar year.

15. Another contention raised by appellant Department that since there was no work charge establishment in the Agriculture department, there was no occasion for the appellant to confer work charge status, has no merit and has been rightly rejected by learned single Judge while passing impugned judgment.

16. Division Bench of this court in **Gauri Dutt** supra has categorically held that that the scheme, as presented by the State of H.P. to the Apex Court, was made applicable to all the daily rated employees in all the departments in H.P and as such, it is held that scheme is applicable to all daily wage employees working in any department of State of Himachal Pradesh

> "[1] By this judgment we are disposing of the aforesaid batch of writ petitions since the following common questions of law arise for decision in these petitions.
>
> 1. Whether the scheme of putting the workers on work charged basis as approved by the Apex Court in Mool Raj Upadhyaya's case is applicable to those daily waged

employees who had not completed minimum of 240 days of service in a calendar year as on 31st December, 1993?

2. If the answer to the first question is in the negative, what will be the process of regularization of services of those employees who had not completed 240 days of service in a calendar year as on 31st December, 1993 or had joined service after Ist January, 1994?

3. Whether the scheme, as approved by the Apex Court, in Mool Raj Upadhyaya's case, is only applicable to the employees of the Irrigation and Public Health Department and Public Works Department of the State of Himachal Pradesh or is applicable to all the daily rated employees working under the Government of H.P.?

4. Where if an employee has rendered service on daily waged basis on 2 separate posts in lower and higher scales, can the employee be given benefit of the service rendered by him in the lower scale and be regularized in the higher scale by combining the two services after 10 years?

[17] Under para 4 of the scheme the State was under an obligation to regularize all daily waged/muster roll workers whether they had joined prior to 31.12.1993 or thereafter. The State has framed a scheme in this behalf on 6th May, 2000. In our opinion those employees who are not governed by the direction given in Mool Raj Upadhyaya's case as set out by us above, shall be governed by the scheme of 2000. The second question is answered accordingly.

[18] The State of H.P. has also raised a plea that the scheme in Mool Raj Upadhyaya's case is only applicable to the employees of the IPH and PWD departments of the State of H.P. and is not applicable to other employees. We have already quoted para 6 of the affidavit of Mr. Subramanyam which clearly shows that the

> scheme, as presented by the State of H.P. to the Apex Court, was to be applicable to all the daily rated employees in all the departments in H.P. In view of the affidavit of Mr. Subramanyam, the State cannot now urge that this scheme is not applicable to other departments. In answer to the third question, it is held that the scheme is applicable to all daily waged employees working in any department of State of H.P."

17. After passing of judgment in Gauri Dutt supra, Division Bench in CWP No. 3111 of 2016, titled **State of HP and Ors**. vs. **Ashwani Kumar**, decided on 10.5.2018 has categorically held that that work charge establishment is not a pre-requisite for conferment of work charge status, meaning thereby that the daily wage employee, who has completed requisite period in terms of policy framed by the Government for conferment of work charge status shall be entitled for such benefit, even in those departments, where work charge establishment has ceased to exist.

18. Consequently, in view of above we do not see any illegality or infirmity in the judgment passed by learned Single Judge and as such, the same is upheld. Appeal stands dismissed alongwith pending applications, if any.