THE

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HIMACHAL SERIES, 2021

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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1966- Section 37- Application under Section 34(3) of the Act for condonation of delay in filing the objections under Section 34 of the Act stood dismissed by the Ld. District Judge, Shimla- Held- Party intending to file objections under Section 34 of the Act, was under obligation to file the same within three months in terms of provisions contained under Section 34(3) of the Act- Appellant filed objections beyond the period of three months from passing of the arbitration award- Appeal dismissed. (Para 5, 11 & 12) Title: State of H.P. vs. Sanjay Chauhan Page-345

Arbitration and Conciliation Act, 1966- Section 37- Application under Section 34(3) of the Act for condonation of delay in filing the objections under Section 34 of the Act stood dismissed by the Ld. District Judge, Shimla- Held- Party intending to file objections under Section 34 of the Act, was under obligation to file the same within three months in terms of provisions contained under Section 34(3) of the Act- Appellant filed objections beyond the period of three months from passing of the arbitration award- Appeal dismissed. (Para 5, 11 & 12) Title: State of H.P. & another vs. Sanjay Chauhan Page-354

Arbitration and Conciliation Act, 1966- Sections 34 & 37- **Limitation Act, 1963**- Section 4- Aggrieved and dissatisfied with award appellants had preferred objections under Section 34 of the Act before the Ld. District Judge along with an application for condonation of delay- Application was dismissed- held- In case of objections under Section 34 of the Act benefit of exclusion of period of vacation/holidays of Court would not be applicable where three months have expired prior to closure of Court and 30 days are expiring during closure of Court- Petition dismissed. (Para 11, 12 & 13) Title: State of H.P. vs. Sanjay Chauhan Page-340

Arbitration and Conciliation Act, 1996 -- Section 37 -- Appellant aggrieved by the judgment dated 06.04.2021 passed by Ld. District Judge Shimla in arbitration case, where by application filed by him under section 36 of Arbitration and Conciliation Act for condonation of delay in filing the

objections under section 34 (3) of Arbitration and Conciliation Act against award dated 01.10.2019 had been dismissed – Held -- Party intending to file objections under Section 34 of Arbitration and Conciliation Act was under obligation to file it within the period of 3 months as provided under section 34 (3) of the Act -- Application filed beyond 3 months period for setting aside the award mentioned in sub-section 2 of Section 34 of the Act, hence rightly dismissed -- Appeal found devoid of merits and dismissed. (Paras 8 & 9) Title: State of H.P. & another vs. Bal Krishan Page-226

'C'

Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Rule 19 – Exercise of powers – Illegal termination – Entitlement for back wages – Held – The question of back wages is to be decided by the concerned authority in accordance with law. [Para 5] Title: Jai Nand vs. State of H.P. Page-629

Civil Procedure Code, 1908 – Order 1 Rule 8-A -- Applicants being residents of Village Manjhala Goura sought permission to present their opinion by joining and taking part in the proceedings alleging that, they are having the shares and as such are interested persons in the proceedings -- Suit filed by the plaintiffs Appellants has been dismissed by the Ld. Trial Court as well as the Ld. Appellate Court on the ground of vestment of property with state of Himachal Pradesh under Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 -- Appellants alleged that Ld. Civil Court had no jurisdiction to entertain the suit as its jurisdiction has been barred -- Appellants challenged construction of public park on the ground that the land was not legally vested in state of Himachal Pradesh – Held -- Rule 8-A has been inserted by the amendment of 1976, empowering the Court, to permit a person or body of persons interested in question of law in issue, in any suit to present his or its opinion before the court and to take part in proceedings in the suit when it is necessary in the public interest -- Respondents are not going to be prejudice in case the applicants are permitted to participate in the proceedings in view of provision contained in Order 1 Rule 8-A – CPC -- Application allowed. (Paras 5 & 7) Title: Om Parkash & others vs. State of H.P. & others Page-315

Civil Procedure Code, 1908 – Order 21, Rule 111 – Petitioner has sought the

directions for the recovery of balance fees from respondent – Held – In view of interdicts imposed by the Statute, the regulatory procedure to fix the fee was taken out of hands of execution petitioner and other educational institutions and was instead vested in independent authorities and further the mandate of judgment is binding on the petitioner – The objections raised in execution petitions lacks merits and are dismissed – The private respondents are directed to pay due and admissible amount of arrears of fee to petitioner within three months, failing which petitioner shall be at liberty to execute the order in accordance with part – C, Rule 16, Writ Jurisdiction (High Court of Himachal Pradesh) Rules, 1997. [Para 34] Title: Bhojia Dental College & another vs. State pf H.P. & others **(D.B.)** Page-591

Civil Procedure Code, 1908 - Section 100 - Regular Second Appeal -- Limitation – First Appeal filed to challenge the judgment and decree passed by Ld. Civil Judge, Senior Division, Mandi, District Mandi, whereby the suit filed by the plaintiff was decreed, which was dismissed – In Regular Second Appeal both judgment and decrees assailed - Held - There is not a single word in the entire judgment passed by Ld. First Appellate Court on the point of limitation - Being First Appellate Court the pleadings and the evidence was required to be scrutinized and the decision was required to be based upon it - The issue of limitation not properly decided by the Trial Court as well as Ld. Appellate Court so the pleadings and the evidence in the judgment are miss appreciated - Appeal allowed as a result of judgment and decrease passed by the Ld. Courts set aside and the case remanded back to Ld. Trial Court to decide the case afresh. (Paras 12 & 13) Title: M/s S.K. Vipan Kumar Karyana Merchand And Commission Agent vs. Jogi Ram Page-281

Civil Procedure Code, 1908 – Section 100 – Regular Second Appeal -- Concurrent findings -- Appellant contended that the provisions of Order 7 Rule 17 CPC have not been complied with so the judgment passed by Ld. Trial Court, whereby the suit filed by the plaintiff has been decreed for Rupees 72,385/- with interest is not proper and the subsequent judgment passed by Ld. First Appellate Court in Appeal whereby judgment of Ld. Trial Court was upheld is also not proper – Held - Appellant contended that provisions of Order 7 Rule 17 not complied with, but bill, when exhibited and the copy of ledger when produced not disputed by him — Plaintiff successfully proved by bill and ledger entry that he sold Steel / Sariya worth Rupees 72,385/- in favour of the defendant on credit basis for which payment has not been

received by the plaintiff firm -- Under Section 100 CPC High Court cannot upset concurrent findings of Ld. Courts below unless same prove to be perverse and in this case the judgments of the Ld. Courts below are based upon proper appreciation of evidence -- Appeal dismissed. (Paras 10, 11 and 14) Title: Kiran vs. M/s Verma Trading Company Page-306

Closure of Defence evidence -- Petitioner felt aggrieved by the order of the Ld. Trial Court where by the Ld. Trial Court granted last opportunity to the accused to lead defence evidence on self responsibility – Held - Petitioner approached the High Court in CrMMO number 38 of 2016 and the Trial Court was directed to grant one more opportunity to the petitioner to lead evidence on self responsibility - the order passed by Ld. Trial Court was not found to be suffering from any illegality or perversity, so, the petition filed by the petitioner found without merits and dismissed.(Para 2) Title: M/s Virus & another vs. Ramesh Jaswal Page-248

Code of Civil Procedure, 1908 – Order 19 – Admissibility of affidavit must be confined to such facts which the deponent can prove by the affidavit in lieu of examination in chief, and (b) it must be an affidavit conforming to the requirement of the Indian Evidence Act and the provision of Order 19 Rule 3 CPC. However the statements in the nature of legal submission and arguments in the pleading should be avoided. [Para 9].

Code of Civil Procedure, 1908 –Order 18 and 19 of the CPC, Should not contain statements which are (1) argumentative or in the nature of submissions and pleadings etc (ii) matter which are wholly irrelevant and not in the personal knowledge of the deponent or witness , and (iii) matters which are demonstrably hearsay. If there is any such material, the court must endeavour to bring that affidavit in conformity with the provision of order 18 and 19 of CPC and of Indian Evidence Act, [Para 10] Title: Ashok Sud & another vs. Roshan Lal Bhardwaj Page-507

Code of Civil Procedure, 1908 - Section 115- Revision- Petitioner assailed order passed in execution petition whereby the objections raised by the petitioner have been dismissed- Held- Petitioner cannot espouse the cause of others regarding possession of third party- Revision dismissed. (Para 4, 5, 6 & 7) Title: Anant Bir Singh vs. Telu Ram alias Subhash Chand & others Page-362

Code of Civil Procedure, 1908- Section 115- Order 18 Rule 17- Application for recalling the witnesses dismissed- Held-

A. It is settled law of the land that in exercise of power under Section 115 CPC, the High Court has limited power to interfere on the ground of illegality, irregularity or perversity committed by the Court below. An order can also be interfered to have been passed in excessive exercise of the jurisdiction or failure to exercise jurisdiction. (Para 7)

B. Court has discretion to recall a witness at any time in order to clarify any doubt for complete and final adjudication of the suit- Documents sought to be placed on record are not relevant to the lis- Revision dismissed. (Para 11) Title: Communist Party of India (Marxist) VS. Bawa Jung Bahadur Page-455

Code of Criminal Procedure, 1973 – Section 449 – Code of Criminal Procedure – Penalty of Rs. 100000/- imposed against the appellant surely and recovery warrant under Section 421 Cr. PC issued – Appeal preferred under Section 449 Cr.PC against the order – Held – Court before passing any order with regard to imposition of penalty ought to afford opportunity of hearing to the appellant surety, especially when he pursuant to notice appeared before the court and filed reply which was not considered – After notices surety caused appearance of accused – Appellant was not given any opportunity of being heard before imposing penalty of being heard so order was nonest and without jurisdiction and hence quashed and set aside. [Paras 4 & 5] Title: Siri Ram vs. State of H.P Page-513

Code of Criminal Procedure, 1973 – Section 482 – Quashing of FIR – Inherent powers – Exercise of - Held – Inherent powers conferred upon High Court under section 482 Cr. PC cannot be exercised to quash the FIR which stands registered under the provision of POCSO Act. [Para-3] Title: Ghanshyam Singh vs. State of H.P. & another Page-480

Code of Criminal Procedure, 1973 – Section 482 – Sections 397, 482 Criminal Procedure Code – Revision petition dismissed by Sessions Judge, Mandi on the ground of maintainability in view fo section 378(4) of Code of Criminal Procedure and on the ground that against order / judgment of

acquittal, revision petition is not maintainable – Held – Magistrate had not taken cognizance of the offence against the respondent as the complaint was dismissed at the stage of section 203 Cr. PC – Trial court instead of taking cognizance of commission of offence and issuing process against respondent has dismissed the complaint under section 203 Cr. PC, which had not resulted in acquittal of accused – Hence, revision found to be wrongly dismissed. [Paras 4 & 5] Title: Pushap Raj vs. Anil Kumar & others Page-518

Code of Criminal Procedure, 1973- Section 377- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Recovery of 150 gm charas- Sentenced to simple imprisonment for a period of two months and to pay a fine of Rs.12,000/- and in default simple imprisonment for a period of 20 days- Held- Ld. Special Judge-III, Kangra at Dharamshala, has exercised the discretion vested in it while imposing sentence upon the accused before it taking into consideration the totality of the matter along with the factum of the accused having pleaded guilty, this Court should respect the discretion so exercised by the Ld. Court below and not to interfere with the same- Appeal dismissed. (Para 4 & 5) Title: State of H.P. vs. Karam Chand & another Page-326

Code of Criminal Procedure, 1973- Section 378- Criminal appeal- **Indian Penal Code, 1860**- Sections 451, 323 and 325 read with Section 24- State assailed the judgment of acquittal- Held- Evidence in criminal cases needs to be evaluated on touchstone of consistency- No illegality and infirmity in the judgment of acquittal- Appeal dismissed. (Para 13, 14) Title: State of H.P. vs. Vipin Kumar & others Page-472

Code of Criminal Procedure, 1973- Section 378- Criminal appeal- **Prevention of Corruption Act, 1988**- Sections 7, 12, 13(1)(d), 13(2)- State assailed the judgment of acquittal passed in corruption case- Held- Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-qua-non to constitute the said offence. As far as guilt under Section 13(1)(d) is concerned same cannot be held to be established in the absence of any proof of demand for illegal gratification- No illegality and infirmity in the judgment of acquittal- Appeal dismissed. (Para 14, 15) Title: State of H.P. vs. Anirudh Kumar & another Page-461

Code of Criminal Procedure, 1973- Section 397- **Negotiable Instruments**

Act, 1881- Section 138- Conviction- Simple imprisonment for one year and compensation to the tune of Rs.10.00 lacs – Held-

A. Evidence clearly indicates that the accused had issued cheque Ex. CW1/B to the company towards discharge of her lawful liability. (Para 12)

B. Statutory presumption- Negotiable Instruments Act, 1881- Section 139- If the accused /drawer 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. (Para 14)

No reason to interfere with the well reasoned judgments of Courts below. Revision dismissed. (Para 14, 19) Title: Satya Pitahan vs. Balbir Bansthu & another Page-443

Code of Criminal Procedure, 1973- Section 438- Bail- **Indian Penal Code, 1860**- Sections 420, 120 B & 201- **Indian Foreigners Act, 1946** - Section 14- Held- Offence involved in the case is not only against an individual but is also against the public at large- Fact cannot be ignored that there is tremendous rise in commission of offences related to cyber crime causing extortion of money from innocent people by alluring them- It is an offence against society- Bail application dismissed. (Para 18) Title: Mhabeni Envy vs. State of H.P. Page-414

Code of Criminal Procedure, 1973- Section 438- Bail- **Protection of Children from Sexual Offences Act, 2012**- Section 6- the minor victim married petitioner claiming that she had attained majority and starting living together husband and wife in the house of the petitioner and during this period of copulation, she became pregnant and delivered a female child in hospital at Sundernagar- Held- It is case where societal interest and individual interest of the victim are in clash- Petitioner being her husband is the only person to look after her for the reasons that her parents may not be ready to accept her as she married without their consent- Balancing the societal interest and individual interest and comparing clashing individual interest of

victim, it is fit case for enlarging the petitioner on bail- Petition allowed with conditions. (Para 6 & 7) Title: Prem Lal vs. State of H.P. Page-399

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 363, 376- **Protection of Children from Sexual Offences Act, 2012**- Section 6- After completion of investigation report under Section 173 Cr.P.C. filed – Petitioner in custody since 17.04.2021- The petitioner has committed a very serious and heinous offence- Apprehension of the respondent that in the event of bail the petitioner may tamper with the prosecution evidence appears to be genuine- Bail petition dismissed. Title: Sudhir Kumar @Sonu vs State of H.P. Page-422

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 15, 25 & 29- Recovery of 65.720 Kg. poppy husk- Commercial quantity- The petitioner to succeed in bail has to cross another legal barrier created by Section 37 of the Act by satisfying the Court that he is not likely to commit any offence while on bail- Nothing on record regarding impeccable antecedents of the petitioner- Bail petition dismissed. Title: Jashwinder Singh @ Rodha vs. State of H.P. Page-322

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8, 20, 25, 28, 29 and 60- Petitioner found involved in transportation of 8.75 Kgs charas and 1.020 kgs of opium- Petition has been filed on medical grounds- Medical Board constituted- Petitioner found stable- Petition dismissed. (Para 4 to 7) Title: Karam Veer vs. Narcotics Control Bureau Page- 404

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 25 & 29- Recovery of 1.555 kgs. of charas- Held- Commercial quantity is involved in the case, thus rigors of Section 37 of the NDPS Act applicable- Implication of petitioner prima facie cannot be said to be without justification- Petition dismissed. Title: Deep Ram vs. State of H.P. Page-426

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 147, 149, 323, 427, 447, 452, 506 read with Section 34- Petitioners have approached the Court for quashing the summoning order-

A. Code of Criminal Procedure, 1973- Section 210- Police case lodged pursuant to FIR and case registered on the basis of private complainant- Though careful perusal of Section 210 (1) of Cr.PC, clearly reveals that police case lodged pursuant to filing of the FIR and case registered on the basis of private complaint cannot go together, if it comes to the notice of the magistrate that FIR qua the same incident, stands filed and investigation is on, he would order stay of the proceedings. However, Section 210 (2) Cr.PC reveals that if a report is made by the investigating officer under section 173 and on such report, cognizance of any offence is taken by the Magistrate against any person, who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. (Para 9)

B. Held- Court below directed to try the complaint case and the case arising out of the police report together as if both the cases were instituted on the police report in terms of provisions contained under Section 210 (2) of the Cr.PC.- Petition disposed of accordingly. (Para 11) Title: Baldev Singh & others vs. State of H.P. & another Page-406

Code of Criminal Procedure, 1973- Sections 397, 401- Revision-

A. Indian Penal Code, 1860- Sections 457, 380 and 120B- Conviction- Held- Recovery duly proved- Conviction upheld.

B. Probation of Offenders Act, 1958- Section 4- Held- Accused can be granted benefit of Section 4 of the Probation of Offenders Act, subject to payment of compensation. Title: Surinder Kumar vs. State of H.P. Page-432

Code of Criminal Procedure, 1973 - Section 482 - Application under Section 311 of code of Criminal procedure for re-examination of complaint dismissed by Ld. Trial Court – challenged by way of petition under section 482 Cr. PC – Held sufficient opportunity granted for cross examination – Petition dismissed. [Paras 4 & 5] Title:Vijay Kumar Sood vs. Birender Chauhan Page-521

Code of Criminal Procedure, 1973 - Section 391 and 311 read with 482 Cr. PC – Application filed to place on record DNA report and for remand back of case to Ld. Trial Court for deciding alongwith on basis of DNA report – Held –

Mere fact that victim has not supported the prosecution case during trial cannot be a valid reason to disallow the prayer for additional evidence especially when same is in the shape of an expert opinion – Held – Report of S.F.S.L. in respect of DNA profiling of samples of products of conception and accused are relevant piece of evidence. [Paras 12 & 14]. Title: State of H.P. vs. Madan Lal & another **(D.B.)** Page-523

Constitution of India, 1950 - Article 226 – The petitioner is aggrieved by the suspension order dated 25-08-2021, where by the respondents suspended the petitioner for allegedly sending email to the Hon'ble Prime Minister on distorted and false facts about bribery and his period of suspension extended on the ground that court has passed order staying proceedings in the inquiry – Held – order of extension of suspension passed by the respondents is without any reasons and hence quashed – other proceedings are at nascent stage so not interfered by the court – Petition allowed accordingly.(Paras 2, 13 & 14) Title: Dr. Manoj Kumar Sinha vs. Union of India & another **(D.B.)** Page-15

Constitution of India 1950 - Article 226 - Service matter - Petitioner is a aggrieved by the promotion of respondent number 4 as superintendent grade-II and further the petitioner has approached the court for the orders of his promotion to the post of Superintendent grade-II alleging that six incumbents had already been promoted to the post of superintendant grade-II so next vacancy in the cadre of Superintendent Grade-II which became available on 11.09.2014 fell at roster point number 7, had to be filled in by promotion of an eligible senior assistant belonging to scheduled caste category - Petitioner Man Singh serving as senior assistant w.e.f 1999 was eligible to be considered for promotion to the post of Superintendent grade II - the grievance of petitioner Neelam Patial in CWPOA number 5342 of 2019 is that the reservation roster cannot be applied qua upgrade/create posts and the roster is required to be applied from Sri B.R. Verma onwards which became available on 11.9.2014 would fall at roaster point number 5 and in such circumstances eligible person belonging to general category is entitled for the promotion – Held - In the year of 2007, two posts of Superintendent Grade-II were upgraded/created and against these upgraded posts senior assistants were promoted on adhoc basis and subsequently were regularized on 11-04-2008 on the basis of recommendations of DPC - the posts of Superintendent grade-II are non-selection posts, so 13 point reservation roster was applied while filling up these posts - the post of Superintendent Grade-II is class-II post and since Sh.

Vij Snvuge and and Nirmal Thakur were promoted, so reservation roster had to be applied to the post occupied by them, hence, reservation roster regarding the vacancy which became available on 11-09-2014 would fall at roster number 7 and wrongly considered at roster point number 5- Respondents after realizing their mistake held review DPC on 16.6.2015 and review meeting of DPC held on 16.6.2015 correctly recommended for rectification of mistake - respondents / competent authority directed to implement the recommendations of review DPC held on 16.6.2015 within 3 weeks - Writ petition filed by Neelam Patial dismissed and the writ petition filed by petitioner Man Singh allowed, since he has been retired therefor consequential benefits due to him are ordered to be paid in his favour - both writ petitions disposed of.(Paras 2(ii), 4(i) and 5(iv)) Title: Man Singh vs. State of H.P. & others Page-168

Constitution of India, 1950 – Article – 226 - Grievance of the Petitioner is that his original Application for compassionate ground has been dismissed by Central Administrative Tribunal–Contention of the Petitioner is that he was never communicated order dated 11.9.2013 by the respondents so delay caused in filing petition- The Respondents have proved by placing on record the copies of dispatch record and proved that letter was sent through registered AD to the petitioner on 11.9.2023- Held- The petitioner approached the Tribunal only in the year 2018, whereas his case had already been rejected by the committee constituted by the respondents in its meeting held on 4.9.2013 as communicated to the petitioner vide order dated 11.9.2013- Limitation laws by its very nature are technical laws and must be construed as such-Claim of petitioner found to be time barred- Petition dismissed. (Paras 5, 9, 8 & 11)Title: Navneet vs. Union of India & another **(D.B.)** Page-20

Constitution of India, 1950 – Article 226 – Bidders were separately required to pay Rs. 5000/- towards the cost of tender and Rs. 5, 00000 as earnest money as per the procedure prescribed in clause 23 & 24 of General Condition of contract **–** Clause 25 of General conditions of contract mandatorily required the bidders to submit the original documents evidencing the deposit of cost of tender and earnest money – Petitioner in both the petitions raised grievance of tender, his bid has been rejected – Held – The petitioner failed to comply directions, hence can not succeed – Government/ department has been directed to adopt a fully transparent and full proof mechanism in grant of government contract – The directions have been issued to respondent – State

to issue guidelines that makes its mandatory to record transaction during floating of tender till finalization. [Paras 8,17 & 18] Title: Naresh Kumar Tuli vs. State of H.P. & others **(D.B.)** Page-560

Constitution of India, 1950 -- Article 226 -- Maintainability of -- Petitioner claimed that Respondent number 1 be directed to continue supplying petrol and petroleum products to the retail outlets of the petitioner and for treating the partnership deed executed between the petitioner and respondent number 2 as non-existent and further to treat petitioner as sole proprietor of petrol retail outlet on NH 22 – Held - Respondent number 1 Indian Oil Corporation undoubtedly is other Authority as envisaged under article 12 of the Constitution of India but the question arises weather the dispute raised by petitioner falls in domain of article 226 of Indian Constitution -- Genesis of dispute and undoubtedly is the partnership deed entered into between the petitioner and the private respondent with regard to petrol pump regarding which the dispute is pending before Ld. Arbitrator and the relief for declaration of partnership deed as honest is totally misconceived relief which cannot be prayed in writ petition -- Status of petrol pump is subject matter of arbitration proceedings hence writ is not maintainable for declaring that the petitioner is sole proprietor of petrol pump -- Petition not maintainable and accordingly dismissed. (Paras 16,17 & 18) Title: Mohinder Nath vs. Indian Oil Corporation & another Page-254

Constitution of India, 1950 – Article 226 – Petitioners aggrieved by the acts of the respondents whereby the land owned by the petitioner has been utilized by the respondents for construction of road without paying any compensation – The respondents department has clearly stated that they have neither possession the land in question nor they have constructed any road over it – Held – The respondents were directed to take steps to acquire land in Khasra No. 180 measuring 0-03-43 hectares situated in Mauja Chalog tehsil and district Shimla - The petition may take steps for correction of revenue entries in respect of his land comprised in Khasra No. 288. [Para 5] Title: Durga Singh vs. State of H.P. & others Page-548

Constitution of India, 1950 – Article 226 - Petitioner seeks compensation from the respondents for the houses/structures belonging to them regarding which A. C. - II Grade, Sh. Naina Devi Ji District Bilaspur had initiated eviction proceedings under Section 163 of H. P. Land Revenues Act, alleging

that other occupants were also compensated - Petitioners also sought quashing of show cause notice dated 20/7/2021 issued by A. C. – II Grade, Sh. Naina Devi Ji District Bilaspur – Held – The encroacher on the Government land or on land of any other person has right to remain in possession without the consent of land owner - the encroachers on the Government land are not entitled for any compensation either for their possession or the assets created by then on the encroach land – there cannot be any claim on the basis of negative parity - Petition dismissed.(Paras 5, 6 & 8) Title: Jagtar Ram & others vs. Union of India & others **(D.B.)** Page-9

Constitution of India, 1950 – Article 226 – Petitioner was aggrieved by the act of the respondent as his name was not considered for promotion as work inspection Supervisor – Held – The petitioner is not entitled for being promoted to the post of Work Inspector from the post of Beldar as the petitioner was promoted to the post of Mate in the year 2012 from feeder post of Beldar and on accepting this promotion without objection the petitioner gave up his right – The petitioner has laso not proved that any person junior to him in seniority of Beldars was promoted directly as Work Inspector over and above the petitioner – Petition dismissed. [Para 8] Title: Ram Pratap vs. State of H.P. & others Page-675

Constitution of India, 1950 – Article 226 – Selection & Appointment – Petitioner has challenged the selection and appointment of respondent No. 4 on the ground that disability of respondent No. 4 fell in category of blindness as he was 100% visually handicapped, whereas the post was reserved for low vision visually impaired – The grievance of petitioner is that since respondent No. 4 was a blind person so eligibility condition for the post in question reserved for visually (low vision) impaired has not been fulfilled – Held - 'Blindness' and 'Low Vision' are two separate nature of disabilities recognized under the Rights of Persons with Disabilities Act, 2016 - the post in question was advertised in terms of the policy / instructions of the respondent State dated 16.01.2006 - The medical certificate for physically handicapped appended by respondent no.4 shows that respondent No.4 was suffering from low vision disability, but in the remarks column it was stated that he was a case of visually handicapped 100% - the post is question was advertised for visually impaired parson suffering from "Low Vision", disability and not for visually impaired person suffering from blindness – Respondent No. 4 has been appointed in violation of selection criteria – Petition dismissed. [Paras

3(i), 4(d) & 5(vi)] Title: Dinesh Kumar vs. State of H.P. & others Page-155

Constitution of India, 1950 – Article 226 – Service law – Regularization - the petitioners felt aggrieved by the order dated 16-12-2020, whereby the employees of society were dispensed with for consideration for taking in Government department and the respondents sought the directions to the respondents for regularization of their services after completion of requisite years of services as per Government policy - Held – the State Government has to act as a modern employer in welfare State and it cannot have different yardsticks for different persons – benefit of regularization to the petitioners on completion of eight years of continuos contract service has been delayed by the petitioner - Financial implications cannot be a ground to deny the rights of the petitioner – Denied of rights of petitioners regarding their regularization lead to violence of article 14 of the constitution – respondent directed to regularize the services of the petitioners from the date they completed eight year of services with consequential ,benefits within three months – Petition allowed. (Paras 15, 19, 27 & 30) Title: Vikas Gupta & others vs. State of H.P. & others Page-40

Constitution of India, 1950 - Article 226 – Service matter – Acceptance of resignation – Petitioner alleged that he withdrew the resignation at earlier point of time so this resignation should not have been accepted-Held-Not in dispute that resignation was not accepted prior to 3.8.2017 –Petitioner forwarded the registered letter to the respondent on 7.8.2017 showing his intention to withdraw his resignation, but communication reached respondent on 10.8.2017 by which time resignation was accepted- Once resignation accepted prior to request of the petitioner to withdraw, it leads to acceptance of the resignation- Petition dismissed. (Paras 3, 7, & 8) Title: Ram Lok vs. H.P. State Council For Child Welfare Craig Garden & another **(D.B.)** Page-110

Constitution of India, 1950 – Article 226 – Service matter – Fixation of Pay – Service record of petitioners was gutted in fire including the service record of the petitioner due to which the respondent asked the petitioner to furnish affidavit with respect to his service details in order to reconstruct his service record – petitioner submitted affidavit furnishing details of his basic pay @ Rs. 1,025/- as on 10.12.1989 and alleged that his increment fell on 1st September of every year – Held – Pay of the petitioner has been incorrectly fixed by the respondent, though pay was fixed on the basis of affidavit furnished by the

petitioner himself on 21.06.1990 – However – respondent was responsible to maintain the service record of the petitioner – Fixation of pay chart of petitioner and Hem Singh another conductor appointed with petitioner reveals that petitioner's pay has been wrongly fixed – Petitioner shall not be entitled to any actual monetary benefits on account of revised fixation of his pay in terms of this judgment till date he retired, although all retiral benefits were made available to him – Respondent directed to do needful – Petition allowed. [Paras 3, 4(ii) & 4 V] Title: Gurcharan Singh vs. Himachal Road Transport Corporation & others Page-143

Constitution of India, 1950 - Article 226 – Service matter - Petitioner felt aggrieved by the order dated 23.9.2015 whereby the case of the petitioner by Director, Higher Education for his re-engagement as Parent Teacher Association teacher with benefit of grant in rules as lecturer / PGT commerce in Government Senior Secondary School, Sulah – as the Respondents availed services of the petitioner but not willing to release grant in aid in his favour - Held - Petitioner was appointed by resolution of PTA and after his appointment in the year 2006 till termination in February/March 2013 he taught students for 7 years as other teachers - Creation of second post in the year 2007 established the need of one more PGT commerce teacher in the school but for lapse on part of respondents to create another post of PGT was constrained to appoint petitioner in addition to single teacher working on regular basis, however after creation of second post no incumbent was appointed against the post and the petitioner taught the students continuously, hence, entitled for grant in aid from his initial appointment - Respondents directed to re-engage the petitioner forthwith as PGT commerce on PTA basis in Government Senior Secondary School, Sulah and to release all admissible benefits including grant in aid as per GIA Rules 2006 from 1.9.2006 till 28.02.2013 within 2 months and also to continue sanction and release the grant in aid in future from the date of re-engagement of the petitioner with seniority extended to other PTA Teachers, but, without any payment of any back wages and in case of appointment or posting of any other person against the vacancy such person shall be adjusted somewhere else in nearby stations for extending benefit of re-engagement to the petitioner. (Paras 8, 9, 13 & 16)Title: Raj Kumar Pathania vs. State of H.P. & others Page-1

Constitution of India, 1950 – Article 226 - Service matter- Promotion – The petitioner Challenged the promotion of respondent No.3 to the post of

Superintending Engineer–Held-Secretary HIMUDA vide notification dated 14.7.2005 mentioned the officers who would form DPC, but at no point of time, Executive Director, HIMUDA was associated in the meeting-DPC Conducted in stipulated manner without pursuing ACR, of Officers being considered for promotion for the relevant years, due to which even the Minister In charge ordered for fresh DPC however, only meeting held for review of review DPC only- Minutes of meeting held for post of Executive Engineer (Civil) and Superintendent Engineer dated 9.8.2019 & 16-8-2019 review of review meeting are quashed and set aside, consequence of which order promoting respondent No.3 for post of Superintending Engineer is also quashed and set aside- Petition allowed. (Paras 23, 25 & 27) Title: Surinder Kumar vs. State of H.P. & others Page-73

Constitution of India, 1950 - Article 226 - Service matters- Promotion - The petitioners have alleged that the respondents issued notification dated 14.11.2014, whereby they withdraw the post of Professor, there by diminish the chances of promotion of the petitioners – Held - The rules which merely affect the chance of promotion cannot be regarded as one varying the conditions of service- Fixation of quota of promotion in various categories in posts in feeder cadres based upon the structure and pattern of department is prerogative of the employer, may be pertaining to policy making – Held - on the date of filling promotion, the petitioners were not even eligible for being considered for the post of Reader, let alone, the post of Professor, hence had no locus standi to file petition- Petition dismissed with costs of Rs. 25,000/- each. (Paras 4,7 ,8 & 10) Title: Ram Mohan Kushwaha vs. State of H.P. & others **(D.B.)** Page-115

Constitution of India, 1950 – Article 226 – The petitioner is aggrieved by the acts of the respondents, whereby the respondents despite of order passed by Hon'ble High Court of H.P., in CWP No. 5120 of 2020 to consider the case of the petitioner for regularization rejected his claim – The petitioner sent documents to the respondents, so that he may be considered for regularization, but, the respondents found that the petitioner was not fulfilling the educational qualification as per R & P Rules and not improved his qualification, despite instruction of department – Held – the petitioner is neither eligible nor acquired eligibility within extended time so claim of petitioner rightly rejected by the respondents – Petition dismissed. (Paras 18 & 23) Title: Mukand Lal vs. State of H.P. & others **(D.B.)** Page-27

Constitution of India, 1950 – Article 226 – Writ of Mandamus – Petitioner feeling aggrieved by the promotion of private respondents against the post of Technical Assistant Grade –I (Computer) – Challenged on the ground that he was fit for promotion – Held – Employee is not having only right of promotion and only fundamental right which stands conferred upon an employee is the right of consideration for promotion – Right of consideration for promotion accrues upon an incumbent upon availability of promotional post vis-a-vis the feeder category post being held by him – feeder category of said post was not proved held by the petitioner – Petition dismissed. [Paras 6 & 8] Title: Prem Singh Kashyap vs. Dr. Y.S. Parmar University & another Page-503

Constitution of India, 1950 - Article 226 - Writ petition number 3503 of 2021 has been filed by petitioner Shankar alleging that petitioner Kiran who has filed writ petition number 5742 of 2021was not eligible to participate in the process as she was not possessing a vehicle duly registered in her name on the date when she applied for the grant of the tender - Petitioner Kiran filed writ petition number 5742 of 2021 feeling aggrieved by the acts of the respondents whereby bid of the petitioner was rescinded by the respondents –Held - the registration certificate demonstrates that the registration of the vehicle was transferred in the name of Smt. Kiran on 15. 03. 2021 - From the provision of the eligibility criteria for allotment also it is clear that the allotment of tender by the respondent Corporation in favour of Smt. Kiran was bed in law as she was not fullfilling the eligibility criteria - Fresh agreement was ordered to be entered into by the respondent Corporation with petitioner Shankar Singh within a period of two weeks provided he is ready to accept the conditions on which it was allotted to Smt. Kiran - Kiran is permitted to do the business of transportation for which she shall be duly paid by the respondent Corporation in terms of agreement entered into - The petitions filed by the petitioners disposed of accordingly.(Paras 4, 5, 14 & 16) Title: Kiran vs. H.P. State Civil Supplies Corporation Ltd. & others Page-271

Constitution of India, 1950 – Article 226 – Writ Petitioners are aggrieved by non-consideration of their names for promotion to the post of Assistant Professor in the department of Pathology and Surgery respectively in Indira Gandhi Medical College on the ground that department of personnel, Government of Himachal Pradesh had issued instruction dated 1.9.2010 and 3.12.2014, whereby the procedure for post having more than one channel of

promotion from feeder post to next higher post was prescribed – Held – Himachal Pradesh Health and Family Welfare Department, Himachal Pradesh Block Medical Officer, Class-I gazetted, recruitment and promotion rules are still in vogue and distinct than 1995 rules – Petitioner being Block medical officers cannot stake claim to be appointed as Assistant Professors by selection, as they are not members of Himachal Pradesh Civil Medical Service – Petition dismissed. [Paras 5 & 12] Title: Dr. Rakesh Panwar vs. State of H.P. & others **(D.B.)** Page-533

Constitution of India, 1950 – Article 226 –Petitioner aggrieved by the order passed by the authority concerned whereby she was warned – Held – If the disciplinary authority was not satisfied with the response of the petitioner to the show cause notice then also before warning the petitioner some sort of inquiry should have been ordered by the authority and after inquiry reasoned order should have been passed by the authority against the petitioner – Petition allowed. [Para 10] Title: Disha Kumari vs. State of H.P & others Page-656

Constitution of India, 1950 – Article 226 read with Rule 9 of CCS (Pension Rules), 1972 – Withholding of gratuity, leave encashment and GPF – The respondents have paid provisional pension to the petitioner but his retirement gratuity, leave encashment and balance pension amount is still to paid to him and the disciplinary proceedings which can be said to have been commenced after petitioner's superannuation were stopped by the respondents at the stage of inquiry report awaiting outcome of criminal case – Held – Petitioner has suffered a lot of denial of retiral benefits due to him for a long period so the respondent were directed to release the retiral benefits in favour of the petitioner – Petition allowed. [Paras 4 (iii) and 4 (iv)] Title: Liaq Ram vs. H.P. State Electricity Board Ltd. & another Page-581

Constitution of India, 1950 – Article 226 –Retiral benefits of the petitioner i.e. Leave Encashment and gratuity withheld despite of the fact the petitioner superannuated from the service – Held – Wrong fixation of the pay by the respondent board was on account of mistake of the respondent department – As such , recovery cannot be affected from the petitioner who is a retired employee in view of law laid down by the Hon'ble Supreme Court in Rafiq Masih's case – Petition allowed [Paras 7 & 8] Title: Kamal Dev vs. HP State Electricity Board Ltd. & others Page-666

Constitution of India, 1950 – Article 226- Service matter- Regularization's fixation of pay – Petitioner engaged as class-IV by the respondent w.e.f 12.1.1998 after 12 year of continuous daily wage service – Petitioner has assailed his regularization by way of CWP No. 5843 of 2010 alleging his entitlement for regularization after 10 years of continuous services as per prevalent regularization policy of State Govt thus claimed regularization w.e,f. 1.1.1994- Respondent directed to examine the case of petitioner in light of judgment passed in CWP No. 420 of 2006 titled State of H.P & others vs. Somdass- On directions of the court respondent regularized petitioner from 1.1.1996 and fixed his pay accordingly- Held- In view of mandate of CWP No. 420 of 2006 petitioner was entitled to be granted benefit of regularization w.e.f 1.1.1994- Respondents directed to grant the benefit of regularization to the petitioner w.e.f., 1.1.1994 with consequential benefits within three months- Petition allowed. (Paras 2 ,5, 7 & 8) Title: Durga Dass vs. State of H.P. & others Page-106

Constitution of India, 1950 – Article 226 –The retired benefits of the petitioner alongwith pension not paid – Held – when work status conferred upon the petitioner subject to the vacancy of clerk available in the Forest department she had a right to be regularized against the valid post with effect from the said date – Held – The period spent by the petitioner on work charge basis was liable to be counted for purpose of counting the qualifying service of petitioner for clause – Act by respondent of denial of pension to the petitioner by not counting the period of service rendered by her as work charge employee is bad in the eyes of law – Petition allowed. [Paras 9 & 10] Title: Lalita Thakur vs. State of H.P. & others Page-6670

Constitution of India, 1950 – Article 227 - Petitioner fulfilled the eligibility criteria for recruitment to the post of Lineman by direct recruitment and was entitled for benefits of FR 22 (1)(a)(1) for fixation of his pay -- Petitioner approached HP State Administrative Tribunal where it was held vide order dated 16.11.2017 that provisions of FR 22 (1)(a)(1) are applicable to promotional cases only and not to the appointments made against direct recruitment -- Held - Bare reading of FR 22 (1)(a)(1) depicts that it is applicable on promotion as well as on appointment in a substantive, temporary or officiating capacity and in case of direct recruitment-- Government servant has option to be exercised by him within one month from

date of promotion or appointment as the case may be to get the pay fixed under this rule from the date of promotion or appointment – Held -- Error apparent on record as it has wrongly being held by the Tribunal that FR 22 (1)(a)(1) is applicable only to the promotional cases and not to the appointment made against direct recruitment quota as the petitioner has not been appointed from open market but he was in service candidate, appointed against the quota reserved for the direct recruitment -- Review petition allowed, order passed by the H.P State Administrative Tribunal is set aside and the original application is order to be restored to its original position. (Paras 5 & 6) Title: Bihari Lal vs. H.P. Electricity Board Ltd. & another Page-288

Constitution of India, 1950 – Articles 14 and 226 – Grievance raised by the petitioners is that their services were arbitrarily terminated by the respondent without following the provisions of the Industrial Disputes Act – Held – The issues primarily being disputed questions of fact and otherwise also covered under provisions of Industrial Disputes Act, cannot be adjudicated by way of writ petition and further the dispute of Private respondents cannot be decided by this court in exercise of its jurisdiction under Article 226 of Constitution of India. [Paras 16 & 17] Title: Manish Sharma & others vs. State of H.P. & others Page-643

Constitution of India, 1950 – Articles 14 and 226 – Petitioner claimed her entitlement for promotion to the post of Assistant Professor from the date of acquiring the qualification for the said post as provided under Rule-III of 1999 – Held – It is apparent from Rule 1999 that teaching experience of three years has to be taken into consideration after acquiring the post graduate Degree or equivalent that not the teaching experience prior to acquire the post Graduate Degree – The court can not issue writ of mandamus commanding the respondents to reckon the seniority for promotion to the post of Assistant Professor from the date when the petitioner acquire qualification – Petition dismissed. [Paras 7 & 8] Title: Dr. Smriti Chauhan & others vs. State of H.P. & others Page-569

Constitution of India, 1950 – Articles 14 and 226 –Petitioner was aggrieved as her case for promotion as Junior Auditor now designated as Senior Assistant not considered although her juniors were given the promotions – Held – When the petitioner being reverted to the post of Steno-Typist from the

post of Junior Scale Stenographer, although posts of Junior Auditor were available in the department against which petitioner could be considered from promotion – The petitioner has opted for the promotion to the post of Junior Auditor, so the department ought not have denied such promotion to her on the ground of junior auditor stand changed to Senior Assistant – Petitioner allowed and respondents are directed to give promotion to petitioner to the post of Junior Auditor promotion from date of her reversion from post of Sr. Scale Stenographer till date of merger of cadre of Junior Auditor [Paras 6 & 8] Title: Sarita Devi vs. State of H.P. & another Page-574

Constitution of India, 1950 – Articles 14, 16 and 226 – Petitioner aggrieved by the order of his transfer dated 7.6.2021 to the office of Senior Executive Engineer, Electricity Division, HPSEBL, Dharampur from the office of Superintending Engineer Design Electrical System HPSEBL, Hamirpur (H.P.), which distance is more than 70 kilometres and the petitioner has been transferred without TTA/JT from his present place of posting – Held – The impugned transfer order has been passed without any independent application of min, in arbitrary manner and the same is the result of the colourable exercise of power and not on account of administrative exigency or public interest – Petition allowed. [Para 7] Title: Gian Chand vs. HPSEB Ltd. & another Page-662

Constitution of India, 1950 – Articles 226 , 227 – The petitioner claims that he was employed as daily wager "Beldar" in the year 1993 and after continuously working for 240 days in each calendar year for eight years has become entitled to be regularized as per regularization policy dated 3.4.2000 of the Government of Himachal Pradesh – Department of personnel circulated vide No. PER (AP) – C-B (2)-2/97 Vol.IV (loose)- the impugned order has been passed on fallacious ground in view of judgment in Gian Singh case – The order dated 17.10.2019 passed by respondent No.2 quashed and set aside and the respondent held entitled for benefit of regularization w.e.f. 1.1.2001. [Paras 17 & 19] Title: Nek Ram vs. State of H.P. & others Page-540

Constitution of India, 1950 – Articles 4 and 16 – Result of outdoor test declared vide Annexure P-13 – the petition is under challenge being contrary standing order – Petitioner after passing the written test, appeared before the individual member of the committee for purpose of outdoor test and waited for the declaration of the result – The petitioner neither made representation

before higher authorities nor approached court of law before declaration of result so they acquiescence themselves to the process adopted so cannot assail it.[Para 27] Title: Umadutt Sharma & others vs. State of H.P. & others Page-483

Constitution of India, 1950 – Articles 4 and 16 - Result of outdoor test declared – Writing in the result sheet – Held cuttings were not found to be result of some bias in favour of certain candidates or done with malafide intent, hence not interfered with. [Para 29] Title: Umadutt Sharma & others vs. State of H.P. & others Page-483

Constitution of India, 1950- Article 226- **The H.P. Irrigation and Public Health, Assistant Engineer (Civil) Class-I (Gazetted) Technical Services R&P Rules, 2010**- writ of certiorari to quash the impugned order issued by the Law Department regarding promotion to the post Assistant Engineer (Civil)- Held- Contention of the petitioner that the private respondent are not eligible for being considered for promotion to the post of Assistant Engineer (Civil) is totally misconceived- The qualification which has been acquired by the petitioner while in service renders them eligible for promotion of the post of Assistant Engineer (Civil) and this is also the stand of the department concerned- No merits in petition. (Para 12) Title: Dilvaru Devi & another vs. State of H.P. & others Page-330

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 14 Rule 5- Additional Issues- Application for framing of additional issues was dismissed and petition has been filed two years after the order- Held- For exercising jurisdiction under Article 227 of the Constitution, it has to be established that judicial order passed by the Court was so palpably wrong so as to strike at the conscience of the Court or should be without jurisdiction, and the impugned order does not fall in any of the categories which may warrant interference- Petition dismissed. (Para 12) Title: Subhash Chand vs. Satya Devi & others Page-377

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 32 Rule 15- Application of petitioner under Order 32 Rule 15 CPC for appointment of guardian was dismissed- Held- Ld. Trial Court following the procedure laid down in Order 32 Rule 15 CPC, asked few questions to defendant No. 1 and found defendant No. 1 to be in fit state of mind- Under

Order 32 Rule 15 satisfaction of the Court is of utmost importance- Petition dismissed. (Para 7) Title: Balram Singh vs Dhani Ram & others Page-386

Criminal Procedure Code, 1973 – Section 482 read with Sections 147, 148, 323, 342, 307, 364, 504, 506, 120-B – Indian Penal Code, 1860 – quashing of FIR and subsequent proceedings – Section 307 I.P.C. was subsequently added against the accused on the basis of the investigation – Medical report of the victim reveals that he sustained simple injuries and not any grievous hurt – Accused charged under Section 307 IPC but there is lack of strong possibility of conviction especially in view of statement of complainant as well as injured / victim – Inherent powers under section 482 Cr.P.C. exercised – FIR and subsequent proceedings quashed – Petition allowed. (Paras 8 & 9) Title: Bhola Singh & others vs. State of H.P. Page-236

Criminal Procedure Code, 1973 - Section 482 read with section 336 of Indian Penal Code, 1860 - Quashing of FIR and subsequent proceedings – Petitioner alleged that there is no allegation of alleged offence against him and further in view of his compromise with the complainant the petition may be allowed and resulting in quashing of FIR – Held -- There is a procedure prescribed under the Criminal Procedure Code which has to be adhered to after lodging of the FIR - Interference of High Courts with the procedure of Criminal Procedure Code by invoking Section 482 of Criminal Procedure Court at any and every stage without permitting the Trial Court to exercise the jurisdiction conferred upon them will lead to collapse of entire machinery of Trial Court - Petitioner required to raise the questions in the petition before the learned Trial Court at appropriate stage - Petition disposed of in above terms.(Paras 4 & 5) Title: Dinesh Dutt vs. State of H.P. & others Page-250

'E'

Employees compensation Act, 1923 - Section-4 – Determination of compensation and liability to pay interest – the income of the deceased has to be considered on the basis of cap of Rs. 4000/- as per the provision of Section -4 of the Act, even if the income of the deceased has been proved to be more than Rs. 4000/- per month - The deceased proved to be the driver so his income would be less than Rs. 4000/- per month- on existence of insurance policy, the interest has to be paid by the insurance company, which is liable to indemnify and the liability to pay the interest would run from the date on

which petitioner became entitled to receive the compensation. [Para 17 & 18] Title: United India Insurance Company Ltd. vs. Asha Devi & others Page- 183

'H'

H.P. Urban Rent Control Act, 1987- Section 24(5)- Revision- Ld. Appellate Authority under H.P. Urban Rent Control Act, 1987, dismissed the appeal under Section 24 of the Act and confirmed the eviction order of the Rent Controller- Held- Revisional Court cannot re-appreciate the evidence to set aside the concurrent findings of courts below except when the same are perverse- Conclusion arrived at by the Courts below is based on proper appreciation of evidence- Petition dismissed. (Para 14 to 17) Title: Ms. Harsh Mehta vs. Baldeep Singh Page-365

H.P. Urban Rent Control Act, 1987- Section 24(5)- Section 2(d)- Landlord – Bonafide requirement- Revision- Ld. Appellate Authority under H.P. Urban Rent Control Act, 1987, confirmed the eviction order of the Rent Controller-
A. Comparative hardship- Held Applying the principle of comparative hardship, as propounded by the Supreme Court, landlord is entitled for possession after eviction of the tenant from the suit premises. (Para 17 & 18)
B. Revisional Jurisdiction- Held- Revisional jurisdiction in rent cases, has limited jurisdiction, unless there is material irregularity or illegality or infirmity or perversity in the order, concurrent findings returned by the Courts below, are not to be interfered with- Petition dismissed. (Para 18, 19 & 20) Title: Jai Dev Singh vs. Tahir Khan Page-370

'I'

Income Tax Act -- Appeal -- Maintainability -- Appellant felt aggrieved by the order dated 11.02.2018 passed by Income Tax Appellate Tribunal, Chandigarh in IT number 715/CHD/2019 and order dated 15.02.2019 whereby appeal of revenue was dismissed – Held -- Tax effects of Rs 2,68,441/- only is subject matter of challenge – Held -- Circular No 17/2019 is extension of circular No. 3/18 issued by CBDT whereby certain modifications have been made in the original circular especially in respect of enhancement of revision of monetary limits for filing appeals/SLPs in income tax matters, so, prescribed monetary limits for filing appeal before High Court is Rs 1,00,00,000/- whereas tax effect in instant case is much less than prescribed limits -- Appeal not

maintainable, hence dismissed. (Paras 4, 5 &12) Title: Pr. Commissioner of Income Tax vs. M/s Hycron Electronics **(D.B.)** Page-221

'L'

Land Acquisition Act, 1894 - RFA preferred by appellants under section 54 of Land Acquisition Act, 1894 stands decided on 28.12.2019 determining the market value of land acquired by the appellants at the rate of 2700/- per centiare regarding which some of co-owners preferred land reference petition under section 54 of the Act which was decided - land owners filed applications seeking directions to the appellants to deposit deficit amount of compensation and for release of amount of compensation - Held - CMP number 8378 of 2020 is allowed as a result of which the appellants are directed to deposit amount of compensation for the entire land acquired along with all consequential benefits so that each and every co-sharer have amount of compensation as per his entitlement on equal footings - CMP number 9238 of 2020 filed for placing on record rough calculations so appellants are direct to calculate the amount of compensation at the rate of 2700/- per centiare, in terms of final judgment dated 28.12.2019, passed in RFA number 455 of 2019 and deposit the amount of compensation in the Registry – In CMP number 8379 of 2020 the share of each and every owner has not mentioned so the application dismissed with liberty to file fresh application for release of amount – In CMP number 10478 of 2020 filed by the appellants for releasing the amount which according to them has become excess after passing of judgment dated 28.12.2019 in RFA number 455 of 2019 and the release of amount has been made on the basis of calculations made by excluding co-owners to which every co-owner held to be entitled for equal amount of compensation irrespective of the fact as to whether he has preferred reference petition or application under section 28A of the Act or not, therefore, appellants have to deposit additional amount for meeting liability to pay compensation to all co-sharers instead of getting refund, hence, the application dismissed - Applications disposed of. (Paras 13, 14, 15 & 16) Title: The Land Acquisition Collector & another vs. Lata & others Page-292

'M'

Motor Vehicle Act, 1988 - Section 166 – Claim petition award passed by learned Motor Accident Claim Tribunal, Chamba was assailed by the

insurance company on the ground of perversity and contrary to evidence on record and not in consonance with law -- Disability suffered by the injured has to be proved by him by examining author of certificate and the injuries suffered by the injured must has proximity with the accident – Held -- Disability certificate issued in favour of respondent on 17.06.2011 whereas respondent has alleged that he suffered injuries in the accident on 14.08.2009 which shows there is no proximity of injuries to the date of accident -- Compensation allowed to respondent with transportation charges however the bills placed on record do not bear any date and are in the name of one Madho Ram - Award passed by Ld. Tribunal found not in consonance with law and as such compensation assessed found dehors the factual and legal position -- Appeal filed by insurance company allowed as a result of which impugned award dated 30.05.2013 passed by Ld. Motor Accident claims Tribunal, Chamba Division Chamba set aside -- Case remanded back to the learned Tribunal to decide afresh. (Paras 4 & 5) Title: The Oriental Insurance Company Ltd. vs. Gorkhi Devi & others Page-192

Motor Vehicle Act, 1988 - Section 166 - Claim petition - Determination of income without any proof – Held - If evidence with regard to income is not available with the Court, the provisions contained in Minimum Wages Act are necessarily required to be resorted and in those very cases where deceased or insured is stated to be skilled or semi skilled worker- Consortium determination of - Consortium is not limited to spousal consortium and it also includes parental consortium as well as filial consortium-Appeal of petitioner partly allowed. (Paras 9 & 14) Title: National Insurance Company Ltd vs. Balma Devi & others Page-205

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Appeal- Appellant convicted under Section 20 of NDPS Act and sentenced to rigorous imprisonment for 10 years and fine Rs. 1.00 lac- Chance recovery- 3.55 Kg charas- Held- Prosecution has been able to discharge the requisite burden and there is nothing on record which may cast shadow of doubt on prosecution story- Appeal dismissed. (Para 12) Title: Tirath Ram vs. State of H.P.**(D.B.)** Page-390

Negotiable Instruments Act, 1881 - Section 141- Impleadment of company

as accused when the offence has been committed by company - When there is nothing on record to prove that cheque in question was belonging to a company, the findings to the effect that complaint was not maintainable for non-compliance of Section 141 of Negotiable Instruments Act are perverse findings- Once court comes to conclusion that matter before it is not maintainable, then Court should not touch its merits. [Paras 7 & 8] Title: Devinder Singh vs. Bhupesh Page-232

Negotiable Instruments Act, 1881- Section 138- Dishonour of Cheque- Closure of defence evidence – Accused could not lead defence evidence despite taking steps- Held- Ld. Trial Court which ordering the fixation of the case for recording of DWs erred in not appreciating that diet money had already been deposited by the accused for the purpose of producing the witnesses- One more opportunity granted to the accused to lead evidence with courts assistance in the interest of justice – Order dated 18.01.2020 passed by Ld. Trial court vide which evidence of accused was closed (though wrongly reference as evidence of prosecution was closed by Ld. court below) is set aside - Opportunity given to accused to lead evidence, failing the opportunity of his right to lead evidence will be closed. (Para 8) Title: Prem Lal vs. Garja Ram & other Page-243

Negotiable Instruments Act, 1881- Section 138 – Conviction - Applicant seeking extension of time for furnishing bail bonds and depositing 20% of compensation amount- Dismissed- Held- Order of Ld. Additional Sessions Judge is without any infirmity or illegal, however, by way of special indulgence one last opportunity is granted to petitioner to furnish bail bonds subject to deposit of 30% of compensation amount instead of 20% as earlier directed by the first Appellate Court- petition disposed of accordingly. Title: Rajbir Singh vs. Hem Singh Page-412

'S'

Specific Relief Act, 1963- Specific Performance Section 20 – The plaintiff was aggrieved by the judgment of the Ld. First Appellate Court whereby the suit decreed by the Ld. Trial Court was reversed – The agreements were executed in favour of the plaintiff by Ritu Udhyog Association, Dugga Khurd, Tehsil and District Hamirpur through its Manager and the agreement has been signed by SHri Ashwani Sharma, Manager of Ritu Udhyog Association for

the owner Ritu Udhyog Association, who is owner in possession of the suit land – Hence, the suit was required to filed against the owner – Appeal dismissed. [Paras 5 (i) and 5 (v)] Title: Joginder Singh vs. Meena Kumari Page-680

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'D'

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Dataram Vs. State of U.P., (2018) 3 SCC 22;

Dev Dutt v. Union of India, (2008) 8 SCC 725;

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Dr. (Major) Meeta Sahai Vs. State of Bihar and others (2019) 20 Supreme Court Cases 17;

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'H'

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'J'

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'K'

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K.V. Rajendran vs. Superintendent of Police, CBCID South Zone, Chennai and others (2013) 12 SCC 480;

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Krishnan and another Vs Krishnaveni and another, (1997) 4 SCC 241;

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Lesru Ram's case supra, 2018 (4) Him. L.R. (HC) 2336;

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Mithilesh Kumar Singh vs. State of Rajasthan and others (2015) 9 SCC 795;

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'N'

Nagaiah and Another vs. Chowdamma (Dead) by Legal Representatives And Another, (2018) 2 SCC 504;

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

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National Insurance Co. Ltd. V. Pranay Sethi and Ors, (2017) 16 SCC 680;

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'P'

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Punjab State Electricity Board Vs. Ashok Kumar Sehgal, AIR 1990 (P&H) 117;

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Raj Kumar Vs. Ajay Kumar & another (2011) 1 SCC 343;

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Ram Krishan Melu Vs. Kusum Bhasin, 2016 (2) CCC 189 (HP);

Ram Sharan Maurya and others vs. State of U.P. and others, AIR 2021 SC 954;

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

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Srikantha S.M. versus Bharath Earth Movers Ltd.", (2005) 8 SCC, Supreme Court Cases, 314;

State of Jharkhand and others Vs Brahmputra Mettalics Ltd. 2020(13) SCALE 500;

State of Kerala and others Vs. Rajesh and others, (2020) 12 SCC 122;

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

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State of Madhya Pradesh Vs. Raghuveer Singh Yadav, (1994) 6 SCC 151;

State of Punjab and Others vs Rafiq Masih (White Washer) and others, (2015) 4 SCC 334;

State of Uttar Pradesh vs. Sudhir Kumar Singh and others, AIR 2020 SC 5215;

State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others (2010) 3 SCC 571;

Sunder Lal v. Union of India and Ors 2000 (10) SCC 409;

Sunkanna versus State of Andhra Pradesh ,(2016) 1 SCC 713;

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Surender Singh vs. Smt. Jai Manti Devi and others 2008 (2) Shim.L.C. 533;

'T'

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'U'

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Union of India and Anr. v. S.K. Goel and Ors 2007 (14) SCC 641;

Union of India and others Versus Tarsem Singh, (2008) 8 SCC 648;

Union of India and others vs. Upendra Singh (1994) 3 SCC 357;

Union of India vs. Pushpa Rani 2008 (9) SCC 242;

Union of India, etc. etc. v. K.V. Jankiraman, etc. AIR 1991 SC 2010;

UPSC v. K. Rajaiah and Ors, (2005) 10 SCC 15;

'V'

Vadiraj Naggappa Vernekar (Dead) through LRs v. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410;

Vidya Devi vs. State of Himachal Pradesh and Others, (2020) 2 SCC 569;

'Y'

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

Yunus Ali (dead) through his LRs. Vs. Khursheed Akram , (2008) 7 SCC 293;

'Z'

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

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

Between:-

RAJ KUMAR PATHANIA, S/O SH. MILAP CHAND PATHANIA, R/O VPO PUNNER, TEHSIL PALAMPUR DISTRICT KANGRA (H.P.) …PETITIONER

(BY SH.PARVEEN CHANDEL, ADVOCATE, VICE MS.SHALINI THAKUR, ADVOCATE.)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY EDUCATION TO THE GOVERNMENT OF HIMACHAL PRADESH.

2. THE DIRECTOR, SECONDARY EDUCATION, HIMACHAL PRADESH.

3. THE PRINCIPAL GOVERNMENT SENIOR SECONDARY SCHOOL SULLAH, TEHSIL PALAMPUR, DISTRICT KANGRA. …RESPONDENTS

(BY SH.DINESH THAKUR, ADDITIONAL ADVOCATE GENERAL.)

CIVIL WRIT PETITION
No. 4670 of 2015
Reserved On: 28.12.2021
Decided on: 30.12.2021

Constitution of India, 1950 - Article 226 – Service matter - Petitioner felt aggrieved by the order dated 23.9.2015 whereby the case of the petitioner by Director, Higher Education for his re-engagement as Parent Teacher Association teacher with benefit of grant in rules as lecturer / PGT commerce in Government Senior Secondary School, Sulah – as the Respondents availed

services of the petitioner but not willing to release grant in aid in his favour - Held - Petitioner was appointed by resolution of PTA and after his appointment in the year 2006 till termination in February/March 2013 he taught students for 7 years as other teachers - Creation of second post in the year 2007 established the need of one more PGT commerce teacher in the school but for lapse on part of respondents to create another post of PGT was constrained to appoint petitioner in addition to single teacher working on regular basis, however after creation of second post no incumbent was appointed against the post and the petitioner taught the students continuously, hence, entitled for grant in aid from his initial appointment - Respondents directed to re-engage the petitioner forthwith as PGT commerce on PTA basis in Government Senior Secondary School, Sulah and to release all admissible benefits including grant in aid as per GIA Rules 2006 from 1.9.2006 till 28.02.2013 within 2 months and also to continue sanction and release the grant in aid in future from the date of re-engagement of the petitioner with seniority extended to other PTA Teachers, but, without any payment of any back wages and in case of appointment or posting of any other person against the vacancy such person shall be adjusted somewhere else in nearby stations for extending benefit of re-engagement to the petitioner. (Paras 8, 9, 13 & 16)

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

J U D G M E N T

Petitioner has approached this Court seeking direction to re-engage him through Parent Teacher Association (for short 'PTA') with benefit of Grant in Aid Rules (for short 'GIA Rules') as Lecturer/PGT Commerce in Government Senior Secondary School, Sulah after quashing the order dated 23.9.2015 (Annexure P-13), whereby the case of the petitioner for his re-engagement has been rejected by Director Higher Education.

2. Undisputed and admitted facts in present case are as under:-

(A) Government of Himachal Pradesh has framed and implemented Grant-in-Aid Rules w.e.f. 29.6.2006, dealing with appointment of Teachers by Parents Teacher Associations, referred as PTA Teachers and providing Grant-

in-Aid (GIA) to such appointees subject to certain conditions contained in "GIA Rules".

(B) In the year 2006 there was one post of Lecturer/PGT Commerce in Government Senior Secondary School Sullah, District Kangra, which was occupied by contract/regular teacher. The said post was created on 5th May, 1999. Keeping in view necessity, for workload on teachers based on strength of students, PTA of the aforesaid school had engaged petitioner as PTA Lecturer/PGT Commerce on 31.8.2006 and the petitioner had joined as such on 1.9.2006 and since then till 28th February, 2013, when his services were terminated, he remained continuously engaged as PTA Lecturer/PGT Commerce.

(C). Second post of Lecturer Commerce in Government Senior Secondary School, Sulah was created vide Government letter No. EDN-B-Kha(1)-1/2007-L dated 15.9.2007. According to respondents, creation and availability of this second post of PGT/Lecturer Commerce was endorsed to the field offices on 24.5.2008 by the Deputy Director Higher Education, Kangra. Prior to that respondents-State had stopped appointments of PTA basis vide instructions dated 3.1.2008.

(D). During pendency of petition, in response to the queries raised, respondents-State has placed on record instructions dated 1.9.2021 and 17.9.2021, received from Director Higher Education. In instructions dated 17.9.2021, it has been informed that second post of Lecturer Commerce remained vacant w.e.f. 2007 to 2013 and services of petitioner were terminated by the PTA concerned, now renamed as School Management Committee (in shot 'SMC'), of Government Senior Secondary School, Sulah vide resolution dated 24.1.2013 and at present both posts of PGT Commerce are occupied by regular incumbents Nimisha and Anil Kumar w.e.f. 21.2.2014 and 27.6.2013 respectively.

(E). Vide communication dated 19.2.2013 respondents-State had directed all PTAs to re-engage PTA teachers under GIA Rules, 2006, whose services were disengaged due to new appointment or by way of transfer, if they are found eligible by the Committee constituted by the Government. Later on, vide communication dated 31.8.2013, re-engagement of PTA teachers was re-iterated. Later on, vide communication dated 22.5.2014, issued from the office of Principal Secretary (Higher Education) to the Government of Himachal Pradesh to the Directors of Higher Education as well as Elementary Education, it was communicated that Government had decided to re-engaged all PTA teachers who were earlier engaged before 31.12.2007 and whose services were discontinued due to the reason other than Inquiry Committee, if they were otherwise eligible as per R&P Rules and GIA would be released in their favour. In this communication, both Directors were requested to take further necessary action in the matter under intimation to the Department.

(F). Against his termination, petitioner had approached this High Court for his re-engagement by filing CWP No. 3382 of 2013, titled as Raj Kumar Vs. State of Himachal Pradesh, which was decided on 29.6.2015, directing the respondents to consider the case of petitioner as per notification No. EDN-H(19)B(1)-1/2012-PTA-GEN dated 31.8.2013 within a period of four weeks.

(G). In pursuance to aforesaid direction, passed in CWP No. 3382 of 2013, Director Higher Education, vide order dated 23.9.2015 (Annexure P-13), had considered and rejected the claim of the petitioner for his re-engagement, on the ground that at the time of appointment of the petitioner there was no vacant post of PGT Commerce available in Government Senior Secondary School, Sulah and appointment of petitioner by PTA was in addition to one sanctioned post of PGT Commerce which was already occupied by contract/regular appointee, whereas second post was created on 15.9.2007 and endorsed to field staff office on 24.5.2008, but prior to that Government

had issued instructions dated 3.1.2008 stopping the selection/appointment of teachers on PTA basis and, therefore, petitioner was not considered entitled for engagement under PTA to GIA Rules against the second post of PGT Commerce.

3. Assailing the aforesaid order dated 23.9.2015 and claiming re-engagement, petitioner has filed instant Writ Petition, which has been opposed by the respondents-State on the basis of reasons assigned for rejection of claim of petitioner vide dated 23.9.2015. It is also claim of respondent-State that GIA can be provided to a person appointed against the sanctioned post and at the time of appointment of petitioner, no sanctioned post was available, therefore, he is not entitled for grant in aid and further that petitioner was not engaged under GIA Rules, 2006.

4. Petitioner had completed his M.Com on 22.10.2002 and B.Ed. on 14.3.2010. Eligibility of petitioner to be appointed as PGT Commerce at the time of his appointment, according to R&P Rules in vogue at that time, has not been disputed. Otherwise also, as observed by this Court in judgment dated 26.5.2018 passed in *CWP No. 384 of 2017*, titled *Renuka Devi Vs. State of H.P. & others*, it is strange behaviour on the part of the State that for teaching students a candidate is considered to be suitable and eligible, but for making payment of Grant-in-Aid, the same candidate is considered ineligible for want of certain formalities to be performed by PTA as well as Department on behalf of respondents-State and also for want of requisite qualification. Such behavior of the State is unwarranted.

5. Following observations of this Court in *Renuka Devi's case* in this regard would also be relevant:

> *"16. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of*

> *State is welfare of people and exploitive actions of rulers have always been deprecated and history speaks that such rulers were always reprimanded and punished. "Rule of Law" was and is Fundamental Principle of "Raj Dharma". Dream of our forefathers, to establish "Rule of Law" after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution."*

6. Learned counsel for the petitioner has also relied upon the judgment passed by a Division Bench of this High Court in *CWP No. 2549 of 2015*, titled *Hem Raj Sharma Vs. State of H.P. and others*, decided on 7.8.2015 and judgments of Co-ordinate Benches of this Court in *CWP No. 2638 of 2015,* titled *Devi Saran Vs. State of H.P. and others* decided on 16.9.2016 and *CWP No. 358 of 2015,* titled *Chander Parkash Sharma Vs. State of H.P. and others,* decided on 1.7.2016, wherein the persons appointed even after issuance of instructions dated 3.1.2008 directing to stop the selection/appointment by Parents Teacher Associations and not to accept joining of such appointees, have also been held entitled for grant-in-aid and the said judgments stand implemented by respondents. Further, it has also been pointed out that in Hem Raj's case supra, it has been recorded that three teachers, namely, Indira Devi, Kauran Devi and Mukand Lal, who were appointed on PTA basis after 3.1.2008, were also being paid grant-in-aid and the said fact has not been denied by respondents-Department in the said writ petition.

7. Reliance has also been put by learned counsel for the petitioner on pronouncement of Division Bench of this Court in *CWP No. 929 of 2017,* titled *Sonika Chaudhary Vs. State of H.P. & another,* decided on 3.4.2018 and

judgment passed by co-ordinate Bench of this Court in *CWP No. 226 of 2010* titled as *Promila Devi Vs. State of H.P. & others* decided on 2.4.2015 with plea that in compliance of directions therein respondents have released grant-in-aid.

8. Plea of payment of grant-in-aid in above referred cases remained unrebutted. Respondents availed services of the petitioner but are not willing to release grant-in-aid to him, despite the fact that he had performed the same duty, as performed and being performed by other PTA teachers to whom grant-in-aid was and is being released.

9. In present case, appointment of petitioner has been made by resolution of PTA and after his appointment in the year 2006 till his termination in February/March, 2013, he continuously taught the students like other similarly situated teachers for about 7 years.

10. Learned counsel for the petitioner has also placed reliance on judgment dated 17th July, 2018, passed by Division Bench of this Court in *CWP No. 379 of 2018*, titled a *Vinod Kumar Vs. State of Himachal Pradesh & others* to substantiate his plea seeking direction to re-engage the petitioner against vacancy or by creating vacancy for re-engagement of the petitioner.

11. In above referred *Vinod Kumar's* case Division Bench had directed to re-engage the petitioner therein forthwith on PTA basis with all admissible benefits including releasing of Grant-in-Aid as per GIA Rules 2006 from initial appointment to the date of his disengagement and w.e.f. his re-engagement till continuation of his engagement as PTA teacher. The period from the date of disengagement till his re-engagement was directed to be counted for the purpose of continuity and seniority etc, but without payment of any back wages. A direction was also issued to the respondents to transfer the incumbent working in the concerned school somewhere else for re-engagement of petitioner therein against vacancy so created.

12. In present case, petitioner was appointed after framing of GIA to PTA Rules by respondents-State on 31.8.2006 and in case his appointment at that time was without any sanctioned post, then also during his engagement as PTA teacher the post was available w.e.f. 15.9.2007, which remained vacant till 2013 and the said post was filled only after termination of services of petitioner.

13. It is also relevant to record that creation of second post in the year 2007 establishes that there was dire necessity of one more PGT Commerce teacher in Government Senior Secondary School, Sulah but for lapse and failure on the part of respondents-State to create another post for providing regular teacher, PTA was constrained to appoint petitioner in addition to single teacher working on regular basis. After creation of second post, no regular incumbent was appointed against the said post and work of teaching students was taken continuously from the petitioner as PTA teacher. Therefore, petitioner is entitled for Grant-in-Aid from his initial appointment, i.e. 1.9.2006 till his termination on 28.2.2013.

14. Petitioner is also entitled for re-engagement in terms of judgment dated 17.7.2018 passed in CWP No. 379 of 2018 and also entitled for Grant-in-Aid from his re-engagement till his continuation as such.

15. At this stage, it has been informed by learned counsel for the petitioner that one post of PGT Commerce is expected to fall vacant on 31.12.2021. If so, then respondents are directed not to fill up that post, but instead re-engage the petitioner against the said vacancy.

16. In view of above discussion, respondents are directed to re-engage the petitioner forthwith as PGT Commerce on PTA basis in Government Senior Secondary School, Sulah and to release all admissible benefits including Grant-in-Aid as per GIA Rules 2006 from 1.9.2006 till 28.2.2013 within two months from today and also to continue sanction and release the Grant-in-Aid in future from his date of re-engagement till his continuation as

such. The period from 1.3.2013 till re-engagement of the petitioner shall be considered for the purpose of continuity and seniority etc. as PTA teacher for extension of benefits as extended to other PTA teachers, but without payment of any back wages. Respondents are also directed not to post any other incumbent against the post likely to fall vacant on 31.12.2021 in Government Senior Secondary School, Sulah and in case someone has been appointed or posted or transferred against the said vacancy, he shall be adjusted somewhere else in nearby stations for extending of benefit of re-engagement to the petitioner forthwith.

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

Parties are permitted to use downloaded copy of this judgment from the High Court Website and concerned authority shall not insist for certified copy, rather it shall verify passing of this judgment from the High Court Website or otherwise.

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

BETWEEN:

1. JAGTAR RAM, S/O SH. CHOTU, R/O VILLAGE TOBA SANGWANA, TEHSIL SHRI NAINA DEVI JI AT SWARGHAT, DISTT. BILASPUR, H.P.

2. SUCHA RAM, S/O SH. CHOTU, R/O VILLAGE TOBA SANGWANA, TEHSIL SHRI NAINA DEVI JI AT SWARGHAT, DISTT. BILASPUR, H.P.

3. AVATAR SINGH, S/O SH. CHOTU, R/O VILLAGE TOBA SANGWANA, TEHSIL SHRI NAINA DEVI JI AT SWARGHAT, DISTT. BILASPUR, H.P.

..... PETITIONERS

(BY SH. VARUN CHANDEL, ADVOCATE)

AND

1. UNION OF INDIA THROUGH SECRETARY RAILWAYS, 256-A RAIL BHAWAN, RAISINA ROAD, CENTRAL SECRETARIAT, NEW DELHI 110001.

2. STATE OF H.P. THROUGH CHIEF SECRETARY GOVT. OF H.P. AT SHIMLA-02.

3. DEPUTY COMMISSIONER BILASPUR, DISTT. BILASPUR, H.P.

4. SUB-DIVISIONAL OFFICER (CIVIL)-CUM-LAND ACQUISITION OFFICER (RAILWAYS) SADAR DISTT. BILASPUR, H.P.

5. ASSISTANT COLLECTOR, IIND GRADE SHRI. NAINA DEVI JI, DISTT. BILASPUR, H.P.

6. CHIEF PROJECT MANAGER, FIRST FLOOR, RAILWAY RECRUITMENT BOARD BUILDING RAILWAY COLONY, CHANDIGARH.

.....RESPONDENTS

(BY SH. V.B. VERMA, ADVOCATE, FOR R. No.1;

SH. ASHOK SHARMA, A.G WITH MR. RAJINDER DOGRA, SR. ADDL. A.G., MR. VINOD THAKUR, MR. HEMANSHU MISRA, ADDL. A.GS. AND MR. BHUPINDER THAKUR, DY. A.G., FOR R.No.2- 5;

SH. YOGESH PUTNEY AND SH. K.B. KHAJURIA, ADVOCATES, FOR R.No.6)

CIVIL WRIT PETITION
NO. 6333 of 2021
RESERVED ON:27.11.2021

DECIDED ON: 03 .12.2021

Constitution of India, 1950 – Article 226 - Petitioner seeks compensation from the respondents for the houses/structures belonging to them regarding which A. C. - II Grade, Sh. Naina Devi Ji District Bilaspur had initiated eviction proceedings under Section 163 of H. P. Land Revenues Act, alleging that other occupants were also compensated - Petitioners also sought quashing of show cause notice dated 20/7/2021 issued by A. C. – II Grade, Sh. Naina Devi Ji District Bilaspur – Held – The encroacher on the Government land or on land of any other person has right to remain in possession without the consent of land owner - the encroachers on the Government land are not entitled for any compensation either for their possession or the assets created by then on the encroach land – there cannot be any claim on the basis of negative parity - Petition dismissed.(Paras 5, 6 & 8)

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

ORDER

Heard.

By way of instant petition, the petitioners have prayedfor the grant of following reliefs:-

> i) That the respondents may be directed to *provide the compensation to the petitioners against their only houses/structures built up on Khasra no. 209/2015 in Village Toba, Tehsil, Shri Naina Devi ji at Swarghat, Distt. Bilaspur under the right to Fair Compensation and Transparency in Land Acquisition, Rehabilitationand Resettlement Act, 2013 like the cases of land acquisition in the construction of four land from Kiratpur to Manali (annexure P/1 further the notice dated 20.07.2021 (annexure P-3 and further proceedings in view of annexure P/3 may be quashed and set aside in the interest of justice.*

2. Petitioners claim to be in possession of land comprised in

Khasra No. 209/15/1 measuring 3-07 Bighas, situated at Toba Sangwana, Tehsil Shri Naina Devi Ji, District Bilaspur, Himachal Pradesh along with structures thereon. State of Himachal Pradesh is recorded owner of said land. An area measuring 1-05 Bighas of this land has been diverted for public purpose i.e. construction of Bhanupalli-Bilaspur-Beri, Broad Gauge Railway Line.

3. The Assistant Collector- II Grade, Shri Naina DeviJi, District Bilaspur, H.P has initiated proceedingsagainst the petitioners under Section 163 of the H.P. Land Revenue Act, for their eviction from above mentioned landmeasuring 03-07 bighas, vide case No. 02/2021. The petitioners havebeen issued show cause notice in aforesaid proceedings.

4. The relevant extract from paragraph 14 of instant petition is being reproduces hereunder to highlight the admission made by them as to their status on the land in question:

> "Presently the State of Himachal Pradesh, through various proceedings is attempting to vacate the petitioners from the possession of their lands/homes. Though the petitioners are in unauthorized occupation of Government and other lands belonging to the State, the petitioners are entitled to protection of their life and liberty as guaranteed under the Constitution of India……."

In response to show-cause notice issued to the petitioners by Assistant Collector IInd Grade, Shri Naina Devi Ji, they have raised the plea of having acquired title on the land involved in said proceedings, by way of adverse possession. Thus, the petitioners admit themselves to be un-authorised occupiers of land in question.

5. The relief soughtby the petitioners in the present petition is twofold. Firstly the petitioners have sought directions against the respondents to pay compensation to them under Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013

(for short,“Act”) and secondly the petitioners have soughtquashing of show cause notice, dated 20.07.2021, issued by Assistant Collector- II Grade, Shri Naina DeviJi, District Bilaspur asalso the further proceedings undertaken in pursuance thereto.

6. The encroacher on government land, or for that matter, on the land of any other person, has no right to remain in such possession, unless the owner of such land consents. The only protection of law available to the encroachers is that they have to be evicted only in accordance with the process established by law. In the instant case, the proceedings have been initiated against the petitioners under Section 163 of H.P. Land Revenue Act, which provides for eviction of encroachers fromGovernment land. The proceedings initiated against the petitioners by the Assistant Collector-II Grade, Shri Naina DeviJi, District Bilaspur, thus, cannot be said to be without jurisdiction. Petitioners have no right toobstruct such lawful proceedings initiated against them in any manner, whatsoever, much less by seeking indulgence of this Court under Article 226 of the Constitution of India. This Court in ***CWP No. 3821 of 2021,*** *titled as* ***Harnam Singh alias Rinku Chandel*** *vs*. ***State of H.P. & ors,*** decided on 19.07.2021**,** has held as under:-

> *"12. This Court is dealing with public property, wherein the public has interest and it is more than settled that private interest must yield to public interest. The petitioner even as per his admitted case is an encroacher and it is more than settled that right and title of the State cannot be permitted to be destroyed so as to give an upper hand to the encroachers, unauthorized occupants or land grabbers.*
>
> *16. State is ordinarily rated as virtuous litigant and it goes without saying that the property recorded in government khata is the property of the public at large and, therefore, cannot be jeopardized by an individual or handful of people. The Court while dealing with a dispute involving public property should be at guard against any fraud, collusion and concoction*

militating against the fair play of justice jeopardizing the interest of the State.

18. There has to be zero tolerance on the part of the Court when it gets down to decide cases of unauthorized encroachments, obstructions and illegal constructions, violation of statutory plans and schemes. Therefore, even on the ground of sympathy, the Court cannot come to the rescue of the petitioner or else such direction would be blatant violation of the orders of the Hon'ble Supreme Court and grant of any relief to the petitioner is not only impermissible, but would even amount to judicial impropriety, blatant and scant respect for the orders of the Hon'ble Supreme Court which otherwise are binding upon this Court under Article 141 of the Constitution of India.

20. It is not only high time but it is necessary to discourage encroachers immediately to such unlawful activities of encroaching on government land, that too, on the National Highways and though raise structures like dhaba, restaurant etc. over these land in order to make huge profit. It is on account of higher returns, such illegal encroachments are carried out over the prime properties on the National Highways and structures are constructed thereupon by the unscrupulous persons, without any right. Therefore, all such cases of illegal encroachments, unauthorised constructions have to be dealt with sternly and swiftly. Social justice will continue to be perpetrated with impunity. Merely because someone is economically weak and has no adequate means of livelihood, will not give him a right to encroach and erect structures on any public place or else there will be a complete breakdown of law and order and chaos, which shall be extremely detrimental to the interest of the society.

7. As regards other reliefs, the petitioners again have failed to make out any ground. The Act nowhere provides for any compensation to be paid to encroachers on the government land. Neither the petitioners are owners of the land in question nor have any other right to possess the same, as has emerged from records as well as admissions made by the petitioners. Petitioners also do not fall within the definition of affected families. That being

so, the claim of petitioners for compensation under the Act is not only highly misconceived but malafide also.

8. The contention of the petitioners that while acquiring the land for the purposes of Kiratpur-Manali National Highway, the National Highway Authority of India has paid compensation, even to the persons, who had their houses on Government land, also needs rejection. As noticed above, the Act nowhere provides for compensation to encroachers on Government land either for their possession or the asset(s) created by them on such encroached land. The averments made by the petitioners with respect to the grant of compensation by National Highway Authority of India and the documents relied upon by them does not conclusively establish the plea of the petitioners. However, assuming that National Highway Authority of India has paid any compensation in the manner as alleged by petitioners, the same cannot be a precedent. There cannot be any claim on the basis of negative parity.

9. In light of above discussions, there is no merit in the instant petition and the same is dismissed with no order as to costs.

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

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

Between:-

DR. MANOJ KUMAR SINHA S/O LATE
SH. RAM KRIPAL SINHA, R/O EAST
AKHILESH NAGAR, P.O. PATNA CITY
PATNA-800008, BIHAR PRESENTLY
RESIDING AT HOUSE No. 428, NIT
HAMIRPUR CAMPUS, HAMIRPUR-177005,
H.P.

……PETITIONER.

(BY SH. SANJEEV BHUSHAN, SENIOR ADVOCATE)
WITH SH. RAKESH CHAUHAN, ADVOCATE)

AND

1. UNION OF INDIA, THROUGH SECRETARY (MINISTRY OF EDUCATION), SHASTRI BHAWAN, C-WING, DR. RAJENDRA PRASAD ROAD , NEW DELHI-110001.

2. NATIONAL INSTITUTE OF TECHNOLOGY, HAMIRPUR, H.P., THROUGH ITS REGISTRAR.

……RESPONDENTS.

(BY SH. BALRAM SHARMA, ASSISTANT SOLICITOR GENERAL OF INDIA)

CIVIL WRIT PETITION
No. 6393 of 2021
Decided on: 20.12.2021

Constitution of India - 1950, Article 226 – the petitioner is aggrieved by the suspension order dated 25-08-2021, where by the respondents suspended the petitioner for allegedly sending email to the Hon'ble Prime Minister on distorted and false facts about bribery and his period of suspension extended on the ground that court has passed order staying proceedings in the inquiry – Held – order of extension of suspension passed by the respondents is without any reasons and hence quashed – other proceedings are at nascent stage so not interfered by the court – Petition allowed accordingly.(Paras 2, 13 & 14)

Cases referred:

Ajay Kumar Choudhary vs. Union of India through its Secretary and another (2015) 7 SCC 291;

Union of India and others vs. Upendra Singh (1994) 3 SCC 357;

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

O R D E R

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

> "i. That appropriate writ, order or direction may very kindly be issued directing the respondents to lodge a complaint/FIR to the Cybercrime Cell of the Police in order to know the identity of the creator and circulator of the email, so that the truth sees the light of the day, in the interest of law and justice.
>
> ii. That suspension order dated 25.08.2021 (Annexure P-3), as also the memorandum issued to the petitioner dated 06.09.2021 (Annexure P-4) may very kindly be ordered to be quashed and set aside, in the interest of law and justice."

2. Since, the matter is pending consideration, therefore, we will not delve into the facts in detail, save and except, to observe that the petitioner is working as Assistant Professor (Grade-II) in the Department of Mechanical Engineering in respondent No.2-Institute. On 11.06.2021, the Institute conducted interviews for the post of Registrar, however, on the very next day i.e. 12.06.2021, some person in the name of A.K.Sharma wrote a communication to the Hon'ble Prime Minister regarding illegal activity and financial fraud in the selection and allegations of bribe were also levelled.

3. On 25.08.2021, the Chairman sent a mail to the Director of the Institute calling upon him to lodge an FIR against the person, who sent the mail. It was thereafter that on 06.09.2021 the petitioner was served with a memorandum and according to the petitioner, he has been referred as the creator of the mail.

4. The petitioner replied to the said memorandum and he was thereafter placed under suspension which came to an end on 24.11.2021, but the same now has been extended by another 90 days.

5. As observed above, since the issue in question is still at large, we are not inclined to go into the merits of the case, lest it cause prejudice to

either of the parties, but would confine ourselves to the extension order of suspension.

6. The Hon'ble Supreme Court in ***Ajay Kumar Choudhary*** *vs.* ***Union of India through its Secretary and another (2015) 7 SCC 291*** cautioned against the undue and unreasonable protraction of suspension by holding that "*suspension, specially preceding the formulation of charges, is essentially transitory and temporary in nature and must perforce be of short duration*". The Hon'ble Supreme Court issued time bound direction for expeditious disposal of the disciplinary proceedings and directed that currency of a suspension order should not extend beyond three months if within three months the memorandum of charges is not served on the delinquent employee. It was further held that if the charge-sheet has been served, then a reasoned order must be passed for extension of suspension.

7. Now, adverting to the facts of the case, it would be noticed that the respondent-Institute had constituted a Committee to review the suspension of the petitioner, which vide its meeting held on 23.11.2021 gave the following recommendations:-

> "Following were present:-
>
> 1. Prof. Ravi Kumar Sharma, Dean (P&D)
> 2. Prof. R.K. Dutta, Dean (Academic)
> 3. Dr. Yogesh Gupta, Registrar.
>
> The matter regarding review of suspension in respect of Dr. Manoj Kumar Sinha Assistant Professor (On Contract), Department of Mechanical Engineering has been deliberated and found that the inquiry in the case has been got withhold by the delinquent Officer in Hon'ble High Court Shimla upto 26.11.2021. Therefore, the committee is of the view that the suspension may be extended under CCS (CCA) Rule 10(6) for

> the next 90 days or till the inquiry is completed whichever is earlier."

8. Having gone through the aforesaid recommendations, we are clearly of the view that the same do not contain any valid reasons for continuing with the suspension of the petitioner merely because the Court has passed an order staying further proceedings in the inquiry. It cannot be held that the delinquent had stalled and withheld the departmental proceedings or else it would virtually amount to permitting the respondents to question the proceedings of this Court for which they could be conveniently proceeded against under the Contempt of Courts Act.

9. That apart, we need to remind ourselves what the Hon'ble Supreme Court observed regarding the long period of suspension and observed as under:-

> "12. Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspended person suffering the ignominy of insinuations, the scorn of society and the derision of his Department, has to endure this excruciation even before he is formally charged with some misdemeanour, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is to determine his innocence or iniquity. Much too often this has now become an accompaniment to retirement....."

10. The law laid down in ***Ajay Kumar Choudhary's case*** (supra) has been reiterated by the Hon'ble Supreme Court in a decision in ***Civil Appeal No. 8427-8428 of 2018*** titled ***State of Tamil Nadu*** *vs.* ***Promod Kumar***, decided on 21.08.2018.

11. At this stage, we also need to notice that earlier the allegations of the respondents as contained in the Article of Charges were that the

petitioner created and further circulated and disseminated the false and damaging information through email as well as through Whatsapp in the public domain and mass media. However, in the reply, the stand of the respondents is that the Institute never named and referred the petitioner as creator of the email.

12. Now, the only allegation against the petitioner is that he circulated the derogative contents of the email.

13. As observed above, the order of extension of suspension passed by the respondents do not contain any valid reasons for continuing the petitioner under suspension, therefore, we quash the extension of the suspension order.

14. Since, the proceedings are at the nascent stage, therefore, we are not inclined to interfere at this stage and would rather fall back on the judgment rendered by the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***Upendra Singh (1994) 3 SCC 357*** wherein it was held that judicial review should not be pressed into service at the nascent stage when it was only issued as the applicant has opportunity to raise his objections and legal submissions before the Inquiring Authority.

15. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Between:-

SH. NAVNEET
SON OF LATE SH. TILAK RAJ,
RESIDENT OF VILLAGE BARUILA,
P.O. MASHOBRA,
TEHSIL AND DISTRICT SHIMLA, H.P. ....PETITIONER

(BY MR. ROMESH VERMA, ADVOCATE)

AND

1. UNION OF INDIA
THROUGH ITS CONTROLLER AND
AUDITOR GENERAL OF INDIA,
POCKET-9, DEEN DAYAL UPADHYAYA MARG,
NEW DELHI.

2. GOVERNMENT OF INDIA,
INDIAN AND ACCOUNTS DEPARTMENT,
PRINCIPLE ACCOUNT GENERAL (AUDIT),
HIMACHAL PRADESH, SHIMLA – 171 003
THROUGH TS AUDITOR GENERAL.

….RESPONDENTS

(MR. BALRAM SHARMA, ASSISTANT SOLICITOR GENERAL OF INDIA)

CIVIL WRIT PETITION
No. 7383 of 2021
Decided on: 27.12.2021

Constitution of India, 1950 – Article – 226 - Grievance of the Petitioner is that his original Application for compassionate ground has been dismissed by Central Administrative Tribunal–Contention of the Petitioner is that he was never communicated order dated 11.9.2013 by the respondents so delay caused in filing petition- The Respondents have proved by placing on record the copies of dispatch record and proved that letter was sent through registered AD to the petitioner on 11.9.2023- Held- The petitioner approached the Tribunal only in the year 2018, whereas his case had already been rejected by the committee constituted by the respondents in its meeting held on 4.9.2013 as communicated to the petitioner vide order dated 11.9.2013- Limitation laws by its very nature are technical laws and must be construed as such-Claim of petitioner found to be time barred- Petition dismissed. (Paras 5, 9, 8 & 11)

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

O R D E R

Aggrieved by the order passed by the learned Central Administrative Tribunal, Chandigarh Bench (for short "the Tribunal") on 23.1.2020, whereby it dismissed the Original Application filed by the petitioner (O.A. No. 63/363/2018) for grant of compassionate appointment, on the basis of limitation, the petitioner has filed the instant writ petition.

2. The father of the petitioner was working as Audit Officer in the office of Auditor General (Audit) and had rendered 28 years of service when he unfortunately died on 13.9.2012 leaving behind his widow and two children. The petitioner submitted written request for consideration of his case for appointment on compassionate basis along with affidavit dated 19.8.2013. His case was considered by the competent Committee constituted for this purpose in its meeting held on 4.9.2013 but was rejected on the ground that he had secured less marks than the candidate who had been offered appointment. The petitioner was duly informed about this decision vide communication dated 11.9.2013 through registered AD letter.

3. Petitioner contended that such letter was never received by him so as to afford him cause of action for filing the Original Application before the Tribunal. However, the learned Tribunal rejected the Original Application by recording the following reasons:

> "6. It is not in dispute that the case of the applicant was considered in the meeting held on 4.9.2013 and it was not found deserving as he secured less marks than the candidate to whom appointment was offered and decision was duly conveyed to him vide order dated 11.9.2013. The applicant did not challenge that decision and filed a belated representation which has been rejected vide order dated 12.4.2017. Perusal of the pleadings makes it clear that applicant has not given any reasons as to why after rejection order dated 11.9.2013,

> he had not approached Court of law. It cannot be believed that he was not aware of this fact because once he had moved an application for appointment on compassionate grounds, then he cannot be expected to remain mum and will not approach respondents to know law is no excuse. This has so been held by the Hon'ble Apex Court recently in the case of **Prahald Pant vs. AIIMS** 2020(1) SLR 431 (para 43) where the Lordships have held that "Law of limitation is founded on public policy. The object of Limitation is to put a quietus on stale and dead disputes. A person ought not to be allowed to agitate his claim after long delay".

4. It is vehemently contended by Mr. Romesh Verma, learned Counsel for the petitioner that the findings recorded by the Tribunal are totally perverse as there is no material on record to suggest that the order dated 11.9.2013 had ever been communicated to the petitioner.

5. This contention has been raised simply to be rejected as the respondents have placed on record despatch receipt showing despatch of said communication and postal receipt of registered AD to the petitioner on 11.9.2013.

6. Under Section 114 III.(f) read with Section 16 of the Evidence Act, 1872, a presumption can be drawn regarding service of notice and since notice in this case has been sent through registered post, the presumption of truth would apply through greater force as held by the Hon'ble Supreme Court in *Samittri Devi & another vs. Sampuran Singh & another,* (2011) 3 SCC 556.

7. Section 21 of the Administrative Tribunals Act, 1985 provides of limitation and reads as under:

> "21. *Limitation.* -- (1) A Tribunal shall not admit an application,--
>
> (a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is

made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where-

-

(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and

(b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court,

the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had

sufficient cause for not making the application within such period."

8. While considering the aforesaid provision the Hon'ble Supreme Court in *D.C.S. Negi vs. Union of India & others*, (2018) 16 SCC 721 has held that the Tribunal cannot admit an application unless the same is made within the specified period or the order is passed in terms of sub-Section (3) of Section 21 for entertaining the application after the prescribed period of limitation. It was further held that since Section 21(1) is couched in negative form, therefore, it is the duty of the Tribunal to first consider the issue of limitation and only thereafter admit the same if found to have been made within the prescribed period of limitation or sufficient cause is shown for not doing so or order is passed under Order 21(3). It is apt to reproduce the relevant observations as made in paragraphs 13 and 14 which read as under:

> "13. A reading of the plain language of the above reproduced section makes it clear that the Tribunal cannot admit an application unless the same is made within the time specified in clauses (a) and (b) of Section 21(1) or Section 21(2) or an order is passed in terms of sub-section (3) for entertaining the application after the prescribed period. Since Section 21(1) is couched in negative form, it is the duty of the Tribunal to first consider whether the application is within limitation. An application can be admitted only if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21(3).
>
> 14. In the present case, the Tribunal entertained and decided the application without even adverting to the issue of limitation. The learned counsel for the petitioner tried to

explain this omission by pointing out that in the reply filed on behalf of the respondents, no such objection was raised but we have not felt impressed. In our view, the Tribunal cannot abdicate its duty to act in accordance with the statute under which it is established and the fact that an objection of limitation is not raised by the respondent/non-applicant is not at all relevant."

9. Adverting to the facts, it would be noticed that the petitioner approached the Tribunal only in the year 2018, whereas his case had already been rejected by the Committee constituted by the respondents in its meeting held on 4.9.2013 as communicated to the petitioner vide order dated 11.9.2013.

10. Mr. Romesh Verma, learned Counsel for the petitioner contends that since the petitioner was a poor person, therefore, the provisions of limitation ought to be construed liberally. However, we find no merit in this submission.

11. Limitation laws by its very nature are technical laws and must be construed as such. These by definition are harsh laws and it would be a mistake to look for ethical principles in such laws. When Courts come to the conclusion that Legislature clearly intends that application shall be barred by particular time, the Court must give effect to such provisions, irrespective of the way the parties are placed vis-a-vis on the merits of the case and what ever is the fallout in terms of the hardship to the looser.

12. In view of the aforesaid discussions, we find no reason to interfere with the order passed by the learned Tribunal in the instant writ petition and, therefore, the same is accordingly dismissed.

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

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

Between:-

SH. MUKAND LAL S/O SH. JAI NAND,
R/O VILLAGE AND POST OFFICE
TODSA, TEHSIL CHIRGAON,
DISTT. SHIMLA H.P.

……PETITIONER.

(BY SH. V.D. KHIDTTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
ITS PRINCIPAL SECRETARY (EDUCATION)
TO THE GOVT. OF H.P., SHIMLA-2.

2. THE DIRECTOR OF ELEMENTARY EDUCATION
HIMACHAL PRADESH, SHIMLA-1.

3. THE DY. DIRECTOR OF ELEMENTARY
EDUCATION, DISTRICT SHIMLA,
SHIMLA-4.

4. THE HEADMASTER, GOVT. HIGH SCHOOL
TODSA, TEHSIL CHIRGAON, DISTRICT
SHIMLA, H.P.

……RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL
WITH SH.RAJINDER DOGRA,
SENIOR ADDITIONAL ADVOCATE GENERAL,
SH. VINOD THAKUR,
SH. SHIV PAL MANHANS,

ADDITIONAL ADVOCATE GENERALS
AND SH. BHUPINDER THAKUR,
DEPUTY ADVOCATE GENERAL,
FOR RESPONDENTS-1 TO 4)

CIVIL WRIT PETITION
No.5959 of 2021
Decided on: 15.12.2021

Constitution of India, 1950 – Article 226 – The petitioner is aggrieved by the acts of the respondents, whereby the respondents despite of order passed by Hon'ble High Court of H.P., in CWP No. 5120 of 2020 to consider the case of the petitioner for regularization rejected his claim – The petitioner sent documents to the respondents, so that he may be considered for regularization, but, the respondents found that the petitioner was not fulfilling the educational qualification as per R & P Rules and not improved his qualification, despite instruction of department – Held – the petitioner is neither eligible nor acquired eligibility within extended time so claim of petitioner rightly rejected by the respondents – Petition dismissed. (Paras 18 & 23)

Cases referred:

Ashok Kumar Sonkar vs. Union of India and others (2007) 4 SCC 54;
Dr. M.S. Mudhol and another vs. S.D. Halegkar and others (1993) 3 SCC 591;
Mohd. Sartaj and another vs. State of U.P. and others (2006) 2 SCC 315;
State of Uttar Pradesh vs. Sudhir Kumar Singh and others, AIR 2020 SC 5215;

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

O R D E R

As per the case set-up by the petitioner, he passed his matriculation examination from H.P. Board of School Education, Dharamshala, in the year 1988 and thereafter passed Hindi (Prabhakar) from H.P. University in the year 1989. Since, the post of Language Teacher was lying vacant in Government High School, Todsa, Tehsil Chirgaon, District

Shimla, H.P., therefore, respondent No.3 i.e. Deputy Director of Elementary Education accorded the requisite permission to the Headmaster of the School to fill-up the post of Language Teacher by the Parents Teacher Association (PTA) under Grant-in-Aid to Parents Teachers Association Rules, 2006.

2. The petitioner was thereafter ordered to be appointed by the Pradhan, PTA, Government High School, Todsa on 30.09.2006. It is claimed that the selection of the petitioner was on the basis of the copy of resolution that came to be passed on 25.10.2006 which reads as under:-

> "Today on 25th October 2006 from 11.00 am to 1.00 PM Parents Teacher Association meeting was held under the chairmanship of Janak Raj Sharma and Officiating Headmaster, in which after deliberation following resolution was passed.
>
> Resolution subject No.6: Under the chairmanship of Janak Raj Sharma deliberation with regard to filling up of posts as per the order of the Deputy Director was held.
>
> Resolution allowed: with regard to above subject, parents teacher association held the deliberation with regard to filling up of various posts in the school like post of Language Teacher. Because matter with regard to filling up of various posts in school is pending before the government, till some decision is taken, the Parents Teacher Association has taken the decision to fill up the post of Language Teacher only with the condition that said teacher selected has to give affidavit duly attested by the Tehsildar/Notary to the effect that he will be teaching the students without salary till further order from the higher authorities.
>
> In the end all the members have unanimously resolved and passed resolution with regard to appointment of one Sh. Mukand Lal S/o Sh. Jai Nand R/o Village Todsa. The appointed

candidate is also directed to give his joining on 01.11.2006 to the officiating Headmaster alongwith all documents. After completing all conditions, matter be forwarded to the office of Deputy Director (Secondary).

Lastly meeting was concluded after the vote of thanks passed by Pradhan.

Stamped and signed
Pradhan PTA Govt. High
School, Todsa, Distt. Shimla."

3. The Government vide order dated 05.08.2020 had decided to regularize the services of PTA teachers both taken over on contract basis and the left out with immediate effect. However, the services of the petitioner were not taken over constraining the petitioner to file CWP No. 5120 of 2020 which was disposed of by this Court vide order dated 22.04.2021 with a direction to the respondents to consider the case of the petitioner for regularization.

4. In compliance to the aforesaid direction, the necessary documents of the petitioner were requisitioned and thereafter the claim of the petitioner was rejected vide order dated 04.08.2020 (Annexure P-13) and the text thereof reads as under:-

"In the matter of CWP No. 5120 of 2020- titled as Mukand Lal V/s State of H.P. & others.

That the applicant filed his application in the Hon'ble High Court of H.P. seeking benefit of regularization as Language Teacher. The Hon'ble High Curt of H.P. decided the above mentioned CWP on 22/04/2021. The operative part of the same is as under:-

"Accordingly, this petition is disposed of with the direction to respondent No. 3 to decide the issue pertaining to the petitioner pending before it on or before 30th June, 2021. In case any clarification/ document/ information in this regard is required by the said respondent from the petitioner, then by way of a written communication, the petitioner shall be intimated to hand over the same on or before 15th May, 2021. In case no such communication is issued from the office of respondent No. 3 to the petitioner on or before 10th May, 2021, then it will be deemed that the said respondent requires no clarification/document/information from the petitioner. It is clarified that no extension shall be granted to respondent No. 3 post the date fixed by the Court for the purpose of deciding the issue. Miscellaneous applications, if any, also stand disposed of.

The above orders were received in this office of respondent No.3 on 15th July, 2021, from the office of respondent No.2. From the perusal of record it is observed that the issue regarding regularization of petitioner was already decided on the file on 28th September, 2020 with the remarks "condition of minimum eligibility is not fulfilling, so regularization cannot be done."

However, in compliance to direction of Hon'ble High the petitioner was again requested to furnish the complete certificate related his qualification vide letter dated 19/07/2021 i.e. immediately after the receipt of the copy of orders.

> The certificates as submitted by the petitioner were again placed before the committee constituted for the purpose and the committee members found the petitioner ineligible to be regularized as Language Teacher as per R&P Rules for the post.
>
> Therefore, in view of above facts the petitioner cannot be considered for regularization and hence his plea made in the petition is rejected. The matter is decided accordingly."

5. This was followed by another order dated 24.08.2021 whereby it was intimated that on the basis of the documents sent by the school it was found that the petitioner did not fulfill the educational qualification as per the Recruitment and Promotion Rules and has also not improved his qualification as per the instructions issued by the department.

6. Therefore, looking into the gravity of the matter, respondent No.4 was directed to take action against the petitioner, who had not fulfilled his educational qualification.

7. In compliance to the instructions, the services of the petitioner came to be terminated and aggrieved thereby, the petitioner has filed the instant petition for grant of the following substantive reliefs:-

> " (i) That the impugned orders dated 24.08.2021(Annexure P-16) and order dated 04.09.2021(Annexure P-17) may kindly be quashed and set aside.
>
> (ii) That writ in the nature of mandamus may kindly be issued directing the respondents to allow the petitioner to work as Language Teacher in Govt. High School Todsa and pay all consequential benefits."

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

9. It is not in dispute that the respondents had decided to regularize the services of the teachers appointed on PTA basis provided they fulfilled the minimum eligibility criteria as per the Recruitment and Promotion Rules at the time of their initial appointment.

10. It is also not in dispute that the PTA Teachers, who did not fulfill minimum eligibility criteria as per the Recruitment and Promotion Rules on the date of initial engagement by the PTAs but had acquired the requisite educational qualification after the initial engagement were to be considered only if they fulfilled the minimum eligibility criteria as per the current Recruitment and Promotion Rules in vogue on the date of regularization with immediate effect.

11. It is further not in dispute that in terms of the letter issued by the Additional Chief Secretary (Education) to the Government of Himachal Pradesh on 18.08.2017, it was provided that the teachers whose services have been taken over or whose services have not been taken over on contract basis in the State were granted five years instead of two years i.e. till 16.08.2021 for acquiring minimum educational qualification as per the Recruitment and Promotion Rules for the respective post(s) failing which their services will be terminated.

12. Lastly, it is not in dispute that the petitioner despite this letter did not acquire minimum eligibility criteria provided under the Rules and accordingly his services were terminated.

13. It is vehemently argued by Shri V.D.Khidtta, learned counsel for the petitioner that the action of the respondent cannot sustain as the same was in total violation of the principles of natural justice.

14. However, we find no merit in this contention as the candidate, who lacks the requisite qualification has no right to hold the post and, therefore, no hearing is required before the cancellation of his appointment.

15. In coming to such conclusion, we are duly supported by the judgment rendered by the Hon'ble Supreme Court in ***Mohd. Sartaj and another*** *vs.* ***State of U.P. and others (2006) 2 SCC 315***, wherein the Hon'ble Supreme Court considered the question of non-issuance of show-cause notice/prior notice or giving opportunity of being heard before cancelling the appointment where the candidate appointed was not eligible and also that the appellants therein did not hold any right over the post because they lacked requisite qualification. Therefore, no hearing was required before cancellation of his appointment. It shall be apt to quote para-6 of the judgment which reads as under:-

> "6. Regarding the non-compliance of natural justice, the Court opined that in the present case there was no procedural illegality and relied upon the State of M.P. vs. Shyama Pardhi, 1996 (7) S.C.C. 118 where it was observed that question of violation of natural justice did not arise in a case where the prerequisite minimum qualification for the appointment was not fulfilled and resulted in the cancellation of the appointment. The Court also opined that the action of cancellation was taken swiftly within a short interval and merely because appellants were allowed to continue on the post in pursuance of the interim order, would not entitle them to the posts on which they were illegally appointed."

16. In ***Ashok Kumar Sonkar*** *vs.* ***Union of India and others (2007) 4 SCC 54***, the Hon'ble Supreme Court observed that there could be no doubt that *audi alteram partem* is one of the basic pillars of natural justice which means no one should be contemned unheard. However, whenever possible the principles of natural justice should be followed. These principles cannot be put in any straitjacket formula. The said principles may not be applied in a

given case unless a prejudice is shown. It is not necessary where it would be a futile exercise. The Court of law does not insist on compliance with useless formality. It will not issue any direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Lastly, it was held that where selection of an employee was illegal and he was not qualified on the cut-off date, he then being ineligible to be considered for appointment, it would have been a futile exercise to offer him an opportunity of being heard. It is relevant to reproduce paras 26 to 28 of the judgment which read as under:-

> "26. This bring us to the question as to whether the principles of natural justice were required to be complied with. There cannot be any doubt whatsoever that the audi alteram partem is one of the basic pillar of natural justice which means no one should be condemned unheard. However, whenever possible the principle of natural justice should be followed. Ordinarily in a case of this nature the same should be complied with. Visitor may in a given situation issue notice to the employee who would be effected by the ultimate order that may be passed. He may not be given an oral hearing, but may be allowed to make a representation in writing.
>
> 27. It is also, however, well-settled that it cannot be put any straight jacket formula. It may not be in a given case applied unless a prejudice is shown. It is not necessary where it would be a futile exercise.
>
> 28. A court of law does not insist on compliance with useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard."

17. Recently, the Hon'ble Supreme Court in ***State of Uttar Pradesh*** *vs.* ***Sudhir Kumar Singh and others, AIR 2020 SC 5215*** has held as under:-

> "38. Under the broad rubric of the Court not passing futile orders as the case is based on "admitted" facts, being admitted by reason of estoppel, acquiescence, non-challenge or non-denial, the following judgments of this Court are all illustrations of a breach of the audi alteram partem rule being established on the facts of the case, but with no prejudice caused to the person alleging breach of natural justice, as the case was one on admitted facts:
>
> (i) Punjab and Sind Bank and Ors. v. Sakattar Singh (2001) 1 SCC 214 : 2000 AIR SCW 4350 (see paragraphs 1, 4 and 5);
> (ii) Karnataka SRTC and Anr. v. S.G. Kotturappa and Anr. (2005) 3 SCC 409: AIR 2005 SC 1933 (see paragraph 24);
> (iii) Viveka Nand Sethi v. Chairman, J&K Bank Ltd. and Ors. (2005) 5 SCC 337: AIR Online 2005 SC 81 (see paragraphs 21, 22 and 26);
> (iv) Mohd. Sartaj and Anr. v. State of U.P. and Ors. (2006) 2 SCC 315 :AIR 2006 SC 3492 (see paragraph 18);
> (v) Punjab National Bank and Ors. v. Manjeet Singh and Anr. (2006) 8 SCC 647: (AIR 2007 SC 262) (see paragraphs 17 and 19);
> (vi) Ashok Kumar Sonkar v. Union of India and Ors. (2007) 4 SCC 54 : AIR Online 2007 SC 24(see paragraphs 26 to 32);
> (vii) State of Manipur and Ors. v. Y. Token Singh and Ors. (2007) 5 SCC 65 :AIR 2007 SC (Supp) 145 (see paragraphs 21 and 22);
> (viii) Secretary, A.P. Social Welfare Residential Educational Institutions v. Pindiga Sridhar and Ors. (2007) 13 SCC 352 : (AIR 2007 SC 1527) (see paragraph 7)
> (ix) Peethani Suryanarayana and Anr. v. Repaka Venkata Ramana Kishore and Ors. (2009) 11 SCC 308 : (AIR 2009 SC 2141)(see paragraph 18);
> (x) Municipal Committee, Hoshiapur v. Punjab State Electricity Board and Ors. (2010) 13 SCC 216 : (2010 AIR SCW 7020)(see paragraphs 31 to 36, and paragraphs 44 and 45);

> (xi) Union of India and Anr. v. Raghuwar Pal Singh (2018) 15 SCC 463 : AIR 2018 SC 1411 (see paragraph 20).
> 39. An analysis of the aforesaid judgments thus reveals:
>
> (1)Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.
> (2)Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.
> (3)No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.
> (4)In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.
> (5)The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

18. Now, adverting to the facts of the case, it would be noticed that the petitioner is neither eligible nor did he acquire eligibility within the extended time(s).

19. However, learned counsel for the petitioner would claim that since petitioner had acquired sufficient experience, therefore, he is entitled to be retained in service in accordance with the ratio laid down by the Hon'ble Supreme Court in ***Dr. M.S. Mudhol and another*** *vs.* ***S.D. Halegkar and***

others (1993) 3 SCC 591, more particularly, the observations made in paragraphs 5 and 6 of the judgment which read as under:-

> "5. As regards the teaching experience, the 1st respondent's contention is that he had worked as a teacher for 9 years in a High School and Higher Secondary School which had upto 11 standards. According to him, he also worked as a Lecturer in History. His further contention is that the post of the School Inspector in Karnataka where he was working as such and that of the teacher were interchangeable. Hence the selection committee had taken into consideration his experience in both the capacities. These facts are not controverted before us and in any case today, he has the requisite experience of teaching as he has been teaching the 11th and the 12th class continuously for 12 years now, since 1981. It can, therefore, be said that at least as on date when his removal from the post of Principal is sought, he cannot be said to be disqualified on account of the lack of required teaching experience.
>
> 6. Since we find that it was the default on the part of the 2nd respondent, Director of Education in illegally approving the appointment of the first respondent in 1981 although he did not have the requisite academic qualifications as a result of which the 1st respondent has continued to hold the said post for the last 12 years now, it would be inadvisable to disturb him from the said post at this late stage particularly when he was not at fault when his selection was made. There is nothing on record to show that he had at that time projected his qualifications other than what he possessed. If, therefore, inspite of placing all his cards before the selection committee, the selection committee for some reason or the other had thought it fit to choose him for the

> post and the 2nd respondent had chosen to acquiesce in the appointment, it would be inequities to make him suffer for the same now. Illegality, if any, was committed by the selection committee and the 2nd respondent. They are alone to be blamed for the same."

20. We have considered the aforesaid submission in light of the observations made by the Hon'ble Supreme Court and find that the case pertained to the post of Principal of the school for which post the petitioner therein was not eligible, but then he was holding and working on the feeder post of teacher which he continued to teach for 9 years. It was in that background that the appointment of the petitioner was not disturbed and directions were passed in exercise of Article 142 of the Constitution and not by way of binding principle 141 as is evident from the observations contained in para-8 of the judgment which reads thus:

> "8. However, we must make it clear that in the present case the 2nd respondent, Director of Education had committed a clear error of law in approving the academic qualifications of the 1st respondent when he was not so qualified. As pointed out above, the interpretation placed by him and the other respondents on the requisite educational qualifications was not correct and the appointments made on the basis of such misinterpretation are liable to be quashed as being illegal. Let this be noted for future guidance."

21. Learned counsel for the petitioner would then argue that the so-called instructions calling upon the ineligible teachers to acquire the qualifications were never circulated or brought to the notice of the petitioner.

22. We are not at all in a position to appreciate this argument. After-all, there is a presumption of regularity in the performance of official duties. A presumption of regularity in the performance of official duties is an aid to the

effective and unhampered administration of government functions. Without such benefit, every official action could be negated with minimal effort from litigants, irrespective of merit or sufficiency of evidence to support such challenge. This presumption of regularity expressed by the maxim *law omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* imply that all judicial and official acts are presumed to be rightly and regularly done. Neither motive could be presumed nor bad faith. This maxim infact stands codified in Section 114(e) of the Indian Evidence Act, 1872.

23. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

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

Between:-

1. VIKAS GUPTA, AGED 48 YEARS, S/O SH. S.P.GUPTA, RESIDENT OF WARD NO. 6, TATILA MOHALLA, VPO & TEHSIL ARKI, DISTRICT SOLAN, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT DIET, SOLAN, DISTRICT SOLAN, H.P.
2. AMIT JOSHI, AGED 47 YEARS, S/O LATE SH. SURESH CHAND JOSHI, RESIDENT OF HOUSE NO. 192, ANAND VIHAR COLONY, SAPROON, DISTRICT SOLAN, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT DIET, EDUCATION BLOCK, KANDAGHAT, DISTRICT SOLAN, H.P.
3. DHAWAN KUMAR, AGED 41 YEARS, S/O SH. ROOP LAL, RESIDENT OF VILLAGE SARSKAN, P.O. BAROTI, TEHSIL DHARAMPUR, DISTRICT MANDI, HP. PRESENTLY WORKING AS JUNIOR ENGINEER AT EDUCATION BLOCK ARKI, DISTRICT SOLAN, H.P.
4. PARKASH CHAND, AGED 47 YEARS, S/O LATE SH. HET RAM, RESIDENT OF VILLAGE GANEYOG, P.O. NEHRA, TEHSIL AND DISTRICT SHIMLA, PRESENTLY WORKING AS DRAUGHTSMAN CIVIL AT DIET, SOLAN, DISTRICT SOLAN, H.P.
5. KULDEEP RAJ, AGED 46 YEARS, S/O SH. BODH RAJ, RESIDENT OF VILLAGE ANSOLI, POST OFFICE NATAUR, TEHSIL AND DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT DIET, KANGRA, DISTRICT KANGRA, H.P.

6. BRIJ MOHAN, AGED 50 YEARS, S/O LATE SH. DHANI RAM SHARMA, RESIDENT OF VILLAGE LOWER DOBH, TEHSIL SHAHPUR, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT EDUCATION BLOCK RAIT, DISTRICT KANGRA, H.P.
7. MRS. BANDNA, AGED 47 YEARS, D/O SH. DESH RAJ, RESIDENT OF VPO & TEHSIL NAGROTA BAGWAN, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT EDUCATION BLOCK DHARAMSHALA, DISTRICT KANGRA, H.P.
8. ANIL KUMAR SHARMA, AGED 45 YEARS, S/O SH. R.D. SHARMA, RESIDENT OF VILLAGE ANSOLI, P.O. MATOUR, TEHSIL AND DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT EDUCATION BLOCK NAGROTA BAGWAN, DISTRICT KANGRA, H.P.
9. BALVINDER KUMAR, AGED 57 YEARS, S/O SH. CHANDER PRAKASH, RESIDENT OF V&PO NANDPUR BHATOLI, TEHSIL HARIPUR, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT EDUCATION BLOCK PRAGPUR, DISTRICT KANGRA, H.P.
10. AVTAR SINGH, AGED 44 YEARS, S/O SH. RAN SINGH, RESIDENT OF VILLAGE AND POST OFFICE AMLELA, TEHSIL JAWALI, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT COMMUNITY DEVELOPMENT BLOCK NAGROTA SURIAN, DISTRICT KANGRA, H.P.
11. SHAKTI KUMAR, AGED 50 YEARS, S/O SH. BUA DITTA, RESIDENT OF VILLAGE SNOUR, POST OFFICE INDORA, TEHSIL INDORA, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER IN DEVELOPMENT BLOCK INDORA, DISTRICT KANGRA, H.P.
12. RAJEEV PRAKASH KAUSHAL, AGED 48 YEARS, S/O SH. PREM PRAKASH SHARMA, RESIDENT OF WARD NO. 6, NEAR BUS STAND CHOWARI, VPO CHOWARI, TEHSIL BHATIYAT, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT COMMUNITY DEVELOPMENT BLOCK NURPUR, DISTRICT KANGRA, H.P.
13. ANIL KUMAR, AGED 39 YEARS, S/O SH. OM PRAKASH, RESIDENT OF VILLAGE AND POST OFFICE ICHHI, TEHSIL AND DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT BAIJNATH COMMUNITY DEVELOPMENT BLOCK, BAIJNATH, DISTRICT KANGRA, H.P.
14. CHARAN SINGH, AGED 37 YEARS, S/O SH. GULWANT SINGH, RESIDENT OF VILLAGE AND POST OFFICE BILASPUR, TEHSIL DEHRA, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT COMMUNITY DEVELOPMENT BLOCK DEHRA GOPIPUR, DISTRICT KANGRA, H.P.
15. NARESH KUMAR, AGED 53 YEARS, S/O LATE SH. AMI CHAND, RESIDENT OF VILLAGE AND POST OFFICE SIMNI, SUB TEHSIL

BHALIE, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT BRCC OFFICE, CHAMBA, DISTRICT CHAMBA, H.P.

16. VIJAY KUMAR, AGED 42 YEARS, S/O SH. JAI RAM, RESIDENT OF VILLAGE LADOH (DALIP NAGAR) POST OFFICE PANCHRUKHI, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT BRCC OFFICE, PANCHRUKHI, DISTRICT KANGRA, H.P.
17. PAWAN KUMAR, AGED 49 YEARS, S/O SH. SANSAR CHAND, RESIDENT OF VILLAGE DEVI DEHRA, P.O. BATHRI, TEHSIL DALHOUSIE, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT BRCC OFFICE, SALOONI, DEVELOPMENT BLOCK SALOONI, D.P.E.P., CHAMBA, DISTRICT CHAMBA, H.P.
18. RAM KRISHAN, AGED 49 YEARS, S/O LATE SH. UDHO RAM, RESIDENT OF VILLAGE AND P.O. MUMTA, TEHSIL NAGROTA BAGWAN, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT DIET, KANGRA AT DHARAMSHALA, H.P.
19. RAJIV SONI, AGED 51 YEARS, S/O LATE SH. BALDEV SONI, RESIDENT OF VILLAGE AND P.O. BANIKHET, TEHSIL DALHOUSIE, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT C. DEVELOPMENT BLOCK, CHOWARI, TEHSIL BHATIAT, DISTRICT CHAMBA, H.P.
20. ARUN SINGH, AGED 48 YEARS, S/O SH. CHATTAR SINGH, RESIDENT OF VILLAGE BARENJAL, PO. BHALEI, TEHSIL SALOONI, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS DRAFTSMAN (CIVIL) AT DPO OFFICE DIET-SARU, DISTRICT CHAMBA, H.P.
21. DIMPLE SOOD, AGED 48 YEARS, S/O LATE SH. PRAN KRISHAN SOOD, RESIDENT OF VILLAGE BADGWAR, P.O. BHAWARNA, NEAR STATE BANK OF INDIA BHAWARNA, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT BRCC OFFICE SULLAHAL BHEDU-MAHADEV, DISTICT CHAMBA, H.P.
22. JAI NARAIN PARKASH, AGED 56 YEARS, S/O LATE SH. KANSHI RAM, RESIDENT OF VILLAGE AND P.O. SAROL, TEHSIL AND DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER AT COMMUNITY DEVELOPMENT BLOCK MEHLA, DISTRICT CHAMBA, H.P.

…PETITIONERS

(BY MR.ADARSH K. VASHISTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS CHIEF SECRETARY TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. H.P. SCHOOL EDUCATION SOCIETY THROUGH ITS CHAIRMAN, ADDITIONAL CHIEF SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, SHIMLA-171002.
3. ADDITIONAL CHIEF SECRETARY (PWD) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
4. MISSION DIRECTOR, SARVA SHIKSHA ABHIYAN, GOVERNMENT OF HIMACHAL PRADESH-CUM-DIRECTOR, ELEMENTARY EDUCATION, DIRECTORATE OF ELEMENTARY EDUCATION, SHIMLA-171001.

....RESPONDENTS.

(MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENTS.).

CWP NO. 1339 OF 2021.

BETWEEN:

1. RAVINDER KUMAR, AGED 48 YEARS, S/O SH. BANSI DHAR, RESIDENT OF VILLAGE BARLI, POST OFFICE AND TEHSIL SALOONI, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS LECTURER IN PLANNING & MANAGEMENT AT DIET, KANGRA AT DHARAMSHALA, DISTRICT KANGRA, H.P.
2. RAJ SINGH KAPOOR, AGED 50 YEARS, S/O LATE SH. PRAHALAD SINGH KAPOOR, RESIDENT OF KAPOOR COTTAGE, SINTRU COLONY, POST OFFICE CHOWARI, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS LECTURER AT DIET - KANGRA AT DHARAMSHALA.
3. MANOJ KUMAR, AGED 50 YEARS, S/O LATE SH GIAN CHAND, RESIDENT OF V&PO KOTI, TEHSIL AND DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT DIET, CHAMBA, DISTRICT CHAMBA, H.P.
4. RATTAN CHAND, AGED 44 YEARS, S/O SH. BHEEM SINGH, RESIDENT OF VILLAGE TOGA, POST OFFICE ATHER, TEHSIL SALOONI, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT DIET CHAMBA, DISTRICT CHAMBA, H.P.
5. RAKESH KUMAR, AGED 45 YEARS, S/O SH. SHAKTI PRASHAD, RESIDENT OF VILLAGE KUPARA, P.O. SARCOW, TEHSIL BHARMOUR, DISTRICT CHAMBA, H.P. WORKING AS CLERK AT BRCC, BHARMOUR, DISTRICT CHAMBA, H.P.
6. GILLU RAM, AGED 45 YEARS, S/O SH. KHINKHER RAM, RESIDENT OF VPO CHOBIA, TEHSIL BHARMOUR, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT BRCC OFFICE, MEHLA, DISTRICT CHAMBA, H.P.

7. SARDAR SINGH, AGED 54 YEAR, S/O SH. RUMAL SINGH, RESIDENT OF VILLAGE GAGAHAR, P.O. RAIPUR, TEHSIL BHATIYAT, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT BRCC CHOWARI, DISTRICT CHAMBA, H.P.
8. DEVI CHAND, AGED 50 YEARS, S/O SH. KRISHAN LAL, RESIDENT OF VILLAGE JUDDA, P.O.SIDOTH, TEHSIL CHURAH, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT BRCC OFFICE, TISSA, DISTRICT CHAMBA, H.P.
9. DEV PRAKASH, AGED 52 YEARS, S/O SH. MOHANU RAM, RESIDENT OF VILLAGE JHAKRAL, P.O. KILOR, TEHSIL SALOONI, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT BRCC OFFICE, SALOONI, DISTRICT CHAMBA, H.P.
10. PAWAN KUMAR, AGED 49 YEARS, S/O SH. CHAND RAM, RESIDENT OF VILLAGE BEHROG, P.O. DIGHAIE, TEHSIL SALOONI, DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT BRCC OFFICE, SALOONI, DISTRICT CHAMBA, H.P.
11. MS. BHUVAN KUMARI, AGED 43 YEARS, D/O SH. DEVINDER PURI, RESIDENT OF VILLAGE KATHANNA, P.O. LUDDU, TEHSIL AND DISTRICT CHAMBA, H.P. PRESENTLY WORKING AS CLERK AT BRCC OFFICE, CHAMBA, DISTRICT CHAMBA, H.P.
12. MADAN LAL,AGED 44 YEARS, S/O SH. GODHAN RAM, RESIDENT OF VILLAGE SANCHUIN, P.O. AND TEHSIL BHARMOUR, DISTRICT CHAMBA, PRESENTLY WORKING AS CLERK AT BRCC OFFICE, BHARMOUR, DISTRICT CHAMBA, H.P.

…PETITIONERS

(BY SH. ADARSH K. VASHISTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS CHIEF SECRETARY TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
2. H.P. SCHOOL EDUCATION SOCIETY THROUGH ITS CHAIRMAN, ADDITIONAL CHIEF SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, SHIMLA-171002.
3. ADDITIONAL CHIEF SECRETARY (PWD) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
4. MISSION DIRECTOR, SARVA SHIKSHA ABHIYAN, GOVERNMENT OF HIMACHAL PRADESH-CUM-DIRECTOR, ELEMENTARY EDUCATION, DIRECTORATE OF ELEMENTARY EDUCATION, SHIMLA-171001.

….RESPONDENTS.

(MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENTS.).

CWP NO. 1755 OF 2021

BETWEEN:

1. NIRMAL KUMAR SON OF SH. RAJINDER KUMAR, AGED 45 YEARS, RESIDENT OF VILLAGE SAIN, POST OFFICE SURAJPUR BARI, TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.
2. HARISH KUMAR SHARMA SON OF SH. GANGA RAM SHARMA, AGED 40 YEARS, RESIDENT OF VED MATA GAYATRI NIWAS, VILLAGE AND POST OFFICE RATTI, TEHSIL BALH, DISTRICT MANDI, H.P.
3. SAMEER GOEL SON OF SH. CHANDERMANI AGED 42 YEARS, RESIDENT OF NEAR BDO OFFICE SADAR, BHIULI, TEHSIL SADAR, DISTRICT MANDI, H.P.
4. RAMESH LAL SON OF SH. BHIM SEN, AGED 42 YEAR, RESIDENT OF VILLAGE SHILLING, POST OFFICE MOORING, TEHSIL UDAIPUR, DISTRICT LAHAUL AND SPITI, H.P.
5. VINOD KUMAR SON OF SH. JAI RAM, AGED 50 YEARS, VILLAGE KOTHI POST OFFICE DELGI, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.
6. JAGDISH CHAND SON OF SH. NAIYA RAM, RESIDENT OF VILLAGE KHOD, POST OFFICE JARAG, TEHSIL DADAHU, DISTRICT SIRMAUR, H.P.
7. HEM LATA WIFE OF SH. BHAG SINGH, AGED 50 YEARS, RESIDENT OF VILLAGE AND POST OFFICE BANJAR, DISTRICT KULLU, H.P.
8. KIRNA DEVI WIFE OF RAMAL SHARMA, AGED 50 YEARS, RESIDENT OF VILLAGE GHANDINAGAR, POST IFFICE TEHSIL AND DISTRICT KULLU, H.P.
9. SURESH KUMAR SON OF SH. SATYA NAND, AGED 53 YEARS, RESIDENT OF VILLAGE SARLI, POST OFFICE DALASH, TEHSIL ANNI, DISTRICT KULLU, H.P.
10. KUSUM LATA WIFE OF SH. MADAN LAL, AGED 46 YEARS, RESIDENT OF VILLAGE AND POST OFFICE KAIS, TEHSIL AND DISTRICT KULLU, H.P.
11. KIRAN BALA WIFE OF SH. PRATAP SINGH, AGED 49 YEARS, RESIDENT OF VILLAGE TALOGI, POST OFFICE PUID, TEHSIL AND DISTRICT KULLU, H.P.
12. KAMLA DEVI WIFE OF SH. TSERING NORBU, AGED 52 YEARS, RESIDENT OF VILLAGE BADA BUIN, POST OFFICE AND TEHSIL BHUNTER, DISTRICT KULLU, H.P.

13. DURGA DEVI WIFE FO SH. CHATTER SINGH, AGED 48 YEARS, RESIDENT OF VILLAGE AND POST OFFICE MOHAL, TEHSIL AND DISTRICT KULLU, H.P.
14. CHAMAN LAL SON OF SH. TEKU RAM, AGED 49 YEARS, RESIDNT OF VILLAGE BADAH, POST OFFICE MOHAL, TEHSIL AND DISTRICT KULLU, H.P.
15. YOG DUTT SHARMA SON OF SH. PURAN CHAND SHARMA, AGED 48 YEARS, RESIDENT OF BADAH, POST OFFICE MOHAL, TEHSIL AND DISTRICT KULLU H.P.
16. MOHINDER PAL SON OF SH. KULDEEP CHAND, AGED 44 YEARS, RESIDENT OF VILLAGE BARI LANJ, POST OFFICE URTOO, TEHSIL NIRMAND, DISTRICT KULLU, H.P.
17. DHANI RAM SON OF BAHADAR SINGH, AGED 55 YEARS, RESIDENT OF VILLAGE MANDLI, POST OFFICE AND TEHSIL, BANJAR, DISTRICT KULLU, H.P.
18. RAVINDER KUMAR SON OF SH. RAMESH KUMAR, AGED 38 YEARS RESIDENT OF BHARECH, POST OFFICE JUNGA, TEHSIL AND DISTRICT, SHIMLA, H.P.
19. OM PARKASH SAINI SON OF SH. PREM SINGH SAINI, AGED 50 YEARS, RESIDENT OF HOUSE NO. 235/08, KAHAR GALI, RANITAL, NAHAN, DISTRICT SIRMAUR, H.P.
20. JAI RAJ SINGH SON OF SH. DEV RAJ SINGH, AGED 48 YEARS, RESIDENT OF HOUSE NO. 222/12, KATCHA TANK, NAHAN, DISTRICT SIRMAUR, H.P.
21. LAL SINGH SON OF SHRI DHYAN SINGH, AGED 47 YEARS, RESIENT OF VILLAGE AND POST OFFICE SHARLI MANPUR, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.
22. AMIT BAKSHI SON OF SHRI CHANDER BAKSHI, AGED 46 YEARS, RESIDENT FO NEAR MAHIMA LIBRARY, VILLA, NAHAN, DISTRICT SIRMAUR, H.P.
23. DEVENDER SINGH SON OF SH. MOHI RAM PUNDIR, AGED 49 YEARS, RESIDENT OF VILLAGE KOOL, POST OFFICE GHANDURI, TEHSIL SANGRAH, DISTRICT SIRMAUR, H.P.
24. SHIWANI GUPTA, DAUGHTER OF SH. RAM KUMAR, AGED 42 YEARS, RESIDENT OF BARA CHOWK, NAHAN, DISTRICT SIRMAUR, H.P.
25. LAL CHAND SON OF SH. KAILASH CHAND, AGED 42 YEARS, RESIDENT OF VILLAGE KOON, POST OFFICE SHAMBHUWALA, TEHSIL NAHAN, DISTRICT SIRMAUR, H.P.
26. JAGPAL SINGH SON OF SH. BAHADUR SINGH, AGED 41 YEARS, VILLAGE DURECH, POST OFFFICE KIYARI GHUNDHA, TEHSIL SHILLAI, DISTRICT SIRMAUR, H.P.

27. RAJENDER KUMAR SON OF SH. MOHI RAM, AGED 45 YEARS, RESIDENT OF VILLAGE PHOTA MANAL, POST OFFICE GAWALI, TEHSIL SHILLAI, DISTRICT SIRMAUR, H.P.
28. MUNISH KUMAR SON OF SH. JAI GOPAL SHARMA, AGED 49 YEARS, RESIDENT OF NEAR RANI TAL GATE, NAHAN, DISTRICT SIRMAUR, H.P.
29. ANJU DEVI DAUGHTER OF SOM DEV, AGE 49 YEARS, VILLAGE THORANG, POST OFFICE GONDHLA, TEHSIL LAHOUL, DISTRICT LAHAUL SPITI, HIMACHAL PRADESH.
30. PHUNCHOG DOLMA DAUGHTER OF TASHI TANDUP, AGE 48 YEARS, VILLAGE AND POST OFFICE LOSSAR, TEHSIL SPITI, DISTRICT LAHOUL SPITI, H.P.
31. NAWANG ZANGMO DAUGHTER OF SOM DEV, AGED 49 YEARS, VILLAGE THORANG, POST OFFICE GONDHLA, TEHSIL LAHOUL, DISTICT LAHOUL SPITI, H.P.
32. PREM CHAND SON OF DHANI RAM, AGE 52 YEARS, VILLAGE AND POST OFFICE JOBRANG, TEHSIL LAHOUL, DISTRICT LAHOUL SPITI H.P.
33. LABZANG PALDAN SON OF SONAM TOBGE, AGE 49 YEARS, VILLAGE AND POST OFFICE LALUNG, TEHSIL SPITI, DISTRICT LAHOUL SPITI, H.P.
34. ASHWANI KUMAR SON OF TILAK RAJ, AGE 51 YEARS, VILLAGE JABAL JHAMROT, POST OFFICE KOTI, TEHSIL AND DISTRICT SOLAN, H.P.

.....Petitioners

(BY MR. VIJAY CHAUDHARY, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS CHIEF SECRETARY TO THE GOVERNMENT OF H.P. SHIMLA-2.
2. ADDITIONAL CHIEF SECETARY (EDUCATION) TO THE GOVERNMENT OF H.P., SHIMLA-2.
3. DIRECTOR HIGHER EDUCATION, HIMACHAL PRADESH, SHIMLA-1.
4. HIMACHAL PRADESH SCHOOL EDUCATION SOCIETY THROUGH ITS CHAIRMAN-CUM-PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF H.P.SHIMLA-2.
5. STATE PROJECT DIRECTOR, SARVA SHIKSHA ABHIYAN, HIMACHAL PRADESH SCHOOL EDUCATION SOCIETY, SHIMLA-1.

.....RESPONDENTS

(MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENTS.).

CWP NO. 1756 OF 2021.

BETWEEN:

1. NISHANT SHARMA SON OF SH. SEWAK RAM SHARMA, AGED 34 YEARS, RESIDETN OF VILLAGE AND POST OFFICE KANAID, TEHSIL SUNDERNAGAR, DISTRICT MANDI, H.P.
2. NAVEEN KUMAR SON OF LATE INDER SINGH, AGED 51 YEARS, RESIDENT OF HOUSE NO. 218/4, SUHARA MOHALLA, TEHSI SADAR, DISTRICT MANDI, H.P.
3. KAMLESH KUMAR VERMA SON OF SHRI KRISHAN CHAND, AGED 49 YEARS, RESIDENT OF VILLAGE BANDAL, POST OFFICE KHUDA, TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.
4. HEM LATA WIFE FO SHRI PRADEEP SEN, AGED 43 YEARS, VILLAGE AND POST OFFICE TALYAHAR, TEHSIL AND DISTRICT MANDI, H.P.
5. HARJIT SINGH SON OF SH. GURNAM SINGH, AGED 42 YEARS, RESIDENT OF VILLAGE ABHIPUR, POST OFFICE KALI BARI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.
6. RAJEEV KUMAR SON OF SHRI SIKANDER LAL, AGED 33 YEARS, RESIDENT OF VILLAGE GARA, POST OFFICE SWAHAN, TEHSIL SRI NAINA DEVI JI, DISTRICT BILASPUR, H.P.
7. BAHGAT RAM SON OF SH. SHOBHU RAM, AGED 40 YEARS, RESIDENT OF VILLAGE KHILAHAR, POST OFFICE BHARANOO, TEHSIL NERWA, DISTRICT SHIMLA, H.P.
8. HEM RAJ SON OF SH. VINU RAM, AGED 48 YEARS, RESIDENT OF VILLAGE AND POST OFFICE BHUTTI, TEHSIL AND DISTRICT KULLU, H.P.
9. JAGDISH SINGH SON OF SH. PUNE RAM, AGED 48 YEARS, RESIDENT OF VILLAGE AND POST OFFICE BHALYANI, TEHSIL, AND DISTRICT, KULLU, H.P.
10. SAHA DEV SON OF SH. KALU RAM, AGED 49 YEARS, RESIDENT OF NEAR ACADEMIC HILL PUBLIC SCHOOL, GADAURI, POST OFFICE SHAMSHI, TEHSIL BHUNTER, DISTRICT KULLU, H.P.
11. KAMLESH SON OF SH. HIRA SINGH, AGED 50 YEARS, RESIDENT OF VILLAAGE LANJ, POST OFFICE URTU, TEHSIL NIRMAND, DISTRICT KULLU, H.P.
12. KHEM RAJ SON OF SH. TULSI RAM, AGED 52 YEARS, RESIDENT OF VILLAG RENH, POST OFFICE BANOGI, SUB TEHSIL SAINJ, DISTRICT KULLU, H.P.
13. PARTAP SINGH SON OF SHRI KALTOO RAM, AGED 50 YEARS, RESIDENT OF VILLAGE KAMAND, POST OFFICE BHUTTI, TEHSIL AND DISTRICT, KULLU H.P.

14. VIJAY SHUSHAN, SON OF SH. BUDH RAM, AGED 54 YEARS, RESIDNT OF VILLAGE PRIRDI, POST OFFICEN MOHAL, TEHSIL AND DISTRICT, KULLU H.P.
15. DEEPAK SHARMA SON OF SHRI PREM NATH SHARMA, AGED 50 YEARS, RESIDENT OF VILLAG AND POST OFFICE BATHRI, TEHSIL DALHOUSIE, DISTRICT CHAMBA, H.P.
16. MOHAN SINGH SON OF SH. MELTHU RAM, AGED 48 YEARS, RESIDENT OF VILLAGE AND POST OFFICE KOTI BOUNCH, TEHSIL SHILLAI, DISTRICT SIRMAUR, H.P.
17. JASWANT KUMAR SON OF SH. SANT RAM, AGED 49 YEARS, RESIDENT OF VILLAGE POPLI WALA, POST OFFICE PURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P
18. MEHMA NAND SON OF SH. ROOP SINGH, AGED 50 YEARS, RESIDENT OF VILLAGE AND POST OFFICE RAJANA, TEHSIL SANGRAH, DISTRICT SIRMAUR, H.P.
19. TAPENDER SINGH SON OF SH. BALWANT SINGH, AGED 53 YEARS, RESIDENT FO VILLAGE AND POST OFFICE KOLAR, TEHSIL NAHAN DISTRICT SIRMAUR, H.P.
20. PREM JEET LAL, SHRI CHHIME DAWA, AGED 56 YEARS, VILLAGE GOHARMAN, POST OFFICE JAHALMAN, TEHSIL LAHOUL, DISTRICT LAHOUL AND SPITI, H.P.

……..PETITIONERS

(BY MR. VIJAY CHAUDHARY, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS CHIEF SECRETARY TO THE GOVERNMENT OF H.P., SHIMLA-2.
2. ADDITIONAL CHIEF SECETARY (EDUCATION) TO THE GOVERNMENT OF H.P., SHIMLA-2.
3. HIMACHAL PRADESH SCHOOL EDUCATION SOCIETY THROUGH ITS CHAIRMAN-CUM-PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF H.P.SHIMLA-2.
4. STATE PROJECT DIRECTOR, SARVA SHIKSHA ABHIYAN, HIMACHAL PRADESH SCHOOL EDUCATION SOCIETY, SHIMLA-1.

……RESPONDENTS

(MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENTS.).

CIVIL WRIT PETITION
No. 3743 OF 2021

ALONGWITH CONNECTED MATTERS.
RESERVED ON: 10.12.2021.
DECIDED ON: 17.12.2021.

Constitution of India, 1950 – Article 226 – Service law – Regularization - the petitioners felt aggrieved by the order dated 16-12-2020, whereby the employees of society were dispensed with for consideration for taking in Government department and the respondents sought the directions to the respondents for regularization of their services after completion of requisite years of services as per Government policy - Held – the State Government has to act as a modern employer in welfare State and it cannot have different yardsticks for different persons – benefit of regularization to the petitioners on completion of eight years of continuos contract service has been delayed by the petitioner - Financial implications cannot be a ground to deny the rights of the petitioner – Denied of rights of petitioners regarding their regularization lead to violence of article 14 of the constitution – respondent directed to regularize the services of the petitioners from the date they completed eight year of services with consequential ,benefits within three months – Petition allowed. (Paras 15, 19, 27 & 30)

Cases referred:

State of Jharkhand and others Vs Brahmputra Mettalics Ltd. 2020(13) SCALE 500;

All these petitions coming on for hearing this day, the Court, passed the following:

O R D E R

Since all these petitions involve common question of law and facts, therefore, these have been heard and are being decided together by a common judgment.

2. The substantive reliefs as prayed in these petitions commonly are as under:

> *"(I) A Writ in the nature of Certiorari may kindly be issued for quashing the condition incorporated in order, dated 16.12.2020, Annexure P-8*

to the effect that "The services of the employees of the Society would stand automatically dispensed with and they will not be considered for taking over in Government Departments."

(II) That the order dated 16.12.2020 (Annexure P-12) may kindly be modified and the respondents may kindly be directed to regularize the services of the petitioners after completion of the requisite years of services as per their date of joining on contract basis, as per the Government Policy prevailing at the relevant time along with all consequential benefits of seniority, increments, allowances and arrears of pay."

3. Petitioners in CWP Nos. 1756 and 3743 of 2021 arethe technical staff (Junior Engineers, Assistant Engineers and Draftsman), whereas, petitioners in CWP Nos. 1339 and 1755 of 2021 were non-technical staff (Lecturers, Accountants, Data Entry Operators, Clerks and Peons) employed with Himachal Pradesh School Education Society (HPSES). The HPSES was formed in 1995 initially to implement District Primary Education Programme (DPEP) and later programmes/projects such as Sarva Shiksha Abhiyan (SSA), Rashtriya Madhyamik Shiksha Abhiyan (RMSA) and currently "Samgra Shiksha". The above noted holistic programmes/ projects have been launched from time to time to focus on provision of basic quality School education to all in mission mode.

4. Initial recruitment of all the petitioners was on contract basis in HPSES under DPEP or SSA as the case may be. Petitioners continued to be contract employees of HPSES till their regularization on 16.12.2020. Before their regularization, as noticed above, majority of the petitioners have continuously served on contract basis for more than 20 years. Petitioners are now aged in the range of 40 to 56 years.

5. The State Government for the last many years has adopted mode of recruiting the personnel to be employed in its various departments either on temporary/ad-hoc basis or on contract basis, notwithstanding the fact

thattheir requirement was predictably permanent.Therefore, the State Government, from time to time, has come up with various Schemes/Policies whereunder services of such temporary/ad-hoc/contract employees have been regularised after a specific period of time ranging from 3 years to 10 years.

6. Petitioners also raised the demand for their regularization on completion of continuous and uninterrupted services of more than 8 years. They claimed that ever-since their employment on contract basis, they had been discharging the duties assigned to them to the satisfaction of their superiors and nothing adverse had been conveyed against them regarding performance of the duties. Seeking parity, with contract employees in other departments of the State Government, whose services were regularised, from time to time, petitioners raised their claim.Petitioners had also sought parity with EGS Instructors (Teachers), who were appointed under the Education Guarantee Scheme in SSA and had been permanently absorbed in the Education Department as "Gramin Vidya Upasaks" i.e. teachers in the Government Primary Schools after having worked there for only four years.

7. The Executive Committee of HPSES on 23.02.2012 resolved to grant regular pay scale to its contractual employees including petitioner. Vide office order dated April, 2012, the employees who had completed 8 years of service as on 31.3.2010 and 31.3.2011, respectively, were granted revised contractual remuneration at par with the Government employees in other departments, thus the petitioners also availed the said benefit.

8. Vide letter dated 24.10.2011, the State Project Director had apprised the Chairman of the Governing Body of HPSES i.e. the Hon'ble Chief Minister that the services of the contractual employees could be considered for regularization since the HPSES was a sister wing of the Education Department. The matter pertaining to regularisation of the services of petitioners, however, attracted least priority.

9. Aggrieved against non-fulfilment of their demands, some of the petitioners approached this Court by way of CWP No. 6275 of 2012 titled Sanjay Gharu and others vs. State of Himachal Pradesh and others and CWP No. 1497 of 2012 titled Tilak Chand Sharma vs. State of Himachal Pradesh and others. These petitions came to be decided by learned Single Judge of this Court vide common judgment dated 16.10.2014 in the following terms:

> *"10. Accordingly, in view of the observations and analysis made hereinabove, both the writ petitions are allowed and the respondents are directed to regularize the services of the petitioners from the date when they have completed eight years of service with all consequential benefits within a period of three months from today. Pending application(s), if any, also stand disposed of. No orders as to costs."*

10. Respondents-State assailed the aforesaid judgment in LPA No. 66 of 2015. However, in the meantime, the State Government took a conscious decision to merge the technical staff of HPSES in HPPWD and I&PH Department. The relevant communication dated 26.9.2017 in that regard from Mission Director (SSA)-cum Director Elementary Education, Himachal Pradesh to the Engineer-in-Chief (PWD), which reads as under:

> "No. HPSES(SSA/RMSA) HO-Vl.II-7395
> OFFICE OF THE STATE PROJECT DIRECTOR SSA/PMSA H.P. SCHOOL EDUCATION SOCIETY, DPEP BHAWAN LAL PANI, SHIMLA-171001.
>
> Dated: 26/09/17
>
> To
>
> The Engineer-in-Chief (PWD)
> Nirman Bhawan, Nigam Vihar,
> Shimla – 171 002.

Subject: Regarding merger of technical staff (Civil Engineers and Draftsmen) of HPSES Employees in HPPWD and IPH Department in view of the Hon'ble High Court order.

Sir,

With reference to letter dated 22.09.2017, on the subject noted above, matter regarding merger of technical staff of Himachal Pradesh School Education Society (HPSES) in HPPWD and I&PH has been approved by the Council of Ministers in its meeting held on 18.09.2017. Accordingly, as per the ratio approved by the Council of Ministers, 60% of total employees are to be merged in PWD Department.

You are, therefore, requested to do the needful as per the list enclosed. It is further apprised that these employees are being paid pay scales equivalent to regular employees of Government Department as per Annexure-A, B and C.

It is also brought to your kind notice that the Council of Ministers has further approved that one Assistant Engineer and 18 Junior Engineers after merging in PWD Department as per list enclosed as Annexure 'D' be deputed in HPSES (SSA) on secondment basis to supervise ongoing works of the department of Education. Therefore, necessary action may please be taken at your end at the earliest please.

Yours faithfully,
Sd/-
Mission Director (SSA)-cum-Director
Elementary Education,
Himachal Pradesh."

Encls: As above.

Letter dated 22.9.17.

11. Vide letter dated 13.11.2017, the Special Secretary (PW) to the Govt. of H.P. requested the Mission Director (SSA) to provide the requisite information regarding the technical staff of HPSES for further transmission to the H.P. Public Service Commission, in sequel to the proposed merger of the technical staff of HPSES in HPPWD and I&PH Department.

12. While the above noticed process was going-on, LPA No.66 of 2015 was disposed of on 10.10.2017 in the following terms:

"Learned Deputy Advocate General has placed on record instructions, dated 29th September, 2017, which read as under:-

"To

The Ld. Advocate General,
H.P. High Court, Shimla-1.

Sub: Regarding withdrawal of L.P.A. No. 66 of 2015 filed by the State of H.P.

Sir,

I am the honour to enclose herewith the copy of letters received from the Principal Secretary (Education)vide which approval of CMM and the Council of Ministers held on 18.09.2017 has been conveyed to this office.

In this context it is submitted that vide above mentioned letters following has been conveyed:

"LPA No. 66/2015 filed by the Government against the order passed by the Hon'ble High Court in CWP No. 6275 of 2012 and CWP No. 1497/2012 and other litigation/CWPs filed by the Society and individual be withdrawn."

It is, therefore, requested to kindly withdraw the L.P.A. No. 66/2015 filed by the State of H.P., as desired by the Government.

Yours faithfully,
Sd/-
State Project Director(SSA &
RMSA) H.P., Shimla-1"

2. At this stage, learned counsel for the writ petitioners, under instructions, states that in view of intervening developments, writ petitioners seek permission to withdraw the original writ petitions being CWP Nos. 1497 of 2012 and 6275 of 2012.

3. Learned Deputy Advocate General also seeks permission to withdraw the present Letters Patent Appeal. Permission, as prayed for, is granted.

4. Consequently, judgment, dated 16th October, 2014, passed in CWP No. 6275 of 2012, titled Sanjay Gharu and others Vs. State of H.P. and others (supra) is rendered infructuous. It stands clarified that all issues are left open, reserving liberty to the petitioners to agitate the same, if so desired at a later stage. Pending applications, if any, also stand disposed of."

13. That after disposal of LPA No. 66 of 2015, the matter with respect to regularization of petitioners was placed before the Cabinet on 25.10.2017 and the Cabinet approved the proposal to merge the technical staff of HPSES with HPPWD and I&PH Department.

14. Despite the decision having been taken by the State Government to merge the technical staff of HPSES with HPPWD and I&PH Department, no action was taken which forced the petitioners to approach the Court again by way of CWPOA No. 5637 of 2020 titled Manoj Kumar and others vs. State of H.P. and others and CWPOA No. 5567 of 2020 titled Bimla Devi and others vs. State of H.P. and others. During the pendency of these petitions, the respondents regularised the services of technical staff as well as non-technical staffvide orders dated 16.12.2020, respectively. The respondents-State while regularizing the services of the petitioners on their existing posts with existing pay scales in HPSES under "Samagra Shiksha" imposed a condition that their

employment would be co-terminus with the existence of HPSES and on dissolution of such Society their services will stand automatically dispensed with and they shall not be considered for taking over by any other Government Departments. In view of the intervening development, CWPOA No. 5637 of 2020 and CWPOA No. 5567 of 2020 were disposed of by this Court on 22.12.2020 in the following terms:

> "Since the services of the petitioners have already been regularized as is evident from order dated 16th December, 2020 we deem it proper to dispose of all these petitions, making it clear that in case any of the petitioner is still aggrieved by non-grant of any of the relief including the one claimed in these petitions and has subsisting cause of action, he/she is always at liberty of approach this court for redressal of the same. Pending miscelleaneous application(s), if any also stand disposed."

15. By way of instant petitions, the petitioners have assailed the action of the State Government primarily on two grounds, firstly, that instead of regularizing the services of the petitioners on completion of 8 years at par with the other similarly situated Government employees, they were regularized after serving for more than 20 years and, secondly, the stipulation to the effect that their employment would be co-terminus with HPSES is arbitrary. The petitioners have assailed the action of the State Government being illegal, unjust and arbitrary as according to the petitioners a promise was held out to them by the express as well as implied conduct of respondents and hence the respondents were estopped from resiling from the promise to regularize the services of the petitioners. In support of such contention, it has been submitted that the respondents have regularized the contract employees in various departments after 8 years of continuous service and the conduct of respondents in allowing the petitioners to work for a period of more than 20 years on contract basis and also allowing them financial benefits at par with other Government servants except to regularize their services was itself a promise to the petitioners that their services would be regularised in due

course. On such promise, the petitioners had stuck to their jobs with HPSES and have now reached such a stage of life where they will not be able to generate any other employment for them. As per petitioners, the imposition of stipulation in their regularization order amounts to resiling from the promise. In addition, such conduct of the State Government is clearly violative of Article 14 and 16 of the Constitution as in all other cases, the respondents have allowed the employees on closure or dissolution of various public sectors/organizations to be absorbed in other departments.

16. Further contention of petitioners is that they had earned a judgment in their favour which was passed by this Court on 16.10.2014 after considering the merits of the case. The respondents were under direction to regularize the services of the petitioners from the date when they had completed 8 years of continuous service on contract basis. The petitioners were made to withdraw the petitions on the promise that their services would be regularised and as a pre-condition thereof, they were required to withdraw the petitions.

17. In reply, the respondents have submitted that the petitioners were engaged under 'Sarv Shiksha Abhiyan' on contract basis and as per para 37.1 of the Manual of Financial Management procurement, no permanent liability could be accrued on the Society or the State Government by filling up of the posts. As per the respondents, some of the petitioners were engaged under DPEP project which was wound up in 2003 resulted their contract had come to an end whereafter they were engaged afresh under 'Sarv Shiksha Abhiyan'. It has been alleged that petitioners cannot be equated with the Government employees as they are selected after due process and through competitive exam, interview etc. in accordance with the relevant R &P Rules, whereas in case of petitioners, no R & P Rules were there and the petitioners were recruited without adoption of procedure in accordance with law. The reason of financial implication has also been mentioned as one of the grounds

for not regularizing the petitioners retrospectively. The contractual remuneration of the petitioners were enhanced at par with regular Government employees only by taking a lenient view. The petitions are stated to be bad for non-joinder of necessary parties. According to respondents, the Union of India is necessary party in view of fact that Samagra Shiksha is aided by the Government of India to the extent of 90%. The respondents have also submitted that the decision of Cabinet dated 22.9.2017 was reviewed in the meeting dated 23.11.2020 and approval was accorded for regularization of petitioners in the HPSES itself under 'Samagra Shiksha Abhiyan'.

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

19. The tone and tenor of the averments in instant petitions reveal that petitioners have based their claim on the doctrine of promissory estoppel. In order to succeed on the strength of said doctrine, it is incumbent upon petitioners to prove existence of pre-existing right in their favour the extension of which may have led to certain promises being made by the public authorities. In the given facts of the case, the petitioners may not qualify the requisite condition. However, the doctrine of promissory estoppel is akin to principle of legitimate expectation and both have overlapping traits. The only marked difference being that principle of legitimate expectation can be applied even in absence of any existing right. The claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel.

20. The Hon'ble Supreme Court in **State of Jharkhand and others Vs Brahmputra Mettalics Ltd. 2020(13) SCALE 500** has expounded in detail the concept of legitimate expectation in the context of India law as under:

> **"40.** Under Indian Law, there is often a conflation between the doctrines of *promissory estoppel* and legitimate expectation. This has

been described in Jain and Jain's well known treatise, *Principles of Administrative Law*:

> "At times, the expressions 'legitimate expectation' and 'promissory estoppel' are used interchangeably, but that is not a correct usage because 'legitimate expectation' is a concept much broader in scope than 'promissory estoppel'.
>
> …
>
> A reading of the relevant Indian cases, however, exhibit some confusion of ideas. It seems that the judicial thinking has not as yet crystallised as regards the nature and scope of the doctrine. At times, it has been referred to as merely a procedural doctrine; at times, it has been treated interchangeably as promissory estoppel. However both these ideas are incorrect. As stated above, legitimate expectation is a substantive doctrine as well and has much broader scope than promissory estoppel.
>
> …
>
> In *Punjab Communications Ltd.* v. *Union of India*, the Supreme Court has observed in relation to the doctrine of legitimate expectation:
>
> "the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way Reliance must have been placed on the said representation and the representee must have thereby suffered detriment."
>
> It is suggested that this formulation of the doctrine of legitimate expectation is not correct as it makes "legitimate expectation" practically synonymous with promissory estoppel. Legitimate expectation may arise from conduct of the authority; a promise is not always necessary for the purpose."

41. While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates. Professors Jain and Deshpande characterize the consequences of this doctrinal confusion in the following terms:

> "Thus, in India, the characterization of legitimate expectations is on a weaker footing, than in jurisdictions like UK where the courts are now willing to recognize the capacity of public law to absorb the moral values underlying the notion of estoppel in the light of the evolution of doctrines like LE [Legitimate Expectations] and abuse of power. If the Supreme Court of India has shown its creativity in transforming the notion of promissory estoppel from the limitations of private law, then it does not stand to reason as to why it should also not articulate and evolve the doctrine of LE for judicial review of resilement of administrative authorities from policies and longstanding practices. If such a notion of LE is adopted, then not only would the Court be able to do away with the artificial hierarchy between promissory estoppel and legitimate expectation, but, it would also be able to hold the administrative authorities to account on the footing of public law outside the zone of promises on a stronger and principled anvil. Presently, in the absence of a like

doctrine to that of promissory estoppel outside the promissory zone, the administrative law adjudication of resilement of policies stands on a shaky public law foundation."

42. We shall therefore attempt to provide a cogent basis for the doctrine of legitimate expectation, which is not merely grounded on analogy with the doctrine of *promissory estoppel*. The need for this doctrine to have an independent existence was articulated by Justice Frankfurter of the United State Supreme Court in *Vitarelli* v. *Seton*:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

43. However, before we do this, it is important to clarify the understanding of the doctrine of legitimate expectation in previous judgments of this Court. In *National Buildings Construction Corporation* v. *S. Raghunathan* ("*National Buildings Construction Corpn.*"), a three Judge bench of this Court, speaking through Justice S. Saghir Ahmad, held that:

> "18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of

> "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."
>
> (emphasis supplied)

44. However, it is important to note that this observation was made by this Court while discussing the ambit of the doctrine of legitimate expectation under English Law, as it stood then. As we have discussed earlier, there was a substantial conflation or overlap between the doctrines of legitimate expectation and *promissory estoppel* even under English Law since the former was often invoked as being analogous to the latter. However, since then and since the judgment of this Court in *National Buildings Construction Corporation* (supra), the English Law in relation to the doctrine of legitimate expectation has evolved. More specifically, it has actively tried to separate the two doctrines and to situate the doctrine of legitimate expectations on a broader footing. In *Regina (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council*[30], the House of Lords has held thus:

> "33 In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone". (See also Dyson J in *R* v. *Leicester City Council, Ex p Powergen UK Ltd.* [2000] JPL 629, 637.)
>
> 34 There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power… But it is no more than an analogy because remedies against

public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see *Coughlan's case*, at pp 254-255) while ordinary property rights are in general far more limited by considerations of public interest : see *R (Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

35 It is true that in early cases such as the *Wells case* [1967] 1 WLR 1000 and *Lever Finance Ltd.* v. *Westminster (City) London Borough Council* [1971] 1 Q.B. 222, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful.....It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet."

(emphasis supplied)

45. In a concurring opinion in *Monnet Ispat and Energy Ltd.* v. *Union of India* ("*Monnet Ispat*"), Justice H.L. Gokhale highlighted the different considerations that underlie the doctrines of *promissory estoppel* and legitimate expectation. The learned judge held that for the application of the doctrine of promissory estoppel, there has to be a promise, based on which the promisee has acted to its prejudice. In contrast, while applying the doctrine of legitimate expectation, the primary considerations are reasonableness and fairness of the State action. He observed thus:

"Promissory Estoppel and Legitimate Expectations

289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party concerned must have acted to its prejudice. In the instant case it was only a proposal, and it was very much made clear that it was

> to be approved by the Central Government, prior whereto it could not be construed as containing a promise. Besides, equity cannot be used against a statutory provision or notification.
>
> 290.....In any case, in the absence of any promise, the Appellants including Aadhunik cannot claim promissory estoppel in the teeth of the notifications issued under the relevant statutory powers. Alternatively, the Appellants are trying to make a case under the doctrine of legitimate expectations. The basis of this doctrine is in reasonableness and fairness. However, it can also not be invoked where the decision of the public authority is founded in a provision of law, and is in consonance with public interest."
>
> (emphasis supplied)

46. In *Union of India* v. *Lt. Col. P.K. Choudhary*, speaking through Chief Justice T.S. Thakur, the Court discussed the decision in *Monnet Ispat* (supra) and noted its reliance on the judgment in *Attorney General for New South Wales* v. *Quinn*. It then observed:

> "This Court went on to hold that if denial of legitimate expectation in a given case amounts to denial of a right that is guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or in violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

47. Thus, the Court held that the doctrine of legitimate expectation cannot be claimed as a right in itself, but can be used only when the denial of a legitimate expectation leads to the violation of Article 14 of the Constitution.

48**.** As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three judge Bench in *Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*, speaking through Justice J.S. Verma, held thus:

"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the

> expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."
>
> (emphasis supplied)

49**.** More recently, in *NOIDA Entrepreneurs Assn.* v. *NOIDA*, a two-judge bench of this Court, speaking through Justice B.S. Chauhan, elaborated on this relationship in the following terms:

> "39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.
>
> …
>
> 41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with

> the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other...]"
>
> (emphasis supplied)
>
> **50.** As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression."

21. Adverting to the instant petitions, the factual position is more or less admitted. The initial recruitment of petitioners on contract basis, the longevity of their continuous service, grant of financial benefits to the petitioners at par with regular Government employees holding equivalent posts, consideration and decision at the end of the State Government to grant the petitioners benefit of continuity of service either by merger or regularization are the facts which admittedly have taken place. The respondents have also not denied that the similarly situated persons in other departments/organizations of State Government were initially regularised after rendering 8 years of continuous service on contract basis and subsequently in certain cases the period of contract service for regularization was reduced to 5 years or even 3 years.

22. The only exception that has been sought to be carved out by the respondents is that petitioners were not initially appointed through procedure in accordance with law. Their appointments were not in accordance with any rules relating to their recruitment and promotion.

23. It is not the case of respondents that petitioners were not holding minimum essential qualifications as required for recruitment to the respective posts held by them in other Government departments/organizations. This plea

otherwise could not have been available to the respondents as the services of the petitioners have already been regularized.

24. The question only remains whether the denial of regularization to the petitioners retrospectively and also imposition of the condition, as noticed above, in regularization order of petitioners, is justified and legal?

25. Indisputably, the State Government has resorted to the mode of recruitment through contract employment since long. The contract employees have been regularized after putting in certain years of continuous service, as noticed above. The initial recruitment of the petitioners was though under a specific project, nevertheless, the project was for a laudable object to spread education in masses as an initiative of the Government itself. Merely the funding of project to larger extent was by the Central Government, it cannot be said the project was alien to the State Government as it was under the aegis of the State Government that the projects have worked. Importantly, the project that commenced about 25 years back is still in operation. The HPSES has been created to run the project in question as well as other related projects. It is not the case of respondents that the project or consequent creation of HPSES was for a limited period or purpose. Even the State Government never had any illusion about the continuance of projects being managed by HPSES. It will be gainful to extract a passage from the Minutes of Meeting To Review the Progress of Absorption of Engineering Staff Engaged Under SSA under the Chairmanship of the Chief Secretary held on 27.8.2020.**"Chairman asked Secretary (Education) to explore the possibility of Engineering wing and regularizing the services of all employees of the Society in the Society itself as Samagra Shiksha has to be implemented and for implementation of new education policy, services of these employees would be required. There will not be any burden on the Society as these employees are being paid the regular salary at par with their counterparts in the departments. If these**

employees are placed in some other department, they would move to the department and other employees will have to be inducted which will be a continuing cycle. He has pointed out that at present salary is being claimed under the project from the Government of India and Government of H.P. in the ratio of 90:10, whereas these employees are inducted in some other department, complete burden will fall on the State Government. He further suggested that if services of these employees are regularised in the Society then Samagra Shiksha Programme will run smoothly and will also help in implementing New Education Policy in the State for which these employees have attained expertise". It becomes evident from above noticed facts that the project in which the petitioners were employed were not temporary in nature by any stretch of imagination. The continuity of the project for more than 25 years as also the purpose sought to be achieved through such project clearly implies that the same is necessitated by inescapable obligations vis-à-vis spread of education in the mass

26. The State Government has to act as a model employer in a welfare State. It cannot have different yardstick for different persons. Conceptually, the executive authorities have the onerous duty to work for the benefit of the public at large. As far as the mode and manner in which the Government has to achieve its purpose is to be chosen by the Government itself, however, with caveat that the same cannot be irrational, unreasonable or arbitrary. In a State where rule of law prevails, the Government is no exception. Right of equality being one of the fundamental traits of the Constitution, the same cannot be denied at the whims and fencies of the authorities.

27. The benefit of regularization to the petitioners on completion of 8 years of continuous contract service has been delayed by the respondents and the petitioners cannot be blamed for that. The financial implication as pleaded by the respondents, therefore, cannot be a ground to deny the right to the

petitioners which had accrued to them especially when the learned Single Judge of this Court had ruled in their favour vide judgment dated 16.10.2014 passed in CWP No. 6275 of 2012 and CWP No. 1497 of 2012 and held the petitioners entitled for regularization from the date when they completed 8 years of continuous contract services. The right so earned by petitioners cannot be obliterated by respondents at such a belated stage under the garb of financial implication. The respondents have failed to justify the reasons for delay in granting the benefit of regularization to the petitioners. Thus, the petitioners had a right to be regularised on completion of 8 years of continuous service on contract basis.

28. The conduct of the respondents throughout belies their assertions. It is not in dispute that the matter of regularization of petitioners was not being considered by the respondents. In fact, in 2017 itself, the State Cabinet had approved the proposal to merge the technical staff working with HPSES with HPPWD and I&PH Department of the State Government and the State Cabinet had again reaffirmed the said proposal in 2019. Various communications exchanged inter se the concerned departments, from time to time, were evident of the fact that the matter with respect to regularization of petitioners was under active consideration. Evidently, the petitioners had withdrawn their petitions being CWPOA No. 5637 of 2020 and CWPOA No. 5567 of 2020 on the clear promise being held out to them by the respondents that the matter of their regularization would be taken ahead only after withdrawal of their petitions. The fact that the petitioners withdrew their petitions after having earned judgment in their favour clearly reflects the unambiguous promise being held out to them by the State Government. The admitted facts of the case clearly suggest that the respondents had held out a clear promise to the petitioners regarding grant of benefit of regularization of their services. The fact that the petitioners have been allowed to work on contract basis for more than 20 years continuously itself was sufficient to

instilla feeling of security of job in the petitioners. At no point of time, the respondents had represented to the petitioners that their employment was not permanent. The petitioners had every reason to believe that their services would be regularized as the same treatment was being meted to contract employees in other departments. Undoubtedly, the petitioners have brought themselves into such stage of life, ostensibly under the legitimate expectation, that any clog on continuity of their respective jobs at this stage will be catastrophic for them.

29. It can also be noticed from the admitted facts of the case that the petitioners had fallen in circumstances which had inculcated a legitimate expectation in them that their services would be regularized at par with the other Government employees and such expectation in the given facts cannot be termed as unreasonable or excessive. In my considered view the evident conduct of the respondents amount of denial of a legitimate expectation of petitioners and thus, leads to the violation of Article 14 of the Constitution.

30. Accordingly, in view of the observations and analysis made hereinabove, all the writ petitions are allowed and the respondents are directed to regularize the services of the petitioners from the date when they have completed eight years of service with all consequential benefits within a period of three months from today. However, in the peculiar facts and circumstances of the case, the financial benefits, if any, shall be permissible to the petitioners only for a period of three years immediately preceding the filing of these petitions. The regularization orders of the petitioners dated 16.12.2020 are held illegal and arbitrary and hence quashed to the extent these contains the condition to the effect that the regular employment of petitioners will be co-terminus with the existence of HPSES. The State Government shall remain under direction to provide continuous regular employment to petitioners till their respective dates of superannuation in

accordance with law, unless petitioners render themselves incapable for such benefit under relevant conduct rules.

All the petitions are accordingly disposed of, in the aforesaid terms, so also the pending miscellaneous application(s) if any. The parties are left to bear their own costs.

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

Between:

SURINDER KUMAR,
S/O SH. RAI SINGH,
RESIDENT OF VILLAGE DEHRI,
P.O. KUTHANDAL
PRESENTLY SERVING AS
SUPERINTENDING ENGINEER
NORTH HIMUDA, CIRCLE OFFICE
DHARAMSHALA,
DISTRICT KANGRA, (HP)

....PETITIONER

(BY MR. P.S. PATWALIA, SENIOR
ADVOCATE WITH MR. SUNIL
MOHAN GOEL, ADVOCATE)

AND

1. STATE OF H.P.
THROUGH SECRETARY
(HOUSING-CUM-CHAIRMAN DPC)
TO THE GOVT. OF HIMACHAL PRADESH,
SHIMLA-2

2. HIMACHAL PRADESH HOUSING &

URBAN DEVELOPMENT AUTHORITY,
NIGAM VIHAR, SHIMLA THROUGH ITS
CEO-CUM-SECRETARY-CUM-MEMBER DPC

3. SMT. ANJORI KAPOOR,
W/O SH. AJAY KAPOOR
PRESENTLY WORKING AS SUPERINTENDING ENGINEER,
(SOUTH) HIMUDA, CIRCLE OFFICE KASUMPTI,
SHIMLA-9

4. EXECUTIVE DIRECTOR HIMUDA
MEMBER DPC NIGAM VIHAR, SHIMLA

5. DEPUTY SECRETARY (PERSONAL)
H.P. SECRETARIAT, SHIMLA-2
MEMBER DPC

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR.DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARENDER THAKUR AND
MR. KAMAL KISHORE AND GAURAV SHARMA,
DEPUTY ADVOCATES GENERAL,
FOR THE RESPONDENT-STATE)

(BY MR. AMIT SINGH CHANDEL,
ADVOCATE, FOR R-2 AND R-4)

(BY MR. DILIP SHARMA, SENIOR ADVOCATE
WITH MR. MANISH SHARMA,
ADVOCATE FOR R-3)

CIVIL WRIT PETITION No. 157 of 2020
Reserved on : 04.12.2021
Decided on : 17.12.2021

Constitution of India, 1950 – Article 226 - Service matter- Promotion – The petitioner Challenged the promotion of respondent No.3 to the post of Superintending Engineer–Held-Secretary HIMUDA vide notification dated

14.7.2005 mentioned the officers who would form DPC, but at no point of time, Executive Director, HIMUDA was associated in the meeting-DPC Conducted in stipulated manner without pursuing ACR, of Officers being considered for promotion for the relevant years, due to which even the Minister In charge ordered for fresh DPC however, only meeting held for review of review DPC only- Minutes of meeting held for post of Executive Engineer (Civil) and Superintendent Engineer dated 9.8.2019 & 16-8-2019 review of review meeting are quashed and set aside, consequence of which order promoting respondent No.3 for post of Superintending Engineer is also quashed and set aside- Petition allowed. (Paras 23, 25 & 27)

Cases referred:

Anil Katiyar versus Union of India (1997) 1 Supreme Court Cases 280;
Brijesh Sood v. State of HP and Ors, 2021 (3) Shimla Law Cases 1270;
Dev Dutt v. Union of India, (2008) 8 SCC 725;
Sunder Lal v. Union of India and Ors 2000 (10) SCC 409;
Union of India and Anr. v. A.K. Narula, 2007 (11) SCC 10;
Union of India and Anr. v. S.K. Goel and Ors 2007 (14) SCC 641;
UPSC v. K. Rajaiah and Ors, (2005) 10 SCC 15;

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

O R D E R

Being aggrieved and dissatisfied with the issuance of office order dated 1.1.2020 (*Annexure-P-22*), whereby respondent No.3-Ms. Anjori Kapoor, on the recommendation of the review Departmental Promotion Committee (Higher), came to be promoted to the post of Superintending Engineer (SE), ahead of the petitioner, petitioner has approached this Court in the instant proceedings, filed under Article 226 of the Constitution of India, praying therein for following main relief(s):

> *"i) That this Hon'ble Court may kindly issue writ of certiorari quashing order dated 1.1.2020 (Annexure-P-22), minutes of meeting of the review DPC held for the*

post of Executive Engineer (Civil) dated 9.8.2019 (Annexure-P-19) resultant minutes of meeting of DPC dated 16.8.2019 (Annexure P-20) and review of review DPC minutes of meeting dated 30.12.2019 (Annexure-P-21).

ii) That this Hon'ble Court may further be pleased to issue writ of mandamus directing the respondents to reconvene the DPC and look into all the ACRs of the petitioner and respondent No.3 and after a comparative evaluation of all the ACRs of the respondent No.3 objectively alongwith the order of upgradation passed by the ACS (Housing) conduct appropriate DPC.

iii) That this Hon'ble Court may be further pleased to issue writ of mandamus directing the respondents to not to hold further DPC for promotion to the post of Chief Engineer based upon the review DPC dated 30.12.2019 and order dated 1.1.2020."

For having bird's eye view, certain undisputed facts, which are relevant for the adjudication of the case at hand, are that respondent No.3-Ms. Anjori Kapoor, joined the respondent-Himachal Pradesh Housing and Urban Development Authority (*hereinafter referred to as "the HIMUDA"*) on 18.10.1996, against the post of Assistant Engineer. Subsequent to aforesaid appointment of respondent No.3, petitioner herein also came to be appointed as Assistant Engineer in HIMUDA and as such, respondent No.3 being senior to the petitioner herein figured at Sr. No. 11 and petitioner at Sr. No.12. Next post to which, both the petitioner and respondent No.3 were eligible for consideration and appointment was that of *"Executive Engineer",* however, this being the selection post was to be filled on the basis of merit cum seniority. Petitioner came to be promoted to the post of Executive Engineer on 16.6.2007 vide office order dated 16.6.2007, on the basis of recommendation made by the Departmental Promotion Committee.

Being aggrieved and dissatisfied with the promotion of the petitioner to the post of Executive Engineer and down grading of her annual ACRs for the period of 1.4.2004 to 31.3.2005, 1.4.2005 to 30.9.2005 and 1.9.2005 to 31.3.2006, respondent No.3 filed an Original Application bearing OA No. 1642 of 2007 in the Erstwhile HP State Administrative Tribunal, but same came to be transferred to this court on account of abolishment of the erstwhile Tribunal and was re-registered as CWP(T) No 15395 of 2008. This court vide judgment dated 18.12.2012, held that non-communication of adverse remarks recorded in the ACR is violative of Article 14 of the Constitution of India and in complete violation of judgment passed by the Hon'ble Apex Court in ***Dev Dutt*** *v.* ***Union of India, (2008) 8 SCC 725***. Vide aforesaid judgment, though this Court did not disturb the promotion of the petitioner and also refused to downgrade his assessment made in the ACRs, but directed the respondent State and HIMUDA to ensure prompt compliance of the directions contained in ***Dev Dutt's*** case (supra). This court also observed that in case (respondent No.3) petitioner herein, becomes aggrieved about the down gradation of his report, he should also be conveyed the entries etc. for the appropriate remedial action. Aforesaid judgment rendered by the learned Single Judge of this Court, was further laid challenge in LPA No. 30 of 2013, titled *Surinder Kumar v. Anjori Kapoor*, and Ors, having been filed by the petitioner herein. The Division Bench of this Court having taken note of the fact that HIMUDA being necessary party was not impleaded as party respondent in the case having been filed by respondent No.3, vide judgment dated 23.8.2014 (*Annexure P-2*), set-aside the judgment dated 18.12.2012 and directed the parties to cause appearance before the learned Single Judge on 6.10.2014. However, before fresh decision, if any, could be taken by the learned Single Judge of this court in the petition having been filed by respondent No.3, matter again came to be transferred to the erstwhile Tribunal and same was registered as TA No. 601 of 2015 (*Annexure-P-3*).

The erstwhile Tribunal vide order dated 13.7.2017, allowed the transfer application and permitted respondent No.3 to make a representation for up-gradation of her ACRs to Secretary (Housing) to the Government of Himachal Pradesh , if she chooses so, within a period of one month, with further direction to the Secretary (Housing) to decide the same

within two months thereafter. While passing aforesaid order, the erstwhile Tribunal also ordered that if entries of the applicant (respondent No.3 herein) are upgraded, she shall be considered for promotion retrospectively by the Departmental Promotion Committee within three months thereafter and if she gets selected for promotion retrospectively, she shall be given benefits notionally till the joining.

Being aggrieved and dissatisfied with the aforesaid order passed by the erstwhile Tribunal, petitioner herein filed CWP No. 1896 of 2017, before a Division Bench of this Court (*Annexure P-4*), wherein vide order dated 23.8.2017, convening of DPC was stayed. The Division Bench of this court, having taken note of the order dated 17.8.2017, passed by the Secretary (Housing) in terms of order dated 23.7.2017, passed by the erstwhile Tribunal, whereby ACRs of respondent No.3 for the year, 2002-03, 2003-04 and 2004-05 came to be upgraded from *"good"* to "very good", vide judgment dated 10.12.2018, disposed of the aforesaid writ petition, reserving liberty to the petitioner to assail the order passed by the Secretary (Housing) by resorting to the remedies available to him in accordance with law (Annexure-P-5). Though aforesaid judgment passed by this Court was laid challenge in SLP filed by the petitioner, but same was withdrawn as is evident from order dated 14.1.2019 passed by the Hon'ble Apex Court in SLP(C) No. 163 of 2019 (*Annexure-P-6*). After dismissal of the SLP as detailed herein above, petitioner herein filed OA No. 342 of 2019 in the erstwhile Tribunal, laying therein challenge to order dated 17.8.2017, passed by the Secretary (Housing) on the representation having been filed by the respondent, praying therein to upgrade her ACRs for the period as detailed herein above (Annexure-P-8). Though, initially the erstwhile Tribunal directed the parties to maintain status quo with regard to DPC, but subsequently vide order dated 10.7.2019 (Annexure-P-17) dismissed the OA having been filed by the petitioner on the ground that it has no power of judicial review to review the order dated 17.8.2017, passed by the ACS (Housing). Aforesaid order was further laid challenge by the petitioner herein in this court by way of CWP No. 1608 of 2019, which was dismissed vide judgment dated 24.7.2019 (*Annexure P-18*) on the ground that petitioner does not have any *locus standi* to challenge the up-gradation of ACRs of respondent No.3. Though petitioner again laid challenge to the

foresaid judgment passed by the Division Bench of this Court by way of SLP in the Hon'ble Apex Court, but same was also dismissed as withdrawn.

On 9.8.2019 (Annexure-P-19), meeting of Review Departmental Promotion Committee for the post of Executive Engineer (Civil) was held, wherein respondent No.3 was granted the seniority over and above the petitioner. On 16.8.2019, resultant to the review Departmental Promotion Committee held for the post to Executive Engineer (Civil), meeting of Review Departmental Promotion Committee for the post of Superintending Engineer was held, wherein respondent No.3 was ordered to be promoted to the post of Superintending Engineer (Civil) with effect from 20.3.2017, and petitioner was ordered to be promoted to the said post w.e.f. 1.9.2014. After convening of the afore meetings of Departmental Promotion Committee held on 9.8.2019 and 16.8.2019, proceedings were placed before the Minister Incharge, who being Chairman-cum-accepting authority, directed the respondents to conduct the revised Departmental Promotion Committee so that justice is done to all, as is evident from the relevant extract of noting sheet placed on record by the petitioner as *Annexure-P-26* alongwith application bearing CMP No. 5099 of 2020. In terms of the aforesaid recommendation of the Chairman-cum-accepting authority. Review Departmental Promotion Committee was held on 30.12.2019 (Annexure-P-21) under the Chairmanship of Secretary (Housing) to the Government of Himachal Pradesh-cum- CEO-cum-Secretary HIMUDA comprising of Mr. OP Bhandari, HPSS, Deputy Secretary (Personal) to the Government of Himachal Pradesh. Aforesaid review Departmental Promotion Committee in its meeting held on 30.12.2019 (Annexure-P-21) observed that the Departmental Promotion Committee finds no reason to not to upgrade ACRs in respect of Anjori Kapoor (respondent No.3) as the same has been decided by the competent authority vide detailed and speaking order in compliance of the orders of Hon'ble court. Aforesaid review Departmental Promotion Committee found that review Departmental Promotion Committees dated 9.8.2019 and 16.8.2019 have been convened in accordance with the prescribed procedure and as such, require no reconsideration. After meeting of review DPC held on 30.12.2019, as has been taken note herein above, the CEO-cum-Secretary HIMUDA, Shimla, vide office order dated 1.1.2020 (*Annexure-P-22*), taking note

of the recommendations of the Review Departmental Promotion Committee in its meetings held on 16.8.2019 and 30.12.2019, promoted respondent No.3 Ms. Anjori Kapoor to the post of the Superintending Engineer w.e.f. 1.9.2014 on notional basis instead of 20.3.2017 and vide same order, petitioner was ordered to be promoted to the post of Superintending Engineer w.e.f. 20.3.2017 instead of 1.9.2014. In the aforesaid background, petitioner has approached this Court in the instant petition, praying therein for reliefs as have been reproduced herein above.

Mr. P.S. Patwalia, learned Senior Counsel duly assisted by Mr. Sunil Mohan Goel, Advocate, representing the petitioner fairly stated that at this juncture, petitioner herein cannot have any grouse with regard to the up-gradation of ACRs of respondent No.3 by the Secretary (Housing) pursuant to the directions issued by the erstwhile Tribunal, which subsequently came to be upheld by this Court. He argued that precise grouse of the petitioner at this stage is that Review Departmental Promotion Committee while considering respondent No.3 for promotion ought not have accepted the ACRs upgraded by the Secretary (Housing) from "*good*" to "*very good*" in a mechanical manner, rather while considering the respondent No.3 for promotion to the post of Executive Engineer, which is a selection post and thereafter, to the post of Superintending Engineer ought to have taken into consideration all the ACRs of the relevant years. While making this Court peruse ACRs of respondent No.3 for the relevant years Annexure P-9, 10, 11 and 12, Mr. Patwalia, made serious attempt to persuade this Court to agree with his contention that had Departmental Promotion Committee perused the entire record with regard to ACRs of the relevant years, it would not have recommended respondent No.3 for promotion. While making this Court peruse Minutes of Departmental Promotion Committee held on 9.8.2019 and 16.8.2019 (Annexure P-19 and P-20), Mr. Patwalia, argued that bare perusal of the same nowhere suggests that DPC perused the record, rather it mechanically after seeing the order of up-gradation passed by the Secretary (Housing), recommended her for promotion to the post of Executive Engineer and thereafter, Superintending Engineer from the respective dates ahead of the petitioner, who, admittedly, stood recorded as very good officer in his ACRs and as such, was rightly given promotion in the

year, 2014 to the post of Executive Engineer. Lastly Mr. Patwalia, also invited attention of this court to the R&P Rules of HP Housing and Urban Development Authority, notified vide notification dated 14.7.2005 issued by the CEO-cum-HIMUDA Secretary (*Annexure P-23*) to demonstrate that Departmental Promotion Committee is/was necessarily required to be comprised of three persons ; *1.) Principal Secretary (Housing)-Chairman; 2.), CEO-cum-Secretary (HIMUDA)-Member; and 3.) Executive Director (HIMUDA)-Member*. He also invited attention of this court to the office memorandum dated 9.5.2014 issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training, Government of India (*Annexure P-24*) to argue that DPC is required to make its own assessment on the basis of entry in the ACRs and not to be guided merely by overall grading. He further argued that in case assessment by the Departmental Promotion Committees are apparently not in the line with the grades in the ACRs, DPCs should appropriately substantiate the assessment by giving reasons so that appointing authority could factor these while taking a view on the suitability of a officer for promotion. In support of his aforesaid contentions, Mr. Patwalia, placed reliance upon the following judgments passed by this Court as well as the Hon'ble Apex Court i.e. ***1.) Union of India and Anr. v. A.K. Narula, 2007 (11) SCC 10; 2.) Union of India and Anr. v. S.K. Goel and Ors 2007 (14) SCC 641; 3.) Sunder Lal v. Union of India and Ors 2000 (10) SCC 409;*** and ***4.) Brijesh Sood v. State of HP and Ors, 2021 (3) Shimla Law Cases 1270.***

Mr. Dilip Sharma, learned Senior counsel duly assisted by Mr. Manish Sharma, Advocate, representing respondent No.3 and Mr. Amit Singh Chandel, learned counsel appearing for respondents Nos. 2 and 4 supported the promotion order of the petitioner to the post of Executive Engineer and thereafter to Superintending Engineer on the basis of recommendation of DPC. Above named counsel further argued that since all the questions as have been raised in the instant petition already stand adjudicated by various courts of law, in the earlier petitions having been filed by respondent No. 3 as well as the petitioner, present petition deserves outright rejection, being not maintainable. Mr. Sharma, strenuously argued that petitioner has lost before all the courts and as such, it would not be proper at this stage to permit him to raise the question, which otherwise stands fully decided. Mr. Sharma, argued

that since Division Bench of this Court has already held that the petitioner has no locus to lay challenge to the order upgrading ACRs of respondent No.3, petitioner cannot be permitted, at this stage, to contend that order /minutes of DPC recommending respondent No.3 for promotion to the post of Executive Engineer and thereafter, Superintending Engineer on the basis of up-gradation of the ACRs made by the Secretary (Housing) is illegal. While making this Court peruse minutes of DPC, Mr. Sharma, argued that it has been clearly mentioned in the proceedings that DPC perused the entire record of ACRs and as such, recommendation made by it for promotion of respondent No.3 cannot be said to be not based upon proper appreciation of record. While referring to the office memorandum issued by the Ministry of Personnel, Public Grievances and Pensions, Mr. Sharma, argued that same has no application in the present case because Departmental Promotion Committee is only required to give reasons if its assessment is not in line with the gradation in the ACRs, but since in the case at hand, DPC has concurred with the ACRs of respondent No.3, it had no occasion otherwise to record any reasons.

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

Having heard learned counsel for the parties and perused the material available on record, this court finds that precise question, which needs to be adjudicated in the case at hand is that "*whether Departmental Promotion Committee is necessarily required to make its own assessment on the basis of entries in the ACRs or it can proceed further merely on the basis of overall grading given in the ACRs of the official concerned*."

Though Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Government of India, have been repeatedly issuing guidelines with regard to role of DPCs as have been taken note herein above, but to have more clarity, on the subject, this court deems it fit to take note of the latest instructions issued in this regard by the Government of India vide office memorandum dated 28.4.2014, which reads as under:

> *"The Department of Personnel & Training had in its O.M. No.22011/5/86-Estt (D) dated 10.04.1989 issued consolidated instructions on Departmental Promotion*

Committee and matters related thereto. Para 6.2.3 of said O.M. provides that "before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs." ***These guidelines further provide that "the DPC should not be guided merely by the overall grading, if any, that may be recorded in the ACRs (now APARs) but should also make its own assessment on the basis of entries in the CRs (now APARs) because it has been noticed that sometimes the overall grading in a ACR (now APAR) may be inconsistent with the grades under various parameters or attributes****".*

2. It further provides that an officer whose increments have been withheld or who has been reduced to a lower stage in the time scale, cannot be considered on that account to be ineligible for promotion to the higher grade as the specific penalty of withholding promotion has not been imposed on him/her. The suitability of the officer for promotion should be assessed by the DPC as and when occasions arise for such assessment. In assessing the suitability, the DPC will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of the general service record of the officer and the fact of the imposition of the penalty he should be considered suitable for promotion. However, even where the DPC considers that despite the penalty, the officer is suitable for promotion, the officer should not be actually promoted during the currency of the penalty.

3. Further this Department's O.M. No. No.22034/5/2004-Estt (D) dated 15.12.2004 provides that a Government servant, on whom a minor penalty of withholding of

increment etc. has been imposed, should be considered for promotion by the Departmental Promotion Committee which meets after the imposition of the said penalty and after due consideration of full facts leading to imposition of the penalty, if he is still considered fit for promotion, the promotion may be given effect after the expiry of the currency of the penalty.

4. The procedure and guidelines to be followed for promotion of Government servants against whom disciplinary/court proceedings are pending or whose conduct is under investigation has been laid down in this Department's O.M. No.22011/4/91-Estt (A) dated 14.9.92 and O.M. No.22034/4/2012-Estt (D) dated 02.11.2012 and 23.1.2014.

5. The role of Departmental Promotion Committee(DPC) in assessment of the officers being considered for promotion, including the officer(s) against whom a chargesheet has been issued or on whom a penalty has been imposed, has been examined by the Supreme Court in several judgments. The observations of Supreme Court in some of the important cases are summarized as under:

(a) In A.K. Narula case (AIR 2007 SC 2296), the Hon'ble Supreme Court has observed:

> *"the guidelines give a certain amount of play in the joints to the DPC by providing that it need not be guided by the overall grading recorded in the CRs, but may make its own assessment on the basis of the entries in the CRs. The DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norms. It is only when the process of assessment is vitiated either on the ground of bias, malafide or arbitrariness, the selection calls for interference. Where the DPC*

has proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment by the DPC, the court will not interfere".

(b) In Union of India vs. K.V. Jankiraman case (AIR 1991 SC 2010), the Supreme Court has taken cognizance of role of DPC the case of an officer on whom a penalty has been imposed and has held that:

"An employee has no right to promotion. He has only right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interest. An employee found guilty of misconduct cannot be placed on par with the other employees, and his case has to be treated differently In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified."

(c) In U01 & Anr. Vs. S.K. Goel & Ors. (Appeal (Civil) 689/2007 -SLP0-2410/2007), the Hon'ble Supreme Court has held that:

"DPC enjoyed full discretion to devise its method and procedure for objective

assessment of suitability and merit of the candidate being considered by it. Hence interference by High Court is not called for. "
While delivering the above judgement, the Division Bench has observed that:
"...it is now more or less well settled that the evaluation made by an Expert Committee should not be easily interfered with by the Court which do not have the necessary expertise to undertake the exercise that is necessary for such purpose."

6. It has been brought to the notice of this Department that DPCs have been adopting varying criteria in assessment of officials undergoing penalty that are not consistent with the extant instructions of the DOPT for e.g., downgradation of grading in ACR/APAR, denying promotion for specified number of years, etc.

7. The matter has been examined in consultation with the Department of Legal Affairs. It is a settled position that the DPC, within its power to make its own assessment, has to assess every proposal for promotion, on case to case basis. In assessing the suitability, the DPC is to take into account the circumstances leading to the imposition of the penalty and decide, whether in the light of general service record of the officer and the effect of imposition of penalty, he/she should be considered suitable for promotion and therefore, downgradation of APARs by one level in all such cases may not be legally sustainable. Following broad guidelines are laid down in respect of DPC:

a) DPCs enjoy full discretion to devise their own methods and procedures for objective assessment of the suitability of candidates who are to be considered by them, including those officers on

whom penalty has been imposed as provided in DoPT O.M. dated 10.4.89 and O.M. dated 15.12.2004.

b) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the ACRs/APARs but should make its own assessment on the basis of the entries in the ACRs/APARs as it has been noticed that sometimes the overall grading in a ACR/APAR may be inconsistent with the grading under various parameters or attributes. Before making the overall recommendation after considering the APARs (earlier ACRs) for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty. (Refer para 6.2.1(e) and para 6.2.3 of DoPT OM dated 10.04.89)

c) In case, the disciplinary/criminal prosecution is in the preliminary stage and the officer is not yet covered under any of the three conditions mentioned in para 2 of DoPT O.M. dated 14.09.1992, the DPC will assess the suitability of the officer and if found fit, the officer will be promoted along with other officers. As provided in this Department's O.M. dated 02.11.2012, the onus to ensure that only person with unblemished records are considered for promotion and disciplinary proceedings, if any, against any person coming in the zone of consideration are expedited, is that of the administrative Ministry/Department.

d) If the official under consideration is covered under any of the three condition mentioned in para 2 of O.M. dated 14.09.1992, the DPC will assess the suitability of Government servant along with other eligible candidates without taking into

consideration the disciplinary case/criminal prosecution pending. The assessment of the DPC including 'unfit for promotion' and the grading awarded are kept in a sealed cover. (Para 2.1 of DoPT OM dated 14.9.92).

e) Para 7 of DoPT OM dated 14.09.92 provides that a Government servant, who is recommended for promotion by the DPC, but in whose case, any of the three circumstances on denial of vigilance clearance mentioned in para 2 of ibid O.M. arises after the recommendations of the DPC are received but before he/she is actually promoted, will be considered as if his/her case had been placed in a sealed cover by the DPC. He/she shall not be promoted until he/she is completely exonerated of the charges against him/her.

f) If any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he/she is found guilty in the criminal prosecution against him/her, the findings of the sealed cover/covers shall not be acted upon. His/her case for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him/her (para 3.1 of DoPT OM dated 14.9.92).

g) In assessing the suitability of the officer on whom a penalty has been imposed, the DPC will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of general service record of the officer and the fact of imposition of penalty, the officer should be considered for promotion. The DPC, after due consideration, has authority to assess the officer as 'unfit' for promotion. However, where the DPC

considers that despite the penalty the officer is suitable for promotion, the officer will be actually promoted only after the currency of the penalty is over (para 13 of DoPT OM dated 10.4.89).

h) Any proposal for promotion has to be assessed by the DPC, on case to case basis, and the practice of downgradation of APARs (earlier ACRs) by one level in all cases for one time, where a penalty has been imposed in a year included in the assessment matrix or till the date of DPC should be discontinued immediately, being legally non-sustainable.

i) While there is no illegality in denying promotion during the currency of the penalty, denying promotion in such cases after the period of penalty is over would be in violation of the provisions of Article 20 of the Constitution.

j) The appointing authorities concerned should review comprehensively the cases of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of 6 months from the date of convening the first Departmental Promotion Committee which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also every six months. The review should, inter alia, cover the progress made in the disciplinary proceedings/criminal prosecution and the further measures to be taken to expedite the completion. (Para 4 of O.M. dated 14.09.1992)

k) In cases where the disciplinary case/criminal prosecution against the Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC which kept

its findings in respect of the Government servant in a sealed cover then subject to condition mentioned in Para 5 of this Department's O.M. dated 14.09.1992, the appointing authority may consider desirability of giving him ad-hoc promotion (Para 5 of this Department's O.M. dated 14.09.1992).

8. All the administrative authorities in the Ministries/Department are advised to place relevant records, including chargesheet, if any, issued to the officer concerned, penalty imposed, etc., before the DPC/ACC who will decide the suitability of officer for promotion keeping in view the general service records of the officer including the circumstances leading to the imposition of the chargesheet or penalty imposed. If such an officer is found suitable, promotion will be given effect after the currency of the penalty is over.

9. All Ministries/Departments are, therefore, requested to keep in view the above guidelines while convening DPC for promotion of the Government servants on whom either penalty has been imposed or where there are adverse remarks in the reckonable ACRs/APARs."

Besides above, this Court finds that clause 16.25 of Handbook On Personnel Matters (Vol.1) (Second Edition), lays down the principles for promotion to the selection post, which are reproduced herein below:

"16.25 Principles for promotion to Selection posts

e). 27-7-1978 to 15-3-1981

The procedure evolved from 13.2.1978 was not comprehensive and was stated to be in supersession of all previous instructions/orders. Accordingly, the Govt. issued comprehensive instructions prescribing the

procedure for preparing select list etc. on 27.7.1978, which provides that the Departmental Promotion Committee will assess the confidential repots of the eligible officers for five years and classify them separately for each year as ""Outstanding"", "Very Good", "Good", and "Fair". This assessment and classification will be made by the Departmental Promotion Committee after considering the whole of a particular confidential report.

Each type of assessment shall carry marks as under:-

Outstanding	*-5 marks*
Very Good	*-4 marks*
Good	*-3 marks*
Fair	*-2 marks.*

Classification for each year shall be evaluated in the form of marks in the above manner and total marks worked out for five years, whereafter average marks shall be worked out by diving the total marks by the same member as the number of years for which confidential reports have been considered. An officer who gets marks 4.5 or above in this manner shall be considered to be of exceptional merit. One getting marks of 3.5 or above but below 4.5 shall be classified as ""Very Good"" and one getting in average of 2.5 or above but below 3.5 marks shall be classified as "Good". Officers who earn less than 2.5 average marks shall be classified as unfit for promotion. Those categorized as unfit will be excluded from the eligibility for promotion.

In a particular slab of three, an officer classified as "Outstanding"(i.e. possessing exceptional merit) will supersede an officer classified as ""Very Good"" and officer classified as ""Very Good"" will supersede an officer classified as "Good". However, if in a slab of three more than one officer have the same classification, the selection will be made on the basis of seniority.

Where the select list includes persons to whom proforma promotion is to be given, then the select list should further be extended to the extent of number of such persons.
(H.P.Govt. Deptt. Of personnel) O.M. No.PER(AP- II)A(3)-9/76 DATED 27-7- 1978 Annexure-16.7).

(f) From 16-3-1981 to 3-11-1981
In partial modification of the. O.M. dated 27.7.1978 (sub para "g" above) the principles for promotion to selection posts were slightly revised from 16.3.1981. According to revised procedure the field of choice, subject to availability or eligible candidates, should extend to five time the number of vacancies within the year. From amongst the officers within the field of choice, those who are considered unfit for promotion should be excluded. The remaining officers should be classified "outstanding", "very Good", and "Good" on the basis of merit as determined from their record of service. For this purpose, Annual Confidential Reports for three to five years should be considered. After the above grading, the select list should be prepared by placing the names in order of these three categories, without disturbing the seniority interse within each category." The procedure for assessing the overall classification shall be as under:-

i). The Departmental Promotion Committee will assess the confidential reports of the eligible officers for five years and classify them separately for each year, as "Outstanding", "Very Good" and "Fair". The assessment of classification will be made by the Departmental Promotion Committee after considering the whole of a particular confidential report.

ii) Each type of assessment shall carry marks as under:-

Outstanding	*5 marks*
Very Good	*4 marks*
Good	*3 marks*
Fair	*2 marks*

The classification for each year shall be evaluated in the form of marks in the above manner and the total marks shall be worked out for five years.

iii) After total evaluation is made as above, average marks shall be worked out by dividing the total marks by the same number as the number of years for which confidential reports have been considered. Thus, an officer who gets average marks 4.5 or above in this manner shall be considered to be of exceptional merit. One getting average marks of 3.5 or above but below 4.5 shall be classified as "Very Good" and one getting an average of 2.5 or above but below 3.5 marks shall be classified as "Good". Officers who earn less than 2.5 average marks shall be classified as unfit for promotion. Those categorised as unfit will be excluded from the eligibility for promotion.

While grading officers as "Oustanding", "Very Good" and "Good", one should not mechanically follow the grading given by the Reporting Officers. They should also take into account the nature of the job against which an individual is posted as well as its responsibilities. For reports on difficult or higher assignments, the categorisation may be stepped up by one category in comparison to similar reports on officers working on junior assignments. For proper and just assessment, the Senior Officer or an officer doing a difficult job needs to be assessed very carefully for comparison with a junior officer or an officer doing a relatively simple job.

(H.P. Govt. Deptt. of Personnel O.M. No. Der (AP-II)-A (1) - 1/80 dated 16-3-1981 - Annexure-16.9)

It is quite apparent from the bare perusal of the notification issued by the Government of India as well as clause 16.25 of the Handbook on Personnel Matters, as has been taken note herein above, that DPC is required to make its own assessment on the basis of entries in the ACRs and it is not to be guided merely by overall grading. It also emerges from the notification as well as provisions contained in the Handbook on Personnel Matters that DPC is well within its right to upgrade/downgrade the ACRs of person to be considered for promotion and it is not bound to mechanically follow the grading given by Reporting/Reviewing Officer.

The Hon'ble Apex Court in case titled ***UPSC v. K. Rajaiah and Ors, (2005) 10 SCC 15***, has categorically held that classification given by the State is not binding on the committee and the committee can evolve its own classification, which may be at variance with the gradation given in the ACRs. It would be apt to take note of para 9 of the aforesaid judgment

> *"9. We cannot also endorse the view taken by the High Court that consistent with the principle of fair play, the Selection Committee ought to have recorded reasons while giving a lesser grading to the 1st respondent. The High Court relied on the decision of this Court in National Institute of Mental Health & Neuro Sciences Vs. Dr. K. Kalyana Raman & Ors. [AIR 1992 SC 1806]. Far from supporting the view taken by the High Court, the said decision laid down the proposition that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons. This Court then observed: (SCC p.485, para 7).*
>
> *"Even the principles of natural justice do not require an administrative authority or a Selection Committee or an Examiner to record reasons for the selection or non selection of the person in the absence of statutory requirement. This principle has been stated by this Court in R.S. Dass Vs. Union of India [1986 (Suppl.) SCC 617] at Page 633.*
>
> *" n the next paragraph, the learned Judges indicated as to what is expected of the Selection Committee, in the following words:*
>
> *"we may state at the outset that giving of reasons for decision is different from, and in principle distinct from the*

> *requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administration action ought to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration. But there is nothing on record to suggest that the Selection Committee did anything to the contrary "*
>
> *That being the legal position, the Court should not have faulted the so called down gradation of the 1st respondent for one of the years. Legally speaking, the term 'down gradation' is an inappropriate expression. The power to classify as '"Outstanding"', '"Very Good"', 'good' and 'unfit' is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government but, for good reasons, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs. That is what has been done in the instant case in respect of the year 1993-94. Such classification is within the prerogative of the Selection Committee and no reasons need be recorded, though it is desirable that in a case of gradation at variance with that of the State Government, it would be desirable to record reasons. But having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government's decision".*

Question at this stage, which also needs to be dealt with is of scope of judicial review as far as gradation of ACRs by the DPC is concerned. In this regard, reliance is placed upon the judgment rendered by the Hon'ble Apex Court in case ***Anil Katiyar versus Union of India (1997) 1 Supreme Court Cases 280***, wherein it has been held that correctness of grading given in the ACRs was not subject to the judicial review unless the selection is assailed as being

vitiated by malafides or on the ground of it being arbitrary. It would be profitable to take note of para-4 of the aforesaid judgment herein below:-

> *"4. Having regard to the limited scope of judicial review of the merits of a selection made for appointment to a service or a civil post, the Tribunal has rightly proceeded on the basis that it is not expected to play the role of an appellate authority or an umpire in the acts and proceedings of the DPC and that it would not sit in judgment over the selection made by the DPC unless the selection is assailed as being vitiated by male fides or on the ground of it being arbitrary. It is not the case of the appellant that the selection by the DPC was vitiated by mala fides."*

Reliance is placed upon judgment passed by the Hon'ble Apex Court in case titled ***Union of India and Anr. v. S.K. Goel and Ors, (2007) 14 SCC 641***, relevant para whereof reads as under:

> *"28.It was also argued by the learned senior counsel appearing for respondent No.1 that the entries for the period had an element of adverse reflection and for that purpose the seniority of respondent No.1 was downgraded and, therefore, the ACR ought to have been communicated to respondent No.1. In our opinion, the observations of the High Court are wholly unjustified inasmuch as the post of Commissioner of Customs and Central Excise is a post required to be filled up on selection made strictly on the basis of merit. No judicial review of DPC proceedings, which are ordinarily conducted in accordance with the standing government instructions and Rules is warranted. The norms and procedure for DPC are prescribed in O.M. dated 10.4.1989. It is thus seen that the decision taken by the appellants has been as per the instructions issued on the subject that only adverse entries and remarks are to be communicated and there is no provision to communicate the downgrading of ACR to a government employee. The decision of the Central Government is in strict accordance with the prevailing rules and government instructions. In the absence of any violation, the impugned order of the High Court while undertaking a judicial review under Art.*

> *226 of the Constitution of India, is wholly unjustified. Since the matter of seniority has been well settled and this Court in a plethora of cases has held that the seniority/promotion granted on the strength of DPC selection should not be unsettled after a lapse of time. Therefore, in the facts and circumstances of the present case, where there is no adverse remarks whatsoever against respondent No.1, the High Court ought not to have interfered with and passed the impugned direction. This apart, as per the instructions contained in para 6.21 of DOPT Order No. 22011/5/86/Estt. D dated 19.4.1981, as amended, the DPC is not required to be guided merely by the overall grading, if any, that may be recorded in the CRs but to make its own assessment on the basis of the entries in the CRs. The DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the impugned order of the High Court, in our opinion, is liable to be set aside."*

Reliance is also placed on ***Union of India and Anr. v. A.K. Narula, 2007 (11) SCC 10***, relevant para whereof reads as under:

> *"15. The guidelines give a certain amount of play in the joints to the DPC by providing that it need not be guided by the overall grading recorded in the CRs, but may make its own assessment on the basis of the entries in the CRs. The DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norms. It is only when the process of assessment is vitiated either on the ground of bias, malafides or arbitrariness, the selection calls for interference. Where the DPC has proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment by the DPC, the court will not interfere (vide State Bank of India v. Mohd. Mynuddin [1987 (4) SCC 486], Union Public Service Commission v. Hiranyalal Dev [1988 (2) SCC 242] and Badrinath v. Government of Tamil Nadu [2000 (8) SCC 395]). The review DPC reconsidered the*

> *matter and has given detailed reasons as to why the case of the respondent was not similar to that of R S Virk. If in those circumstances, the Review DPC decided not to change the grading of the respondent for the period 1.4.1987 to 31.3.1988 from 'good' to 'very good', the overall grading of the respondent continued to remain as 'good'. There was no question of moving him from the block of officers with the overall rating of 'good' to the block of officers with the overall rating of 'very good' and promoting him with reference to the DPC dated 13.6.1990. In the absence of any allegation of mala fide or bias against the DPC and in the absence of any arbitrariness in the manner in which assessment has been made, the High Court was not justified in directing that the benefit of upgrading be given to respondent, as was done in the case of R. S. Virk."*

Reliance is also placed upon the judgment rendered by this Court in case titled ***Brijesh Sood v. State of HP and Ors, 2021 (3) Shimla Law Cases 1270***, wherein this Court while placing reliance upon the aforesaid judgments held that the correctness of grading given in ACRs is not subject to judicial review, but also held that DPC is well within its right to upgrade/downgrade the ACRs of person to be considered for promotion and it is not bound to mechanically follow the grading given by Reporting/Reviewing Officer.

Careful perusal of aforesaid exposition of law taken into consideration clearly reveals that decision of DPC is not subject to judicial review unless selection is assailed as being vitiated by the malafidies or on the ground of it being arbitrary. Similarly, it is quite apparent from the perusal of the notifications issued by the government from time to time and the judgments relied upon herein above, that DPC is necessarily required to make its own assessment on the basis of entries in the ACRs and is not to be guided by the overall grading given by the reporting/reviewing officers.

Now being guided by the aforesaid instructions issued by the Government of India as well as State of Himachal Pradesh and law on the point, this court would make an endeavour to ascertain the correctness of submissions having been made by the learned counsel for the parties *vis-à-vis* correctness of the decision made by the Departmental Promotion Committee recommending respondent No.3 for promotion to the post of Executive Engineer and

thereafter to Superintending Engineer. There cannot be any dispute to the fact that ACRs of respondent No.3 were downgraded by the Reviewing Authority from "*very good*" to "*good*" and as such, she was compelled to approach the competent court of law, which permitted her to make representation to the Secretary (Housing) to make representation. It is also not in dispute that Additional Chief Secretary (Housing) to the Govt. of Himachal Pradesh, passed order dated 17.8.2017 on the representation of respondent No.3 (Annexure P-7), whereby ACRS for the year, 2003, 2004, 2005 and 2006 were ordered to be upgraded from *"good"* to "*very good".* Though aforesaid order was laid challenge by the petitioner, wherein Division Bench of this Court vide judgment dated 24.7.2019, held that the petitioner herein has no locus to lay challenge to the up-gradation of the ACRs, if any, of respondent No.3.

Now question remains whether ACRS upgraded by the Secretary (Housing) on the representation having been made by respondent No.3 could be mechanically accepted by the DPC while considering the petitioner for promotion to the post of Executive Engineer and thereafter to Superintending Engineer or it was required to make its own assessment on the basis of entries made in the ACRs for the relevant years.

Though Mr. Dilip Sharma, learned senior counsel representing respondent No.3, made a serious attempt to persuade this Court to agree with his contention that since ACRs stood upgraded pursuant to order passed by the Secretary (Housing) on the representation filed by respondent No.3, there was no occasion, if any, for DPC to look into the record of ACRs for relevant years, but after having carefully perused office memorandums issued by the Ministry of Personal Public Grievance and Pension, Government of India, from time to time as well as judgments on the subject rendered by the Honble Apex Court as well as this Court from time to time, this Court finds no reason to agree with the aforesaid contention of Mr. Sharma, learned Senior Counsel. By now it is well settled that DPC is required to make its own assessment on the basis of entries in the ACRs and not to be merely guided by overall grading and in cases where the assessment by DPC(s) are apparently not in line with the grades in ACRs, the DPC should appropriately substantiate its assessment by giving reasons, which can only be done after perusing the entire record of ACRs. Mr. Sharma, tried to carve out a case

that need for DPC to peruse the entire record would only arise if it disagrees with the overall grading given to the office being considered for promotion. However, this Court does not subscribe to the aforesaid view for the reason that before making the overall grading after considering the ACRs for the relevant years, DPC otherwise is required to take into account major or minor penalties and adverse remarks in the ACRs for the period under consideration. While clarifying the aforesaid aspect of the matter, Ministry of Personnel, Public Grievances and Pension, vide office memorandum dated 28.4.2014, has categorically stated that DPC should not be guided merely by the overall grading, if any, that may be recorded in the ACRs, but should also make its own assessment on the basis of entries in the ACRs because it has been noticed that sometimes the overall grading in the ACRs may be inconsistent with the grades under various parameters or attributes. Hon'ble Apex Court in various judgments as have been taken note herein above, has repeatedly held that DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norms and when process of assessment is vitiated either on account of bias, malafides or arbitrariness, the selection calls for interference. Where the DPC has proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment by the DPC, the court would normally not interfere. Though an employee has no right to promotion, but definitely, he has right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. Person desiring to have promotion is definitely expected to be an employee of a unblemished record and as such, DPC while considering person concerned for promotion needs to examine his/her entire record and cannot be guided merely by overall grading given in the ACRs because sometimes same may not be consistent with the grades under various parameters or attributes. No doubt, DPC enjoys full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it and evaluation made by an Expert Committee should not be easily interfered with by the Court but once assessment smacks of bias, *malafides* or arbitrariness, the selection calls for interference.

Mr. Dilip Sharma, learned counsel for respondent No.3 vehemently argued that since there is no malafide, if any, alleged against the members of the DPC and it while assessing the petitioner and respondent No.3 for promotion have adopted same yardsticks, there is no occasion, if any, for this court to intervene. No doubt, no specific malafides have been alleged in the petition against the members of DPC, and similarly, record placed on record reveals that DPC promoted both the petitioner and respondent No.3 on the basis of their overall grading, which in the case of respondent No.3, was upgraded by the Secretary (Housing), but once there is a complete departure from the laid down procedure, whereby DPC is/was under obligation to make its own assessment on the basis of entries in the ACRs and it only having taken note of the overall grading proceeded to recommend the candidate concerned for promotion, the decision being totally contrary to the law needs to be interfered with. Though Mr. Sharma while making this court peruse record of DPC strenuously argued that the entire record of ACRs was seen by the DPC, but such submission of him is not tenable being totally contrary to the record. DPC proceedings held on 9.8.2019 and 16.8.2019 (P-19 and P-20) clearly reveal that DPC appreciated the revised ACRs of Smt. Anjori Kapoor-respondent No.3 and the petitioner, meaning thereby, at no point of time, DPC made an effort/endeavour to look into the ACRs of the relevant years so that it could see whether overall grading given by the competent authority while upgrading her from *"good"* to *"very good"* is in consonance with the grading under various parameters or attributes. Interestingly, DPC in its meeting held on 9.8.2019, recommended respondent No.3 for promotion as Executive Engineer from Assistant Engineer w.e.f. 16.6.2007 and subsequently on the basis of same, in its next meeting held on 16.8.2019, recommended respondent No.3 for promotion to the post of Superintending Engineer. Having carefully perused the record of DPC as has taken note herein above, this court is fully convinced and satisfied that DPC in slipshod manner, without perusing ACRs of the officers being considered for promotion for the relevant years proceeded to make recommendation merely on the basis of ACRs revised on the order of Additional Chief Secretary HIMUDA. Aforesaid conclusion drawn by this Court is further substantiated from the noting given by the Minister Incharge, P-26, who being dissatisfied with the decision of DPC

ordered for revised DPC. Interestingly, this Court finds from the record that pursuant to orders passed by the Minister Incharge, Review DPC was to be conducted, however, in the case at hand, meeting of Review DPC came to be held to further review the minutes of review DPCs held on 9.8.2019 and 16.8.2019. Careful perusal of minutes of aforesaid meeting nowhere suggests that Review DPC proposed to be held by the Minister Incharge scanned the entire record of the candidate being considered for promotion *de-novo*. Rather, Review DPC under the chairmanship of Secretary (Housing) Government of Himachal Pradesh merely held the meeting to review/ consider further review of Review DPC held on 9.8.2019 and 16.8.2019. It has been specifically recorded in the minutes of this committee that "*the present DPC also finds no reason not to upgrade ACRs in respect of Smt. Anjori Kapoor, for consideration as the same has been decided by the competent authority with a detailed and speaking order also in compliance of the Hon'ble Court order.*"

The committee noticed that there is no circumstance, which can be considered for having further review of Review DPC held on 9.8.2019 for the post of Executive Engineer (Civil) and on 16.8.2019, for the post of Superintending Engineer and found that the Review DPCs dated 9.8.2019 and 16.8.2019 have been convened in accordance with the prescribed procedure. Minutes of meeting held on 30.12.2019 (*Annexure P-21*) itself suggest that no Review DPC, if any, ever came to be held pursuant to the direction issued by the Minister Incharge, who being fully dissatisfied with the minutes of DPC, held on 9.8.2019 had specifically ordered for review DPC, rather fresh Review DPC though held its meeting on 30.12.2019, but not conducted fresh proceedings, rather concluded in its recommendation that there is no reason to consider further review of review DPC held on 9.8.2019 and 16.8.2019 for the posts in question. Since order upgrading ACRs in respect of respondent No.3 was passed by the competent authority with a detailed and speaking order, DPC deemed it not fit to tinker with the same. It appears that DPC was so much overawed with the order passed by the Secretary (Housing) upgrading the ACRs of respondent No.3 that it thought not proper to follow the prescribed procedure while recommending respondent No.3 for promotion. No doubt, ACRs of respondent No.3 came to be upgraded from "*good*" to "*very good*" pursuant to order passed by the Secretary

(Housing), but DPC while considering respondent No.3 for promotion is/was under obligation to see the entire record of ACRs for the relevant years to ascertain whether overall grading given in favour of respondent No.3 is consistent with the grades under various parameters or attributes. True, it is that Secretary (Housing) being Appellate Authority was well within his/her rights to upgrade or downgrade the ACRs of respondent No.3 on her representation, but order of up-gradation, if any, by Secretary (Housing) being appellate authority could not be taken as a gospel truth by the DPC while considering respondent No.3 for promotion, rather it was under obligation to scan the entire service record of her including ACRs for the relevant years to ascertain whether overall grading is consistent with the grades under various parameters. Mere up-gradation of overall grading by the competent authority/Secretary (Housing) would not make respondent No.3 entitled for promotion, rather for that purpose, entire service record is/was required to be taken into consideration by the DPC as has been repeatedly advised/clarified by the Government of India from time to time by issuing circulars as have been taken herein above. No doubt, the Division Bench of this Court has already held that the petitioner herein has no locus to challenge the up-gradation of the ACRs of respondent No.3, but that does not mean that DPC is estopped from perusing the entire service record of respondent No.3 including the ACRs of the relevant years while considering her for promotion. DPC being specialized agency is not to be guided by the overall grading, but to ensure that sincere, deserving and hardworking officer is promoted, it is required to make its own assessment on the basis of entries in the ACRs. While doing so, it is not merely to take into consideration the fact that over all grading of respondent No.3 stands upgraded by the Secretary (Housing), rather it is/was under duty to see whether up-gradation made by the Secretary (Housing) is in consonance with the grades given under various parameters in the ACRs of respondent No.3 for the relevant years. Though entire record of ACRs of respondent No.3 for the relevant years stands annexed with the petition, which is otherwise not disputed/refuted, but any finding qua the same at this stage by this Court would amount to substitution of opinion/decision, if any, to be arrived/formed by the DPC if it is ordered to

review its decision for the reasons stated herein above. Hence, this court purposely restrains itself to not to go into that aspect of the matter at this stage.

There is yet another aspect of the matter that Secretary HIMUDA vide notification dated 14.7.2005 (P-23), itself ordered that DPC would consist of following officers; 1.) Principal Secretary (Housing) as Chairman; 2.) CEO-cum-Secretary as Member; and 3.) Executive Engineer HIMUDA as Member. But if the minutes of review DPC held on 30.12.2019 (P-21) which upheld the recommendation of earlier review Departmental Promotion Committee held on 9.8.2019 is seen, it clearly reveals that such meeting held under the Chairmanship of CEO-cum-Secretary HIMUDA, but at no point of time, Executive Director, HIMUDA came to be associated in meeting. Though Mr. Amit Singh Chandel, learned counsel for the respondent HIMUDA argued that since the Executive Director was not available and meeting of DPC was to be held in a time bound manner pursuant to orders passed by this Court, Deputy Secretary (Personal) to the Government of Himachal Pradesh was associated, but it cannot be denied that Deputy Secretary (Personal) to the Government of Himachal Pradesh had no knowledge whatsoever about the working of the petitioner as well as respondent No.3 and as such, department could have waited for some time to ensure the presence of the Executive Director HIMUDA. Be that as it may, since there is specific composition provided under the Rules for formation of DPC for constitution of DPC, department could not have made any departure from the well settled norms and conventions.

Reliance is placed upon the judgment rendered by the Hon'ble Supreme Court in similar case titled ***Sunder Lal v. Union of India and Ors, 2000 (10) SCC 409,*** wherein it has been held as under:

> *"5. Despite this, as per the office order dated 9-8-1995, the Departmental Promotion Committee for various Group 'A' and 'B' posts in the Official Languages Wing, Legislative Department, Ministry of Law, Justice and Company Affairs was constituted as follows:*
>
> *(A) For promotion to the grades of Joint Secretary and Legislative Counsel (Hindi Branch):*

(a)	*Chairman/Member, Union Public Service Commission*	*Chairman*
(b)	*Secretary, Legislative Department*	*Member*
(c)	*Additional Secretary, Legislative Department*	*Member*
(d)	*An officer of the appropriate level belonging to a Scheduled Caste/Scheduled Tribe to be co-opted from any other ministry/department*	*Member*

6. Before the Tribunal, it was pointed out that the addition of the 4th Member was not necessary in view of the fact that the Secretary, Legislative Department himself was belonging to a Scheduled Caste and there was no necessity of co-opting for the 4th member.

7. In our view, the finding given by the Tribunal cannot be said to be in any way illegal or erroneous. Statutory rule for the constitution of a Departmental Promotion Committee provides that the Committee shall consist of three named members, i.e. (i) Chairman/Member, UPSC-Chairman; (ii) Secretary, Legislative Department – Member; and (iii) Additional Secretary, Legislative Department -Member. The office memorandum dated 10-4-1989 also specifically provides that if none of the officers included in DPC as per the composition given in the recruitment rules is an SC or ST officer, it would be in order to co-opt a member belonging to the SC or ST, if available within the ministry/department. In view of the admitted fact that the Secretary, Legislative Department himself was belonging to a Scheduled Caste, addition of the fourth member in the Committee was not justified.

8. Therefore, in our view, the order passed by the Tribunal is just and in accordance with the statutory

rules. The appeal is dismissed. There will be no order as to costs."

Consequently, in view the detailed discussion made herein above as well as law taken note herein above, this Court finds merit in the present petition and accordingly, same is allowed and minutes of meeting held for the post of Executive Engineer (Civil) and Superintending Engineer dated 9.8.2019 (Annexure P-19) and 16.8.2019 (P-20) and review of review DPC meeting dated 30.12.2019 (P-21) are quashed and set-aside, as a consequence of which, order dated 1.1.2020 (*Annexure-P-22*), promoting respondent No.3 to the post of Superintending Engineer is also quashed and set-aside. Respondents are directed to re-convene the DPC, which while considering respondent No.3 for promotion shall take into account her entire record of ACRs, to arrive at a decision, whether upgradation of overall grading is consistent/in consonance with the grades /parameters recorded in the ACRs for the relevant years. Since dispute inter-se petitioner and respondent No.3 is hanging fire for the last 14 years, this court hopes and trusts that necessary steps or reconvening of DPC by the department shall be positively taken within a period of two weeks so that entire exercise is done by the DPC within four weeks from the receipt of copy of the judgment. In the aforesaid terms, present petition is disposed of, alongwith pending applications, if any.

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

Between:-

SHRI DURGA DASS SON OF LATE SH. UTTAM RAM

(AGED ABOUT 61 YEARS), R/O VILLAGE AND P.O. KHATNOL, TEHSIL SUNNI, DISTRICTSHIMLA, H.P.

...PETITIONER

(BY SH. NEEL KAMAL SOOD, ADVOCATE.)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS ADDITIONAL CHIEF SECRETARY-CUM-SECRETARY (FORESTS) TO THE GOVT. OF H.P. SHIMLA-2.

2. PRINCIPAL CHIEF CONSERVATOR OF FORESTS,
HIMACHAL PRADESH, SHIMLA.
3. CONSERVATOR OF FORESTS, SHIMLA CIRCLE, SHIMLA.
4. DIVISIONAL FOREST OFFICER, SHIMLA, MIST. CHAMBER,
KHALINI, DISTRICT SHIMLA, H.P.

...RESPONDENTS.

(SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL WITH SH. HEMANSHU MISRA, ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENTS).

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 1031 of 2019
RESERVED ON: 17.12.2021
DECIDED ON : 24.12.2021

Constitution of India, 1950 – Article 226- Service matter- Regularization's fixation of pay – Petitioner engaged as class-IV by the respondent w.e.f 12.1.1998 after 12 year of continuous daily wage service – Petitioner has assailed his regularization by way of CWP No. 5843 of 2010 alleging his entitlement for regularization after 10 years of continuous services as per prevalent regularization policy of State Govt thus claimed regularization w.e,f. 1.1.1994- Respondent directed to examine the case of petitioner in light of judgment passed in CWP No. 420 of 2006 titled State of H.P & others vs. Somdass- On directions of the court respondent regularized petitioner from 1.1.1996 and fixed his pay accordingly- Held- In view of mandate of CWP No. 420 of 2006 petitioner was entitled to be granted benefit of regularization w.e.f 1.1.1994- Respondents directed to grant the benefit of regularization to the petitioner w.e.f., 1.1.1994 with consequential benefits within three months- Petition allowed. (Paras 2 ,5, 7 & 8)

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

O R D E R

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

> *i) Respondents may kindly be directed to rectify/amend/modify Annexure P-3, i.e. office order No.*

> *1111/2011 dated 19-10-2011 issued from the office of respondents, which is based on the decision of respondent No 1 conveyed vide letter dated 14.7.2011 relating to the work charge status w.e.f. 1.1.1996 instead of regularization w.e.f. 1.1.1994 in view of the averments made in the writ petition in paras supra and his pay may kindly be ordered to be fixed w.e.f. 1.1.1994 instead of 1.1.1996.*
>
> *ii) In view of relief at (i) above, the petitioner maykindly be held entitled for the grant of pension and pensionary benefits and also the consequential benefits."*

2. Petitioner was engaged by the respondents as Class-IV on daily wage basis on 1.1.1984. His services were regularizedw.e.f. 12.1.1998 after 12 years of continuous daily wage services. Petitioner assailed his regularization w.e.f. 12.1.1998 by way of CWP No. 5843 of 2010 before this Court on the ground that he was entitled for regularization after 10 years of continuous service as per prevalent regularization policy of the State Government and thus his date of regularization should have been 1.1.1994. CWP No. 5843 of 2010 was decided on 20.9.2010 with following directions: -

> *"It is submitted that the matter has been considered the by State Administrative Tribunal and the order of Tribunal was challenged before this Court and this Court has dismissed the same as can be seen from Annexure P-3, judgement in CWP No.420 of 2006. It is further submitted that said judgement has been accepted and implemented by the State. It is submitted by the learned counsel for the petitioner that petitioner is similarly situated person like the petitioner in the said case. There will be a direction to first respondent to look into all the aspects of the mater and take appropriate action in accordance with law and justice without discriminating the petitioner. This will be done within a period of four months from the date of production of a copy of this order along with the copy of the writ petition."*

3. The direction to respondents thus was to examine the case of petitioner in light of judgment passed in CWP No. 420 of 2006 titled State of H.P. and others vs. SomDass. The factual ground in the case of SomDass is that he had made a claim for regularization of his services after completion of

10 years w.e.f. 1979. Such claim was filed by him before the State Administrative Tribunal (for short 'Tribunal') inO.A.No. 3625 of 1999. The Tribunal vide order dated 17.5.2005 decided the Original Application No. 3625 of 1999 in the following terms:

> "*Above being the position, the applicant is entitled for regularization of his services as per policy dated July 8,1999 as he had also completed 8 years of continuous service with a minimum 240 days in a calendar year on December 31,1993 as admitted by the respondents. The respondents are, therefore, directed to regularize his services subject to the availability of post. In case, the post is not available, the same may be created. Needful may be done within five months."*

4. This order of the Tribunal was challenged by the State before this Court in CWP No. 420 of 2006, which was disposed of by learned Division Bench of this Court on 4.8.2006 in the following terms:

> "*The Tribunal in the main judgment dated 17.5.2005 clearly held that based upon the Policy of the petitioners themselves, the respondent was entitled to the regularization of his service, because as on 31.12.1993, he had completed 10years of continuous service, rendering 240 days in each year of service. Tribunal has also relied upon the earlier judgment ofthe Tribunal in OA No. 1856/2001 in the case of Janam Singh versus ForestCorporation and others, decided on 9.5.2002, which judgment was upheld by this Court, also affirmed bythe SupremeCourt Ultimately.*
>
> *The petitioners havenot disputed the aforesaid factual aspects involved in the case.*
>
> *No interference is called for. Petition is dismissed."*

5. On the directions of this Court, respondents considered the representation of petitioner and allowed him regularization from 1.1.1996 and fixed the pay accordingly. Once there were clear directions from this Court to the respondents to consider the case of petitioner in light of decision in CWP No. 420 of 2006 and also by examining the aspects of the matter and to take

appropriate action in accordance with law without discriminating the petitioner, the respondents were not justified by granting the benefit of regularization to petitioner w.e.f. 1.1.1996 i.e. after 12 years of daily wage services, whereas the regularization policy prevalent at the time provided for regularization after 10 years. SomDass whose case was made the basis by petitioner was allowed regularization w.e.f. 1.1.1994 vide memorandum dated 31.7.2009 issued by respondent No.4. As noticed above, SomDass was regularized after granting him the benefit of policy dated July 8, 1999 on the premise that he had completed 8 years of continuous service with a minimum of 240days in a calendar year as on 31.12.1993. On the same analogy, petitioner was also entitled to regularization after 10 years of his continuous service as per policy prevalent wherein the requisite period of continuous service was prescribed as 10 years.

6. Respondents thus discriminated petitioner vis-à-vis the case of SomDass by granting him work charge status onlyw.e.f. 01.01.1994 instead of regularization from the said date.

7. Once the respondents were under clear mandate to consider the case of petitioner in the context of the judgment passed by this Court in CWP No. 420 of 2006, titled State of H.P. and others vs. SomDass, the petitioner was entitled to be granted the benefit of regularization w.e.f. 01.01.1994.

8. In view of above discussion, the petition is allowed and office order dated 19.10.2011 is quashed and set-aside. The respondents are directed to grant the benefit of regularization to the petitioner w.e.f. 01.01.1994 with all consequential benefits within a period of three months from today.

9. The petition is disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

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

Between:

RAM LOK S/O LATE SHRI CHANDER SAIN, AGED ABOUT 37 YEARS, PRESENTLY UNEMPLOYED, R/O VILLAGE MOLGI, P.O. LAVANA, TEHSIL RAMPUR BUSHEHAR, DISTRICT SHIMLA, H.P.

…PETITIONER

(BY MR. R.L. VERMA, ADVOCATE VICE MR. PREM PAL CHAUHAN, ADVOCATE)

AND

1 H.P. STATE COUNCIL FOR CHILD WELFARE CRAIG GARDEN, SHIMLA THROUGH ITS GENERAL SECRETARY.
2. THE PRINCIPAL, ANGANWADI WORKERS TRAINING CENTRE, WORKING WOMEN HOSTEL, JAIL ROAD, MANDI, H.P.

…RESPONDENTS

(BY MR. ANUJ BALI, VICE MS. SUSHMA SHARMA, ADVOCATE FOR RESPONDENT NO. 1 AND MR. PEEYUSH VERMA, ADVOCATE, FOR RESPONDENT NO. 2)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3563 OF 2020
Decided on: 14.12.2021

Constitution of India, 1950 - Article 226 – Service matter – Acceptance of resignation – Petitioner alleged that he withdrew the resignation at earlier point of time so this resignation should not have been accepted-Held-Not in dispute that resignation was not accepted prior to 3.8.2017 –Petitioner forwarded the registered letter to the respondent on 7.8.2017 showing his intention to withdraw his resignation, but communication reached respondent on 10.8.2017 by which time resignation was accepted- Once resignation

accepted prior to request of the petitioner to withdraw, it leads to acceptance of the resignation- Petition dismissed. (Paras 3, 7, & 8)

Cases referred:

Srikantha S.M. versus Bharath Earth Movers Ltd.", (2005) 8 SCC, Supreme Court Cases, 314;

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

O R D E R

The petitioner was appointed as Chowkidar at Anganwadi Worker Training Centre, working women hostel, jail Road Mandi and accordingly joined as such on 18.5.2017. Thereafter, petitioner submitted his resignation to be effected from 3.8.2017. Accordingly, the respondent accepted the same vide office order dated 9.8.2017 and aggrieved thereby, the petitioner has filed the instant petition for the grant of following substantive relief(s):

> "a) Quash the impugned order dated 9.8.2017 (Annexure A-1) being arbitrary, malafide and illegal;
>
> b) Direct the respondents to consider the applicant in service for all purposes and intents with all consequential benefits from the date of acceptance of illegal resignation vide (Annexure A-1).
>
> c) Direct the respondents to consider the posting of the applicant to any of three vacant places in the given facts and circumstances of the case;

2. According to the petitioner, resignation could not have been accepted, more particularly, when the same had already been withdrawn at an earlier point of time. It is next contended that respondents were required to pass a speaking order before acting upon the representation of the petitioner regarding his resignation.

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

4. In order to appreciate the controversy, one needs to understand the meaning of resignation. In legal parlance, resignation means a spontaneous relinquishment of one's own rights. In relation to an office, resignation connotes the act of giving up or relinquishing the office. Generally, resignation to get its full effect should be unconditional.

5. The Hon'ble Supreme Court of India in the case of "**Srikantha S.M. versus Bharath Earth Movers Ltd.",** (2005) 8 SCC, Supreme Court Cases, 314 has defined resignation in legal parlance and the same is found in para-12 of the judgment (supra), which reads as under.

> "Now let us consider the controversy on merits. The term "resignation" has not been defined in the Service Rules. According to the dictionary meaning, however, "resignation" means spontaneous relinquishment of one's own right. It is conveyed by the Latin maxim *Resignatio est juris propii spontanea refutatio.* (Resignation is a spontaneous relinquishment of one's own right). In relation to an office, resignation connotes the act of giving up or relinquishing the office. "To relinquish an office" means "to cease to hold office" or "to lose hold of the office" implies to detach", "unfasten", "undo" or "untie" "the binding knot or link" which holds one to the office and the obligation and privileges that go with it."

6. Adverting to the facts, it would be noticed that letter dated 27.7.2017, whereby the petitioner submitted his resignation was conditional only to the effect that this would come into effect only from 3.8.2017, as is evident from the letter which is reproduced as under:

उचित माध्यम द्वारा
सेवा मे,

महासचिव,
हि. प्र., राज्य बाल कल्याण परिषद,
शिमला-2

विषय : इस्तीफा स्वीकार करने बारेI

महोदया,

सादर निवेदन यह है की मै राम लोक पुत्र स्व . श्री चन्दर सैन आंगनवाड़ी प्रशिक्षण केंद्र मंडी मे चौकिदार के पद पर कार्यरत हूँ.

यह है की मेरे घर की परिस्थितियां ठीक न होने से उपरोक्त पद से इस्तीफ़ा देना चाहता हूँ क्योंकि यहाँ से मेरा घर बहुत दूर पड़ता है। आये दिन घर मे कुछ न कुछ समस्या घटित होती रहती है। मेरी पत्नी का स्वास्थय भी ठीक नहीं चल रहा है . वह बीमार पड़ जाती है और मुझे बहुत परेशानी हो जाती हैI

इसलिए मुझे बड़े खेद के साथ व् विवश होकर उपरोक्त पद से इस्तीफ़ा देना पड़ रहा है / अतः आप मेरा इस्तीफ़ा स्वीकार कर अपना प्रबंध करें। क्योंकि मै दिनांक 3.8.2017 को छोड़कर चला जाऊंगा तथा अगर संभव हो सके तो मेरी प्रतिनियुक्ति शिमला के आसपास ही करेंI

सधन्यवाद।

भवदीय,
राम लोक पुत्र श्री चन्दर सेन,
चौकीदार
आ. प्रशि। केंद्र मंडीI

दिनांक 27.7.2017

7. It is not in dispute that resignation in question was not accepted prior to 3.8.2017 and came to be accepted only on 9.8.2017 that too w.e.f. 3.8.2017 (afternoon).

8. No doubt the petitioner did forward the registered letter to the respondents on 7.8.2017 showing his intention to withdraw his resignation, but the same, even as per the petitioner, was received in the office of the respondents only on 10.8.2017, by which time resignation as tendered by the respondents had already been accepted and had become effective on and w.e.f. 3.8.2017. The resignation could at best have been withdrawn prior to the acceptance but once the same was not withdrawn, it obviously had to be given effect to by the employer.

8. Even if, taking the case of the petitioner at its best and even if he was to withdraw the resignation, then he should have personally approached the respondents, prior to the respondents having acted upon his request of

resignation. But once the resignation has been accepted prior to the request of the petitioner for withdrawal of the resignation, then in such circumstances, he has no one else to blame, save and except himself.

9. In view of the aforesaid discussion and for the reasons, as stated above, we find no merit in the petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, are also disposed of.

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

Between:-

RAM MOHAN KUSHWAHA, SON OF LATE SHRI DASHRATH SINGH KUSHWAHA, RESIDENT OF UTRALA ROAD, NEAR PANCHAYAT GHAR, PAPROLA, DISTRICT KANGRA, (H.P.) PRESENTLY WORKING AS SENIOR LECTURER, RAJEEV AYURVEDIC MEDICAL COLLEGE, PAPROLA, DISTRICT KANGRA (H.P.).

……APPLICANT.

(BY SH. AMANDEEP SHARMA, ADVOCATE)
VICE SH. VIJENDER KATOCH, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (AYURVEDA), TO THE GOVT. OF HIMACHAL PRADESH, H.P. SECRETARIAT, SHIMLA-171002 (H.P.).

2. THE PRINCIPAL, RAJEEV GANDHI AYURVEDIC

POST GRADUATE MEDICAL COLLEGE,
PAPROLA, DISTRICT KANGRA (H.P.).

3. DR. ANJANA MISHRA, D/O DR. SURINDER KUMAR MISHRA, RESIDENT OF V. & P.O. KHARANAL, VIA PAPROLA, TEHSIL BAIJNATH, DISTRICT KANGRA (H.P.), PRESENTLY WORKING AS SENIOR LECTURER, IN THE POST GRADUATE DEPARTMENT OF KAYA CHIKITSA, RAJEEV GANDHI AYURVEDIC POST GRADUATE MEDICAL COLLEGE, PAPROLA, DISTRICT KANGRA (H.P.).

4. DR. SUNIL KUMAR, S/O SHRI BASANT SINGH THAKUR, RESIDENT OF VILLAGE DABROG, P.O. SARKAGHAT, TEHSIL SARKAGHAT, DISTRICT MANDI, (H.P.), PRESENTLY WORKING AS LECTURER IN THE POST GRADUATE DEPARTMENT OF KAYA CHIKITSA, RAJEEV GANDHI AYURVEDIC POST GRADUATE MEDICAL COLLEGE, PAPROLA, DISTRICT KANGRA (H.P.).

5. DR. VIJAY CHAUDHARI, S/O SHRI KRIPAL SINGH, RESIDENT OF VILLAGE ASHIRVAD, UTRALA ROAD, PAPROLA DISTRICT KANGRA (H.P.) PRESENTLY WORKING AS LECTURER IN THE POST GRADUATE DEPARTMENT OF KAYA CHIKITSA, RAJEEV GANDHI AYURVEDIC POST GRADUATE MEDICAL COLLEGE, PAPROLA, DISTRICT KANGRA (H.P.).

6. UNION OF INDIA, MINISTRY OF AYUSH, THROUGH ITS SECRETARY.

……RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE
GENERAL WITH SH. RAJINDER DOGRA,
SENIOR ADDITIONAL ADVOCATE GENERAL
AND SH. BHUPINDER THAKUR, DEPUTY
ADVOCATE GENERAL, FOR THE
RESPONDENTS-STATE)

(SH. ADARSH K. VASHISHTA, ADVOCATE
FOR RESPONDENTS- 3 TO 5)

(SH. RAJINDER THAKUR, CENTRAL
GOVERNMENT COUNSEL, FOR
RESPONDENT-6)
CIVIL WRIT PETITION(ORIGINAL APPLICATION) No. 6875 of 2019.

Between:-

DR. UPENDER NATH SHARMA,
SON OF LATE SHRI TULSI RAM,
RESIDENT OF VILLAGE AND POST
OFFICE RAKKAR, TEHSIL BAIJNATH,
DISTRICT KANGRA, HIMACHAL PRADESH,
PRESENTLY WORKING AS READER IN
THE DEPARTMENT OF SHARIR RACHNA,
RAJEEV AYURVEDIC MEDICAL COLLEGE,
PEPROLA, DISTRICT KANGRA, HIMACHAL
PRADESH.

……APPLICANT.

(BY SH. AMANDEEP SHARMA, ADVOCATE)
VICE SH. VIJENDER KATOCH, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH

THROUGH PRINCIPAL SECRETARY
(AYURVEDA), TO THE GOVT. OF
HIMACHAL PRADESH, H.P. SECRETARIAT,
SHIMLA-171002 .

2. THE PRINCIPAL, RAJEEV GANDHI AYURVEDIC
POST GRADUATE MEDICAL COLLEGE,
PAPROLA, DISTRICT KANGRA, HIMACHAL
PRADESH.

3. DR. ANJANA MISHRA, D/O DR. SURINDER KUMAR
MISHRA, RESIDENT OF VPO KHARANAL-VIA-
PAPROLA, TEHSIL BAIJNATH, DISTRICT
KANGRA, HIMACHAL PRADESH PRESENTLY
WORKING AS SENIOR LECTURER, IN
THE POST GRADUATE
DEPARTMENT OF KAYA CHIKITSA, RAJEEV
GANDHI AYURVEDIC POST GRADUATE
MEDICAL COLLEGE, PAPROLA, DISTRICT
KANGRA, HIMACHAL PRADESH.

4. DR. SUNIL KUMAR, S/O SHRI BASANT SINGH
THAKUR, RESIDENT OF VILLAGE DABROG,
POST OFFICE SARKAGHAT, TEHSIL SARKAGHAT,
DISTRICT MANDI, HIMACHAL PRADESH, PRESENTLY
WORKING AS LECTURER IN THE POST
GRADUATE DEPARTMENT OF KAYA
CHIKITSA, RAJEEV GANDHI AYURVEDIC
POST GRADUATE MEDICAL COLLEGE,
PAPROLA, DISTRICT KANGRA, HIMACHAL
PRADESH.

5. DR. VIJAY CHAUDHARI, S/O SHRI KRIPAL SINGH,
RESIDENT OF VILLAGE ASHIRVAD, UTRALA ROAD,
PAPROLA DISTRICT KANGRA, HIMACHAL
PRADESH, PRESENTLY WORKING AS LECTURER
IN THE POST GRADUATE DEPARTMENT

OF KAYA CHIKITSA, RAJEEV GANDHI AYURVEDIC POST GRADUATE MEDICAL COLLEGE, PAPROLA, DISTRICT KANGRA, H.P.

.....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL AND SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL, FOR THE RESPONDENTS-STATE)

(SH. ADARSH K. VASHISHTA, ADVOCATE FOR RESPONDENTS- 3 TO 5)

CIVIL WRIT PETITION(ORIGINAL APPLICATION)
No. 6733 of 2019
Reserved on : 13.12.2021
Decided on: 17.12.2021

Constitution of India, 1950 - Article 226 - Service matters- Promotion - The petitioners have alleged that the respondents issued notification dated 14.11.2014, whereby they withdraw the post of Professor, there by diminish the chances of promotion of the petitioners – Held - The rules which merely affect the chance of promotion cannot be regarded as one varying the conditions of service- Fixation of quota of promotion in various categories in posts in feeder cadres based upon the structure and pattern of department is prerogative of the employer, may be pertaining to policy making – Held - on the date of filling promotion, the petitioners were not even eligible for being considered for the post of Reader, let alone, the post of Professor, hence had no locus standi to file petition- Petition dismissed with costs of Rs. 25,000/- each. (Paras 4,7 ,8 & 10)

Cases referred:

Air Commodore Naveen Jain vs. Union of India and others (2019) 10 SCC 34;
Satish Jamwal and others vs. State of H.P. and others, 2015 (6) ILR 468;

These petitions coming on for orders after notice this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan,*** *passed the following:*

O R D E R

Since common questions of law and facts arise for consideration in these petitions, the same were taken up together for hearing and are being disposed of by a common judgment.

2. The petitioners are aggrieved by the order dated 14.11.2014 whereby the official-respondents have transferred the post of Professor from 'Shareer Rachna' Department where the petitioners were working to the Department of 'Kayachikitsa'in Ayurvedic Medical College, Paprola, District Kangra, which according to them, has extinguished chances of their promotion.

3. According to the petitioners, initially they were appointed as Ayurvedic Medical Officers. Lateron, the petitioner in CWPOA No.6875 of 2019 was appointed as Lecturer in the Ayurvedic Medical College at Paprola, District Kangra, in the year 2002 and petitioner in CWPOA No. 6733 of 2019 was appointed as Lecturer in the Ayurvedic Medical College at Paprola, District Kangra, in the year 2012 and thereafter promoted as Senior Lecturers on 27.09.2006 and 10.04.2015, respectively.

4. According to the petitioners, they can be promoted as Readers after working for a minimum period of five years in the capacity of Senior Lecturers. But, the respondents issued a Notification dated 14.11.2014 whereby they have withdrawn the post of Professor, as aforesaid, thereby diminishing the chances of promotion of the petitioners.

5. It is conceded at the Bar and otherwise proved on record that both the petitioners were not eligible for the post of Reader, let alone, the post of Professor, for which the Reader is a feeder post.

6. In such circumstances, we really wonder how the learned Tribunal could have entertained these petitions, much less pass an order of status quo on 27.02.2016.

7. For, it is more than settled that though right to be considered for promotion is a condition of service, however, mere chances of promotion are not. The rule which merely affects the chances of promotion cannot be regarded as one varying a condition of service.

8. The law, in this regard, is too well settled to be reiterated. However, we may, at this stage, refer to one of the latest judgments of the Hon'ble Supreme Court in ***Air Commodore Naveen Jain*** *vs.* ***Union of India and others (2019) 10 SCC 34*** wherein Clause-17 of the Promotion Policy dated 20.02.2008 for promotion to the post of Air Marshal was challenged *inter alia* on the ground that the same was contrary to the established principles of law pertaining to promotion on the basis of "merit-cum-seniority". In view of the principles governing the right of promotion, the Hon'ble Supreme Court held that the grievance of the appellant is in respect of lost chances of promotion inasmuch as he had attained the age of superannuation before the vacancy arose. Dismissing the appeal, the Hon'ble Supreme Court made these pertinent observations in paragraphs 13, 14 and 15 which read as under:-

> "13) In State of Mysore & Anr. v. G.B. Purohit & Ors. 1967 SLR 753 (SC), this Court held that a right to be considered for promotion, is a condition of service but mere chances of promotion are not. The rule which merely affects the chances of promotion cannot be regarded as varying a condition of service. The said judgment was quoted with approval in later judgment reported as Ramchandra Shankar Deodhar & Ors. v. State of Maharashtra & Ors. (1974) 1 SCC 317, wherein this Court held as under: (SCC p.329, para 15)

> **"15.....All that happened as a result of making promotions to the posts of Deputy Collectors division wise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners. It is now well settled by the decision of this Court in State of Mysore vs. G.B. Purohit(1967) SLR 753 (SC) that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affects chances of promotion cannot be regarded as varying a condition of service. In Purohit's case the district wise seniority of sanitary inspectors was changed to State wise seniority, and as a result of this change the respondents went down in seniority and became very junior. This, it was urged, affected their chances of promotion which were protected under the proviso to Section 115, sub-section (7). This contention was negatived and Wanchoo, J. (as he then was), speaking on behalf of this Court observed: (SLR para 10)**
>
> > **"10. It is said on behalf of the respondents that as their chances of promotion have been affected their conditions of service have been changed to their disadvantage. We see no force in this argument because chances of promotion are not conditions of service....."**

14) In Dwarka Prasad & Ors. v. Union of India & Ors. (2003) 6 SCC 535, the argument examined was that the promotion opportunities have to be provided in ratio with the strength of the feeder cadre. It was held as under:

> **"16. Fixation of quotas or different avenues and ladders for promotion in favour of various categories of posts in feeder cadres based upon the structure and pattern of the Department is a prerogative of the employer, mainly pertaining to the policy-making field. The relevant considerations in fixing a particular quota for a particular post are various such as the cadre strength in the feeder quota, suitability more or less of the holders in the feeder post, their nature of duties, experience and the channels of**

promotion available to the holders of posts in the feeder cadres. Most important of them all is the requirement of the promoting authority for manning the post on promotion with suitable candidates. Thus, fixation of quota for various categories of posts in the feeder cadres requires consideration of various relevant factors, a few amongst them have been mentioned for illustration. Mere cadre strength of a particular post in the feeder cadre cannot be a sole criterion or basis to claim parity in the chances of promotion by various holders of posts in feeder categories."

15) In A. Satyanarayana & Ors. v. S. Purushotham & Ors.(2008) 5 SCC 416, this Court held that the power of the State to fix quota for promotion cannot be said to be violative of the Constitutional Scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. The Court held as under: (SCC. 426, paras 23 & 25-26)

"23. We, however, are of the opinion that the validity or otherwise of a quota rule cannot be determined on surmises and conjectures. Whereas the power of the State to fix the quota keeping in view the fact situation obtaining in a given case must be conceded, the same, however, cannot be violative of the constitutional scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. There cannot be any doubt whatsoever that a policy decision and, in particular, legislative policy should not ordinarily be interfered with and the superior courts, while exercising their power of judicial review, shall not consider as to whether such policy decision has been taken mala fide or not. But where a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation, indisputably, the same would be amenable to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India. (See Vasu Dev Singh v. Union of India [(2006) 12 SCC 753 and State of Kerala v. Unni [(2007) 2 SCC 365] .)

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> **25. While saying so, we are not unmindful of the legal principle that nobody has a right to be promoted; his right being confined to right to be considered therefor.**
>
> **26. Similarly, the power of the State to take a policy decision as a result whereof an employee's chance of promotion is diminished cannot be a subject-matter of judicial review as no legal right is infringed thereby."**

9. Similar issue came up before the Division Bench of this Court wherein one of us (Justice Tarlok Singh Chauhan) was a member in ***Satish Jamwal and others*** *vs.* ***State of H.P. and others, 2015 (6) ILR 468***, wherein it was observed as under:-

> "7. Coming to the second contention of the appellants regarding the amended rules affecting their chances of promotion, it may be observed that it is more than settled that such contention could have been accepted only if chances of promotions are treated as conditions of service, but then it is also settled that the mere chances of promotions are not conditions of service and the fact that there is reduction in the chances of promotion does not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not. Reference in this regard can conveniently be made to a recent judgment of the Honble Supreme Court in Dhole Govind Sahebrao and Others Vs. Union of India (2015) 6 SCC 727 wherein it was held as under:
>
> > "31. We shall now venture to deal with another aspect of the matter, emerging out of the impugned order passed by the High Court. The conclusions drawn by the High Court, as have been recorded in paragraph 46 of the impugned judgment and order dated 13.4.2007, emerged out of a consideration which was noticed in paragraphs 38 to 45. Paragraphs 38 and 43 to 46 of the impugned judgment and order, have already been extracted hereinabove. A perusal of the above consideration reveals, that the High Court was swayed by the coincidental prejudice suffered by the erstwhile members of the ministerial cadre, resulting in

lost chances of promotion. The aforesaid consideration could have been justified only if chances of promotion are treated as conditions of service. Insofar as the instant aspect of the matter is concerned, this Court has repeatedly examined the issue whether chances of promotion constitute conditions of service. In this behalf, reference may be made to a few judgments rendered by this Court:

32. First of all, we may advert to the decision rendered by this Court in State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others, (1981) 4 SCC 130, wherein a three Judge Bench of this Court held as under: (SCC pp. 141-42, para 16)

> "16. Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not. Under the Departmental Examination Rules for STOs, 1954, framed by the former State Government of Madhya Pradesh, as amended on January 20, 1960, mere passing of the departmental examination conferred no right on the STIs of Bombay, to promotion. By passing the examination, they merely became eligible for promotion. They had to be brought on to a select list not merely on the length of service, but on the basis of merit-cum-seniority principle. It was, therefore, nothing but a mere chance of promotion. In consequence of the impugned orders of reversion, all that happened is that some of the STIs, who had wrongly been promoted as STOs Grade III had to be reverted and thereby lost a few places. In contrast, the conditions of service of ASTOs from Madhya Pradesh and Hyderabad, at least so far as one stage

> of promotion above the one held by them before the reorganisation of States, could not be altered without the previous sanction of the Central Government as laid down in the Proviso to sub-section (7) of Section 115 of the Act."
>
> emphasis in original).

33. Reference may also be made to the decision of this Court in Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another,(1989) 2 SCC 541 , wherein a three Judge Bench of this Court held as under: (SCC pp. 552 & 554, paras 12 & 15)

> "12. In the case of Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, , the petitioners and other allocated Tahsildars from ex-Hyderabad State had under the notification of the Raj Pramukh dated September 15, 1955 all the vacancies in the posts of Deputy Collector in the ex-Hyderabad State available to them for promotion but under subsequent rules of July 30, 1959, 50 per cent of the vacancies were to be filled by direct recruitment and only the remaining 50 per cent were available for promotion and that too on divisional basis. The effect of this change obviously was that now only 50 per cent vacancies in the post of Deputy Collector being available in place of all the vacancies it was to take almost double the time for many other allocated Tahsildars to get promoted as Deputy Collectors. In other words it resulted in delayed chance of promotion. It was, inter alia, urged on behalf of the petitioners that the situation brought about by the rules of July 30, 1959 constituted variation to their prejudice in the conditions of service applicable to them immediately prior to the reorganisation of the State and the rules were consequently invalid. While repelling this submission the Constitution Bench held: (SCC p. 329, para 15)

'15.....All that happened as a result of making promotions to the posts of Deputy Collectors divisionwise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners. It is now well settled by the decision of this Court in State of Mysore v. G.B. Purohit, 1967 SLR 753 (SC), that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affect chances of promotion cannot be regarded as varying a condition of service. In Purohit case (supra), the districtwise seniority of sanitary inspectors was changed to Statewise seniority, and as a result of this change the respondents went down in seniority and became very junior. This, it was urged, affected their chances of promotion which were protected under the proviso to Section 115, sub-section (7). This contention was negatived and Wanchoo, J., (as he then was), speaking on behalf of this Court observed: It is said on behalf of the respondents that as their chances of promotion have been affected their conditions of service have been changed to their disadvantage. We see no force in this argument because chances of promotion are not conditions of service. It is, therefore, clear that neither the Rules of 30-7-1959, nor the procedure for making promotions to the posts of Deputy Collector divisionwise varies the conditions of service of the petitioners to their disadvantage."

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> 15. It cannot be disputed that the Director General of Ordnance Factories who had issued the Circular dated November 6, 1962 had the power to issue the subsequent Circular dated January 20, 1966 also. In view of the legal position pointed out above the aforesaid circular could not be treated to be one affecting adversely any condition of service of the Supervisors A. Its only effect was that the chance of promotion which had been accelerated by the Circular November 6, 1962 was deferred and made dependent on selection according to the Rules. Apparently, after the coming into force of the order dated December 28, 1965 and the Circular dated January 20, 1966 promotions could not be made just on completion of two years satisfactory service under the earlier Circular dated November 6, 1962 the same having been superseded by the later circular. It is further obvious that in this view of the matter Supervisors A who had been promoted before the coming into force of the order dated December 28, 1965 and the Circular dated January 20, 1966 stood in a class separate from those whose promotions were to be made thereafter. The fact that some Supervisors A had been promoted before the coming into force of the order dated December 28, 1965 and the Circular dated January 20, 1966 could not, therefore, constitute the basis for an argument that those Supervisors A whose cases came up for consideration for promotion thereafter and who were promoted in due course in accordance with the rules were discriminated against. They apparently did not fall in the same category."

34. This Court had also declared the position of law, on the above aspect of the matter, in Syed Khalid Rizvi and Others Vs. Union of India and Others, 1993 Supp. (3) SCC 575,

wherein a three Judge Bench observed as under: (SCC pp. 601-03, paras 30-31)

> "30. The next question is whether the seniority is a condition of service or a part of rules of recruitment? In State of Madhya Pradesh and Others Vs. Shardul Singh, (1970) 1 SCC 108, this Court held that the term conditions of service means all those conditions which regulate the holding of a post by a person right from the time of his appointment (emphasis supplied) to his retirement and even beyond, in matters like pensions etc. In I.N. Subba Reddy Vs. Andhra University, (1977) 1 SCC 554, the same view was reiterated. In Mohammad Shujat Ali and Others Vs. Union of India, (1975) 3 SCC 76, a Constitution Bench held that the rule which confers a right to actual promotion or a right to be considered for promotion is a rule prescribing a condition of the service. In Mohd. Bhakar v. Krishna Reddy, 1970 SLR 768, another Constitution Bench held that any rule which affects the promotion of a person relates to his condition of service. In State of Mysore v. G.B. Purohit, 1967 SLR 753 , this Court held that a rule which merely affects chances of promotion cannot be regarded as varying a condition of service. Chances of promotion are not conditions of service. The same view was reiterated in another Constitution Bench judgment in Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, (1974) 1 SCC 317. No doubt conditions of service may be classified as salary, confirmation, promotion, seniority, tenure or termination of service etc. as held in State of Punjab Vs. Kailash Nath, (1989) 1 SCC 321, by a Bench of two Judges but the context in which the law therein was laid must be noted. The question therein was whether non-prosecution for a grave offence after expiry of four years is a condition of service? While negativing the contention that non-

prosecution after expiry of 4 years is not a condition of service, this Court elaborated the subject and the above view was taken. The ratio therein does not have any bearing on the point in issue. Perhaps the question may bear relevance, if an employee was initially recruited into the service according to the rules and promotion was regulated in the same rules to higher echelons of service. In that arena promotion may be considered to be a condition of service. In A.K. Bhatnagar Vs. Union of India, (1991) 1 SCC 544, this Court held that seniority is an incidence of service and where the service rules prescribe the method of its computation it is squarely governed by such rules. In their absence ordinarily the length of service is taken into account. In that case the direct recruits were made senior to the recruits by regularisation although the appellants were appointed earlier in point of time and uninterruptedly remained in service as temporary appointees along with the appellants but later on when recruited by direct recruitment, they were held senior to the promotees.

31. No employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible. Take an illustration that the Promotion Regulations envisage maintaining integrity and good record by Dy. S.P. of State Police Service as eligibility condition for inclusion in the select-list for recruitment by promotion to Indian Police Service. Inclusion and approval of the name in the select-list by the UPSC, after considering the objections if any by the Central Government is also a condition precedent. Suppose if B is far junior to A in State Services and B was found more meritorious and suitable and was put in

a select- list of 1980 and accordingly B was appointed to the Indian Police Service after following the procedure. A was thereby superseded by B. Two years later A was found fit and suitable in 1984 and was accordingly appointed according to rules. Can A thereafter say that B being far junior to him in State Service, A should become senior to B in the Indian Police Service. The answer is obviously no because B had stolen a march over A and became senior to A. Here maintaining integrity and good record are conditions of recruitment and seniority is an incidence of service. Take another illustration that the State Service provides - rule of reservation to the scheduled castes and scheduled tribes. A is a general candidate holding No. 1 rank according to the roster as he was most meritorious in the State service among general candidates. B scheduled castes candidate holds No. 3 point in the roster and C, scheduled tribe holds No. 5 in the roster. Suppose Indian Police Service Recruitment Rules also provide reservation to the Scheduled Castes and Scheduled Tribes as well. By operation of the equality of opportunity by Articles 14 , 16(1) , 16(4) and 335 , B and C were recruited by promotion from State Services to Central Services and were appointed earlier to A in 1980. A thereafter in the next year was found suitable as a general candidate and was appointed to the Indian Police Service. Can A thereafter contend that since B and C were appointed by virtue of reservation, though were less meritorious and junior to him in the State service and gradation list would not become senior to him in the cadre as IPS officer. Undoubtedly B and C, by rule of reservation, had stolen a march over A from the State Service. By operation of rule of reservation B and C became senior and A became junior in the Central Services. Reservation and roster were

> conditions of recruitment and seniority was only an incidence of service. The eligibility for recruitment to the Indian Police Service, thus, is a condition of recruitment and not a condition of service. Accordingly we hold that seniority, though, normally an incidence of service, Seniority Rules, Recruitment Rules and Promotion Regulations form part of the conditions of recruitment to the Indian Police Service by promotion, which should be strictly complied with before becoming eligible for consideration for promotion and are not relaxable."
>
> (emphasis in original)

35. More recent in time, is the judgment rendered by another three Judge Division Bench in S.S. Bola and others Vs. B.D. Sardana and others, (1997) 8 SCC 522. The majority opinion in the above judgment was rendered by Justice K. Ramaswamy. In the process of consideration, he observed as under: (SCC p. 622, para 145)

> "145. It is true that the Rules made under the proviso to Article 309 of the Constitution can be issued by amending or altering the Rules with retrospectivity as consistently held by this Court in a catena of decisions, viz., B.S. Vadera Vs. Union of India, AIR 1969 SC 118; Raj Kumar Vs. Union of India, (1975) 4 SCC 13; K. Nagaraj Vs. State of Andhra Pradesh, (1985) 1 SCC 523; T.R. Kapur v. State of Haryana, 1986 Supp. SCC 584, and a host of other decisions. But the question is whether the Rules can be amended taking away the vested right. As regards the right to seniority, this Court elaborately considered the incidence of the right to seniority and amendment of the Act in the latest decision in Ashok Kumar Gupta v. State of U.P.,

> (1977) 5 SCC 201 , relieving the need to reiterate all of them once over. Suffice it to state that it is settled law that a distinction between right and interest has always been maintained. Seniority is a facet of interest. The rules prescribe the method of selection/recruitment. Seniority is governed by the existing rules and is required to be worked out accordingly. No one has a vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the Rules. It would be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects the promotion of a person relates to conditions of service. The rule merely affecting the chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service."

36. Consequent upon the above detailed consideration, K. Ramaswamy, J. recorded his conclusion in paragraph 153. On the issue in hand, sub- paragraph AB of paragraph 153 is relevant and is being extracted hereunder: (S.S. Bola case, SCC p. 634)

> "AB. A distinction between right to be considered for promotion and an interest to be considered for promotion has always been maintained. Seniority is a facet of interest. The rules prescribe the method of recruitment/selection. Seniority is governed by the rules existing as on the date of consideration for promotion. Seniority is required to be worked out according to the existing rules. No one has a vested right to promotion or seniority. But an officer has an interest to seniority acquired by working out the

> rules. The seniority should be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects chances of promotion of a person relates to conditions of service. The rule/provision in an Act merely affecting the chances of promotion would not be regarded as varying the conditions of service. The chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service. However, once a declaration of law, on the basis of existing rules, is made by a constitutional court and a mandamus is issued or direction given for its enforcement by preparing the seniority list, operation of the declaration of law and the mandamus and directions issued by the Court is the result of the declaration of law but not the operation of the rules per se."
>
> (emphasis in original)

37. S. Saghir Ahmad, J. concurred with the view expressed by Justice K. Ramaswamy, J. A dissenting view was recorded by G.B. Pattanaik, J. On the subject in hand, however, there was no dissent. The conclusions recorded by G.B. Pattanaik, J. were to the following effect (S.S. Bola case, SCC pp. 665-66 & 675 - 77, paras 199-202 & 212)

> "199. To the said effect the judgment of this Court in the case of State of Punjab Vs. Shri Kishan Das, (1971) 1 SCC 319, wherein this Court observed an order forfeiting the [pic]past service which has earned a government servant increments in the post or rank he holds, howsoever adverse it is to him,

affecting his seniority within the rank to which he belongs or his future chances of promotion, does not attract Article 311(2) of the Constitution since it is not covered by the expression reduction in rank.

200. Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion get delayed thereby. It was urged by Mr. Sachar and Mr. Mahabir Singh appearing for the direct recruits that the effect of redetermination of the seniority in accordance with the provisions of the Act is not only that the direct recruits lose a few places of seniority in the rank of Executive Engineer but their future chances of promotion are greatly jeopardised and that right having been taken away the Act must be held to be invalid. It is difficult to accept this contention since chances of promotion of a government servant are not a condition of service. In the case of State of Maharashtra Vs. Chandrakant Anant Kulkarni, (1981) 4 SCC 130, this Court held: (SCC p. 141, para 16)

> '6. Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not.'

201. To the said effect a judgment of this Court in the case of K. Jagadeesan Vs. Union of India,

(1990) 2 SCC 228, wherein this Court held: (SCC pp. 230-31, para 7)

> '7.....The only effect is that his chances of promotion or his right to be considered for promotion to the higher post is adversely affected. This cannot be regarded as retrospective effect being given to the amendment of the rules carried out by the impugned notification and the challenge to the said notification on that ground must fail.'

202. Again in the case of Union of India and others Vs. S.L. Dutta, (1991) 1 SCC 505, this Court held: (SCC p. 512, para 17)

> 17.....In our opinion, what was affected by the change of policy were merely the chances of promotion of the Air Vice-Marshals in the Navigation Stream. As far as the posts of Air Marshals open to the Air Vice-Marshals in the said stream were concerned, their right or eligibility to be considered for promotion still remained and hence, there was no change in their conditions of service.

xxx xxx xxx

212. So far as the rules dealing with Irrigation Branch are concerned, the said rules namely the Punjab Service of Engineers (Irrigation Branch) Class I Service Rules, 1964 have not been considered earlier by this Court at any point of time. One Shri M.L. Gupta was appointed to the post of Assistant Executive Engineer as a direct recruit on 27-8-1971, pursuant to the result of a competitive examination held by the Haryana

Public Service Commission in December 1970. The said Shri Gupta was promoted to the post of Executive Engineer on 17-9-1976. He made a representation to the State Government to fix up his seniority in accordance with the service rules but as the said representation was not disposed of for more than three years he approached the High Court of Punjab and Haryana by filing CWP No. 4335 of 1984. That petition was disposed of by the High Court on the undertaking given by the State that the seniority will be fixed up soon. The said undertaking not having been complied with, the said Shri Gupta approached the High Court in January 1986 by filing a contempt petition. In September 1986 the State Government fixed the inter se seniority of the said Shri Gupta and other members of the Service and Gupta was shown at Serial No. 72. Two promotees had been shown at Serial Nos. 74 and 75. Those two promotees filed a writ petition challenging the fixation of inter se seniority between the direct recruits and promotees and the High Court of Punjab and Haryana by its judgment passed in May 1987 quashed the order dated 29-9-1986 whereunder the seniority of the direct recruits and promotees has been fixed and called upon the State Government to pass a speaking order assigning position in the gradation list. The State Government issued a fresh notification on 24-7-1987 giving detailed reasons reaffirming the earlier seniority which had been notified on 29-9-1986. Prior to the aforesaid notification of the State Government Shri Gupta had filed a writ petition in the Punjab and Haryana High Court which had been registered as CWP No. [pic]6012 of 1986 claiming his seniority at No. 22 instead of 72 which had been given to him under the notification dated 29-9-1986. The promotees

also filed a writ petition challenging the government order dated 24-7-1987 which was registered as CWP No. 5780 of 1987. Both the writ petitions, one filed by the direct recruit, Shri Gupta, (CWP No. 6012 of 1986) and the other filed by the promotees (CWP No. 5780 of 1987) were disposed of by the learned Single Judge by judgments dated 24-1-1992 and 4-3-1992, respectively, whereunder the learned Single Judge accepted the stand of the promotees and Shri Gupta was placed below one Shri O.P. Gagneja. The said Shri Gupta filed two appeals to the Division Bench against the judgment of the learned Single Judge, which was registered as Letters Patent Appeals Nos. 367 and 411 of 1992. The aforesaid letters patent appeals were allowed by judgment dated 27-8-1992. This judgment of the Division Bench of the Punjab and Haryana High Court was challenged by the State of Haryana in the Supreme Court which has been registered as CAs Nos. 1448-49 of 1993. This Court granted leave and stayed the operation of the judgment in the matter of fixation of seniority. The promotees also challenged the said judgment of the Division Bench in this Court which has been registered as CAs Nos. 1452-1453 of 1993. During the pendency of these appeals in this Court, an Ordinance was promulgated on 13-5-1985 as Ordinance No. 6 of 1995 and the said Ordinance was replaced by the impugned Act 20 of 1995 by the Haryana Legislature. The validity of the Act was challenged by the said Shri Gupta and pursuant to the order of this Court the said writ petition having been transferred to this Court has been registered as TC No. 40 of 1996. So far as the validity of the Act is concerned, the question of any usurpation of judicial power by the legislature does not arise in relation to the Irrigation Branch inasmuch as the

Recruitment Rules of 1964 framed by the Governor of Punjab in exercise of power under proviso to Article 309 of the Constitution which has been adapted by the State of Haryana on and from the date Haryana was made a separate State had not been considered by this Court nor has any direction been issued by this Court. The legislative competence of the State Legislature to enact the Act had also not been assailed and in our view rightly since the State Legislature has the powers under Entry 41 of List II of the Seventh Schedule to frame law governing the conditions of service of the employees of the State Government. That apart Article 309 itself stipulates that the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State subject to the provisions of the Constitution. Proviso to Article 309 confers power on the President in connection with the affairs of the Union and on the Governor in connection with the affairs of the State to make rules regulating the recruitment and the conditions of service until provision in that behalf is made by or under an Act of the appropriate legislature under Article 309 main part. In this view of the matter, the legislative competence of the State Legislature to enact the legislation in question is beyond doubt. The only question which, therefore, arises for consideration and which is contended in [pic]assailing the validity of the Act is that under the Act the direct recruits would lose several positions in the gradation list and thereby their accrued and vested rights would get jeopardised and their future chances of promotion also would be seriously hampered and such violation tantamounts to violation of rights under Part III of

> the Constitution. For the reasons already given while dealing with the aforesaid contention in connection with the Public Health Branch and the Buildings and Roads Branch the contention raised in the transfer case cannot be sustained and, therefore, the transfer case would stand dismissed. The Act in question dealing with the service conditions of the engineers belonging to the Irrigation Branch must be held to be a valid piece of legislation passed by the competent legislature and by giving it retrospective effect no constitutional provision has been violated nor has any right of the employee under Part III of the Constitution been infringed requiring interference by this Court."

38. Finally, reference may be made to a decision rendered by this Court in Union of India and Others Vs. Col. G.S. Grewal, (2014) 7 SCC 303, wherein this Court observed as under: (SCC p. 315, para 28)

> "28. As pointed out above, the Tribunal has partly allowed the OA of the respondent primarily on the ground that the decision contained in the Government Order dated 23-4-2010 amends the promotion policy retrospectively thereby taking away the rights already accrued to the respondent in terms of the earlier policy. It is also mentioned that the revised policy fundamentally changes the applicants prospects of promotion. What is ignored is that the promotions already granted to the respondent have not been taken away. Insofar as future chances of promotions are concerned, no vested right accrues as chance of promotion is not a condition of service. Therefore, in the first instance, the Tribunal will have to spell out as to what was the vested right which had already

> accrued to the respondent and that is taken away by the Policy decision dated 23-4-2010. In this process, other thing which becomes relevant is to consider that once the respondent is permanently seconded in DGQA and he is allowed to remain there, can there be a change in his service conditions vis-?-vis others who are his counterparts in DGQA, but whose permanent secondment is not in cloud? To put it otherwise, the sole reason for issuing Government Policy dated 23-4-2010 was to take care of those cases where permanent secondment to DGQA was wrongly given. As per the appellants, since the respondent had suffered final supersession, he was not entitled to be seconded permanently to DGQA. This is disputed by the respondent. That aspect will have to be decided first. That apart, even if it be so, as contended by the appellants, the appellants have not recalled the permanent secondment order. They have allowed the respondent to stay in DGQA maintaining his promotion as Colonel as well, which was given pursuant to this secondment. The question, in such circumstances, that would arise is whether the respondent can be treated differently even if he is allowed to remain in DGQA viz. whether not allowing him to take further promotions, which benefit is still available to others whose permanent secondment is not in dispute, would amount to discrimination or arbitrariness thereby offending Articles 14 and 16 of the Constitution of India. In our opinion, these, and other related issues, will have to be argued and thrashed out for coming to a proper conclusion."

39. It is apparent from a collective perusal of the conclusions recorded in the judgments extracted in the

> foregoing paragraph, that chances of promotion do not constitute a condition of service. In that view of the matter, it is inevitable to hold, that the High Court erred in recording its eventual determination on the basis of the fact that the promulgation of the TA Rules, 2003 and the STA Rules, 2003 was discriminatory and arbitrary with regard to the fixation of the inter se seniority, since the same seriously prejudiced the chances of promotion of the erstwhile members of the ministerial cadre, namely, those members of the original ministerial cadre, who had not opted for appointment/absorption into the cadre of Data Entry Operators, with reference to and in comparison with, those members of the original ministerial cadre who had opted for appointment/absorption into the cadre of Data Entry Operators.
>
> 40. As a proposition of law it is imperative for us to record, that chances of promotion do not constitute conditions of service, and as such, mere alteration of chances of promotion, would not per se call for judicial interference. The above general proposition would not be applicable, in case the chances of promotion are altered arbitrarily, or on the basis of considerations which are shown to be perverse or mala fide."

10. As observed above, the petitioners as on the date of filing of the petitions were not even eligible for being considered to the post of Reader, let alone, the post of Professor. In such circumstances, when the petitioners lacked even the eligibility, obviously, they had no locus-standi to file and maintain the instant petitions, much less, seek the reliefs as claimed in these petitions.

11. These petitions are clearly mischievous as the petitioners have successfully managed to reserve a berth by obtaining interim orders, that too, despite being not eligible even for the post of Reader what to talk to the post of Professor.

12. In view of the aforesaid discussion, we do not find any merit in these petitions, but find the same to be mischievous and accordingly both these petitions are dismissed with costs of Rs.25,000/- each to be deposited by the petitioners in the H.P. High Court Advocates' Welfare Fund within a period of three months from today.

13. All pending applications, if any, also stand disposed of.

14. For compliance, to come up on **22.02.2022.**

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

Between:-

GURCHARAN SINGH
S/O SH. BALBIR SINGH,
R/O VILLAGE KANGANWAL,
P.O. PLASI, TEHSIL NALAGARH,
DISTRICT SOLAN, H.P.

……PETITIONER

(BY SH. MEHAR CHAND THAKUR, ADVOCATE)

AND

1. HIMACHAL ROAD TRANSPORT CORPORATION,
   SHIMLA, THROUGH ITS MANAGING DIRECTOR,
   SHIMLA-3

2. THE DIVISIONAL MANAGER (ADMINISTRATION),
   H.R.T.C., SHIMLA, H.P.

3. THE REGIONAL MANAGER, H.R.T.C.
   NALAGARH UNIT, DISTRICT SOLAN, H.P.

4. THE REGIONAL MANAGER, HRTC,
   DHALLI, SHIMLA-12

……RESPONDENTS

(BY SH. RAMAN JAMALTA, ADVOCATE)

CIVIL WRIT PETITION(ORIGINAL APPLICATION)

No.6499 of 2019
Decided on: 8.12.2021

Constitution of India, 1950 – Article 226 – Service matter – Fixation of Pay – Service record of petitioners was gutted in fire including the service record of the petitioner due to which the respondent asked the petitioner to furnish affidavit with respect to his service details in order to reconstruct his service record – petitioner submitted affidavit furnishing details of his basic pay @ Rs. 1,025/- as on 10.12.1989 and alleged that his increment fell on 1st September of every year – Held – Pay of the petitioner has been incorrectly fixed by the respondent, though pay was fixed on the basis of affidavit furnished by the petitioner himself on 21.06.1990 – However – respondent was responsible to maintain the service record of the petitioner – Fixation of pay chart of petitioner and Hem Singh another conductor appointed with petitioner reveals that petitioner's pay has been wrongly fixed – Petitioner shall not be entitled to any actual monetary benefits on account of revised fixation of his pay in terms of this judgment till date he retired, although all retiral benefits were made available to him – Respondent directed to do needful – Petition allowed. [Paras 3, 4(ii) & 4 V]

Cases referred:
M.R. Gupta Versus Union of India and others, (1995) 5 SCC 628;
State of Madhya Pradesh and Others vs. Yogendra Shrivastava, (2010) 12 SCC 538;
Union of India and others Versus Tarsem Singh, (2008) 8 SCC 648;

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

O R D E R

The petitioner was appointed as Conductor on 10.09.1982 in the respondent-Himachal Road Transport Corporation (HRTC) in the pay scale of Rs.400-600/-. The revision of pay scale was carried out w.e.f. 01.01.1986. After the revision of pay scales in the year 1986, the petitioner was fixed in the pay scale of Rs.950-1800/-. The pay of the petitioner was fixed at Rs.1000/- per month w.e.f. 01.01.1986 with next date of increment as 01.09.1986.

A fire broke out in the regional office of the respondents at Dhalli in the year 1989. A lot of record of the respondent-Corporation was gutted in the fire including the service record of the petitioner.

2. Since the service record of the petitioner was gutted in fire, the respondent-Corporation in an attempt to reconstruct the record, asked the petitioner to furnish an affidavit with respect to his service details including his basic pay and allowances etc. The affidavit as directed by the respondents, was furnished by the petitioner on 21.06.1990. Following details were given by him in the affidavit:-

"I, Gurcharan Singh Son of Shri Bilbier Singh resident of village Kanganwal P.O. Palsi, Teh. Nalagarh Distt. Solan.

1. *That My date of birth is 10.6.61.*
2. *That my educational qualification is as under:-*
   (i) Matric.
3. *That my date of appointment in HRTC is 10.9.82.*
4. *That my date of appointment in the different post/ grade chronological is as under.*
   (i) Cond. w.e.f. 10.9.82.
5. *That I have got medically examined at the time of entering in service.*
6. *That the following leave was due on 19.12.89 in my credit:-*
   (i) Earned Leave 150 days.
   (ii) H.A.P. Leave 100 days.
7. *That I never remained under suspension during my entire service upto 19.12.89.*
8. *That during the period from the date of appointment upto 19.12.89 no penalty was/is in operation against me.*
9. *That no chargesheet is pending against me.*
10. *That my basic pay as on 10.12.89 is Rs.1000/-. 1025/- according to the revised pay scale and date of next increment is 1.9.89 because I was on medical leave and the increment for the year 1.9.89 not be allowed to me and next date of increment is 1.9.90.*
11. *That I belong to open category.*

12. *That Sh. Bhagwan Dutt conductor presently working in HRTC Dhalli Unit was my batch mate.*
13. *That I have not availed L.T.C. in my entire service."*

Since in the above affidavit, the petitioner submitted that his basic pay as on 10.12.1989 was at Rs.1025/-, therefore, the respondents accordingly worked out his subsequent pay and annual increments. Relevant portion of pay fixation chart of the petitioner prepared by the respondent-Corporation on the basis of above affidavit furnished by him is as under:-

(Extracted from Annexure R-1)

"Date	*Pay*	*Remarks*
10.09.82	*400*	*New appointment.*
18.12.89	*1025*	*As per affidavit submitted.*
17.05.90	*1050*	*Annual increment deferred due to leave.*
01.09.90	*1075*	*Annual increment.*
01.09.91	*1100*	*Annual increment.*
01.09.92	*1125*	*Annual increment."*

There is no dispute qua the above facts between the parties.

3. The case put forth by the petitioner in the instant petition is that during the year 2014, he came across an office order dated nil (Annexure A-1), whereunder on revision of pay scales w.e.f. 01.01.1986, his pay as on 01.01.1986 was fixed at Rs.1000/- in the pay scale of Rs.950-1800/-. Petitioner's date of increment falls on 1st September of the year. Therefore, his pay as on 01.09.1986 was to be fixed at Rs.1025/- after allowing the annual increment due to him. In this way, as on 01.09.1987, his pay would be Rs.1050/-. Thereafter, as on 01.09.1988, his pay would be Rs.1075/-,

whereas, the respondents have fixed his basic pay at Rs.1025/- as on 18.12.1989.

Learned counsel for the petitioner submitted that the office order (Annexure A-1) was submitted by the petitioner to the respondents alongwith a detailed representation in this regard on 27.11.2014. However, the respondents instead of correctly fixing the pay of the petitioner, rejected his representation on 04.11.2015 on the ground of having been presented at a belated stage. In the aforesaid circumstances, the petitioner has preferred instant petition on 20.12.2015 for the following substantive reliefs:-

> *"(a) That the impugned order dated 4.11.2015 (Annexure A-4) may kindly be quashed and set aside, being wrong and against the records of the present case.*
>
> *(b) That the respondents may kindly be directed to re-fix the pay of the applicant from the year 1989 and revision of the pay scale thereafter from time to time and grant him all consequential benefits accordingly, keeping in view the (Annexure A-1)."*

In their reply, the respondents have not disputed that petitioner's service record was gutted in fire during the year 1989 and that his service book was reconstructed by the respondents on the basis of affidavit furnished by the petitioner. The stand taken by the respondents for opposing the prayers made by the petitioner is that the pay of the petitioner was fixed as per the affidavit furnished by him on 21.06.1990. The respondents have highlighted that since in his affidavit, the petitioner had himself stated that he was getting basic pay of Rs.1025/- as on 10.12.1989, therefore, his pay was fixed at Rs.1025/- w.e.f. 18.12.1989 onwards. Another argument raised by the respondents is that the claim of the petitioner is barred by limitation as he had represented to the respondents for re-fixation of his pay after about 33 years.

4. Having heard learned counsel for the parties and after going through the case record, in my considered opinion, this petition deserves to be allowed for the following reasons:-

4(i). It is not in dispute that the petitioner was initially appointed as Conductor on 10.09.1982 at Dhalli Unit of the respondents. Respondents have also admitted in their reply filed to the petition that the basic pay of the petitioner was fixed at Rs.1000/- per month as on 01.01.1986 in the pay scale of Rs.950-1800/-.

4(ii). The petitioner has claimed in the petition that the date of his increment falls on 1st September of every year. The pay fixation chart of the petitioner appended with the reply of the respondents as AnnexureR-1 reflects itto be a correct position. The petitioner therein has been allowed increment on 1st September of each year.

4(iii). The petitioner has placed on record copy of his pay fixation order at Annexure A-1, which he statedly came across during the year 2014. The respondents in their reply have not specifically denied this annexure. According to this annexure, pay of the petitioner had already been fixed at Rs.1000/- as on 01.01.1986 in the revised pay scale of Rs.950-1800/-. With annual increment of Rs.25/-, his pay as on 01.09.1986 would be Rs.1025/-, whereas, in the affidavit furnished by the petitioner to the respondents, he stated his pay at Rs.1025/- as on 10.12.1989. This was obviously incorrect factual submission in the affidavit. The respondents on the basis of petitioner's incorrect affidavit, fixed his basic pay at Rs.1025/- as on 18.12.1989. The error thus crept in and kept on recurring. The error continued till petitioner's retirement.

4(iv). Vide order dated 17.11.2021 passed in the instant petition, the respondents were directed to seek instructions in respect of veracity of office order at Annexure A-1 by means of any contemporaneous record available with them. Pursuant thereto, the respondents filed a supplementary affidavit

dated 30.11.2021. In this affidavit, it has been stated that one Sh. Hem Singh S/o Sukh Ram was also appointed as Conductor alongwith the petitioner on 10.09.1982 at HRTC Dhalli Unit. The respondents have appended the pay fixation chart of said Sh. Hem Singh, Conductor. A perusal of this chart shows that Sh. Hem Singh was also getting the revised pay scale of Rs.950-1800/- w.e.f. 01.01.1986 with 1st September of the year as his next date of increment. Relevant extract from this chart pertaining to Sh. Hem Singh is extracted hereinafter:-

(Extracted from Annexure R1-A)

"Pay as on	*10.09.82*	*Rs.400/*	*Fixed*
Pay as on	*01.09.83*	*Rs.400/*	*Effect dt 20.12.82*
Pay as on	*01.09.84*	*Rs.400/*	*Effect dt 20.12.82*
Pay as on	*01.09.85*	*Rs.420/*	*Restored inc effect dt 20.12.82* *(2) Effect dt 27.5.83 with Cumulative*
Scale Revised w.e.f. 01.01.1986 (Rs.950-1800)			
Pay as on	*01.01.86*	*Rs.1000/*	*Fixed*
Pay as on	*01.09.86*	*Rs.1000/*	*Effect dt 27.5.83 with cumulative*
Pay as on	*01.9.87*	*Rs.1000/*	*Effect dt 08.6.84 for a period of one year*

Pay as on	*01.09.88*	*Rs.1025/*	*Restored inc effect dt 08.6.84 after one year* *(2) Effect dt 10.2.86 for a period of six month*
Pay as on	*01.03.89*	*Rs.1050/*	*Restored inc effect dt 10.2.86 after six month*
Pay as on	*01.9.89*	*Rs.1075/*	*A.I*
Pay as on	*01.9.90*	*Rs.1100/*	*A.I*
Pay as on	*10.9.90*	*Rs.1125/*	*8 years ACP Allowed*
Pay as on	*01.9.91*	*Rs.1125/*	*Effect dt 29.7.91 for a period of six month*
Pay as on	*01.3.92*	*Rs.1150/*	*Restored inc effect dt 29.7.91 after six month*
Pay as on	*01.09.92*	*Rs.1175/*	*A.I"*

Though the above chart gives an inference that the said Sh. Hem Singh was imposed some penalty, because of which, probably his increments were stopped in the interregnum, nonetheless, the fact remains that on 01.01.1986, the pay of said Sh. Hem Singh was fixed at Rs.1000/- in the revised pay scale of Rs.950-1800/- with next date of increment as 01.09.1986. This leads credence to the petitioner's assertion that his pay as on 01.01.1986 was Rs.1000/- and would been Rs.1025/- as on 01.09.1986.

4(v). Insofar as the question of delay on part of the petitioner in seeking correct fixation of his pay is concerned, it will be appropriate to refer to ***(1995) 5 SCC 628,*** titled ***M.R. Gupta Versus Union of India and others,*** wherein the Hon'ble Apex Court has held that grievance of pay fixation, being not in accordance with the rules, is an assertion of a continuing wrong against an employee, giving rise to recurring cause of action each time the employee is paid salary, which is not computed in accordance with the rules. It was further held that if an employee's claim is found correct on merits, he would be entitled to be paid accordingly to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. Relevant paragraph of the judgment is as under:-

> *"5. Having heard both sides, we are satisfied that the Tribunal has missed the real point and overlooked the crux of the matter. The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid accordingly to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into*

account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action."

The judgment in M.R. Gupta's case, supra, has been followed in ***(2008) 8 SCC 648***, titled ***Union of India and others Versus Tarsem Singh***, wherein Hon'ble Supreme Court summarized the law by holding that a belated service related claim will normally be rejected on the ground of delay and laches or limitation, however, one of the exceptions to the said rule is cases relating to a continuing wrong, which does not affect settled rights of third parties. It was further held that if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. Relevant paragraphs of the judgment are as under:-

"7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the

principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. *In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances."*

To the similar effect is the judgment in ***(2010) 12 SCC 538***, titled ***State of Madhya Pradesh and Others vs. Yogendra Shrivastava***, wherein it was held as under:-

"18. We cannot agree. Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid, thereby giving rise to a fresh cause of action, based on continuing wrong. Though the lesser payment may be a consequence of the error that was committed at the time of appointment, the claim for a higher allowance in accordance with the Rules (prospectively from the date of application) cannot be rejected merely because it arises from a wrong fixation made several years prior to the claim for correct payment. But in respect of grant of consequential relief of recovery of arrears for the past period, the principle relating to recurring and successive wrongs would apply. Therefore the consequential relief of payment of arrears will have to be restricted to a period of three years prior to the date of the original application. (See: M.R. Gupta vs. Union of India and Union of India vs. Tarsem Singh)."

In the facts of instant case, it has been established on record that the pay of the petitioner has been incorrectly fixed by the respondents.

Though this incorrect fixation of pay was on the basis of affidavit furnished by the petitioner himself on 21.06.1990, however, the fact remains that it was the responsibility of the respondent-Corporation to have maintained the service record of the petitioner. The service book of the petitioner had admittedly been gutted in fire during the year 1989. It was on the asking of the respondent-Corporation that the petitioner furnished his affidavit, wherein he gave incorrect particulars with respect to the pay drawn by him. The respondents have not specifically disputed the office order at Annexure A-1, which reflects petitioner's correct pay being drawn by him as on 01.01.1986. In fact, in their supplementary affidavit, the respondents have also given the pay fixation chart of one Sh. Hem Singh, who was appointed as Conductor alongwith the petitioner on the same date and fixed in the same pay scale. A comparison of the pay fixation charts of the petitioner and Sh. Hem Singhreveals that petitioner's pay had been incorrectly fixed to his disadvantage on the basis of incorrect affidavit filed by him. Throughout his service, the petitioner had been paid less pay than what was payable to him in law in accordance with Annexure A-1.

The petitioner has already retired from service on 30.06.2019. He raised the dispute regarding his incorrect fixation of pay at the fag end of his service career. Instant petition was filed by him on 31.12.2015. Therefore, in the facts and circumstances of the case and taking into consideration the legal position extracted earlier, this writ petition is allowed. The respondents are directed to work out the notional pay of the petitioner in terms of Annexure A-1, in accordance with law, w.e.f. 01.01.1986. The petitioner shall not be entitled to any actual monetary benefit on account of revised fixation of his pay in terms of this judgment till the date he retired. However, all retiral benefits, i.e. Gratuity, Leave Encashment, Pension etc., shall be admissible to him on actual basis on the basis of notional re-fixation of his pay. The respondents are directed to carry out this entire exercise and pay actual

monetary benefits (retiral) to the petitioner w.e.f. 30.06.2019 in terms of this judgment, within a period of six weeks from today.

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

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

Between:-

DINESH KUMAR S/O SH. KRISHAN DASS,
R/O NEAR CIVIL HOSPITAL, GHUMARWIN,
DISTRICT BILASPUR, HIMACHAL PRADESH.

.....PETITIONER

(BY SHRI MALAY KAUSHAL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ADDITIONAL CHIEF SECRETARY (FOOD, CIVIL SUPPLIES AND CONSUMER AFFAIRS) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. HP STATE CIVIL SUPPLIES CORPORATION LTD., THROUGH THE MANAGING DIRECTOR, BLOCK NO. 16-17, SDA COMMERCIAL COMPLEX, KASUMPTI, SHIMLA, H.P. -171009.

3. THE DIRECTOR, DIRECTORATE FOR EMPLOYMENT OF SCS, OBCS, MINORITIES AND SPECIALLY ABLED, BLOCK NO. 33, SDA COMPLEX, KASUMPTI, SHIMLA, H.P.-171009.

4. SH. VIKAS SIDHU, S/O SH. MOHAN SINGH, HOUSE NO. 74 NEAR LAL KOTHI, FAGLI, SHIMLA, H.P.-171004.

.....RESPONDENTS

(SH. VIKRANT CHANDEL, DEPUTY ADVOCATE

GENERAL, FOR R-1 & R-3,

SMT. BHAWNA DUTTA, ADVOCATE, FOR R-2 & R-4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 1866 of 2020
Decided on: 15.12.2021

Constitution of India, 1950 – Article 226 – Selection & Appointment – Petitioner has challenged the selection and appointment of respondent No. 4 on the ground that disability of respondent No. 4 fell in category of blindness as he was 100% visually handicapped, whereas the post was reserved for low vision visually impaired – The grievance of petitioner is that since respondent No. 4 was a blind person so eligibility condition for the post in question reserved for visually (low vision) impaired has not been fulfilled – Held - 'Blindness' and 'Low Vision' are two separate nature of disabilities recognized under the Rights of Persons with Disabilities Act, 2016 - the post in question was advertised in terms of the policy / instructions of the respondent State dated 16.01.2006 - The medical certificate for physically handicapped appended by respondent no.4 shows that respondent No.4 was suffering from low vision disability, but in the remarks column it was stated that he was a case of visually handicapped 100% - the post is question was advertised for visually impaired parson suffering from "Low Vision", disability and not for visually impaired person suffering from blindness – Respondent No. 4 has been appointed in violation of selection criteria – Petition dismissed. [Paras 3(i), 4(d) & 5(vi)]

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

O R D E R

Respondent No. 4 was selected and appointed by respondent No. 2 as Clerk against the advertised vacancy reserved for visually handicapped visual impaired (Low Vision). The selection and appointment has been assailed by the petitioner in the instant petition on the ground that disability of respondent No. 4 fell in category of 'blindness' and he was 100% visually handicapped, whereas the post was reserved for 'low vision' visually impaired.

2. **Facts**

2(i) Respondent No. 2 i.e. H.P. State Civil Supplies Corporation Limited issued an advertisement on 5.12.2014 inviting applications from eligible persons for the post of Clerk to be filled-up on contract basis. The post was meant for visually handicapped persons VI (Low Vision). The eligibility conditions prescribed in the advertisement were as under:

a) The candidate must be in possession of graduate degree from a recognized university.

b) The candidate should be bonafide resident of Himachal Pradesh.

c) The candidate must have been declared visually handicapped by the competent authority.

d) The age of the candidate should not be over 45 years as on 1.1.2014.

The advertisement also stipulated that the interested candidates having above qualifications could apply for the post of Clerk alongwith attested copies of educational qualification i.e. Matriculation, +2, B.A. and visually handicapped certificate VI Low Vision (LV).

2(ii) The petitioner was suffering from 40% low vision disability. He satisfied the eligibility criteria stipulated in the advertisement and, therefore, applied for the post in question. Respondent No. 4 Shri Vikas Sidhu also applied for the post in question.

2(iii) On 3.12.2014 respondent No. 2 wrote to the Employment Officer (Placement), Directorate of Employment and Training , Shimla to sponsor the names of visually impaired candidates for filling-up the post of Clerk reserved for visually impaired (LV). Reminders in this regard were also sent to the Employment Exchange. The Employment Exchange eventually forwarded some names to respondent No. 2 on 26.4.2017. Respondent No. 2 also

published the advertisement in the newspaper on 3.5.2017 inviting applications for filling up the post of Clerk on contract basis on fixed contractual emoluments. The post as indicated in the earlier advertisement issued in the year 2014 was again shown to be reserved for visually handicapped visual impaired (LV) persons. The advertisement reads as under:

> "The Management of H.P. State Civil Supplies Corporation Limited proposed to fill-up one (1) post of Clerk on contract basis on fixed contractual amount @ Rs. 8.760/- per month (5910+1900+950 i.e. 50% of the Grade Pay) reserved for visually handicapped persons Visual Impaired (LV). The essential qualification for this post is as under:
>
> 1. The candidate must have passed graduation from any recognized University.
> 2. He/she should be a bonafide resident of Himachal Pradesh.
> 3. He/she must have been declared visually handicapped
> by competent authority.
> 4. The age of applicant should not be more than 45 years as on 01.01.2017
>
> The interested candidates having above qualification may apply for the post of Clerk on a simple application along with attested copies of each educational qualification i.e. Matriculation, +2, BA and visually handicapped certificate Visual Impaired (LV) and the same must reach in the o/o Managing Director, H.P. State Civil Supplies Corporation Limited, Block No. 16-17, SDA Commercial Complex, Kasumpti Shimia-9 on or before 31.05.2017 up to 5:00 PM. The applications received after this date shall be summarily rejected."

2(iv) The selection process commenced. Interview/screening was conducted by respondent No. 2 on 22.9.2017. Respondent No. 4 with 14.5 marks stood at serial No. 1 and petitioner with 13.36 marks stood at serial No. 2 of the merit list. Respondent No. 4 being at serial No. 1 in the merit list was offered the appointment. He joined his duties and is stated to be continuing to serve in respondent No. 2-Corporation.

3. **Contentions**

3(i) The grievance of the petitioner is that respondent No. 4 did not satisfy the eligibility conditions mentioned in the advertisement in question. That the post in question was reserved for visually impaired (Low Vision), whereas respondent No. 4 was a blind person. That the medical certificate dated 3.5.2016 appended by respondent No. 4 along with his application though showed the category of his disability as 'Low Vision', however, the remarks on the said certificate were that he was "visually handicapped 100%".

Shri Malay Kaushal, learned counsel for the petitioner submitted that after acquiring the documents pertaining to respondent No. 4 under the Right to Information Act, the petitioner on 12.10.2017 represented to respondent No. 2 in respect of respondent No. 4's ineligibility for the post in question. No action was taken by the respondent-Corporation on this representation, compelling the petitioner to file instant petition on 5.1.2018 with the following prayers:

> "i) Quash the selection/appointment of respondent no.4 to the post of clerk on contract basis reserved for visually impaired (LV) in respondent no.2 Corporation;

ii) Direct the respondent no.2 to offer the post of clerk on contract basis reserved for visually impaired (LV) in respondent no.2 Corporation, to the applicant, being the next candidate in merit."

3(ii) Ms. Bhawna Dutta, learned counsel appearing for respondents No. 2 and 4 submitted that the post in question was advertised in terms of the policy decision of the respondent-State Government dated 16.1.2006. The post was reserved for visually handicapped personnel. Respondent No. 4 fell in the category of visually handicapped, hence, there was no error in his selection and appointment against the post in question. Learned counsel also placed reliance upon the selection criteria adopted in the selection of the candidates whereunder maximum of six marks could be allotted to a candidate depending upon the percentage of his disability. In the said criteria two marks were allocated for candidates with visual disability of 40-59%, four marks for candidate with disability of 60-79% and maximum six marks for candidate with disability ranging from 80-100%. Learned counsel submitted that respondent No. 4 suffered from 100% disability and was accordingly given six marks under this head. Respondent No. 4 was highest in the merit list and accordingly he was selected by respondent No. 2 and appointed against the post in question.

3(iii) Respondent No. 3-the Directorate for Empowerment of SCs, OBCs, Minorities and Specially abled in its reply filed on 1.3.2018 submitted that respondent No. 2 had issued the advertisement for the post of Clerk reserved for the person with disabilities Visually Impaired (Low Vision) under Section 32(a) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. That all formalities such as prior identification of posts, advertisement of posts, scrutiny of applications,

issuance of call letters and appointment letters was done by respondent No. 2 at its own level. The interview for the post in question was held under Chairmanship of respondent No. 3. The selection committee recommended name of respondent No. 4 on the basis of record i.e. valid medical certificate issued by the competent authority. Respondent No. 3 further submitted in its reply that in case incorrect medical certificate was issued to respondent No. 4, then the petitioner should have approached appropriate medical authority for redressal of his grievances. That petitioner's representation had been forwarded to the Health Department on 2.2.2018 to provide clarification "as to whether any person could be given a medical certificate for 100% Low Vision."

4. **Observations**

I have heard learned counsel for the parties and gone through the case file. In my considered view, this petition deserves to be allowed for the following reasons:

4(a) 'Blindness' and 'Low Vision' are two separate nature of disabilities recognized under the Rights of Persons with Disabilities Act, 2016. Section 2(i) in this regard reads as under:-

> "2(i) "disability" means-
>
> (i) blindness;
>
> (ii) low vision"

Section 2(b) defines "blindness" as under:

> "(i) total absence of sight; or
>
> (ii) visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or
>
> (iii) limitation of the filed of vision subtending an angle of 20 degree or worse;"

Section 2(u) defines low vision as:-

> "person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device;"

4(b) It is the respondents' pleaded and canvassed case that the post in question was advertised in terms of the policy/instructions of the respondent-State dated 16.1.2006 (Annexure R-1). Being relevant, the contents thereof are extracted hereinafter:

> "No. PER.(AP)-C-B(12)-1/2006
> Government of Himachal Pradesh
> Department of Personnel (AP-III).
>
> Dated: Shimla-171 002, the 16" January, 2006
>
> From
>
> The Principal Secretary (Pers), to
> Government Himachal Pradesh.
>
> To
>
> 1. All the Secretaries to the
> Govt. of Himachal Pradesh.
>
> 2. All the Heads of Departments in Himachal Pradesh.
> 3. All the Deputy Commissioners in Himachal Pradesh
> 4. All the Chairmen/Managing Directors/Secretaries/
> Registrars of all the Public Sector Undertakings/
> Corporations/Boards/Universities etc. in Himachal Pradesh.

Subject: Providing of reservation to the disabled persons in respect of Class-I to IV posts/service to be filled in by direct recruitment-Instructions therefor regarding.

I am directed to say that the State Government has provided 3% reservation to the disabled persons in direct recruitment in respect of Class-III and IV posts/services vide Department of Personnel letter No. Karmik(NI-II)B(12)-11/76, dated 22.01.1981, which has further been split up 1% each to the Blind, Deaf and Orthopedically Handicapped vide Department of Personnel letter No. Karmik (NI-11) B(12)-11/76, dated 11.05.1981. Thereafter, 3% reservation has also been provided to the disabled persons in respect of Class-I and II posts/services direct recruitment by the State Government vide Department of Personnel letter No. PER. (AP)-C-B(12)-1/99, dated the 2nd December, 1999.

2. Pursuant to these instructions, 1% reservation has been distributed to all the Visually Impaired Persons without considering the percentage of their disability. This matter was under consideration of the Government for quite some-time past. After a through scrutiny of the matter it has now been decided by the Government that henceforth, 1% reservation provided to the Visually impaired Persons may be distributed further in between the totally blind and low vision persons in the ratio of 2:1 respectively, subject to the condition that this reservation will be given to them out of their own 1% quota i.e.their total percentage of reservation in services shall not exceed the limit of 1% reservation distributed to this category of the disabled persons.

3. These instructions may please be followed strictly and also brought to the notice of all concerned for compliance.

Yours faithfully,

Deputy Secretary (Pers.) to the
Govt. of Himachal Pradesh"

4(c) The above extracted policy pertains to providing reservation to disabled persons in State services through direct recruitment. The instructions state that vide letter dated 11.5.1981 the 3% reservation available to the disabled persons in direct recruitment in State services has been split up 1% each to the blind, deaf and orthopedically handicapped category. The 1% reservation for the visually impaired persons has been further split up between totally blind and low vision persons in the ratio of 2:1. It is not in dispute that the post in question was advertised by the respondent-corporation for visually handicapped persons VI visually impaired (LV). The advertisement (already extracted above) clearly stated that interested candidates satisfying the requisite educational qualifications criteria alongwith visually handicapped visually impaired (LV) certificate were to apply for the post. Respondent No.2 in para-3 of its reply on merits filed to the writ petition has also stated that the vacancy was reserved for visually impaired (LV) handicapped persons under 1% reservation for category of visually impaired (low vision). The para is extracted hereinafter:-

> "3. That Para 3 of the application is wrong hence denied. It is submitted that Respondent No. 4 Sh. Sidhu son of Sh. Mohan Singh has been offered appointment as clerk on contract basis against the vacancy reserved for visually impaired (LV) handicapped person being eligible, under 1% reserved for category of Visually impaired (Low Vision) as per instruction contained in letter No. PER(AP)-C-B(12)1/2015 dated 16.1.2006 (Annexure 'R-1)."

Also, in its correspondence with Employment Exchange (Annexures R-2 to R-5), respondent No. 2 had stated that "post comes in the share of reservation of physically handicapped persons for general category which is earmarked for category of disabled Visual Impaired (Low Vision)……."

4(d) The medical certificate for physically handicapped persons appended by respondent No.4 alongwith his application has been placed on record. As per this certificate dated 3.5.2016, respondent No.4 was suffering from low vision, disability but in the remarks column it was stated that he was a case of 'visually handicapped 100%'. The petitioner in his representation to respondent No.2 sent on 12.10.2017 complained that respondent No.4 was 100% visually disabled (blind), whereas the post in question was advertised by respondent No.2 as reserved for visually impaired (LV). It appears that during the pendency of the present petition, action was taken by respondent No.2 on the representation of the petitioner for verifying the disability of respondent No.4. Petitioner's representation was forwarded to the Director Health and Family Welfare Department on 2.2.2018 to provide clarification as to whether any person could be given a medical certificate for low vision disability in case of 100% visual handicap.

Further communications in this regard received from the Health & Family Department have been placed on record as Annexures R/9 to R/11. The sum total of these documents is that disability certificate issued to respondent No. 4 on 3.5.2016 was reviewed by the two member Committee of Eye Surgeons of Deen Dayal Upadhyaya Hospital, Shimla. The committee reported that the category of disability in the disability certificate of respondent No.4 was erroneously marked as low vision. The disability suffered by respondent No.4 fell in the category of blindness. He was visually

handicapped to the extent of 100%. The committee's report dated 18.01.2019 is extracted hereinafter:-

> "With due regards, it is submitted that in the disability certificate of Vikas Sidhu S/o Late Sh. Mohan Singh, the category was erroneously marked as low vision but he fall in the category of blindness as his visual acuity is FC 1 foot in both eyes due to bilateral optic atrophy and is visually handicapped to the extent of 100% as has already been mentioned in his disability certificate, hence it may be treated as blindness. Further it is stated that if necessary, he may be asked to appear before board on any working day."

The medical examination of respondent No.4 was conducted afresh by the State Medical Board. The fresh medical certificate issued to him on 19.03.2019 has also been placed on record, whereunder category of his disability has been described as 'blindness' with the remarks 'visually handicapped 100%'.

The above documents have been placed on record by respondent No. 2 with the submission that medical record reflects 100% blindness of respondent No. 4.

5. **Conclusion**

From the above discussion it becomes quite clear that :-

5(i) 'Blindness" and 'Low Vision' are two separate nature of disabilities under the Rights of Persons with Disabilities Act, 2016.

5(ii) 1% reservation available to persons suffering from visual disability was split up in the ratio of 2:1 for totally blind and low vision persons, respectively.

5(iii) The post in question was advertised for visually impaired persons suffering from 'low vision' disability and not for visually impaired persons suffering from 'blindness'.

5(iv) Respondent No.4 applied as a candidate suffering from disability of low vision. His medical certificate dated 3.5.2016 described him as falling in the category of 'low vision', however, it also stated that he was 100% visually handicapped person. He was selected and appointed on the basis of this medical certificate.

5(v) On the representation of petitioner, the disability certificate of respondent No.4 was got verified again by respondent No.2 from the State Health and Family Welfare Department. The medical expert committee constituted for this purpose held that respondent No.4 was 100% visually handicapped. Nature of disability suffered by him was 'blindness' and not 'low vision'. That the category of disability in the medical certificate of respondent No. 4 issued on 3.5.2016, was wrongly marked as 'low vision' instead of 'blindness'. Respondent No. 4 was also medically examined by State Medical Board thereafter. The disability certificate issued to respondent No. 4 on 19.3.2018 described nature of his disability as 'blindness' with 'visual handicap 100%.'

5(vi) The criteria formed by Selection Committee for awarding 6 marks to the persons suffering from 100% visually impairedness is of no help to respondent No.4. The post in question was reserved for visually impaired (low vision). This has also been mentioned at the top of the result sheet prepared by the selection committee. Nature of disability suffered by respondent No. 4 fell in the category of 'blindness' and not 'visually impairedness (low vision)'.

5(vii) During hearing of the case, learned counsel for the petitioner, to show different treatment of instant case by respondent No. 2 also placed on record a list of candidates rejected by respondent No.2 on 1.9.2021 for direct recruitment to the post of Junior Office Assistants (IT) to filled up on contract

basis. The post therein was statedly reserved for visually impaired (LV). The list shows that applications of several candidates had been rejected by respondent No.2 on the ground that nature of disability mentioned in their certificates was 'Blindness', whereas the post was reserved for 'Low Vision' category of Visually Impaired disability.

For all the aforesaid reasons, I find merit in the present writ petition. Accordingly, the writ petition is allowed. The selection and appointment of respondent No.4 against the post in question is quashed and set aside. Respondents No.2 and 3 are directed to offer appointment against the post in question to the petitioner, who is next in the merit list within a period of three weeks from today. Pending miscellaneous application (s), if any, shall also stand disposed of.

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

Between:-

1. CWPOA No. 6450 OF 2019

SH. MAN SINGH S/O LATE SH. GOVIND RAM,
R/O VILLAGE CHAILI, P.O.MEHLI,
TEHSIL AND DISTRICT SHIMLA,
PRESENTLY WORKING AS SENIOR
ASSISTANT IN ECONOMIC AND STATISTICS
DEPARTMENT HIMACHAL PRADESH,
PRESENTLY ON DEPUTATION IN THE OFFICE
OF ADG OF POLICE (SV&ACB) H.P. SHIMLA-2.

.....PETITIONER

(BY MS. KIRAN DHIMAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
ITS PRINCIPAL SECRETARY (ECONOMICS
AND STATISTICS) TO THE GOVT. OF H.P.
SHIMLA-2.

2. DIRECTOR, ECONOMIC ADVISOR,
ECONOMIC AND STATISTICS DEPARTMENT
HIMACHAL PRADESH, KASUMPTI SHIMLA-9.

3. THE ADDITIONAL DIRECTOR GENERAL OF
POLICE, SV & ACB, POLICE HEADQUARTERS,
SHIMLA-2.

4. KUMARI NEELAM PATIAL (SPDTT. GRADE-II),
C/O DIRECTOR, ECONOMIC ADVISOR,
ECONOMIC AND STATISTICS DEPARTMENT
HIMACHAL PRADESH, KASUMPTI SHIMLA-9,H.P.

.....RESPONDENTS

(SH. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL
WITH SH. VIKRANT CHANDEL DEPUTY ADVOCATE GENERAL
AND SH. SUNNY DHATWALAI, ASSISTANT ADVOCATE
GENERAL, FOR R-1 TO R-3,

SMT. RANJANA PARMAR, SENIOR ADVOCATE WITH
SH. KARAN SINGH PARMAR, ADVOCATE, FOR R-4)

2. CWPOA No. 5342 OF 2019

NEELAM PATIAL, SUPERINTENDENT GRADE-II
OFFICE OF DIRECTORATE OF ECONOMICS AND
STATISTICS DEPARTMENT, SHIMLA-9

.....PETITIONER

(BY SMT. RANJANA PARMAR, SENIOR
ADVOCATE WITH SH. KARAN SINGH
PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
SECRETARY (ECONOMICS & STATISTICS) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. ECONOMIC ADVISOR,
   GOVERNMENT OF HIMACHAL PRADESH,
   SHIMLA.

3. MAN SINGH S/O SHRI GOVIND RAM,
   R/O VILLAGE CHAILI, P.O.MEHLI,
   DISTRICT SHIMLA, H.P.
   PRESENTLY ON DEPUTATION IN THE OFFICE
   OF ADG OF POLICE (SV&ACB), SHIMLA.

.....RESPONDENTS

(SH. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL WITH SH. VIKRANT CHANDEL DEPUTY ADVOCATE GENERAL AND SH. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR R-1 AND R-2,

MS. KIRAN DHIMAN, ADVOCATE, FOR R-3)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NOS. 6450 AND 5342 of 2019
Decided on:7.12.2021

Constitution of India 1950 - Article 226 - Service matter - Petitioner is a aggrieved by the promotion of respondent number 4 as superintendent grade-II and further the petitioner has approached the court for the orders of his promotion to the post of Superintendent grade-II alleging that six incumbents had already been promoted to the post of superintendant grade-II so next vacancy in the cadre of Superintendent Grade-II which became available on 11.09.2014 fell at roster point number 7, had to be filled in by promotion of an eligible senior assistant belonging to scheduled caste category - Petitioner Man Singh serving as senior assistant w.e.f 1999 was eligible to be considered for promotion to the post of Superintendent grade II - the grievance of petitioner Neelam Patial in CWPOA number 5342 of 2019 is that the reservation roster cannot be applied qua upgrade/create posts and the roster is required to be applied from Sri B.R. Verma onwards which became available on 11.9.2014 would fall at roaster point number 5 and in such circumstances eligible person belonging to general category is entitled for the promotion – Held - In the year of 2007, two posts of Superintendent Grade-II were upgraded/created and against these upgraded posts senior assistants were promoted on adhoc basis and subsequently were regularized on 11-04-2008 on the basis of recommendations of DPC - the posts of Superintendent grade-II are non- selection posts, so 13 point reservation roster was applied while filling up these posts - the post of Superintendent Grade-II is class-II post and

since Sh. Vij Snvuge and and Nirmal Thakur were promoted, so reservation roster had to be applied to the post occupied by them, hence, reservation roster regarding the vacancy which became available on 11-09-2014 would fall at roster number 7 and wrongly considered at roster point number 5- Respondents after realizing their mistake held review DPC on 16.6.2015 and review meeting of DPC held on 16.6.2015 correctly recommended for rectification of mistake - respondents / competent authority directed to implement the recommendations of review DPC held on 16.6.2015 within 3 weeks - Writ petition filed by Neelam Patial dismissed and the writ petition filed by petitioner Man Singh allowed, since he has been retired therefor consequential benefits due to him are ordered to be paid in his favour - both writ petitions disposed of.(Paras 2(ii), 4(i) and 5(iv))

Cases referred:

Bharat Sanchar Nigam Limited vs. R. Santhakumari Velusamy and Others (2011) 9 SCC 510;

Rama Nand and Others vs. Chief Secretary, Government (NCT of Delhi) and Another (2020) 9 SCC 208;

Union of India vs. Pushpa Rani 2008 (9) SCC 242;

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

O R D E R

Whether post of Superintendent Grade-II against which respondent No. 4 (Neelam Patial) was promoted on 31.10.2014 fell at roster point No. 5 or 7 of the 13 point roster followed by the respondents, is the question to be determined in these two petitions. In case the post in question fell at roster point No. 7, then it was to be filled up by promotion from an eligible person belonging to scheduled caste category. In that eventuality, the petitioner in CWPOA No. 6450 of 2019 (Man Singh) would succeed. However, if it was roster point No. 5, then promotion of respondent No. 4 (petitioner in CWPOA No. 5342 of 2019) as Superintendent Grade-II on 31.10.2014 belonging to general category would be saved. Both these writ petitions

involve overlapping facts and common issues, hence, are taken up together for decision. For convenience, facts and documents from CWPOA No. 6450 of 2019 are being referred hereinafter.

2. **Facts**

2(i) The petitioner (Man Singh) was promoted to the post of Senior Assistant in the year 1999. The next promotional post from the post of Senior Assistant is that of Superintendent Grade-II.

2(ii) Admittedly, the respondents are following 13 point roster for filling up the posts of Superintendent Grade-II, which is a cadre consisting of total two posts. It is not in dispute that 5th post as per 13 point roster is to go to an eligible person belonging to general category, whereas the 7th post as per the roster has to go to an eligible person belonging to scheduled caste category.

2(iii) A post of Superintendent Grade-II became available in the respondent department on 11.9.2014. The respondents treated this post at roster point No. 5. The Departmental Promotion Committee (in short 'DPC') was convened on 17.9.2014 for filling up this vacancy. The DPC recommended name of respondent No. 4 belonging to general category for promotion to the post of Superintendent Grade-II. The recommendations were implemented by the respondents. Respondent No. 4 was accordingly promoted as Superintendent Grade-II on 31.10.2014.

2(iv) Aggrieved against the promotion of respondent No. 4 as Superintendent Grade-II, the petitioner preferred this petition on 23.4.2015 for the following substantive reliefs:-

> "i) That the Office Order dated 31.10.2014 (Annexure A-5) whereby the private respondent has been promoted to the post of Supdtt. Grade-II may kindly be quashed and set aside.

ii) That the respondents may further be directed to consider the case of applicant for promotion to the post of Supdtt. Grade-II and promote him to the post of Supdtt. Grade-II."

The case put up by the petitioner is that the vacancy which became available on 11.9.2014 fell at roster point No. 7 and was thus reserved for candidate belonging to scheduled caste category. That the petitioner was an eligible feeder cadre personnel belonging to scheduled caste category and was required to be considered for promotion to the post of Superintendent Grade-II.

2(v) In reply filed to the petition, respondent-State conceded its mistake in having wrongly treated the vacancy in question at roster point No. 5. It was submitted that the vacant post in question actually fell at roster point No. 7 and therefore, eligible person belonging to scheduled caste category was required to be considered for promotion against the said roster point. During pendency of the petition, the respondents convened review meeting of the DPC on 16.6.2015. The review DPC concluded that the post in question actually fell at roster point No. 7 and not at roster point No. 5. Petitioner Man Singh belonging to scheduled caste cateory was recommended for promotion against this roster point No. 7. The DPC also recommended that *"the DPC held in 2014 in which the name of Km. Neelam Patial is recommended against point No. 5 erroneously is set aside after reviewing the DPC and her demotion to her substantive post of Sr. Assistant be done as point No. 7 is meant Schedules Caste as per 13 point roster of reservation. Before issuing demotion orders, her personal hearing be fixed by the Appointing authority and decision be conveyed as per instructions as referred in the Memorandum."*

2(vi) Based upon the above recommendations of the review DPC, notice was issued by the respondent department to respondent No. 4 on 16.6.2015 for giving her an opportunity of hearing in this regard. At this

stage, respondent No. 4 filed CWPOA No. 5342 of 2019 assailing the notice dated 16.6.2015. Substantive relief prayed by respondent No. 4 in her petition, runs as under:

> "i) That the impugned communication dated 16th June, 2015 may kindly be quashed and set aside and both the Original Applications may be tagged together with and may be heard at an early date in the interest of justice and fair play."

Pursuant to a status quo order passed by learned erstwhile H.P. Administrative Tribunal on 26.6.2015 in CWPOA No. 5342 of 2019, respondent No. 4 continued to work as Superintendent Grade-II in terms of her earlier promotion dated 31.10.2014. In view of the interim order, no further action was taken by the respondent department on the basis of recommendations of review DPC dated 16.6.2015 and the notice dated 16.6.2015.

2(vii) Man Singh (petitioner in CWPOA No. 6450 of 2019) and Neelam Patial (petitioner in CWPOA No 5342 of 2019) superannuated on 31.3.2016.

3. I have heard learned counsel for the petitioners in both the petitions and have also heard learned Additional Advocate General and gone through the case files as well as the record produced by the respondent-department during hearing of the case.

4. **Contentions**

4(i) Case of petitioner Man Singh is that six incumbents had already been promoted to the post of Superintendent Grade-II prior to 11.9.2014. Names of these six incumbents are as under:

A. Sh. S.N. Vij
B. Smt. Nirmal
C. Sh. B.R. Verma
D. Smt. Aruna Sood
E. Sh. Rajesh Sawant
F. Sh. Ramesh Thakur

Simple case of petitioner Man Singh is that since six persons had already been promoted as Superintendent Grade-II, therefore, the next vacancy in the cadre of Superintendent Grade-II which became available on 11.9.2014 fell at roster point No. 7. In terms of 13 point roster which is admittedly applicable in the instant case, the 7th vacancy had to be filled in by promotion of an eligible Senior Assistant belonging to Scheduled Caste category. The petitioner Man Singh serving as Senior Assistant w.e.f. the year 1999 was eligible to be considered for promotion to the post of Superintendent Grade-II. He belongs to scheduled caste category, therefore, was required to be considered and promoted as Superintendent Grade-II.

4(ii) The case of the petitioner Neelam Patial in CWPOA No. 5342 of 2019 is that Shri S.N. Vij and Smt. Nirmal [at points A & B of para 4(i) above] were promoted as Superintendent Grade-II against the up-graded posts. Therefore, reservation roster cannot be applied qua these two upgraded/created posts. According to petitioner Neelam Patial, the roster will have to be applied only from Shri B.R. Verma onwards [at point C of para 4(i) above]. In case the roster is applied from Shri B.R. Verma onwards, then the vacancy which became available on 11.9.2014 would fall at roster point No. 5. Admittedly, vacancy at roster point No. 5 had to be filled-in by promotion of a eligible person belonging to general category. Another submission made on behalf of petitioner Neelam Patial is that at the time of up-gradation of posts held by Shri S.N. Vij and Smt. Nirmal, the Recruitment and Promotion Rules (in short 'R&P Rules') for the posts of Superintendent Grade-II had not been finalized. The R&P Rules were finalized on 12.9.2008. Therefore, 13 point roster cannot be applied to the posts which were filled up prior to the finalization of the R & P Rules.

5. In my considered view, the petition filed by Man Singh (CWPOA No. 6450 of 2019) deserves to be allowed and CWPOA No. 5342 of 2019 (filed by Neelam Patial) deserves dismissal for the following reasons:

5(i) On 1.10.2007 government accorded its sanction to upgrade two posts of Senior Assistants in the respondent department to Superintendent Grade-II in the pay scale of Rs. 6400-10640 with Grade pay of Rs. 4800/-. Shri S.N. Vij and Smt. Nirmal were promoted on ahoc basis as Superintendent Grade-II for a period of six months or earlier vide office order dated 4.1.2008. Later a meeting of DPC was convened for filling-in the upgraded posts. The memorandum before the DPC stated that the posts were upgraded by the government and the administrative department & the department of Personnel were of the opinion that there was no requirement to look into the R & P Rules at that time. That the posts being 'non-selection posts' will be filled up by promoting the senior most officials and 13 point roster of reservation will be applied whereunder point Nos. 1 and 2 are unreserved. On the basis of recommendations of DPC held on 9.4.2008, the ad-hoc promotions of these two officials (Sh. S.N. Vij and Smt. Nirmal Thakur) were regularized vide office order dated 11.4.2008. Subsequently, the R & P Rules for the posts of Superintendent Grade-II were notified on 12.9.2008. In terms of these Rules, the cadre of Superintendent Grade-II consisted of two posts which were to be filled up 100% by promotion from amongst Senior Assistants with six years regular service or regular combined with continuous ad-hoc service in the grade.

5(ii) After retirement of Shri S.N. Vij & Smt. Nirmal, Sh. B.R. Sharma & Smt. Aruna Sood and thereafter Sh. Rajesh Sawant & Sh. Ramesh Thakur were promoted to the posts of Superintendent Grade-II. Total six incumbents have been promoted as Superintendent Grade-II. Whether the roster would be applicable against the upgraded post of Superintendent Grade-II or not is a question which has been highlighted by learned counsel for the petitioner Neelam Patial. Hon'ble Apex Court in ***(2011) 9 SCC 510,*** titled ***Bharat Sanchar Nigam Limited*** versus ***R. Santhakumari Velusamy and Others*** elaborated the distinction between 'upgradation' and 'promotion'. It was held

that if there is mere up-gradation of posts, then the reservation provisions would not apply but in case there is promotion, then the reservation provisions would be applicable. The Apex Court further held that upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibility. Where the process is an upgradation simplicitor, there is no need to apply the rules of reservation but where the upgradation involves a selection process and is therefore a promotion, the rules of reservation will apply. It was also held by the Hon'ble Apex Court that where there is restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service will attract rules of reservation. The relevant paras encapsulating the principles formulated by the Hon'ble Apex Court relating to promotion and upgradation are as under:

> "26. In view of the decisions in Dayaram Asanand Gursahani, Fateh Chand Soni and Ram Prasad, the position that emerges is that even where the upgradation does not involve appointment to a different or higher post, but is as a result of a promotional process involving selection, then the principles of reservation are attracted.
>
> 29. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :
>
> (i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both - that is advancement to a higher position and advancement to a higher pay scale - are

described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of

> upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.
> (v) Where the process is an upgradation simplicitor, there is no need to apply the rules of reservation. But where the upgradation involves selection process and is therefore a promotion, the rules of reservation will apply.
> (vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

The above judgment was relied upon in ***(2020) 9 SCC 208,*** titled ***Rama Nand and Others*** versus ***Chief Secretary, Government (NCT of Delhi) and Another.*** In *Rama Nand's* case the Apex Court also considered ***2008 (9) SCC 242****,* titled ***Union of India*** versus ***Pushpa Rani****,* wherein it was held that the scheme in question (therein) provided for restructuring exercise resulting in creation of additional posts in most of the cadres and there was a conscious decision to fill-up such posts by promotion from all eligible and suitable employees and therefore, it was a case of promotion and consequently, reservation rules were held to be applicable. The relevant paras from the judgment in Rama Nand's case are as under:

> "14. The posts in Pushpa Rani was held to be promotion for the reasons set out in para 28.
>
> > "28. In Pushpa Rani, this Court while considering a scheme contained in the Letter dated 9-10-2003 held that it provided for a restructuring exercise resulting in creation of additional posts in most of the cadres and there was a conscious decision to fill up such posts by

promotion from all eligible and suitable employees and, therefore, it was a case of promotion and, consequently, the reservation rules were applicable."

18. The reasons for coming to this conclusion are based on the principles set out in the BSNL case. No doubt, sometimes there is a fine distinction which arises in such cases, but, a holistic view has to be taken considering the factual matrix of each case. The consequence of reorganisation of the cadre resulted in not only a mere re-description of the post but also a much higher pay scale being granted to the appellants based on an element of selection criteria. We say so as, at the threshold itself, there is a requirement of a minimum 5 years of service. Thus, all Telephone Operators would not automatically be eligible for the new post. Undoubtedly, the financial emoluments, as stated above, are much higher. The third important aspect is that the appellants had to go through the rigorous of a specialised training. All these cannot be stated to be only an exercise of merely re- description or reorganisation of the cadre. On applying the test in BSNL case as per sub-para (i) of para 29, promotion may include an advancement to a higher pay scale without moving to a different post. In the present case, there is a re-description of the post based on higher pay scale and a specialised training. It is not a case covered by sub-para (iii), as canvassed by learned counsel for the appellants, where the higher pay scale is available to everyone who satisfies the eligibility condition without undergoing any process of selection. The training and the benchmark of 5 years of service itself involve an element of selection process. Similarly, it is not as if the requirement is only a minimum of 5 years of service by itself, so as to cover it under sub-para (iv)."

5(iii) In the instant case two posts of Superintendent Grade-II were upgraded/created in the respondent department in the year 2007. Against these two upgraded posts, Senior Assistants Shri S.N. Vij and Smt. Nirmal Thakur were promoted on ad-hoc basis on 4.1.2008. Their ad-hoc promotions

were regularized on 11.4.2008 on the basis of recommendations of the DPC. The posts of Superintendent Grade-II involve higher responsibilities and duties than that of Senior Assistant. Post of Senior Assistant is Class-III post with grade pay of Rs. 4200/-, whereas post of Superintendent Grade-II is Class-II post with grade pay of Rs. 4800/-. The posts of Superintendent Grade-II are 'non-selection' posts. Accordingly, Sh. S.N. Vij & Smt. Nirmal Thakur were promoted against these two upgraded/created posts of Superintendent Grade-II initially on ad-hoc basis & later on regular basis. The 13 point reservation roster was applied while filling up the upgraded posts. Point Nos. 1 & 2 of this roster were unreserved and were accordingly filled in. Even after framing of R&P Rules the nature of the posts remains as 'non-selection'. The senior most Senior Assistants belonging to general category were, therefore, considered against the upgraded/created posts of Superintendent Grade-II. It is on that basis that Shri S.N. Vij and Smt. Nirmal Thakur were promoted on ad-hoc basis on 4.1.2008 and later on regularized as such on 11.4.2008. In accordance with the principles formulated by the Hon'ble Apex Court in above extracted judgments, it has to be construed that Shri S.N. Vij and Smt. Nirmal Thakur were actually promoted as Superintendent Grade-II. The upgraded posts carried higher emoluments and higher responsibilities. These posts were Class-II posts. Since it was a case of promotions of Shri S.N. Vij and Smt. Nirmal Thakur, therefore, reservation roster had to be applied to the posts occupied by them. On applying the reservation roster from the first roster point occupied by Shri S.N. Vij, the vacancy which became available on 11.9.2014 would fall at roster point No. 7.

Respondents No. 1 to 3 realized their mistake in wrongly considering this vacancy at roster point No. 5 and thereafter correctly took steps for rectification of the mistake committed by them by holding the review DPC on 16.6.2015. Because of the status quo order passed in the petition filed by respondent Neelam Patial, no further action could be taken in the

matter. Neelam Patial continued to work as Superintendent Grade-II till her retirement on 31.3.2016. However, as held earlier the post in question which became available on 11.9.2014 fell at roster point No. 7 of the 13 point roster and, therefore, was required to be filled in by promotion of an eligible person from the feeder category belonging to scheduled caste category. The review meeting of DPC held on 16.6.2015 correctly recommended for rectification of mistake.

5(iv) For all the aforesaid reasons, CWPOA No. 6450 of 2019 is allowed and CWPOA No. 5342 of 2019 is dismissed. Following directions are further issued in the matter:

a) Respondents/competent authority will implement the recommendations of the review DPC held on 16.6.2015 within a period of three weeks from today. In the review DPC, Man Singh (petitioner in CWPOA No. 6450 of 2019) has been recommended for promotion as Superintendent Grade-II against vacancy which became available on 11.9.2014, therefore, promotion order in accordance with law shall be issued in his favour within this period. Petitioner Man Singh has retired on 31.3.2016 without discharging the duties as Superintendent Grade-II, therefore, consequential benefits due to him shall be worked out notionally from the date of his promotion till the date of his retirement. However, all actual monetary benefits in form of retiral dues and pension etc. shall be payable to him w.e.f. date of his retirement i.e. 31.3.2016. This exercise be also completed within the aforesaid period of three weeks.

b) Since pursuant to an interim order passed in CWPOA No. 5342 of 2019, Neelam Patial (petitioner in CWPOA No. 5342 of 2019) had worked as Superintendent Grade-II w.e.f. 31.10.2014 till her retirement on 31.3.2016, therefore, emoluments paid to her as Superintendent Grade-II during this period shall not be recovered from her. However, on her superannuation, she

would get the benefits (retiral dues pension etc.) admissible to her in accordance with recommendations of the review DPC dated 16.6.2015.

Both the writ petitions are disposed of in above terms. Pending miscellaneous application(s), if any, shall also stand disposed of.

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

Between:-

UNITED INDIA INSURANCE COMPANY LTD.
THROUGH ITS DIVISIONAL MANAGER,
SHIMLA DIVISION, TIMBER HOUSE,
CART ROAD, SHIMLA.

…APPELLANT

(BY SH. HARISH BAHL, ADVOCATE.)

AND

1. SMT. ASHA DEVI WIDOW OF SH. PAWAN KUMAR,
   RESIDENT OF VILLAGE NALTA SARSEHRA,
   ILLAQUA SRANAGA, TEHSIL SARKAGHAT,
   DISTRICT MANDI, H.P.
2. SMT. OMA DEVI W/O SH. HUKAM CHAND,
   RESIDENT OF VILLAGE NALTA SARSEHRA,
   ILLAQUA SRANAGA, TEHSIL SARKAGHAT,
   DISTRICT MANDI, H.P.
3. SHRI TEJENDER SINGH, C-2/6, ASHOK BIHAR,
   PH-IIM DELHI-110052.

... RESPONDENTS

(SH. LOVNEESH KANWAR AND SH. TEK CHAND, ADVOCATES, FOR R-1.
SH. NAVEEN K. BHARDWAJ, ADVOCATE, FOR R-2.

NONE FOR RESPONDENT NO.3.)

FAO (WCA) No. 84 of 2010
RESERVED ON:10.12.2021

DECIDED ON:17.12.2021

Employees compensation Act, 1923 - Section-4 – Determination of compensation and liability to pay interest – the income of the deceased has to be considered on the basis of cap of Rs. 4000/- as per the provision of Section -4 of the Act, even if the income of the deceased has been proved to be more than Rs. 4000/- per month - The deceased proved to be the driver so his income would be less than Rs. 4000/- per month- on existence of insurance policy, the interest has to be paid by the insurance company, which is liable to indemnify and the liability to pay the interest would run from the date on which petitioner became entitled to receive the compensation. [Para 17 & 18]

Cases referred:
Anita Abrol and others vs. Rishi Co-operative Societies Limited and others Latest HLJ 2009 (HP) 1342;
Narchinva V. Kamat and Anr. v. Alfredo Antonio Doe Martins and Ors., 1985 AIR(SC) 1281;
Oriental Insurance Co. Vs Khajuni Devi and others (2002) 10 SCC 567;
PartapNarain Singh Deo Vs SiriniwasSabata and others (1976) 1 SCC 289;
Surender Singh vs. Smt. Jai Manti Devi and others 2008 (2) Shim.L.C. 533;

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

J U D G M E N T

By way of instant appeal, the appellant(for short," Insurer") has assailed Award dated 19.10.2009 passed by learned Commissioner under Workmen's Compensation Act, Sarkaghat, District Mandi, H.P. (for short, "Commissioner") in case File No. 3/2007.

2. Petitioner/claimant (for short, "wife") preferred claim petition under Workmen Compensation Act (for short, "Act") before the learned Commissioner for grant of compensation on account of death of her husband late Sh. Pawan Kumar, who was employed as driver by Respondent No.3 herein (for short, "owner") to drive truck bearing registration No.HR 38D-3310. As per wife, on 27.12.2006 her husband while driving above mentioned truck, in the course of his employment with

owner, met with an accident and died as a result thereof.Age of the deceased, at the time of his death, was stated to be 29 years. As claimed, he was being paid salary of Rs.10,000/- per month. The truck in question was stated to be insured with the insurer at the time of accident. Wife also impleaded mother of deceased as proforma respondent (for short, "mother") being one of the Class-I heir of the deceased.

3. The owner, despite service, chose not to contest the claim petition before the learned Commissioner and was proceeded ex-parte. Appellant-Insurer contested the petition on the grounds that the vehicle in question was not insured at the time of accident.The deceased was not holding legal and valid driving licence and the death of Pawan Kumar was not during the course of his employment. In addition, breach of terms of policy in generality was also pleaded.

4. Learned Commissioner framed the following issues:

i) Whether the deceased died on 27.12.2006 in an accident of truck No. HR-38D-3310? ….OPP
ii) Whether the deceased died during the employment of respondent No.1? …OPP
iii) Whether the applicant is the sole dependent of deceased Pawan Kumar and entitled to the award of compensation with interest and also the penalty to the extent of 50%? ..OPP
iv) Whether the vehicle involved with accident was not insured? ..OPR.
v) Relief.

5. Petitioner/Respondent No.1 examined herself as AW-1 and proved on record copies of documents FIR(Ex.AW-1/B), Post Mortem Report (Ex. AW-1/C), Family Register (Ex.AW-1/D) and Insurance Cover Note (Ex.AW-1/E). She reiterated the contents of the claim petition on oath. In her cross-examination on behalf of the insurer it was suggested to her that the cheque, through which premium was paid by the owner for purchase of policy of

insurance,had remained unpaid.To which she feigned ignorance. Besides this, it was also suggested to the wife that at the time of accident vehicle was without insurance, butshe had denied such suggestion. Another witness, AW-2 Sh. Niranjan Singh, was also examined. As per this witness, he was also a driver and was on wheels following the vehicle of deceased at the time of accident in question.He further deposed that deceased Pawan Kumar was employed as driver by the owner. The cross-examination of this witness by the insurer was also on the similar lines as that of wife.

6. In rebuttal, the insurer, through statement of its counsel, placed on record a cover note in respect of vehicle in question for the period 07.03.2007 to 05.04.2007 as Ex.RW-2/A and Ex.RW-2/B. No other evidence was produced.

7. Learned counsel representing the mother made a statement adopting evidence and stand taken by the claimant. It was, however, asserted that the mother also was Class-I heir of deceased Pawan Kumar.

8. Learned Commissioner, allowed the claim petition and awarded a sum of Rs.5,61,742/- including interest and apportioned the same in the ratio of 75% and 25% in favour of the wife and the mother respectively. The liability to satisfy the award was fastened on the insurer by holding that insurance cover vide Ex.AW-1/E was valid on the date of accident.

9. The insurer has assailed the impugned award mainly on the grounds that the award was result of misreading and mis-appreciation of evidence and the truck in question was not insured on the date of accident as cheque in lieu of premium, issued by the owner, had remained unpaid. Further, contention raised by insurer is that the relationship of employee and employer was not proved between the deceased and the owner and it had also not been proved that at the time of accident the deceased was having legal and valid driving licence. As per insurer, the liability to pay interest was wrongly fastened on the appellant, more so, from the date of accident, whereas as per

Section 4-A (3) of the Act, the interest would fall due one month after adjudication of the claim by the Commissioner.

10. Vide order dated 19.10.2010, the appeal was admitted on the following substantial questions of law: -

1. Whether in the event of dishonour of the cheque paid towards the premium of the insurance policy the contract of insurance still subsists and the liability to indemnify the award can be fastened on the insurer particularly in view of clear recital in thepolicy document that in case of dishonour of premium cheque the policy document shall stand automatically cancelled from its very inception?
2. Whether in the absence of any proof that the decrease was having a valid driving license the liability could have been fastened on the insurance company when the owner of the ill-fated vehicle had chosen to be proceeded e-parte and the employer workman relationship had not been proved on record?
3. Whether the income of the deceased can be assessed on the basis of the bald statement of the claimant without there being anyother proof in this behalf?
4. Whether the liability to pay interest on the amount of compensation awarded under the Workmen's Compensation Act can be fastened on the insurer unless such a liability is specifically undertaken in the contract of insurance?
5. Whether the interest under Section 4-A (3) of the Workmen's Compensation Act on the amount of compensation falls due on the date ofaccident or one month after the date of accident or one month after the date of accident or after one month after the date of adjudication of the claim by the Commissioner under the Workmen's Compensation Act?

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

12. Noticeably, the reply to the claim petition filed by the insurer reveals that there was no specific plea that the cheque issued in lieu of premium was dishonoured and therefore, there was no valid policy of insurance existing on the date of accident. However,such plea for first time was invented during the cross-examination of the claimant's witnesses.A plea which did not have any foundation in the pleadings cannot be allowed to be raised. The insurer also did not lead any evidence to support such contention. In such view of the matter, there is no escape from conclusion that the policy of insurance Ex.AW-1/E was purchased by the owner for the vehicle in question having validity from 06.04.2006 to 05.04.2007.

13. Further the documents, Ex.RW-2/A and RW-2/B, reveal that a cover notefor limited period of 07.03.2007 to 05.04.2007 was issued in the name of Surinder Kumar R/o House No.95, Village Sadipur, Tehsil Pathankot, District Gurdaspur (Punjab). It is also revealed that Ex.RW-2/A was issued on transfer of the vehicle by owner in favour of said Surinder Kumar for the remaining period of original policy Ex. AW-1/E. Substantial Question of law No.1 is decided accordingly.

13. As regards, the plea with respect to the deceased not having valid and effective driving licence, it can be noticed from the records that save and except an objection raised to this effect by theinsurer in its reply, no evidence whatsoeverwas produced by insurer to prove such fact. Even no suggestion to this effect was put to the witnesses of the claimant.

14. It is settled that the onus to prove breach of condition(s) of the policy of insurance is always on the insurer. Reference can be made to the judgment passed by this Court in ***Surender Singh vs. Smt. Jai Manti Devi and others 2008 (2) Shim.L.C. 533,*** in which it was held as under:

> *"12. The onus to prove the issue whether the Insurance Company was not liable to pay the awarded compensation for the reason that the driver of the truck was not holding a valid driving license was*

heavy on the Insurance Company and rightly so fixed by the Tribunal.

[13] In ***Narcinva v. Kamat v. Alfredo Antonio Doe Martins, 1985 3 SCR 951****, the Apex Court has held that the insured is under no obligation to furnish evidence so as to enable the insurance company to wriggle out of its liability under the contract of insurance. Mere failure on the part of the owner to produce the driving licence, when called upon to do so in the cross-examination would not discharge the burden and no adverse inference to the effect that the driver did not have a valid licence can be drawn. The insurance company should have got evidence to substantiate its allegation. Applying the test who would fail if no evidence is led, the Court held that it would be the insurance company.*

[14] ***In National Insurance Co. Ltd. v. Swaran Singh and Ors., 2004 AIR(SC) 1531****, the Apex Court has held that once the assured proves that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within its exception. The Insurance Company, which alleges the breach must prove the same and is required to establish the said breach by cogent evidence. Failure to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. The Insurance Company with a view to avoid the liability must not only establish the available defences raised in the proceedings but must also establish the breach on the part of the owner of the vehicle."*

15. Similar view has been taken by this Court in ***Anita Abrol and others*** vs**. *Rishi Co-operative Societies Limited and others Latest HLJ 2009 (HP) 1342***, wherein it was held as under:

"9. *The learned Motor Accident Claims Tribunal has erred in law by shifting the burden to prove whether there was breach of terms of the policy or not upon the owner. It is settled law that it is for the Insurance Company to prove that there was breach of terms of the policy and the driver did not have valid licence. In the present case the Insurance Company has not produced any evidence to prove the breach. The Counsel appearing for*

respondent No. 3 had not produced any evidence. Respondent No. 3 has not filed any application seeking details of the driving licence issued in favour of respondent No. 2.

10. Their Lordships of the Hon'ble Supreme Court in ***Narchinva V. Kamat and Anr. v. Alfredo Antonio Doe Martins and Ors., 1985 AIR(SC) 1281*** *have held as under:*

> *"15. To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance."*

[11] It was necessary for the Insurance Company to give notice to the owner or the driver to give the details of the driving licence. The Insurance Company has also not moved any application under Order 11 Rule 12 of the Code of Civil Procedure for production of document. The onus of proving that the driver of the bus did not have the valid licence to drive the vehicle lied on the Insurance Company, because it was the Insurance Company which sought to avoid its liability under the policy on the ground that the terms of the policy had been violated.

It was not sufficient for respondent No.3-company to make assertion that the driver was not holding driving licence without adducing necessary proof and escape its liability under the policy. In the present case the driver was already arrayed as respondent No. 2. The requirement for holding the owner vicariously liable is that the driver was in the employment of the owner. This fact has not been denied by the owner."

16. Lastly, during course of arguments learned Senior Counsel representing insurer made a submission that the wife had failed to produce the driving licence of deceased despite the fact that a notice under order 11

Rule 12 of the Code of Civil Procedure was served upon her. This assertion also is not borne out from the record. Thus, the plea of insurer that deceased did not have legal and valid driving licence remained unsubstantiated and hence not proved. Substantial question of law No. 2 is according decided.

17. The provision of Section 4 of the Act as it stood on the date of accident placedcap of Rs.4000/- per month to be considered as income of deceased, even though the income was proved to be more than that. Once the deceased was proved tobe in employment of the owner, as a driver of truck, it will be preposterous to assume that his income would be less than Rs.4000/- per month. Even otherwise, referring to the records, no material was placed by the insurer to dislodge the version of the claimant. The wife while appearing as AW-1, had specifically stated that the deceased was earning Rs.10000/- per month from his job as a driver with the owner. Being wife of the deceased, she was the best person to depose as to what was the avocation and income of her husband. The statement of AW-1 to this effect has not been challenged on behalf of the insurer in cross-examination and hence, the same is deemed to be admitted. The insurer had, therefore, miserably failed to prove its plea. Substantial question of law No.3 is decided accordingly.

18. It is more than settled that right of compensation accrues under the Act from the date of cause of action i.e. the date of accident. Reference can be made to **PartapNarain Singh Deo Vs SiriniwasSabata and others (1976) 1 SCC 289** and also **Oriental Insurance Co. Vs Khajuni Devi and others (2002) 10 SCC 567**. Further, the liability of interest has to be borne by the insurer as the said liability is attached to the amount of awarded compensation under the Act, which the insurer is liable to indemnify and as necessary corollary the liability to pay interest would run from the date on which right to receive compensation accrues. Reference in this regard can be made to **1997 Lab IC 891(Ker)(DB), 1976 ACJ 104 (Guj)(DB), 1982 ACJ**

361(Kar)(DB), 1983 ACJ 231(All)(DB), (1985) 1 TAC 359 (Bom) and also**Ved Prakash Vs Premi Devi (1997) 8 SCC 1.**

The substantialquestions of law No.4 and 5 are accordingly decided.

19. In view of discussion made hereinabove, I find no merit in the appeal and the same is dismissed with no order as to costs.

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

Between:-

THE ORIENTAL INSURANCE COMPANY LTD.
DIVISIONAL OFFICE,
MYTHE ESTATE, UPPER KAITHU,
SHIMLA-3

.....APPELLANT

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

AND

1. SMT. GORKHI DEVI,
WIFE OF SHRI PRITHU RESIDENT OF
VILLAGE POWA, TEHSIL
SALOONI, DISTRICT CHAMBA, H.P.

2. SH. HEM SINGH RANA,
SON OF SHRI UDHAM SINGH RANA,
RESIDENT OF VILLAGE FOLGHAT,
PARGANA RAJNAGAR,
TEHSIL AND DISTRICT
CHAMBA, H.P.
(OWNER OF VEHICLE NO.HP-48-3321)

3. SHRI SATISH KUMAR SON OF

SHRI SHRIKANT RESIDENT OF
VILLAGE GHANESHU, PARGANA,
KIHAR, TEHSIL SALOONI,
DISTRICT CHAMBA, HIMACHAL PRADESH.
(DRIVER OF VEHICLE NO.HP-48-3321)

.....RESPONDENTS

(SH. PARVEEN CHAUHAN, ADVOCATE, FOR
RESPONDENT No.1,
SH. ASHIR KAITH, ADVOCATE, VICE SH. HAMENDER
CHANDEL, ADVOCATE, FOR RESPONDENT No.2.)

FIRST APPEAL FROM ORDER (MVA)
No.4095 OF 2013
RESERVED ON : 22.11.2021
DELIVERED ON : 29.11.2021

Motor Vehicle Act, 1988 - Section 166 – Claim petition award passed by learned Motor Accident Claim Tribunal, Chamba was assailed by the insurance company on the ground of perversity and contrary to evidence on record and not in consonance with law -- Disability suffered by the injured has to be proved by him by examining author of certificate and the injuries suffered by the injured must has proximity with the accident – Held -- Disability certificate issued in favour of respondent on 17.06.2011 whereas respondent has alleged that he suffered injuries in the accident on 14.08.2009 which shows there is no proximity of injuries to the date of accident -- Compensation allowed to respondent with transportation charges however the bills placed on record do not bear any date and are in the name of one Madho Ram - Award passed by Ld. Tribunal found not in consonance with law and as such compensation assessed found dehors the factual and legal position -- Appeal filed by insurance company allowed as a result of which impugned award dated 30.05.2013 passed by Ld. Motor Accident claims Tribunal, Chamba Division Chamba set aside -- Case remanded back to the learned Tribunal to decide afresh. (Paras 4 & 5)

Cases referred:

Chanappa Nagappa Muchalagoda Vs. Divisional Manga, New India Insurance Company Ltd. (2020) 1 SCC 796;
National Insurance Company Vs. Nant Ram & Others, Latest HLJ 2005 (HP) 153;
Oriental Insurance Company Vs. Sh. Parveen and others 2011(2) Him L.R. 1007;
Pappu Deo Yadav Vs. Naresh Kumar & others (2020) SCALE 192.
Raj Kumar Vs. Ajay Kumar & another (2011) 1 SCC 343;

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

O R D E R

In an injury case, learned Motor Accident Claims Tribunal, Chamba, awarded a compensation amount of Rs.7,64,500/- to the claimant-respondent No.1 alongwith interest @ Rs.7.5% from the date of filing of petition till its realization. This award has been assailed by the insurance company on the ground of being perverse, contrary to the evidence on record and not in consonance with law.

2. Facts

2(i) Respondent No.1 filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 for the grant of compensation of Rs.16,00,000/- from the respondents. Claimant-respondent No.1 submitted in the claim petition that she was travelling in a bus bearing registration No.HP-48-3321 on 14.08.2009 and was going from Salooni to Chamba. The bus was being driven in rash and negligent manner by its driver-respondent No.3. Because of his negligent driving, an accident occurred, wherein she sustained grievous injurious in her left leg. She was taken to the Regional Hospital Chamba for treatment from where she was referred to Dr. RPGMC Tanda. She remained admitted in the medical college & hospital Tanda from 15.08.2009 to 29.09.2009 and thereafter again from 12.02.2010 to 16.02.2010. She has been

assessed to be suffering from 70% permanent disability in relation to injuries suffered by her in the accident. The claimants asserted that her age was 34 years at the time of accident. She was a house-wife, agriculturist and was earning Rs.8,000/- per month.

2(ii) Learned Motor Accident Claims Tribunal vide impugned award dated 30.05.2013 held that claimant-respondent No.1 sustained injuries due to rash and negligent driving of the vehicle in question by respondent No.3.

The issue of accident having been caused by rash and negligent driving of the vehicle in question by respondent No.3 has attained finality. The findings of learned Motor Accident Claims Tribunal in this regard as given in various other awards arising out of the accident in question have been upheld by a Coordinate Bench of this Court in ***FAO No.256/2010*** titled ***Oriental Insurance Compnay Vs. Smt. Indiro & Others [(2015) 3 Him L.R. 1677]*** alongwith other connected cases decided on 19.06.2015.

In the instant case the award has been impugned on grounds pertaining to quantum of compensation determined by the learned Tribunal.

3. I have heard Mr. G.C. Gupta, learned Senior Counsel assisted by Ms. Meera Devi, learned counsel, for the appellant, Mr. Parveen Chauhan, learned counsel and Mr. Ashir Kaith, learned vice counsel, for respondents No.1 and 2, respectively and have also gone through the record of the case.

4 In the facts and circumstances of the case, the impugned award deserves to be set aside for the following reasons:-

4(a) Learned Tribunal below has held the claimant-respondent No.1 entitled to following amounts of compensation under different heads;- (i) compensation for loss of earning for 15 days when the petitioner remained admitted in the hospital: Rs.1500/- (ii) loss of future income: Rs.4,03,000/- (iii) compensation on account of medicines: Rs.50,000/- (iv) compensation on account of attendant charges: Rs.5,000/- (v) compensation on account of

special diet charges: Rs.5,000/- (vi) compensation on account of pain and sufferings: Rs.1,50,000/- (vii) compensation for loss of amenities of life: Rs.1,50,000/-. Total amount of compensation: Rs.7,64,500/-.

In allowing claimant-respondent No.1 the above compensation amount, the reasoning given by the learned Tribunal is as under:-

> *"28. However, taking into consideration the evidence of the petitioner and the fact that her age at the time of accident was 34 years, her multifarious services for managing the entire family being a house wife, even on a modest estimation,it can safely be held that the petitioner income from all sources at the relevant time was approximately Rs.3000/- per month or say Rs.36,000/- per annum.*
>
> *29. Dr. Prashant Rana PW-2 has proved the disability certificate Ex.PW2/A which shows that the petitioner locomotor has been impaired as her left leg has been amputated and the nature of the disability is permanent and it was to the extent of 70%. He has admitted this disability is not regarding whole of the body. Since the left leg of the petitioner has been amputated and she has suffered permanent disability to the extent of 70% and the petitioner remained hospitalized for 15 days and thus there is loss of earning of Rs.1500/- and the loss of future earning on account of permanent disability which comes to Rs.2100/- per month (70% of Rs.3,000/-). Since at the time of accident, the petitioner was 34 years old, the appropriate multiplier would be 16. Thus the total loss of future income to which the petitioner is entitled to comes to Rs.4,03,200 (Rs.2100/-- x 12 x 6).*
>
> *30. The petitioner has also submitted the medical bills and transportation receipts Ext.PW3/A to Ext.PW3/F, Ext.PW4/1 to Ext.PW4/6 amounting to Rs.38,575/-. Thus the petitioner is awarded Rs.50,000/- on account of medical expenditure and transportation charges, which she had incurred. The petitioner is also entitled to Rs.5,000/- on account of an attendant charges Rs.5000/- on account of special diet Rs.1,50,000/- on account of pain and sufferings and Rs.1,50,000/- on account of loss of*

amenities of life. Thus, in total , the petitioner is held entitled to the following amounts of compensation under different heads:
(i) compensation for loss of earning for 15 days when the petitioner remained admitted in the hospital: Rs.1500/-
(ii) loss of future income: Rs.4,03,000/-
(iii) compensation on account of medicines: Rs.50,000/-
(iv) compensation on account of attendant charges: Rs.5,000/-
(v) compensation on account of special diet charges: Rs.5,000/-
(vi) compensation on account of pain and sufferings: Rs.1,50,000/-
(vii) compensation for loss of amenities of life: Rs.1,50,000/-
Total amount of compensation: Rs.7,64,500/-."

4(b) The only medical evidence produced by the claimant respondent No.1 in support of her case is a disability certificate Ext. PW2/A. In this certificate, the category of disability suffered by the claimant-respondent No.1 has been indicated as 'Locomotor Impaired'. The nature of disability has been reflected as permanent. Certificate also carries remark 'left leg amputated'. The certificate has been proved by Dr. Prashant Rana, who appeared as PW2. He has not stated that he had examined respondent No.1 or that the certificate in question was issued by him or that he was member of the board, which allegedly issued the certificate to respondent No.1. His only statement as PW2 in this regard is that he has verified the certificate with the original in their record. Why should the original disability certificate of respondent No.1 remain in their record and not with the claimant is another question went unanswered. It is well settled that mere marking of a document as exhibit will not automatically prove the document. The document has to be proved in accordance with law, in accordance with relevant provisions of the Indian Evidence Act. The disability certificate has not been proved in accordance with law. In ***National Insurance Company*** Vs. ***Nant Ram & Others, Latest HLJ 2005 (HP) 153***, it was held as under:-

"15. It is a cardinal, basic and established principle of evidence law that documents, other than public documents are tendered in evidence through witnesses who, after taking oath prove the documents appropriately as well as the contents of the documents, by way of leading direct evidence. Actually the documents are produced and proved through witnesses and their contents also established and proved either by way of primary evidence or secondary evidence but in any event the established and accepted mode of proving documents is by production of witnesses in the court who testify about the correctness, genuineness and authenticity of the documents as well as their contents, mostly through the medium of proving them as and by way of primary evidence and in certain given situations through the medium of secondary evidence. The purpose of course is twofold; firstly, that such a witness appearing in the court is sworn and under oath testifies about a particular document, its genuineness and authenticity as well as its correctness and secondly once under oath and examination, this witness is subject to cross-examination by the opposite party so that the opposite party through the mechanism of cross-examination of such a witness can elicit appropriate information concerning the document itself with respect to its veracity, truthfulness, background, correctness, etc. etc. Enough indication of such requirement of law is found in Section 62 of the Evidence Act which refers to the documents as 'primary evidence' and clearly suggests that such documents can be produced for the inspection of the court meaning thereby that through witnesses alone the documents have to be brought on record of the courts. Similarly, under Section 63 of the Evidence Act, 'secondary evidence' has been defined and reading together these two sections, it can be safely said that documents, either by way of 'primary evidence' or by way of 'secondary evidence' or otherwise have to be appropriately and properly proved by their production in the courts through witnesses alone.

16. There is only one exception to the aforesaid rule of evidence law with respect to proof of documents and that exception relates only to the proof of public documents by production of certified copies of such documents. Section 74 of the Indian Evidence Act

defines 'public documents' which include documents forming the acts or records of the acts of the sovereign authority and of the official bodies and the Tribunals and also include documents from public officers, legislative, judicial as well as executive. Under Section 76 of the Evidence Act every public officer having the custody of a public document, which any person has a right to inspect, has a duty to give to such a person on demand a certified copy of such document. Under Section 77 of the Evidence Act the certified copies of public documents issued in the manner prescribed by Section 76 may be produced in proof of the contents of the public documents. The practice of allowing such documents to be brought on record by their mere production by a counsel and then even marking them as exhibits is very very unhealthy, very dangerous and the same is totally opposed to all principles of evidence law.

17. Even though undoubtedly, proceedings under Section 166 of the Motor Vehicles Act, 1988 may be summary in nature and the strict procedural laws may not be attracted in such proceedings, yet insofar as the requirement of the proof of disputed documents is concerned, the Tribunals should be well advised to keep in mind that the established norms emanating from the principles of evidence law must be followed even in such proceedings with a view to ensuring that the documents of suspicious or doubtful character or documents which are liable to be disputed by opposite party must not be allowed to be brought on record unless they are proved in accordance with the well established and well accepted norms and principles of evidence law."

In ***Oriental Insurance Company*** Vs. ***Sh. Parveen and others 2011(2) Him L.R. 1007***, It was held that disability certificate is not a public document and therefore must be proved in accordance with law. It is only the doctor, who issued the certificate or had examined the claimant, who can verify what is the disability suffered by the claimant. Relevant paras from the judgment are as under:-

"7. A disability certificate is not a public document and therefore must be proved in accordance with law. In fact, it is only the Doctor who issues the certificate or has examined the claimant who can

certify what is the disability suffered by the claimant. It is only the doctor who on examination can clearly state as to what work the claimant can do and what he cannot do.

10. Thus, it is obvious that mere production of a disability certificate is no proof of the extent of disability till the Doctor who issued the certificate ……."

In the instant case, the certificate of disability has not been proved by examining the author of the certificate, therefore, it could not have been taken into consideration ipso-facto.

4(c) As per the remarks appearing on the certificate Ext.PW2/A, the disability certificate was issued in view of amputation of left leg of respondent No.1. This has also been so stated by PW2, Dr. Prashant Rana. However, no such case has been pleaded by respondent No.1 in her claim petition. In the claim petition, respondent No.1 had submitted having suffered grievous injuries in her left leg in the accident. No averment about amputation of left leg of the claimant exists in the claim petition filed on 28.11.2011. Even in her affidavit dated 15.10.2012 (Ex.PW3/A) submitted by way of examination-in-chief, the claimant has not stated anything about amputation of her left leg due to injury suffered in the accident. She has only talked about suffering grievous injuries in left leg due to the accident. This raises doubts as to whether the disability allegedly suffered by respondent No.1 in terms of the certificate (Ext.PW2/A) is on account of injuries suffered by her in the accident in question or not. Relationship between the injuries suffered by the claimant in the accident and her disability is neither pleaded nor proved.

4(d) The certificate Ext.PW2/A was issued on 17.06.2011, whereas respondent No.1 had allegedly suffered injuries in the accident on 14.08.2009. The certificate, therefore, is not proximate to the date of accident. Respondent No.1 has not examined any doctor to prove that the disability allegedly suffered

by her in terms of Ext.PW2/A was result of the accident in question. In this regard, it will be appropriate to refer to 2008 ACJ 2131, titled ***Rajesh Kumar Vs. Yudhvir Singh and another***, the Hon'ble Supreme Court held as under:-

> *"9 .The certificate in question in this case was obtained after two years. It is not known as to whether the Civil Surgeon of the hospital treated the appellant. On what basis, such a certificate was issued two years after the accident took place is not known. The author of the said certificate had not been examined. Unless the author of the certificate examined himself, it was not admissible in evidence. Whether the disability at 60% was calculated on the basis of the provisions of the Workmen's Compensation Act or otherwise is not known. It is also not known as to whether he was competent to issue such a certificate. It even does not appear that the contentions raised before us had either been raised before the Tribunal or the High Court. The Tribunal as also the High Court, therefore, proceeded on the materials brought on record by the parties. In absence of any contention having been raised in regard to the applicability of the Workmen's Compensation Act which, in our opinion, ex facie has no application, the same, in our opinion, cannot be permitted to be raised for the first time."*

4(e) Learned Tribunal on the basis of disability certificate Ext.PW2/A proceeded to award compensation in favour of claimant-respondent No.1. 70% disability reflected in the certificate was taken as resulting into 70% loss in the earning of respondent No.1. This was not in consonance with law laid down by the Hon'ble Apex Court in ***(2011) 1 SCC 343*** titled ***Raj Kumar Vs. Ajay Kumar & another,*** wherein it was held that in case claimant suffers permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earning would depend upon effect and impact of such permanent disability on his earning capability. The tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. What requires to be assessed is the

effect of permanent disability on earning capacity of the injured. Relevant paras from the judgment are as under:-

> *"10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra V. New India Assurance Co. Ltd. 2010(10) SCALE 298 and Yadava Kumar V. D.M. National Insurance Co. Ltd. - 2010 (8) SCALE 567).*
>
> *12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent*

disability. This means that the tribunal should consider and decide with reference to the evidence:
(i) whether the disablement is permanent or temporary;
(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,
(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.
If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.
13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.
14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent,

if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of `loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

The above judgment was relied upon in ***(2020) 1 SCC 796*** titled ***Chanappa Nagappa Muchalagoda*** Vs. ***Divisional Manga, New India Insurance Company Ltd***. and reaffirmed in ***Pappu Deo Yadav*** Vs. ***Naresh Kumar & others (2020) SCALE 192***.

4(f) Learned Tribunal has allowed compensation to respondent No.1 on account of transportation charges. However the taxi bills placed on record do not bear any date whatsoever and have been issued in the name of one Madho Ram. Whether these bills were worth accounting for in light of statement of PW4 Madho Ram, has not been considered by the learned Tribunal.

4(g) Medical expenditure has been allowed to respondent No.1 by the learned Tribunal. However, but for the medicine bills dated 20.08.2009 (Ext.PW3/E) and dated 15.8.2009 (Ext.PW3/F), all other medicines bills placed on record at Ext.PW3/B to PW3/D bear 18.12.2009 as date of purchase of medicines, whereas the accident in question took place on 14.08.2009.

Different bills of same date from same medical store have been issued. These aspects have not been considered by the learned Tribunal. It has been assumed that respondent No.1 was hospitalized, whereas no such record is available in the file. No evidence in that regard was adduced. Attendant charges have been allowed to respondent No.1, whereas there is no evidence for the same. Compensation for the loss of amenities of life has been awarded to respondent No.1. However Hon'ble Apex Court in ***Raj Kumar's case*** supra had held that it is only in cases of serious injury, where there is medical evidence corroborating the evidence of claimant that compensation can be granted for loss of amenities of life. Medical evidence is lacking in the instant case.

5. The sum total of above discussion is that the award passed by the learned Tribunal is not in consonance with law. The compensation assessed is also dehors the factual & legal position. Consequently, instant appeal filed by the Insurance Company is allowed. The impugned award dated 30.05.2013 passed by the learned Motor Accident Claims Tribunal, Chamba Division Chamba H.P. in MAC Petition No. 97/2011 is set aside. The case is remanded to the learned tribunal below to decide the same afresh. Reasonable opportunity shall be given to the claimant only to produce the doctor concerned in the witness box. Parties through their learned counsel are directed to appear before the learned Tribunal on 23.12.2021. Record be returned to the learned Tribunal forthwith.

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

Between:

NATIONAL INSURANCE COMPANY LIMITED,
OFFICE 10, 803A, 8TH FLOOR, TOWER NO.3,
KONNECTUS BUILDING, OPPOSITE NEW DELHI,
RAILWAY STATION, BHAVBHUTI MARG,

NEW DELHI, 110002 THROUGH ITS
ADMINISTRATIVE OFFICER (LEGAL),
NATIONAL INUSRANCE COMPANY DIVISIONAL OFFICE, HIMLAND HOTEL,
CIRCULAR ROAD, SHIMLA-1, H.P.

…. APPELLANT

(BY MR. JAGDISH THAKUR,
ADVOCATE)

AND

1. BALMA DEVI,
W/O LATE SH. HEM RAJ,
R/O VILLAGE NARAIN,
POST OFFICE SHARONTHA,
TEHSIL ROHRU, DISTRICT SHIMLA,
HIMACHAL PRADESH

2. ARTHIK,
S/O LATE SH. HEM RAJ,

3. SAPNA,
D/O LATE SH. HEM RAJ,

BOTH R/O VILLAGE NARAIN,
POST OFFICE SHARONTHA,
TEHSIL ROHRU, DISTRICT SHIMLA,
HIMACHAL PRADESH THROUGH PETITIONER
NO.1 BALMA DEVI, W/O LATE SH. HEM RAJ
BEING MOTHER/NATURAL GUARDIAN

….RESPONDENTS/PETITIONERS

4. SHARDA DEVI,
W/O SH. SANJEEV

R/O VILLAGE NARAIN,
POST OFFICE SHARONTHA,
TEHSIL ROHRU, DISTRICT SHIMLA,
HIMACHAL PRADESH
(OWNER OF THE VEHICLE BEARING
REGISTRATION NO. HP-10A-9256).

5. SH. SANJEEV,
S/O SH. SHAYAM LAL,
R/O VILLAGE NARAIN,
POST OFFICE SHARONTHA,
TEHSIL ROHRU, DISTRICT SHIMLA,
HIMACHAL PRADESH
(DRIVER OF THE VEHICLE BEARING
REGISTRATION NO. HP-10A-9256).

....RESPONDENTS

(BY MR. D.S. NAINTA, ADVOCATE,
FOR RESPONDENTS NO. 1 TO 3)

(BY MR. DEEPAK BHASIN, ADVOCATE,
FOR RESPONDENTS NO.4 & 5)

FIRST APPEAL FROM ORDER
NO. 227 of 2019
Decided on:13.12.2021

Motor Vehicle Act, 1988 - Section 166 - Claim petition - Determination of income without any proof – Held - If evidence with regard to income is not available with the Court, the provisions contained in Minimum Wages Act are necessarily required to be resorted and in those very cases where deceased or insured is stated to be skilled or semi skilled worker- Consortium determination of - Consortium is not limited to spousal consortium and it also includes parental consortium as well as filial consortium-Appeal of petitioner partly allowed. (Paras 9 & 14)

Cases referred:

Govind Yadav v. New India Assurance Company Limited, 2012(1) ACJ 28;

Magma General Insurance Co. Ltd. V. Nanu Ram alias Chuhru Ram and Ors, (2018) 18 SCC 130;
National Insurance Co. Ltd. V. Pranay Sethi and Ors, (2017) 16 SCC 680;

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

JUDGMENT

Instant appeal filed under Section 173 of the Motor Vehicles Act, (*herein after referred to as " the Act"*), lays challenge to award dated 16.3.2019, passed by the learned MACT-III, Shimla camp at Rohru, HP, in MAC case No. 11-R/2 of 2017, titled *Balma Devi and others v. Sharda Devi and Ors*, whereby the learned Tribunal below while allowing the claim petition filed under Section 166 of the Act, having been filed by the respondents-claimants No. 1 and 2 (*in short "the claimants"*), saddled the Appellant-Insurance Company with liability to pay the compensation to the tune of Rs. 13,30,000 a/w interest @ 9% from the date of filing of the petition till realization.

2. Precisely, facts of the case as emerge from the record are that the claimants filed petition under Section 166 of the Act, claiming therein compensation to the tune of Rs. 30,00,000/- alongwith statutory interest from the Appellant-Insurance Company as well as respondents No. 4 and 5 being owner and driver on account of death of Sh. Hem Raj, being his legal heirs. Claimants claimed that on 13.2.2017, deceased Hemraj was going to Tikkar in a vehicle bearing registration No.HP-10A-9256 alongwith other occupants and at that relevant time vehicle was being driven by respondent No.5, Sanjeev Kumar. Unfortunately, aforesaid vehicle met with an accident, as a consequence of which, all the occupants got injured, but person named Hem raj died on the spot. Factum with regard to accident came to be reported to the police vide FIR No. 0012 of 2017 dated 13.2.2017, whereafter case under sections 279, 337 and 304-A of the IPC was registered against respondent

No.5. Claimants claimed that at the time of the accident, deceased Hem Raj was 42 years old and he being mason and plumber used to earn sum of Rs. 20,000/- per month.

3. Aforesaid claim put forth by the claimants came to be resisted by the Appellant-Insurance Company as well as respondents No. 4 and 5, who, in their reply, though nowhere disputed the factum with regard to the accident, but claimed that the accident did not occur on account of rash and negligent driving of the driver of the bus, which was coming from Tikkar side. Appellant-Insurance company claimed that since vehicle was being driven in violation of the terms and conditions of the insurance policy and driver of the vehicle was not holding effective and valid licence, it cannot be fastened with the liability to indemnify the insured.

4. On the basis of pleadings adduced on record by the respective parties, learned MACT below farmed following issues:

> ***"1. Whether deceased Hem Raj died on 13.02.2017 at place Kasheni Kainchi, Tehsil Rohru due to rash and negligent driving of respondent No.2, while he was driving vehicle bearing registration No.HP-10A-92567? OPP***
>
> ***2. In case, issue No. 1 is proved in affirmation, whether the petitioners are entitled for compensation, if so, to what extent and from whom? OPP***
>
> ***3. Whether the petition is not maintainable as alleged? OPR***
>
> ***4. Whether the accident in question had taken place due to rash and negligent driving of bus driver who was coming from opposite side? OPR-1 and 2***

5. Whether the respondent No. 2 was not having valid and effective driving licence, as alleged? OPR-3

6. Whether the vehicle in question was being driven in contravention of terms and condition of insurance policy, as alleged? OPR-3

7. Whether the deceased was travelling in the ill-fated vehicle as gratuitous passenger, as alleged? OPR-3

8. Whether the petition is bad for non-joinder of necessary party, as alleged? OPR-3

9. Relief"

5. Subsequently, vide judgment dated 16.3.2019, learned Tribunal below on the basis of pleadings as well as evidence adduced on record by the respective parties, held the Appellant-Insurance Company and respondents No. 4 and 5 jointly and severally liable to pay the compensation to the tune of Rs. 13,30,000/- to the claimants alongwith interest @ 9% from the date of filing of the petition till its realization. But since Appellant-Insurance Company being insurer was directed to indemnity the insured, it has approached this court in the instant proceedings, praying therein to set-aside the aforesaid award passed by the court below.

6. Having heard learned counsel for the parties and perused material available on record, this Court finds that primarily, challenge to the impugned award has been laid on the ground of quantum.

7. Mr. Jagdish Thakur, learned counsel for the Appellant-Insurance Company, while making this Court to peruse the evidence led on record vehemently argued that since at no point of time, it ever came to be proved that deceased at the time of his death was doing work of mason/plumber and

he was earning sum of Rs. 20,000/- p.m., court below while assessing his monthly income ought have resorted to the provisions of Minimum Wages Act. He further argued that in the case at hand, court below without any basis, considered monthly income of the deceased Hem Raj to the tune of Rs. 9,000/- which, otherwise, being on higher side, deserves to be reduced/modified.

8. In the case at hand, pleadings as well as evidence led on record by the claimants clearly reveal that though claimants claimed that the deceased was working as mason/plumber at the time of his death, but no cogent and convincing evidence ever came to be led on record with regard to occupation and monthly income of the deceased and the court below while applying the guess work, considered monthly income of the deceased to the tune of Rs. 9000/-.

9. It is well settled by now that in the absence of any specific evidence with regard to income, court is necessarily required to resort to the provisions of Minimum Wages Act, especially in the cases where deceased or insured is stated to be skilled or semi skilled worker. Though in the case at hand, there is no material available on record that the deceased Hem Raj was skilled mason/plumber, but even if his income is taken as of plumber/mason, same cannot be said to be Rs.9000 p.m. Reliance is placed on judgment dated 23.4.2018, rendered by this Court in ***FAO No. 43 of 2018***, titled ***Reliance General Insurance Company Limited v. Ishwar Singh and Ors***, , wherein it has been categorically held that in the absence of any specific evidence/documentary evidence of income of the deceased, the income is to be taken/assessed on the basis of minimum wages prevalent at the time of the accident. Relevant paras of the aforesaid judgment read as under:

> ***"10. After having carefully heard the arguments advanced by the learned counsel representing the parties and perused the record, this Court finds considerable force in the argument of Mr. Jagdish***

Thakur, learned counsel for the appellant-Insurance company that claimant has not led on record specific evidence to prove his income. No doubt, claimant has claimed that he was studying in class 12th at the time of the accident and was doing part time work by selling milk, but no evidence has been led on record in this regard. Needless to say, learned Tribunal below in the absence of specific evidence, if any, led on record by the claimant with regard to his income, ought to have assessed income on the basis of minimum wages prevalent at the time of the accident. In this regard reliance is placed upon the judgment rendered by Hon'ble Apex Court in Govind Yadav versus New India Assurance Company Limited, 2012(1) ACJ 28, wherein it has been held as under:-

> ***"17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as helper and was getting salary of Rs. 4,000/- per month. The Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. Learned Tribunal then proceeded to determine the amount of compensation in lieu of loss of earnings by assuming the appellant's income to be Rs. 15,000/- per annum. On his part, the learned single Judge of the High Court assumed that while working as a cleaner, appellant may have been earning Rs. 2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the***

High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earnings by taking the appellant's notional annual income as Rs. 36,000/- and the loss of earnings on account of 70 percent permanent disability as Rs.25,200/- per annum. The application of multiplier of 17 by the Tribunal, which was approved by the High Court, will have to be treated as erroneous in view of the judgment in Sarla Verma V. Delhi Transport Corporation 2009 ACJ 1298(SC). In para 21 of that judgment, the court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying that multiplier, we hold that the compensation payable to the appellant in lieu of the loss of earnings would be Rs.4,53,600/-."

11. Reliance is also placed upon the judgment passed by this Court in Smt. Pappi Devi and others versus Kali Ram and others, Latest HLJ2008 (Himachal Pradesh) 1440, which reads as under:-

"6. It has come in the statement of claimant Smt. Kala Devi (PW-1) that the deceased while working as a labourer and also selling milk was having an income of Rs. 4000/- per month. Importantly, there is no cross-examination on this point at all. But the fact of the matter, is that no

documentary evidence has been placed on record to prove the income. This is the only evidence with regard to income of the deceased on record.

7. It has come on record that the deceased was illiterate and working as a labourer. In my view, his income determined by the Tribunal i.e. Rs.50/- per day, is on the lower side. Taking the deceased to be employed as a daily wager, the minimum wages paid by the government in the year, 2001 to the labourers was more than Rs.70/- per day. This is not disputed at the Bar. Therefore, the same can be made the basis for determining the income of the deceased. Thus, the monthly income of the deceased is determined as Rs.70x30 Rs.2100/- and after deducting 1/3rd of the amount i.e. Rs.700/- for the purpose of dependency is determined as Rs.1400/-."

10. Reliance is also placed upon judgments passed by this Court in case titled ***Govind Yadav v. New India Assurance Company Limited, 2012(1) ACJ 28***, ***Mast Ram v. Yogesh Azta and Ors, decided on 4.5.2017, FAO No. 488 of 2016, ICICI Lombard v. Kala Devi and Ors in FAO No. 9 of 2019 dated 30.5.2019, National Insurance Company Ltd. v. Kamal Kishore and Ors., decided on 5.7.2019 and Minimum wages notification for the year, 2016 by the State of HP***.

11. In the case at hand, accident in question occurred in the year, 13.2.2017, meaning thereby minimum wages payable at that particular time is required to be taken into consideration for assessing income of the deceased. It is not in dispute that w.e.f 1.4.2017, minimum wages prevalent in the State of HP qua the category of worker engaged in the construction or maintenance

of roads or building, operations, stone breaking and stone crushing was Rs. 227 per day, and as such, monthly income of the deceased Hem raj comes out to be 227x30= Rs.6810/-.

12. Since deceased at the time of the accident, was 42 years old and was in self employment, he is/was required to be given addition of 25% on account of future prospects in terms of judgment passed by the Hon'ble Apex Court in ***National Insurance Co. Ltd. V. Pranay Sethi and Ors, (2017) 16 SCC 680.*** Vide aforesaid judgment, the Hon'ble Apex Court has also held that no amount, if any, can be awarded under the head of loss of love and affection and as such, award made in this regard by the learned Tribunal below needs to be modified. Para 59 of ***Pranay Sethi's*** judgment reads as under:-

> ***"59. In view of the aforesaid analysis, we proceed to record our conclusions:-***
>
> ***59.1. 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.***
>
> ***59.2 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.***

59.3 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.

59.4 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.

59.5 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.

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

59.7 The age of the deceased should be the basis for applying the multiplier.

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

13. 1/3rd of the income is required to be deducted towards personal expenses of the deceased. Learned tribunal below taking note of the age of the deceased has rightly applied multiplier of 14. In the aforesaid background loss of dependency after applying multiplier of 14 is calculated as 9,53,400/-. Apart from above, this Court finds that tribunal below has erred in not awarding filial consortium in favour of claimants 2 and 3, who at the time of the accident, were minor and as such, sum of Rs. 40,000/- each, is required to be awarded in their favour.

14. Reliance is placed upon judgment passed by the Hon'ble Apex Court in case titled ***Magma General Insurance Co. Ltd. V. Nanu Ram alias Chuhru Ram and Ors, (2018) 18 SCC 130***, which has been also taken note of, in ***The New India Assurance Co. Ltd. V. Smt. Somwati and Ors,*** *in* ***Civil appeal No. 3093 of 2020 (a/w connected matters),*** wherein it has been held that consortium is not limited to spousal consortium and it also includes parental consortium as well as filial consortium. Having taken note of the aforesaid judgment rendered by Three-Judge Bench of the Hon'ble Apex Court in ***Magma General Insurance's case (supra),*** the Hon'ble Apex Court in its latest judgment passed in ***Somwati's case*** (supra) has held as under :-

"35. The Constitution Bench in Pranay Sethi has also not under conventional head included any compensation towards 'loss of love and affection' which have been now further reiterated by three-Judge Bench in United India Insurance Company Ltd. (supra). It is thus now authoritatively well settled that no compensation can be awarded under the head 'loss of love and affection'.

36. The word 'consortium' has been defined in Black's law Dictionary, 10th edition. The Black's law dictionary also simultaneously notices the filial consortium, parental consortium and spousal consortium in following manner:-

> ***"Consortium 1. The benefits that one person, esp. A spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support, and (between spouses) sexual relations a claim for loss of consortium.***
>
> ***• Filial consortium A child's society, affection, and companionship given to a parent.***
>
> ***• Parental consortium A parent's society, affection and companionship given to a child.***
>
> ***• Spousal consortium A spouse's society, affection and companionship given to the other spouse."***

37. The Magma General Insurance Company Ltd. (Supra) as well as United India Insurance Company ltd.(Supra), Three-Judge Bench laid down that the consortium is not limited to spousal consortium and

it also includes parental consortium as well as filial consortium. In paragraph 87 of United India Insurance Company Ltd. (supra), 'consortium' to all the three claimants was thus awarded. Paragraph 87 is quoted below:-

> ***"87. Insofar as the conventional heads are concerned, the deceased Satpal Singh left behind a widow and three children as his dependants. On the basis of the judgments in Pranay Sethi (supra) and Magma General (supra), the following amounts are awarded under the conventional heads:-***
>
> ***i) Loss of Estate: Rs. 15,000***
>
> ***ii) Loss of Consortium:***
>
> ***a) Spousal Consortium: Rs.40,000***
>
> ***b) Parental Consortium: 40,000 x 3 = Rs. 1,20,000***
>
> ***iii) Funeral Expenses: Rs. 15,000"***

38. Learned counsel for the appellant has submitted that Pranay Sethi has only referred to spousal consortium and no other consortium was referred to in the judgment of Pranay Sethi, hence, there is no justification for allowing the parental consortium and filial consortium. The Constitution Bench in Pranay Sethi has referred to amount of Rs.40,000/- to the 'loss of consortium' but the Constitution Bench had not addressed the issue as to whether consortium of Rs.40,000/- is only payable as spousal consortium. The judgment of Pranay Sethi cannot be read to mean that it lays down the proposition that the consortium is payable only to the wife.

39. The Three-Judge Bench in United India Insurance Company Ltd. (Supra) has categorically laid down

that apart from spousal consortium, parental and filial consortium is payable. We feel ourselves bound by the above judgment of Three Judge Bench. We, thus, cannot accept the submission of the learned counsel for the appellant that the amount of consortium awarded to each of the claimants is not sustainable.

40. We, thus, found the impugned judgments of the High Court awarding consortium to each of the claimants in accordance with law which does not warrant any interference in this appeal. We, however, accept the submissions of learned counsel for the appellant that there is no justification for award of compensation under separate head 'loss of love and affection'. The appeal filed by the appellant deserves to be allowed insofar as the award of compensation under the head 'loss of love and affection."

15. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, impugned award passed by learned Tribunal below needs to be modified to the following extent:

	Heads	***Amount in Rs.***	***Final amount after deduction /addition***
1	***Loss of dependency*** ***a)*** *Income Rs. 6810 per month with 25% addition on future prospects) 6810x25/100= 1702 i.e. 6810+1702=8512*	*9,53,400*	***9,53,400***
	b) *1/3rd deduction on personal expenses i.e. 8512/3=2837*		
	c) *Loss of dependency =8512-2837=5675*		

	d) *Annual dependency 5675x12=68100 with multiplier of 14 i.e. 68100x14= 9,53,400/-*		
2.	***loss of estate (in favour of wife)***	*15,000*	***15,000***
3.	***Loss of consortium (Rs.40,000 each to the claimants)***	*1,20,000*	***1,20,000***
4.	***Funeral expenses***	*15,000*	***15,000***
	Total compensation		***11,03,400/-***

16. Interest @ 9% awarded by the learned tribunal below also appears to be on higher side and as such, same is modified to 7.5% from the date of filing of the petition till its deposit.

17. 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 dated 16.3.2019, passed by learned MACT below in MAC Case No. 11-R/2 of 2017, is modified to aforesaid extent only. Needless to say, claimants would be entitled to the interest @ 7.5% on the aforesaid total amount of compensation instead of 9%. Accordingly, present appeal is disposed of, alongwith all pending applications, if any. Interim directions, if any, are vacated.

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

Between:-

PR. COMMISSIONER OF INCOME TAX, SHIMLA.

…APPELLANT

(BY SH. VINAY KUTHIALA, SENIOR ADVOCATE
WITH MS. VANDANA KUTHIALA, ADVOCATE.)

AND

M/S HYCRON ELECTRONICS, VILLAGE BATED,
BAROTIWALA, TEHSIL BADDI,
DISTRICT SOLAN, THROUGH ITS PROPRIETOR

.... RESPONDENT.

(SH. CHANDRANARAYAN SINGH, ADVOCATE)

ITA NO. 2 of 2021
Decided on:15.12.2021

Income Tax Act -- Appeal -- Maintainability -- Appellant felt aggrieved by the order dated 11.02.2018 passed by Income Tax Appellate Tribunal, Chandigarh in IT number 715/CHD/2019 and order dated 15.02.2019 whereby appeal of revenue was dismissed – Held -- Tax effects of Rs 2,68,441/- only is subject matter of challenge – Held -- Circular No 17/2019 is extension of circular No. 3/18 issued by CBDT whereby certain modifications have been made in the original circular especially in respect of enhancement of revision of monetary limits for filing appeals/SLPs in income tax matters, so, prescribed monetary limits for filing appeal before High Court is Rs 1,00,00,000/- whereas tax effect in instant case is much less than prescribed limits -- Appeal not maintainable, hence dismissed. (Paras 4, 5 & 12)

This appeal coming on for admission before notice this day, **Hon'ble Mr. Justice Satyen Vaidya**, delivered the following:

J U D G M E N T

By way of instant appeal, the appellant seeks to assail order dated 11.02.2020, passed by the Income Tax Appellate Tribunal (for short 'ITAT'), Chandigarh in ITA No. 715/Chd./2019.

2. Respondent herein, (for short 'assessee'), declared Rs.25,98,91,180/- as income in the ITR filed for the A.Y. 2015-2016. Assessment u/s 143(3) of the Income Tax Act (for short 'Act') was completed

on 30.10.2017 and income of the assessee was assessed at Rs.29,27,51,617/- by making following additions:

i. Addition of Rs.13,79,767/- on account of disallowance of interest u/s 14A of the Income Tax Act read with Rule 8D.

ii. Addition of Rs.3,12,44,216/- on account of loan from ex-partner as income under section 41(1) of the Act;

iii. Addition of Rs.2,36,456/- on account of expenditure incurred on repair of building.

iv. Addition of Rs.6,71,504/- on account of loss on retiring asset sold.

3. Assessee assailed above noted order of A.O before CIT(A) by way of appeal No. IT/198/17-18/SML and the same was allowed in respect of amounts detailed atserial number ii to iv above and further addition of Rs.8,68,744/- was deleted from additional amount mentioned at serial number i above.

4. The revenue challenged the order dated 15.02.2019 of the CIT(A) before the ITAT, Chandigarh. The appeal of the revenue was dismissed vide impugned order assailed in the instant appeal.

5. The grievance of the appellant herein is that the ITAT Chandigarh had wrongly proceeded to dismiss the appeal. The revenue has thus, sought adjudication from this court on alleged substantial question of law as reflected in para 7 of instant appeal.

6. Noticeably, the revenue seeks to assail the impugned order only on the issue of deletion of the addition of Rs. 8,68,744/- made u/s 14A of the Act on the ground that the same was against CBDT's Circular No. 05/2014.

7. In view of the extent of challenge brought before this court the involved tax effect is only to the tune of Rs. 2,68,441/-. It is submitted on

behalf of appellant that though the tax effect is less than the prescribed limit for filing appeal before this court, but the case of revenue was saved by para 10(b) of CBDT's Circular No.17/2019 as the effect of impugned order was implied declaration of CBDT's Circular No.05/2014 as illegal and ultra vires.

8. We have heard learned counsel for the parties and have also gone through the records of the case.

9. The controversy can be summed up in narrow encompass. The issue for adjudication is whether the exemption Clause 10 (b) of Circular No. 17/2019 dated 8.8.2019 issued by the CBDTis applicable to facts of the case.

10. Perusal of impugned order passed by the ITAT reveals that it has not declared CBDT's Circular No. 05/2014 either as illegal or ultra vires. The findings recorded by the ITAT are only on interpretation of the contents of said circular and as such we do not find any merit in the contention raised by the appellant.

11. Circular No.17/2019 dated 8.8.2019 issued by the CBDT, reads as under:

> "Circular No. 17 of 2019
> Date – 8th August, 2019
>
> *Further Enhancement of Monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court – Amendment to Circular 3 of 2018 – Measures for reducing litigation.*
>
> *Circular No. 3/2018 dated 11th July 2018 has been replaced by circular No. 17/2019 dated 8th August 2019 to enhance Monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court for reducing litigation.*

Appeals/SLPs	*Monetary Limit*	*Monetary Limit*

in Income-tax matters	*(Rs.) (Previous Limit)*	*(Rs.) (Revised Limit)*
Before Appellate Tribunal	*20,00,000*	*50,00,000*
Before High Court	*50,00,000*	*1,00,00,000*
Before Supreme Court	*1,00,00,000*	*2,00,00,000*

- *The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit.*

- *Further, even in the case of composite order of any High court or appellate authority which involves more than one assessment year and common issues in more than one assessment year, no appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit.*

- *In case where a composite order/judgment involves more than one assessee, each assessee shall be dealt with separately."*

12. It is not in dispute that the above noted Circular No. 17/2019 is extension of Circular No. 3/2018 issued by the CBDT whereby certain modifications have been made in the original circular especially in respect of enhancement of revision of monetary limits for appeals/SLPs in

income tax matters. Thus, the prescribed monetary limit for filing appeal before this court is 1,00,00,000/-, whereas the tax effect in instant case is much less than the prescribed limit. The instant appeal, therefore, is clearly not maintainable and the same is accordingly dismissed, so also the pending application(s), if any.

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

Between:-

1. THE STATE OF H.P. THROUGH PRINCIPAL SECRETARY (PW), H.P. SECTT. SHIMLA-171002.
2. THE EXECUTIVE ENGINEER, H.P. PWD,DIVISION DODRA KAWAR, DISTT. SHIMLA, HP.

.....APPELLANTS

(BY M/S ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. KAMAL KANT CHANDEL, DEPUTY ADOVCATE GENERAL)

AND

SH. BAL KRISHAN S/O LATE SH. SUNDER SINGH, R/O VILLAGE SHEKHAL, P.O. DHADI GHUNSA, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

.....RESPONDENTS

(BY MR. J.S. BHOGAL, SENIOR ADVOCATE WITH MR. T.S. BHOGAL, ADVOCATE)

ARBITRATION APPEAL No. 13 OF 2021
Decided on: 23.11.2021

Arbitration and Conciliation Act, 1996 -- Section 37 -- Appellant aggrieved by the judgment dated 06.04.2021 passed by Ld. District Judge Shimla in

arbitration case, where by application filed by him under section 36 of Arbitration and Conciliation Act for condonation of delay in filing the objections under section 34 (3) of Arbitration and Conciliation Act against award dated 01.10.2019 had been dismissed – Held -- Party intending to file objections under Section 34 of Arbitration and Conciliation Act was under obligation to file it within the period of 3 months as provided under section 34 (3) of the Act -- Application filed beyond 3 months period for setting aside the award mentioned in sub-section 2 of Section 34 of the Act, hence rightly dismissed -- Appeal found devoid of merits and dismissed. (Paras 8 & 9)

This appeal coming on for hearing this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G M E N T

By way of this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, the appellants have challenged judgment dated 06.04.2021, passed by the Court of learned District Judge, Shimla, in arbitration case titled as The State of H.P. and another versus Sh. Bal Krishan, vide which, an application filed under Section 36(4) of the Arbitration and Conciliation Act, for *condonation* of delay in filing the objections under Section 34 of the Arbitration and Conciliation Act, against award dated 01.10.2019, stands dismissed by the learned Court below.

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

Feeling aggrieved by an award passed under the Arbitration and Conciliation Act, dated 01.10.20219, signed copy whereof was provided to the parties on the same date, Objections were preferred under Section 34 of the Arbitration and Conciliation Act by the State of Himachal Pradesh-Appellants herein. Along with the Objections, an application was filed under Section 36(4) of the Arbitration and Conciliation Act for *condonation* of delay in filing the

same. These Objections along with the application for *condonation* of delay was filed on 17.02.2020, i.e. on 138th day after passing of the arbitration award.

3. For the purpose of record, it is relevant to mention that post winter vacations, the Court of learned District Judge, Shimla, reopened on 17th February, 2020, on which date, the Objections along with the application for *condonation* of delay, were filed.

4. This application filed for *condonation* of delay in filing the objections stood dismissed by the learned District Judge, by placing reliance upon the judgment of Hon'ble Supreme Court of India in *Assam Urban Water Supply and Sewerage Board* versus *M/s Subash Projects and Marketing Limited*, (2012) 2 Supreme Court Cases 624.

5. I have heard learned Counsel for the parties and have also gone through the documents appended with the appeal, including the order passed by the learned Court below.

6. It is not in dispute that in the present case, as on the date when the Court reopened after winter vacations and the Objections were preferred by the present appellants against the award passed by the learned Arbitrator, the period of three months plus the extended period of 30 days, benefit whereof can be given by the Court, was over. In this view of the matter, this Court is of the Considered view that there is no infirmity in the order which stands assailed by way of this appeal because learned Court below could not have given the benefit of vacations for the purpose of computing the limitation to the present appellants, in terms of the law laid down by Hon'ble Supreme Court of India in Assam Urban Water Supply and Sewerage Board (supra). In the said judgment, Hon'ble Supreme Court of India has been pleased to hold, while interpreting Section 2(j) and Section 4 of the Limitation Act as under:-

"12. Section 4 of the 1963 Act reads as under :-

"4. Expiry of prescribed period when court is closed.-Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens.

Explanation.-A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."

The above Section enables a party to institute a suit, prefer an appeal or make an application on the day court reopens where the prescribed period for any suit, appeal or application expires on the day when the court is closed.

13. The crucial words in Section 4 of the 1963 Act are "prescribed period". What is the meaning of these words?

14. Section 2(j) 'period of limitation' {which} means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act;"

Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case."

7. Coming back to the facts of this case, the application filed for *condonation* of delay in filing the appeal was dismissed by learned Court below by assigning the following reasons:-

> *"7. Section 34 of the Arbitration Act is the only remedy for challenging the award under Part-I of the Arbitration Act. Section 34 o(3) of the Arbitration Act is a limitation provision, which is an inbuilt into the remedy provision.*
>
> *8. A plain reading of sub-section (3) along with proviso to Section 34 of the Arbitration Act shows that application for setting aside the award mentioned in sub-section (2) of Section 34 of the Arbitration Act could be made within three months and the period can be extended for further period of 30 days on showing sufficient grounds and not thereafter. When any special statute prescribes certain period of limitation as well as provision for extension upto specified time limit on sufficient cause being shown, then the period of limitation prescribed under special law shall prevail and to that extent the provision of the Limitation Act shall stand excluded. When the intention of the legislature by enacting Sub Section (3) to Section 34 of the Arbitration Act is explicit that an application for setting aside the award should be made within three months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter, it implies that the Section 5 of the Limitation Act is not applicable.*
>
> *9. In Assam Urban Water Supply and Sewerage Board supra, the Hon'ble Apex Court has explained Section 4 of the Limitation Act, 1963, which enables the period of institute any suit, appeal or application on the day Court reopens where the prescribed period for any suit, appeal or application expires on the day when the Court is closed. The Hon'ble Apex Court has explained the meaning of "prescribed period" as mentioned in Section 4 of the Limitation Act, 1963 to say that period of 30 days mentioned in the proviso that follows in sub-section (3) of Section 34 of the Arbitration Act is not the "period of limitation", therefore, not "prescribed period" for the purpose of making the application for setting aside the arbitral award*

and accordingly, Section 4 of the Limitation Act, 1963 is not attracted."

8. This Court is of the considered view that the order so passed by the learned Appellate Court calls for no interference especially in view of law laid down by Hon'ble Supreme Court of India in case referred to supra. The limitation for assailing the award passed under the Arbitration and Conciliation Act, 1996, is three months as from the date on which the party filing application under Section 34 of the Arbitration and Conciliation Act has received the arbitral award. Extendable period of 30 days referred to in the proviso to Section 34 (3) of the Arbitration and Conciliation Act is not the period of limitation. Therefore, if a party has to get the benefit of limitation on account of vacations in a Court, then, the condition precedent for that is that this period of "three months" must expire during the vacations. In other words, it is not the extendable period, which should expire during the limitation, but the period of three months which should expire during the period of vacation. In the present case, the period of three months as from the date when signed copy of the award was received by the appellant, expired before the learned Court below closed for winter vacations. This is not in dispute. That being the case, as the limitation for filing the Objections under Section 34 of the Arbitration and Conciliation Act, had expired before the Courts closed for vacations and it is the extendable period, which expired during the period of vacations, the appellant herein was not entitled for the benefit of Section 4 of the Limitation Act.

9. In view of findings returned hereinabove, as this Court does not finds any infirmity with the order impugned, therefore, the present appeal, being devoid of merit, is dismissed. Pending miscellaneous application(s), if any, also stands disposed of accordingly.

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

Between:-

DEVINDER SINGH SON OF SHRI PREM SINGH, RESIDENT OF VILLAGE AND POST OFFICE KHOKHAN, TEHSIL AND DISTRICT KULLU, H.P.

…….APPELLANT

(BY SH. D.S. KAINTHLA, ADVOCATE)

AND

SHRI BHUPESH SON OF SHRI RAKESH, RESIDENT OF 115/4, SHURAD POST OFFICE KHOKHAN, TEHSIL AND DISTRICT KULLU, H.P.

……..RESPONDENT

(BY M/S NEEL KAMAL SOOD AND SEEMA AZAD, ADVOCATES)

CRIMINAL APPEAL
No. 77 of 2021
Decided on: 03.12.2021

Negotiable Instruments Act, 1881 - Section 141- Impleadment of company as accused when the offence has been committed by company - When there is nothing on record to prove that cheque in question was belonging to a company, the findings to the effect that complaint was not maintainable for non-compliance of Section 141 of Negotiable Instruments Act are perverse findings- Once court comes to conclusion that matter before it is not maintainable, then Court should not touch its merits. [Paras 7 & 8]

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

O R D E R

By way of this appeal, the appellant herein has challenged judgment dated 23.08.2019 passed by the Court of learned Chief Judicial Magistrate, Kullu, District Kullu, H.P. vide which, a complaint filed by the present petitioner under Section 138 of the Negotiable Instruments Act has been dismissed by the learned Trial Court primarily holding that as the cheque in issue was in the name of Sh. Krishna Trading Company, therefore, in terms of the provisions of Section 141 of the Negotiable Instruments Act, in the absence of the company having been impleaded as a party-accused, the complaint was not maintainable. Learned Trial Court has also further held that it appeared that complainant had given an amount to the accused without obtaining receipt and it was highly improbably that any prudent person would hand over such a huge amount without receipt and without preparing any document and therefore also, the complaint against the accused was not maintainable as the complainant had failed to prove that accused had any liability towards him.

2. I have heard learned Counsel for the parties and gone through the record of the case as well as the judgment under challenge.

3. Brief facts necessary for the adjudication of this appeal are as under:-

Proceedings stood initiated by the petitioner-complainant against the respondent-accused under Section 138 of the Negotiable Instruments Act on the ground that the complainant and accused were well known to each other and were having friendly terms. The accused owed an amount of `4.5 lac to the complainant, and in order to discharge his liability, accused issued/handed over the cheque, subject matter of the complaint, to the complainant, dated 03.12.2012. Upon presentation to the bank for encashment, the cheque was dishonoured by the bank on the ground of 'insufficient funds'. Thereafter, a statutory notice was issued by the complainant to the accused, calling upon him to make good the

payment but as the same was not done within the statutory period, this led to filing of the complaint.

4. The complaint was resisted by the accused *inter alia* on the ground that the cheque in issue was never handed over by the accused to the complainant purportedly in discharge of any liability as there was no liability, which accused owed to the complainant. The defence of the accused was that he had borrowed money from one Khimi Ram, and in lieu thereof, he had given the cheque in issue to Khimi Ram. After he paid back the money to Khimi Ram, said Khimi Ram did not return the cheque back to him and this cheque was probably handed over by Khimi Ram to the complainant, who subsequently misused it.

5. The complaint stands dismissed by the learned Trial Court on account of the reasons which already stand spelled out hereinabove.

6. This Court is of the considered view that the judgment passed by learned Court below is not sustainable in the eyes of law. The cheque in issue is on record as Ext. CW1/B. Persual thereof demonstrates that the same has been signed by the accused in his capacity as the 'proprietor' for Sh. Krishna Trading Co. This Court has observed so because a perusal of the cheque demonstrates that the same has been signed by the accused in his capacity as 'proprietor' of the firm concerned and the signatures of the accused on the cheque are not disputed by the accused.

7. As already mentioned hereinabove, the complaint *inter alia* has been dismissed by the learned Trial Court on the ground that as the cheque pertained to a Company, therefore, as provisions of Section 141 of the Negotiable Instruments Act were not complied with, as such, the complaint was not maintainable. This Court is of the considered view that in the absence of there being any evidence on record that the cheque in issue was indeed belonging to a company, these findings which have been returned by the learned Trial Court, are perverse findings. In fact, this was

neither the defence of the accused nor a perusal of the cheque prima facie demonstrates that the same belongs to the Company. On the contrary, the signatures stand appended by the accused upon the cheque above a typed term "Proprietor". That being the case, dismissal of the complaint by the learned Trial Court by assuming and presuming that Sh. Krishna Trading Company was a company, as is envisaged under the Companies Act, is based on conjectures and surmises rather than on any evidence on record. On this short ground, this appeal deserves to be allowed.

8. This Court would like to make a mention with regard to the findings returned by learned Trial Court in para-19 of the impugned judgment. After returning the findings that the complaint was not maintainable for non-compliance of Section 141 of the Negotiable Instruments Act, thereafter, learned Trial Court further returned the findings on the merit of the case by holding that the complainant had not been able to prove that any amount indeed was given by him to the accused. This Court is of the considered view that once a Court of law holds that *lis* before it is not maintainable, then that Court should not comment upon the merits of the case. In this case, once learned Trial Court had come to the conclusion that the complaint was not maintainable for non-compliance of Section 141 of the Negotiable Instruments Act, then, it should not have had further made any observation with regard to the merits of the case in hand. Therefore also, the impugned judgment is not sustainable in law.

9. Accordingly, in view of findings returned hereinabove, this appeal is allowed. The impugned judgment is ordered to be set aside and the matter is remanded back to the learned Trial Court with the direction that the complaint be restored to its original number and heard afresh. In order to be fair to both the parties, in case a prayer is so made, then opportunity be given to the parties to demonstrate that character of Krishna

Trading Company, cheque issued in whose name is the subject matter of the litigation. Parties to appear before leaned Trial Court on 05.01.2022.

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

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

Between:-

1. BHOLA SINGH S/O SH. SARWAN SINGH RO VILLAGE ISPUR, TEHSIL HAROLI, DISTRICT UNA (HP). AGE 32 YEARS.

2. SATYAM JOSHI S/O RAJESH JOSHI R/O V.P.O KUNGRAT, TEHSIL HAROLI DISTRICT UNA (HP).

3. SUNIL KUMAR S/O TILAK RAJ R/O V.P.O AJAULI, TEHSIL NANGAL, DISTRICT ROPAR (PB).

4. LAKHBIR SINGH S/O BACHITER SINGH R/O VILLAGE PUNA PO SANOLI,TEHSIL AND DISTRICT UNA (HP).

5. RAGHAV CHOUDHARY S/O SURINDER SINGH R/O V.P.O KALITRAN, TEHSIL AND DISTRICT ROPAR (PB).

6. RAHUL CHOUDHARY S/O JATINDER KUMAR R/O V.P.O KALITRAN, TEHSIL AND DISTRICT ROPAR (PB).

7. AVTAR SINGH S/O BALDEV SINGH R/O VILLAGE SOLERAN PO CHOHALTEHSIL AND DISTRICT HOSHIARPUR (PB).

8. SHUBHAM S/O MOHAN LAL R/O V.P.O PALASI TEHSIL ,NANGAL DISTRICT RUPNAGAR (PB).

9. NITIN MODGIL S/O DAVINDER MODGIL R/O V.P.O BAINSPUR TEHSIL NANGAL DISTRICT RUPNAGAR (PB).

10. SUNNY KUMAR S/O BALWINDER SINGH R/O VILAAGE DHUMEWAL P.O TEHSIL, ANANDPUR SAHIB, DISTRICT RUPNAGAR (PB).

11. ROHIT KUMAR S/O RAJINDER KUMAR R/O V.P.O CHOTEWAL, TEHSIL NNAGAL, DISTRICT RUPNAGAR (PB)

12. RAVI KUMAR S/o RAJ KUMAR R/o V.P.O MAUJOWAL, TEHSIL NANGAL, DISTRICT RUPNAGAR (PB).

13. GURBHAG SINGH S/O KARNAIL NANGAL DISTRICT RUPNAGAR (PB)

14. GURPREET SINGH S/O WARIRAM SINGH R/O V.P.O BEHLU TEHSIL ANANDPUR SAHIB, DISTRICT RUPNAGAR (PB).

15. AMANDEEP SINGH S/O SUKHDEV SINGH R/O V.P.O BHATOLI, TEHSIL KIRATPUR SAHIB, DISTRICT RUPNAGAR (PB).

.....PETITIONERS

(BY MR. ANUP RATTAN, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH,

.....RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 346 OF 2021
Decided on: 6.12.2021

Criminal Procedure Code, 1973 – Section 482 read with Sections 147, 148, 323, 342, 307, 364, 504, 506, 120-B – Indian Penal Code, 1860 – quashing of FIR and subsequent proceedings – Section 307 I.P.C. was subsequently added against the accused on the basis of the investigation – Medical report of the victim reveals that he sustained simple injuries and not any grievous hurt – Accused charged under Section 307 IPC but there is lack of strong possibility of conviction especially in view of statement of complainant as well as injured / victim – Inherent powers under section 482 Cr.P.C. exercised – FIR and subsequent proceedings quashed – Petition allowed. (Paras 8 & 9)

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:-

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 quashing of FIR No. 104 of 2019, dated 26.04.2019, registered at Police Station Haroli, District Una, HP, under Sections 147, 148, 323, 342, 307, 364, 504, 506, 120-B read with Section 149 of the Indian Penal Code, as well as ensuing criminal proceedings, pending in the Court of Additional Sessions Judge (II), Una, District Una, H.P.

2. Mr. Anup Rattan, learned Counsel for the petitioners has argued that the issue, which led to the filing of the FIR, now stands settled amicably between the accused, the complainant as well as the injured/victim. He informed the Court that this is a joint petition, which has been filed by the complainant, victim as well as accused. He submitted that taking into consideration the background, in which the unfortunate incident took place and the fact that now the matter stands amicably settled between the parties, it will be in the interest of justice, in case, this petition is allowed and the FIR in issue as well as ensuing criminal proceedings pending in the Court of learned Additional Sessions Judge(II), Una, H.P. are quashed as the parties now intend to live in peace and harmony with each other. He has drawn the attention of the Court to the compromise entered into between the parties, copy of which is appended with the petition as Annexure P-3.

3. Mr. Sumesh Raj, learned Additional Advocate General, has argued that though the factum of the matter having been compromised between the complainant as well as victim and accused is not in dispute but taking into consideration the sections involved, under which the FIR stands registered against the accused, this is not a fit case wherein this Court should exercise its inherent powers so conferred under Section 482 of the Code of Criminal Procedure, and it will be in the interest of justice, in case, the trial is permitted to continue and taken to its conclusion. He submitted that gravity

of the offences does not entail the accused/petitioners for the relief, which they are seeking by way of this petition.

4. I have heard learned Counsel for the petitioners as well as learned Additional Advocate General and also gone through the petition as well as documents appended therewith, including the compromise deed Annexure P-3.

5. Before proceeding further, it is relevant to mention that on 26.11.2021, the complainant Shri Bhola Singh and injured/victim Sh. Avtar Singh, were present in person in the Court and they have made separate statement on oath that they have no objection, in case, this petition is allowed as prayed for and the FIR in issue as well as ensuing criminal proceedings, pending before the learned Court below, are ordered to be quashed. The sections of Indian Penal Code under which the FIR in issue has been registered are already enumerated hereinabove.

6. Hon'ble Supreme Court of India in **Narinder Singh and Others** vs. **State of Punjab and Another**, (2014) 6 Supreme Court Cases 466, has been pleased to hold that the power conferred under Section 482 of the Code of Criminal Procedure has to be exercised sparingly and with caution. Hon'ble Supreme Court has been pleased to hold that when the parties have reached the settlement, and on that basis, petition for quashing the criminal proceedings, is filed, the guiding factors in such cases would be to (i) secure ends of justice; and (ii) prevent abuse of the process of any Court. Hon'ble Supreme Court has further been pleased to hold that while exercising this power, the High Court is to form an opinion on either of the aforesaid two objectives. It has further been held in the said judgment by Hon'ble Supreme Court that such a power is not to be exercised in those prosecutions, which involve heinous and serious offences. As per the Hon'ble Supreme Court, offences under Section 307 would fall in the category of heinous and serious offences, and therefore, are to be generally treated as crime against the society

and not against the individual alone but the High Court would not rest its decision merely because there is a mention of Section 307 of the Indian Penal Code in the FIR or the charge is framed under this provision and it would be open to the High Court to examine as to whether incorporation of Section 307 of 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/delicate 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. Hon'ble Supreme Court has further been pleased to hold that 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.

7. Guided by said principles laid down by Hon'ble Supreme Court, now this Court will see as to whether present one is a fit case wherein this Court should exercise its inherent power conferred upon it under Section 482 of the Code of Criminal Procedure for quashing the FIR or not. The FIR in issue is appended with the petition as Annexure P-2. The same is dated 05.05.2019, whereas the date of the incident is 26.04.2019. It stands mentioned in the FIR at the behest of the complainant that the complainant was the owner of the Poultry Farm, and in his Poultry Farm, which was otherwise not functioning on 26.04.2019, some person was beaten up by some unknown persons, which fact came to his notice after about two days, that too by virtue of a video which stood made viral on social media. It was mentioned in the FIR that the complainant had nothing to do with the incident and one person, who was having Camera in his hand, was being shown in the video, being beaten up by five or more persons. It is on the basis of this statement that FIR in issue was registered under Sections, 147, 148, 149, 323, 308, 342 and 504 of the Indian Penal Code.

8. It appears from the documents on record that Section 307 of IPC was subsequently incorporated against the accused on the basis of investigation which was carried out in the case. There is also on record medical report of the victim Shri Avtar Singh, dated 26.04.2019, which is appended with the petition as Annexure P-4, wherein it is mentioned that duration of the injuries was more than 12 hours. In terms of the opinion given by Doctor, the injuries suffered by the victim were simple and there were no external injuries on the body of the victim. During the course of hearing of this petition, this Court was informed that the incident took place on account of some misunderstanding between the parties which had occured on the basis of renting out of one Camera through OLX. A perusal of the medical report demonstrates that the injuries suffered by the injured were simple and not grievous in nature. Besides this, no external injuries were found by the Doctor on the body of the injured/ victim. Initially the FIR, which was registered, was not under Section 307 of the Indian Penal Code and this section has been subsequently added. During the course of arguments, this Court has not found any material from which it could be *prima facie* concluded that the beatings were given to the injured on any vital part of the body or any such weapon was used so as to attract the provisions of 307 of the IPC. The above facts thus demonstrate that though the accused have been charged under Section 307 of the Indian Penal Code, but from the facts of the case, it can be safely concluded that strong possibility of conviction does not exists especially in view of the statement of the complainant as well as the injured/victim. Further, taking into consideration the nature of the dispute, which was there between the parties, this Court is of the considered view that it would be in the ends of justice, in case, this Court exercises powers so conferred upon it under Section 482 of the Code of Criminal Procedure and quashes the FIR in issue as well as ensuing criminal proceedings as the matter now stands compromised.

9. Accordingly, in view of above, this petition is allowed and FIR No. 104 of 2019, dated 26.04.2019, registered at Police Station Haroli, District Una, HP, under Sections 147, 148, 323, 342, 307, 364, 504, 506, 120-B read with Section 149 of the Indian Penal Code, as well as ensuing criminal proceedings, pending in the Court of Additional Sessions Judge (II), Una, District Una, H.P., are ordered to be quashed and set aside, taking into consideration the compromise entered between the parties. Statement made by the complainant as well as the injured/victim on oath on 26.11.2021, in this Court, which shall form part of the judgment.

The 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:-

PREM LAL, S/O CHAUDHARY RAM, R/O VILAGE OEL, NEAR UCO BANK, OM SHANTI ASHRAM, P.O. BILASPUR, TEHSIL AND DISTRICT BILASPUR, H.P.

.....PETITIONER

(BY MR. MALAY KAUSHAL, ADVOCATE)

AND

GARJA RAM(NOW DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:

1. LACHAMAN SINGH SON OF LATE SHRI GARJA RAM;
2. PREM SINGH SON OF LATE SHRI GARJA RAM,
3. LEKH RAM SON OF LATE SHRI GARJA RAM;

4. CHINTA DEVI D/O LATE SHRI GARJA RAM;
5. PROMILA DEVI WIFE OF LATE SHRI GARJA RAM;
6. DURGI DEVI WIFE OF LATE SHRI GARJA RAM;
   ALL RESIDENTS OF VILLAGE CHAMYON, P.O. HARNORA, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

.....RESPONDENTS

(BY MR. NARESH VERMA, ADVOCATE)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 606 OF 2021
Decided on: 29.12.2021

Negotiable Instruments Act, 1881 - Section 138 - Dishonour of Cheque- Closure of defence evidence – Accused could not lead defence evidence despite taking steps- Held- Ld. Trial Court which ordering the fixation of the case for recording of DWs erred in not appreciating that diet money had already been deposited by the accused for the purpose of producing the witnesses- One more opportunity granted to the accused to lead evidence with courts assistance in the interest of justice – Order dated 18.01.2020 passed by Ld. Trial court vide which evidence of accused was closed (though wrongly reference as evidence of prosecution was closed by Ld. court below) is set aside - Opportunity given to accused to lead evidence, failing the opportunity of his right to lead evidence will be closed. (Para 8)

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

O R D E R

Respondents stand served. Mr. Naresh Verma, learned Counsel, by way of filing memo of appearance, has put in appearance on behalf of the respondents.

2. With the consent of learned Counsel for the parties, the petition is taken up for final consideration today itself.

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

A Complaint under Section 138 of the Negotiable Instruments Act is pending adjudication before the Court of learned Judicial Magistrate First Class, Bilaspur. Respondents herein are the legal representatives of the original complainant before the learned Trial Court. Documents appended with the petition demonstrate that the statement of the petitioner/accused (hereinafter to be referred as 'the accused" for convenience) under Section 313 of the Code of Criminal Procedure was recorded on 23.09.2019. Thereafter, the case was ordered to be listed for defence evidence, if any, on 15.11.2019. On the said date, no evidence was led by the accused, but an application was filed by him to deposit diet money of witnesses, which application was allowed by the learned Court below and the case was listed for recording of defence evidence on 07.12.2019.

4. On 07.12.2019, learned Trial Court passed the following order:-

> *"An exemption application on behalf of accused moved which is considered and allowed for today only for the reasons stated therein. Be now put up for D.Ws. on 18.01.2020."*

5. Thereafter, on 18.01.2020, learned Trial Court passed the following order:-

> *"An exemption application on behalf of accused filed, which is considered and allowed for the reasons stated therein only for today. No. DWS present today. Perusal of file shows that case was listed for DWS since 15.11.2019, now DWs present, neither any steps for the same have been taken. As such, evidence of the*

prosecution is closed by the Court's order. Be put up for arguments on 19.02.2020."

6. Feeling aggrieved, the petitioner has preferred this petition.

7. I have heard learned Counsel for the parties and also gone through the petition as well as the documents appended therewith.

8. As mentioned hereinabove, though on 15.11.2019, no evidence was produced by the accused but he filed an application praying for deposit of diet money, which application was allowed by the learned Trial Court. A copy of this application is on record at page 21 of the paper book, a perusal whereof demonstrates that two witnesses were sought to be called for recording their statements on his behalf by the accused. At page 23 of the paper book is the order dated 15.11.2019 passed by learned Judicial Magistrate First Class, which is to the effect that "let a sum of Rs.1000/- (one thousand only) be deposited in the relevant head, thereafter, process be issued to the witnesses for the date fixed". The acknowledgement of the amount being deposited is also there below order dated 15.11.2019. Therefore, it appears that when the case was listed on 07.12.2019 before the learned Court below, again no witness appeared on behalf of the accused, however, learned Trial Court while ordering the fixation of the case for recording of DWs on 18.01.2020, erred in not appreciating that diet money had already been deposited by the accused for the purpose of producing the witnesses for 07.12.2019 and no mention was made as to what was the fate of the process undertaken by the Court for summoning of the witness. Be that as it may, on 18.01.2020, as again no DWs were present, probably as after 07.12.2019, no fresh steps were taken by the accused, impugned order was passed. This Court is of the considered view that herein there is lapse on the part of the accused but the Court below has also contributed towards this

lapse by not undertaking the exercise of going through its orders and ascertaining the fate of the process undertaken by the Court to summon the witnesses in terms of the list of witnesses filed by the accused and the diet money deposited by him. Therefore, in these peculiar circumstances, this Court is of the considered view that interest of justice demands that at least one more opportunity be granted to the accused to lead evidence with Court assistance so that justice is done to him. Ordered accordingly. Order dated 18.01.2020 passed by the learned Trial Court, vide which, evidence of the accused was closed (though wrongly referred to as the evidence of the prosecution was closed by the learned Court below) is ordered to be set aside. Parties through Counsel are directed to appear before the learned Court below on 06.01.2022, on which date, the case shall be listed by the learned Trial Court for summoning the witnesses of the accused. Thus, an opportunity will be given to the accused to lead evidence. If he fails to avail this opportunity, his right to lead evidence will be closed.

9. Mr. Malay Kaushal, leaned Counsel for the petitioner prays that to avoid any misgiving, let accused furnish fresh list of witnesses, which will contain names of earlier quoted witnesses only and also fresh diet money for summoning these witnesses. Ordered accordingly.

10. The indulgence, which has been shown in favour of the petitioner by the Court today, shall be subject to payment of cost of Rs.5000/- by the petitioner to the complainants (as before learned Trial Court). It is clarified that the order which has been passed today permitting the petitioner to lead evidence will be subject to payment of cost by him to the complainants on the next date of hearing, and in the event of his failure of doing so, the indulgence, which has been shown by the Court, shall automatically cease to be effective.

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

Copy *dasti*.

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

Between:-

1. M/S VIRUS, THROUGH ITS PROPRIETOR, SH. GAURAV WALIA, AGED ABOUT 39 YEARS, S/O LATE SH. OMKAR WALIA R/O HOUSE NO. 25, WARD NO. 9, M.C. AREA HAMIRPUR, NEAR PNB BRANCH HAMIRPUR, HP.

2. SH. GAURAV WALIA, AGED ABOUT 39 YEARS, S/O LATE SH. OMKAR WALIA R/O HOUSE NO. 25, WARD NO. 9, M.C. AREA HAMIRPUR, NEAR PNB BRANCH HAMIRPUR, HP.

…….PETITIONERS

(BY MR. AMARDEEP SINGH, ADVOCATE)

AND

SHRI RAMESH JASWAL, S/O SH. GIAN CHAND, R/O SAI NIWAS, GHORA CHOWKI, P.O. BOILEAUGANJ, TEHSIL AND DISTRICT SHIMLA, H.P.

……..RESPONDENT

(NEMO)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 672 OF 2021
Decided on:15.12.2021

Closure of Defence evidence -- Petitioner felt aggrieved by the order of the Ld. Trial Court where by the Ld. Trial Court granted last opportunity to the accused to lead defence evidence on self responsibility – Held - Petitioner approached the High Court in CrMMO number 38 of 2016 and the Trial Court was directed to grant one more opportunity to the petitioner to lead evidence on self responsibility - the order passed by Ld. Trial Court was not found to be suffering from any illegality or perversity, so, the petition filed by the petitioner found without merits and dismissed.(Para 2)

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 Judicial Magistrate First Class, Court No. 3, Shimla, H.P. dated 27.11.2021, which reads as under:-

> *"Case listed for defence evidence, at this stage, an exemption application U/S 205 Cr.P.C. on behalf of the accused person and adjournment of the case file has been moved by his counsel. It is averred in the application that the accused could not appear before this court since accused has to remain present before the Court of LD ACJM, Hamirpur today. The application is duly supported with the copy of B.W. issued by the Court of Ld. ACJM, Hamirpur. In view of the aforesaid documents, the present application is considered and allowed. The ld. counsel for the accused has prayed for taking steps for summoning the official witnesses. Prayer is considered and however disallowed since vide order dated 28.05.2019, passed by the Hon'ble High Court of H.P., the accused has been directed to lead evidence on self responsibility and no opportunity has been granted by the Hon'ble High Court to the accused to taking steps. Therefore, in view of order dated 28.05.2019, passed by the Hon'ble High Court of H.P., the accused is granted*

last opportunity for leading defence evidence on self-responsibility for 18.12.2021, failing which defence evidence shall be closed by the order of the Court."

2. Record demonstrates that earlier in a petition filed by the present petitioner before this Court, i.e. Cr.MMO No. 38 of 2019, vide order dated 28.05.2019, this Court while setting aside the order passed by learned Trial Court closing the evidence of the present petitioner, had granted one more opportunity to the petitioners to lead evidence before the learned Trial Court on self responsibility. That being the case, there is no illegality or perversity in the order passed by the learned Court below which stands impugned by way of present petition, wherein the petitioners have been denied the Court assistance for summoning the official witnesses. The order which has been passed by the learned Court below is strictly in consonance with the order passed by this Court, in compliance whereof, now the petitioners are being given an opportunity to lead the evidence on self responsibility.

That being the case, as this petition has no merit, the same is accordingly dismissed in limine. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:-

DINESH DUTT SON OF SH. SURAJ PRAKASH, RESIDENT OF VILLAGE JHAL, P.O. HINNER, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

.....PETITIONER

(BY MR. SUDHIR THAKUR, SENIOR ADVOCATE
WITH MR. KARUN NEGI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY HOME, GOVERNMENT OF H.P., SHIMLA.
2. THE HIMACHAL PRADESH STATE ELECTRICITY BOARD, THROUGH ITS ENGINEER IN CHIEF.
3. SMT. MEENA WIFE OF SH. BABU RAM, RESIDENT OF VILLAGE KURGAL, POST OFFICE HINNER, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

.....RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDL. AGS WITH MR. SUNNY DATWALIA, ASSTT. AG FOR R-1;
MR. VIKRANT THAKUR, ADVOCATE FOR R-2;
MR. AJAY CHAUHAN, ADVOATE FOR R-3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 692 OF 2019
Decided on: 29.12.2021

Criminal Procedure Code, 1973 - Section 482 read with section 336 of Indian Penal Code, 1860 - Quashing of FIR and subsequent proceedings – Petitioner alleged that there is no allegation of alleged offence against him and further in view of his compromise with the complainant the petition may be allowed and resulting in quashing of FIR – Held -- There is a procedure prescribed under the Criminal Procedure Code which has to be adhered to after lodging of the FIR - Interference of High Courts with the procedure of Criminal Procedure Code by invoking Section 482 of Criminal Procedure Court at any and every stage without permitting the Trial Court to exercise the jurisdiction conferred upon them will lead to collapse of entire machinery

of Trial Court - Petitioner required to raise the questions in the petition before the learned Trial Court at appropriate stage - Petition disposed of in above terms.(Paras 4 & 5)

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

O R D E R

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has prayed for quashing of FIR No. 27/19, dated 03.03.2019, registered at Police Station Kandaghat, under Section 336 of the Indian Penal Code and also for quashing of the final report prepared under Section 173 of the Code of Criminal Procedure.

2. Mr. Sudhir Thakur, learned Senior Counsel appearing for the petitioner has vehemently argued that the proceedings, which are pending before the learned Court below, are nothing but an abuse of process of law as the petitioner is not guilty of the offence alleged against him. He submits that a bare perusal of the FIR demonstrates that there is no allegation of the alleged offence made out against the petitioner, yet, he is being made to undergo/face the agony of the trial. He further submits that even the stand of the complainant is that she has no objection in case this petition is allowed and the FIR is quashed because she has not leveled any specific allegation against the petitioner.

3. I have heard learned Counsel for the petitioner and also gone through the petition as well as documents appended therewith.

4. This Court is of the considered view that the provisions of Section 482 of the Code of Criminal Procedure cannot be invoked by a party at

the throw of the hat when there is a procedure which stands prescribed under the Criminal Procedure Code which has to be adhered to after lodging of the FIR. This Court can safely take note of the fact that very rarely does an accused admits that he is guilty of the offences alleged against him. This Court is also aware of the well settled principle of law that ordinarily in criminal jurisprudence, until the accused is held guilty, he is presumed to be innocent. Yet, after lodging of the FIR, the investigating agency has to carry out the investigation and thereafter challan has to be filed or a closure report has to be presented before the appropriate Court of law whereupon the Court has to take a call as to how the matter has to be further proceeded with. In case, the High Courts start interfering with this procedure by invoking Section 482 of the Criminal Procedure Code at any and every stage, without permitting the Trial Courts to exercise the jurisdiction, which stands conferred upon them and also the duty which stands enshrined upon them, then, the entire machinery of the trial Courts, is likely to collapse, because, as has been observed hereinabove also, then in that eventuality, every accused would approach this Court under Section 482 of the Code of Criminal Procedure asking for quashing of the FIR as well as subsequent criminal proceedings. The Court is not discarding the contention of the petitioner that he is innocent, however this Court is observing that at the first instance all these issues can be and should be raised by the petitioner before the learned Trial Court and this Court has no reason to believe that learned Trial Court will not look into the issues which are being raised by the petitioner in the present petition and take a appropriate call on the matter. The contention of learned Senior Counsel appearing for the petitioner that in case this High Court does not interferes under Section 482 of the Code of Criminal Procedure, then, the provisions of this Section will become otiose, is completely mis-conceived because the provisions of Section 482 which are contained in the Criminal Procedure Code are meant to prevent the abuse of

process of law and the Court exercises these powers where its judicial conscious is satisfied that in case it does not interferes under Section 482 of Cr.P.C, then, same would indeed amount to abuse of process of law. In the given facts of this case, this Court is of the view that no case for interference under Section 482 of the Code of Criminal Procedure is made out and it is purposely that this Court is not referring to the factual matrix involved in this petition so as not to prejudice the case of the petitioner.

5. Accordingly, these proceedings are ordered to be closed but with the observations that the petitioner shall be at liberty to raise all these issues before the learned Trial Court at the appropriate stage.

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

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

Between:-

MOHINDER NATH S/O LATE RAM KRISHAN R/O VILLAGE ANJI NEAR RADHASWAMI GROUND TEHSIL AND DISTRICT SOLAN.

.....PETITIONER

(BY MR. SHRAWAN DOGRA, SENIOR ADVOCATE WITH M/S AJAY SIPAHIYA & HARSH KALTA, ADVOCATES)

AND

1. INDIAN OIL CORPORATION LIMITED TRROUGH ITS SENIOR DIVISIONAL RETIAL SALES MANAGER, SHIMLA DIVISIONAL OFFICE SDA COMPLEX BLOCK-21 KASUMPATI, SHIMLA.

2. SMT. VEENA GUPTA W/O SH. AHSOK GUPTA R/O SUBATHU ROAD DHARAMPUR, TEHSIL KASUALI, DISTRICT SOLAN.

.....RESPONDENTS

(MR. K.D. SOOD, SENIOR ADVOCATE WITH M/S HET RAM THAKUR AND SANYA KAUSHAL, ADVOCATES FOR R-1;
MR. B.C. NEGI, SENIOR ADVOCATE WITH MR. NITIN THAKUR, ADVOCATE,FOR R-2.)

CIVIL WRIT PETITION
No. 5417 of 2014
Reserved on :04.10.2021
Decided on: 29.11.2021

Constitution of India, 1950 -- Article 226 -- Maintainability of -- Petitioner claimed that Respondent number 1 be directed to continue supplying petrol and petroleum products to the retail outlets of the petitioner and for treating the partnership deed executed between the petitioner and respondent number 2 as non-existent and further to treat petitioner as sole proprietor of petrol retail outlet on NH 22 – Held - Respondent number 1 Indian Oil Corporation undoubtedly is other Authority as envisaged under article 12 of the Constitution of India but the question arises weather the dispute raised by petitioner falls in domain of article 226 of Indian Constitution -- Genesis of dispute and undoubtedly is the partnership deed entered into between the petitioner and the private respondent with regard to petrol pump regarding which the dispute is pending before Ld. Arbitrator and the relief for declaration of partnership deed as honest is totally misconceived relief which cannot be prayed in writ petition -- Status of petrol pump is subject matter of arbitration proceedings hence writ is not maintainable for declaring that the petitioner is sole proprietor of petrol pump -- Petition not maintainable and accordingly dismissed. (Paras 16,17 & 18)

Cases referred:

ABL International Ltd. And Another vs. Export Credit Guarantee Corporation of India Ltd. and Others, (2004) 3 SCC, 553;

K.K. Saksena vs. International Commissioner on Irrigation and Drainage and Others, (2015) 4 SCC 670;
National Highways Authority of India vs. Ganga Enterprises and Another,(2003) 7 SCC 410;
National Textile Corpn. Ltd. and Others vs. Haribox Swalram and Others (2004) 9 SCC 786;
Noble Resources Ltd. vs. State of Orissa and Another (2006) 10 SCC 236;

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

O R D E R

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

> *"(i) For issuing any appropriate writ, order or directions for directing respondent No. 1 to continue making supply of patrol and petroleum products in petitioner's name to the retail out let set up in 2005 by the petitioner on NH 22 at Dharampur on Shimla-Kalka road, which was allotted to petitioner vide annexure P-1 dated 16.1.2002.*
> *(ii) For directing the respondent No. 1 to continue supplying petrol and petroleum products to the retail outlet of the petitioner as hereto before notwithstanding any dispute between petitioner and respondent No. 2 which is liable to be settled and can be settled or adjudicated upon in separate proceedings.*
> *(iii) For issuing directing to the respondents to treat the partnership deed executed between petitioner and respondent No. 2 as non existent and to treat the petitioner as sole proprietor of the petrol retail outlet on NH-22 at Dharampur on Shimla-Kalka road."*

2. The case of the petitioner is that the he had raised a Petrol Pump on his owned and possessed land pursuant to his selection by respondent No. 1 as a dealer at Dharampur. The outlet is situated at National Highway -22 in District Solan. The same was made functional by the petitioner in the name

and style of M/S Jai Hind Filling Station, Dharampur, with the petitioner being its sole proprietor. Respondent is the wife of a close family friend of the petitioner. In the year 2012, she expressed interest to invest in the Petrol Pump. It was mutually decided between the petitioner and respondent No. 2 to form a partnership deed for the purpose of running the Petrol Pump, and for this purpose, market value of the land exclusively owned and possessed by the petitioner was assessed at `5,00,00,000/- (Rs. Five Crores). In lieu of 40% share to be allotted to respondent No. 2 in the partnership firm, said respondent was to pay `2,45,00,000/- (Two Crores and Forty Five Lac) to the petitioner by 31.03.2014. The proposal to form this partnership firm was submitted to respondent No. 1, which accepted said proposal. Thereafter, the partnership deed as per format of respondent No. 1 was formed and registered on 25.4.2013. As per the petitioner, despite registration of the partnership deed and its acceptance by respondent No.1, the Petrol Pump continued to be operated by him as a sole proprietor and this was done with the knowledge of respondent No. 1, who did not object to the same. The partnership deed was to become workable only on the fulfillment of obligations on the part of respondent No. 2. According to the petitioner, this deed was never acted upon by the petitioner or respondent No. 1 or 2 for want of fulfillment of obligations by respondent No. 2. The partnership deed remained in abeyance and was treated as such even by respondent No. 1. An amount of `2,45,00,000/-, which was to be paid by respondent No. 2, was not paid by her to the petitioner. She issued three cheques for an amount of `75.00 Lac each, which were dishonoured on presentation. Respondent No. 2 did not invest in the running and operation of Petrol Pump. In the years 2006-07, unsecured loan of `8.60 Lac given by respondent No. 2 on interest in favour of the petitioner was also not merged against her liability towards partnership firm. The sole proprietorship continued to repay the loan to respondent No. 2 with interest. The partnership firm which was at will of the partners, was eventually

dissolved and terminated by the petitioner by issuance of notice to this effect to respondent No. 2 vide Annexure P-10, dated 112.4.2014 and vide Annexure P-11, dated 17.7.2014. The bank accounts of the firm work in the name of the petitioner in his capacity as sole proprietor. The return of the proceeds of the Petrol Pump were being reflected in the income tax returns of the petitioner only. The petitioner brought the fact of dissolution and termination of partnership deed to the notice of respondent No. 1 vide letter dated 07.06.2014 and requested for continuance of petroleum products and petrol supply in his name only. The Registering Authority was also apprised of the termination of the partnership deed, however, respondent No. 1 stopped supplying the retail outlet of the petitioner in his capacity as proprietor w.e.f. July, 2014. Despite requests made by the petitioner, respondent No. 1 was not continuing to supply petrol and petroleum products to the petitioner as a proprietor, and it is in this background that the petition stood filed by the petitioner praying for the reliefs already enumerated hereinabove.

3. By way of its reply filed to the writ petition by respondent No. 1, in the preliminary submissions, it stood mentioned by said respondent that Petrol Pump (MS) High Speed Diesel (HSD) Oil Retail Outlet Dealership was entered into between IOC as first party and Shri Mohinder Nath Sofat and Smt. Veena Gupta, partners of M/s Jai Hind Filling Station on 26.04.2013. Clause 62 of the agreement dated 26.04.2013 (Annexure R1/1), provided for a provision for resolving of the disputes through sole arbitration of Director (Marketing) of the Indian Oil Corporation, and therefore, according to respondent No. 1, the writ petition was not maintainable. It was further mentioned in the reply in preliminary submissions and on merit also that it stood wrongly averred by the petitonner that respondent No. 1 had stopped supplying the petroleum products to retail outlet at Dharampur and the petitioner had indeed obtained interim stay by suppressing real facts and had invoked the writ jurisdiction of this Court despite the fact that the dispute

inter se the petitioner and respondent No. 2 had to be resolved through arbitration in terms of partnership deed and in fact an application filed under Section 11(6) of the Arbitration and Conciliation Act by Veena Gupta against Mohinder Nath Sofat in this High Court which was pending adjudication. It was further mentioned in the reply that filling station in issue was one of the most popular and convenient filling station for all users and that the stopping of upliftment of supplies w.e.f. 08.07.2014, the general public was being harassed and the petitioner having obtained directions from this Court , respondent No. 1 is supplying the petroleum products to it.

4. Respondent No. 2 took the defence that the writ petition was not maintainable *inter alia* on the ground that highly disputed questions of fact were involved in the writ petition and further that the writ petition was otherwise not maintainable as the disputes were intra private parties and were in fact now subject matter of arbitration pursuant to order dated 31.10.2014, passed in Arbitration Case No. 59 of 2014, titled as Veena Gupta vs. Mohinder Nath & another. Said respondent also took the preliminary objection that declaratory relief sought by the petitioner to the effect that the partnership deed executed between the petitioner and respondent No. 2 be held as non-existent and the petitioner be treated as sole proprietor of petrol retail outlet, was beyond the scope of jurisdiction of this Court in exercise of its extraordinary writ jurisdiction. As per said respondent, a deed of partnership was entered into between the petitioner and respondent No. 2 on 25.04.2013. Before this partnership deed was entered into, the petitioner and respondent No. 2 submitted an indemnity bond to respondent No. 1. In terms of the indemnity bond Annexure R-2/B, the petitioner confirmed the change in the constitution of erstwhile sole proprietorship and the petitioner in the indemnity bond had agreed to enter into a fresh dealership agreement with respondent No. 1 on behalf of new partnership created by the petitioner and respondent No. 2. This led to creation of partnership on 26.04.2013 which

partnership entered into a dealership agreement with respondent No. 1-Corporation for running the Petrol Pump in question of 26.04.2013. As per respondent No. 2, creation of partnership on 25.04.2013 and thereafter the partnership entering into a dealership agreement with respondent No. 1 on 26.04.2013 qua the Petrol Pump in question clearly belied the stand of the petitioner that the partnership in question had not come into a workable existence and the same was kept in abeyance. It was further the stand of respondent No. 2 that the bank account through which the business was to be transacted after 26.04.2013 was to be in the name of partnership firm. According to respondent No. 2, as requisite changes in terms of the indemnity bond as also partnership deed were not being done by the petitioner, therefore, respondent No. 2 was constrained to take criminal action against the petitioner and the communication appended with reply Annexure R-2/H were sent to the Corporation/ respondent No. 1, informing it about misdeeds of the petitioner as also the officials of the Corporation. Primarily on the basis of these averments, the maintainability of the petition has been assailed.

5. Accordingly, the judgment being pronounced today by this Court is on the maintainability of the present writ petition.

6. During the course of arguments, learned Senior Counsel appearing for the petitioner and learned Senior Counsel appearing for respondent No. 2 have relied upon the following judgments:-

By the petitioner:-

(i) ABL International Ltd. And Another vs. Export Credit Guarantee Corporation of India Ltd. and Others, (2004) 3 Supreme Court Cases, 553;

(ii) Rapid MetroRail Gurgaon Limited etc. vs. Haryana Mass Rapid Transport Corporation Limited & Ors. Civil Appeals Nos. 925-926 of 2021, decided on 26.03.2021;

(iii) Unitech Limited & Ors. vs. Telangana State Industrial Infrastructure (TSIIC) & Ors. Civil Appeal No. 317 of 2021, decided on 17.02.2021.

By respondent No. 2:-

(i) National Highways Authority of India vs. Ganga Enterprises and Another,(2003) 7 Supreme Court Cases 410;
(ii) (2004) 9 Supreme Court Cases 786, National Textile Corpn. Ltd. and Others vs. Haribox Swalram and Others;
(iii) (2006) 10 Supreme Court Cases, Noble Resources Ltd. vs. State of Orissa and Another;
(iv) K.K. Saksena vs. International Commission on Irrigation and Drainage and Others, (2015) 4 Supreme Court Cases 670;

7. Hon'ble Supreme Court of India in **ABL International Ltd. And Another** vs. **Export Credit Guarantee Corporation of India Ltd. and Others**, (2004) 3 Supreme Court Cases, 553, has been pleased to hold that while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. Hon'ble Supreme Court has also held that merely because some disputed questions of fact arise for consideration, the same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

8. Hon'ble Supreme Court of India in **Rapid MetroRail Gurgaon Limited etc.** vs. **Haryana Mass Rapid Transport Corporation Limited & Others**, Civil Appeals Nos. 925-926 of 2021, decided on 26.03.2021has been pleased to hold in para-49 thereof as under:-

> *"49.Clause (ii) of the order dated 20 September 2019 makes it abundantly clear that the basic purpose underlying the entrustment of the reference to the CAG was the*

determination of the debt due "as defined under the Concession Contract". The High Court, it must be emphasized, was seized of a proceeding under Article 226 of the Constitution, and its writ jurisdiction had been invoked to challenge the notices of termination issued by RMGL and RMGSL, and for ensuring that the consequence which would emanate on the expiry of the notice period of 90 days by the cessation of the metro operations could be prevented by the judicial intervention in the course of the public law jurisdiction. The issuance of a notice of termination, the consequences which would ensue, and the resolution of disputes is specifically provided in the arbitration agreement between the parties, which is an intrinsic part of the Concession Agreements. Hence, there was an evident interface between this element of public interest on the one hand and the contractual rights of the parties to the Concession Agreements on the other. However, when HMRTC and HSVP moved the High Court under Article 226, they did so in view of the impending threat which was looming large on the horizon of the rapid metro operations being brought to a standstill as a result of the proximate expiry of the notice of 90 days preceding termination. In Sanjana M. Wig vs. Hindustan Petroleum Corporation Limited 6, a two judge Bench of this Court, speaking through Justice S B Sinha, has observed:

"12. The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious…

13. However, access to justice by way of public law remedy would not be denied when a lis involves public (2005) 8 SCC 242 law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

[…]

18. It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the

domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in Amritsar Gas Service [(1991) 1 SCC 533] and E.Venkatakrishna [(2000) 7 SCC 764] that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent." (emphasis supplied)

In the present case, the High Court was evidently concerned over a fundamental issue of public interest, which was the hardship that would be caused to commuters who use the rapid metro as a vehicle for mass transport in Gurgaon. As such, the High Court's exercise of its writ jurisdiction under Article 226 in the present case was justified since non-interference, which would have inevitably led to the disruption of rapid metro lines for Gurgaon, would have had disastrous consequences for the general public. However, as a measure of abundant caution, we clarify that ordinarily the High Court in its jurisdiction under Article 226 would decline to entertain a dispute which is arbitrable 7. Moreover, remedies are available under the Arbitration and Conciliation Act, 1996 for seeking interim directions either under Section 9 before the Court vested with jurisdiction or under Section 17 before the Arbitral Tribunal itself."

9. Hon'ble Supreme Court of India in **Unitech Limited & Ors.** vs. **Telangana State Industrial Infrastructure (TSIIC) & Ors**. Civil Appeal No.

317 of 2021, decided on 17.02.2021, has been pleased to hold in paras 32 and 33 thereof as under:-

> *"32. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.*
>
> *33. A two judge Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corporation of India7 [ABL International] analyzed a long line of precedent of this Court8 to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:*
> *"27. …the following legal principles emerge as to the maintainability of a writ petition:*
> *(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.*

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

This exposition has been followed by this Court, and has been adopted by three- judge Bench decisions of this Court in State of UP v. Sudhir Kumar9 and Popatrao Vynkatrao Patil v. State of Maharashtra10. The decision in ABL International, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226.11 If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in ABL International:
"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available

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

(emphasis supplied)

Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state Harbanslal Sahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107; Ram Barai Singh & Co. v. State of Bihar & Ors., (2015) 13 SCC 592power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal".

10. Hon'ble Supreme Court of India in **National Highways Authority of India** vs. **Ganga Enterprises and Another**,(2003) 7 Supreme Court Cases 410, has been pleased to hold in para 6 thereof as under:-

> *"The Respondent then filed a Writ Petition in the High Court, for refund of the amount. On the pleadings before it, the High Court raised two questions viz. (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered question (a) and then chose not to answer question (b). In our view, the answer to question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala State Electricity Board v. Kurien E. Kalathil, State of U.P. v. Bridge & Roof Co. (India) Ltd. and Bareilly 'Development Authroity v. Ajai Pal Singh. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a Writ Court was not the proper forum. Mr. Dave however relied upon the cases of Verigamto Naveen v. Government of H.P. and Harminder Singh Arora v. Union of India. These however are cases where the Writ Court was enforcing a statutory right or duty. These cases do not lay down that a Writ Court can interfere in a matter of contract only. Thus on the ground of maintainability the Petition should have been dismissed."*

11. Hon'ble Supreme Court of India in **National Textile Corpn. Ltd. and Others** vs. **Haribox Swalram and Others** (2004) 9 Supreme Court Cases 786 has been pleased to hold as under:-

> *"17. We are also in agreement with the view taken by the learned Single Judge that the writ petition which was filed in December 1989 was highly belated as the claim of the writ petitioners had been categorically refuted by the letter dated 7.11.1990 by the Director Finance on behalf of National Textile*

Corporation (South Maharashtra). The petition was therefore liable to be rejected on this ground alone. That apart, the prayer made in the writ petition is for issuance of a writ of mandamus directing the appellant herein to supply the goods (cloth). It is well settled that in order that a mandamus be issued to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the Statute to enforce its performance. The present is a case of pure and simple business contract. The writ petitioners have no statutory right nor any statutory duty is cast upon the appellants whose performance may be legally enforced. No writ of mandamus can, therefore, be issued as prayed by the writ petitioners."

12. Hon'ble Supreme Court of India in **Noble Resources Ltd.** vs. **State of Orissa and Another** (2006) 10 Supreme Court Cases 236 has been pleased to hold as under:-

"43. Ordinarily, a specific performance of contract would not be enforced by issuing a writ of or in the nature of mandamus, particularly when keeping in view the provisions of the Specific Relief Act, 1963 damages may be an adequate remedy for breach of contract."

13. Hon'ble Supreme Court of India in **K.K. Saksena** vs. **International Commissioner on Irrigation and Drainage and Others**, (2015) 4 Supreme Court Cases 670, has been pleased to hold in para 43 thereof as under:-

"What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a 'State' within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a

> *part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is 'State' under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law."*

14. I have heard learned Counsel for the parties and also gone through the pleadings at length.

15. Before proceeding further, it is relevant to mention that when the case was listed before the Court on 30th September, 2021, the following order was passed:-

> *"An objection has been taken with regard to the maintainability of the writ petition by the private respondent. As agreed, the Court is hearing the contentions of learned Counsel for the parties on the issue of the maintainability of the writ petition. Mr. B.C. Negi, learned Senior Counsel appearing for the private respondent has made his submissions. As prayed for, list for continuation on 01.10.2021."*

16. The reliefs prayed for by the petitioner have already been enumerated hereinabove. Respondent No. 1-Indian Oil Corporation undoubtedly is "other authority" as envisaged under Article 12 of the Constitution of India and thus amenable to the writ jurisdiction of this Court. The issue herein is as to whether the dispute, which has been raised by the petitioner, will fall in the domain of Article 226 of the Constitution of India or not? The genesis of the dispute undoubtedly is the partnership deed entered into between the petitioner and the private respondent with regard to the Petrol Pump subject matter of the writ petition. There have arisen disputes between the petitioner and respondent No. 2, as a result of the partnership deed so entered into and the disputes stand referred for adjudication by way of arbitration and the matter is pending before the learned Arbitrator. That being

the case, this Court is of the considered view that it will be in the interest of justice that this Court does not comment on the issues raised either by the petitioner or the private respondent with regard to the partnership deed which was entered into between the petitioner and respondent No. 2 and fallout thereof, including the allegations of the petitioner that the partnership deed was never acted upon and counter of respondent No. 2 that partnership deed was duly acted upon. These issues undoubtedly involve disputed questions of fact, which parties need to establish by way of leading cogent evidence before the learned Arbitrator who is seized of the matter. In this background, this Court has no hesitation in holding that the direction prayed for the petitioner to treat the partnership between him and respondent No. 2 as non-existent and treat the petitioner as sole proprietor of Petrol Retail Outlet, is a totally mis-conceived relief ,which, by no stretch of imagination, can be prayed for in a writ petition. This Court would go a step further and observe that filing of the writ petition with said prayer is nothing but abuse of process of law as this kind of declaration between two private entities is not to be given by a writ Court. Therefore, with regard to this relief, undoubtedly, the petition is mis-conceived and not maintainable.

17. Now coming to reliefs No. 1 and 2 prayed for by the petitioner. If one peruses the reply, which has been filed to the writ petition by Indian Oil Corporation, i.e. respondent No. 1, a perusal thereof clearly demonstrates that it stands mentioned therein that said respondent is supplying petrol and petroleum products to the petrol pump in issue. *De hors* this fact, whether or not the Petrol Pump in issue is to be continued the supply of the petrol and petroleum products is a matter intra the petitioner, respondent No. 2 and respondent No. 1-Corporation, subject to the agreements entered into between them and as the entire issue is pending before the learned Arbitrator, therefore, these two reliefs can also not be gone into by this Court in the peculiar facts of the case for the reason that in the garb of these two reliefs,

the petitioner cannot be permitted to run the Petrol Pump claiming that he is the sole proprietor thereof especially in view of the fact that the status of the Petrol Pump is also subject matter of the arbitration proceedings. Therefore, on these counts also, this writ petition is held to be not maintainable.

18. In fact, in the peculiar facts of this case, which, as has been argued by learned Senior Counsel appearing for respondent No. 2, involves seriously disputed questions of law, this Court in exercise of its writ jurisdiction cannot venture into and adjudicate the issues which the petitioner wants this Court to do. This is well left to either a Civil Court to do the needful where the parties can lead evidence in support of their respective contentions or the learned Arbitrator who, as mentioned hereinabove, is already seized of the entire matter. Accordingly, this writ petition is held to be not maintainable and is thus dismissed. Interim order, if any, stands vacated. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

SMT. KIRAN W/O SH. DEV RAJ, R/O WARD NO. 1, CHOWGAN BAZAR, NURPUR, TEHSIL NURPUR, DISTRICT KANGRA, H.P.

…….PETITIONER

(BY MR. ASHOK THAKUR, ADVOCATE)

AND

1. HIMACHAL PRADESH STATE CIVIL SUPPLIES CORPORATION LIMITED, SHIMLA-171009, THROUGH ITS MANAGING DIRECOTR.
2. THE DIVISIONAL MANAGER, HIMACHAL PRADESH STATE CIVIL SUPPLIES CORPORATION LIMITED,

DHARAMSHALA, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.

3. THE REGIONNAL MANAGER, HIMACHAL PRADESH STATE CIVIL SUPPLIES CORPORATION LIMITED, DHARAMSHALA, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.
4. STATE OF H.P. THROUGH ITS PRINCIPAL SECRETARY (TRANSPORT).

…….RESPONDENTS

(MS. BHAVNA DATTA, ADVOCATE FOR RESPONDENT-CORPORATION;
MR. AHSOK SHARMA, ADVOCATE GENERAL WITH M/S ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERAL AND MR. KAMAL KANT CHANDEL, DEPUTY AG FOR R-4.)

CWP No. 3503 of 2021

Between:-

SH. SHANKAR SINGH S/O SH. RAMELA RAM R/O VILL. & P.O. DAMTAL, TEHSIL INDORA, DISTT. KANGRA, (H.P.)-176403, AGED ABOUT 53 YEARS.

…….PETITIONER

(BY MR. NARESH KAUL, ADVOCATE)

AND

1. HIMACHAL PRADESH STATE CIVIL SUPPLIES CORPORATION LIMITED,

SHIMLA-171009, THROUGH ITS MANAGING DIRECOTR.

2. THE DIVISIONAL MANAGER, HIMACHAL PRADESH STATE CIVIL SUPPLIES CORPORATION LIMITED, DHARAMSHALA, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.
3. THE REGIONNAL MANAGER, HIMACHAL PRADESH STATE CIVIL SUPPLIES CORPORATION LIMITED, DHARAMSHALA, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.
4. SH. KULBHUSHAN SHARMA, S/O SH. NOT KNOWN TO THE PETITONER AT PRESENT) PRESENTLY WORKING/ OFFICIATING/ IN THE OFFICE OF/AS AREA MANNAGER, H.P. CIVIL SUPPLIES CORPORATION LIMITED DHARAMSHALA, TEHSIL DHARAMSHALA, DISTT. KANGRA, H.P.
5. SMT. KIRAN W/O SH. DEV RAJ, R/O WARD NO. 1, CHOWGAN BAZAR, NURPUR, TEHSIL NURPUR, DISTRICT KANGRA, H.P. 176202.
6. STATE OF H.P. THROUGH ITS PRINCIPAL SECRETARY (TRANSPORT).

.....RESPONDENTS

(MS. BHAVNA DATTA, ADVOCATE FOR RESPONDENT-CORPORATION;
MR. ASHOK THAKUR, ADVOCATE FOR R-5;
MR. AHSOK SHARMA, ADVOCATE GENERAL WITH M/S ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERAL

AND MR. KAMAL KANT CHANDEL, DEPUTY AG FOR R-6.)

CIVIL WRIT PETITIONs
No.5742 of 2021 and 3503 of 2021
Decided on:15.12.2021

Constitution of India, 1950 - Article 226 - Writ petition number 3503 of 2021 has been filed by petitioner Shankar alleging that petitioner Kiran who has filed writ petition number 5742 of 2021was not eligible to participate in the process as she was not possessing a vehicle duly registered in her name on the date when she applied for the grant of the tender - Petitioner Kiran filed writ petition number 5742 of 2021 feeling aggrieved by the acts of the respondents whereby bid of the petitioner was rescinded by the respondents –Held - the registration certificate demonstrates that the registration of the vehicle was transferred in the name of Smt. Kiran on 15. 03. 2021 - From the provision of the eligibility criteria for allotment also it is clear that the allotment of tender by the respondent Corporation in favour of Smt. Kiran was bed in law as she was not fullfilling the eligibility criteria - Fresh agreement was ordered to be entered into by the respondent Corporation with petitioner Shankar Singh within a period of two weeks provided he is ready to accept the conditions on which it was allotted to Smt. Kiran - Kiran is permitted to do the business of transportation for which she shall be duly paid by the respondent Corporation in terms of agreement entered into - The petitions filed by the petitioners disposed of accordingly.(Paras 4, 5, 14 & 16)

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

O R D E R

As common facts and issues are involved in these writ petitions, they are being disposed of by a common judgment.

2. CWP No. 3503 of 2021 was filed by petitioner Shankar Singh, praying for the following substantive reliefs:-

> *"a) That a writ in the nature of certiorari may kindly be issued and the impugned allotment as mentioned in Annexure P-5 dated 15.03.2021, in favour of the respondent*

No. 5, may kindly quashed and set aside, in the interest of law and justice.

b) That at writ in the nature of mandamus may kindly be issued to implement the order dated 01.03.2021 (Annexure P-3) in favour of the petitioner, being L-2, when it is evident that as on 25.02.2021 & on 01.03.2021, it was Sh. Saravjeet Singh, who was owner of vehicle No. HP-38C-4088 and not the respondent No. 5, who made false averments in the tender document etc., in connivance with respondents No. 3 & 4.

c) That the respondent No. 1 may also be directed to initiate enquiry about the manner and method adopted to allot tender in favour of the respondent No. 5, by the respondent No. 3 & 4 and the culprits may be brought to books, in the interest of law and justice."

3. CWP No. 5742 of 2021 was filed by the petitioner Kiran, praying for the following substantive reliefs:-

"(a) That the respondent-department may kindly be directed to quash tender notice published in news paper Amar Ujala (Annexure –P/2)."

4. The dispute involved in these writ petitions is in a very narrow compass. Vide Annexure P-1, appended with CWP No. 3503 of 2021, bids were invited from eligible candidates by the Civil Supplies Department for the purpose of distribution and uploading of gas cylinders to the consumers in the gas agencies mentioned therein. The last date, by which the application were to be submitted to the Area Manager of Civil Supplies Corporation at Dharamshala as prescribed in the Notice was 25.02.2021. In terms of Annexure P-1, the bids had to be submitted in two parts, i.e. technical bid and financial bid. The gas agencies were divided in two categories depending upon the number of active consumers in the area (a) where the number of active consumers was less than 15000; and (b) where the number of active consumers was more than 15000. As per the conditions of the notice inviting bid, it was mandatory for the applicant to possess three vehicles, one big and

two small, if he was applying for such gas agency, where the number of active consumers was less than 15000, and it was mandatory for the applicant to possess four vehicles, big and small, if he was applying for gas agency where the number of active consumers was more than 15000. Under both the categories, it was mandatory that at least one vehicle should be under the registered ownership of the applicant, though the remaining could have been in the name of associates. Both the petitioners herein participated in the process, which was so undertaken by the Civil Supplies Corporation and it is not in dispute that petitioner Smt. Kiran was declared as L-1 and petitioner Shankar Singh as L-2. Her being declared as L-1, was challenged by petitioner Shankar Singh, by way of writ petition No. 3503 of 2021 *inter alia* on the ground that said applicant i.e. Smt. Kiran, was not eligible to participate in the process as she was not possessing a vehicle duly registered in her name on the date when she applied for the grant of the tender. It is pertinent to mention here that both the petitioners were participating for a bid where the number of active consumers vis-a-vis the gas agency was less than 15000. In addition to the petitioners, there were two other bidders.

5. During the pendency of CWP No. 3503 of 2021, the tender process, vide which, the bid of the petitioner Smt. Kiran was accepted, was rescinded by the Civil Supplies Corporation, which is evident from Annexure P-2, appended with CWP No. 5742 of 2021, which is the copy of advertisement published in vernacular news paper on 29.08.2021, vide which, again fresh tenders were invited for the gas agency in issue. Said advertisement was challenged by petitioner Smt. Kiran by way of CWP No. 5742 of 2021.

6. While hearing these two matters, on 21.09.2021, Hon'ble Division Bench of this Court passed the following order:-

"CWP No. 5742 of 2021 & CMP No.11184 of 2021

CWP No. 3503 of 2021 & CMP No.11106 of 2021

So far as CWP No. 3503 of 2021 is concerned, learned counsel for the respondents-Corporation submits that since the petitioner has withdrawn the EMD (Earnest Money Draft), the award of tender could not have been granted to him. So far as CWP No. 5742 of 2021 is concerned, the award of the tender to the petitioner is stated to have been cancelled by the order dated 18.8.2021 and thereafter the impugned notification has been issued calling for fresh tenders.

Various submissions are made at the Bar. The petitioner's counsel in CWP No. 3503 of 2021 submits that the EMD was returned by the respondents-Corporation. Learned counsel for the respondents-Corporation submits that the EMD has been voluntarily taken back by the writ petitioner, therefore, the contract could not have been given to him. We are of the considered view that all these matters require consideration after examining the record. That the reply of each one of the respondents in both the petitions are required. Hence, two weeks' time is granted to the respondents in both the cases to file reply(ies), if not already filed.

Call after four weeks.

In the interregnum, tender notification dated 27.8.2021 and all further proceedings shall remains stayed.

CMP No. 11185 of 2021 in CWP No. 5742 of 2021

The applicant/petitioner to file English typed version of Annexures P/1 and P/2 within four weeks. The application is disposed off accordingly."

7. Thereafter, post admission both these cases have been heard by this Court. When these cases were taken up on 01.12.2021, this Court passed the following order:-

" This application is disposed of with the direction that the documents appended therewith are ordered to be taken on record, subject to all just exceptions.

CWP No. 5742 of 2021 a/w CWP No. 3503 of 2021

Replies on behalf of respondent No. 1 to 3 in CWP No. 5742 of 2021 and on behalf of respondent No. 5 in CWP No. 3503 have been filed in the Court, which are ordered to be taken on record.

Heard for some time. At this stage, Mr. Naresh Kaul, learned counsel for the petitioner in CWP No. 3503 of 2021 submits that petitioner-Shankar Singh is willing to perform the work of transportation on the same terms as is being done by Smt. Kiran, petitioner in CWP No. 5742 of 2021.

Learned counsel for the respondent-Corporation is directed to have instructions in this regard by the next date of hearing.

Taking into consideration the issues involved in these petitions, State of Himachal Pradesh through Principal Secretary (Transport) is impleaded as respondent in both the petitions. Mr. Adarsh Sharma, learned Additional Advocate General accepts notice on behalf of the newly added respondent in both the petitions. He is directed to inform the Court as to when the registration of vehicle No.HP38C-4088 was actually transferred in the name of Smt. Kiran, petitioner in CWP No. 5742 of 2021 on the next date of hearing.

As prayed for, list for continuation on 15th December, 2021.

Learned counsel for the petitioner(s) to supply the paper-books to the State."

8. Today, in compliance thereto, Ms. Bhavna Datta, learned Counsel for the respondent-Corporation has handed over a copy of written instructions so imparted to her by the Financial Advisor of the respondent-Corporation, which is ordered to be taken on record and which read as under:-

> *“That the case titled as "Shankar Singh" Versus Himachal Pradesh State Civil Supplies Corporation Limited and others pertaining to the tender process for transportation of LPG cylinders for the LPG Agencies of the corporation at Baijnath, Nurpur, Ghuggar (Palampur), Shilla (Dharamshala), Nagrota Bagwan and Damtal was listed on 9/02/2021. The Counsel for the ioner in Shankar Singh's case has submitted before the Hon'ble Court that "he is ready & willing to work on the same terms & conditions as has been done by successful bidder Kiran (petitioner in CWP No. 5402 of 2021).*
>
> *2. That the Hon'ble Court after hearing the statement made by the counsel for the petitioner in Shankar Singh's case directed the Corporation to have instructions in this regard. The Managing Director of the HPSCSC after going through the record of the case, instructs the standing counsel of the Corporation to give consent to abide by the directions of the Hon'ble Court and if the Hon'ble Court is of the opinion that fair chance be given to the petitioner Shankar Singh to substitute Kiran for the said purpose, the Corporation is ready to do the needful.*

9. Mr. Naresh Kaul, learned Counsel for the petitioner Shankar Singh, has made a statement in the Court that henceforth the petitioner Shankar Singh is willing to execute the work of the gas agency in issue of the respondent-Corporation, on the same terms and conditions, on which it was allotted to Smt. Kiran.

10. Besides this, in compliance to the last order passed by this Court, learned Additional Advocate General has also handed over a copy of the registration certificate pertaining to vehicle bearing registration No. HP-38C-4088, which is ordered to be taken on record, perusal whereof demonstrates that the vehicle in question was transferred in the name of petitioner Kiran on 15.03.2021 from its previous owner Shri Saravjeet Singh. This clearly demonstrates that as on the last date of submission of bids, in terms of Annexure P-1 appended with CWP No. 3503 of 2021, i.e. 25.02.2021, vehicle

in issue was not duly registered in the name of Smt. Kiran. The above demonstrates that there was merit in the contention of petitioner Shankar Singh that the allotment of the tender in favour of Smt. Kiran was not sustainable in law as she indeed was not eligible to participate in the process.

11. In this view of the matter, this Court has no hesitation in holding that the allotment of tender by the respondent-Corporation in favour of Smt. Kiran was bad in law, as she was not fulfilling the eligibility criteria prescribed in Annexure P-1 appended with CWP No. 3503 of 2021.

12. Learned Counsel for the respondent-Corporation submits that the tender stood allotted to Smt. Kiran as her contention, that she was registered owner of the vehicle in question, was believed by the respondent-Corporation because she did not approach the respondent-Corporation with clean hands.

13. Mr. Ashok Thakur, learned Counsel for petitioner Smt. Kiran submits that though the vehicle was transferred in the name of Smt. Kiran on 15.03.2021, however, she was actually in possession of the same since long, therefore, she did not mislead the corporation.

14. Be that as it may, this Court is not going to decipher the factum of registered ownership of the vehicle on the basis of its physical possession, but the same has to be deciphered on the basis of statutory certificates, which are issued under the Motor Vehicles Act in this regard by the competent authority and in this case, the certificate demonstrates that the ownership of the vehicle was transferred in the name of Smt. Kiran on 15.03.2021 only.

15. At this stage, Mr. Ashok Thakur, learned Counsel for petitioner Smt. Kiran submits that the work, which was duly carried out by the petitioner on the asking of the respondent-Corporation be saved. Ordered accordingly.

16. As further prayed for, it is ordered that henceforth a fresh agreement be entered into by the respondent-Corporation with petitioner

Shankar Singh within a period of two weeks from today, which shall be for a period, as is envisaged in Annexure P-1 appended with CWP No. 3503 of 2021, provided Sh. Shankar Singh is willing to accept the same on the same terms and conditions, on which, it was allotted to Smt. Kiran. Needful shall be done on or before 31st December, 2021, so that from 1st January, 2022, the tender stands allotted in favour of Sh. Shankar Singh. Till 31.12.2021, petitioner Smt. Kiran, as prayed for, is permitted to continue to do the business of transportation, for which, she shall be duly paid for by the respondent-Corporation in terms of agreement already entered into. This protection is being granted by the Court in the larger public interest, taking into consideration the fact that the work being performed by petitioner Smt. Kiran is that of the distribution and uploading of LPG cylinders.

The petitions stand disposed of in above terms, so also pending miscellaneous application(s), if any. Interim order(s), if any, stand vacated.

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

Between:-

M/S S.K. VIPAN KUMAR KARYANA MERCHAND AND COMMISSION AGENT, PARTAP GALI, MAJITH MANDI, AMRITSAR, PUNJAB.

…….APPELLANT

(BY SH. ARVIND SHARMA, ADVOCATE)

AND

JOGI RAM SON OF VED RAM, RESIDENT OF VILLAGE KANDHA PO HANOGI, SUB TEHSIL AUT, DISTRICT MANDI, H.P.

……..RESPONDENT

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

REGULAR SECOND APPEAL
No. 189 of 2017
Decided on:15.11.2021

Civil Procedure Code, 1908 - Section 100 - Regular Second Appeal -- Limitation – First Appeal filed to challenge the judgment and decree passed by Ld. Civil Judge, Senior Division, Mandi, District Mandi, whereby the suit filed by the plaintiff was decreed, which was dismissed – In Regular Second Appeal both judgment and decrees assailed - Held - There is not a single word in the entire judgment passed by Ld. First Appellate Court on the point of limitation - Being First Appellate Court the pleadings and the evidence was required to be scrutinized and the decision was required to be based upon it - The issue of limitation not properly decided by the Trial Court as well as Ld. Appellate Court so the pleadings and the evidence in the judgment are miss appreciated - Appeal allowed as a result of judgment and decrease passed by the Ld. Courts set aside and the case remanded back to Ld. Trial Court to decide the case afresh. (Paras 12 & 13)

This appeal coming on for admission this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G E M E N T

By way of this regular second appeal, the appellant herein has challenged the judgment and decree passed by the Court of learned Civil Judge Senior Division), Mandi, District Mandi, in Civil Suit No. 3 of 2013, titled as Jogi Ram vs. S.K. Vipin Kumar, dated 08.07.2016, vide which, the suit filed by the respondents herein for recovery of an amount of `2.00 lac was decreed with interest, as well as the judgment and decree passed by the Court of learned Additional District Judge in Civil Appeal No. 17 of 2016, titled as M/s S.K. Vipin Kumar vs. Jogi Ram, dated 28.02.2017, vide which, an appeal preferred by the present appellant against the judgment and decree passed by learned Trial Court was dismissed.

2. Brief facts necessary for the adjudication of this appeal are that the respondent plaintiff filed a suit for recovery on the plea that he deals in forest produce and on 25.02.2009, after obtaining permission/permit from Divisional Forest Officer, Mandi, he assigned 20 quintal of Kuth to the defendant. The same was delivered to defendant on 26.02.2009 at Amritsar. It was transported through vehicle bearing No. HP-34A-0351. Sale price of Kuth was fixed at `175 per kilogram. The value of Kuth delivered to plaintiff by defendant was `3.5 Lac, out of which, the defendant paid an amount of `1.5 lac to the plaintiff which was credited in the account of the plaintiff in Punjab National Bank. The balance amount of `2.00 lac was recoverable. To recover the same, the plaintiff filed a complaint under Section 12 of the Consumer Protection Act . The same was dismissed on the ground that the plaintiff did not fall under the definition of a consumer. He filed an appeal before the State Consumer Commission, which was decided on 04.07.2012. Thereafter, civil suit was filed, in which, a prayer was made for recovery of `2.00 with interest.

3. The suit was contested by the defendant *inter alia* on the ground that the plaintiff had offered to supply the defendant the Kuth, which offer was made in the premises of the defendant at Amritsar. Supply was subject to advance, which was made through cheque bearing No. 529387, dated 02.03.2009, which cheque was encashed by the plaintiff. Despite receiving advance payment, no Kuth was supplied by the plaintiff, and when in this regard, a demand was raised by the defendant, the plaintiff firstly dragged him to Consumer Courts and thereafter the suit was filed. Defendant denied that 20 quintals of Kuth was supplied to him as alleged by the plaintiff. Defendant also took the stand that this suit was time barred. Objection of territorial jurisdiction was also taken.

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

"1. Whether the plaintiff is entitled for recovery of suit amount, as alleged? OPP

2. Whether the suit is not maintainable? OPD

3. Whether the suit is time barred? OPD

4.Whether the plaintiff is stopped to file the present suit by her own act and conduct, as alleged?OPD

5. Whether the plaintiff has no cause of action to file the present suit? OPD.

6. Relief."

5. On the basis of the evidence, which was led by the respective parties in support of their respective contentions, the Issues so framed were answered as under:-

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

6. Learned Trial Court decreed the suit of the plaintiff by holding that the plaintiff was entitled for recovery of an amount of `2.00 lac with interest at the rate of 6% per annum from the date of delivery of goods i.e. 26.02. 2009 till its actual realization. These findings have been affirmed in appeal by the learned Appellate Court.

7. I have heard learned Counsel for the parties and also gone through the judgments and decrees passed by the learned Courts below as well as record of the case.

8. This appeal was admitted by this Court on 18.08.2017, on the following substantial question of law:-

> *"1) Whether on account of misappropriation of the pleadings and misreading of the oral and well as documentary evidence available on record the findings recorded by both Courts below are erroneous and as such the judgment and decree impugned in the main appeal being perverse is vitiated and not legally sustainable.?"*

9. In this case, there was an objection taken by the defendant with regard to the maintainability of the suit on the ground that the same was time barred. Issue No. 3, as has been quoted hereinabove, was specifically framed to the effect as to whether the suit was time barred. Learned Trial Court decided this issue as under:-

> *"The suit is not time barred in the light of Section 14 of the Indian Limitation Act, 1963 as discussed supra. Therefore, Issue No. 3 is decided in favour of the plaintiff and against the defendant."*

10. Earlier part of the judgment demonstrates that while dwelling upon the issue of limitation, all that has been held by the learned Trial Court in para-24 is as under:-

> *"24. Counsel for the defendant argued that there is delay in filing this suit. Plaintiff has already explained the delay in plaint."*

11. Record demonstrates that in the civil suit, it was mentioned by the plaintiff that he had approached the Consumer Forum earlier, which complaint of his was dismissed on 09.12.2010 on the ground that the plaintiff was not a consumer and an appeal filed by him against this order was decided by the Appellate Forum on 04.07.2012, which had led to the delay in filing of the suit, which delay was neither intentional nor deliberate. Now in the written statement, in para-3 on merit, it was specifically averred that the delay in filing the suit was not liable to be *condoned* as the provisions of Section 14 of the Indian Limitation Act were not attracted in the facts of the case. This

Court is of the considered view that this important aspect of the matter as to whether the suit was barred by limitation or not, has not been decided by both the leaned Courts below, without due application of judicial mind. Learned Trial Court in a slip shod manner held in para-24 of the judgment that Counsel for defendant argued that there was delay in filing the suit and plaintiff had already explained the delay in plaint. Except this, there is no finding worth its name returned by the learned Trial Court based on the averments contained in the plaint and the written statement as to how the suit was within limitation. The findings which have been returned in para-25 to para-27 of the judgment also contain no discussion on merit as to how the suit was within limitation. Similarly, learned Appellate Court has also dealt with this issue in an extremely slip shot manner. Para-22 and 23 of the judgment passed by learned Appellate Court are quoted hereinbelow:-

> *"22. As per section 12 Exclusion of time of proceeding bonafide in court without jurisdiction:-*
>
> *1. In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which from detect of jurisdiction or other cause of a like nature is unable to entertain it.*
>
> *2. In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be exclused, where such proceeding is prosecuted in good faith in a court which from detect of jurisdiction or other cuase of a like nature is unable to entertain it.*
>
> *3. Notwithstanding anything contained in rule 2 of order XVIII of the Code of Civil Procedure 1908, the provisons of*

Sub Section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that oter, where such permission is granted on the ground that first suit must fall by reason of a defect in the jurisdiction of the court or other cause of a like nature. For the purpose of this section (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted; (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceedings; (c) mis joinder of parties or of causes or action shall be deemed to be a cause of a like nature with detect of jurisdiction.

23. For the foregoing reasons, I hold that the findings returned by the learned trial Court on all issues suffers from no legal infirmity and as such the findings are affirmed, consequently the impugned judgment and decree passed by the ld trial court calls for no interference by this Court. hence, this point is decided in the negative."

12. Above demonstrates that in para-22, the statutory provisions of Section 14 (wrongly mentioned as Section 12, by both the learned Courts below), are quoted and in para-23, in a cursory manner, it is mentioned by learned Appellate Court that for the foregoing reasons the Court was holding that the findings returned by the learned trial Court on all issues suffer from no legal infirmity. There is not even a single word in the entire judgment passed by the learned Appellate Court on the point as to how the findings returned by learned Trial Court on the issue of limitation were correct findings. Said Court being the Court of first appeal, was duty bound to have scrutinized the pleadings as well as evidence, and thereafter, based its decision thereupon. The above clearly demonstrates that both the learned Courts below have, without any due application of judicial mind, decided the issue of limitation. Therefore, it can be safely said by this Court that there is a complete mis-appreciation of pleadings as well as other evidence because non-

consideration of the pleadings and evidence and non-deliberation upon the pleadings and evidence in the judgment also amounts to mis-appreciation thereof. Substantial question of law is answered accordingly.

13. In view of discussion held hereinabove, the appeal succeeds and the judgments and decrees passed by both the learned Courts below are ordered to be set aside, but in the interest of justice, the case is remanded back to the learned Civil Court with the direction to decide the case afresh after hearing the parties by returning reasons on all the issues framed. Parties through Counsel are directed to appear before learned Trial Court on 22.12.2021.

The appeal stands disposed of in above terms, so also pending miscellaneous application(s), if any. There is no order as to costs.

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

BETWEEN:-

BIHARI LAL, LINEMAN (RETD.) FROM THE OFFICE OF SENIOR EXECUTIVE ENGINEER HPSEBL ELECTRICAL DIVISION, JAWALI, DISTRICT KANGRA, HP PRESENTLY R/O VILLAGE AGWAH, PO THAKARIMATTI, TEHSIL SALOONI, DISTRICT CHAMBA, HP.

…PETITIONER

(BY SH. M.L. SHARMA, ADVOCATE.)

AND

1. HIMACHAL PRADESH ELECTRICITY BOARD LTD. VIDYUT BHAWAN, KUMAR HOUSE, SHIMLA, THROUGH ITS

EXECUTIVE DIRECTOR.

2 THE SENIOR EXECUTIVE ENGINEER,
HPSEBL ELECTRICAL DIVISION,
JAWALI, DISTRICT KANGRA, HP. ...RESPONDENTS

(BY SH. ANIL GOD & SH.AVINAH JARYAL,
ADVOCATES.)

REVIEW PETITION (TRIBUNAL)
No. 29 OF 2020
Decided on:25.11.2021

Constitution of India, 1950 – Article 227 - Petitioner fulfilled the eligibility criteria for recruitment to the post of Lineman by direct recruitment and was entitled for benefits of FR 22 (1)(a)(1) for fixation of his pay -- Petitioner approached HP State Administrative Tribunal where it was held vide order dated 16.11.2017 that provisions of FR 22 (1)(a)(1) are applicable to promotional cases only and not to the appointments made against direct recruitment -- Held - Bare reading of FR 22 (1)(a)(1) depicts that it is applicable on promotion as well as on appointment in a substantive, temporary or officiating capacity and in case of direct recruitment-- Government servant has option to be exercised by him within one month from date of promotion or appointment as the case may be to get the pay fixed under this rule from the date of promotion or appointment – Held -- Error apparent on record as it has wrongly being held by the Tribunal that FR 22 (1)(a)(1) is applicable only to the promotional cases and not to the appointment made against direct recruitment quota as the petitioner has not been appointed from open market but he was in service candidate, appointed against the quota reserved for the direct recruitment -- Review petition allowed, order passed by the H.P State Administrative Tribunal is set aside and the original application is order to be restored to its original position. (Paras 5 & 6)

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

J U D G M E N T

Petitioner was serving with the respondent-Board as Assistant Lineman and in the year 2005 process was undertaken by the Board to fill up the vacant posts of SSAs/Electricians/Lineman which were falling in the share of Direct Recruitment Quota, by appointment from amongst those Class-III and Class-IV regular and Work-charge officials working in different categories in the Board, who were having qualification of Matric with ITI in Electrician/Wireman trade in relaxation of R&P Rules with respect to source of recruitment.

2. It is undisputed that minimum eligibility for appointment as Lineman by direct recruitment was Matric with ITI in Electrician/Wireman trade or Matriculation with apprentice training of Lineman having passed the All India Trade Test. Undisputedly, petitioner was Matriculate having ITI Certificate in Electrician. Therefore, he was fulfilling the eligibility criteria for recruitment to the post of Lineman by direct recruitment. However, he was serving as Assistant Lineman like others.

3. In view of proposal of the Board to fill up the posts of direct quota through the officials already working with the Board, in relaxation of R&P Rules i.e. 25% by direct recruitment, case of the petitioner was considered and on screening he was found eligible in terms of eligibility criteria prescribed for appointment to the direct recruitment and accordingly vide memorandum dated 27.1.2005, appointment was offered to the petitioner to the post of SSA Lineman.

4. It is claim of the petitioner that on appointment as Lineman he was entitled for benefit of FR 22 (I) (a) (1) for fixation of his pay. For non-grant of such benefit, he had filed Original Application No. 3286 of 2015, which was dismissed by erstwhile H.P. State Administrative Tribunal vide order dated 16.11.2017 only on the ground that FR 22 (I) (a) (1) is applicable to promotional cases only and not to the appointments made against direct recruitment quota.

5. Relevant portion of FR 22(I)(a)(1) reads as under:-

"F.R. 22.(I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-

(a) (1) Where a government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or [rupees one hundred only], whichever is more.

[Save in cases of appointment on deputation to an ex cadre post, or to a post on ad hoc basis or on direct recruitment basis], the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/ promotion, to be exercised within one month from the date of such regular appointment.

Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on

regular basis by an amount equal to the last increment in the time-scale of the lower post or rupees one hundred, whichever is more."

6. Bare reading of FR 22 (I) (a) (1) depicts that it is available on promotion as well as on appointment in a substantive, temporary or officiating capacity and in case of direct recruitment, Government servant has the option, to be exercised within one month from date of promotion or appointment as the case may be, to have the pay fixed under this Rule from the date of such promotion or appointment, therefore, on the face of record, there is error apparent on record, as it has wrongly been held by the Tribunal that F.R. 22(I) (a) (1) is applicable only to the promotional cases and not to the appointment made against direct recruitment quota as petitioner has not been appointed from open market but is a in-service candidate appointed against quota reserved for direct recruitment, but in relaxation of source of recruitment.

6. In view of above, present Review Petition is allowed and order passed by erstwhile H.P. State Administrative Tribunal is set aside and Original Application No. 3286 of 2015 is ordered to be restored to its original position. Registry is directed to assign it fresh number as CWPOA and list the same before appropriate Bench.

Petition stands allowed and disposed of.

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

Between:-

1. THE LAND ACQUISITION COLLECTOR, HPSEB, HIMFED BHAWAN,
   BELOW B.C.S.
   NEW SHIMLA – 171009 (H.P.)
2. THE HIMACHAL PRADESH POWER CORPORATION LIMITED
   (ERSTWHILE PABBER VALLEY CORPORATION LIMITED)

HIMFED BHAWAN, BELOW B.C.S.
NEW SHIMLA – 171009 (H.P.)
THROUGH ITS MANAGING DIRECTOR

.....APPELLANTS

(BY SH. VIVEK NEGI, ADVOCATE)

AND

1. LATA
   RESIDENT OF VILLAGE MATASA,
   TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

2. DURGU (SINCE DECEASED THROUGH LEGAL REPRESENTATIVES :-
   a) GANGA DASSI
      W/O LATE SH.DURGU
   b) CHAMAN LAL
      S/O LATE SH.DURGU
   c) ASHOK KUMAR
      S/O LATE SH.DURGU
   d) BABLI DEVI
      D/O LATE SH. DURGU
   e) SURESH KUMAR
      S/O LATE SH. DURGU

   ALL RESIDENTS OF VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA (H.P.)

3. ATRU
   S/O SH. MINSI, S/O MANIA,
   R/O VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA (H.P.)

4. KANKU (SINCE DECEASED)

THROUGH LEGAL
REPRESENTATIVES:-
A) JEBKU ALIAS JAI SINGH
B) MURKI LAL
BOTH SONS OF KANKU ALIAS KONK
RESIDENTS OF VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA (H.P.)
C) KANA SINGH
S/O SH. TAMCHU,
R/O VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA (H.P.)

5. KANA SINGH
S/O SH. TAMCHU,
R/O VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA (H.P.)

6. SUNDLA
D/O MINSI

7. PHETI (SINCE DECEASED)
THROUGH LEGAL
REPRESENTATIVES:-

a) SUNDLA
D/O LATE SH. MINSI RAM AND
W/O SH. MADHU RAM,
R/O VILLAGE BANTARI, TEHSIL JUBBAL,
DISTRICT SHIMLA, (H.P.)
b) PYAR PATTI
W/O LATE SH. LAGAN CHERYA,
R/O VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA, (H.P.)
c) KANA SINGH

S/O LATE SH. LAGAN CHERYA,
R/O VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA, (H.P.)

d) SULAKSHNA DEVI,
D/O LATE SH. LAGAN CHERYA,
R/O VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA, (H.P.)

e) NAINA DEVI
D/O LATE SH. LAGAN CHERYA,
R/O VILLAGE GAWANA, TEHSIL ROHRU, DISTRICT SHIMLA, (H.P.)

8. BELU
S/O MANIA (SINCE DECEASED) ON 25.09.2006 THROUGH LEGAL REPRESENTATIVES

a) KISHORI LAL- SON
b) KUMB DASS- SON
c) USHA DEVI-DAUGHTER-IN-LAW
d) CHAMPA DEVI- DAUGHTER

9. SUMNU
D/O MANIA
(SINCE DECEASED ON 3.7.1999 THROUGH ITS LEGAL REPRESENTATIVES)

a) GAYANU MAL
S/O SMT.SUMNU,
R/O VILLAGE MANDARLI, KOTRU,
P.O. KARASA, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

b) SMT. SITLA
D/O SMT. SUMNU,
W/O SH. BRESTU,

R/O VILLAGE KOTRU, P.O. KARASA, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

c) VIJAY KUMAR
GRANDSON OF SMT. SUMNU,
S/O LATE SH.DEVKI NAND.

d) YASHWANT SINGH
GRANDSON OF SMT.SUMNU,
S/O LATE SH.DEVKI HAND,

BOTH R/O VILLAGE MANDARLI, KOTRU, P.O. KARASA, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

e) SMT.SANDHIRA
GRAND DAUGHTER OF SMT. SUMNU,
W/O SH.RAJESH,
HOUSE NO.175, DHARASALI BAG MAUI MAJORA, CHANDIGARH.

f) SMT.BANITA
GRAND DAUGHTER OF SMT.SUMNU,
W/O SH.CHOTU RAM,
VILLAGE HAWANICOL, P.O. KANDHAR, TEHSIL ARKI, DISTRICT SOLAN, H.P.

g) SMT. SHANTA DEVI
DAUGHTER IN LAW OF SMT.SUMNU,
W/O LATE SH. DEVKI NAND,
R/O VILLAGE MANDARLI KOTRU, P.O. KARASA, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

h) SMT. SANTOSH
GRAND DAUGHTER OF SMT.SUMNU,

W/O SH.BELI RAM,
VILLAGE & P.O. JUBBAL,
DISTRICT SHIMLA, H.P.

10. MADHU RAM (SINCE DECEASED ON 2.9.2012) THROUGH LEGAL REPRESENTATIVES:-

a) RAVINDER
S/O SH.MADHU RAM
RESIDENT OF VILLAGE BANTARI (ANAND PARVAT) P.O. MANDHOL, TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

b) SARAN
S/O SH.MADHU RAM
RESIDENT OF VILLAGE BANTARI (ANAND PARVAT) P.O. MANDHOL, TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

c) BABLU
S/O SH.MADHU RAM
RESIDENT OF VILLAGE BANTARI (ANAND PARVAT) P.O. MANDHOL, TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

d) SMT.SUNDLA
WIDOW OF SH.MADHU RAM
RESIDENT OF VILLAGE BANTARI (ANAND PARVAT) P.O. MANDHOL, TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

e) SMT.SUSHMA
DAUGHTER OF SH.MADHU RAM,
WIFE OF SH.LAIQ RAM,
RESIDENT OF SHARKOLI, P.O. KALOTI, TEHSIL CHIRGAON,

SHIMLA, H.P.

11. MAHINDER SINGH
S/O SH. THARU
12. THEGU
D/O SH. THARU
13. GUDDI
D/O SH. THARU
14. FALRI
D/O SH. THARU
15. PADI
D/O SH. THARU

ALL RESIDENTS OF VILLAGE MATASA, TEHSIL JUBBAL, DISTRICT SHIMLA, (H.P.) ....RESPONDENTS

(BY SH.ROMESH VERMA, ADVOCATE)

16. THE H.P. STATE ELECTRICITY BOARD,
THROUGH ITS SECRETARY
SHIMLA-3, HP. ....PROFORMA RESPONDENT

(NONE)

REGULAR FIRST APPEAL
NO.455 OF 2019
Decided on:3.12.2021

Land Acquisition Act, 1894 – RFA preferred by appellants under section 54 of Land Acquisition Act, 1894 stands decided on 28.12.2019 determining the market value of land acquired by the appellants at the rate of 2700/- per centiare regarding which some of co-owners preferred land reference petition under section 54 of the Act which was decided - land owners filed applications seeking directions to the appellants to deposit deficit amount of compensation and for release of amount of compensation - Held -

CMP number 8378 of 2020 is allowed as a result of which the appellants are directed to deposit amount of compensation for the entire land acquired along with all consequential benefits so that each and every co-sharer have amount of compensation as per his entitlement on equal footings - CMP number 9238 of 2020 filed for placing on record rough calculations so appellants are direct to calculate the amount of compensation at the rate of 2700/- per centiare, in terms of final judgment dated 28.12.2019, passed in RFA number 455 of 2019 and deposit the amount of compensation in the Registry – In CMP number 8379 of 2020 the share of each and every owner has not mentioned so the application dismissed with liberty to file fresh application for release of amount – In CMP number 10478 of 2020 filed by the appellants for releasing the amount which according to them has become excess after passing of judgment dated 28.12.2019 in RFA number 455 of 2019 and the release of amount has been made on the basis of calculations made by excluding co-owners to which every co-owner held to be entitled for equal amount of compensation irrespective of the fact as to whether he has preferred reference petition or application under section 28A of the Act or not, therefore, appellants have to deposit additional amount for meeting liability to pay compensation to all co-sharers instead of getting refund, hence, the application dismissed - Applications disposed of. (Paras 13, 14, 15 & 16)

Cases referred:

A. Viswanatha Pillai and others vs. Special Tahsildar for Land Acquisition No.IV and others, AIR 1991 SC 1966;

Dinesh Kumar & Ors. Vs. State of Himachal Pradesh & Anr., AIR 2012 Himachal Pradesh 68;

Jalandhar Improvement Trust vs. State of Punjab and others, AIR 2003 SC 620;

Lesru Ram's case supra, 2018 (4) Him. L.R. (HC) 2336;

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

O R D E R

CMP Nos.8378, 8379, 9238 and 10478 of 2020

Main appeal bearing RFA No.455 of 2019, titled as *LAC, HPSEB and another vs. Lata and others,* preferred by the appellants under Section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act'), stands decided finally on 28.12.2019 determining the market value of the land acquired by the appellants @ `2700/- per centiare.

2. Undisputedly, being aggrieved by and dissatisfied with value of land determined by Land Acquisition Collector, in present case, some of the co-owners had preferred Land Reference Petition No.45-R/4 of 2008, titled as *Lata & others vs. H.P. State Electricity Board and others,* under Section 18 of the Act, which was decided by the Reference Court on 16.07.2016 and appeal, under Section 54 of the Act, arising thereto, preferred by beneficiary project-proponent, being RFA No.455 of 2019 has been decided determining value of land finally, and the judgment passed therein has been accepted by the appellants/project proponent.

3. After disposal of main appeal, land owners have filed an application being CMP No.8378 of 2020 seeking direction to the appellants to deposit deficit amount of compensation, as according to them, appellants have not deposited entire amount of compensation for the land acquired in present case.

4. An application being CMP No.8379 of 2020 has also been filed by the landowners for release of amount of compensation in their favour on the ground that all of them are co-owners of the land in reference in present case.

5. In aforesaid applications those co-owners are also applicants who had neither preferred Reference Petitions under Section 18 of the Act nor a petition/application under Section 28-A of the Act.

6. The aforesaid applications have been contested by the appellants and prayer seeking direction to deposit deficit amount and also to release

amount in favour of those landowners also, who had not preferred Reference Petition under Section 18 of the Act, has been opposed, on the ground that the respondents-landowners, who were petitioners before the Reference Court, only are entitled to the compensation qua their respective share to the extent of 53/128 share out of total land measuring 2605 centiare, inasmuch as they are only entitled to the compensation with respect to 1078.63 centiare and further that those, who had not preferred Reference Petition, have no competence to maintain the application for release of amount of compensation for their shares in the land in question.

7. Learned counsel for the landowners referring judgments pronounced by the Supreme Court in ***A. Viswanatha Pillai and others vs. Special Tahsildar for Land Acquisition No.IV and others, AIR 1991 SC 1966; Jalandhar Improvement Trust vs. State of Punjab and others, AIR 2003 SC 620***, and judgments passed by Single Benches of this Court in ***Dinesh Kumar & Ors. Vs. State of Himachal Pradesh & Anr., AIR 2012 Himachal Pradesh 68;*** and ***Lesru Ram (deceased) through LR's Kalu Devi and others vs. Collector Land Acquisition NHPC and another,*** **2018 (4) Him. L.R. (HC) 2336,** has contended that every co-owner, irrespective of the fact whether he has preferred Land Reference Petition or not, is entitled for compensation of the acquired land equal to the other co-owners of the land.

8. The Supreme Court in ***A. Viswanatha Pillai's case,*** has held as under:-

> "2. The sole question for decision is whether in a reference sought for by one of the co-owners whether the other co-owners, who did not expressly seek reference are entitled to enhanced compensation pro rata as per their shares. It is not in dispute that under the partition deed, the four brothers as coparceners kept in common the acquired property and Venkatachalam was in management

thereof and each are entitled to 1/4 share in the ancient Anicut and the irrigation system. ... ...It is true that Viswanathan and Pasupathy made such request in respect of two awards and Sabhapathy did not make any request for reference against any of the awards. But what would be the consequence in laws is the question. It is surprising that the State having acquired the property of a citizen would take technical objections regarding the entitlement of the claim. The State certainly is right and entitled to resist claim for enhancement and lead evidence in rebuttal to prove the prevailing price as on the date of notification and ask the court to determine the correct market value of the lands acquired compulsorily under the Act. But as regards the persons entitled to receive compensation are concerned it has no role to play. ... ...It is settled law that one of the co-owners can file a suit and recover the property against strangers and the decree would enure to all the co-owners. It is equally settled law that no co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property or coparcenary under Hindu Law by all the coparceners. In Kanta Goel vs. B.P. Pathak, (1977) 3 SCR 412 : (AIR 1977 SC 1599), this Court upheld an application by one of the co-owners for eviction of a tenant for personal occupation of the co-owners as being maintainable. The same view was reiterated in Sri Ram Pasricha v. Jagannath, (1977) 1 SCR 395 : (AIR 1976 SC 2335) and (1989) 1 SCR 67 : (AIR

1989 SC 758). A co-owner is as much an owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner's property was not its own. He owns several parts of the composite property alongwith others and it cannot be said that he is only a part owner or a fractional owner in the property. That position will undergo a change only when partition takes place and division was effected by metes and bounds. Therefore, a co-owner of the property is an owner of the property acquired but entitled to receive compensation pro rata. The State would plead no waiver nor omission by other co-owners to seek reference nor disentitle them to an award to the extent of their legal entitlement when in law they are entitled to."

9. In ***Jallandhar Improvement Trust's case,*** the Supreme Court, referring ***Viswanatha Pillai's case,*** has held as under:-

"5. Having regard to the view we propose to take and the manner of disposal intended to be given, it is unnecessary for us to even advert to the relevance or applicability of Section 28-A of the Act to the case of the nature before us. The 4th respondent indisputably is a co-owner along with her children who were added as petitioners 2 to 5 to the award dated 5-2-1986, in which case, even on the first principles of law one co-owner is entitled to have the benefit of the enhanced compensation given in respect of the other co-owners in a reference made at his instance in respect of the land acquired, which belonged to all of them, jointly. So far as the fact that in

> this case the 4th respondent's application for reference under Section 18 was rejected by the Tribunal ultimately on the ground that the reference was made on a belated application, does not make any difference and, is no reason, in our view, to differentiate the claims of such co-owners whose claims came to be really sustained and that of the 4th respondent, for differential treatment. We are fortified to some extent in the view expressed above, by the principles laid down by this Court in the decision reported in (AIR 1991 Supreme Court P. 1966), A. Vishwanth Pillai & Ors. V. Special Tehsildar for Land Acquisition."

10. In similar situation, in ***Dinesh Kumar's case,*** an application filed by co-owner under Section 146 CPC, who had not filed Reference Petition or application under Section 28-A of the Act, for grant of compensation to the extent of their shares by enforcing the award passed in favour of other co-owners was dismissed by learned District Judge and the dismissal of the application was assailed in this High Court. This Court, after taking into consideration judgments passed by the Supreme Court in ***A.Viswanatha Pillai's*** and ***Jalandhar Improvement Trust's cases***, has set aside the order of dismissal passed by the District Judge by holding that co-owners were entitled for enhanced pro rata compensation alongwith interest and other statutory benefits such as solatium etc. under the Act, according to their share in the acquired land, by observing as under:-

> "9. Thus, it is more than clear that even a co-sharer who has not sought reference to the court is entitled for enhanced compensation pro rata in accordance with his share in the acquired land.
>
> … … … …

> 11. Thus, it is manifest that the claim for enhanced compensation by a co-owner at par with other co-owners in whose favour an award has been passed is based on his own right as a co-owner irrespective of any claim for re-determination of the amount of compensation on the basis of award of the court under Section 28-A of the Act."

11. Similar view has been taken by another Coordinate Bench of this Court in ***Lesru Ram's case supra, 2018 (4) Him. L.R. (HC) 2336.***

12. In the light of aforesaid settled exposition of law, plea of the appellants that they are liable to pay enhanced compensation with respect to share of only those landowners who had preferred Reference Petitions and other co-owners of the same land are not entitled for enhanced compensation, is not tenable and, thus, rejected and all co-owners, irrespective of fact that they have neither preferred Reference Petitions nor filed application under Section 28-A of the Act, are entitled for enhanced pro rata compensation alongwith all statutory benefits like other co-owners who had preferred Reference Petitions or have been awarded compensation under Section 28-A of the Act, according to their right in the acquired property on the basis of their share.

13. Therefore, CMP No.8378 of 2020 is allowed. Appellants are directed to deposit the amount of compensation for the entire land acquired, in reference in present case alongwith all consequential statutory benefits in the Registry of this Court within eight weeks from today, so that each and every co-owner can have amount of compensation as per his entitlement on equal footings like other co-owners.

14. Application being CMP No.9238 of 2020 has been filed for placing on record rough calculations. In view of order passed hereinabove, fresh calculations shall be required. Therefore, appellants are directed to calculate

the amount of compensation @ ₹2700/- per centiare, in terms of final judgment dated 28.12.2019, passed in RFA No.455 of 2019 and deposit the amount of compensation in the Registry of this Court in aforesaid terms. Therefore, this application has become infructuous.

15. In CMP No.8379 of 2020, share of each and every co-owner has not been stated, therefore, this application is dismissed with liberty to respondents-landowners to file fresh application for release of amount with specification of share of each and every co-owners entitled for getting compensation in present case.

16. Application being CMP No.10478 of 2020 has been filed by the appellants for releasing the amount which according to them, has become excess after passing of judgment dated 28.12.2019 in RFA No.455 of 2019. Prayer for release of amount has been made on the basis of calculations made by excluding co-owners who had not filed Reference Petitions. As, now, it has been clarified and held that every co-owner is entitled for equal amount of compensation irrespective of fact as to whether he has preferred Reference Petition or application under Section 28-A of the Act or not, therefore, there may be situation that instead of getting refund, appellants have to deposit additional amount for meeting their liability to pay compensation to all co-owners in present case. Therefore, this application is also dismissed, with liberty to file fresh, if occasion arises to do so.

17. All these applications are disposed of in aforesaid terms.

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

Between:

SMT. KIRAN,
W/O LATE SH. RAKESH KUMAR,
CLERK M.N.T. DIVISION,
HPSEB LTD, DIVISION-1,

NEAR RAILWAY STATION, SOLAN,
H.P., PRESENTLY RESIDING AT BY PASS
KAUTHER, SOLAN, P.O.CHAMBA GHATT,
DISTRIC SOLAN, H.P.

....APPELLANT

(BY MS. MEERA DEVI AND MS.
ANITA KANWAR, ADVOCATES).

AND

M/S VERMA TRADING COMPANY,
NEAR GURUDWARA, SAPROON, SOLAN,
THROUGH ITS PROP. SH. RAMESH VERMA.

....RESPONDENT

(BY. SH. SUDHIR THAKUR, SENIOR
ADVOCATE WITH MR.
KARUN NEGI, ADVOCATE).

REGULAR SECOND APPEAL
No.19 of 2020
Decided on:20.10.2021

Civil Procedure Code, 1908 – Section 100 – Regular Second Appeal -- Concurrent findings -- Appellant contended that the provisions of Order 7 Rule 17 CPC have not been complied with so the judgment passed by Ld. Trial Court, whereby the suit filed by the plaintiff has been decreed for Rupees 72,385/- with interest is not proper and the subsequent judgment passed by Ld. First Appellate Court in Appeal whereby judgment of Ld. Trial Court was upheld is also not proper – Held - Appellant contended that provisions of Order 7 Rule 17 not complied with, but bill, when exhibited and the copy of ledger when produced not disputed by him — Plaintiff successfully proved by bill and ledger entry that he sold Steel / Sariya worth Rupees 72,385/- in favour of the defendant on credit basis for which payment has not been received by the plaintiff firm -- Under Section 100 CPC High Court cannot upset concurrent findings of Ld. Courts below unless same prove to be perverse and in this case the judgments of the Ld. Courts below are based

upon proper appreciation of evidence -- Appeal dismissed. (Paras 10, 11 and 14)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264;

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

J U D G M E N T

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, lays challenge to judgment and decree dated 30.10.2019, passed by learned Additional District Judge-I, Solan, District Solan, Himachal Pradesh in Civil Appeal No.5-S/13 of 2019, affirming the judgment and decree dated 27.12.2018, passed by learned Civil Judge(Junior Division) Court No.2, Solan, District Solan, H.P., in Civil Suit No. 153/1 of 2016, titled as ***M/s Verma Trading Company versus Kiran,*** whereby suit having been filed by the respondent ***(hereinafter referred to as the plaintiff)*** for recovery of Rs. 72,385/- alongwith future interest at the rate of 18% per annum, came to be decreed.

2. Precisely, the facts of the case as emerge from the record are that the plaintiff filed suit for recovery in the Court of learned Civil Judge, Court No.2, Solan, District Solan, H.P., against the appellant ***(hereinafter referred to as the defendant),*** averring therein that the plaintiff being a firm is dealing in the business of trading building material under the name and style of M/s Verma Trading Company, near Gurudwara Saproon, Solan sold Steel/Saria worth Rs. 72,385/- on credit basis to the defendant through bill No.1455, dated 24.08.2013 Ex.PW1/A. As per books maintained by the plaintiff a sum of Rs. 72, 385/- is still outstanding in the name of the defendant. Plaintiff repeatedly requested the defendant to pay the outstanding amount, but since she did not accede to the request of the plaintiff, plaintiff was compelled to serve a legal notice, dated 30.5.2016 upon the defendant.

Notice was duly sent through registered post, but defendant despite having received notice ignored request of the plaintiff on one pretext of other and as such, it was compelled to institute the suit for recovery, as detailed hereinabove.

3. Defendant by way of written statement refuted the aforesaid claim of the plaintiff as set up in the plaint and denied that the plaintiff firm is dealing in the business of building materials under the name and style of M/s Verma Trading Company. Defendant also denied that she being customer of the plaintiff purchased steel/Saria worth Rs. 72,385/- on credit basis through bill No.1455, dated 24.08.2013. Defendant also claimed that she did not purchase steel/Saria on credit basis and if there is any such type of bill in possession of plaintiff, it is false and forged. While denying the fact that the plaintiff firm supplied the items in accordance with bill and the entry of the sale duly made in the ledger account of the firm, defendant termed such entries in the ledger to be false, fake and forged. Defendant specifically denied that sum of Rs. 72, 385/- is outstanding for the period of 32 months.

4. Learned trial Court on the basis of the pleadings adduced on record by the respective parties framed following issues:-

1. Whether the plaintiff is entitled to recovery of Rs. 72,385/- alongwith interest as alleged? OPP.

2. Whether the suit is not maintainable in its present form? OPD.

3. Whether the plaintiff has no legal cause of action to maintain the present suit? OPD.

4. Whether the plaintiff is estopped by his own act, conduct and acquiescence? OPD.

5. Whether the plaintiff has not come to this Court with clean hands and suppressed the material facts from this Court? OPD.

6. Relief:-

5. Subsequently, on the basis of the pleadings as well as evidence adduced on record by the respective parties, learned trial Court vide judgment dated 27.12.2018, decreed the suit of the plaintiff for a sum of Rs. 72, 385/- against the defendant alongwith pendent lite and future interest at the rate of 6% per annum till its realization. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, defendant filed an appeal in the Court of learned Additional District Judge-I, Solan, District Solan, H.P., which also came to be dismissed vide judgment and decree dated 30.10.2019. In the aforesaid background, defendant has approached this Court in the instant appeal, praying therein to dismiss the suit of the plaintiff after setting aside the judgments and decrees impugned in the instant appeal passed by learned Courts below.

6. Though, today matter was ordered to be listed for admission, but during the proceedings of the case learned Senior counsel representing the plaintiff-respondent vehemently argued that no question of law muchless substantial arises in the instant proceedings, enabling this Court to admit the instant Regular Second Appeal and as such, this Court heard the matter finally at the admission stage with the consent of learned counsel for the parties.

7. Ms. Meera Devi, learned counsel representing the defendant-appellant vehemently argued that since entire suit of the plaintiff was based upon the entries made in the ledger, learned courts below ought not have entertained the suit of the plaintiff without there being production of account books. While referring to provisions of Order 7 Rule 17 CPC, Ms. Meera vehemently argued that otherwise also suit for recovery based upon entries in

the account books could not be decreed without there being production of account books by the plaintiff. She further argued that since there is total non-compliance of provisions of 7 Rule 17 CPC, judgments and decrees passed by learned courts below are not sustainable in the eyes of law. Since both the courts below have totally ignored the provisions of Order 7 Rule 17 CPC, which is mandatory and in the absence of same suit could not be entertained/decreed by the courts below as such, substantial question of law arises for consideration of this Court.

8. Learned Senior Counsel representing the plaintiff-respondent vehemently argued that once factum with regard to purchase of the steel/Saria has been duly admitted by the defendant in her cross-examination and she has been not able to dispute the bill adduced on record by the plaintiff qua purchase made by her, non production, if any, of account books could not be made basis for dismissing the suit of the plaintiff by the courts below. While referring to the record, learned Senior Counsel representing the plaintiff-respondent further argued that plaintiff filed suit against the defendant on the basis of bill Ex.PW1/A and ledger entry Ex.PW1/B. Learned trial Court at the time of evidence of the plaintiff allowed the plaintiff to produce bill Ex.PW1/A and ledger entry Ex.PW1/B and as such, documents were produced by PW-1, Sh. Ramesh Verma, proprietor of M/s Verma Trading Company, but at no point of time objection, if any, ever came to be raised on behalf of the defendant qua production and exhibition of aforesaid documents and as such, at this stage defendant cannot be allowed to raise the plea that there is no compliance of provision contained in Order 7 Rule 17 CPC.

9. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that vide bill Ex.PW1/A Steel/Saria came to be sold by the plaintiff to the defendant for a sum of Rs.72,385/- on credit basis. Learned counsel representing the

appellant-defendant while referring to aforesaid documents vehemently argued that bare perusal of aforesaid documents suggests that the plaintiff firstly ticked the column of cash, but subsequently cut the same and ticked column of credit. However, having carefully perused the aforesaid document, this Court finds that plaintiff has clearly cut the column of cash and ticked the column of credit, meaning thereby Saria/Steel was sold to defendant on credit basis.

10. Interestingly, in the case at hand though defendant has claimed that the provisions of Order 7 Rule 17 CPC have not been complied with but existence of bill Ex.PW1/A has been not disputed. Defendant in her cross-examination admitted that she purchased Steel/Saria from the plaintiff vide bill Ex.PW1/A. There is no dispute with regard to purchase of Steel/Saria from the plaintiff firm, but only dispute is with regard to payment. As per defendant she made payment in cash, whereas as per the plaintiff Steel/Saria was sold on credit basis to the defendant. In her cross-examination, defendant made altogether new plea by stating that she made payment in cash, which is otherwise totally contrary to her pleadings. In her pleadings, she nowhere stated that sum of Rs. 72,385/- was paid by cash. Since, it is specific case of the defendant that she made payment in cash, onus was upon her to prove such transaction. However, in the instant case there is no evidence, worth credence, available on record suggestive of the fact that sum of Rs. 72,385/- ever came to be paid to the plaintiff firm in cash by the defendant. Defendant in her cross-examination categorically admitted that she cannot produce any evidence to show cash payment in respect of the bill amount.

11. To the contrary, plaintiff firm successfully proved on record by placing on record bill Ex.PW1/A and ledger entry Ex.PW1/B that it had sold Steel/Saria worth Rs. 72,385/- to the defendant on credit basis and such amount is still outstanding in the ledger Ex.PW1/B. There is yet another

aspect of the matter, that plaintiff firm issued legal notice Ex.PW1/D calling upon the defendant to make the payment but she after having received the legal notice never bothered to reply the same. If nothing was payable by the defendant, it is not understood that what prevented defendant from replying the legal notice Ex.PW1/D. In her cross-examination, defendant admitted that she received legal notice and she also admitted that she did not reply the legal notice. True, it is that as per provisions contained in Order 7 Rule 17 CPC, a documents on which plaintiff sues, if is an entry in the shop book or other account in his possession or power, he/she shall produce the book or account at the time of filing of the plaint, together with a copy of the entry on which he relies. But, in the case at hand, though plaintiff not produced the accounts book at the time of filing of the plaint, but during trial he besides producing bill Ex.PW1A qua the sale made in favour of the defendant also produce ledger entry Ex.PW1/B, which at no point of time ever came to be disputed by the defendant. Record of the court below clearly reveals that learned trial court allowed the plaintiff to produce the bill Ex.PW1/A and ledger entry Ex.PW1/B at the time of examination of PW-1, Sh. Ramesh Verma, proprietor M/s Verma Trading Company, but at no point of time objection, if any, qua the exhibition of aforesaid documents ever came to be raised on behalf of the defendant. Moreover, once there is no dispute with regard to issuance of bill Ex.PW1/A qua the sale made in favour of the defendant by plaintiff, non-production of account books otherwise has lost its relevance in the instant case. Once defendant herself admitted the factum with regard to purchase of Steel/Saria and took the specific stand that she had made payment in cash, onus was upon her to prove the mode and source of the payment, especially when such fact was seriously disputed by the defendant by placing heavy reliance on ledger entry Ex.PW1/B, wherein sum of Rs.72,385/- was shown to be outstanding against the defendant.

12. Having perused the material available on record, this Court is fully satisfied and convinced that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. No question of law muchless substantial arises in the instant case for adjudication. Besides above, this Court sees no reason to interfere in the concurrent finding of facts and law recorded by the court below, especially when learned counsel representing the appellant has been not able to point out any perversity in the findings recorded by the Court below.

13. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, it has been held as under:

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***
>
> ***(p.269)***

14. Aforesaid exposition of law clearly suggests that High Court, while excising power under Section 100 CPC, cannot upset concurrent findings of fact unless the same are shown to be perverse. In the case at hand, this Court while examining the correctness and genuineness of submissions having been made by the parties, has carefully perused evidence led on record by the respective parties, perusal whereof certainly suggests that the Courts below have appreciated the evidence in its right perspective and there is no perversity, as such, in the impugned judgments and decrees passed by both the Courts below. Moreover, learned counsel representing the appellants was unable to point out perversity, if any, in the impugned judgments and decrees passed by both the Courts below and as such, same do not call for any interference.

15. Consequently, in view of the detailed discussion made hereinabove, this Court sees no illegality and infirmity in the impugned judgments and decrees passed by courts below which otherwise appear to be based upon proper appreciation of evidence and as such, same are upheld. The present appeal fails and same is accordingly dismissed. Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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

Between:-

1. OM PARKASH
   AGE 86 YEARS,
   S/O SHRI BAJIRA,

2. RAJ KUMAR
   S/O SHRI ROSHAN LAL,
   S/O SH. BAJIRA,

3. RAVI KUMAR
   S/O SHRI ROSHAN LAL,

S/O SH. BAJIRA,

4. RAJESH GAUTAM
S/O SH.PREM DASS,
S/O SH. SUDAMA,

5. PRITAM DASS GUPTA
S/O SH. MAST RAM,
S/O RUALU,

6. ASHWANI KUMAR
S/O SH. BHAGTI,

7. PAWAN KUMAR
S/O SH. JAGAT RAM,
S/O SH. SARAN DASS,

8. ARVIND KUMAR
S/O SH. BRAHAM DASS,

9. VIPAN KUMAR
S/O SH. OM PRAKASH,

ALL RESIDENTS OF MANJHLA GOURA, ...APPELLANTS
WARD NO.10, MOLUZA BAJURI,
M.C. AREA, TEHSIL AND DISTRICT HAMIRPUR (H.P.)

(BY SH.BHUVNESH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH DISTRICT COLLECTOR,

HAMIRPUR (H.P.)

2. URBAN DEVELOPMENT
DEPARTMENT,
SHIMLA (H.P.), THROUGH ITS
DIRECTOR, SHIMLA, (H.P.)

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

3. MUNICIPAL COUNCIL
HAMIRPUR, (H.P.), THROUGH
ITS EXECUTIVE OFFICER,
HAMIRPUR (H.P.)

(BY SH.ANIL KUMAR GOD, ADVOCATE) ....RESPONDENTS/DEFENDANTS

4. SANJAY KUMAR
S/O LATE SHRI RAM PARSAD,
RESIDENT OF MANJHLA
GOURA, WARD NO.10, MOUZA
BAJURI, TEHSIL & DISTRICT
HAMIRPUR (H.P.)

(EX-PARTE VIDE ORDER DATED12.06.2019) ....PROFORMA RESPONDENT

5. SURJEET KUMAR GAUTAM
S/O SH. JAGAN NATH,

6. ARUN GAUTAM
S/O SH. JAGAN NATH,

7. SHRUTI PRAKASH,
S/O LATE SH. AMAR NATH,

8. RAJNISH KUMAR
S/O SH. JAGDISH KUMAR,

9. RAJIV GAUTAM
S/O SH. RAM KRISHAN SHARMA,

10. SUSHIL SHARMA ....APPLICANTS/PROPOSED RESPONDENTS
S/O SH. RAM KRISHAN SHARMA,
ALL RESIDENTS OF WARD NUMBER 10, GUARA (MIDDLE) HAMIRPUR, H.P.

(BY SH.HAMENDER SINGH CHANDEL, ADVOCATE, IN CMP NO.8676 OF 2021)

CIVIL MISC. PETITION
NO.8676 OF 2021 IN
REGULAR SECOND APPEAL
NO.222 OF 2019
Reserved on: 10.12.2021
Decided on : 18.12.2021

Civil Procedure Code, 1908 – Order 1 Rule 8-A -- Applicants being residents of Village Manjhala Goura sought permission to present their opinion by joining and taking part in the proceedings alleging that, they are having the shares and as such are interested persons in the proceedings -- Suit filed by the plaintiffs Appellants has been dismissed by the Ld. Trial Court as well as the Ld. Appellate Court on the ground of vestment of property with state of Himachal Pradesh under Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 -- Appellants alleged that Ld. Civil Court had no jurisdiction to entertain the suit as its jurisdiction has been barred -- Appellants challenged construction of public park on the ground that the land was not legally

vested in state of Himachal Pradesh – Held -- Rule 8-A has been inserted by the amendment of 1976, empowering the Court, to permit a person or body of persons interested in question of law in issue, in any suit to present his or its opinion before the court and to take part in proceedings in the suit when it is necessary in the public interest -- Respondents are not going to be prejudice in case the applicants are permitted to participate in the proceedings in view of provision contained in Order 1 Rule 8-A–CPC-- Application allowed. (Paras 5 & 7)

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

O R D E R

CMP No.8676 of 2021

Applicants herein are residents of Village Manjhala Goura. They are seeking permission to present their opinion by taking part in the proceedings in present case on the ground that being residents of Village Manjhala Goura, wherein suit property situates, in which they are having shares, they are interested persons. Further that suit filed by the plaintiffs (appellants in the appeal herein), has been dismissed by the trial Court as well as First Appellate Court, on the ground that for vestment of the property with the State of Himachal Pradesh for provisions of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 (hereinafter referred to as 'the Act'), the Civil Court has no jurisdiction to adjudicate the suit filed by the plaintiffs and now question of law, directly and substantially in issue in the suit/appeal, would be as to whether findings returned by the Civil Court that because of the provisions of the Act, jurisdiction of the Civil Court to entertain the suit has been barred or not. Being persons residing in the same village

having shares in the Shamlat land/suit land, vested in the State, they are interested in the question of law in issue, in present proceedings and, therefore, they are seeking permission to assist the Court by presenting their opinion on that question of law in the proceedings of the appeal as provided under Order 1 Rule 8A of the Code of Civil Procedure (in short 'CPC').

18. It is settled position that proceedings in the appeal are in continuation of the suit therefore, word "suit" referred in Rule 8A, also includes "appeal" preferred against the judgment and decree passed in the suit.

19. It has further been submitted on behalf of the applicants that State has proposed construction of Public Park on the suit land which will be serving the public interest at large, including applicants and other villagers, but the appellants are resisting the construction of Public Park thereon by raising an issue that the land was not legally vested in the State of Himachal Pradesh and having share in the suit land, applicants are very much interested in the question of law involved in the present case.

20. In response, appellants have reiterated their contention that suit land has illegally been vested in the State of Himachal Pradesh and it should not be used for construction of Park, but should be kept for common use of village and further that applicants seeking permission to take part in the proceedings for having very small almost negligible shares in the suit land and, therefore, they should not be permitted to implead as party at this appellate stage.

21. Rule 8A has been inserted by the Amendment Act of 1976, empowering the Court to permit a person or body of persons interested in question of law in issue in any suit to present his or its opinion before the Court and to take part in proceedings in the suit when it is necessary in the public interest. This amendment has been carried out on the basis of Law Commission's Fifty-fourth Report, wherein it was observed as under:-

> "The Code has, at present, no provision for permitting the joinder of an organization interested in the legal issues in a suit, i.e., an organization which though not concerned with the narrow question of fact arising between the parties has a view to offer on some broader issues.
>
> … … …
>
> Nevertheless, it would be worthwhile inserting a provision which could be pressed into service in suitable cases.
>
> … … …
>
> This will not be exactly the same as the practice of appointing an *amicus curiae,* because the organization concerned would have its own views to present, and its role would not be confined to assisting the Court, though its participation may help the Court in elucidation of some of the issues.
>
> … … …
>
> The provision permitting intervention by a person who has not been joined as party *eo nomine* is an exception to the general rule and 'not in harmony with the adversary system on which our procedure is based' and, hence, appropriate safeguards should be taken to prevent 'busybodies' from interfering with private disputes. In proper cases, however, such permission may be granted by the court, Law Commission's Fifty-forth Report."

22. Hon'ble Mr.Justice C.K. Thakker, former Chief Justice of this Court and former Judge of Supreme Court of India, in his Commentary on Code of Civil Procedure, Volume-3, has commented as under:

> "The power conferred on the court under Rule 8-A is discretionary; and a person or a body of persons interested in a question of law in the suit cannot claim the right to put forward his or its opinion on such question. The power has to be exercised by the court with utmost care, caution and circumspection only on fulfillment of requisite conditions.

For exercise of power under Rule 8-A, the following conditions must be fulfilled:-

(i) A person or body of persons must be interested in a question of law;

(ii) Such question must be directly and substantially in issue in the suit; and

(iii) It is in the public interest to allow intervention, by such person or body of persons."

23. Considering facts and circumstances of the present case, I find that no prejudice would be caused to the appellants in case applicants are permitted to participate in the proceedings in view of provision contained in Order 1 Rule 8-A CPC.

24. Therefore, this application is allowed and applicants are permitted to participate in the proceedings to present their opinion in the appeal.

Application is disposed of in aforesaid terms.

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

Between:

JASHWINDER SINGH @ RODHA S/O RAJ SINGH V.P.O. KANDO TEHSIL PAYAL, DISTRICT LUDHIYANA AGED ABOUT 35.

……..PETITIONER

(BY SHRI VINOD CHAUHAN, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

…….RESPONDENT

(BY SH. RAJINDER DOGRA, SR. ADDITIONAL

ADVOCATE GENERAL FOR THE RESPONDENT

/ STATE.

CRIMINAL MISCELLANEOUS PETITION (MAIN)

NO. 2310 OF 2021

RESERVED ON:-17.12.2021

DECIDED ON :- 24.12.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 15, 25 & 29- Recovery of 65.720 Kg. poppy husk- Commercial quantity- The petitioner to succeed in bail has to cross another legal barrier created by Section 37 of the Act by satisfying the Court that he is not likely to commit any offence while on bail- Nothing on record regarding impeccable antecedents of the petitioner- Bail petition dismissed.

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

O R D E R

Petitioner is accused in a case registered vide FIR No. 36 of 2021, dated 16.02.2021, registered at Police Station Aut, District Mandi, H.P., under Section 15, 25, 29 of ND & PS Act.

2. Petitioner has prayed for grant of bail under Section 439 of Cr.P.C on the ground that he has been falsely implicated. No recovery has been effected from him. Investigation has been completed and there is no legal evidence to connect the petitioner with alleged offence. He undertakes to abide by all the conditions as may be imposed for grant of his bail.

3. In response, respondent has opposed the bail application and has submitted the summary of facts and investigation carried out by way of status report. The investigation is already complete and the Challan stands filed which is pending adjudication before the learned Special Judge-II, Mandi. Charges have not yet been framed.

4. Perusal of status report reveals that on 16.02.2021, the Police officials of Police Station Aut, District Mandi, H.P. were on patrol duty. At about 3:00 AM, their vehicle was stopped by two labourers at the distance of about 300 meters from Aut towards Kullu. They were working at four lane construction site and had disclosed that they had noticed three persons alighting from of a car and running towards river side. A car was found parked nearby. The registration number of the car was noticed with the help of search light and it was also found that a gunny bag was lying on the rear seat of the car. Search was conducted for the persons who had left the car. At about 7:15 AM two persons, including the petitioner were apprehended at the bank of

river. They disclosed that the car belonged to Kulwant Singh. On search of the car, total five gunny bags were recovered containing 65.720 kg poppy husk. The petitioner along with his companion, named Bhola Singh @ Kiddu, were arrested. The third accused named Kulwant Singh is stated to be absconding. It is also mentioned in the status report that petitioner is already an accused in case registered vide FIR No. 51/2020, dated 12.06.2020 at Police Station Dohra, District Ludhiana, Punjab under Section 15 of NDPS Act.

5. I have heard learned counsel for the petitioner and also learned Additional Advocate General for the respondent/State and have also gone through the contents of the status report. The prayer for bail of the petitioner has been vehemently opposed by learned Senior Additional Advocate General representing the State.

6. Admittedly, petitioner was not identified by anyone to be the same person, who had abandoned the car and ran towards the river. Merely, because the petitioner was found on the banks of river in the morning hours, cannot be a credible circumstance to link him with the alleged offence. On pointed query to respondent, it has been stated that the car was found unlocked at the time Police had found the same parked on road at first instance. It being so, the recovery of contraband had been made by the police in absence of the petitioner. It is not the case of the respondent that it was the petitioner and his companion Bhola Singh @ Kiddu, who were found in possession of key of the vehicle to connect them with alleged offence. Petitioner is not the registered owner of the vehicle. Nothing has been produced on record by respondent to show any relationship of the petitioner with the registered owner of the car.

7. In the teeth of Section 37 of N.D.P.S. Act, accused can be released on bail in cases involving commercial quantity of contraband, if all three conditions prescribed in said Section viz. opportunity of opposing the bail to the prosecutor, recording of satisfaction by the Court to the effect that there are reasonable grounds for believing the accused not guilty of such offence and that

the accused was not likely to commit the offence during the period of bail. The bare language of Section 37 of the Act reveals that conditions thereof placing fetters on the right of appeal of an accused have to be read conjunctively and absence of any single condition thereof dis-entitle a person from relief of bail.Admittedly, the quantity of contraband involved is commercial. However, in view of the circumstances detailed here-in-above, *prima facie*, the petitioner cannot be said to be prima facie connected with the alleged offence. However, The petitioner to succeed in bail has to cross another legal barrier created by Section 37 of the Act by satisfying the Court that he is not likely to commit any offence while on bail. To satisfy the conscience of this Court as to aforesaid requirements of law, it was incumbent on the petitioner to have placed on record such material as to justify his impeccable antecedents. The petitioner has failed to satisfy this requirement and nothing has been produced on record to satisfy the Court as to the antecedents of the petitioner. There is not even a whisper to explain the presence of petitioner at the spot from where he was apprehended. On the other hand, the status report submitted by the respondent makes a mention about the involvement of petitioner in an earlier case under NDPS Act, as noticed above. This being so, the likelihood of petitioner committing another offence while on bail, cannot be ruled out.

8. In view of above discussion, the petitioner is held not entitled for bail and the petition is accordingly dismissed.

9 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 AJAY MOHAN GOEL, J.

Between:-

STATE OF HIMACHAL PRADESH

...APPELLANT

(BY SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S SUMESH RAJ, ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS AND MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL)

AND

1. KARAM CHAND, S/O SHRI KARTAR SINGH, R/O VILLAGE KHARTI, P.O. NANDROOL, TEHSIL AND DISTRICT KANGRA, H.P.

2. BEAS DEV, S/O SHRI BALAK RAM, R/O V.P.O. LOWER TIKKARI, TEHSIL & P.S. TISSA, DISTRICT CHAMBA, H.P.

...RESPONDENT

(SHRI B.L. SONI, ADVOCATE, FOR R-1
SHRI JAGAN NATH,ADVOCATE, FOR R-2)

CRIMINAL APPEAL
No.568 of 2019
Decided on:21.12.2021

Code of Criminal Procedure, 1973- Section 377- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Recovery of 150 gm charas- Sentenced to simple imprisonment for a period of two months and to pay a fine of Rs.12,000/- and in default simple imprisonment for a period of 20 days- Held- Ld. Special Judge-III, Kangra at Dharamshala, has exercised the discretion vested in it while imposing sentence upon the accused before it taking into consideration the totality of the matter along with the factum of the accused having pleaded guilty, this Court should respect the discretion so exercised by the Ld. Court below and not to interfere with the same- Appeal dismissed. (Para 4 & 5)

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 appeal filed under Section 377 of the Code of Criminal Procedure, the State has prayed for imposition of proportionate sentence upon the respondents/convicts by setting aside/modifying the judgment/order, dated 19.07.2019, passed by the Court of learned Special Judge-III, Kangra at Dharamshala, H.P. in Case CNR No. HPKA01-001857-2015, titled as *State Vs. Karam Chand and another*, vide which, the respondents/convicts were sentenced to undergo simple imprisonment for a period of two months and to pay a fine of Rs.12,000/- each and further in default of payment of fine, to undergo simple imprisonment for a period of 20 days.

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

Charas weighing 150 grams was recovered from the exclusive and conscious possession of accused Karam Chand, leading to the registration of FIR in issue, in which, the other convict was also arrayed as an accused, as he was the pillion rider of the motorcycle being driven by Karam Chand. The accused pleaded guilty and did not claim trial. In lieu of this, vide order dated 19.07.2019, the Court of learned Special Judge-III, Kangra at Dharamshala, H.P. passed the following order:-

> *"...Called after lunch:*
> *19.07.2019*
>
> *Present: Shri L.M. Sharma, Ld. P.P. for the State.*
> *Both accused with Sh. V.K. Prashar, Ld. Counsel.*

> *Heard on quantum of sentence. The convicts have stated that they are sole bread earners of their family and if they will be sentenced to jail, then, their families will receive untold story, which cannot be explained in words and they are making confession voluntarily, some leniency has to be shown to them. On the other hand, learned P.P. for the State has argued that the accused persons have committed a serious offence, which is against the society and no leniency has to be shown towards them.*
>
> *As per the perusal of the file, the accused persons have voluntarily made the confession. Accordingly, I am of the opinion that some leniency has to be shown to them, therefore, the accused persons are sentenced to undergo simple imprisonment for a period of two months each and to pay a fine of Rs.12,000/- each and in default of payment of fine, they will further undergo simple imprisonment for a periiod of 20 days. At this stage, fine amount of Rs.24,000 (12000 +12000) deposited by the convicts with the Reader of this Court. The Reader is directed to deposit the same in the Government Treasury under proper head. The period already undergone by the convicts in police/judicial custody, is set off under Section 428 of Cr. P.C. File after its due completion be consigned to the record room."*

It is this order, which is under challenge by way of this appeal.

3. I have heard learned Additional Advocate General as also learned counsel appearing for the respondents.

4. A perusal of order under challenge demonstrates that the sentence which was imposed by the learned Court below upon the accused before it, was in lieu of voluntary confession which was made by them before the learned Court below. It is in this background that the Court observed that some leniency has to be shown to the accused before it. This Court is of the considered view that as the Court of learned Special Judge-III, Kangra at

Dharamshala has exercised the discretion vested in it while imposing the sentence upon the accused before it taking into consideration the totality of the matter with which it was dealing with alongwith the factum of the accused having pleaded guilty, this Court should respect the discretion so exercised by the learned Court below and not interfere with the same, more so, keeping in view the fact that the *charas* which was recovered from the possession of the accused was 150 grams.

5. In view of the observations made hereinabove, as this Court does not find that the sentence imposed upon the accused by the learned Court below calls for any modification, the present proceedings are ordered to be closed by dismissing the appeal. The bail and surety bonds stand discharged.

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

Between:-

1. DILVARU DEVI, D/O SH. HIRA LAL, AGED 33 YEARS, RESIDENT OF VILLAGE PHAGWANA, P.O. CHAKURTHA, TEHSIL BANJAR, DISTRICT KULLU, H.P., PRESENTLY POSTED AS JUNIOR ENGINEER (CIVIL), JAL SHAKTI VIBHAG, CIRCLE KULLU, DISTRICT KULLU, H.P.

2. NEERAJ THAKUR, S/O SHRI SURINDER SINGH THAKUR, AGED 27 YEARS, RESIDENT OF VILLAGE GHALOTH, P.O. OKHRU (VIA DHAMI), TEHSIL ARKI, DISTRICT SOLAN, H.P., PRESENTLY POSTED AS JUNIOR ENGINEER (CIVIL), JAL SHAKTI VIBHAG, SECTION

JUBBAR HATTI, SUB DIVISION NO. 1, KASUMPTI, SHIMLA-9.

...PETITIONER

(BY SHRI JIYA LAL BHARDWAJ, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (JAL SHAKTI VIBHAG) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. THE ENGINEER-IN-CHIEF, JAL SHAKTI VIBHAG, JAL SHAKTI BHAWAN, TUTIKANDI, SHIMLA-5.

3. SHRI DEVINDER SINGH, S/O SHRI LALA RAM, PRESENTLY POSTED AS JUNIOR ENGINEER (CIVIL), JAL SHAKTI VIBHAG, THUNAG, TEHSIL THUNAG, DISTRICT MANDI, H.P.

4. SHRI MANOJ KUMAR SHARMA, S/O SH. MANOHAR LAL SHARMA, PRESENTLY POSTED AS JUNIOR ENGINEER (CIVIL), JAL SHAKTI DIVISION, SUNDER NAGAR, TEHSIL SUNDER NAGAR, DISTRICT MANDI, H.P.

5. SHRI RAKESH KUMAR, S/O SH. SURJEET SINGH, RESIDENT OF CHARARA, P.O. KANGOO, TEHSIL & DISTRICT HAMIRPUR, H.P. PRESENTLY POSTED AS JUNIOR ENGINEER (CIVIL), JAL SHAKTI

VIBHAG, DIVISION DEHRA, TEHSIL
DEHRA, DISTRICT KANGRA, H.P.

....RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, FOR R-1 & R-2.

SHRI NIMISH GUPTA, ADVOCATE, FOR R-3 TO R-5)

CIVIL WRIT PETITION
No. 4529 of 2020
RESERVED ON: 07.09.2021
DECIDED ON: 29.11.2021

Constitution of India, 1950- Article 226- **The H.P. Irrigation and Public Health, Assistant Engineer (Civil) Class-I (Gazetted) Technical Services R&P Rules, 2010**- writ of certiorari to quash the impugned order issued by the Law Department regarding promotion to the post Assistant Engineer (Civil)- Held- Contention of the petitioner that the private respondent are not eligible for being considered for promotion to the post of Assistant Engineer (Civil) is totally misconceived- The qualification which has been acquired by the petitioner while in service renders them eligible for promotion of the post of Assistant Engineer (Civil) and this is also the stand of the department concerned- No merits in petition. (Para 12)

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 writ petition, the petitioners have, *inter alia*, prayed for the following reliefs:-

"(i) That a writ in the nature of certiorari may kindly be issued to quash the impugned Annexure P-10, i.e.,

order dated 19.09.2020, issued by the Law Department, Government of Himachal Pradesh on the basis of which respondents No. 1 & 2 have included the names of respondents No. 3 to 5 for promotion/placements to the post of Assistant Engineer (Civil) under Rule 11(ii) and 11(iii) notified vide Annexure P-8 under 10% and 15% quota prescribed to Junior Engineers (Civil) who are having the qualification of B.E./B. Tech. (Civil) or AMIE degree.

(ii) That a writ in the nature of mandamus may kindly be issued restraining respondents No. 1 & 2 to make promotions/placements of respondents No. 3 to 5 for the post of Assistant Engineer (Civil), under Rule11(ii) and 11(iii) notified vide Annexure P-8 and justice be done."

2. The case of the petitioners is that petitioner No. 1 did her Bachelor of Technology in Civil Engineering in the year, 2012. She was appointed as Junior Engineer (Civil) on contract basis vide Office Order dated 05.10.2013 on the recommendations of the Himachal Pradesh Staff Selection Commission, Hamirpur, H.P. and her services were regularized as such vide Office Order dated 06.05.2017. Petitioner No. 2 did his Bachelor of Technology in Civil Engineering from Jaypee University of Information Technology, Vaknaghat, District Solan, H.P. in the year, 2014. He was appointed on contract basis as Junior Engineer (Civil) vide Office Order dated 01.11.2016 and regularized vide Office Order dated 28.04.2020.

3. Respondent No. 2 issued a provisional list of Junior Engineers (Civil) vide letter dated 18.11.2019, as it stood on 31.12.2018 and in terms thereof, the name of petitioner No. 1 figured at Sr. No. 775 and as the services of petitioner No. 2 were not regularized at that the relevant time, therefore, his name did not find mention in the said seniority list. Further, the case of the

petitioners is that the State framed the Recruitment and Promotion Rules for the post of Assistant Engineer (Civil), Class-1 (Gazetted) Technical Services in Irrigation and Public Health Department, which stood notified on 20.03.1997. In terms of these Rules, 30% of the posts were to be filled by way of direct recruitment and 70% by way of promotion from amongst Junior Engineers (Civil). From the 70% quota of promotion, 45% is meant for Junior Engineer (Civil), who completed seven years regular service or regular combined with continuous *ad hoc* in the grade and unqualified Junior Engineers (Civil) with fifteen years regular or regular combined with continuous *ad hoc*experience in the grade and 10% is meant for Junior Engineer (Civil), who acquired AMIE or its equivalent degree during service and 10% is reserved in favour of those Junior Engineers (Civil), who possess the Degree of Civil Engineering at the time of joining the services as Junior Engineer, having completed three years regular or regular combined with continuous *ad hoc* services. In addition, 5% posts were reserved for Draughtsman, who have the qualification of Matriculation and also possess two years diploma in Draughtsmanship and have put in ten years regular or regular combined with continuous *ad hoc* service in the grade. These Rules, which were framed in the year 1997, were amended thereafter in the year 1998 and 2005. According to the petitioners, as they are degree holders, they are concerned with their quota prescribed under Rule11(iii) of the Rules, as they stand amended from time to time.

4. Vide notification dated 5th June, 2020 (Annexure P-7), the earlier Recruitment and Promotion Rules were repealed and The Himachal Pradesh Irrigation & Public Health, Assistant Engineer (Civil) Class-I (Gazetted) Technical Services Recruitment and Promotion Rules, 2010 were brought into force. These Rules were also repealed vide notification dated 6th December, 2019 (Annexure P-8) and thereafter, The Himachal Pradesh, Department of Irrigation & Public Health, Assistant Engineer (Civil), Class-I (Gazetted) Recruitment and Promotion

Rules, 2019 have been brought into force. Rules 10 and 11 thereof, which are relevant for the purpose of adjudication of this petition, are quoted hereinbelow:-

> *"10. Method(s) of recruitment, whether by direct recruitment or by promotion/ Secondment/transfer and the percentage of post(s) to be filled in by various methods.- (i) 25% by direct recruitment on regular basis or by recruitment on contract basis, as the case may be.*
>
> *(ii) 75% by promotion.*
>
> *11. In case of recruitment by promotion/secondment/transfer, grade for which promotion/Secondment/transfer is to be made.- By Promotion amongst:-*
>
> *(i) Junior Engineer (Civil) with seven years' regular or regular combined with continuous ad hoc service rendered, if any, in the grade and unqualified Junior Engineer (Civil) with atleast 15 years' regular or regular combined with continuous ad hoc service rendered, if any, in the grade…….45%;*
>
> *(ii) Junior Engineer(Civil), who acquire BE/B.Tech. (Civil) or AMIE degree during service as Junior Engineer (Civil) with three years regular or regular combined with continuous adhoc service rendered, if any, in the grade after acquiring such qualification……..10%;*
>
> *(iii) Junior Engineer (Civil) who possess BE/B. Tech (Civil) or AMIE degree at the time of appointment as Junior Engineer (Civil) with three years' regular or regular combined with continuous adhoc service rendered, if any, in the grade……15%;*

(iv) Planning Officers who have passed Matriculation and possess two years' Diploma in Draughtsmanship from a recognized Institution and having three years' regular or regular combined with continuous adhoc service rendered, if any, as Circle Head Draughtsman and Planning Officer combined, out of which one year service rendered as Planning Officer must be essential……04%; and

(v) Planning Officer/Officer(s) of Draughtsman cadre who acquire BE/B/ Tech (Civil) or AMIE degree during service with three years' regular or regular combined with continuous adhoc service rendered, if any, in the grade after acquiring such qualification……..01%."

5. It is the case of the petitioners that the Department has now commenced the process of making promotions to the posts of Assistant Engineer in terms of the 2019 Rules. Respondents No. 3 to 5 were appointed as Junior Engineers (Civil) on the strength of diploma qualification possessed by them and they have acquired their degrees of AMICE(I)/degrees equivalent to Civil Engineering from the Institute of Civil Engineering India (ICE India), Carrier House, Binder Complex, Model Town, Ludhiana, Punjab, which degrees as per the petitioners cannot be equated with either B.E./B.Tech.(Civil) or AMIE, for the reason that there is no provision in the Rules, which provides for equating the degrees of AMICE(I) either with B.E./B. Tech. or AMIE. As per the petitioners, in terms of the Rules, which were in force prior to 2019, there was a provision of equating the degree with Civil Engineering at the time of appointment as Junior Engineer (Civil), but now the Rules in force envisage that only those Civil Engineers, who possess B.E./B. Tech. (Civil) or AMIE Degree at the time of appointment as Junior Engineer (Civil) with three years

regular or regular combined with continuous *ad hoc* service can be considered for promotion and degrees acquired by the private respondents cannot be considered for the purpose of promotion. On this count, the prayers have been made for issuance of directions to respondents No. 1 and 2, which already stand quoted hereinabove.

6. The petition is resisted by the Department on the ground that All India Council of Technical Education (AICTE) vide letter dated 14.01.2019 informed that the Council in its 52nd emergent meeting held on 03.08.2017, had recognized the courses conducted by the professional bodies/institutions, such as, Institution of Civil Engineers (India) for equivalence purposes, which were duly recognized by MHRD with permanent recognition up to 31.05.2013. It is further the stand of said respondents that the Institution of Engineers (India) at Kolkatta has certified that Associate Member of Institution of Engineers India (AMIE) is equivalent to B.E./B. Tech. and as per the Ministry of Human Resource Development (MHRD), Government of India, this AMIE qualification is considered equivalent to a degree in Engineering. The Institution of Civil Engineers (India) also conducts Associate Membership Examination and degrees and the degrees of AMICE obtained from Institution of Civil Engineers (India) are considered equivalent to AMIE degrees. It is further the stand of said respondents that once the degrees of AMICE (I) have been held equivalent to AMIE, therefore, as per the Recruitment and Promotion Rules, they are said to be AMIE for all intents and purposes and private respondents No. 3 to 5 are entitled for consideration under Clause (ii) of Rule 11 of the Recruitment and Promotion Rules for promotion to the post of Assistant Engineer. It is further the stand of the Department that petitioner No. 1 has been placed as Assistant Engineer(Civil) vide notification dated 16.01.2021 vide Annexure R-2, whereas, petitioner No. 2 does not fall in the zone of consideration at present and, therefore, he has not been placed as Assistant Engineer as of now. It is also the stand of the respondent-

Department that private respondents are entitled for consideration for placement/consideration for the post of Assistant Engineer (Civil) under Clause-(ii) of Rule-11 of the Recruitment and Promotion Rules for the post of Assistant Engineer (Civil).

7. The private respondents have also resisted the petition on the ground that as they are eligible for being considered for promotion to the post of Assistant Engineer (Civil) on the basis of certificates, which have been obtained by them from the recognized Institutes, therefore, the petition be dismissed.

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

9. The relevant Rules, which render the parties eligible for promotion to the post of Assistant Engineer (Civil), have already been quoted hereinabove. In terms thereof, the petitioners have a right of consideration for being promoted against the post of Assistant Engineer (Civil) upon completion of three years service as such, whereas, the private respondents have been treated as eligible candidates by the Department on the strength of the certificates obtained by them from the Institution of Civil Engineers (India). The challenge which has been laid by the petitioners to the qualifications of private respondents, is that as the qualification referred to in the 2019 Rules is BE/B.Tech. (Civil) or AMIE degree and the qualification possessed by the private respondents is AMICE(I) degree, therefore, the same cannot be treated as AMIE degree.

10. This Court is of the considered view that there is no merit in the said contention of the petitioners. The full form of AMIE degree is Associate Membership Examination Engineering degree and the full form of AMICE degree is Associate Membership Examination in Civil Engineering. Thus, the additional word, which is there in the degree of the private respondents connotes to the word ‘Civil’. This is the trade in which the private respondents

have done their AMIE degree from the concerned Institution and this is the trade, in which, they are appointed as Junior Engineers and have to be considered for promotion as Assistant Engineers. The above clearly demonstrates that the degree of AMICE, which has been obtained by the private respondents, having been obtained from the Institution of Civil Engineers (India), is given under the nomenclature of AMICE, full form of which is Associate Membership Examination in Civil Engineering. A perusal of the photo copies of the certificates of qualification of the private respondents which are on record, demonstrate that the Institution from which these certificates have been obtained by the private respondents, is duly recognized by the Government of India. In fact the Institution is a duly recognized Degree Level Institution. During the course of arguments, there was no serious dispute with regard to this aspect of the matter.

11. Another thing, which is pertinent to be mentioned is that whereas the petitioners were appointed as Junior Engineers initially on contract basis in the year 2012 and 2016, respectively, they were regularized as such vide orders dated 06.05.2017 and 28.04.2020. The private respondents, on the other hand, joined the services as Junior Engineers much before the petitioners. Respondent No. 3 joined the services of the respondent-Department as a Civil Engineer on 13.11.2009 on regular basis and passed AMICE in the year, 2012. Respondent No. 4 joined the Department as a Junior Engineer (Civil) on 29.05.2009, initially on contract basis. He completed his AMICE in November, 2012 and he was regularized in the month of March, 2015. Respondent No. 5 was appointed as a Junior Engineer (Civil) on 22.09.2012 and he passed his AMICE in the year, 2015. His services were regularized in the year, 2017. Besides this, this Court is of the considered view that the best entity to take a call as to whether the qualifications possessed by the private respondents were good enough to render them eligible for promotion or not is the Department. In the present case, it is not the stand of

the Department that the private respondents are not eligible for promotion. The documents, which have been appended with the reply by respondents No. 1 and 2, especially Annexure R-1, prove beyond doubt that the qualification possessed by the private respondents is a duly recognized qualification.

12. Therefore, in the background what has been discussed hereinabove, this Court is of the considered view that the contention of the petitioners that the private respondents are not eligible for being considered for promotion to the post of Assistant Engineer (Civil) is totally mis-conceived. The qualification which has been acquired by the petitioners while in service renders them eligible for promotion to the post of Assistant Engineer (Civil) and this is also the stand of the Department concerned. Accordingly, as this Court finds no merit in the present petition, the same is dismissed. Interim orders, if any, stand vacated. Miscellaneous applications, if an, also stand disposed of.

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

Between

1. THE STATE OF HIMACHAL PRADESH,
   THROUGH PRINCIPAL SECRETARY (PW)
   H.P. SECTT. SHIMLA-171002

2. THE EXECUTIVE ENGINEER, HPPWD,
   DIVISION DODRA KAWAR, DISTT.
   SHIMLA HP

.....PETITIONERS

(BY SH. RAJU RAM RAM DEPUTY ADVOCATE GENERAL)

AND

SH.SANJAY CHAUHAN, S/O BALWAN SINGH,
R/O VILLAGE SHAROG, PO ARHAL, TEHSIL
ROHRU, DISTT. SHIMLA HP

….RESPONDENT

(BY SH. TARUNJEET SINGH BHOGAL AND MS.SRISHTI VERMA, ADVOCATES)

ARBITRATION APPEAL
NO. 7 OF 2021
DECIDED ON:22.12.2021

Arbitration and Conciliation Act, 1966- Sections 34 & 37- **Limitation Act, 1963**- Section 4- Aggrieved and dissatisfied with award appellants had preferred objections under Section 34 of the Act before the Ld. District Judge along with an application for condonation of delay- Application was dismissed- held- In case of objections under Section 34 of the Act benefit of exclusion of period of vacation/holidays of Court would not be applicable where three months have expired prior to closure of Court and 30 days are expiring during closure of Court- Petition dismissed. (Para 11, 12 & 13)

Cases referred:

Assam Urban Water Supply and Sewerage Board vs. Subash Projects and Marketing Limited (2012)2 SCC 624;

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

J U D G M E N T

In instance case, in a dispute between the parties referred for arbitration, the Arbitrator had passed an award under the Arbitration and Conciliation Act (hereinafter in short 'the Act') on 1.10.2019. Signed copy of award was provided to parties on the same day.

2 Feeling aggrieved and dissatisfied with award, appellants had preferred objections before learned District Judge under Section 34 of the Act along with an application for condonation of delay in filing the same. Objections along with application for condonation of delay were filed on 17th

February, 2020 after expiry of 138 days as Courts were closed for winter vacation from 20th January, 2020 to 17th February, 2020.

3 Learned District Judge, referring the pronouncement of the Supreme Court in ***Assam Urban Water Supply and Sewerage Board vs. Subash Projects and Marketing Limited*** reported in ***(2012)2 SCC 624*** has dismissed the application for condonation of delay being not filed within limitation period as provided under Section 34 of the Act.

4 The aforesaid dismissal of application by learned District Judge has been assailed in present appeal.

5 Section 34(3) of the Act provides the limitation period for filing objections under Section 34 of the Act against the award passed by the Arbitrator, which reads as under:-

> "34(1).....
> (2).....
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

6 As evident from the aforesaid provision that Section 34(3) of the Act provides the limitation period of 3 months for filing objections and proviso thereof provides a further period of 30 days which can be condoned by Court for sufficient cause shown by applicant preventing him from filing objections within three months. Therefore, prescribed period for limitation is 90 days and 30 days are the extended period which can be condoned by Court after three

months. It has been specifically provided in the Proviso that Court is not empowered to extend the period beyond 30 days.

7 As per Section 43 of the Act, provisions of Limitation Act are applicable to the arbitration as it applies to the proceedings in the Court. Therefore, it has been contended on behalf of State that in view of provisions of Section 4 of Limitation Act, the period when Court was closed deserves to be excluded for calculation of period available for filing objections.

8 In present case, limitation period prescribed in Section 34(3) had expired on 1st January, 2020, but, not during the closure of Court as Court had closed for winter vacation on 20.1.2020 (19.1.2020 was Sunday).

9 Section 4 of Limitation Act is applicable for extension of prescribed period of limitation. 30 days provided in Proviso of Section 34(3) is not a prescribed limitation period, but, it is a limit of the Court with respect to period for which Court can condone the delay after expiry of prescribed period of limitation of three months.

10 The aforesaid issue is no longer res-integra in view of pronouncement of the Supreme Court, as referred by learned District Judge also, in ***Assam Urban Water Supply and Sewerage Board's case*** wherein the Court has held as under:

> "9. Section 43(1) of the 1996 Act provides that the 1963 Act shall apply to arbitrations as it applies to proceedings in Court. The 1963 Act is thus applicable to the matters of arbitration covered by the 1996 Act save and except the extent its applicability has been excluded by virtue of the express provision contained in Section 34(3) of the 1996 Act.
>
> 10……
>
> 11. The question, therefore, that falls for out determination is whether the appellants are entitled to extension of time under Section 4 of the 1963 Act in the above facts?
>
> 12. Section 4 of the 1963 Act reads as under:
>
> **"4. *Expiry of prescribed period when Court is closed*-** Where the prescribed period for any suit, appeal or application

expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens.

Explanation- A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."

The above section enables a party to institute a suit, prefer an appeal or make an application on the day the court reopens where the prescribed period for any suit, appeal or application expires on the day when the court is closed.

13. The crucial words in Section 4 of the 1963 Act are "prescribed period". What is the meaning of these words?

14. Section 2(j) of the 1963 Act defines:

"2.(j) 'period of limitation' which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act.

Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case."

11 In case three months expire during the days when Court is closed, then filing of objections/petition under Section 34 of the Act, on the first opening day of Court, would amount to filing of objections within the period but when period of three months expires prior to closure of Court for vacation/holidays, then, the Court has power only to extend the period for

further 30 days and in such eventuality, Section 4 of Limitation Act will be of no help as 30 days period, limited in proviso to Section 34(3) of the Act is a period beyond the prescribed period of limitation for filing the objections which provides cap of maximum period of 30 days which can be condoned in filing objections/petition under Section 34 of the Act. In normal course, in general cases, where no such cap limiting the power of the Court with respect to period of delay in filing appeal/application/other proceedings to which Section 5 of Limitation Act is applicable, the Court has power to condone the period without any limit subject to satisfactory explanation of sufficient cause and other necessary ingredients preventing the applicant from filing appeal/application/other proceedings. But for proviso to Section 34(3) of the Act, such power has been limited by the statute in filing of objections/petition under Section 34 of the Act.

12 Therefore, in case of objections/petition under Section 34 of the Act, benefit of exclusion of period of vacation/holidays of Court would not be applicable where three months have expired prior to closure of Court and 30 days are expiring during closure of Court.

13 In view of above discussion, I do not find any infirmity, illegality or perversity in the order passed by learned District Judge and accordingly, present petition is dismissed along with pending miscellaneous application OMP(M) No. 25 of 2021.

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

Between:

1. THE STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (PW) H.P.SECTT. SHIMLA-171002.

2. THE EXECUTIVE ENGINEER, HP PWD, DIVISION DODRA KANWAR, DISTRICT SHIMLA, H.P.

....PETITIONERS

(BY MR. SUDHIR BHATNAGAR AND MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL SWITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL).

AND

SH. SANJAY CHAUHAN SON OF SH.BALWAN SINGH, R/O VILLAGE SHAROG, P.O. ARHAL, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

....RESPONDENT

(BY SH.J.S.BHOGAL, SENIOR ADVOCATE WITH MR. TARUNJEET SINGH BHOGAL AND MS. SRISHTI VERMA, ADVOCATE).

ARBITRATION APPEAL
NO.4 OF 2021
Decided on:3.12.2021

Arbitration and Conciliation Act, 1966- Section 37- Application under Section 34(3) of the Act for condonation of delay in filing the objections under Section 34 of the Act stood dismissed by the Ld. District Judge, Shimla- Held- Party intending to file objections under Section 34 of the Act, was under obligation to file the same within three months in terms of provisions contained under Section 34(3) of the Act- Appellant filed objections beyond the period of three months from passing of the arbitration award- Appeal dismissed. (Para 5, 11 & 12)

Cases referred:

Assam Urban Water Supply and Sewerage Board vs. Subash Projects and Marketing Limited (2012)2 SCC 624;

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

JUDGMENT

Instant appeal filed under Section 37 of the Arbitration and Conciliation Act,1966 ***(for short 'Act'),*** lays challenge to order/ judgment dated 6.4.2021, passed by learned District Judge, Shimla, District Shimla, H.P., in CMP No.48-S/6 of 2020, titled as ***The State of Himachal Pradesh and another versus Sh. Sanjay Chauhan***, whereby an application under Section 34(3) of the Act, having been filed by the appellants, praying therein for condonation of delay in filing the objections under Section 34 of the Act, came to be dismissed.

2. Ms. Srishti Verma, Advocate, appears and waives service of notice on behalf of the respondent. Before the case at hand could be heard and decided on its own merit, learned Senior counsel representing the respondent while inviting attention of this Court to the judgment dated 23.11.2021, passed by Co-Ordinate Bench of this Court in Arbitration Appeal No.31 of 2021, titled as ***The State of Himachal Pradesh versus Sh. Bal Krishan,*** submits that instant appeal having been filed by the appellant-State deserves to be rejected in the light of aforesaid judgment rendered by Co-ordinate Bench of this Court.

3. Though, Mr. Desh Raj Thakur, learned Additional Advocate General, made an attempt to carve out a case that facts of the case at hand are disguisable from the case relied upon by counsel representing the respondent, but having carefully perused judgment rendered by Co-Ordinate Bench of this Court, as detailed hereinabove, this Court finds no merit in the submission of learned Additional Advocate General and same deserves outright rejection.

4. The facts of the case as emerge from the record are that the appellants being aggrieved and dissatisfied with award dated 1st October, 2019, passed by learned Arbitrator, filed objections under Section 34 of the Act. Since, objections were filed beyond period of limitation, an application under Section 34(3) came to be filed alongwith the objections, seeking therein

condonation of delay in the Court of learned District Judge, Shimla, but fact remains that aforesaid application, as detailed hereinabove, was dismissed vide order dated 6.4.2021, as a consequence of which, objections filed by the appellants also came to be dismissed. In the aforesaid background, appellant-State has approached this Court in the instant appeal.

5. In the case at hand, arbitration award was passed on 1st October, 2019 and copy thereof was made available on the same day to the parties to the *lis* and as such, being aggrieved and dissatisfied, if any, with the award, party intending to file objections under section 34 of the Act, was under obligation to file the same within a period of three months in terms of provision contained under Section 34(3) of the Act, but in the case at hand record reveals that appellants being aggrieved and dissatisfied with the award, filed objections on 17.2.2020, which was admittedly beyond the period of three months from passing of the award by the learned Arbitrator and as such, an application under Section 36(4) of the Act came to be filed, seeking therein condonation of delay.

6. At this stage, it would be profitable to take note of provision contained under Section 34(3) of the Act hereinbelow:-

> **"Section 34(3) in THE ARBITRATION AND CONCILIATION ACT, 1996**
>
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*"

7. Careful perusal of aforesaid provisions of law clearly reveals that an application for setting aside arbitration award may not be made after three

months from the date of receipt of signed copy of the award, but such time can be extended by the Court, if it is satisfied that the applicant was prevented by sufficient cause from filing the objections within the said period of three months, but definitely such time cannot be extended beyond 30 days, meaning thereby even Court has power to extend the time of 30 days over and above period of three months provided under Section 34(3) of the Act. Since in the case at hand, objections under Section 34(3) of the Act came to be filed after expiry of 30 days grace time, which court could have granted in terms of proviso to Section 34(1), if it was satisfied with the explanation, learned District Judge rightly dismissed the application, praying therein for condonation of delay.

8. Question, which needs to be determined in the case at hand is "whether time beyond grace period of 30 days can be extended by the Court" stands already adjudicated by the Co-ordinate Bench of this Court in its judgment dated 23rd November, 2021 in case titled ***The State of Himachal Pradesh and another versus Sh. Bal Krishan,*** which is clearly based upon the judgment rendered by Hon'ble Apex Court in **Assam Urban Water Supply and Sewerage Board versus M/s Subhash Projects and Marketing Limited (2012) 2 Supreme Court Cases 624.** It would be profitable to reproduce para Nos. 6 and 7 of the aforesaid judgment hereinbelow:-

> "6. It is not in dispute that in the present case, as on the date when the Court reopened after winter vacations and the Objections were preferred by the present appellants against the award passed by the learned Arbitrator, the period of three months plus the extended period of 30 days, benefit whereof can be given by the Court, was over. In this view of the matter, this Court is of the Considered view that there is no infirmity in the order which stands assailed by way of this appeal because learned Court below could not have given the benefit of vacations for the purpose of computing the limitation to the present appellants, in terms of the law laid

down by Hon'ble Supreme Court of India in Assam Urban Water Supply and Sewerage Board (supra). In the said judgment, Hon'ble Supreme Court of India has been pleased to hold, while interpreting Section 2(j) and Section 4 of the Limitation Act as under:"

12. Section 4 of the 1963 Act reads as under:"

4. Expiry of prescribed period when court is closed. Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens.

Explanation.-A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."

The above Section enables a party to institute a suit, prefer an appeal or make an application on the day court reopens where the prescribed period for any suit, appeal or application expires on the day when the court is closed.

13.The crucial words in Section 4 of the 1963 Act are "prescribed period". What is the meaning of these words?

14. *Section 2(j) 'period of limitation' {which} means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act;"*

Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the

application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our
opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case."

7. Coming back to the facts of this case, the application filed for condonation of delay in filing the appeal was dismissed by learned Court below by assigning the following reasons:

"7. Section 34 of the Arbitration Act is the only remedy for challenging the award under Part-I of the Arbitration Act. Section 34 o(3) of the Arbitration Act is a limitation provision, which is an inbuilt into the remedy provision.

8. A plain reading of sub-section (3) along with proviso to Section 34 of the Arbitration Act shows that application for setting aside the award mentioned in sub-section (2) of Section 34 of the Arbitration Act could be made within three months and the period can be extended for further period of 30 days on showing sufficient grounds and not thereafter. When any special statute prescribes certain period of limitation as well as provision for extension upto specified time limit on sufficient cause being shown, then the period of limitation prescribed under special law shall prevail and to that extent the provision of the Limitation Act shall stand excluded. When the intention of the legislature by enacting Sub Section (3) to Section 34 of the Arbitration Act is explicit that an application for setting aside the award should be made within three months and the period can be further extended on sufficient cause by another period of 30 days and

> *not thereafter, it implies that the Section 5 of the Limitation Act is not applicable.*
>
> *9. In Assam Urban Water Supply and Sewerage Board supra, the Hon'ble Apex Court has explained Section 4 of the Limitation Act, 1963, which enables the period of institute any suit, appeal or application on the day Court reopens where the prescribed period for any suit, appeal or application expires on the day when the Court is closed. The Hon'ble Apex Court has explained the meaning of "prescribed period" as mentioned in Section 4 of the Limitation Act, 1963 to say that period of 30 days mentioned in the proviso that follows in sub-section (3) of Section 34 of the Arbitration Act is not the "period of limitation", therefore, not "prescribed period" for the purpose of making the application for setting aside the arbitral award and accordingly, Section 4 of the Limitation Act, 1963 is not attracted."*

9. Precisely, the case of the appellants is that since they immediately after reopening of the Court after winter vacation filed the objections under Section 34 of the Act, same could not be held to be barred by limitation. However, such plea is totally devoid of any merit on account of the judgment rendered by Hon'ble Apex Court qua this issue only, as has been taken note hereinabove. Moreover, in the case at hand, it is not in dispute that grace period of 30 days over and above period of three months, as prescribed under Section 34(3) of the Act, had lapsed when objections under Section 34 of the Act were filed. Otherwise, there was no occasion, if any, for the appellants to claim that since they filed appeal on the opening day their objections deserves to be held within limitation.

10. Hon'ble Apex Court in ***Assam Urban Water Supply and Sewerage case (***supra) while interpreting Section 4 of the Limitation Act, has categorically held that Section 4 talks about the "prescribed period" not about

the “grace period”, meaning thereby section 4 of the Limitation Act cannot be applied to “grace period” which is over and above the period prescribed under Section 34(3) of the Act and it is discretion of the Court after being satisfied to grant grace period.

11. At this stage, learned Additional Advocate General vehemently argued that since provision of Section 34(3) of the Act enable the Court to condone the delay, if any, in filing the objections beyond period of three months, objections filed by the appellants in the case at hand could not be held to be barred by limitation, especially when these objections were filed during the winter vacation, which period otherwise could not be counted towards calculating limitation. However, this Court is not persuaded to agree with the aforesaid contention of learned Additional Advocate General for the reason that Section 4 of the Limitation Act, 1963 talks about “prescribed period” and “prescribed period” in the case at hand is three months, as provided under Section 34(3) of the Act. Admittedly, in the case at hand, no objections, if any, ever came to be filed within the prescribed period, rather same were filed after expiry of 137 days i.e. opening day of the Court after winter vacation. As has been held by Hon’ble Apex Court as well as Co-Ordinate Bench of this Court that Court considering prayer for condonation of delay could not grant time more than 30 days over and above period of three months, as prescribed under Section 34(3) of the Act and as such, no illegality can be said to be committed by the Court below while dismissing the objections.

12. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds no merit in the present appeal and same is accordingly dismissed being devoid of any merit. Pending application(s), if any, also stands disposed of.

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

Between:

1. THE STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (PW) H.P.SECTT. SHIMLA-171002.

2. THE EXECUTIVE ENGINEER, HP PWD, DIVISION DODRA KANWAR, DISTRICT SHIMLA, H.P.

....PETITIONERS

(BY MR. SUDHIR BHATNAGAR AND MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL SWITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL).

AND

SH. SANJAY CHAUHAN SON OF SH.BALWAN SINGH, R/O VILLAGE SHAROG, P.O. ARHAL, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

....RESPONDENT

(BY SH.J.S.BHOGAL, SENIOR ADVOCATE WITH MR. TARUNJEET SINGH BHOGAL AND MS. SRISHTI VERMA, ADVOCATE).

ARBITRATION APPEAL
NO.5 OF 2021
Decided on: 3.12.2021

Arbitration and Conciliation Act, 1966- Section 37- Application under Section 34(3) of the Act for condonation of delay in filing the objections under Section 34 of the Act stood dismissed by the Ld. District Judge, Shimla- Held- Party intending to file objections under Section 34 of the Act, was under obligation to file the same within three months in terms of provisions contained under Section 34(3) of the Act- Appellant filed objections beyond the

period of three months from passing of the arbitration award- Appeal dismissed. (Para 5, 11 & 12)

Cases referred:

Assam Urban Water Supply and Sewerage Board versus M/s Subhash Projects and Marketing Limited (2012) 2 SCC 624;

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

JUDGMENT

Instant appeal filed under Section 37 of the Arbitration and Conciliation Act,1966 ***(for short 'Act'),*** lays challenge to order/ judgment dated 6.4.2021, passed by learned District Judge, Shimla, District Shimla, H.P., in CMP No.52-S/6 of 2020, titled as ***The State of Himachal Pradesh and another versus Sh. Sanjay Chauhan***, whereby an application under Section 34(3) of the Act, having been filed by the appellants, praying therein for condonation of delay in filing the objections under Section 34 of the Act, came to be dismissed.

13. Ms. Srishti Verma, Advocate, appears and waives service of notice on behalf of the respondent. Before the case at hand could be heard and decided on its own merit, learned Senior counsel representing the respondent while inviting attention of this Court to the judgment dated 23.11.2021, passed by Co-Ordinate Bench of this Court in Arbitration Appeal No.31 of 2021, titled as ***The State of Himachal Pradesh versus Sh. Bal Krishan,*** submits that instant appeal having been filed by the appellant-State deserves to be rejected in the light of aforesaid judgment rendered by Co-ordinate Bench of this Court.

14. Though, Mr. Desh Raj Thakur, learned Additional Advocate General, made an attempt to carve out a case that facts of the case at hand are disguisable from the case relied upon by counsel representing the respondent, but having carefully perused judgment rendered by Co-Ordinate

Bench of this Court, as detailed hereinabove, this Court finds no merit in the submission of learned Additional Advocate General and same deserves outright rejection.

15. The facts of the case as emerge from the record are that the appellants being aggrieved and dissatisfied with award dated 1st October, 2019, passed by learned Arbitrator, filed objections under Section 34 of the Act. Since, objections were filed beyond period of limitation, an application under Section 34(3) came to be filed alongwith the objections, seeking therein condonation of delay in the Court of learned District Judge, Shimla, but fact remains that aforesaid application, as detailed hereinabove, was dismissed vide order dated 6.4.2021, as a consequence of which, objections filed by the appellants also came to be dismissed. In the aforesaid background, appellant-State has approached this Court in the instant appeal.

16. In the case at hand, arbitration award was passed on 1st October, 2019 and copy thereof was made available on the same day to the parties to the *lis* and as such, being aggrieved and dissatisfied, if any, with the award, party intending to file objections under section 34 of the Act, was under obligation to file the same within a period of three months in terms of provision contained under Section 34(3) of the Act, but in the case at hand record reveals that appellants being aggrieved and dissatisfied with the award, filed objections on 17.2.2020, which was admittedly beyond the period of three months from passing of the award by the learned Arbitrator and as such, an application under Section 36(4) of the Act came to be filed, seeking therein condonation of delay.

17. At this stage, it would be profitable to take note of provision contained under Section 34(3) of the Act hereinbelow:-

> **"Section 34(3) in THE ARBITRATION AND CONCILIATION ACT, 1996**
>
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making*

> *that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*"

18. Careful perusal of aforesaid provisions of law clearly reveals that an application for setting aside arbitration award may not be made after three months from the date of receipt of signed copy of the award, but such time can be extended by the Court, if it is satisfied that the applicant was prevented by sufficient cause from filing the objections within the said period of three months, but definitely such time cannot be extended beyond 30 days, meaning thereby even Court has power to extend the time of 30 days over and above period of three months provided under Section 34(3) of the Act. Since in the case at hand, objections under Section 34(3) of the Act came to be filed after expiry of 30 days grace time, which court could have granted in terms of proviso to Section 34(1), if it was satisfied with the explanation, learned District Judge rightly dismissed the application, praying therein for condonation of delay.

19. Question, which needs to be determined in the case at hand is "whether time beyond grace period of 30 days can be extended by the Court" stands already adjudicated by the Co-ordinate Bench of this Court in its judgment dated 23rd November, 2021 in case titled ***The State of Himachal Pradesh and another versus Sh. Bal Krishan,*** which is clearly based upon the judgment rendered by Hon'ble Apex Court in **Assam Urban Water Supply and Sewerage Board versus M/s Subhash Projects and Marketing Limited (2012) 2 Supreme Court Cases 624.** It would be profitable to reproduce para Nos. 6 and 7 of the aforesaid judgment hereinbelow:-

"6. It is not in dispute that in the present case, as on the date when the Court reopened after winter vacations and the Objections were preferred by the present appellants against the award passed by the learned Arbitrator, the period of three months plus the extended period of 30 days, benefit whereof can be given by the Court, was over. In this view of the matter, this Court is of the Considered view that there is no infirmity in the order which stands assailed by way of this appeal because learned Court below could not have given the benefit of vacations for the purpose of computing the limitation to the present appellants, in terms of the law laid down by Hon'ble Supreme Court of India in Assam Urban Water Supply and Sewerage Board (supra). In the said judgment, Hon'ble Supreme Court of India has been pleased to hold, while interpreting Section 2(j) and Section 4 of the Limitation Act as under:"

12. Section 4 of the 1963 Act reads as under:"

4. Expiry of prescribed period when court is closed. Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens.

Explanation.-A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."

The above Section enables a party to institute a suit, prefer an appeal or make an application on the day court reopens where the prescribed period for any suit, appeal or application expires on the day when the court is closed.

13.The crucial words in Section 4 of the 1963 Act are "prescribed period". What is the meaning of these words?

14. *Section 2(j) 'period of limitation' {which} means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act;"*

Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our
opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case."

7. Coming back to the facts of this case, the application filed for condonation of delay in filing the appeal was dismissed by learned Court below by assigning the following reasons:

"7. Section 34 of the Arbitration Act is the only remedy for challenging the award under Part-I of the Arbitration Act. Section 34 o(3) of the Arbitration Act is a limitation provision, which is an inbuilt into the remedy provision.

8. A plain reading of sub-section (3) along with

proviso to Section 34 of the Arbitration Act shows that application for setting aside the award mentioned in sub-section (2) of Section 34 of the Arbitration Act could be made within three months and the period can be extended for further period of 30 days on showing sufficient grounds and not thereafter. When any special statute prescribes certain period of limitation as well as provision for extension upto specified time limit on sufficient cause being shown, then the period of limitation prescribed under special law shall prevail and to that extent the provision of the Limitation Act shall stand excluded. When the intention of the legislature by enacting Sub Section (3) to Section 34 of the Arbitration Act is explicit that an application for setting aside the award should be made within three months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter, it implies that the Section 5 of the Limitation Act is not applicable.

9. In Assam Urban Water Supply and Sewerage Board supra, the Hon'ble Apex Court has explained Section 4 of the Limitation Act, 1963, which enables the period of institute any suit, appeal or application on the day Court reopens where the prescribed period for any suit, appeal or application expires on the day when the Court is closed. The Hon'ble Apex Court has explained the meaning of "prescribed period" as mentioned in Section 4 of the Limitation Act, 1963 to say that period of 30 days mentioned in the proviso that follows in sub-section (3) of Section 34 of the Arbitration Act is not the "period of limitation", therefore, not "prescribed period" for the purpose of making the application for setting aside the arbitral award and accordingly, Section 4 of the Limitation Act, 1963 is not attracted."

20. Precisely, the case of the appellants is that since they immediately after reopening of the Court after winter vacation filed the objections under Section 34 of the Act, same could not be held to be barred by

limitation. However, such plea is totally devoid of any merit on account of the judgment rendered by Hon'ble Apex Court qua this issue only, as has been taken note hereinabove. Moreover, in the case at hand, it is not in dispute that grace period of 30 days over and above period of three months, as prescribed under Section 34(3) of the Act, had lapsed when objections under Section 34 of the Act were filed. Otherwise, there was no occasion, if any, for the appellants to claim that since they filed appeal on the opening day their objections deserves to be held within limitation.

21. Hon'ble Apex Court in ***Assam Urban Water Supply and Sewerage case (***supra) while interpreting Section 4 of the Limitation Act, has categorically held that Section 4 talks about the "prescribed period" not about the "grace period", meaning thereby section 4 of the Limitation Act cannot be applied to "grace period" which is over and above the period prescribed under Section 34(3) of the Act and it is discretion of the Court after being satisfied to grant grace period.

22. At this stage, learned Additional Advocate General vehemently argued that since provision of Section 34(3) of the Act enable the Court to condone the delay, if any, in filing the objections beyond period of three months, objections filed by the appellants in the case at hand could not be held to be barred by limitation, especially when these objections were filed during the winter vacation, which period otherwise could not be counted towards calculating limitation. However, this Court is not persuaded to agree with the aforesaid contention of learned Additional Advocate General for the reason that Section 4 of the Limitation Act, 1963 talks about "prescribed period" and "prescribed period" in the case at hand is three months, as provided under Section 34(3) of the Act. Admittedly, in the case at hand, no objections, if any, ever came to be filed within the prescribed period, rather same were filed after expiry of 137 days i.e. opening day of the Court after winter vacation. As has been held by Hon'ble Apex Court as well as Co-

Ordinate Bench of this Court that Court considering prayer for condonation of delay could not grant time more than 30 days over and above period of three months, as prescribed under Section 34(3) of the Act and as such, no illegality can be said to be committed by the Court below while dismissing the objections.

23. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds no merit in the present appeal and same is accordingly dismissed being devoid of any merit. Pending application(s), if any, also stands disposed of.

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

Between:-

ANANT BIR SINGH SON OF LATE SH. GURKIRAT SINGH, SON OF SH. GIANI HARINDER SINGH,
CASTE KHATRI, R/O BAAG MATA STREET,
TEHSIL AND DISTRICT UNA, H.P.

..PETITIONER

(BY SH. DHEERAJ K. VASHISHT, ADVOCATE)

AND

1. TELU RAM ALIAS SUBHASH CHAND S/O SH. RAM PARKASH
2. SATISH KUMAR SON OF SH. RAM PARKASH

   BOTH RESIDENTS OF JAWAHAR MARKET, NANGAL TOWNSHIP, TEHSIL NANGAL, DISTRICT ROPAR (PUNJAB)
3. ASHOK KUMAR (DIED EXEMPTED FROM BRINGING ON RECORD LEGAL HEIRS AS PER ORDER DATED 11.09.2017)
4. PAWAN KUMAR S/O SH. BALDEV KRISHAN (DELETED)
5. VIJAY KUMAR S/O SH. BALDEV KRISHAN (DELETED)
6. NARESH KUMAR S/O SH. BALDEV KRISHAN (DELETED)
   RESIDENTS OF JAWAHAR MARKET, NANGAL TOWNSHIP, TEHSIL NANGAL, DISTRICT ROPAR (PUNJAB).

.... RESPONDENTS.

(BY SH. AJAY KUMAR, SENIOR ADVOCATE WITH SH. GAUTAM SOOD, ADVOCATE, FOR THE RESPONDENTS.)

CIVIL REVISION No. 20 OF 2020
RESERVED ON: 26.11.2021.
DECIDED ON: 03.12.2021.

Code of Civil Procedure, 1908- Section 115- Revision- Petitioner assailed order passed in execution petition whereby the objections raised by the petitioner have been dismissed- Held- Petitioner cannot espouse the cause of others regarding possession of third party- Revision dismissed. (Para 4, 5, 6 & 7)

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

O R D E R

By way of instant petition, petitioner has assailed order dated 07.01.2020 passed by learned Senior Civil Judge, Court No.1, Una, District Una, H.P. in Execution Petition No. 11/2014 whereby the objections raised by petitioner to the executability of the execution petition have been dismissed.

2. Briefly, the facts are that on 18.06.1990 a decree for possession of immoveable property was passed in favour of the respondents and against HarNiranjan Kaur, who was predecessor-in-interest of the petitioner. After passing of decree, HarNiranjan Kaur died. Appeal against decree dated 18.06.1990 was filed by her son Gurkirat Singh, which was dismissed. Gurkirat Singh further filed RSA No. 131 of 1997 which was also dismissed on 23.04.1997. Thus, the decree dated 18.06.1990 attained finality.

3. The above noticed decree was put to execution and the petitioner was impleaded as judgment debtor as even his father Gurkirat Singh had died.

4. Petitioner preferred reply to the execution petition and also termed it as objections under Section 47 read with Section 151 of the Code of Civil Procedure. The first objection raised by petitioner was that HarNiranjan Kaur was survived by other legal heirs in addition to Gurkirat Singh and in their absence the execution petition could not proceed. Another objection was raised that the property with respect to which decree under execution was passed, was not in possession of the petitioner and was with the adjoining land holders, as such, the decree could not be executed for want of identification.

5. Both the objections raised by petitioner are clearly without merit. Petitioner cannot espouse the cause of others, who had never chosen to assail the decree dated 18.6.1990 passed against Har Niranjan Kaur. Similarly, the objection that the property which was subject matter of the decree was in possession of third party cannot be allowed to be raised by the petitioner for the same reason that he cannot espouse the cause of others. The persons referred to by the petitioner to be necessary parties in execution, may have their own cause of action, if any.

6. It is not the case of petitioner that after passing of decree dated 18.6.1990 and after the death of HarNiranjan Kaur, anyone of the alleged legal heirs of HarNiranjan Kaur had come forward to assail the decree or to stake their independent claim on the suit property. That being so, all legal heirs of HarNiranjan Kaur are bound by the decree passed against her. As noticed above, in case they have any individual grievance, they have every right to approach the Court in accordance with law.

7. In light of above discussion, no fault can be found in the impugned order. The petition is accordingly dismissed with no order as to costs.

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

Between:-

MS. HARSH MEHTA, AGED 73 YEARS, D/O LATE SH. KRISHAN LAL, RESIDENT OF GROUND FLOOR, SURYA DARSHAN, UPPER KAITHU, SHIMLA-171003.

…….. PETITIONER.

(BY MR. Y.P SOOD, ADVOCATE)

AND

BALDEEP SINGH SON OF LATE COL. W.S BALJEET SINGH, RESIDENT OF SURYA DARSHAN, UPPER KAITHU, SHIMLA-171003 (H.P).

…..RESPONDENT

(MR. K.D SOOD, SR. ADVOCATE WITH MR. HET RAM, ADVOCATE)

CIVIL REVISION NO. 20 OF 2021
Reserved on : 8.11.2021
Decided on : 7.12.2021.

H.P. Urban Rent Control Act, 1987- Section 24(5)- Revision- Ld. Appellate Authority under H.P. Urban Rent Control Act, 1987, dismissed the appeal under Section 24 of the Act and confirmed the eviction order of the Rent Controller- Held- Revisional Court cannot re-appreciate the evidence to set aside the concurrent findings of courts below except when the same are perverse- Conclusion arrived at by the Courts below is based on proper appreciation of evidence- Petition dismissed. (Para 14 to 17)

Cases referred:

Yunus Ali (dead) through his LRs. Vs. Khursheed Akram , (2008) 7 SCC 293;

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

O R D E R

Petitioner (hereinafter referred to as "tenant") has approached this Court by way of this Revision Petition, assailing judgment dated 20.4.2021, passed by Additional District Judge, Shimla exercising powers of Appellate Authority (IV) under Himachal Pradesh Urban Rent Control Act, 1987) in Rent Appeal No. 2-S/14 of 2020, titled as Harsh Mehta vs. Baldeep Singh, whereby, dismissing the appeal under Section 24 of the H.P Urban Rent Control Act, 1987 (for Short "the Act"), Appellate Authority has confirmed eviction order dated 12.12.2019, passed by learned Rent Controller, Court No. (II), Shimla, Himachal Pradesh, in Rent Petition No. 106/2 of 2016 titled as Baldeep Singh versus Harsh Mehta.

2. Respondent (hereinafter referred to as "landlord") approached the Rent Controller, Shimla for eviction of the tenant on the ground of bonafide requirement, claiming that accommodation occupied/available with the landlord was not sufficient to accommodate his daughter, studying in University of London intending to settle in Shimla to look after her aged parents i.e landlord and his wife.

3. Eviction Petition was opposed by the tenant on the ground that one set vacated by one Mrs. Judith Kroll, comprising of two big rooms, lobby and bath-cum-toilet, was available with landlord after eviction of tenant 2-3 years prior to filing of eviction petition and further that eviction petition has been filed by the landlord in order to harass the tenant and compelling her to enhance the rent exorbitantly.

4. Landlord, to substantiate his plea, has appeared in witness box as PW-1 and has examined PW-2 Bal Krishan whereas tenant did not appear in Court nor led any other evidence to substantiate her claim.

5. After taking into consideration the material on record, Rent Controller passed eviction order against the tenant and the appeal preferred by the tenant has also been dismissed by the Appellate Authority.

6. Main ground to assail the impugned judgment and order, propounded on behalf of tenant is that both the Courts below have failed to appreciate the evidence in right perspective and ratio of law that the landlord is best person to assess his requirement of accommodation, has been wrongly applied in present case as in this case, landlord has acquired premises in the ground floor 2-3 years prior to filing of eviction petition. It is vehemently argued on behalf of the tenant that the landlord has suppressed the material facts and has not come to Court with clean hands by claiming that there is no other accommodation to settle his daughter, despite having sufficient accommodation in the ground floor adjacent to the premises occupied by the tenant and also that for availability of four rooms in first floor in his accommodation, claim of the landlord was falsified but the Courts below have passed eviction order which is perverse for evidence on record.

7. It is submitted on behalf of tenant that despite having more than sufficient accommodation, the landlord has failed to explain for what purpose entire building is required by him as the daughter of landlord can be accommodated in the accommodation already available with the landlord. It has been argued that though in his cross-examination landlord has tried to justify his requirement by giving details of the rooms alongwith purpose for which they are required but for want of claim in the petition, such evidence is not admissible.

8. Learned counsel for landlord has submitted that landlord has not suppressed any material facts and has stated all facts in truthful manner

as existing at the time of filing the petition as in para 18(a) it has been specifically mentioned that in recent past, from the date of filing of petition, landlord got vacant possession of two rooms set which is adjacent to set of tenant through Court from tenant Mrs. Judith Karoll on the ground of non-payment of rent and ceased to occupy.

9. It has further been contended on behalf of land lord that in paragraph 18(a), the landlord has also disclosed details of entire accommodation available with him in ground floor as well as in first floor with further details that which room was being used and shall be used for what purpose.

10. It is pointed out on behalf of landlord that not only in petition but also in deposition of landlord, as a witness, as PW-1, the landlord has disclosed complete facts with respect to accommodation available with him and his requirement and has also placed on record map Ex. PW-1/A depicting the status of accommodation available with him and also the premises/set occupied by the tenant.

11. Learned counsel for landlord has submitted that the evidence led by landlord remains un-rebutted as neither tenant nor any witness has been examined to substantiate claim of the tenant and the pleadings without evidence are of no help to the tenant.

12. Lastly it has been submitted that tenant is not residing in the rented accommodation for throughout the year but only for 6-7 months and, therefore, it is not the only accommodation with the tenant to live but her son and daughter in law are also residing in Shimla.

13. Learned counsel for landlord has submitted that scope of interference by the High Court with the concurrent findings of the Courts below is very narrow and to substantiate his plea he has referred to a case reported in (2008) 7 SCC 293, titled ***Yunus Ali (dead) through his LRs***. Versus ***Khursheed Akram***.

14. It is well settled position in law that revisional Court cannot re-appreciate the evidence to set aside the concurrent findings of Courts below by taking a different view of evidence especially when view taken by Courts below is a possible and plausible view. It is no ground to interfere in concurrent findings of Courts below by exercise of the revisional jurisdiction that another view on face of evidence could have also been taken. Undoubtedly, revisional Court is empowered to interfere with the findings of Court in revisional jurisdiction when findings are perverse or there has been non-appreciation or non-consideration of material evidence and pleadings on record by the Courts below.

15. In the present case, though the eviction petition has been opposed and averments made in the petition have been denied by filing reply, but fact remains that to rebut the evidence led by the landlord, tenant has not led any evidence and the evidence led by the landlord remained un-rebutted.

16. Undoubtedly landlord's case for insufficient or inadequate evidence and/or for lacking necessary material on record in his pleadings as well as evidence, shall result into dismissal of the claim of the landlord even in absence of evidence on the part of tenant. However it is not so in present case as in present case landlord has disclosed all material facts honestly in his eviction petition and that claim has been substantiated by evidence led by the landlord with clear depiction of accommodation available with him in map Ex. PW-1/A. Ongoing through the entire record, I find that plea raised by tenant in present petition is factually not correct and thus not tenable.

17. Conclusion arrived at by the Courts below, including observations that landlord is the best person to determine his requirement to settle himself and his family members, is possible and plausible view based on material on record of present case based on proper appreciation of evidence. I find no infirmity, illegality or perversity, warranting interference by the Court in concurrent findings of the Courts below.

Accordingly, present petition is dismissed being devoid of merits. Pending application(s), if any also stand disposed of.

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

BETWEEN:-

JAI DEV SINGH, SON OF LATE SH.DHARAM SINGH, SHOE MAKER BY PROFESSION, MOHALLA GUNNU GHAT, NAHAN, DISTRICT SIRMOUR, HIMACHAL PRADESH, RESIDENT OF PETROL PUMP NAHAN, DISTRICT SIRMAUR, HIMACHAL PRADESH. …PETITIONER/TENANT

(BY SH. KARAN SINGH KANWAR, ADVOCATE.)

AND

TAHIR KHAN, SON OF SH. MOHD. KHAN, RESIDENT OF MOHALLA GUNNU GHAT, NAHAN, DISTRICT SIRMAUR, HIMACHAL PRADESH. …RESPONDENT/LANDLORD

(BY SH. OWAIS KHAN, ADVOCATE.)

CIVIL REVISION No. 60 OF 2020
Reserved on: 9.12.2021
Decided on: 29.12.2021

H.P. Urban Rent Control Act, 1987- Section 24(5)- Section 2(d)- Landlord – Bonafide requirement- Revision- Ld. Appellate Authority under H.P. Urban Rent Control Act, 1987, confirmed the eviction order of the Rent Controller-

A. **Comparative hardship**- Held Applying the principle of comparative hardship, as propounded by the Supreme Court, landlord is entitled for possession after eviction of the tenant from the suit premises. (Para 17 & 18)

B. **Revisional Jurisdiction**- Held- Revisional jurisdiction in rent cases, has limited jurisdiction, unless there is material irregularity or illegality or

infirmity or perversity in the order, concurrent findings returned by the Courts below, are not to be interfered with- Petition dismissed. (Para 18, 19 & 20)

Cases referred:

D. Sasi Kumar Vs. Soundararajan, (2019) 9 SCC 282;
Faruk Ilahi Tamboli & Anr. Vs. B.S. Shankarrao Kokate (D) by LRs. & Ors., 2016 (1) CCC 805;
Prem Lal Vs. Soma Devi, 2019 (Supp) Shim. LC 349;
Ram Krishan Melu Vs. Kusum Bhasin, 2016 (2) CCC 189 (HP);

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

J U D G M E N T

Instant Revision Petition, under Section 24(5) of H.P. Urban Rent Control Act (herein after referred to the "Act") has been preferred against the order dated 24.12.2019, passed by learned District Judge, Sirmaur, exercising the powers of Appellate Authority under the Act (herein after referred to be the "Appellate Authority") in Rent Appeal No. 6-RA/14 of 2019, titled as Jai Dev Singh Vs. Tahir Khan, whereby order of eviction dated 25.6.2019 passed in Rent Petition No. 08/2 of 2013, titled as Tahir Khan Vs. Jai Dev Singh passed by Rent Contrller-2, Nahan, District Sirmaur, H.P., has been upheld.

2. Petitioner herein is tenant and respondent is landlord and hereinafter they have been referred as tenant and landlord respectively.

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

4. It is admitted fact that Mohd. Khan, father of Tahir Khan (landlord) had rented out two shops to tenant. Mohd. Khan was having six children, i.e. two sons and four daughters. After death of Mohd. Khan interest in the property devolved upon his six children. Landlrod herein is one of

them. It is also admitted fact that not only landlord Tahir Khan, but his brother Mehtab Khan also filed Rent Petition under Section 14 of the Act for eviction of tenant Jai Dev Singh from the shops, under reference.

5. Learned counsel for the tenant has contended that there are six co-owners in the property having right over the shops and, therefore, petition filed by landlord is not maintainable, particularly when another landlord Mehtab Khan has also preferred rent petition for eviction of tenant from the same shops. Further that despite the fact that landlord had filed Rent Petition for eviction of tenant from two shops, the Rent Controller has splitted the tenancy by passing eviction order from one shop in favour of landlord in present petition.

6. It has been argued on behalf of tenant that there is no bonafide requirement of landlord as landlord has also failed to place on record sufficient material to substantiate his claim of bonafide requirement of the shops and further that he is not the landlord and, therefore, he is not entitled for maintaining the Rent Petition and there is dispute inter se children of original landlord and for that reason, tenant is depositing rent in the Court. It has been further contended that, as claimed by landlord, a partition decree has been passed amongst the children of Mohd. Khan, whereby equal share in the property has been given to Tahir Khan and Mehtab Khan, whereas four sisters have been held entitled for `1,00,000/- each and, therefore, Mehtab Khan is also having equal right alongwith Tahir Khan, whereas Rent Controller has passed eviction order of bigger shop in favour of Tahir Khan landlord, which is not in consonance with the claim put forth by the landlord with respect to his share in the property. It has been contented that landlord did not approach the Court with clean hands by claiming him to be absolute owner of two shops, whereas neither it was nor it is so and further that the property in reference has been divided during pendency of the petition, but at the time of filing petition, property was joint.

7. It has been also argued on behalf of tenant that Mehtab Khan had also filed eviction petition to evict the tenant from two shops, however, eviction order from one shop has been passed in his favour and against the tenant. According to learned counsel for the tenant, this course was not available with the Rent controller, rather both petitions should have been dismissed for having filed two petitions seeking identical relief i.e. eviction of tenant from two shops. Learned counsel for the tenant has contended that without giving any finding with respect to bonafide requirement, passing of eviction order against the tenant, on the said ground is perverse for being not substantiated by any material on record.

8. Learned counsel for the landlord has submitted that landlord, after retirement, has no source of livelihood, except the shops and, therefore, he requires the shops bonafide, whereas tenant himself has admitted in his deposition in the Court that he is having share in the shops situated in Balmiki Basti to the extent of 29.5 meters and further that he is in possession of a shop on rent of `700/- in Hindu Ashram, where his son is running the shop and he has also admitted that out of three sons of tenant, one son is Trained Graduate Teacher, second is working with the tenant and third one is running the shop in Hindu Ashram, whereas landlord has no other shop to earn his livelihood.

9. Learned counsel for the landlord has referred pronouncement of the Supreme Court in ***Faruk Ilahi Tamboli & Anr. Vs. B.S. Shankarrao Kokate (D) by LRs. & Ors., 2016 (1) CCC 805***, wherein the Supreme Court in the same circumstances where tenant was having other shops/premises in his possession to run his business, either in his name or in the name of his wife, has upheld the eviction of tenant on the ground that comparative hardship would be that of the landlord as against the tenant.

10. By referring ***D. Sasi Kumar Vs. Soundararajan, (2019) 9 SCC 282***, it is contended on behalf of landlord that there is no better proof than

admission and in present case tenant has himself admitted that he is possessing shops at Hindu Ashram and Balmiki Basti and his sons are running the said shops and thus, alternative premises is available with the tenant, whereas landlord has no other shop and thus comparatively landlord is facing hardship more than that of tenant.

11. Referring pronouncement of a Co-ordinate Bench of this Court in ***Ram Krishan Melu Vs. Kusum Bhasin, 2016 (2) CCC 189 (HP)***, it has been contended that landlord is the best judge of his bonafide requirement and in present case landlord has categorically averred in petition and deposed in the Court that after retirement landlord intends to run a business for earning his livelihood and, therefore, it would be wrong to say that landlord has failed to justify his bonafide requirement.

12. Learned counsel for the landlord has also referred judgment of this Court in ***Prem Lal Vs. Soma Devi, 2019 (Supp) Shim. LC 349***, wherein this Court, referring judgment of the Supreme Court in *D.Sasi Kumar's* case supra, has held that once the landlord has established his bonafide requirement, the tenant has no right to stall the eviction process on the ground that he is earning his livelihood from the premises in question and that on eviction it would be difficult for him to maintain his family and to earn his livelihood.

13. Lastly, it has been contended on behalf of landlord that tenant has no concern to raise question with respect to dispute between co-sharers/landlords as in view of definition of "landlord" in Section 2(d) of the Act, respondent is landlord and further that so called dispute between co-sharers after death of original landlord Mohd. Khan, stands settled and the shop in reference has come in the share of landlord herein, whereas another shop has been given to Mehtab Khan and in the Rent Petition filed by Mehtab Khan eviction order of tenant with respect to other shop has been passed.

14. Section 2(d) of the Act defines "landlord" as under:-

> *"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."*

15. Landlord herein is son of original landlord Mohd. Khan and he is one of the persons who have driven title under the original landlord and legal heirs of landlord are definitely entitled to be considered landlord and either of them on his own behalf or on behalf of all is entitled to maintain the eviction petition against the tenant. No doubt, in case there is dispute between landlords, the said dispute inter se landlords shall have no bearing upon right to file the Rent Petition by one or more of them, however, at the time of passing final order, Rent Controller may take into consideration established right of other landlord(s) in the property in question and may pass appropriate order accordingly.

16. In case, at the time of final adjudication of Rent Petition, title of the landlord, preferring Rent Petition is undisputed and clear after determining rights of co-sharers/co-owners in the property, then dispute, if any, amongst co-owners/co-sharers/landlords at the time of filing Rent Petition shall not have any adverse impact on the landlord with clear undisputed title who has preferred Rent Petition. Successor-in-interest of landlord is competent to file and continue the Rent Petition. In present case, at the time of deciding the Rent Petition, the matter with respect to inheriting the property by children of Mohd. Khan was settled by way of partition of the suit property, whereby Tahir Khan and Mehtab Khan were given 7/16 shares each to them and in addition remaining 2/16 share was also given to Tahir Khan and, therefore, Tahir Khan is having larger share than Mehtab Khan in the property of Mohd. Khan. Therefore, there was no cloud on the title of

landlord on the property in question and Rent Controller has rightly splitted the tenancy between Tahir Khan and Mehtab Khan by considering entitlement of Tahir Khan on bigger shop and that of Mehtab Khan on smaller shop, keeping in view partition of the entire property and it is apt to record that Mehtab Khan has also accepted the order passed by Rent Controller in his favour, entitling him for vacant possession of smaller shop from tenant.

17. Though learned counsel for the tenant has contended that there is no material to establish bonafide requirement of the landlord, however, it is also noticeable that it has been specifically stated by landlord in rent petition as well as in his deposition in the Court that after retirement, he wants to run a shop for earning better livelihood and there is no premises/shop available for him in the locality for doing so, whereas tenant has admitted himself, as referred supra, that he is having more than one other alternative shops in his possession to continue his business and, therefore, applying the principle of 'comparative hardship', as propounded by the Supreme court referred supra, landlord is entitled for possession after eviction of the tenant from the shop in question. Landlord has every right to enhance his income by utilizing his property including shop under tenancy, but by getting possession thereof in accordance with law.

18. Considering the reasons assigned by the Courts below for passing and upholding the eviction order, passed against the petitioner/tenant, I find no material infirmity, irregularity, illegality or perversity in the order passed by the Courts below. It is also settled law that the High Court, exercising the revisional jurisdiction in rent cases, has limited jurisdiction, unless there is material irregularity or illegality or infirmity or perversity in the order, concurrent findings returned by the Courts below, are not to be interfered with.

19. In view of above discussion, I find no ground warranting interference in the impugned orders passed by the Rent Controller as well as Appellate Authority.

20 Accordingly, petition is dismissed with direction to the tenant to handover vacant possession of premises in question, in reference to the landlord Tahir Khan on or before 31st January, 2022, failing which landlord shall be entitled for taking appropriate course available with him for evicting the tenant from the premises. Landlord shall also be entitled for use and occupation charges being deposited by tenant in the Court with respect to shop proportionate to area of shop and rest shall be released to Mehtab Khan brother of Tahir Khan in whose share another shop has fallen. In case no such amount is found to be deposited by the tenant, then landlord shall also be entitled to recover use and occupation charges @ `3000/- per month for one shop fallen in his share from the tenant from the date of passing of eviction order by the Rent Controller till handing over vacant possession thereof to the landlord.

The petition stands dismissed in aforesaid terms.

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

Between:

SHRI SUBHASH CHAND, SON OF LATE SH. RAKHA RAM, RESIDENT OF VILLAGE GADOHAG, PARGNA MAJHOLA, TEHSIL AND DISTRICT SHIMLA, H.P. AND AT PRESENT C/O SHRI PREM CHAND SANJAY GENERAL STORE, GHANAHATTI, P.O. GHANAHATTI, TEHSIL AND DISTRICT SHIMLA, H.P.

……..PETITIONER/PLAINTIFF

(BY SH. ROMESH VERMA, ADVOCATE)

AND

1. SMT. SATYA DEVI, WIDOWOF LATE SH. BALBIR S/O LATE SHRI BAHADRU,S/O SH. NARDU.

2. SHRI ANIL KUMAR.

3. SH. AJAY KUMAR

BOTH SONS OF LATE SH.BALBIR SON OF LATE SH. BAHADRU, S/O LATE SH. NARDU, RESIDENT OF VILLAGE GADOHAG, P.O.BOH, PARGNA MAJHOLA, TEHSIL AND DISTRICT SHIMLA, H.P.

…….RESPONDENTS/DEFENDANTS

(BY SH. I.D. BALI, SR. ADVOCATE WITH
MR. SUMIT SHARMA, ADVOCATE, FOR
THE RESPONDENTS)

CIVIL MISCELLANEOUS PETITION MAIN (ORIGINAL)
No. 199 / 2021
RESERVED ON:10.12.2021
DECIDED ON: 17.12.2021

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 14 Rule 5- Additional Issues- Application for framing of additional issues was dismissed and petition has been filed two years after the order- Held- For exercising jurisdiction under Article 227 of the Constitution, it has to be established that judicial order passed by the Court was so palpably wrong so as to strike at the conscience of the Court or should be without jurisdiction, and the impugned order does not fall in any of the categories which may warrant interference- Petition dismissed. (Para 12)

Cases referred:

Bithika Mazumdar and another Vs. Sagar Pal and others (2017) 2 SCC 748;

Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil (2010) 8 SCC 329;

This petition coming on for orders this day, ***Hon'ble***

Mr. Justice Satyen Vaidya, delivered the following:

ORDER

By way of instant petition, petitioner has challenged order dated 14.11.2019 passed by learned Civil Judge, Court No. IV, Shimla, in case No. 72-1/2018, whereby an application of the petitioner for framing of additional issues was rejected.

2. Petitioner, who is plaintiff before the learned Trial Court, has filed above noted suit with following prayers: -

> a) That the plaintiff may be declare owner of the land and built up structure there on as entered against khata khatauni No. 3/3 khasra No.78 and 75 situated atMauza Gadog, Tehsil and District Shimla as per jamabandi for the year 1957-58.
>
> b) That a decree for possession may be passed pertaining to land and built up structure existing thereon.
>
> c) That the defendants being in unauthorized possession of the suit property may be held liable to pay use and occupation charges at the rate of Rs. 20,000/- per month from the date of filing suit till further orders and delivery of possession.

3. The petitioner has filed the suit on the premise that the suit land was owned by his father late Sh. Rakha Ram, who had died on 26.05.1959. During life time of Rakha Ram, suit land was recorded in his ownership and possession. However, during preparation of jamabandi for the year 1961-62, one Bhadru was wrongly shown in possession of suit land as "Gair Maurusi". Petitioner has alleged that the entries made in revenue records in the name of

Bhadru as non-occupancy tenants were illegal as it did not have any backing of a lawful order by a competent authority. The wrong revenue entries continued and on coming into force H.P. Tenancy and Land Reforms Act, 1972, Bhadru was shown to have acquired proprietary rights qua the suit land. It has further been pleaded by the petitioner that notwithstanding the entries so made in favour of Bhadru and on his death, his successors BalbirSingh, and therefore, the present respondents, petitioner continued to exercise rights of ownership and possession over the suit property till December, 2011 when Balbir Singh, predecessor-in-interest of respondents herein, forcibly dispossessed the petitioner from the suit land on the basis of wrong entries. Initially, the petitioner is stated to have taken recourse to revenue authorities but his contention was rejected on the ground that due to long lapse of time revenue entries could not be ordered to be corrected.

4. Respondents are contesting the suit. Besides having raised legal objections, the stand of the respondents, *inter alia,* is that they are in lawful possession of suit land as owners. They have denied that their predecessor-in-interest manipulated to procure wrong and illegal entries in the revenue records. The allegations with respect to dispossession of petitioner in the year 2011 have specifically been denied.

5. Learned Trial Court framed the following issues on 02.04.2019 and listed the case for evidence of plaintiff on 10.05.2019.

(i) Whether the plaintiff may be declared as owner of the land and built up structure there on as entered against khata khatauni No. 313 khasra No. 78 and 75 situated at Mauja Gadog, Tehsil and District Shimla as per Jamabandi for the year 1957-1958?

.....OPP

(ii) Whether the plaintiff is entitled for decree of possession of suit property?

.....OPP

(iii) Whether the defendant being in unauthorized possession of the suit property at the rate of Rs. 20,000/- per month from date of filing suit till further orders and delivery of possession of suit land?

.....OPP

(iv) Whether the suit is maintainable in its present form?

.....OPD

(v) Whether the plaintiff is stranger to the property and has no right,title and interest to file the present suit?

.....OPD

(vi) Whether the suit is bad for non-joinder of necessary parties as alleged?

.....OPD

(vii) Whether the plaintiff has no locus standi to file the present suit?

.....OPD

(viii) Relief.

6. Instead of leading evidence on the given date, petitioner filed an application under Order 14 Rule 5 CPC with the prayer to frame additional issues as under: -

> Whether defendants are owners in possession of the suit property and plaintiff have no right title and interest of any kind over the same.
>
> ...OPD
>
> Whether the entries of tenancy in favour of late Sh. Bhadru, Predecessor of the defendants, in the jamabandi for the years 1961-62, has been made on the basis of lawful order and whether subsequent jamabandi Sh. Bhadru, was rightly recorded as a Gair Maurusi and he lawfully acquired ownership rights under provisions of H.P. Tenancy and Land Reforms Act?
>
> ...OPD.
>
> Whether entries of tenancy with respect to suit land in the name of Sh. Bhadru, was lawfully made in the jamabandi for the years 1961-62 and on the basis of these entries

> and subsequent entries in the jamabandi mutation regarding conferment of ownership rights under Section 104 of H.P. Tenancy and land Reforms Act, have rightly been made in the name of late Sh. Bhadru."
>
> ....OPD.

7. Learned trial Court rejected the application of petitioner for framing of additional issues. Petitioner has sought to set aside the impugned order on the ground that the learned trial court has not recorded any valid reason for dismissal of the application and has not exercised the jurisdiction lawfully vested in it. It has been pleaded that grave injustice has been caused to the petitioner as the proposed issues are necessary for just and effective disposal of the controversy involved in the case.

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

9. Noticeably, the instant petition under Article 227 of the Constitution of India has been preferred on 14.09.2021 exactly after two years from the date of passing of impugned order. No reason whatsoever has been assigned by the petitioner for assailing the impugned order at such a belated stage. Though, no specific limitation is provided under any statute for filing the petition under Article 227 of the Constitution of India, yet the same cannot be allowed to be filed at the wish of the petitioner at any time, that to, without disclosing the reasons for delay, if any.

10. Reference can be made to para-4 of the judgment passed by Hon'ble Supreme Court in ***Bithika Mazumdar and another*** *Vs.* ***Sagar Pal and others (2017) 2 SCC 748***, which reads as under:-

> " 4 It is an admitted position in law that no limitation is prescribed for filing application under Article 227 of the Constitution. Of course, the petitioner who files such a petition is supposed to file the same without unreasonable delay and if there is a delay that should be duly and satisfactorily explained. In the

> facts of the present case, we find that the High Court has dismissed the said petition by observing that though there is no statutory period of limitation prescribed, such a petition should be filed within a period of limitation as prescribed for applications under Sections 115 of the Code of Civil Procedure. This approach of the High Court cannot be countenanced. As mentioned above, in the absence of any limitation period, if the petition is filed with some delay but at the same time, the petitioner gives satisfactory explanation thereof, the petition should be entertained on merits."

In view of the legal position detailed above, the instant petition is clearly not maintainable.

11. The petitioner, even otherwise, has not been able to make out any ground seeking indulgence of this Court under Article 227 of the Constitution of India. The jurisdiction of this Court under Article 227 of the Constitution of India is not unbridled. In ***Shalini Shyam Shetty and another*** *Vs.* ***Rajendra Shankar Patil (2010) 8 SCC 329,*** Hon'ble Supreme Court has delineated the fetters in exercise of jurisdiction under Article 227 of the Constitution of India as under: -

> "49 On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:
>
> (a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.
>
> (b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.
>
> (c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that

would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will invest this extraordinary power of its strength and vitality.

12. From the aforesaid exposition of law, there remains no doubt that for exercising jurisdiction under Article 227 of the Constitution of India, it has to be established that the judicial order passed by the Court was so palpably wrong so as to strike at the conscience of the Court or should be without jurisdiction. As noticed above, the impugned order does not fall in any of the categories which may warrant interference by this Court. The frame of additional issues proposed by petitioner clearly reveals that the prayer was not bonafide. The plaintiff intends to shift the burden of proving the facts on to respondent, which otherwise are required to be proved by the petitioner in the facts and circumstances of the instant case. The provisions of Sections 109

and 110 of the Evidence Act are applicable to the facts of the case, which reads as under: -

> "109. **Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.** — When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.
>
> 110. **Burden of proof as to ownership.** When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

Thus, the pleadings as brought on record by the parties do not warrant the framing of additional issues as proposed by the petitioner.

13. In view of above discussions, I do not find any merit in the instant petition and the same is dismissed. No order as to costs.

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

Between:

BALRAM SINGH,
AGED 52 YEARS,
S/O SHRI DHANI RAM,
S/O SH. SHANKAR,
R/O VILLAGE AND POST OFFICE
INDPUR, TEHSIL INDORA, KANGRA,
H.P.

....PETITIONER

(BY MR. VIJENDER KATOCH,
ADVOCATE)

AND

1. DHANI RAM,
S/O SH. SHANKAR,
S/O SH. LEHNU,
R/O VILLAGE AND POST OFFICE
INDPUR,
TEHSIL INDORA,
KANGRA, H.P.

2. HARPAL SINGH,
S/O SH. DHANI RAM,
S/O SH. SHANKAR,
R/O VILLAGE AND POST OFFICE
INDPUR,
TEHSIL INDORA,
KANGRA, H.P.

3. RAHUL,
S/O SH. HARPAL,
S/O SH. DHANI RAM
S/O SH. SHANKAR,
R/O VILLAGE AND POST OFFICE
INDPUR,
TEHSIL INDORA,
KANGRA, H.P.

....RESPONDENTS

(BY MR. AJAY SHARMA, SENIOR
ADVOCATE WITH MR. ATHARV
SHARMA, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.230 of 2021
Decided on:3.12.2021

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 32 Rule 15- Application of petitioner under Order 32 Rule 15 CPC for appointment of guardian was dismissed- Held- Ld. Trial Court following the procedure laid down in Order 32 Rule 15 CPC, asked few questions to

defendant No. 1 and found defendant No. 1 to be in fit state of mind- Under Order 32 Rule 15 satisfaction of the Court is of utmost importance- Petition dismissed. (Para 7)

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 18.8.2021, passed by the learned Civil Judge, Indora, District Kangra, HP, whereby an application under Order 32 Rule 15 CPC, having been filed by the petitioner-plaintiff (herein after referred to as "the plaintiff"), praying therein for appointment of natural guardian for defendant No.1, came to be dismissed, plaintiff has approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to set-aside the order passed by the court below and constitute medial board to examine the mental health of defendant No.1, who is 88 years old.

2. Pursuant to notice issued in terms of order dated 5.10.2021, Mr. Atharv Sharma, Advocate, has put in appearance on behalf of the respondent.

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

4. Precisely, in the case at hand, plaintiff, who happens to be son of defendant No.1, filed an application Order 32 Rule 15 CPC, praying therein for appointment of natural guardian on behalf of defendant No.1, who is 88 years old on the ground that he is not in fit state of mind and as such, is being exploited by the other defendants, who also happen to be son and grandsons of defendant No.1.

5. Perusal of impugned order reveals that court with a view to ascertain correctness of the allegation made in the application summoned defendant No.1 to the court and asked few questions. Having interacted with defendant No.1, court found him to be in fit state of mind. Court observed that though defendant No. 1, being old aged person may be suffering from various ailments, but he understands each and everything and as such, it cannot be said that he being of unsound mind is not able to protect his interest in the ongoing proceedings.

6. Though Mr. Vijender Katoch, learned counsel for the petitioner submits that to ascertain factum with regard to mental illness, if any of defendant No.1, medical board can be constituted, but Mr. Ajay Sharma, learned senior counsel representing the respondents opposes the aforesaid prayer on the ground that once court below after having interacted with defendant No.1 has recorded its satisfaction with regard to mental state of mind of defendant No.1, there is no occasion, if any, to accede to the aforesaid request made by the plaintiff.

7. Having carefully perused provision contained under Order 32 Rule 15 CPC, this Court is of the view that it is the satisfaction of the court, which is of utmost importance, while acceding prayer, if any, made for appointment of natural guardian. Aforesaid provision/rule suggests that if court, during proceedings of the case, comes to conclusion or finds a person to be of unsound mind, it after having made inquiry, can proceed to appoint natural guardian. In the instant case, learned trial court, applying aforesaid procedure laid down in Order 32 Rule 15 CPC, asked few questions to defendant No.1 and found defendant No.1 to be in fit state of mind. Leaving everything aside, no material worth credence has been led on record suggestive of the fact that mental state of defendant No. 1 is not good and he is being exploited by the other defendants.

8. Consequently, in view of the above, this Court finds no illegality and infirmity in the impugned judgment passed by the court below and as such, same is upheld. As a consequence of which, present petition fails and dismissed being devoid of any merit.

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

Between:-

TIRATH RAM S/O SH. PURAN CNAHD,
R/O VILLAGE SHATGARH, POST OFFICE,
BRADHA, TEHSIL & POLICE STATION,
BHUNTAR, DISTRICT KULLU, H.P.
(IN JUDICIAL CUSTODY), AGED 27 YEARS.

…APPELLANT

(BY SH. NAVEEN K. BHARDWAJ, ADVOCATE).

AND

STATE OF HIMACHAL PRADESH ….RESPONDENT.

(SH. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL, FOR THE RESPONDENT).

CRIMINAL APPEAL NO.147 OF 2018
RESERVED ON : 22.12.2021
DECIDEDON : 28.12.2021

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Appeal- Appellant convicted under Section 20 of NDPS Act and sentenced to rigorous imprisonment for 10 years and fine Rs. 1.00 lac- Chance recovery- 3.55 Kg charas- Held- Prosecution has been able to discharge the requisite burden and there is nothing on record which may cast shadow of doubt on prosecution story- Appeal dismissed. (Para 12)

This appeal coming on for hearing this day, **Hon'ble Mr. Justice Satyen Vaidya**, deliveredthe following:

J U D G M E N T

By way of instant appeal, appellant has assailed the judgment dated 02.01.2018 passed by learned Special Judge-II (Additional Sessions Judge), Kullu, H.P. in Sessions Trial No. 31 of 2016, whereby the appellant has been convicted for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS" Act) and has been sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/-. Further, in default of payment of fine, the appellant has also been sentenced to undergo simple imprisonment for one year.

2. Brief facts of the case are that on 27.01.2016 a Police Party from Police Station Kullu headed by ASI Dinesh Kumar along with HHC Tikam Ram and HHC Shyam Dass left the Police Station at about 3.30 a.m. in Government vehicle No. HP-34A-9986 driven by C. Dinesh Kumar and reached "Cheela Mour" on Bhunter–Manikarn Road at about 4.20 a.m. The purpose was to lay a "NAKA" for general checking of traffic as well as persons. Immediately after having laid "NAKA", the police party noticed a person approaching them on foot from the side of place known as Jari. He was carrying a bag in his hand. On seeing the police party, such person turned back and ran towards a trail. He was apprehended by the police officials. On being questioned regarding contents of the bag, he got perplexed and started shivering. The person could not satisfactorily explain his conduct and thus raised suspicion in the mind of Police officials. The Investigating Officer ASI Dinesh Kumar then suspected the appellant having possession of some incriminating material. The area was isolated, therefore, HHC Tikam Ram was deputed to search for some independent witnesses. He returned after about

twenty minutes and disclosed that none could be found at that hour of the night. In the given circumstances, the Investigating Officer ASI Dinesh Kumar associated HHC Shyam Dass and HHC Tikam Ram as witnesses. Firstly, he allowed his personal search to be made by the appellant in presence of aforesaid witnesses and thereafter the bag of appellant was searched. On search, six packets of rectangular shape, containing black coloured substance were recovered from the bag, which were wrapped in polythene tape. On being smelled, the substance was found to be cannabis/charas. The contraband so recovered was weighed and found 3 Kg. 55 grams. The recovered contraband was then placed in the same polythene packet and was thereafter sealed in a cloth parcel. Ten seals of 'H' were placed on the parcel. Facsimile of the sample seal was obtained on a separate piece of cloth. NCB-1 form in triplicate was filled by ASI Dinesh Kumar. Necessary memos were prepared and copies thereof were supplied to the appellant. A "Rukka"was prepared and sent for registration of FIR to Police Station, Kullu through HHC Shyam Dass. FIR No.10 of 2016 was registered. Photographs, evidencing proceedings conducted on spot, were taken. Appellant was arrested and information of his arrest was given to his wife. The case property was then produced by the Investigating Officer to SHO, who re-sealed the same with four seals withimpression 'T'. The facsimile of seal was preserved and the case property was deposited in Malkhana.

3. On 29.01.2016 the case property was sent to SFSL, Junga for chemical analysis through (PW-2) C. Sanjeev Kumar No. 156. The case property along with the report of SFSL, Junga was brought back to the Police Station by (PW-3) HHC Lal Singh No. 219 on 17.02.2016. The challan was presented. The appellant was charged for commission of offence under Section 20 of the NDPS Act by learned Special Judge-II, Kullu on 20.06.2016.

4. The prosecution examined total nine witnesses to prove its case. The statement of appellant under Section 313 Cr.P.C. was recorded. He did

not avail the opportunity to lead defence evidence. Learned Special Judge-II, Kullu proceeded to convict and sentenced the appellant vide judgment impugned in the present appeal, as noticed above.

5. The appellant has assailed the impugned judgment on the grounds that the impugned judgment is based on conjectures and surmises. The material evidence pointing towards innocence of appellant has been ignored. The appellant was not connected with the alleged offence in any manner and the quality and volume of prosecution evidence lacked in proving the guilt of the appellant beyond all reasonable doubts. It has also been contended that the entire case of prosecution is shrouded under shadow of doubt and the appellant deserves the benefit thereof. A specific defence has been raised that the appellant, in fact, was sitting at bus-stand Kullu and the police had found an unclaimed bag under the bench on which he was sitting. The police confronted him about the bag and appellant had clearly disowned the same. Nevertheless, the police falsely implicated the appellant by foisting a false case. As per the appellant, no trustworthy evidence was placed on record to connect the appellant with the offence. There were material contradictions in the prosecution evidence which rendered such evidence doubtful. It has further been pointed out that in the arrest memo, Ex.PW-8/C, there is a cutting in the figure denoting time of arrest which again casts doubt on the prosecution story.

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

7. The fact regardingrecovery of contraband from appellant and the events preceding as well as succeeding thereto have been deposed by (PW-7)HHC ShyamDass and (PW-8) ASI Dinesh Kumar. It has been stated by these witnesses that on 27.1.2016 the police party including (PW-8) ASI Dinesh Kumar, (PW-7) HHC Shyam Dass along with HHC Tikam Ram (not examined as witness) had laid a Naka at Cheela Mour at about 4.20 A.M. Appellant was

apprehended by them and on his personal search, cannabis/charas weighing 3 kg. 55 grams was recovered from the bag carried by him in his hand. Before conducting the personal search of the appellant, the Investigating Officer ASI Dinesh Kumar (PW-8) had offered his own personal search to the appellant. Memo Ex. PW-7/A in respect of personal search of the appellant was prepared. Another memo of recovery and seizure of cannabis/charas Ex. PW-7/O was prepared. (PW-8)ASI Dinesh Kumar prepared the "Rukka" Ex. PW-7/E and sent the same to Police Station, Kullu for registration of case through (PW-7) HHC Shyam Dass. On receipt of "Rukka", FIR No. 10/2016 dated 27.01.2016 (Ext. PW-9/A) was registered at Police Station, Kullu at 8.15 A.M. The appellant was arrested and arrest memo Ex. PW-8/C (Ex. DB) was prepared. The police party returned to the Police Station along with the appellant. The seized contraband was produced before the SHO, who re-sealed the seized contraband with 4 seals having impression 'T'.Facsimile was obtained vide memo Ex. PW-9/C and the case property was handed over to HC Gajender Pal No.33 for deposit in the Malkhana. An entry in Malkhana register evidencing the deposit of case property in Malkhana is Ex. PW-6/A.

8. Special Report Ex. PW-1/A was submitted to the Additional Superintendent of Police, Kullu on 29.01.2016 at 11.00 A.M. An endorsement to this effect is recorded in the Special Report (Ex. PW-1/A) at encircle Ex.PW-1/B. An entry in Special Report register has been proved on record as Ex. PW-1/C. The case property was sent on 29.01.2016 to SFSL, Junga alongwith NCB-I form, in triplicate, seizure memo, copy of FIR and sample seals "H' and "T" through C. Sanjeev Kumar No. 156 (PW-2). The case property after chemical analysis alongwith report of SFSL, Junga was brought back to the Police Station on 17.02.2016 by HHC Lal Singh No. 219. The examination report of SFSL, Junga is Ex.PW-8/D.

9. The prosecution has also proved on record copies of various Daily Diary Reports (for short "DDR") recorded at Police Station, Kullu viz.,

DDR No. 03 (Ex. PW-5/A) at 3.30 a.m., DDR No. 012 (Ex. PW-4/A) and DDR No.014 (Ex.PW-4/B) dated 27.01.2016 recorded at 9.44 a.m. and 10.10 a.m. respectively. The CCTN Certificates with respect to DDR No.03 (Ex.PW-5/A), is Ext. PW-5/B and in respect of DDR No.012 (Ex. PW-4/A) and DDR No.014 (Ex.PW-4/B) is Ex. PW-4/C.

10. The perusal of DDR No. 03 (Ex. PW-5/A) reveals that the factum of police party leaving the Police Station, Kullu at 3.30 a.m. on 27.01.2016 for laying "NAKA" at CharodNallahwas recorded. This evidence has not been seriously challenged on behalf of the appellant save and except by putting a general suggestion that the report was fabricated. Similarly, the entries made in DDR No. 012 (Ex. PW-4/A) and DDR No. 014 (Ex. PW-4/B), have not been seriously contested by the appellant. Vide Ex. PW-4/A, which recordedthe factum of Police party reporting back at Police Station, Kullu as well as submission of the seized contraband along with necessary documents to SHO.Ex. PW-4/B recorded the proceedings of re-sealing of case property by the SHO and also the handing over of seized contraband in the custody of MHC for its deposit in Malkhana. The time of preparation of Rukka (Ex. PW-7/C) is 7.15 a.m.

11. PW-7 and PW-8, who were spot witnesses, while making their respective statements on oath before learned Trail Court, remained in unison.From the cross-examination of these witnesses, nothing substantial could be elicited.Noticeably, in cross-examination it was suggested to both these witnesses that the contraband was found,by the Police, lying unattended at Kullu bus-stand at about 9.00 p.m. on 26.01.2016. Since the appellant was found near the contraband, he was suspected and then falsely implicated. Inanswer to Question No.31 of his statement under Section 313 Cr.P.C., the appellant stated as under:

> *"Ans: I am innocent. In fact on 26.01.2016, I had come to Kullu to attend the function of 26th January. After attending the function in*

the evening time at about 9:00 p.m., I was in Bus Stand Kullu waiting for the bus to go home. I was sitting on the bench. Police officials came there and found one unclaimed bag underneath the Bench where I was sitting. Police inquired about the ownership of that bag from me as well as from other passengers present there. I and others disowned the ownership of the bag. The police opened the bag and found black substance therein. The police disclosed that it is Charas. Thereafter, the police brought me to Police Station by stating that since the bag was found underneath the bench where I was sitting so they wanted to make further inquiry from me. In the night time they prepared the documents and other proceedings in the police station and in the morning of 27.01.2016 at about 6:00 a.m. I was taken to left bank where the police officials took some photographs. Police made a false case of 27.01.2016 of morning time. In fact, police brought me to PS on 26.01.2016 at about 9.30 p.m."

12. The fact that the appellant had taken a specific defence, as noticed above, will not absolve the prosecution from its obligation of discharging the burden to prove guilt of appellant beyond all reasonable doubts. On scrutiny of the oral as well as documentary evidence, we find that the prosecution has been able to discharge the requisite burden. There is nothing on record which may cast shadow of doubt on prosecution story. The testimonies of PW-7, PW-8 and PW-9 have not been shaken as is evident from the perusal of cross-examination. PW-7 HHC Shyam Dass and PW-8 ASI Dinesh Kumar have been consistent in their depositions by narrating sequence of events that had taken place. Definitely, the witnesses cannot be expected to give parrot like version. The fact that the statements of the spot witnesses were recorded after a gap of more than 18 months, itself negates the possibility of the witnesses

remembering the happening of events photogenically especially when the witnesses are police officials and have to deal with the investigations of various cases on day-to-day basis. Still as noticed above, no material contradiction can be culled out from the statements of these witnesses. It is also noticeable from the cross-examination conducted on the prosecution witnesses that they had stuck to their statements recorded under Section 161 Cr.P.C. as none of the witnesses has been confronted with their previous statements so recorded, meaning thereby that the prosecution witnesses had not improved their versions while deposing before the Court.

13. In view of this matter, it is to be seen whether the appellant has been able to probabilise his defence. From cross-examining the prosecution witnesses, nothing could be extracted so as to lend some credence to defence raised by the appellant.Learned counsel for the appellant has drawn our attention to document i.e. the arrest memo Ex. PW-8/C where at encircle "A" and "B" there appears to be overwriting on the figure depicting time of arrest. Undoubtedly, there is overwriting on the figure depicting time of arrest in aforesaid document, but there is nothing on record to suggest that such overwriting would have materially affected the investigation. It is also not inferable from the record that such overwriting was done with some ulterior motive. As per argument of learned counsel for the appellant, the original figure '6' has been overwritten as '9'. Assuming the same to be correct, we are of the view that such overwriting, though not warranted, may have been done for more than one reasons. No explanation has been rendered by the prosecution witnesses for the discrepancies that has crept in document Ex.PW-8/C (Ex.-DB), but this fact alone cannot be taken to be sufficient to dislodge the prosecution version, otherwise duly proved on record. Assumingly, figure '6' was overwritten as '9', only reflects the change recorded in the timing of arrest of the appellant. The document reveals that the time recorded therein relates to morning hours as each and every entry of time

recorded therein is succeeded by words “a.m.” or morning. Even at 6.00 a.m. the appellant was with the police party, therefore, in our considered view, the wrong recording of time of arrest either initially or subsequently is not going to affect the merits of the case. The link evidence of the case has remained un-shattered. The proper sealing of the effects of recovery, its re-sealing, timely prescription of NCB forms, submission of special report, secured custody of case property, its safe and secured transmission to and from SFSL, Junga has duly been proved. In fact, no challenge has been laid to this part of the evidence on behalf of the defence save and except the general denial.

14. Another argument addressed on behalf of appellant is that the spot of alleged recovery was about 15 Kms away from the Police Station and PW-7 could not be expected to have travelled the distance along with Rukka on foot. He might have used some conveyance and if it was so, it was wrong on part of prosecution witnesses to say that no independent witness was available on spot. This argument deserves to be rejected for the simple reason that the appellant was apprehended at 4.20 AM and recovery was effected immediately thereafter, whereas the Rukka was prepared at 7.10.AM, whereafter PW-7 left the place for Police Station. Hence, it cannot be said that presence of any independent person at spot after 7.10.AM can be sufficient to assume that such witness was available at the time of recovery of contraband will be preposterous.

15. As against the aforesaid evidence, the appellant has not led any evidence to prove his alleged presence at Kullu on 26.01.2016 more specifically at Kullu bus-stand at 9.00 p.m. There is no corroboration to the version of appellant in this respect. It is also not comprehensible that in case the version put-forth by the appellant was correct, why the police would not have registered the case there and then at 9.00 p.m. on 26.01.2016 at bus-stand Kullu. There are no reasons appearing from record to infer any ulterior motive of police in projecting the place, mode and manner of recovery different

than what had actually happened. The place i.e. bus-stand Kullu falls within the jurisdiction of Police Station, Kullu and the place where recovery has been effected in the instant case also falls within the jurisdiction of same Police Station, therefore, there cannot be any reason for the police to have deferred the registration of case for next morning especially by subjecting themselves to extreme cold condition as usually prevail during last week of the month of January in the area in question.

16. We have also not been able to find any fault or infirmity in appreciation of evidence by learned trial Court. The findings and conclusions drawn by learned trial Court are borne out from the material proved on record.

17. In light of the aforesaid discussion, we do not find any merit in the instant appeal and the same is dismissed, so also the pending application(s) if any.

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

Between:-

PREM LAL
SON OF SH.BELI RAM,
RESIDENT OF VILLAGE PABO,
POST OFFICE SUKKI BAIN,
TEHSIL CHACHYOT,
DISTRICT MANDI, H.P. AGED 25 YEARS.

.....PETITIONER

(BY SH.DEVENDER K. SHARMA,
ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH.HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
NO. 2341 of 2021
Decided on: 30.12.2021

Code of Criminal Procedure, 1973- Section 438- Bail- **Protection of Children from Sexual Offences Act, 2012**- Section 6- the minor victim married petitioner claiming that she had attained majority and starting living together husband and wife in the house of the petitioner and during this period of copulation, she became pregnant and delivered a female child in hospital at Sundernagar- Held- It is case where societal interest and individual interest of the victim are in clash- Petitioner being her husband is the only person to look after her for the reasons that her parents may not be ready to accept her as she married without their consent- Balancing the societal interest and individual interest and comparing clashing individual interest of victim, it is fit case for enlarging the petitioner on bail- Petition allowed with conditions. (Para 6 & 7)

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

O R D E R

Petitioner has approached this Court invoking provisions of Section 438 Code of Criminal Procedure (in short 'Cr.P.C.'), seeking bail in Case FIR No.86 of 2021, dated 03.12.2021, registered in Police Station Gohar, District Mandi, H.P., under Sections 376 of the Indian Penal Code (in short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act').

2. Status report stands filed, wherein it has been stated that on receiving information from the Medical Officer Alok from Civil Hospital

Sundernagar that a 17 years old minor girl has given birth to a female child. Police rushed to the hospital and recorded statement of the girl. In her statement, victim stated that she is 17 years old and has studied up to 10th class and when she was studying in 9th class, she got acquainted with Prem Lal (petitioner), who is a Carpenter and they started love each other and petitioner used to come to meet her, and about one and a half year ago, she informed the petitioner that she had attained majority and thereafter in August, 2020 both of them on their own will, but without informing the parents, married each other and she started living as a wife of the petitioner in the house of petitioner-Prem Lal and during this period, for copulation, she became pregnant and on 01.12.2021, she was brought to Hospital at Sundernagar for checkup where on 02.12.2021 she delivered a female child.

3. On the basis of aforesaid statement, as complainant was minor, FIR was registered.

4. Supplementary statement of victim was also recorded, wherein she disclosed that she and petitioner had married with each other in the Temple of Mata Lambodari by offering garlands (Varmala and Jaimala) to each other and at that time there was no Priest available in the Temple and marriage has also not been recorded in the Gram Panchayat.

5. Female child expired on 05.12.2021. Learned counsel for the petitioner has placed on record Birth certificate as well as Death certificate of female child, wherein name of petitioner has been mentioned as father, whereas, victim has been reflected as mother of female child.

6. It is a case where societal interest and individual interest of the victim are in clash. In case for societal interest, petitioner is sent behind the bars then the personal and individual interest of victim would be adversely affected. It is a case where, two individual interests of victim are also in clash with each other as for protecting her interest as minor girl, petitioner has been considered as an accused, however, in that process the real sufferer is victim

herself as it would be ruining her marital life as well as family as petitioner being her husband is only person to look after her for the reason that for solemnizing marriage by victim with petitioner without their consent, her parents may not be ready to accept her and to take her responsibility. Her safety and welfare is with safety of her matrimonial family. To protect family is also in larger interest of society. Balancing the societal interest and individual interest and comparing clashing individual interest of victim, I find that it is a fit case for enlarging the petitioner on bail.

7. Accordingly, present petition is allowed and order dated 08.12.2021 granting interim bail to the petitioner is confirmed, subject to his furnishing personal bond in the sum of `30,000/- with one surety in the like amount, to the satisfaction of the trial Court, within four weeks from today, upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to ensure the presence of petitioner/accused at the time of trial:-

(i) That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;

(ii) that the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that the petitioner shall not obstruct the smooth progress of the investigation/trial;

(iv) that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;

(v) that the petitioner shall not misuse his liberty in any manner;

(vi) that the petitioner shall not jump over the bail;

(vii) that in case petitioner indulges in repetition of similar offence(s) then, his bail shall be liable to be cancelled on taking appropriate steps by prosecution;

(viii) that the petitioner shall not leave the territory of India without prior permission; and

(ix) that the petitioner shall inform the Police/Court his contact number and shall keep on informing about change in address and contact number, if any, in future.

8. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

9. In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

10. Trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

11. Observations made in this petition hereinbefore, shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application.

12. Petition is disposed of in aforesaid terms.

13. Copy dasti.

14. 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.

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

BETWEEN:-

KARAM VEER, S/O SH.PREM R/O GHATIWALA, BITNA COLONY, PINJORE, TEHSIL AND DISTRICT PANCHKULA, HARYANA, (PRESENTLY CONFINED IN MODEL CENTRAL JAIL NAHAN, HIMACHAL PRADESH) AND THE PETITION IS BEING FILED THROUGH WIFE OF THE BAIL APPLICANT.

…PETITIONER

(BY SH. PARAS RAO, ADVOCATE VICE MR.B.R. KASHYAP, ADVOCATE.)

AND

NARCOTICS CONTROL BUREAU ZONEL, SECTOR 25, CHANDIGARH UNION OF INDIA, THROUGH INTELLIGENCE OFFICE, NCB CHANDIGARH.

…RESPONDENT

(BY SH. SANDEEP SHARMA, ADVOCATE.)

CRIMINAL MISC. PETITION (MAIN)
No. 1378 OF 2021
Decided on: 14.12.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8, 20, 25, 28, 29 and 60- Petitioner found involved in transportation of 8.75 Kgs charas and 1.020 kgs of opium- Petition has been filed on medical grounds- Medical Board constituted- Petitioner found stable- Petition dismissed. (Para 4 to 7)

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

O R D E R

Petitioner has approached this Court, invoking provisions of Section 439 of Cr.P.C., for enlarging him on bail in case FIR No. 66 of 2019, dated 7.11.2019, registered under Sections 8, 20, 25, 28, 29 and 60 of Narcotics Drugs and Psychotropic Substance Act, 1985 in Police Station Baddi (Nalagarh), District Solan, H.P.

2. As per prosecution case petitioner has been found involved in transportation of 8.75 Kilograms Charas and 1.020 Kilograms of Opium and trial is in progress.

3. Petitioner had also approached this Court by filing Cr.M.P. (M) No. 1206 of 2020, which was dismissed on 7.12.2020 on merits.

4. Present petition has been preferred by petitioner, seeking bail, mainly on medical grounds, referring his ailment by substantiating his claim by placing on record prescription slips and other documents, indicating his ongoing treatment.

5. To verify the claim of the petitioner, vide order dated 27.11.2021, petitioner was ordered to undergo medical examination to be conducted by Medical Board constituted by Medical Superintendent, Medical College, Nahan with direction to the Board to submit its report by answering the question as to whether treatment of the petitioner is not possible in jail.

6. In response to the aforesaid, petitioner has been subjected to medical examination and as per medical examination report received through Superintendent of Jail Nahan, following findings have been reported:-

> *"At present on examination patient conscious & ambulatory.*
> *Pulse rate:- 76 per minute, BP: 140/90 and SPo2:-98%*
> *Chest is clear*
> *Cardiovascular examination is within normal limits ECG done. WNL*
>
> *In my opinion at present patient is haemodynamically stable. He requires continued treatment as prescribed and on going from PGI Chandigarh. In case of recurrent of chest pain patient would require further evaluation under cardiologist."*

7. In view of aforesaid report, I do not find any merit in the prayer made by the petitioner at this stage. Therefore, present petition is dismissed.

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

Between:

1. SHRI BALDEV SINGH,
   S/O SHRI CHATTER SINGH

2. ANIL KUMAR,
   S/O SH. SHANKER DASS

3. RAKESH SINGH,
   S/O SHRI BALDEV SINGH

4. RAJESH KUAMR @ KAKA,
   S/O SHRI BALDEV SINGH

5. RAVINDER SINGH
S/O SHRI UTTAM SINGH

ALL R/O VILLAGE BEHI PATHIAR,
TEHSIL & ps JAWALI,
DISTRICT KANGRA (HP)

6. RAJINDER SINGH,
S/O SHRI SHER SINGH,
R/O VILLAGE GAHIN LAGOR,
TEHSIL NURPUR,
DISTRICT KANGRA, (HP)

....PETITIONERS-ACCUSED

(BY MR. ASHOK CHAUDHARY,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH.

2. SHRI RASHPAL SINGH
S/O MAGGAR SINGH,
R/O VILLAGE CHHO (JAUNTA)
TEHSIL NURPUR, DISTRICT KANGRA, HP

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL,
WITH MR. NARENDER THAKUR AND
MR. GAURAV SHARMA, DEPUTY ADVOCATES
GENERAL, FOR R-1)

(BY MR. PRASHANT SHARMA,
ADVOCATE FOR R-2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 401 OF 2021
Decided on: 8.12.2021

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 147, 149, 323, 427, 447, 452, 506 read with Section 34- Petitioners have approached the Court for quashing the summoning order-

C. Code of Criminal Procedure, 1973- Section 210- Police case lodged pursuant to FIR and case registered on the basis of private complainant- Though careful perusal of Section 210 (1) of Cr.PC, clearly reveals that police case lodged pursuant to filing of the FIR and case registered on the basis of private complaint cannot go together, if it comes to the notice of the magistrate that FIR qua the same incident, stands filed and investigation is on, he would order stay of the proceedings. However, Section 210 (2) Cr.PC reveals that if a report is made by the investigating officer under section 173 and on such report, cognizance of any offence is taken by the Magistrate against any person, who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. (Para 9)

D. Held- Court below directed to try the complaint case and the case arising out of the police report together as if both the cases were instituted on the police report in terms of provisions contained under Section 210 (2) of the Cr.PC.- Petition disposed of accordingly. (Para 11)

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 3.2.2020, passed by the learned ACJM, Nurpur, District Nurpur, District Kangra, HP, whereby petitioners herein came to be summoned to the court on account of their having allegedly committed offences punishable under Sections 147, 149, 323, 427, 447, 452, 506 read with Section 34 of IPC, petitioner have approached this Court in the instant proceedings praying therein to set-aside the aforesaid order.

2. Pursuant to notices issued vide order dated 24.8.2021, respondent-State has already file reply, whereas no reply has been filed on

behalf of respondent No.2, who is otherwise being represented by Mr. Prashant Sharma, Advocate.

3. Precisely, the facts of the case as emerge from the record are that while petitioner No.1 Sh. Baldev Singh, alongwith daughter namely Reeta Devi, was going back to his home on 2.3.2017, one vehicle i.e. Canter (truck), being driven by some unknown person hit his vehicle. While petitioner was having conversation with the truck driver, respondent No.2 Rashpal Singh alongwith persons namely Deepu, Rakesh, Pradeep and his brother, came on the spot and started giving beatings to the petitioner with stick/danda. After having heard cries of petitioner No.1, Up-Pradhan of Behi Pathiar namely Sh. Ravinder Singh and another person namely Anil Kumar, came on the spot and saved the petitioner from the clutches of above named persons. Immediately, after the aforesaid incident, petitioner No.1 approached the Police Station Nurpur and on his complaint, FIR No. 84 of 2017 dated 2.3.2017, under Sections 147, 148, 149 and 323 of IPC, came to be registered against respondent No.2 and other persons namely Deepu, Rakesh and Pradeep and his brother.

4. After lodging of the aforesaid FIR by petitioner No.1, respondent No.2 also lodged complaint at PS Nurpur, stating therein that he was beaten by one Sh. Rajesh Kumar, S/o Sh. Baldev Singh (petitioner No.1) and as such, FIR No. 85 of 2017, dated 2.3.2017, came to be registered against petitioner No.1 under Sections 451, 323, 504 and 34 of IPC.

5. Though police after having completed investigation in both the FIRs, as detailed herein above, filed final report under Section 173 of the Cr.PC, in the competent court of law, but yet respondent No.2 filed a private complaint under Section 200 of the Cr.PC, in the court of learned ACJM Kangra, with respect to the same incident, qua which, FIR, as detailed herein above, stood already registered (Annexure P-3).

6. Learned court vide order dated 3.2.2020, having perused complaint and preliminary evidence led on record by the complainant, summoned the petitioners herein to the court for their having allegedly committed offence punishable under Sections 147, 323, 427, 447, 452 and 506 read with Section 34 of IPC. In the aforesaid background, petitioners have approached this Court in the instant proceedings, for quashing of aforesaid order.

7. Precise grouse of the petitioners, as has been raised in the instant petition, is that once FIR qua the incident on the basis of which, subsequently, private complaint came to be lodged at the behest of the respondent No.2, stood lodged and police after having completed investigation had already filed challan in the competent court of law, there was no occasion, if any, for the learned ACJM Nurpur to issue summons to the petitioners. Reply filed by respondent No.1 clearly reveals that police after having taken cognizance of the complaints made by petitioner No.1 and respondent No.2 lodged FIR Nos. 84 and 85 of 2017 and thereafter, after completion of investigation presented the challan in the competent court of law in both the cases. However, it appears that respondent No.2 despite his having lodged FIR, which was otherwise taken to its logical end by the police, lodged private complaint under Section 200 of the Cr.PC in the competent court of law, qua the same incident, which otherwise stood reported to the police by way of FIR No. 85 of 2017. Learned trial Court vide order dated 3.2.2020, summoned the petitioners in that complaint case.

8. Careful perusal of private complaint filed by respondent No.2 reveals that factum with regard to lodging of FIR No. 85 of 2017 dated 2.3.2017, at the behest of respondent No.2 was very much in the knowledge of learned ACJM Nurpur, District Kangra, who before passing order dated 3.2.2020, while summoning the petitioners to the court, failed to call for report from the police with regard investigation, if any, carried out by it in the

FIR bearing 85 of 2017 lodged at the behest of the respondent and issued summons to the petitioners.

9. Though careful perusal of Section 210 (1) of Cr.PC, clearly reveals that police case lodged pursuant to filing of the FIR and case registered on the basis of private complaint cannot go together, if it comes to the notice of the magistrate that FIR qua the same incident, stands filed and investigation is on, he would order stay of the proceedings. However, Section 210 (2) Cr.PC reveals that if a report is made by the investigating officer under section 173 and on such report, cognizance of any offence is taken by the Magistrate against any person, who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

10. In the case at hand, as has been taken note herein above, FIR qua the same incident stood already lodged at the behest of the respondent, but yet he chose to file private complaint before the magistrate, who also issued process against the accused.

11. Since in the case at hand, challan stands filed in the competent court of law on the basis of investigation carried out by the police in the FIR lodged by the respondents, this court having taken note of the provisions contained under Section 210 (2) of Cr.PC, deems it fit to direct the court below to try the complaint case and the case arising out of the police report together as if both the cases were instituted on the police report. Ordered accordingly. Interim order dated 24.8.2021, is hereby vacated and parties are directed to remain present before the learned Court below on ***20.12.2021***, enabling it to proceed with the matter strictly in terms of provisions contained under Section 210 (2) of the Cr.PC. In the aforesaid terms, present petition is disposed of alongwith pending applications if any.

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

BETWEEN:-

RAJBIR SINGH SON OF LATE SHRI HARI CHAND, RESIDENT OF MUHAL CHHOTA SAMAHAL, SUB-TEHSIL BHADROTA, TEHSIL SARKAGHAT, DISTRICT MANDI, HIMACHAL PRADESH. ...PETITIONER

(BY SHRI MAAN SINGH, ADVOCATE.)

AND

HEM SINGH SON OF SHRI CHUNI LAL, RESIDENT OF VILLAGE KHANDLA, TEHSIL BALH, MANDI, HIMACHAL PRADESH.

...RESPONDENT

(NONE.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 680 of 2021
Decided on:17.12.2021

Negotiable Instruments Act, 1881- Section 138- Conviction- Applicant seeking extension of time for furnishing bail bonds and depositing 20% of compensation amount- Dismissed- Held- Order of Ld. Additional Sessions Judge is without any infirmity or illegal, however, by way of special indulgence one last opportunity is granted to petitioner to furnish bail bonds subject to deposit of 30% of compensation amount instead of 20% as earlier directed by the first Appellate Court- petition disposed of accordingly.

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

J U D G M E N T

For the order proposed to be passed, there is no necessity to issue notice to the respondent.

2. Present petition has been filed for setting aside the impugned order dated 4.12.2021, passed by learned Additional Sessions Judge, Sundernagar, District Mandi, H.P., in Cr.MA No. 906 of 2021 in Criminal Appeal No. 150 of 2019, titled as Rajbir Singh Vs. Hem Singh, whereby application of the petitioner seeking extension of time for furnishing bail bonds and depositing amount in compliance of order dated 18.9.2019, has been dismissed.

3. Petitioner has been convicted in a case under Section 138 of Negotiable Instruments Act by the trial Court and vide order dated 5.8.2019 has been sentenced to undergo simple imprisonment for two years and to pay compensation to the tune of ₹13,00,000/- to the complainant for dishonor of cheque amounting to ₹10,00,000/-.

4. In appeal preferred by the petitioner, substantive sentence was suspended vide order dated 18.9.2019, subject to furnishing bail bonds and depositing of 20% of compensation amount within 30 days. However, petitioner did not comply with the order and on every subsequent date seeks extension and time was extended on those dates. The sentence was suspended about 2 years and 4 months ago. Lastly, vide impugned order dated 4.12.2021, learned Additional Sessions Judge has dismissed the application filed by the petitioner for further extension by passing a reasoned and speaking order.

5. There is no plausible justification for not complying with the terms and conditions imposed at the time of suspension of sentence, therefore, I do not find any infirmity, illegally or irregularity in the impugned order passed by learned Additional Sessions Judge, Sundernagar, warranting interference of this Court.

6. However, considering the persuasive request of learned counsel for the petitioner, by way of special indulgence one more, but last opportunity is granted to the petitioner to furnish personal and surety bonds in the sum of

`25,000/- to the satisfaction of trial Court on or before 14th January, 2022, but subject to deposit of 30% of compensation amount by that date in the trial Court, instead of 20% of compensation amount, as directed by the first Appellate Court and subject to aforesaid condition, interim protection granted to petitioner by learned Additional Sessions Judge, Sundernagar vide order dated 18.9.2019 shall continue, but subject to any further condition as deemed fit to be imposed by the first Appellate Court during pendency of the appeal. On failure in furnishing bail bonds and depositing 30% of compensation amount on or before 14th January, 2022, interim protection with respect to suspension of sentence shall stand vacated automatically.

7. In case bail bonds are furnished and 30% of compensation amount is deposited by the petitioner on or before 14th January, 2022 in the trial court, then he shall not be arrested for execution of sentence imposed upon him by the trial Court. Information in this regard shall be transmitted by the trial Court to first Appellate Court.

8. In view of aforesaid order, petitioner shall not be arrested till 14th January, 2022 for execution of non-bailable warrants issued by trial Court against him vide order dated 23.11.2021, returnable for 14.1.2022. On compliance by the petitioner in terms of this order, execution of sentence shall remain suspended subject to further order passed by the Court(s).

The petition stands disposed of in aforesaid terms.

Petitioner is permitted to use downloaded copy of this order from the High Court website and concerned authority shall not insist for certified copy. Passing of order may be verified from High Court website.

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

Between:-

MHABENI ENVY, D/O MHONYAMO ENNI
R/O H. NO. 391, LANK MARK COLONY

(PWD), NEAR SM COLLEGE DIMAPUR SADA, DIMAPUR, NAGALAND, PRESENTLY LODGED IN DISTT. JAIL BANGARH, UNA H.P. …PETITIONER

(BY SH. N.K. THAKUR, SENIOR ADVOCATE ALONGWITH SH.DIVYA RAJ SINGH THAKUR, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH. …RESPONDENT

(BY SH. HEMANT VAID, ADDITONAL ADVOCATE GENERAL.)

CRIMINAL MISC. PETITION (MAIN) No. 2274 of 2021

Between:-

NICOLAS CHINEDU, S/O OKOFAR ONYEKA R/O VILLAGE ANAM ANAMBARE STATE MIJIRA, NIGERIA, IN INDIA, R/O H. NO. 279, MOHAN GARDEN, UTTAM NAGAR DELHI, PRESENTLY LODGED IN DISTRICT JAIL BANGARH, UNA, H.P. …PETITIONER

(BY SH. N.K. THAKUR, SENIOR ADVOCATE ALONGWITH SH.DIVYA RAJ SINGH THAKUR, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH. …RESPONDENT

(BY SH. HEMANT VAID, ADDITONAL
ADVOCATE GENERAL.)

CRIMINAL MISC. PETITION (MAIN)
No. 2273 of 2021
Reserved on: 20.12.2021
Decided on: 29.12.2021

Code of Criminal Procedure, 1973- Section 438- Bail- **Indian Penal Code, 1860**- Sections 420, 120 B & 201- **Indian Foreigners Act, 1946** - Section 14- Held- Offence involved in the case is not only against an individual but is also against the public at large- Fact cannot be ignored that there is tremendous rise in commission of offences related to cyber crime causing extortion of money from innocent people by alluring them- It is an offence against society- Bail application dismissed. (Para 18)

Cases referred:

Dataram Vs. State of U.P., (2018) 3 SCC 22;

These petitions coming on for pronouncement this day, the Court delivered the following:

J U D G M E N T

These petitions have been filed seeking regular bail under Section 439 Cr.P.C. in case FIR No. 236 of 2019, dated 4.7.2019, under Sections 420, 120-B, 201 IPC and Section 14 of Indian Foreigner Act, registered at Police Station Sadar, Una, District Una, H.P.

2. Status report stands filed, wherein manner, in which offence alleged to have been committed by petitioners alongwith co-accused Martin James John, causing the victim to transfer/transmit about `27,00,000/- in the account supplied by the accused person during 11th January, 2019 to 7th March, 2019, has been narrated in detail.

3. In brief, as per status report, complainant, serving as Head Mistress, had come in contact of some unknown person through Face Book,

who was claiming himself to be resident of United Kingdom. After some time she received a call purporting to be a call from Airport Custom Department informing that one parcel sent to her from United Kingdom was lying with them and for release of which she had to deposit `93,000/- in the account number communicated by them. At first instance complainant had refused by saying that she had not been expecting any such parcel. But thereafter, she received a message from resident of United Kingdom, came in her contact through Face Book, disclosing that he had sent the parcel to her and had advised to receive it, whereupon complainant had deposited `93,000/- in the account number communicated to her. Thereafter complainant received another call claiming it to be a call from Airport Custom Department to inform her that parcel contained number of dollars and huge Gold and, therefore, she had to pay `1,75,000/- in addition to the amount deposited by her earlier. After couple of days, complainant again received a message from resident of United Kingdom that he had been coming to India, but he was detained by Custom Department at Mumbai Airport as he was possessing huge quantity of dollars and gold, and Custom Department was asking for money and he was not in a position to exchange the dollars and Gold into Rupees, therefore, he asked complainant to send money to the account communicated by him. Complainant transferred the amount to the account communicated by the accused person under compulsion as she thought that in case she would not send money, then the person would remain in detention and her money, already transferred by her, would not be recovered. On last occasion of demand of money complainant asked for `2,00,000/- from her husband, who was not aware about this entire episode and thereupon her husband had inquired about the matter and when complainant asked resident of United Kingdom to refund her money, then the said person switched off the phone. Whereupon complainant, on 4.7.2019, approached the Police and FIR was lodged.

4. Complainant had reported that she had been receiving messages and calls from phone Nos. 7303637393, 7065518321, 9711196438, 447511750525, 4474677112886, 447513152214 and 447448352202.

5. After registration of FIR, investigation was carried out and co-accused Martin James John was detained on the basis of phone call and location of shop and mobile phone through which he had been recharging his phone and he, on finding involved in commission of offence, was arrested on 20.2.2021, however he was enlarged on bail by the Court on 29.4.2021 by extending benefit of default bail as the Investigating Agency was not able to file challan within prescribed period.

6. During investigation account numbers to which amount was transferred were verified. These account numbers were of different branches of State Bank of India located in Nagaland. Complainant had transferred `27,78,794/- to these accounts. On inquiry, all these accounts were found fake.

7. During investigation it was found that from SIM No. 70655-18321 complainant had 42 calls, for commission of offence and this SIM Card/number was used in phone sets having IEMI No. 865146020660770 and 355821093999270. These Mobile sets were used for large number of SIM/Mobile phone number and this mobile set was also being used by Martin James John (a Nigerian Citizen) and Investigating Agency reached to Martin James John and he was arrested.

8. During investigation SIM No. 98620-97938 having tower location Mohan Garden, Uttam Nagar, Delhi belonging to petitioner Mhabeni Envy and another SIM Card No. 84488-18565 of Mhabeni Envy were also found used in mobile Set 355821093999270. With the aforesaid clue petitioner Mhabeni Envy was traced and she was found residing in Mohan Garden, Uttam Nagar, Delhi along with her husband Nicolas Chinedu co-accused.

9. During search of the room of the petitioners Mobile Phone used for commission of offence was found without SIM Card and apart from aforesaid Phone, currency of `3,50,000/-, eight other Mobile Phones alongwith number of SIM Cards and a laptop were recovered. The Mobile Phones used for commission of offence was found in possession of petitioner. Petitioner Mhabeni Envy is originally resident of Nagaland and fake account numbers used for commission of offence were also found to be opened in various branches of SBI on fake identity and in these circumstances petitioners have been arrested and produced before the court on 5.8.2021. Thereafter, they after remaining in Police custody, are now in judicial custody. It was claimed by petitioner Mhabeni Envy that `3,50,000/- had been withdrawn by her from her own account No. 31714378551 SBI Ranga Pahar Deemapur Nagaland. During investigation this account number was found in the name of Mhabeni Envy, however, after obtaining the account statement of that account this claim of Mhabeny was found false, which substantiated the claim that petitioners were involved in illegal transaction of amount in deceitful manner.

10. Learned counsel for the petitioner has contended that offence at the most, in case considered to be true, committed by the petitioners is under Section 420 IPC, for which petitioners should not be detained in jail without conviction, particularly when co-accused Martins James John has been enlarged on bail on 29.4.2021.

11. In case of Mhabeni Envy, it has also been contended that she is also entitled to be enlarged on bail being a lady as envisaged under Section 437 of Cr.P.C., especially for the reason that she is Indian National and there is no possibility of her absconding.

12. It has been further contended that co-accused Nicolas Chinedu is husband of Mhabeni Enny and, therefore, he is also entitled to be enlarged on bail, particularly when main accused has been enlarged on bail.

13. It has been submitted by learned counsel for the petitioners that first transaction of amount had taken place in January, 2019 and date of last transaction is March, 2019 whereas FIR has been lodged in July, 2019 without any explanation for delay and petitioners have been arrested after more than two years and on this count also prayer for granting bail has been made.

14. It has been contended that nothing has been recovered from petitioners except mobile phone, laptop and cash unconnected to offence in present case and beneficiary of alleged offence is on bail and challan has been presented in the Court, therefore, petitioners cannot be refused bail for pre conviction punishment particularly keeping in view pronouncement of the Supreme Court in ***Dataram Vs. State of U.P., (2018) 3 SCC 22*** especially when for conduct of Police/Investigator Martin James John has been enlarged on bail. It has also been canvassed that when main accused is on bail, accomplice cannot be kept behind the bars.

15. Learned Additional Advocate General has submitted that co-accused Martin James John has not been released on bail on merits, but he has been granted default bail for not filing challan within the period as investigation could not be completed, because Investigator had to visit Nagaland and Delhi etc. and during that period statutory time for filing challan had expired. According to him, involvement of petitioners in the crime is evident from the material on record, particularly from the recovery of nine Mobile Phones and number of SIMs, and also fake accounts opened in the State of Nagaland. Lastly, it has been submitted that cyber crimes are increasing day by day and innocent people are being duped by culprits like present case where complainant has lost not only her lifelong earning but has also borrowed huge money for transferring to accused persons. It has also been contended by learned Additional Advocate General that there is no delay in lodging FIR as it is natural conduct and behavior of a lady, who had

transferred the amount without taking into confidence her husband, to transfer further amount, instead of reporting the matter, with a hope that after making further payment she would be getting/recovering entire amount.

16. Learned Additional Advocate General has contended that Mhabeni Envy is main accused as entire amount has been routed through fake bank accounts opened in Nagaland wherefrom she hails and thus she is not entitled for benefit being a lady for main and active role in commission of offence. Further that default bail to one co-accused does not entitle other co-accused arrested later on to get bail on the said ground.

17. It has been submitted by learned Additional Advocate general that menace of duping innocent persons through cyber crime leading to irreparable and unbearable loss to victim is increasing day by day and, therefore, petitioners do not deserve any leniency.

18. As a matter of fact, offence involved in present case is not only against an individual, but is also against the public at large. This fact cannot be ignored that there is tremendous rise in commission of offences related to the cyber crime causing extraction/extortion of money from innocent people by alluring them by the offenders. Thus offence like nature of offence committed in present case is an offence against society. Because of such incidents, a considerable population is discouraged to adopt modern technology for transactions of money.

19. After going through the contents of the status report, considering cumulative effect of facts and circumstances and weighing personal interest of the petitioner(s) with societal interest, and also impact of enlarging the petitioners, at this stage, on the society, I do not find it fit to enlarge the petitioner(s) on bail.

Hence, bail application(s) are dismissed.

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

Between:-

SH. SUDHIR KUMAR @ SONU S/O LATE SH. ILAM CHAND, AGED ABOUT 36 YEARS, R/O KURDI KHEDA, KALUWALA JAHANPUR, SAHARANPUR, KALUWALA, UTTAR PRADESH. PRESENTLY AT M.C. JAIL, NAHAN (HP).

...PETITIONER

(BY SH. T.K. VERMA AND SH. HEMANT KUMAR THAKUR, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH....RESPONDENT.

(SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENT.)

CRIMINAL MISC.PETITION (MAIN)
No. 1963 of 2021
RESERVED ON: 12.11.2021
DECIDED ON : 18.11.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 363, 376- **Protection of Children from Sexual Offences Act, 2012**- Section 6- After completion of investigation report under Section 173 Cr.P.C. filed – Petitioner in custody since 17.04.2021- The petitioner has committed a very serious and heinous offence- Apprehension of the respondent that in the event of bail the petitioner may tamper with the prosecution evidence appears to be genuine- Bail petition dismissed.

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

O R D E R

Petitioner is accused in case registered, vide FIR No. 42 of 2021 dated 13.4.2021 at Police Station, Majra, District Sirmaur, H.P. under Sections 363, 376 of IPC and Section 6 of the POCSO Act, 2012.

2. After completion of investigation, report under Section 173 Cr.P.C. has already been presented before the competent Court, which after having taken cognizance, is seized of the matter. Petitioner was arrested on 17.4.2021 and remained in police custody till 22.4.2021 and since then, he is in judicial custody.

3. Petitioner has approached this Court for grant of bail, in the above noted case, under Section 439 of the Code of Criminal Procedure (for short 'Code'), inter-alia, on the grounds that the victim was above 18 years of age at the time of alleged offence. He has placed reliance on a document, which is a photocopy of the school leaving certificate, purportedly issued by the 'Innava Public School' Ganeshpur, District Saharanpur (U.P.) revealing the date of birth of the victim as 25.12.2002. According to petitioner, the victim has been opined to be habitual of sexual intercourse by the medical expert. It has further been stated that no incriminating role of the petitioner has come-forward during investigation, which is complete and hence does not warrant further custody of petitioner. Petitioner has contended that he belongs to respectable family and has roots in the society. Nothing is required to be recovered from him. He is ready and willing to abide by all the terms and conditions as may be imposed. He does not have any past criminal record.

4. On notice, respondent has submitted status report. It has been affirmed that the learned trial Court after having taken cognizance is seized of the matter. The prayer of the petitioner is resisted on the ground that petitioner is a clever person and belongs to other State. In case he is released on bail, there is apprehension of petitioner threatening the witnesses, which may affect the result of the case. It has been submitted that the date of birth of the victim has been found to be 25.12.2005 and thus she was below the age of 16 years on the date of alleged offence. The evidence to this effect is stated to have been collected by way of record from

the Gram Panchayat, Majra, Aadhar Card of the victim and the certificate issued by the Principal, Satya Shri Public School, Pipliwala. As per respondent, the victim has clearly implicated the petitioner in her statement under Section 164 Cr.P.C. as well as other supplementary statements made by her during investigation. As per her allegation, she was taken to Haridwar and Chandigarh etc. by petitioner where she was subjected to forcible sexual intercourse.

5. The case was registered on 13.4.2021 on the complaint of one Sh. Ram Kishan, uncle of the victim. He had reported that the victim was daughter of his younger brother and was missing since 11.4.2021. On 16.4.2021, father of petitioner had brought the victim at Police Station, Majra, District Sirmaur, H.P. Initially, she did not implicate the petitioner in any offence, but subsequently, as noticed above, in her statement under Section 164 Cr.P.C., she made narration of facts alleging commission of serious offences against petitioner. She explained that she did not reveal the correct factual position earlier under the threat.

6. I have heard learned counsel for the parties and have also perused the contents of the status report.

7. The victim, as per the evidence collected by the Investigating Agency, was born on 25.12.2005, meaning thereby, the victim was about 15 years 4 months old at the time of alleged offence. The version of petitioner that the victim was more than 18 years of age at the time of alleged offence has not been substantiated by any unimpeachable evidence even for the purpose of prima-facie appraisal of the Court. The copy of school leaving certificate, relied upon by the petitioner, does not inspire confidence for the reasons, firstly, that no effort was made during investigation to get this fact verified through the Police and secondly, the police has collected the certificate from the head of some other school showing 25.12.2005 as the

date of birth of the victim. In addition, the panchayat record as well as Aadhar Card of the victim also reflects her date of birth as 25.12.2005.

8. Petitioner is stated to be 36 years old, which is a fact that needs to be taken into consideration while assessing the prayer of petitioner. At his age, there can be no mis-apprehension in the mind of a person to make relations with a girl, who had just completed 15 years of age. The conduct of the petitioner is clearly evident of his intent which cannot be said to be honest or bonafide by any stretch of imagination. The petitioner, thus has committed a very serious and heinous offence. Mere fact that he doesn't have any criminal history will not mitigate his sin, especially keeping in view the fact noticed hereinabove.

9. Another fact which needs to be noticed is that initially the victim refused to implicate the petitioner, but subsequently implicated him by rendering an explanation that she was under threat. There is nothing on record to suggest any plausible reason for false implication of the petitioner in the case. This being so, the explanation rendered by the victim cannot be brushed aside lightly. In this view of the matter, apprehension of respondent that in case of release of petitioner on bail, there is likelihood of tampering with the prosecution evidence at the hands of petitioner, appears to be genuine. He may pressurize the victim and other witnesses to not to disclose truth before the Court. The trial, therefore, is likely to be affected.

10. In light of the above discussion, I find no merit in the petition and the same is rejected.

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

12. The petition is disposed of accordingly.

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

Between:-

SH. DEEP RAM S/O SH. SUKH DEV,
R/O VILLAGE LUHNU KANAITA,
P.O. CHANDPUR, TEHSIL SADAR,
DISTRICT BILASPUR, H.P.
AGED ABOUT 33 YEARS..

...PETITIONER

(BY MR. MUKESH SHARMA & MR. GURDEV NEGI,
ADVOCATES.)

AND

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

....RESPONDENT.

(MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENT.)

CRIMINAL MISC.PETITION (MAIN)
No.2216 of 2021
RESERVED ON: 17.12.2021.
DECIDED ON: 24.12.2021.

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 25 & 29- Recovery of 1.555 kgs. of charas- Held- Commercial quantity is involved in the case, thus rigors of Section 37 of the NDPS Act applicable- Implication of petitioner prima facie cannot be said to be without justification- Petition dismissed.

Cases referred:
State of Kerala and others Vs. Rajesh and others, (2020) 12 SCC 122;
Satpal Singh Vs. State of Punjab (2018) 13 SCC 813;

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

O R D E R

Petitioner is accused in case registered, vide FIR No.14 of 2021 dated 27.03.2021, at Police Station, Sainj, District Kullu, H.P. under Sections 20, 25 & 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. Petitioner seeks bail under Section 439 of the Code of Criminal Procedure (for short 'Code'),in the above noted case on the ground that his implication is false. He alleges that no recovery was effected from him. As per petitioner, he had been working as agricultural labour in District Kullu and on the fateful night he had taken lift in the vehicle of Ram Krishan, who was acquainted with him as they hailed from the same area.

3. It has also been canvassed on behalf of petitioner that he has no previous criminal history. He is permanent resident of Village LuhnuKanaita, P.O. Chandpur, Tehsil Sadar, District Bilaspur, H.P. He belongs to a very poor family and the entire burden of maintaining the family is on him. The investigation of the case is complete and there is no justification to prolong the custody of petitioner. There is no apprehension of petitioner fleeing from the course of justice.

4. On notice, respondent has placed on record status report. The case of respondent is that on 27.3.2021, police party headed by HC Anupam Kumar No. 13 had laid "Nakka" at place Larji. At about 4.30 A.M. a vehicle bearing No. HP-24B-6994 (Tata Tigor) was stopped for checking. Immediately, another vehicle bearing No. HP-24C-6968 (Pick-up) followed and stopped behind the Tata Tigor car. Two persons occupying vehicle bearing No. HP-24B-6994 immediately alighted and ran towards river. Vehicle bearing No. HP-24C-6968 (Pick-up) was occupied by its driver

named Vinod Kumar. On search of said vehicle HP-24C-6968 "Charas" was recovered, which weighed 1 KG and 555 grams. Vinod Kumar was arrested. As per his version, the recovered "Charas" belonged to Ram Krishan and Deep Ram @ Nittu, who were occupants of the car bearing No. HP-24B-6994.

5. Ram Krishan and petitioner were arrested on 30.03.2021. As per the case of police, they disclosed that they had purchased the recovered contraband from Dave Ram, who was also arrested on the same day. As per disclosure made by Dave Ram, he had purchased the contraband from Saina Devi on 26.03.2021. The investigation is stated to have been completed. Challan has been filed and matter is pending before learned Special Judge, Kullu.

6. I have heard learned counsel for petitioner as well as learned Senior Additional Advocate General, for the State.

7. It has been argued on behalf of petitioner that he had taken lift in the vehicle of Ram Krishan to visit his home as he was working as an agricultural labour in District Kullu. It has further been stated on behalf of petitioner that he ran from the spot as he was asked to do so by Ram Krishan. He was not aware about the transactions relating to contraband allegedly recovered from the other vehicle.

8. It is not in dispute that commercial quantity of contraband is involved in the instant case. The challan has been presented in the Court for offences under Sections 20, 25 and 29 of the NDPS Act. Thus, the rigors of Section 37 of the NDPS Act will be applicable in the instant case.

9. In **State of Kerala and others Vs. Rajesh and others, (2020) 12Supreme Court Cases122**, it has been held as under: -

> *"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non*

obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

10. Similarly, in **Satpal Singh Vs. State of Punjab (2018) 13 Supreme Court Cases 813**, the three Judges Bench of Hon'ble Supreme Court has held as under*:* -

*"**3.** Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are*

in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court."

11. Thus, in the teeth of Section 37 of NDPS Act, accused can be released on bail in the cases involving commercial quantity of contraband, if all three conditions are satisfied viz. opportunity of opposing the bail is granted to the prosecutor, the Court records satisfaction to the effect that there are reasonable grounds for believing the accused not guilty of such offence and that he/she with certainty can be believed not to commit the same offence during the period of bail.

12. Coming to the facts of the case, no credible explanation hasbeen given by petitioner regarding his presence in the vehicle of RamKrishan at the time of its apprehension. The explanation that petitioner ran away with Ram Krishan on his asking does not inspire confidence. In case petitioner initially ran from the spot in the state of confusion, he could have easily reported to the police after regaining his senses and have explained to them his innocence. It is also not believable that petitioner had taken lift from Ram Krishan. The timings do not lend any credence to the version of petitioner, more so, when petitioner has not provided the details as to with whom he was working as agricultural labour and from which place he had boarded the vehicle of Ram Krishan. The vehicle was apprehended at4.30 A.M. in the morning at Larji, which is hardly at a distance of 20-25 KM from Kullu. It is hard to believe that petitioner could have been waiting for lift in the mid of night.

13. Thus, the implication of petitioner prima facie cannot be said to be without justification. That being so, this court is unable to return findings that there are reasonable grounds to believe that petitioner is not guilty of charged offence. In addition, the possibility of petitioner indulging in similar offence during bail can also not be ruled out. Therefore, Section 37 of NDPS Act comes into play and petitioner's right, if any, to be released on bail gets clogged.

14. The ingredients of Section 37 of NDPS Act are to be readconjunctively and absence of any single condition thereof disentitles aperson from reliefof bail.

15. An argumenthas further been raised on behalf of petitioner thatas per admitted case of respondent no recovery was effected frompetitioner, therefore, Section 37 of the NDPS Act will not be applicable. The argument so raised deserves to be rejected for the reason that Section 29 ofthe NDPS Act speaks about abetment or conspiracy that makes the personliable for punishment for the same offence of which abetment or conspiracyis alleged. Section 29 of the NDPS Act carves out an independent offenceand will be covered under the expression "and also the offences involvingcommercial quantity" used in Section 37 (1) (b) of the NDPS Act. Thus, whenever a person is accused of offence under Section 29 of the NDPS Actand the involvement is of commercial quantity of contraband, undoubtedly, the rigors ofSection 37 of the NDPS Act shall apply.

16. Even otherwise, the mere absence of recovery of contrabandfrom the possession of an accused shall not exempt him from the rigors of Section 37 of the NDPS Act. Reference can be made to a recent judgmentdated 22.9.2021 passed by the Hon'ble Supreme Court in Criminal Appeal No. 1043 of 2021 (Arising out of SLP (Crl) No.1771 of 2021), titled **Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan**, wherein it has been held as under:

"24. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in Union of India vs. Rattan Mallik, (2009) 2 SCC 624, a twojudge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfill the parameters of Section 37 (1) (b) and there was non-application of mind by the High Court.

25. Inline with the decision of this Court in RattanMallik (Supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

17. In view of above discussion, I find no merit in the petition and the same is accordingly dismissed.

18. 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 SANDEEP SHARMA, J.

Between:

SURINDER KUMAR,
S/O SH. MASARU RAM,
R/O VILLAGE JUNDI,
TEHSIL ROHRU,
DISTT SHIMLA, HP.

....PETITIONER

(BY MR. V.B. VERMA,

ADVOCATE)

AND

STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY (HOME,
HIMACHAL PRADESH

....RESPONDENT

(BY MR. SUDHIR BHATNAGAR
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL,
WITH MR. NARENDER THAKUR,
MR. GAURAV SHARMA AND
MR. KAMAL KISHORE SHARMA,
DEPUTY ADVOCATES GENERAL)

CRIMINAL REVISION
No. 203 OF 2012
Decided on: 17.12.2021

Code of Criminal Procedure, 1973- Sections 397, 401- Revision-

A. Indian Penal Code, 1860- Sections 457, 380 and 120B- Conviction- Held- Recovery duly proved- Conviction upheld.

B. Probation of Offenders Act, 1958- Section 4- Held- Accused can be granted benefit of Section 4 of the Probation of Offenders Act, subject to payment of compensation.

Cases referred:

Hari Kishan and State of Haryana versus Sukhbir Singh 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;

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

O R D E R

Instant criminal revision petition filed under Section 397 Cr.PC read with Section 401 of Cr.PC, lays challenge to judgment dated 13.8.2012,

passed by the learned Sessions Judge, Solan, District Solan, HP, in Criminal Appeal No. 2-S/10 of 2011, affirming the judgment of conviction and order of sentence dated 16.12.2010, passed by the learned Judicial Magistrate First Class-2, Nalagarh, District Solan, H.P., in Criminal Case No. 3/2 of 09/2004, whereby the learned trial Court while holding the petitioner-accused guilty of having committed offence punishable under Section 380 of IPC, convicted and sentenced him to undergo rigorous imprisonment for a period of six months and pay fine of Rs. 500/- and in default of payment of fine, to further undergo simple imprisonment for a period of ten days.

2. Precisely, the facts of the case, as emerge from the record are that in the intervening night of 13/14.10.2003 at about 2:30 AM, while police party headed by ASI Iqbal Hussain (PW7) was on patrolling duty at bus stand Nalagarh, a vehicle bearing registration No HP-10-2827, came, but driver of the aforesaid vehicle after having seen the police, turned back the vehicle. On suspicion, police party chased the aforesaid vehicle in a government vehicle bearing registration No. HP-14-7753 and intercepted the vehicle at a place called Simani. Though 2-3 persons travelling in the vehicle in question fled away from the spot taking advantage of the darkness, whereas driver of the vehicle i.e. petitioner-accused, came to be nabbed by the police. Though police tried to search the remaining 2-3 persons travelling with the accused, but in vain. Police brought the vehicle to Ramshehar, where Junior Engineer of IPH Sub Division Ramshehar i.e. PW1 Krishan Kumar, met the police and disclosed that some persons have committed theft of 21 gun metal gate valves, 2½" dia, 22 gun metal gate valve 3" dia and 42 GI Unions of 3"dia, from their store. The above named complainant identified the stolen articles, which at that relevant time, were being transported in the vehicle being driven by the accused. Police after having recorded the statement of the complainant under Section 154 Cr.PC (Ex.PW1/A), wherein he disclosed the factum with regard to theft in the IPH store at Ramshehar, lodged formal FIR Ext.PW6/A. Though

police was unable to trace out the other 2-3 persons, who had fled away from the spot, but person namely Rattan Sen, who is owner of the vehicle also came to be named in the FIR and he was also tried alongwith the accused. After completion of the investigation, police presented challan in the competent court of law, who being satisfied that prima-facie case exists against the accused, charged them under Sections 457, 380 and 120-B of IPC, to which they pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as seven witnesses; i.e. Krishan Kumar Sharma as PW1, Bagga Singh as PW2, Surinder Singh as PW3, Virender Kumar as PW-4, Const. Baljeet Singh as PW5, Surender Pal as PW6 and ASI Iqbal Hussain as PW7, whereas accused in their statements recorded under Section 313 denied the case of the prosecution in t*oto* and claimed themselves to be innocent. However, they did not lead any evidence in their defence.

4. Learned trial Court on the basis of evidence led on record by the prosecution, vide judgment dated 16.12.2010, though acquitted the co-accused Rattan Sen of the offences punishable under Sections 457, 380 and 120-B of IPC, but held the petitioner-accused guilty of having committed offence under Section 380 of the IPC and accordingly, sentenced him as per the description given herein above.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the court of learned Sessions Judge-I, Solan, District Solan, H.P., which also came to be dismissed vide judgment dated 13.8.2012, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be upheld. In the aforesaid background, present petitioner-accused has approached this Court by way of instant proceedings, seeking therein his acquittal after setting aside the judgments of conviction recorded by the courts below.

6. Having heard the learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the impugned judgments of conviction and order of sentence recorded by the courts below, this Court finds no illegality and infirmity in the same and same being based upon the proper appreciation of evidence led on record by the prosecution, deserves to be upheld.

7. Though Mr. V.B. Verma, learned counsel representing the petitioner-accused while making this Court to peruse the evidence led on record by the prosecution, made a serious attempt to persuade this Court to agree with his contention that both the courts below misread the evidence, but careful examination of the statements made by all the prosecution witnesses clearly reveals that prosecution successfully proved on record that the accused was transporting the stolen property of the IPH department, in the vehicle in question, and as such, the learned trial court rightly convicted him under Section 380 of IPC.

8. PW1 Krishan Kumar and PW3 Surender, who at that relevant time were Junior Engineer and Store Helper (respectively) in the IPH Sub-Division, Ramshehar, categorically deposed that during the intervening night of 13/14.10.2003, theft was committed at their IPH store, situate at Ramshehar and on verification of the articles in the store, it was found that 21 gun metal gate valves, 2½" dia, 22 gun metal gate valve 3" dia and 42 GI Unions of 3"dia have been stolen. Interestingly, both the aforesaid witnesses never came to be cross-examined on behalf of the accused on the aforesaid point, meaning thereby, statements of both the witnesses with regard to theft of the articles as detailed herein above, remained unchallenged. Otherwise also, cross-examination conducted upon these witnesses nowhere suggests that learned counsel representing the accused was able to shatter their testimony. Factum with regard to theft from the store of IPH at Ramshehar, further stands proved with the perusal of copy of BIN cards Ext.PW7/C and

Ex.PW1/C. All the articles disclosed by PW1 Krishan Kumar Sharma in his statement stand duly recorded in the Bin Cards Ext.PW1/C and Ext.PW7/C and entry regarding further disbursement of such articles also stands recorded in the BIN cards. Moreover, on verification of the stock of the IPH department, it was found that the theft of the articles has been committed by someone by breaking the lock of the store. Aforesaid statements made by the above named material prosecution witnesses stand duly corroborated by the statement of PW7 ASI Iqbal Hussain, who after having received information visited the spot and prepared the site plan Ext.PW7/B and seized the broken lock and bolt vide memo Ext.PW3/A.

9. ASI PW7 Iqbal Hussain, deposed that during the night, when he alongwith other police officials was on patrolling duty at Nalagarh, one vehicle bearing registration No. HP-10-2827 came there, but occupants of the aforesaid vehicle after having seen the police party turned back the vehicle. Though 2-3 occupants of the vehicle fled away taking advantage of the darkness, but accused, who at that relevant time, was driving the vehicle in question, was apprehended. This witness deposed that PW1 Krishan Kumar and PW3 Surender, came and reported the matter qua the commission of theft of the articles from the IPH store situate at Ramshehar and on search of the vehicle, 21 gun metal gate valves, 2½"dia, 22 gun metal gate valve 3"dia 42 GI Unions of 3" dia, which were subsequently duly identified by PW1 Krishan Kumar and PW3 Surender Singh. The stolen property was seized vide memo Ext.PW1/E. If the statements made by the aforesaid material witnesses PW1 and PW3 are read in conjunction with the statement made by PW7 Iqbal Singh, it clearly proves factum with regard to theft of the articles as detailed herein above from the IPH store at Ramshehar. Since aforesaid articles subsequently came to be recovered from the vehicle in question being driven by the accused and he was unable to explain the presence of the articles in his

vehicle, courts below rightly held him guilty of having committed offence punishable under Section 380 of IPC.

10. Though Mr. V.B. Verma, learned counsel appearing for the petitioner-accused tried the carve out a case that accused was mere driver and articles recovered from the vehicle being driven by him actually belonged to 2-3 persons, who after seeing the police fled away from the spot, but such plea of him cannot be accepted at this stage, especially when no such defence ever came to be taken by the accused while getting his statement recorded under Section 313 of Cr.PC. Accused in his statement recorded under Section 313 Cr.PC, while denying the case of the prosecution in *toto*, claimed that since he refused to give lift to the police officials, he has been falsely implicated in the case. Mr. V.B. Verma, argued that the statements made by all the material prosecution witnesses, as have been taken note herein above, are not contrary/contradictory, but perusal of the same clearly reveals that all the witnesses have corroborated the versions put forth by each other in their statements. There is overwhelming evidence that stolen articles came to be recovered from the vehicle bearing registration No. HP-10-2827 and at that relevant time, the said vehicle was being driven by the accused.

11. Factum with regard to driving of the vehicle by the accused at the time of the recovery of articles from the vehicle in question stands duly proved on account of suggestion put to PW7 ASI Iqbal Hussain, by the learned counsel representing the accused that police official asked the accused to drop them in the vehicle, but when the accused refused, police falsely implicated him in the case, meaning thereby,, at the time of the recovery of the stolen articles, vehicle in question was being driven by the petitioner-accused. Moreover, plea taken by the accused that he has been falsely implicated since he had refused to drop the police officials cannot be believed, especially, when such version is not corroborated /established on the basis of material available on record.

12. Having carefully perused the entire evidence led on record, this Court finds no illegality and infirmity in the impugned judgments of conviction recorded by the courts below and as such, no interference is warranted. Faced with aforesaid situation, Mr. V.B. Verma, states that it is a fit case where petitioner can be extended benefit of Section 4 of the Probation of Offenders Act. He states that at the time of the alleged incident, petitioner-accused was 22 years old and by now, 18 years have passed and in case at this juncture, he is sent behind the bars, his entire family would suffer. He also states that there is nothing adverse on record against him, especially with regard to his conduct after lodging of FIR, which ultimately culminated in the trial at hand. He states that petitioner is sole bread earner in the family and in case, he is sent behind bars, his entire family including his old aged parents would starve. Mr. Verma also stated that mitigating circumstance in this case is that approximately, more than eighteen years have passed after happening of that incident and eleven years have been passed after passing of the judgment of conviction dated 16.12.2010 and the accused petitioner has already suffered much agony/trauma during the pendency of the appeal in the court of learned Sessions Judge Solan (H.P.), as well as in High Court of Himachal Pradesh.

13. In support of the aforesaid arguments, Mr. Verma, also invited the attention of this Court to the judgment passed by this Hon'ble 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.

14. In this regard, reliance is also placed upon Hon'ble Apex Court judgment ***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."

15. The reliance is also placed upon the Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 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."

16. Consequently, in view of the above, this Court sees no illegality and infirmity in the impugned judgments passed by the courts below and accordingly, same are upheld, but in view of the aforesaid law as well as submissions having been made by the learned counsel appearing for the petitioner and after taking into consideration the facts and circumstances of the present case, I am of the considered opinion that the present petitioner-accused can be granted benefit of Section 4 of the Probation of Offenders Act, 1958 subject to payment of adequate compensation, which would be determined after the receipt of the report of Probation Officer.

17 Accordingly, Registry is directed to call for the report of the Probation Officer, Solan, District Solan, H.P., within six weeks and list this matter on **14.3.2022**.

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

Between:

MS. SATYA PITAHAN, D/O SH. BIRJA NAND,
R/O VILLAGE PUJARLI, P.O. CHILALA,
TEHSIL CHIRGAON, DISTRICT SHIMLA, H.P.

....PETITIONER

(BY SH. DEEPAK BHASIN ADVOCATE)

AND

1. SH. BALBIR BANSHTU SON OF LATE SH. SUKH CHAIN, R/O VILLAGE DALGAON, P.O.KUTARA, TEHSIL ROHRU, DISTRICT SHIMLA, HIMACHAL PRADESH.

2. STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH.K.B.KHAJURIA, ADVOCATE
FOR R-1).

(BY SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SH. NARENDER THAKUR, SH. KAMAL KISHORE SHARMA AND SH. GAURAV SHARMA, DEPUTY ADVOCATE GENERALS, FOR R-2).

CRIMINAL REVISION
No.127 of 2021
Decided on:11.12.2021

Code of Criminal Procedure, 1973- Section 397- **Negotiable Instruments Act, 1881**- Section 138- Conviction- Simple imprisonment for one year and compensation to the tune of Rs.10.00 lacs – Held-

C. Evidence clearly indicates that the accused had issued cheque Ex. CW1/B to the company towards discharge of her lawful liability. (Para 12)

D. Statutory presumption- Negotiable Instruments Act, 1881- Section 139- If the accused /drawer 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. (Para 14)

No reason to interfere with the well reasoned judgments of Courts below. Revision dismissed. (Para 14, 19)

Cases referred:

Bir Singh versus Mukesh Kumar (2019)4 Supreme Court Cases 197;
Krishnan and another Vs Krishnaveni and another, (1997) 4 SCC 241;
M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal);
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999) 2 SCC 452;

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

O R D E R

Instant Criminal Revision petition filed under Section 397 of the Code of Criminal Procedure, is directed against the judgment, dated 3.3.2021, passed by learned Sessions Judge (Forest) Shimla, District Shimla, H.P., in Criminal Appeal No. 41-R/10 of 2019, affirming the judgment of conviction dated 1.10.2019 and order of sentence dated 25.10.2019, passed by learned Additional Chief Judicial Magistrate, Court No.1, Rohru, District Shimla, H.P., in criminal case No.RBT-324/3 of 2019/14, whereby learned trial Court while holding petitioner-accused guilty of having committed an offence punishable under Section 138 of the Negotiable Instruments Act, convicted and sentenced her to undergo simple imprisonment for a period of one year and to pay compensation to the tune of `10,00,000/- to the complainant.

2. Precisely, the facts of the case as emerge from the record are that the respondent ***(for short 'complainant')*** instituted a complaint under Section 138 of the Negotiable Instruments Act (***for short 'Act')*** in the Court of learned Additional Chief Judicial Magistrate, Court No.1, Rohru, District Shimla, H.P., alleging therein that on 5.6.2013, accused demanded friendly loan of `6, 00,000/- from the complainant. Since complainant had friendly relation with her, he made payment of `6, 00,000/- to the accused in cash on 5.6.2013. With a view to discharge her liability, accused issued cheque No.588813, dated 22.08.2013(Ex.CW1/B), amounting to `6,00,000/- in favour of the complainant drawn at State Bank of India of her account No.32608692802, but fact remains that on presentation aforesaid cheque was dishonoured on account of insufficient funds in the account of the accused, as is evident from memo Ex. CW/D, issued by the bank concerned. After receipt of aforesaid memo, complainant issued legal notice Ex.CW1/E, dated 29.11.2013 through registered A.D. post Ex.CW1/F, calling upon the accused to make the payment good within the stipulated time, but since accused failed to make the payment good within the time stipulated in the legal notice,

complainant was compelled to institute complaint under Section 138 of the Act in competent court of law.

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

4. Being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence recorded by trial court, present petitioner-accused preferred an appeal in the Court of learned Sessions Judge (Forest) Shimla, which also came to be dismissed vide judgment dated 3.3.2021, as a consequence of which, judgment of conviction and order of sentence recorded by trial Court came to be upheld. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for her acquittal after quashing and setting aside the impugned judgments and order of sentence passed by learned Courts below.

5. Vide order dated 29.6.2021, this Court suspended the substantive sentence imposed by court below subject to the petitioner's depositing 50% of the entire compensation amount within a period of three months and furnishing personal bonds in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of trial Court. However, fact remains that aforesaid order never came to be complied with despite repeated opportunities. Today, during the proceedings of the case, learned counsel representing the petitioner apprised this Court that despite repeated communications, petitioner is not coming forward to impart instructions and as such, matter may be heard and decided on its own merit.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds no force in the submission of learned counsel representing the petitioner that Courts below

have failed to appreciate the evidence in its right perspective, rather this Court is convinced and satisfied that complainant successfully proved on record that he advanced friendly loan of `6,00,000/- to the accused, who with a view to discharge her lawful liability, issued cheque Ex.CW1/B, amounting to ₹6,00,000/-, but same was dishonoured on account of insufficient funds in the bank account of the accused. Interestingly, in the case at hand, there is no denial, if any, on the part of the accused with regard to issuance of cheque, rather she has categorically stated that she had borrowed sum of `1,00,000/- only and in lieu thereof, had given blank cheque to the complainant, which was subsequently misused by the complainant.

7. Complainant with a view to prove his case examined himself as CW-1 and deposed through his affidavit EX.CW1/A, perusal whereof reveals that he stated/narrated the contents of the complaint verbatim in the affidavit tendered in the evidence. Besides above, this witness also tendered in evidence Cheque Ex.CW1/B, cheque presentation slip Ex.CW1/C, dishonour memo Ex.CW1/D, legal notice Ex.CW1/E, postal receipt Ex.CW1/F and acknowledgment Ex.CW1/G.

8. Accused in her statement recorded under Section 313 Cr.P.C., nowhere denied the factum with regard to issuance of cheque, but claimed that same was issued as a security. Since, there is no dispute with regard to issuance of cheque in question as well as signatures thereupon of the accused, there is presumption under Sections 118 and 139 of the Act that cheque was issued by the accused towards discharge of her lawful liability. No doubt, aforesaid presumption is rebuttal, but for that purpose, accused was under obligation to raise probable defence, which could be either raised by leading positive evidence or by referring to the material adduced on record by the complainant. However, in the instant case, accused has not been able to raise any probable defence, rather she has simply stated that she had handed over blank cheque. Once, she has admitted factum with regard to borrowing

sum of `1,00,000/-, it is not understood that where was the occasion for her to issue blank cheque, as has been claimed by her.

9. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Bir Singh versus Mukesh Kumar*** (2019)4 Supreme Court Cases 197, wherein it has been held as under:-

> "6. The object of Section 138 of the Negotiable Instruments Act is to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments including cheques in financial transactions. The penal provision of Section 138 of the Negotiable Instruments Act is intended to be a deterrent to callous issuance of negotiable instruments such as cheques without serious intention to honour the promise implicit in the issuance of the same.
>
> 20. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduced evidence showing the reasonable possibility of the non- existence of the presumed fact as held in *Hiten P. Dalal.*
>
> 24. In *K.N. Beena vs. Muniyappan,* this Court held that in view of the provisions of Section 139 of the Negotiable Instruments Act read with Section 118 thereof, the Court had to presume that the cheque had been issued for discharging a debt or liability. The said presumption was rebuttable and could be rebutted by the accused by proving the contrary. But mere denial or rebuttal by the accused

was not enough. The accused had to prove by cogent evidence that there was no debt or liability. This Court clearly held that the High Court had erroneously set aside the conviction, by proceeding on the basis that denials/averments in the reply of the accused were sufficient to shift the burden of proof on the complainant to prove that the cheque had been issued for discharge of a debt or a liability. This was an entirely erroneous approach. The accused had to prove in the trial by leading cogent evidence that there was no debt or liability.

32. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would

> attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

10. Complainant deposed through affidavit Ex.CW1/A that he made payment of `6, 00,000/- to the accused in cash on 5.6.2013 at Rohru. With a view to discharge aforesaid liability, accused issued cheque No.588813, dated 22.8.2013, amounting to `6,00,000/- drawn at SBI, but on presentation aforesaid cheque was dishonoured by the bank on account of insufficient funds in the account of the accused. He also deposed that on 29.11.2013, he issued legal notice to the accused calling upon her to make the payment well within stipulated time and such notice was received by the accused on 3.12.2013, but yet she failed to repay the cheque amount within stipulated period of notice. He also tendered in evidence dishonoured cheque Ex.CW1/B, cheque presentation slip Ex.CW1/C, dishonour memo Ex.CW1/D, legal notice Ex.CW1/E, postal receipt Ex.CW1/F and acknowledgment Ex.CW1/G and successfully proved on record that he immediately after having received dishonour memo took all necessary steps as provided under Section 138 of the Act for securing amount lent by him to the accused. 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. This witness categorically stated in his cross-examination that accused did not return any money. He also denied that cheque was given blank after putting signatures as security. He also denied that despite having received money, he misused the blank cheque to grab the money. This witness specifically denied the suggestion put to him that he filled cheque himself.

11. Accused while deposing as DW-1 stated that she had received `1,00,000/- 3-4 years earlier and lieu thereof, had given complete payment to the complainant, but she does not remember whether she demanded her

cheque from the complainant or not. She also deposed that she was not to give any money to the complainant. In her cross-examination, she denied that during the pendency of case she had given two cheques. She could not recollect that on 5.1.2017 she had given cheque bearing No.588835 for `1,00,000/- in the Court. However, during her cross-examination she admitted that she had issued cheque Ex. PX for sum of `1,00,000/- to the complainant, which bears date 9.1.2017. She also admitted that on 10.3.2017, she issued another cheque Ex.PZ to the complainant and both the cheques issued to the complainant were not honoured. She feigned her ignorance that why she had given two cheques to the complainant. She stated that cheque Ex.CW1/B is of her and bears her signatures in red circle 'A' on the same. She also admitted that on 20.11.2013, there was insufficient fund in her account and Ex.CW1/G bears her signatures in red circle.

12. Entire evidence led on record by the respective parties, clearly indicates that accused had issued cheque Ex.CW1/B to the complainant towards discharge of her lawful liability. Though, accused claimed before the court below that she had repaid the amount and has no liability towards the complainant, but to that effect no cogent and convincing evidence ever came to be led on record. As has been taken note hereinabove, accused could rebut the presumption in favour of the complainant that cheque in question was issued in lieu of discharge of her lawful liability by leading probable defence but in the case at hand neither accused was able to explain the mode of repayment of `6,00,000/-, if any, made by her to the complainant nor she was able to prove that blank cheque, if any, was given by her as security and same was misused by the complainant.

13. Leaving everything aside, factum with regard to issuance of cheque and signature thereupon stands duly admitted by the accused and as such, there is presumption in favour of the complainant that he had received cheque in question issued towards lawful liability.

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:-

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

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

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

15. 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:-

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

16. 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.

17. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has

held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but learned counsel representing the accused has failed to point out any material irregularity committed by the courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below.

18. Consequently, in view of the discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no valid reason to interfere with the well reasoned finding recorded by the courts below, which otherwise, appear to be based upon proper appreciation of evidence available on record and as such, same are upheld.

19. Accordingly, the present revision petition is dismissed being devoid of any merit. The petitioner is directed to surrender herself before the learned trial Court forthwith to serve the sentence as awarded by learned trial Court, if not already served. Interim direction, if any, stands vacated. Pending applications, if any, also stand disposed of.

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

Between

COMMUNIST PARTY OF INDIA (MARXIST)
THROUGH ITS GENERAL SECRETARY NO.9
BAWA BUILDING, BAWA ESTATE
THE MALL , SHIMLA-3
HIMACHAL PRADESH .....PETITIONER

(BY SH. SANJEEV BHUSHAN, SENIOR ADVOCATE,

WITH MR. RAKESH CHAUHAN, ADVOCATE)

AND

BAWA JANG BAHADUR
S/O LATE BAWA RATTAN SINGH BAHADUR
R/O BAWA BUILDING, BAWA ESTATE, SHIMLA-3
HIMACHAL PRADESH. ....RESPONDENT

(BY SH. PANKAJ CHAUHAN, ADVOCATE)

CIVIL REVISION NO.63 OF 2020
Reserved on: October 6, 2021
Decided on : December 10, 2021

Code of Civil Procedure, 1908- Section 115- Order 18 Rule 17- Application for recalling the witnesses dismissed- Held-

C. It is settled law of the land that in exercise of power under Section 115 CPC, the High Court has limited power to interfere on the ground of illegality, irregularity or perversity committed by the Court below. An order can also be interfered to have been passed in excessive exercise of the jurisdiction or failure to exercise jurisdiction. (Para 7)

D. Court has discretion to recall a witness at any time in order to clarify any doubt for complete and final adjudication of the suit- Documents sought to be placed on record are not relevant to the lis- Revision dismissed. (Para 11)

Cases referred:

Tilak Raj v. Rajinder Sood, (1026) ILR(HP) 1580.
Vadiraj Naggappa Vernekar (Dead) through LRs v. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410;

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

J U D G M E N T

Petitioner (hereinafter referred to as 'defendant') has approached this Court, invoking provisions of Section 115 of the Code of Civil Procedure

(hereinafter referred to as 'CPC'), assailing order dated 30.9.2020, passed by Senior Civil Judge, Court No.1, Shimla, in Case No.9-1 of 17/15, whereby application filed by defendant, under Order 18 Rule 17 CPC, for recalling the witness, has been dismissed.

2. Present petition has been filed on the ground that, by passing the impugned order, the Court below, in fact, has decreed the suit by giving detailed finding on merit of the suit, instead it ought to have limited its finding to the merits of the application, and it has also ignored the fact that the documents sought to be put to plaintiff, by way of cross-examination, are very relevant for just adjudication of the case and such necessity warrants to take on record such documents and put the same to the plaintiff for the purpose of cross-examination, at any time, subject to provisions of Order 18 Rule 17 CPC. It has been contended that there is no delay in placing on record the documents, existence whereof came in the knowledge of defendant on 28.3.2019 and, therefore, it cannot be concluded that placing on record such documents was intentionally delayed or the same was a tactic for prolonging the trial. According to the defendant, the Sale Certificate, issued under Rule 90(15) qua Property No.245/4, as was required to be adduced, is a relevant document and the plaintiff is required to be confronted with the recitals of the same, but the Court below has completely ignored such necessity for just adjudication of the controversy involved in the suit. Lastly, it has been contended that the document proposed to be placed on record in evidence is main document, having bearing on the claim of plaintiff, being Sale Certificate, and, therefore, it was required to be brought on record by the plaintiff but on failure of the plaintiff, the defendant intends to place and prove such document on record through cross-examination of plaintiff, but the trial Court has committed an irregularity by rejecting prayer of the defendant.

3. Learned counsel for the defendant has submitted that the power under Order 18 Rule 17 CPC can be exercised even after closure of the

evidence, at any stage, by recalling any witness, who had been examined, for complete and final adjudication of the case to advance the cause of justice.

4. Plaintiff has opposed the claim of the defendant on the ground that the defendant is adopting all techniques for prolonging adjudication and determination of the suit as the defendant has availed nine opportunities to conclude its evidence and, to further prolong the proceeding, at the time of final opportunity granted for arguments, has moved application under Order 18 Rule 17 CPC just to reset the clock of the case back, despite the fact that on earlier occasion also right to file defence/ written statement on behalf of defendant was struck down by the Court on account of unexplained delay, and at that time on interference of this High Court three weeks additional time to file written statement was granted to the defendant on 31.3.2016 and now once again defendant is trying to invoke jurisdiction of this Court to prolong the matter.

5. It has also been contended on behalf of the plaintiff that document, proposed to be placed on record in evidence, is neither original document nor relevant for adjudication of the controversy involved in the present case and, therefore, for the reasons assigned by the trial Court, passing of the impugned order has been justified.

6. To substantiate the plea taken by the plaintiff, learned counsel for the plaintiff has relied upon ***Vadiraj Naggappa Vernekar (Dead) through LRs v. Sharadchandra Prabhakar Gogate,*** **(2009) 4 SCC 410;** and a decision of this High Court in ***Tilak Raj v. Rajinder Sood,*** **(1026) ILR(HP) 1580.**

7. It is settled law of the land that in exercise of power under Section 115 CPC, the High Court has limited power to interfere on the ground of illegality, irregularity or perversity committed by the Court below. An order can also be interfered to have been passed in excessive exercise of the jurisdiction or failure to exercise jurisdiction.

8. Perusal of Order 18 Rule 17 CPC and judgments, referred supra, depict that main purpose of this Rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to evidence led by the parties, and that this provision is not intended to be used to fill up omission in evidence of the witness which has already been examined, as the power under Order 18 Rule 17 is discretionary and ought to be exercised with greatest care and only in exceptional circumstances as the Court ought not to recall a witness at the instance of party in order to fill up a lacuna in the evidence already adduced.

9. Undoubtedly, Court has discretion to recall a witness at any time in order to clarify any doubt for complete and final adjudication of the suit. In present case, in plaint, plaintiff has set up his claim of ownership on the basis of Sale Certificate dated 1.12.1989, with respect to Property No.264/4, known as Melrose, comprising Khasra Nos.808/580, 581/1 and 794/581/1 min. To substantiate the plea, the plaintiff has placed on record Deed of Conveyance issued under Rule 91(8), exhibited as Ex.PW-1/D, made on 1.12.1989 between President of India and the plaintiff, whereby Property No.264/4, referred supra, was sold to plaintiff and this Conveyance has been signed by Naib Tehsildar (Sales)-cum-Managing Officer, Shimla, whereas the document proposed to be placed on record, by the defendant, by putting it to the plaintiff in cross-examination, is photocopy of a document stated to be Certificate of Sale (Freehold Properties) under Rule 90(15), wherein it has been stated that Shri B.R. Singh was the highest bidder for acquiring the property mentioned in Schedule and was declared purchaser of the said property with effect from 16.2.1957. In this document, in Schedule, property has been identified as 245/4, Melrose Upper Kaithu, Shimla. This photocopy has several blank columns. This Certificate of Sale does not appear to have been issued at any point of time but appears to be a rough work which may or may not have culminated into Certificate of Sale as the last line stating that the said

document was given under Hand and Seal of some office is blank and also it does not contain details of office as well as signature, name and designation of the Officer certifying and issuing the Certificate. The property of the suit is Evacuee Property No.264/4, whereas property mentioned in Certificate of Sale proposed to be brought on record is 245/4.

10. Other documents proposed to be placed on record, are (i) copy of statement, dated 4.8.1986, stated to be made by the plaintiff in some proceedings before Manager (Sales) admitting to have acquired Property No.245/4 in open auction; and (ii) a copy of order passed by District Rent & Managing Officer, Ambala, dated 29.5.1959, in which B.R. Singh, Manorama Rattan Singh and Dulhano Mal have been shown to be owner. The property in reference in the above referred statement of plaintiff made before the Manager (Sales) on 4.8.1986 and Certificate issued by the District Rent & Managing Officer, Ambala pertains to the property identified as Melrose 245/4, which is not subject matter of the present suit.

11. Therefore, the documents and statement of the plaintiff sought to be placed on record by recalling the plaintiff for cross-examination to put these documents to him, are not relevant to the lis of the suit being not connected to the suit property in any manner and, therefore, finding returned by the trial Court that these documents are not relevant for the present case in no manner irregular, illegal or perverse.

12. Trial Court has found, and rightly so, that the documents proposed to be placed on record in evidence by putting the same to the plaintiff in his cross-examination after recalling him, are not relevant for adjudication of the present suit. Therefore, trial Court has rightly dismissed the application of the defendant as these documents are not necessary for adjudication of the claim of the parties in the suit and, thus, there is no necessity to recall the plaintiff for cross-examination.

13. As discussed supra, existence of the documents does not create any doubt with regard to evidence led by the parties and, therefore, conclusion of the trial Court is neither irregular nor illegal or perverse and, thus, does not warrant any interference and it is not a case of exercise of power beyond jurisdiction or failure to exercise jurisdiction vested in the Court. Therefore, application under Order 18 Rule 17 CPC has been rightly rejected by the Court below, following the well established principle with respect to invocation of power by the Court under this provision.

In view of the aforesaid, petition is dismissed. Pending application(s), if any, also stands disposed of.

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

Between:

State of Himachal Pradesh

....PETITIONER

(BY MR. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL)

AND

1. ANIRUDH KUMAR SON OF SH. JAGAN NATH, R/O VILLAGE LUTHER, P.O.KOTLA, TEHSIL JAWALI, DISTRICT KANGRA, H.P.

2. MEGH RAJ SON OF SH. PURAN CHAND, R/O VILLAGE JANERA, P.O. BHALI, TEHSIL JAWALI, DISTRICT KANGRA, H.P.

....RESPONDENTS

(BY MR. SANJEEV KUMAR SURI, ADVOCATE).

Cr. Appeal No.307 of 2014
Decided on: 2.12.2021

Code of Criminal Procedure, 1973- Section 378- Criminal appeal- **Prevention of Corruption Act, 1988**- Sections 7, 12, 13(1)(d), 13(2)- State assailed the judgment of acquittal passed in corruption case- Held- Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-qua-non to constitute the said offence. As far as guilt under Section 13(1)(d) is concerned same cannot be held to be established in the absence of any proof of demand for illegal gratification- No illegality and infirmity in the judgment of acquittal- Appeal dismissed. (Para 14, 15)

Cases referred:

B. Jayaraj vs. State of Andhra Pradesh (2014) 13 SCC 55;

P. Satyanarayna Murthy vs. The District Inspector of Police and another (2015 (9) SCALE 724;

Sunkanna versus State of Andhra Pradesh ,(2016) 1 SCC 713;

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

J U D G M E N T

By way of instant Criminal Appeal, challenge has been laid to judgment of acquittal dated 22.2.2014, passed by learned Special Judge Kangra at Dharamshala, H.P., in Corruption Case No.3-J/2011, titled ***State versus Anirudh Kumar and another,*** whereby Court below held respondents-accused***(hereinafter referred to as the accused)*** not guilty of having committed offence punishable under Sections 7 read with Section 12 and 13(1)(d)(1) read with section 13(2) of Prevention of Corruption Act and accordingly acquitted them.

2. Precisely, the case of the prosecution as emerge from the record is that SHO/Inspector, police Station, SV & ACB Dharamshala, District

Kangra H.P., presented challan for trial against the accused for their having allegedly committed offence punishable under Sections 7 & 13(2) P.C. Act, 1988 and 120-B IPC in Case FIR No. 8 of 2010, dated 24.5.2010, Police station SV & ACB Dharamshala, District Kangra, H.P., alleging therein that on 25.5.2011, accused Anirudh Kumar, Deputy Ranger, Jawali Block of Jawali Range and accused Megh Raj, Forest Guard, Naina Beat of Jawali Range, demanded bribe from the complainant Narender Singh. Police alleged that one Bir Singh (PW-1) was raising construction of his house and there existed a "Share-Aam-Path" (Common) near his house, which was being widened by using JCB of person namely, Narender Singh (PW-2) and while path was being widened, a tree of 'Amaltash' was uprooted by JCB. Accused came on the spot and forcibly took away the keys of JCB. Police alleged in the challan that both accused told PW-2, Narender Singh to bring `15,000/-to be paid to them as bribe in lieu of return of the keys. On 24.5.2010, complainant Narender Singh along with one Bir Singh approached the office of Vigilance Bureau and made a complaint Ex.PW2/A regarding demand of bribe made by both the accused. On the basis of compliant Ex. PW2/A, FIR (Ex PW17/A) was registered by Inspector Asha Kumari (PW-17). After registration of the FIR, case was entrusted to Inspector Bhisham Thakur for investigation, who after having associated Ravinder son of Prem Singh as shadow witness and Constable Navneet Kumar alongwith complainant Narender Kumar, made a plan to catch hold accused red handed while taking bribe. Above named Investigating Officer gave demonstration to the persons associated by him that how currency notes treated with solution of phenolphthalein and sodium carbonate is to be kept by the complainant for giving it further to the accused. Inspector Bhisham Thakur, after having taken thirty currency notes of the denomination of 500/- each from the complainant Narender Kumar, which were treated with phenolphthalein powder, prepared memo Ex. PW2/C and asked the complainant to put the said currency notes in his pent pocket

and hand over the same to the accused when they demand for it. Inspector also instructed shadow witness Ravinder Singh to give a signal when such amount is accepted by the accused. As per prosecution, members of the trap party hid themselves outside the office of Ranger and the moment shadow witness Ravinder signaled, then Inspector Bhisham Thakur i.e. Investigating Officer alongwith other members of the trap party ran to upper storey of the office of Ranger and found accused Anirudh sitting in his office Chair and co-accused Megh Raj Forest Guard sitting right in front of accused Anirudh. Inspector Bhisham Thakur after having given his introduction, caught hold accused Anirudh from his left arm wrist and HHC Jagroop caught hold of the accused Anirudh from his right arm wrist and thereafter Inspector Bhisham Thakur took out one small box from his investigation attaché, which was containing sodium carbonate, and plastic bowl, empty glass tumblers, one empty liquor quarter and cleaned them thoroughly and also washed his own hands and thereafter put sodium carbonate in the empty glass tumbler and put water in it and prepared its solution and got washed the hands of accused Anirudh in the sodium carbonate solution in the plastic bowl, whereafter the colour of solution in the bowls turned slightly pink and the hand-wash solution was taken in a glass quarter and sealed with seal impression "P". It is further alleged by the prosecution that on inquiry accused Anirudh took out thirty currency notes of the denomination of ₹500/- each from the front pocket of his shirt worn by him and the same were tallied by independent witnesses, Surinder Kumar Pradhan, Gram Panchayat Palahara and the currency notes Ex. P3 to P32 were found to be the same, which were earlier treated with phenolphthalein powder and described in the memo Ex. PW2/C. After having effected aforesaid recovery of currency notes from the accused, police after completion of all the necessary codal formalities registered FIR against the accused and presented the challan in the competent court of law.

3. Learned trial Court on the basis of the material made available to it found prima-facie case against the accused and accordingly, charged them under Section 7 read with Section 12 Prevention of Corruption Act and 13(1)(d)(1) read with section 13(2) of Prevention of Corruption Act, to which they pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of the entire evidence led on record held accused not guilty and accordingly, acquitted them. In the aforesaid background, appellant-State has approached this Court in the instant proceedings, praying therein for conviction of the accused after setting aside the judgment of acquittal recorded by the Court below.

5. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned by learned court below while acquitting the accused of the charges framed against them, this Court finds no force in the submission of Sh. Sudhir Bhatnagar, learned Additional Advocate General that court below failed to appreciate the evidence in its right perspective, as a consequence of which, finding contrary to the record came on record to the detriment of the appellant-State. Rather, this Court finds from the record that prosecution miserably failed to prove beyond reasonable doubt that sum of `15,000/- allegedly recovered from the pocket of accused Anirudh was paid as a bribe by complainant Narender Kumar and as such, there appears to be no reason/justification to interfere with the findings returned by the Court below, which otherwise appear to be based upon the proper appreciation of evidence led on record by the respective parties.

6. Prosecution with a view to prove its case examined as many as seven witnesses. Accused in their statements recorded under Section 313 Cr.P.C, denied the case of the prosecution in toto and claimed themselves to be innocent. However, they did not lead any evidence in defence.

7. PW-1, Bir Singh while stating that he is resident of village Gaili and in the year 2010 he was raising construction of his house admitted that there is "Share-Aam-Path" (Common) near to his house, which was being widened by using JCB of complainant Narender. He also deposed that while common path was being widened with the help of JCB, a tree of Amaltash" was uprooted by JCB and in the meantime, BO Anirudh and Forest Guard came there and took the keys of JCB in their possession and told Narender driver of JCB that a compensation of 15000/- shall be paid to the Forest Department. He deposed that both the accused persons asked Narender Singh to bring `15,000/-to their office at Jawali on the next day. He deposed that on 24.5.2010 Narender visited BO office at Jawali. He deposed that both the accused persons were present in the office and Narender paid `15,000/- to BO Anirudh Singh and BO Anirudh Singh counted the currency notes of `15,000/- and then put the same in his shirt pocket. He further deposed that Forest Guard, Megh Raj obtained his signature on the damage report and told him that they will fill damage report and would hand over the copy of the same to him. He deposed that accused persons did not issue receipt of `15,000/- to him. His signature were obtained by Forest Guard, Megh Raj on the reverse of blank form of damage report Ex. PWI/A at three places, which is in red circle. This witness in his cross-examination admitted that as per the rules and instructions described in Ex. DX, the Forest Department of Himachal Pradesh has fixed `15,000/- as compensation to be deposited for the purpose of compounding Forest offence, if vehicle involved is JCB. This witness further admitted that accused persons had only informed him about the compensation and did not make any demand of bribe from him. He also deposed that keys of JCB were returned by the Range Officer, Sushil Guleria. He also admitted that Sushil Kumar Guleria, Range Officer, was also on duty on that day. While admitting that after his having put signatures on damage

report, police reached there, this witness feigned ignorance that compensation book and damage report are verified by the Range Officer.

8. PW-2, Narender Singh deposed that he is owner of JCB and about two years back, his JCB was hired by Cap. Bir Singh R/o village Kelly in order to create passage to his house. He stated that person namely; Arvind Kumar was kept as driver in the said JCB. While the road was being widened with the JCB, a Amaltash tree fell down and thereafter Forest officials reached there and demanded `15,000/- as compensation in lieu of tree which fell down. He deposed that they thought that Forest officials are demanding bribe as amount of compensation was quite high and as such, he lodged report with the vigilance police, Dharamshala. He further deposed that he as well as caption Bir Singh (PW-1) went to the Forest office at village Labh, Tehsil Jawali and he kept `15.000/ currency notes on the table of Range officer and thereafter police officials took in to possession the bribe money from the table of the Range officer. He also deposed that he put his signatures on documents as per the direction of police officials. This witness was declared hostile. In his cross-examination by public prosecutor he has maintained that he did not make statement Ex.PW2/A to the police including portion A to A, B to B, C to C, D to D and E to E. He specifically denied that BO demanded bribe of `15,000/- from him in lieu of returning keys of JCB. In his cross-examination conducted by defence counsel, this witness admitted that he came to know that as per the instructions of the Government Forest Department can charge `15,000/-as compensation for compounding of Forest offence if the vehicle involved is JCB. If the statements of aforesaid two material prosecution witnesses are read in conjunction juxtaposing each other, there appears to be no illegality, if any, committed by court below while returning finding that prosecution miserably failed to prove that sum of `15,000/- was paid by complainant Narender Kumar to the accused as bribe. Both the witnesses, as detailed hereinabove, specifically stated that one tree of

"Amaltash" fell down while road leading to the house of Capt. Bir Singh was being widened and thereafter two Forest officials reached on the spot and asked them to pay compensation. Most importantly, it has been specifically come in the statements of both the aforesaid witnesses that they on the askance of investigating officer visited the office of Forest Department, Dharamshala and gave `15,000/- currency notes to the accused, who in turn obtained signature on the damage report and told that they will fill damage report and hand over the copies of the same to complainant. If the statement of both the witnesses, are perused in its entirety, it clearly reveals that both the accused after having visited spot asked the complainant to come present in their office to pay compensation, but since complainant gathered the impression that money is being demanded as bribe, he reported the matter to vigilance, who without verifying the facts constituted the team and laid trap.

9. No doubt, statements of Bir Singh reveals that 15000/-rupees paid by PW-1 Narender Kumar was kept in pocket by accused Anirudh, but since it has been specifically come in his statement that accused after having taken money, as detailed hereinabove, made him to sign on damage report, learned trial Court rightly concluded that sum of `15,000/- was not paid as bribe, but as a compensation amount.

10. Leaving everything aside, there are major contradictions and inconsistencies with regard to handing over the money by Narender Kumar to accused after his visit to office on the instructions of Investigating Officer. PW-1, Bir Singh stated that sum of `15,000/- was given to accused Anirudh, who put the same in his pocket, but complainant Narender Kumar stated that sum of `15,000/- was kept on the table and thereafter same was recovered by the police from the table. If afore version of PW-2, Narender Kumar is taken into consideration, it renders entire story of prosecution to be highly doubtful and unbelievable. Once sum of `15,000/- if paid by Narender Kumar was not touched by accused Anirudh, there was otherwise no occasion for Inspector

Bhisham Thakur and other team members to make accused Anirudh to wash his hand in the water treated with solution of phenolphthalein and sodium carbonate**.** Though, major contradiction with regard to handing over of sum of `15,000/- to the accused by complainant Narender Kumar has made story of the prosecution highly doubtful, but even if it is presumed that sum of `15,000/- was received by accused Anirudh, there is no evidence that such amount was received by him as a bribe, rather as per own statement of both the material prosecution witnesses such amount was paid on account of damages qua the one tree of Amaltash, which was uprooted on account of the widening of the road. Though, complainant Narender Kumar was declared hostile but cross-examination conducted upon this witness by prosecution as well as defence counsel, nowhere suggests that prosecution was able to extract something contrary to what this witness stated in his examination-in-chief. Since, story with regard to handing over sum of ` 15,000/- as bribe to accused Anirudh has become highly doubtful on account of aforesaid statements made by two material prosecution witnesses PW-1, Bir Singh and PW-2 Narender Kumar, there is no occasion, if any, for this Court to refer to the statements made by other official witnesses, who were admittedly part and parcel of the team, which had laid trap to catch the accused red handed taking bribe from the complainant Narender Kumar.

11. Interestingly, PW3, Ravinder Kumar shadow witness deposed that Narender Kumar (PW-2) asked him to accompany him to Dharamshala and when they reached in the office of Vigilance at Dharamshala, PW-2, Narender Kumar went inside but he remained outside. He deposed that PW-2, Narender Kumar told him that Forest officials were demanding compensation or bribe from him as a tree fell down while widening the road. He specifically stated that no proceedings took place in his presence in the Vigilance office. This witness was declared hostile at the request of Ld. P.P for State, but even

cross-examination conducted upon this witness nowhere improves case of the prosecution, rather, raises doubt with regard to story of the prosecution.

12. PW4, Surinder Kumar deposed that currency notes were not seized from the accused in his presence. This witness was also declared hostile. Cross-examination conducted upon this witness also does not suggests that prosecution was able to extract something contrary to what this witness stated in his examination-in-chief.

13. PW10, Sushil Kumar deposed that in the year 2010 he was posted as Range Officer, Jawali and on 24.5.2010 police raided the office of accused Anirudh Kumar BO. He deposed that complainant party was constructing a road with JCB and one or two trees fell down about which he was verbally informed by the accused persons. He deposed that accused persons did not issue damage report qua falling of trees and breaking of soil. The road was constructed to the house of Bir Singh. The revenue department also visited the spot and gave the demarcation of the land and found that land belongs to the Forest Department. The receipt of damage book Ex.P35, receipt No.14 Ex.PW1/A is blank and having the signature only. He deposed that the damage report was issued by Range Officer, Jawali. If the version put forth by aforesaid witness is examined in the light of the statements made by PW-1 and PW-2, it clearly establishes on record that at the time handing over of `15,000/- by complainant Narender Kumar to the accused, they were duly informed that such amount is being taken as a compensation/damages that's why they were made to sign on the blank damage report. Since, in the case at hand prosecution has been not able to prove demand, of bribe, if any, by accused, case registered against the accused under Section 7 read with Section 12 Prevention of Corruption Act and 13(1)(d)(1) read with section 13(2) of Prevention of Corruption Act, otherwise is not maintainable. As per own statement of PW-3 sum of `15,000/-was demanded as a compensation/damage of the tree. He categorically deposed that since amount

of compensation demanded was high, he thought that it was being demanded as a bribe.

14. By now it is well settled that mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-qua-non to constitute the said offence. As far as guilt under Section 13(1)(d) is concerned same cannot be held to be established in the absence of any proof of demand for illegal gratification. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in case titled as ***Sunkanna versus State of Andhra Pradesh*** ,(2016) 1 SCC 713, wherein it has been held as under:-

> "The prosecution examined the other fair price shop dealers in Kurnool as PWs 3, 4 and 6 to prove that the accused was receiving monthly mamools from them. PWs 4 and 6 did not state so and they were declared hostile. PW-3 though in the examination-in-chief stated so, in the cross-examination turned round and stated that the accused never asked any monthly mamool and he did not pay Rs.50/- at any time. The prosecution has not examined any other witness present at the time when the money was demanded by the accused and also when the money was allegedly handed-over to the accused by the complainant. The complainant himself had disowned his complaint and has turned hostile and there is no other evidence to prove that the accused had made any demand. In short there is no proof of the demand allegedly made by the accused. The only other material available is the recovery of the tainted currency notes from the possession of the accused. The possession is also admitted by the accused. It is settled law that mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-qua-non to constitute the said offence. The above also will be conclusive insofar as the offence under Section 13(1)(d) is concerned as in the absence

of any proof of demand for illegal gratification the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. It is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Unless there is proof of demand of illegal gratification proof of acceptance will not follow. Reference may be made to the two decisions of three-Judge Bench of this Court in ***B. Jayaraj vs. State of Andhra Pradesh*** [(2014) 13 SCC 55] and ***P. Satyanarayna Murthy vs. The District Inspector of Police and another*** [(2015 (9) SCALE 724]. In the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent. The judgments of the Courts below are, therefore, liable to be set aside. For the aforesaid reasons the appeal is allowed and the conviction of the appellant under Section 7 and under Section 13(1)(d) read with Section 13(2) of the Act and the sentences imposed are set aside and he is acquitted of the charges. The bail bond, if any, furnished by the appellant be released".

15. Consequently, in view of the detailed discussion made hereinabove, this Court finds no illegality and infirmity in the judgment of acquittal recorded by the Court below, which is based upon proper appreciation of evidence and as such, no interference is called for and accordingly, same is upheld.

16. The present appeal fails and accordingly same is dismissed alongwith pending applic ation (s), if any.

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

Between:

STATE OF HIMACHAL PRADESH.

....APPELLANT

(BY SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL).

AND

1. VIPIN KUMAR ALIAS BITTU,
SON OF SH. DHANI RAM,

2. VIKAS SONI SON OF AMRIT LAL,

3. NARESH KUMAR, SON OF SH. MAST RAM,

ALL R/O VILLAGE GAGRET, TEHSIL AMB,
DISTRICT UNA, H.P.

4. SANJIV KUMAR ALIAS SANJU,
SON OF SH. GIRDHARI LAL,
R/O VILLAGE KALOH, TEHSIL AMB,
DISTRICT UNA, HP.

....RESPONDENTS

(BY SH. ATHARV SHARMA, ADVOCATE).

CRIMINAL APPEAL
NO.319 of 2009
Decided on: 21.10.2021

Code of Criminal Procedure, 1973- Section 378- Criminal appeal- **Indian Penal Code, 1860**- Sections 451, 323 and 325 read with Section 24- State assailed the judgment of acquittal- Held- Evidence in criminal cases needs to be evaluated on touchstone of consistency- No illegality and infirmity in the judgment of acquittal- Appeal dismissed. (Para 13, 14)

Cases referred:

C. Magesh and others versus State of Karnataka (2010) 5 SCC 645;

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

JUDGMENT

Instant Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, lays challenge to judgment of acquittal dated 11.2.2009, passed by learned Judicial Magistrate 1st Class, Court No.II, Amb, District Una, H.P., in case No.7-1 of 2007/12-II of 2008, titled as ***State of Himachal Pradesh versus Vipin Kumar alias Bittu and others,*** whereby court below held respondents-accused ***(hereinafter referred to as the accused)*** not guilty of having committed the offence punishable under Sections 451, 323 and 325 read with Section 34 of IPC and accordingly acquitted them.

2. In nutshell, the case of the prosecution is that complainant Raj Kumar (PW-1) in his statement recorded under Section 154 Cr.P.C., (Ex.PW1/A), alleged that on 6.10.2006, at about 9.10 AM, accused Vipin Kumar gave him beatings in his office on the pretext that he had given beatings to his son. He also alleged that after some time other accused namely, Vikas Soni, Naresh Kumar and Sanjeev Kumar alias Sanju also reached on the spot and started giving beatings to him with dandas, as a consequence of which, he suffered multiple injuries. Complainant also alleged that accused besides causing injuries to him, also destroyed articles lying in his office. Manager namely, Rekha Rani (PW-2) called the police. At the time of incident, person namely, Sharwan Kumar (PW-3) was also present on the spot among others. On the basis of aforesaid statement made by the complainant under Section 154 Cr.P.C, FIR (Ex.PW10/E), came to be lodged against the accused. After completion of the investigation, police presented the challan in the competent court of law.

17. The learned trial Court after satisfying itself that a prima-facie case exists against the accused, charged them under Sections 451, 323 and 325 read with Section 34 of IPC, to which they pleaded not guilty and claimed trial.

18. Prosecution with a view to prove its case examined as many as 10 witnesses, whereas despite sufficient opportunities accused failed to lead

any evidence. However, accused in his statement recorded under Section 313 Cr.P.C. denied the case of the prosecution in toto and claimed themselves to be innocent. On the basis of totality of evidence led on record by the prosecution, trial Court held accused not guilty for having committed offence punishable under sections 451, 323 and 325 read with Section 34 of IPC and accordingly acquitted them. In the aforesaid background, appellant-State has approached this Court in the instant proceedings, praying therein for conviction of the accused after setting aside the judgment of acquittal recorded by the Court below.

19. Having heard learned counsel representing the parties and perused material available on record vis-à-vis reasoning assigned by the trial court while acquitting the accused, this Court finds it difficult to agree with the contention of Mr. Desh Raj Thakur, learned Additional Advocate General that learned court below has failed to appreciate the evidence in its right perspective, as a consequence of which, all the accused despite their having committed offences punishable under Sections 451, 323 and 325 read with Section 34 of IPC, came to be acquitted. This Court after having carefully perused the entire evidence led on record finds that prosecution has not been able to prove beyond reasonable doubt that on the date of alleged incident complainant Raj Kumar (PW-1) was given beatings by the accused. During the case at hand, prosecution examined 10 witnesses in toto in support of its case, but statements made by PW-1, PW-2, PW-3, PW-5, PW-8 and PW-10, are relevant for determining the correctness of the judgment passed by the Court below.

20. PW-1, Raj Kumar deposed in the Court that on 6.10.2006 while he was coming from Bazar after taking bricks from Brick-kiln. Accused Vipin Kumar alias Bittu, who has a shop of dry-cleaning asked him to give his clothes for dry-cleaning. PW-1 deposed that accused started making remarks against him by saying that the he had killed his mother. He also deposed that

accused told him that he would be dealt with similarly as he has dealt with his mother. PW-1 deposed that thereafter he first went to his residence and later on came to the office and at that time Rekha Rani (PW-2) was in the office. At about 9-10 AM, accused persons came with dandas and gave beatings to him and his computer was also destroyed. This witness also deposed that other articles i.e. gold chain was lost and accused persons snatched sum of Rs. 200-300/- from him and his clothes were also torn. This witness also deposed that his mobile was also taken by one of the accused Naresh Kumar. In his cross-examination, this witness stated that his statement was not recorded by the police regarding taking bricks from the brick-kiln. He also stated that he did not make statement to the police that he had gone to his residence and from there he had come to his office. However, this witness when was confronted with his previous statement, it was not previously so recorded. This witness stated in his cross-examination that he had told to the police that his mobile was snatched, however, on this point he was again confronted with his previous statement and such fact was not recorded. In his cross-examination, this witness admitted that all his cases are on account of land dispute with his family members and he admitted that he remained in judicial custody for offence under Section 366 IPC. Besides above, this witness also admitted that case was instituted against him under Section 302 of IPC, as he had pushed his mother into the well.

21. PW-2, Rekha Rani corroborated the version put forth by PW-1 that at around 9-10 AM accused Bittu carrying danda in his hand entered the office of the complainant and gave beatings to him. In her cross-examination, she admitted that fighting was for about one hour. She also admitted that accused Naresh Kumar was witness in a case under Section 302 of IPC registered against the complainant. However, she feigned her ignorance with regard to beatings, if any, given by complainant Raj Kumar to the son of accused No.1. She admitted that she cannot say anything against the

complainant because she has been working in the office of the complainant. She feigned her ignorance that the injuries were caused to the complainant on account of fall from the motorcycle. This witness also admitted that police took into possession Danda from the place of occurrence. However, she deposed that she does not remember whether recovery memo was signed by her or not.

22. PW-3, Sharwan Kumar i.e. sole independent witness nowhere supported the case of the prosecution and as such, he was declared hostile. He deposed that 5-6 years ago he was working as a mechanic of scooter and his workshop was near the office of complainant Raj Kumar, who was a property dealer. This witness deposed that he does not know anything about the case and his shop was closed. In his cross-examination, this witness denied that on 6.10.2006, at about 9-9.15 Am he was present in his workshop. He also denied all the suggestions put to him on behalf of the prosecution. In his cross-examination on behalf of the defence, this witness stated that complainant Raj Kumar generally remains under the influence of liquor and he generally falls from the motorcycle.

23. PW-5, Subhash Kumar stated that he does not remember the date and month when he had gone to serve tea to the police personnel. However, stated that when he had gone to serve tea to the police personnel, his signatures were obtained somewhere. This witness himself volunteered that the police personnel came to his shop for taking tea. He also stated that nothing was presented to the police by anyone. This witness was declared hostile. Cross-examination conducted upon this witness nowhere suggests that the prosecution was able to extract something contrary to what he stated in his examination-in-chief. In his cross-examination by defence counsel, this witness admitted that complainant Raj Kumar had also grudge against the accused persons. He also stated that false case has been made at the instance of complainant Raj Kumar against the accused persons.

24. PW-10, Amar Singh, Retired Sub Inspector deposed that he was posted in the police Station after the death of SI Gopal Dass. He stated that he had recorded the statement of Avtar Singh, Photographer Ex.PW10/A. He also stated that investigation was conducted by Gopal Dass and he is familiar with the signature of Gopal Dass. In his cross-examination, this witness admitted that there are lot of cases pending against the complainant Raj Kumar. He also admitted that in investigation, it did not come on record that articles in the office were destroyed by the accused persons.

25. If the statements made by aforesaid witnesses are read in conjunction juxtaposing each other, there cannot be any disagreement with the findings returned by the court below that are lot of inconsistencies and contradictions in the statements made by the prosecution witnesses. Statement made by PW-1, complainant is in complete contradiction with the statements made by other prosecution witnesses, rather his deposition made in the Court is totally contrary to the statement made by him under Section 154 Cr.P.C. Besides above, this Court finds that I.O. Gopal Dass, who had an occasion to investigate the case at first instance, had expired and as such, his statement could not be recorded. All the prosecution witnesses nowhere supported the case of the prosecution. PW-2, Rekha Rani specifically admitted in her cross-examination that since she is a employee of the complainant Raj Kumar, she cannot say anything against him. PW-3, Sharwan Kumar, so called independent witness cited by the prosecution totally denied the case of the prosecution and stated before the court below that nothing happened in his presence. PW-5, Subhash Kumar also stated that false case has been planted against the accused persons. No doubt, by way of adducing MLC Ex.PW7/A, which subsequently came to be proved by PW-7, Dr. Sandip Narula, prosecution made an attempt to establish a case against the accused that they gave injuries with danda on the person of complainant, but mere such finding in MLC cannot be said to be sufficient to hold accused guilty of

having committed the offence punishable under Sections 451, 323 and 325 read with Section 34 of IPC, especially when there is no concrete evidence adduced on record by prosecution suggestive of the fact that accused herein entered the office of the complainant and gave him beatings. Rather PW-7, Dr. Sandip Narula in his cross-examination admitted that injuries on the person of complainant could be caused by fall etc. Since, majority of the prosecution witnesses admitted that complainant used to remain under the influence of liquor and usually used to fall from the motorcycle, it can be safely presumed that he suffered injuries as opined in MLC Ex.PW7/A by falling down from the motorcycle.

26. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled***

Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

27. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment passed by learned Court below, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

28. Accordingly, the present appeal is dismissed, alongwith pending application(s), if any.

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

Between:-

GHANSHYAM SINGH, S/O SH. BHOP SINGH, R/O VILL. JUGHAND, P.O. JAROL, TEHSIL THUNAG, DISTRICT MANDI, H.P. AGED ABOUT 29 YEARS.

...PETITIONER

(BY SHRI NARENDER KUMAR REDDY, ADVOCATE)

AND

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

2. SARITA DEVI, D/O SH. RAMESH CHAND, R/O VILL. JUGHAND, P.O. JAROL, TEHSIL THUNAG, DISTRICT MANDI, H.P.

...RESPONDENTS

(SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS AND KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR R-1.
SHRI NARESH KUMAR VERMA, ADVOCATE, FOR R- 2)

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC No. 141 OF 2021
DECIDED ON: 18.11.2021

Code of Criminal Procedure, 1973 – Section 482 – Quashing of FIR – Inherent powers – Exercise of - Held – Inherent powers conferred upon High Court under section 482 Cr. PC cannot be exercised to quash the FIR which stands registered under the provision of POCSO Act. [Para-3]

Cases referred:

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

This petition coming on for admission after notice 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. 18/2018, dated 16.03.2018, registered under Sections 363, 366, 354 & 354D of the Indian Penal Code and Section 12 of The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act') at Police Station Janjehli, District Mandi, Himachal Pradesh.

2. Learned counsel for the petitioner submits that as the issue, which led to the registration of FIR, has been amicably settled between the parties in terms of a compromise deed, which stands appended with the petition, it will be in the interest of justice in case this petition is allowed and the FIR in issue as well as ensuing criminal proceedings are quashed by this Court by invoking its power so conferred upon it under Section 482 of the Code of Criminal Procedure.

3. Having heard learned counsel for the parties and after perusing the documents appended with this petition, this Court is of the considered view that inherent powers so conferred upon this Court under Section 482 of the Code of Criminal Procedure cannot be exercised to quash an FIR which stands registered under the provisions of the POCSO Act.

4. Hon'ble Supreme Court in ***Narinder Singh and others Vs. State of Punjab and another (2014) 6 Supreme Court Cases 466*** has held in para-29.3 thereof that the power of quashing under Section 482 of the Code of Criminal Procedure is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity etc. This Court is of the considered view that offences under the POCSO Act are heinous offences. That being the case, power vested in this Court under Section 482 of the Code of Criminal Procedure cannot be exercised to quash the FIR registered under the provisions of the POCSO Act. Of course, whether or not the accused is guilty of the offences alleged against him, is a matter of trial, but compromise *per se* cannot be a ground to invoke

the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, seeking quashing of FIR. Accordingly, this petition is dismissed. However, it is clarified that this Court has not made any observation on the merits of the case and the trial shall be held by the learned Trial Court strictly on merits of the case, uninfluenced by any observations made by this Court in this judgment.

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

Between:-

1. UMADUTT SHARMA, S/O SH. DEVENDER SHARMA, R/O VILL. KOTLA, P.O. DHARAMPUR, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

2. RAVI BANSAL, NO. 1316, S/O SH. PRAKASH CHAND, R/O VILL. GANANA, P.O. BHARARIGHAT, TEHSIL ARKI, DISTRICT SOLAN, H.P., PRESENTLY POSTED AT POLICE POST DHAMI.

3. RANJEET SINGH, S/O SH. AMAR SINGH, R/O VILL. MAJRI, P.O. MANDHALA, TEHSIL BADDI, DISTRICT SOLAN, H.P.

4. ASHISH CHAUHAN, S/O LT. SH. KASHMIRI LAL, R/O V.P.O. MOGINAND, TEHSIL NAHAN, DISTRICT SIRMAUR, H.P.

5. KULDEEP, S/O SH. TULSI RAM, R/O VILL. CHYOLA BOHAL, P.O.

GANGAL, TEHSIL PACHHAD, DISTRICT SIRMOUR, H.P.

6. SUBHASH CHAND, S/O LT. SH. SAHI RAM, R/O V.P.O. ANDHERI, TEHSIL SANGRAH, DISTRICT SIRMOUR, H.P.

7. DEEPAK SHARMA, NO. 1312, S/O SH. VIJAY KUMAR, R/O VILL. & P.O. BATAL, TEHSIL ARKI, DISTRICT SOLAN, H.P., PRESENTLY POSTED AT POLICE STATION KANDHAGHAT.

8. AMARJEET, S/O SH. BACHAN SINGH, R/O VILLAGE KURANWALA, P.O. MANDHALA, TEHSIL BADDI, DISTRICT SOLAN, H.P.

9. SUKHWINDER SINGH, S/O SH. OM PRAKASH, R/O VILLAGE & P.O. DABHOTA, TEH. NALAGARH, DISTRICT SOLAN, H.P.

...PETITIONERS

(BY SHRI SHRAWAN DOGRA, SENIOR ADVOCATE, WITH M/S KUSH SHARMA, TEJASVI DOGRA AND HARSH KALTA, ADVOCATES)

AND

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

HIMACHAL PRADESH, SHIMLA-171002 (H.P.).

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

3. SH. ROHIT MALPANI (IPS), CHAIRMAN OF SELECTION COMMITTEE, PRESENTLY SUPERINTENDENT OF POLICE, SIRMOUR, H.P.

4. SH. MOHIT CHAWLA, CHAIRMAN OF SELECTION COMMITTEE, PRESENTLY SUPERINTENDENT OF POLICE, SHIMLA, H.P.

5. SUNNY, CONSTABLE NO. 621 (PARENTAGE NOT KNOWN), POSTED AT 4TH IRB JANGALBERI, HAMIRPUR, H.P.

6. ANURADHA, NO. 242 (PARENTAGE NOT KNOWN), POSTED AT POLICE STATION BADDI, DISTT. SOLAN, H.P.

...RESPONDENTS

(SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS & MR. KAMAL KANT CCHANDEL, DEPUTY ADVOCATE GENERAL, FOR R-1 TO R-4)

NO NOTICE HAS BEEN ISSUED TO R-5 & R-6, POST ADMISSION, IN TERMS OF ORDER DATED 15.07.2021.

CIVIL WRIT PETITION
No. 3146 of 2021
Reserved on: 20.10.2021
Decided on: 27.10.2021

Constitution of India, 1950 – Articles 4 and 16 – Result of outdoor test declared vide Annexure P-13 – the petition is under challenge being contrary standing order – Petitioner after passing the written test, appeared before the individual member of the committee for purpose of outdoor test and waited for the declaration of the result – The petitioner neither made representation before higher authorities nor approached court of law before declaration of result so they acquiescence themselves to the process adopted so cannot assail it.[Para 27]

Constitution of India, 1950 – Articles 4 and 16 - Result of outdoor test declared – Writing in the result sheet – Held cuttings were not found to be result of some bias in favour of certain candidates or done with malafide intent, hence not interfered with. [Para 29]

Cases referred:

AIR Commodore Naveen Jain Vs. Union of India and others (2019) 10 SCC 34;
Anupal Singh and others Vs. State of Uttar Pradesh (2020) 2 Supreme Court Cases 173;
Brajendra Singh Yambem Vs. Union of India and another (2016) 9 Supreme Court Cases 20;
Dipak Babaria Vs. State of Gujarat and others, AIR 2014 Supreme Court 1792;
Dr. (Major) Meeta Sahai Vs. State of Bihar and others (2019) 20 Supreme Court Cases 17;
Raj Kumar and others Vs. Shakti Raj and others (1997) 9 Supreme Court Cases 527;
Supreme Court Advocates-On-Record Association and others Vs. Union of India (1993) 4 Supreme Court Cases 441;

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 writ petition, the petitioners have, *inter alia,* prayed for the following reliefs:-

> *"(i) That the impugned order dated 19.05.2021 (wrongly mentioned as 19.05.2020) i.e., Annexure P-18 and order dated 14.03.2018 (Annexure P-6) may kindly be quashed and set aside.*
> *(ii) That the result of B-1 outdoor test declared vide Annexure P-13 qua the petitioners, having not been conducted as per the law contrary to Standing Order No. 11/2016, and the final list (Annexure P-10) be quashed and set aside. Further the respondents may kindly be directed to conduct the B-1 outdoor test afresh as per the standing order and in a fair and impartial manner.*
> *(iii) That in alternate to Relief No. (ii) official respondents may be directed to declare the petitioners eligible for Lower School Course, 2021 in parity to the petitioners in CWPOA No. 40671 of 2020, who have been recommended and set for the course notwithstanding the fact that they had also not passed the outdoor test."*

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

Petitioners are serving as Constables in the Police Department of the respondent-State. The next promotional post from the post of Constable is that of Head Constable. In order to be eligible for promotion to the post of Head Constable, a Constable, who has put in five years service as such, has to participate in a selection process for selection of candidates for admission to promotion course for Constables at the Police Training College, as envisaged vide Notification dated 13.06.2008, issued by the Home Department, Government of

Himachal Pradesh under The Punjab Police (Himachal Pradesh Amendment) Rules, 2008. In terms of Amendment Rules, Rule 13.7 of The Punjab Police Rules, 1934, in its application to the State of Himachal Pradesh stands substituted to the effect that each Superintendent of Police/Commandant Police Battalions of Himachal Pradesh has to maintain a List 'B', which shall include the names of Constables, who are selected for admission to the Promotion Course for Constables at Police Training College. According to Rule 13.7, the test is to be regulated by a Standing Order issued by the Director General of Police. All successful candidates are to be kept in a panel and sent for Lower School Course on merit basis as per available vacancies. Names of the successful candidates are to be entered in List 'B' in order of their merit, as determined by the Departmental Promotion Committee constituted by the Director General of Police, on the basis of tests, as envisaged in this Notification. The Notification further envisages that there shall be two written papers for the test, i.e., Paper-I comprising of Punjab Police Rules and Practical Police Work and Paper-II comprising of Laws, including Local and Special Laws. The office of Director General of Police has issued Standing Order qua B-I test vide Annexure P-2, dated 02.01.2017, i.e., Standing Order No. 11/2016, which, *inter alia*, provides for regulation of B-I test, prescribes the composition of Departmental Committees for selection to be made from amongst Constables for admission to List-B etc. The composition of Departmental Selection and Promotion Committee is defined as one, which shall be constituted at District level. The Committee is to comprise of Superintendents of Police of the Districts other than the Superintendent of Police of that District where the test is to be held and other members of Committee are to be nominated by ADGP/AP&T. The ADGP/AP&T is also to prepare the final merit list and send the same to PHQ for deciding the merit of selected candidates. The Standing Order further envisages that the function of the Departmental Selection Committee will be to scrutinize the cases of all eligible Constables, who opted to appear in the test and facilitate/conduct

the B-I written test in respect of the candidates of respective Districts and Battalions and other offices attached to the District for the purpose of test. It further provides that two GOs. nominated by the ADGP/AP&T will assist in conduct of the test if held in a District. The Standing Order envisages a written test and outdoor tests of the candidates, who qualify the written test. In terms of the Standing Order, once the result for written test has been declared and notified, the qualified candidates shall be called for outdoor test by the Departmental Selection Committee constituted in terms of the Standing Order and outdoor test will be conducted as per the syllabus notified vide Himachal Pradesh Government Notification dated 13.06.2008, which provides as under:-

> *"The syllabus shall be parade, squad drill, rifle exercises and traffic and sentry duties, dispersal of crowd. The candidates shall be tested not only in personal performance but also to see their power of command and control over a squad particularly their ability to point out mistakes committed by members of the squad an*d get those corrected."

3. The maximum marks for outdoor events assigned in the Standing Order are as under:-

> "(c) The maximum marks for outdoor events are assigned as follows:-

			Marks
*	Parade & Squad Drill	=	10
*	Rifle exercises	=	06
*	Traffic & Sentry Duties	=	06
*	Dispersal of crowd	=	08
*	Command & Control over squad	=	10

Total	=	*40*

The maximum qualifying marks percentage for the outdoor test are 60%,i.e., 24 marks out of 40 marks. Further, as per the Standing Order, those Police Constables, who qualify the outdoor test, shall be called for personal interview, which will carry 10 marks.

4. The contention of the petitioners is that they successfully participated in the written test, which was held for selection of candidates to undergo the promotion course in issue, which were held from 08.08.2017 onwards. Their grievance is with regard to the rejection of their candidature in the course of outdoor tests by the Departmental Selection Committee.

5. In all, there are nine petitioners before this Court. Out of them, petitioners No. 1 to 3 and 7 to 9 participated in the selection process undertaken in District Solan, whereas, petitioners No. 4 to 6 participated in the selection process undertaken in District Sirmaur at Nahan.

6. This Court will first refer to the grievance of the candidates, who participated in the selection process undertaken in District Solan. The non-selection of petitioners No. 1 to 3 and 7 to 9, who participated in the selection process for District Solan stands assailed by them, *inter alia*, on the grounds that the manner in which the outdoor test was conducted by the Committee isbad, as the Committeerather than assessing the suitability of the candidates, including the petitioners as a single Unit, bifurcated the number of candidates *intra* the three members and the number of candidates assigned to one Member were adjudged by that member alone for the purpose of assessing suitability and not by other two Members, which has led to grave *prejudice* to the petitioners, for the reason that there was no collective wisdom of the Committee while assessing the suitability of the petitioners, which is against the provisions and spirit of the Standing Order, which constitutes the Departmental Selection Committee. Besides this, the process has been assailed by the petitioners also

on the ground that the result sheet prepared, contains cuttings and alterations, which casts doubt over the veracity of the process so undertaken by the Committee. Further, as per the petitioners, no videography of the outdoor test was undertaken by the Committee, as was done in many other Districts and the outdoor tests were held in late hours, without their being adequate lighting facilities etc. nor the syllabus was strictly followed.

7. The non-selection of petitioners No. 4 to 6, who participated in the selection process undertaken in District Sirmaur has been assailed on the ground that there were interpolations in the result sheets and further the outdoor tests were held in late hours without their being adequate light facilities, nor the syllabus of outdoor test was strictly followed. On these counts, the petitioners have prayed for the reliefs already enumerated hereinabove.

8. Before proceeding further, this Court would, in brief, refer to the orders/documents, quashing of which stands prayed for by way of this writ petition.

A. Annexure P-18, dated 19.05.2020, is order passed by the Director General of Police, vide which, the representation filed by the petitioners in terms of order, dated 14.12.2020, passed by this Court in CWPOA No. 4170 of 2020, stands rejected.

B. Order, dated 14.03.2018 (Annexure P-6), is also order passed by the Director General of Police, Himachal Pradesh, vide which also, representation filed by the petitioners in terms of order, dated 02.02.2018, passed by the erstwhile learned Himachal Pradesh Administrative Tribunal in OA No. 410 of 2018, stood dismissed.

C. Annexure P-13 is the result of B-I outdoor test pertaining to District Solan and District Sirmaur conducted in the year, 2017.

D. Annexure P-10 is the list of Constables, who have been declared to have qualified the B-I test in the year, 2017 and whose names have been approved for their nomination to undergo Lower School Course on the basis of State level merit list of qualified candidates 2017.

9. Learned Senior Counsel for the petitioners has argued that Standing Order No. 11/16, dated 02.01.2017 provides for composition of the Departmental Selection and Promotion Committee, which has to be constituted for the purpose of facilitating/conducting the B-1 written test and in terms of the said Standing Order, the composition of the Departmental Selection & Promotion Committee shall comprise of the Superintendent of Police of the District other than the one where the test is to be conducted and two other Members to be nominated by ADGP/AP&T. Learned Senior Counsel by referring to the record, has contended that perusal of the record demonstrates that outdoor test of the candidates, who passed the written test, was not conducted by the Committee, but was conducted by individual Members of the Committee, by dividing the number of candidates into three separate groups, which was not in consonance with the spirit of the Standing Order. He has argued that the word 'Committee' means a Committee in totality comprising of all three Members and the Standing Order nowhere provided that the candidates to be assessed by the Committee could have been divided into groups and then, some candidates could have been adjudged by one Member to the exclusion of others and the results from all groups could then have been grouped together so as to find out the merit. On these basis, learned Senior Counsel has submitted that as the outdoor test was not held by the Committee in terms of the spirit of the Standing Order, therefore, non-selection of the petitioners on the basis of this outdoor test is not sustainable in the eyes of law and it will be in the interest of justice in case the petitioners are declared to have passed the outdoor test, with all consequential benefits. Learned Senior Counsel has further, by referring to the

record, argued that the result sheet prepared of the outdoor test demonstrates that there are interpolations therein, as there are cuttings against the names of many of the candidates against marks allotted to them, which shrouds the entire process with suspicion. These interpolations hint at favouratism and create doubt as to whether the allotment of marks was fairly done by the members, because as per the petitioners, cuttings give an impression that the same was not done in a fair manner. Learned Senior Counsel has also argued that the syllabus mentioned for conducting the outdoor test was never followed in letter and spirit. The outdoor tests were held during late hours, without there being adequate light facilities etc., which has also resulted in unfairness and which also demands that the petitioners be declared as passed in the outdoor tests, with all consequential benefits. Learned Senior Counsel has relied upon the following judgments in support of his arguments:

> *"1. Supreme Court Advocates-On-Record Association and others Vs. Union of India (1993) 4 Supreme Court Cases 441.*
>
> *2. Raj Kumar and others Vs. Shakti Raj and others (1997) 9 Supreme Court Cases 527*
>
> *3. Dipak Babaria Vs. State of Gujarat and others, AIR 2014 Supreme Court 1792*
>
> *4. Brajender Singh Yambem Vs. Union of India and another (2016) 9 Supreme Court Cases 20.*
>
> *5. Dr. (Major) Meeta Sahai Vs. State of Bihar and others (2019) 20 Supreme Court Cases 17."*

10. No other ground was urged.

11. Defending the act of the State, learned Advocate General has argued that after participating in the B-1 outdoor test without any protest, the petitioners have no locus standi to maintain the present writ petition. He argued

that if the petitioners were not satisfied with the method, which was undertaken by the Committee for conducting the outdoor test, then they should have protested the same there and then. He submitted that it does not lie in the mouth of the petitioners after unsuccessfully participating in the outdoor test to turn around and say that the same was bad in law. He further argued that cuttings etc. in the documents reflect the fairness of the Committee, otherwise nothing prevented the Committee to have had created flawless record in which there were no cuttings etc. He also argued that all the candidates who participated in the test were subjected to the same parameters and same testing conditions and the petitioners after being unsuccessful, are creating grounds for shrouding the process of outdoor test with suspicion, whereas the outdoor tests were conducted openly, fairly and in an unbiased manner. In support of his contentions, he has relied upon the following judgments:

> *"1. AIR Commodore Naveen Jain Vs. Union of India and others (2019) 10 Supreme Court Cases 34.*
> *2. Anupal Singh and others Vs. State of Uttar Pradesh (2020) 2 Supreme Court Cases 173."*

12. I have heard learned counsel for the parties at length and also gone through the pleadings as well as the documents appended therewith, in detail.

13. Before dealing with the grounds raised by learned Senior Counsel for the petitioners with regard to the mode and manner in which the outdoor tests were conducted, this Court intends to make certain observations in this case. One of the prayers of the petitioners is to quash the result of B-I outdoor test declared vide Annexure P-13 qua the petitioners on the ground that the same has been conducted contrary to the Standing Order No. 11/16. Further prayer has been made for quashing of final list issued in terms of Annexure P-10, vide which, the Constables, whose names are mentioned therein, were approved and nominated to undergo Lower School Course on the basis of State

Level Merit List of qualified candidates for the year 2017. Now, a perusal of Annexure P-10 demonstrates that in terms of the same, more than 200 Constables were approved to undergo the Lower School Course. The petitioners have prayed for quashing of this communication. However, the candidates, who stood nominated by way of this Annexure to undergo Lower School Course, have not been impleaded as party respondents. In case the prayer of the petitioners is allowed by this Court and Annexure P-10 is quashed and set aside, then it is but obvious that the same will adversely affect the candidates who stood nominated vide this order (Annexure P-10). It is settled law that no order can be passed at the back of a person, which has civil consequences vis-a-vis him. Praying for quashing of Annexure P-10, without impleading the persons likely to be affected, in the event of the prayer being allowed, is bad in law and not permissible. This is for the reason that non-impleading of persons to be likely affected, as respondents renders this petition bad for *non-joinder* of necessary parties. This Court is of the considered view that the Constables, who stood nominated vide Annexure P-10 and who were likely to be affected, in the event of the petition being allowed, were necessary parties and in the absence of them having been impleaded as such, this petition is bad for *non-joinder* of necessary parties and the same deserves to be dismissed on this count alone.

14. Now, while dealing with the factual issues, this Court will refer to the Standing Order, vide which the Departmental Selection Committee is constituted. This Standing Order, i.e., Order No. 11/16, dated 02.01.2017, is appended as Annexure P-2 with the writ petition. As has been mentioned hereinabove also, the Standing Order provides that for selection of Constables for admission to promotion List-B, from which, Constables are to be sent to undergo promotion course, the Departmental Selection Committee shall be constituted at the District level. The Committee is to comprise of Superintendents of Police of the District other than the Superintendent of Police of the District where the test is to be held and other Members, who are to be

nominated by ADGP/AP&T. In terms of this Standing Order, the functions of the Departmental Selection Committee are to scrutinize the cases of all the eligible Constables, who have opted to appear in the test and to facilitate/conduct the B-I written test in respect of the candidates of respective Districts and Battalions and once the result of written test has been declared and notified, the qualified candidates are to be called for outdoor test by the Departmental Selection Committee.

15. It is not in dispute that while adjudging the qualified candidates, who appeared before the Departmental Selection Committee, constituted for District Solan, the criteria which was followed by the Departmental Selection Committee was that the number of qualified candidates were divided into three groups and three members of the Committee then took the outdoor test of one group each and the final result was declared on the basis of the marks so allotted by the member concerned to the candidates, who appeared before him. In other words,the qualified candidates were not adjudged in the outdoor test by the Committee *per se,* but they were adjudged by a single member of the Committee. This Court is of the considered view that this criteria which was followed by the Departmental Selection Committee for District Solan is not just.

16. The purpose as to why a Committee is constituted to adjudge the suitability of candidates, is that there are more than one heads to assess the suitability of the candidates, which thus gives more pragmatism to the selection process and brings out the collective wisdom of the Committee. As per the Black's Law Dictionary, Sixth Edition, "Committee" means: a person, or an assembly or Board of persons, to whom the consideration, determination, or management of any matter is committed or referred, as by a Court or legislature. An individual or body to whom others have delegated or committed a particular duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for. In legislatures a standing committee considers all bills, resolutions, and other

items of legislative business falling within the category of matters over which it has been given jurisdiction. Membership and rank on standing committees are largely determined by the seniority rule. A special (or select) committee investigates and reports on specific matters and terminates when that function has been rendered. A joint committee of a legislative body comprising two chambers is a committee consisting of representatives of each of the two houses, meeting and acting together as one committee.

17. As per *Pollock C.B.,Reynell Vs. Lewis, (1846) 16 LJ Ex 25 at 30, quoted in AIR 1994 Bom. 96 at 100*, the term "Committee" means an individual, or body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it, in the expectation of their act being confirmed by the body they profess to represent or act for.

18. This Court is of the considered view that the reason as to why more than one Members Committee has been constituted for the purpose of testing the suitability of the candidates, is that it is the collective wisdom of the Committee, which prevails rather than whims of one or two Members while adjudging the suitability of the candidates. This element of collective wisdom goes a miss once the Committee segregates itself into Members and subjects only few candidates for scrutiny before a particular Member. In this way, the spirit of collective wisdom is not only defeated but is also lost and wisdom behind constitution of a Multi Members Committee is also negated.

19. This Court is not oblivious to the fact that there can be a Single Member Committee also. However, in terms of the Standing Order in issue, for the purpose of selection of Constables, the Departmental Selection Committee envisaged in the Standing Order was not a Single Member Committee, but was a Committee comprising in terms of para-3 of the Standing Order, of the Superintendent of Police of the District other than where the test was being conducted and the other members of the Committee were to be nominated by the ADGP/AP&T. When the Standing Order itself provided that the composition

of Departmental Selection Committee was a Multi Member Committee, then this Court is of the considered view that the merit of the candidates, who appeared and participated in the outdoor test ought to have been adjudged by the entire Committee collectively as a Unit and not by the individual member of the Committee. Had it been a case where all qualified candidates appeared before each Member, though separately, then also it would have been a different matter, because in that case, each Member of the Committee would have had an opportunity to adjudge the suitability of all the qualified candidates and give their individual opinion. Here is a case where one Member assessed the suitability of 1/3rd of the qualified candidates only and other 2/3rd qualified candidates did not at all appear before said Member. This is not what the spirit of Standing Order No. 11/16 is. This Court concurs with the submissions of learned Senior Counsel for the petitioners that the manner in which the suitability of the candidates was adjudged by the Departmental Selection Committee for District Solan is not in sync with the spirit of Standing Order No. 11/16. However, the next question is as to whether in the peculiar facts of this case, will it be in the interest of justice to quash the result of the said outdoor selection test or not?

20. At this stage, it will be relevant to refer to the judgments relied upon by the learned counsel for the parties.

21. In ***Supreme Court Advocates-On-Record Association and others Vs. Union of India (1993) 4 Supreme Court Cases 441,*** the Hon'ble Supreme Court has been pleased to hold that the constitutional scheme excludes the scope of absolute power in anyone individual.

22. In ***Raj Kumar and others Vs. Shakti Raj and others (1997) 9 Supreme Court Cases 527,*** the Hon'ble Supreme Court has been pleased to hold as under:-

> *"16. Yet another circumstance is that the Government had not taken out the post from the purview*

*of the Board, but after the examinations were conducted under the 1955 Rule and after the results were announced, it exercised the power under the proviso to para 6 of 1970 notification and the post were taken out from the purview thereof. thereafter the Selection Committee was constituted for selection of the condidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in*Madan Lal vs. State of & K*(1995) 3 SCC 486 and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the selection Board or the method of Selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules, So also in the method of selection and exercise of the power in taking out from the purview of the and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case, thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action take by the Government are not correct in law."*

23. In ***Dipak Babaria Vs. State of Gujarat and others, AIR 2014 Supreme Court 1792***, the Hon'ble Supreme Court has been pleased to hold

that if the manner of doing a particular act is prescribed under any Statute, then the act must be done in that manner only.

The same principle has been reiterated by the Hon'ble Supreme Court in ***Brajendra Singh Yambem Vs. Union of India and another (2016) 9 Supreme Court Cases 20.***

24. In ***Dr. (Major) Meeta Sahai Vs. State of Bihar and others (2019) 20 Supreme Court Cases 17,*** Hon'ble Supreme Court has been pleased to hold that the principle of *estoppel* prevents a candidate from challenging the selection process after having failed in it, however, this principle can be differentiated on the ground that a candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. Hon'ble Supreme Court has further held that in a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process.

25. In ***AIR Commodore Naveen Jain Vs. Union of India and others (2019) 10 Supreme Court Cases 34***, the Hon'ble Supreme Court has been pleased to hold that the appellant therein having participated in the selection process is *estopped* from challenging such policy. Hon'ble Supreme Court has reiterated the principle that a person, who consciously takes part in the process of selection cannot thereafter turn around and challenge the selection process, by relying upon its earlier pronouncements.

26. In ***Anupal Singh and others Vs. State of Uttar Pradesh (2020) 2 Supreme Court Cases 173,*** the Hon'ble Supreme Court has been pleased to hold that having participated in the interview and having failed in the final selection, it was not open to the aggrieved candidate to turn around and

challenge the revised Notification and having regard to the consistent view taken by the Supreme Court, the High Court should not have granted any relief to the private respondents intervenors.

27. Now, referring back to the facts of this cases, the petitioners after passing the written test, appeared before the individual Member of the Committee for the purpose of outdoor test. At that stage, they did not raise any protest with the mode and manner in which the suitability of the candidates was being adjudged by the Committee, *per se*.Not only this, after participating in the outdoor test, they waited for the declaration of the result. Had the petitioners been really aggrieved by the manner in which the Committee conducted itself in the course of adjudging the candidates for outdoor test, then the least that was expected, was that the petitioners would have either represented against the same before the higher authorities or ought to have had approached the appropriate Court of law before declaration of the final result against the same. This also was not done by them. It is only after the declaration of the final result when the petitioners did not find their names in the merit list of the selected candidates that they have assailed the mode and manner in which the outdoor test was conducted by the Selection Committee at Solan. This Court is of the considered view that in this background when the petitioners acquiescenced themselves to this irregular process adopted by the Committee, they cannot now be permitted to assail the same. Though this Court again reiterates that it is not satisfied with the manner in which the Committee undertook the outdoor test, yet in the larger interest, this Court is not interfering with the selection of the candidates, which stood made on the basis of the assessment made by the Committee for District Solan, especially when selected candidates are not before the Court. Now, as far as District Sirmaur is concerned, record does not demonstrates that therein also this kind of a procedure was followed by the Committee. It is further pertinent to mention that even qua District Solan, during the course of arguments, the petitioners have not been able to

demonstrate that it were only the candidates, who were interviewed by one particular member, who got selected in the outdoor test. Thus, *per se* discrimination could not be demonstrated by the petitioners, though this Court reiterates that the procedure followed, was not very happy procedure.

28. Now, coming to the question of interpolations in the result sheet, it is evident from the record that there are number of cuttings in the result sheet of B-1 outdoor test. During the course of arguments, learned Advocate General could not give any reasonable explanation as to why such cuttings were present. However, a close scrutiny of the pleadings demonstrates that there is no *bias* which has been alleged by the petitioners in the pleadings *vis-a-vis* the candidates against whose names cuttings are there to the effect that the cuttings were made to give undue advantage to these candidates. Moreover, such candidates, in front of whose names cuttings are there in the remarks columns, are not before the Court and, thus, have not been given any opportunity to put forth their contention in this regard.

29. Be that as it may, though this Court does not approves of any unnecessary cuttings in the result sheet, yet, this Court is of the view that as it could not be demonstrated during the course of arguments that these cuttings were a result of some *bias* in favour of certain candidates or were done with *malafide* intent, therefore, this Court is not interfering with the final selection on account of the allegation of cuttings being there in the result sheet.

30. In this view of the matter, as this Court finds no merit in this petition, the same is dismissed and as a result thereof, the orders which have been passed by the appropriate authority on the representations of the petitioners are also not being disturbed. However, before parting with the judgment, this Court observes and directs that for future, the Departmental Selection Committee which is so constituted in terms of the Standing Order No. 11/16, shall adjudge the suitability of the candidates for outdoor test as a Unit and shall not adopt the methodology which stood adopted by the Committee for

District Solan. Similarly, the preparation of result sheet should not contain unnecessary and undue cuttings, as the same does not bears a good reflection on the conduct of the Selection Committee. With these remarks, this petition is ordered to be closed. Pending miscellaneous applications, if any, also stand disposed of.

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

Between:-

SHRI PREM SINGH KASHYAP, SON OF SHRI KAKU RAM, RESIDENT OF VILLAGE BAJROL, P.O. SAPROON, DISTT. SOLAN, H.P., PRESENTLY WORKING AS SENIOR TECHNICAL ASSISTANT GR.-II, DR. Y.S. PARMAR UNIVERSITY OF HORTICULTURE AND FORESTRY, NAUNI, DISTRICT SOLAN, H.P.

...PETITIONER

(BY SHRI L.N. SHARMA, ADVOCATE)

AND

1. DR. Y. S. PARMAR UNIVERSITY OF HORTICULTURE AND FORESTRY, NAUNI SOLAN THROUGH ITS REGISTRAR.

2. MADAN SINGH CHAUHAN, COMPUTER OPERATOR, PROMOTED AS TECHNICAL ASSISTANT GR. I (COMPUTERS) THROUGH REGISTRAR, DR. Y.S. PARMAR UNIVERSITY OF

HORTICULTURE & FORESTRY,
NAUNI, SOLAN, H.P.

...RESPONDENTS

(SHRI AVINASH JARYAL, ADVOCATE, FOR R-1.
SHRI MANISH SHARMA, ADVOCATE, FOR R-2).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.3944 of 2019
DECIDED ON: 24.11.2021

Constitution of India, 1950 – Article 226 – Writ of Mandamus – Petitioner feeling aggrieved by the promotion of private respondents against the post of Technical Assistant Grade –I (Computer) – Challenged on the ground that he was fit for promotion – Held – Employee is not having only right of promotion and only fundamental right which stands conferred upon an employee is the right of consideration for promotion – Right of consideration for promotion accrues upon an incumbent upon availability of promotional post vis-a-vis the feeder category post being held by him – feeder category of said post was not proved held by the petitioner – Petition dismissed. [Paras 6 & 8]

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 relief:-

> *"(i) That the impugned order dated 13th November, 2001 (Annexure A-17) may be quashed and set aside and respondent University may be directed to fill up the post of Senior Technical Assistant Gr.I for the Scheme HNP-029 (H) (now HNP-004-42) in accordance with Recruitment and Promotion Rules made on 15.3.2000 (Annexure A-2) with further directions to consider the applicant for promotion to the post of Senior Technical Assistant Gr. I and promote him with all consequential benefits."*

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

Petitioner herein approached the erstwhile learned Himachal Pradesh State Administrative Tribunal by way of OA No. 3156 of 2001, feeling aggrieved by the promotion of private respondent against the post of Technical Assistant Grade-I (Computers) vide Annexure A-17, i.e., office order dated 13th November, 2001, on the ground that in terms of the seniority list of Senior Assistants Grade-II of the respondent-University, it was the petitioner, who was entitled for the said promotion.

3. The petition is resisted by the respondent-University as well as the private respondent, *inter alia*, on the ground that promotion order of the private respondent stood issued strictly in accordance with the provisions contained in the Recruitment and Promotion Rules for the post of Technical Assistant Grade-I (Computer) notified by the respondent-University vide Annexure R-1, dated 5th July, 2001. As per the respondents, the post of Technical Assistant Grade-I (Computer) was not in the promotion channel of the petitioner, who happened to be Senior Assistant Grade-II, whereas, the post of Technical Assistant Grade-I (Computer) was to be filled in by way of promotion from amongst Computer Operators with three years of service in the Grade in UHF.

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

5. Learned counsel for the petitioner has informed the Court that during the pendency of the petition, the petitioner has superannuated on 31st March, 2009. On a pointed query put to him as to whether there was any post of Technical Assistant Grade-I available till the date of his superannuation, for which, the post being held by him at the time of his superannuation, was a feeder category post, learned counsel has fairly submitted that in terms of the pleadings and documents on record, there was

none. However, as per him, in terms of Annexure A-4, one post of Senior Assistant Grade-I was available under NP029(H) Establishment in the University and the petitioner could have been conveniently promoted to the said post.

6. It is settled law that an employee does not has a fundamental right of promotion and the only fundamental right which stands conferred upon an employee is the right of consideration for promotion. It is but natural that right of consideration for promotion accrues upon an incumbent upon the availability of promotional post vis-a-vis the feeder category post being held by him.

7. In this case, as from the post being held by the petitioner, admittedly, no promotional post of Senior Assistant Grade-I became available till the date of his superannuation, against which, he could have been promoted in terms of his seniority. Thus, right of consideration never accrued upon the petitioner. That being the case, this Court is of the considered view that there is no merit in the present petition.

8. Coming to the challenge laid by the petitioner to office order, dated 13th November, 2001 (Annexure A-17), as it is duly borne out from the record in general and Annexure R-1 in particular that this was a totally distinct cadre post, which stood filled up by the respondent-University by strictly complying with the Recruitment and Promotion Rules, which govern the promotion to this post, the promotion of private respondent against this post vide Annexure A-17 cannot be faulted with. In other words, the promotion of private respondent vide Annexure A-17 is a valid promotion and the present petitioner has no right of consideration against this post, which was not in the channel of promotion of the petitioner. As far as the contention of the petitioner that he should have been considered for the post which was available in some other stream, this Court is of the considered view that this Court cannot issue a mandamus directing the respondents to

consider him for promotion to a post with similar nomenclature in some other stream until and unless there is cogent material on record to demonstrate that feeder category of the said post was the one held by the petitioner. Therefore, this petition being devoid of any merit is dismissed, so also pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, CHIEF JUSTICE

Between:

1. ASHOK SUD SON OF
LATE SH. P.N. SUD,
PERMANENT RESIDENT C-243,
DEFENCE COLONY,
NEW DELHI 110024.
(PRESENTLY RESIDENT OF
IRWIN LODGE, CHAURA MAIDAN,
BELOW THE INDIAN AUDIT AND
ACCOUNTS SERVICES
ACADEMY, SHIMLA 171004)
2. SMT. RADHA SUD
WIFE OF SH. ASHOK SUD,
PERMANENT RESIDENT C-243,
DEFENCE COLONY,
NEW DELHI 110024.
(PRESENTLY RESIDENT OF
IRWIN LODGE, CHAURA MAIDAN,
BELOW THE INDIAN AUDIT AND
ACCOUNTS SERVICES
ACADEMY, SHIMLA 171004)

...PETITIONERS

(BY MR. SANJAY KUMAR VERMA
ADVOCATE)

AND

ROSHAN LAL BHARDWAJ

SON OF LATE SH. SHAM
LAL BHARDWAJ,
RESIDENT OF 1, KOHARI,
KANDAGHAT, DISTRICT
SOLAN, H.P.

...RESPONDENT

(BY MR. DEVENDER KUMAR
SHARMA, ADVOCATE VICE
MR. C.N. SINGH, ADVOCATE.

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 441 of 2019
RESERVED ON: 12.11.2021.
PRONOUNCED ON: 24.11.2021

Code of Civil Procedure, 1908 – Order 19 – Admissibility of affidavit must be confined to such facts which the deponent can prove by the affidavit in lieu of examination in chief, and (b) it must be an affidavit conforming to the requirement of the Indian Evidence Act and the provision of Order 19 Rule 3 CPC. However the statements in the nature of legal submission and arguments in the pleading should be avoided. [Para 9].

Code of Civil Procedure, 1908 –Order 18 and 19 of the CPC, Should not contain statements which are (1) argumentative or in the nature of submissions and pleadings etc (ii) matter which are wholly irrelevant and not in the personal knowledge of the deponent or witness , and (iii) matters which are demonstrably hearsay. If there is any such material, the court must endeavour to bring that affidavit in conformity with the provision of order 18 and 19 of CPC and of Indian Evidence Act, [Para 10]

Cases referred:

Garja Ram versus Kamla Devi and others reported in 2012 (1) Shim.LC 24;

This Civil Writ Petition coming on for pronouncement this day, ***Hon'ble Mr. Justice Mohammad Rafiq,*** *passed the following:*

O R D E R

This petition has been filed by plaintiffs/petitioners assailing the order dated 2.8.2019, passed by the learned Civil Judge Court No. 3, Shimla in case

No. 172-1 of 18/15, titled Ashok Sood and another versus Roshan lal Bhardwaj whereby their objection to the admissibility of the affidavit of the defendant Roshan lal Bhardwaj, has been rejected.

2. The facts of the case, as emerging from the pleadings, are that the defendant/respondent was a tenant of the plaintiffs/petitioners in the first floor of Irwin Lodge and its Annexe as well as one room in the ground floor thereof. The plaintiffs/petitioners succeeded in obtaining eviction order against him in Rent petition No. 47/2 of 2010/08 from the Rent Controller No. 1 on 30.6.2011. The defendant/tenant challenged the aforesaid order in Rent Appeal No. 40-S/14 of 2011 in which an interim order was passed on 3.7.2013 whereby operation of the eviction order was stayed subject to the respondent paying use and occupation charges @ Rs.6000/- per mensem. Since the defendant/respondent did not comply with the aforementioned order, the plaintiffs/ petitioners filed Execution Petition No. 17-10 of 2011 before the Rent Controller No. 1 Shimla, who issued the warrant of possession qua the tenanted premises in their favour and against the defendant/respondent. The Executing Court passed an order dated 27.7.2013 against the defendant/respondent dismissing his objection ordering issuance of warrant of possession. The defendant/respondent filed a Civil Revision Petition No. 4034 of 2013 against the aforesaid order dated 27.7.2013 before this Court, which was dismissed vide order dated 4.10.2013. The defendant /respondent unsuccessfully challenged the aforesaid order before the Supreme Court in SLP (C) No. 36864 of 2013 which, too, was dismissed in *limine* vide order dated 13.1.2014. While dismissing the SLP, the Supreme Court directed the defendant/tenant to deposit arrears in the account of the petitioners within two months from the date of passing the order. It was in this background that the plaintiffs filed the suit for recovery of the amount of arrears and interest due from the respondent. The issues in the suit were framed on 13.10.2015. Thereafter the plaintiffs/petitioners led evidence in that case. After recording the evidence of the plaintiffs, the matter was fixed for the evidence of the defendant/respondent on

1.6.2017 onwards. The defendant/respondent examined one Shri Uma Shankar who produced the record pertaining to the petitions filed before this Court.

3. I have heard the learned counsel for the parties and have gone through the entire material on record.

4. Mr. Sanjay Kumar Verma, the learned counsel for the petitioners contended that despite several opportunities granted to the defendant, he failed to produce his evidence and therefore, counsel for the plaintiffs requested the trial Court to close the right of the defendant to adduce evidence. The trial Court however fixed 5.3.2018 as the date for the respondent to produce his remaining evidence. Thereafter the matter was transferred to the learned Civil Judge Court No. 3 on 3.5.2018, who granted further opportunities to the defendant on 17.5.2018, 4.7.2018 and 28.8.2018. It was thereafter the the learned Court below on 28.5.2019 directed that non-official witnesses shall be produced by the defendant/respondent on his own responsibility on 2.8.2019. The defendant/respondent then produced one official witness Sh. Vinod Kumar who has produced the record of the execution proceedings. Apart from that, the defendant/respondent filed his own affidavit by way of examination-in-chief. The objection was taken by the plaintiffs/petitioners qua the admissibility of the aforesaid affidavit contending that it was nothing but a complete reproduction of the written statement filed by the defendant/respondent. In fact, it was cut, copy and paste of the written statement and therefore, violative of the provisions as contained in Order 19 of the Code of Civil Procedure, hereinafter referred to as "the CPC". It is contended that a perusal of the affidavit would show that it is repetitive and a reproduction of the entire written statement, is also argumentative and was liable to be struck off from the record of the case. The prayer of the plaintiffs/petitioners was disallowed by the learned Court below despite its conclusion that some of the paragraphs are similar to that of the written statement and the learned Court below has recorded the finding that there is nothing argumentative or cut copy paste in the same.

5. Learned counsel for the petitioners further argued that the impugned order passed by the learned Court below suffers from non-application of mind. The learned Court below has failed to appreciate ratio of the judgment of this Court in ***Garja Ram versus Kamla Devi and others*** reported in ***2012 (1) Shim.LC 24*** and has wrongly held that the same is not applicable to the facts of the present case. It is argued that the learned Court below has illegally granted further opportunities for cross-examination of the witnesses to the defendant/respondent on the premise that the plaintiffs /petitioners have themselves availed around 11 opportunities for their witnesses. The learned counsel for the petitioners has also relied upon the judgment delivered by the Bombay High Court in ***Harish Loyalka and another versus Dileep Nevatia and others*** in ***Suit No. 3598 of 1996***.

6. Mr. Devender Kumar Sharma, the learned counsel for the defendant/respondent opposed the petition and submitted that the learned Court below has rightly rejected the objection of the plaintiffs/petitioners to the admissibility of the affidavit of the defendant and has rightly concluded that there was no breach of the provisions of Order 19 Rule 3 of the CPC. The judgment of this Court in Garja Ram's case *(supra) and that of the Bombay High Court in Harish Loyalka's case* supra, relied on, on behalf of the plaintiffs/petitioners are distinguishable and therefore, could not have been applied.

7. A perusal of the impugned order indicates that the learned Court below has threadbare examined the objection of the plaintiffs/petitioners as to the admissibility of the affidavit of the defendant. It was noted that the suit was filed by the plaintiffs for recovery of Rs.2,00,925/- alongwith interest and use and occupation charges. The written statement filed by the defendant contains various facts in the pleadings. After going through the affidavit of the defendant Roshan Lal Bhardwaj, in the light of the provisions of Order 19 Rule 3 CPC, the learned Court below observed that it did not see any reason to reject the same on the grounds put forth by the plaintiffs. It was held that upon taking into consideration

the nature of the suit, there was nothing argumentative or cut copy paste in the affidavit. Even if some of the paragraphs are similar to what was stated in the written statement they are merely explanatory in nature and are well within the knowledge of the plaintiffs.

8. Judgment of the learned Single Judge of this Court in Garja Ram's case (supra), relied upon by the plaintiffs, arose out of a case where the Court, on a perusal of the affidavit concluded that not only the affidavit is highly repetitive but certain facts stated therein, on the face of it, are hearsay. Most part of the affidavit is argumentative and philosophical in nature. Apart from that, the Court observed that the civil suit was filed way- back in the year 2004 and such affidavit was likely to hamper the progress of the suit. However, such are not the facts of the present case.

9. In Harish Loyalka's case (supra), the Court held that the emphasis of Order 19 Rule 3 of the CPC is that no affidavit should contain material which is hearsay or argumentative. The affidavit must be confined to such facts which the deponent can prove. The affidavit in lieu of examination-in-chief is constrained by two factors: (a) it must be examination-in-chief; and (b) it must be an affidavit conforming to the requirement of the Indian Evidence Act and the provisions of Order 19 Rule 3 CPC. However, the statements in the nature of legal submissions and arguments in the pleadings should be avoided.

10. It the light of the above, it must be held that the affidavit filed in the examination-in-chief, as per the mandate of Orders 18 and 19 of the CPC, should not contain statements which are (i) argumentative or in the nature of submissions and pleadings etc; (ii) matters which are wholly irrelevant and also not in the personal knowledge of the deponent or witness; and (iii) matters which are demonstrably hearsay. If there be any such material, the Court must endevour to bring that affidavit in conformity with the provisions of Orders 18 and 19 of CPC and of the Indian Evidence Act.

11. Applying the aforementioned yard-sticks, it cannot be said that the affidavit filed by the defendant in the present case is based on hearsay or, in any manner argumentative, or contains such statements which are wholly irrelevant or which can be described outside the personal knowledge of the defendant.

12. In view of the aforesaid discussion/observations, I do not find any infirmity in the impugned order passed by the learned Court below. The petition is therefore dismissed. Pending miscellaneous applications, if any, shall also stand disposed of.

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

Between:

SIRI RAM,
S/O SH. MANGRU RAM,
R/O VPO KHOKHAN,
TEHSIL BHUNTER,
DISTRICT KULLU, H.P.

....APPELLANT

(BY MS. RAMESHWARI SHARMA,
ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

(BY MR. SUDHIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL, WITH
MR. NARENDER THAKUR, DEPUTY
ADVOCATE GENERAL)

....RESPONDENT

CRIMINAL APPEAL NO. 195 OF 2021

DECIDED ON: 15.11.2021

Code of Criminal Procedure, 1973 – Section 449 – Code of Criminal Procedure – Penalty of Rs. 100000/- imposed against the appellant surely and recovery warrant under Section 421 Cr. PC issued – Appeal preferred under Section 449 Cr.PC against the order – Held – Court before passing any order with regard to imposition of penalty ought to afford opportunity of hearing to the appellant surety, especially when he pursuant to notice appeared before the court and filed reply which was not considered – After notices surety caused appearance of accused – Appellant was not given any opportunity of being heard before imposing penalty of being heard so order was nonest and without jurisdiction and hence quashed and set aside. [Paras 4 & 5]

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

JUDGMENT

Instant appeal filed under Section 449 Cr.PC, lays challenge to order dated 3.5.2018, passed by the learned Special Judge, -III, Mandi, H.P., in Session Trial No. 55/16/15, titled State of H.P. vs. Udham Singh and in respect of State v. Siri Ram (Annexure A-2), whereby penalty in the sum of Rs. 1,00,000/-, came to be imposed upon the appellant-surety on account of his failure to cause production of the accused in the court during trial.

2. Precisely, facts of the case as emerge from the record are that FIR No. 16 of 2015, dated 8.1.2015, under Section 20 of NDPS Act, was registered against the accused Udham Singh, at PS Sundernagar, District Mandi, H.P. Above named Udham Singh filed an application for grant of bail, wherein present appellant stood as surety. Since despite notice, accused Udham Singh failed to put in appearance in trial, vide order dated 20.2.2018, NBWs were issued against him returnable for 31.3.2018. Besides above, court below while passing order dated 20.2.2018, forfeited the surety bonds furnished by the appellant surety and issued notice to him under Section 446 of the Cr.PC. On 31.3.2018, NBWs issued against the main accused Udham

Singh were received back unexecuted, but appellant surety Siri Ram came present in person and undertook before the court below that he would cause presence of the accused on the next date of hearing. In the aforesaid background, matter came to be adjourned to 3.5.2018. On 3.5.2018, neither main accused nor the appellant surety came present and as such, court below ordered issuance of fresh NBWs against the accused and vide separate order dated 3.5.2018 (Annexure A-2), imposed penalty in the sum of Rs. 1.00 lac, against the appellant surety and ordered for issuance of warrant of recovery under Section 421 of Cr.PC against the appellant surety. Subsequently, on 22.5.2018, appellant surety caused presence of the accused Udham Singh in the Court and thereafter, he was sent to judicial custody.

3. Being aggrieved and dis-satisfied with the aforesaid order dated 3.5.2018, passed by the court below, appellant surety approached this Court by way of Cr.MMO No. 414 of 2019, which came to be disposed of vide judgment dated 30.8.2019. In the afore judgment dated 30.8.2019, coordinate Bench of this court observed that once there is specific remedy provided under the criminal Procedure Code to file appeal under Section 449 against the order, if any, passed under Section 446 of Cr.PC, criminal revision petition is not maintainable. In the aforesaid backdrop, appellant surety approached this Court in the instant appeal, praying therein to quash and set-aside order dated 3.5.2018, whereby court below without affording opportunity of being heard to the appellant surety proceeded to impose penalty to the tune of Rs. 1.00 lac.

4. Having heard learned counsel for the parties and perused material available on record, this Court finds that there is no dispute that appellant surety stood surety for the main accused Udham Singh and accused despite notice, failed to put in appearance in trial. It is also not in dispute that appellant surety after having received notices in terms of order dated 20.2.2018, passed by the court below appeared in the court on 31.3.2018, and

assured that on the next date of hearing i.e. 3.5.2018, he would cause presence of the main accused. On 3.5.2018, neither accused nor surety came present and as such, court below ordered for issuance of fresh NBWs against the accused for 18.6.2018. Vide separate order dated 3.5.2018, court proceeded to impose penalty to the tune of Rs. 1.00 lac on appellant surety on account of his failure to cause presence of the accused. Once court below having taken note of the absence of the accused from the trial had already ordered for forfeiture of the surety bond furnished by the appellant surety vide order dated 20.2.2018, there was otherwise no occasion for the court below to call upon the appellant surety to cause presence of the accused, rather at that stage, court could only issue notice under Section 446 Cr.PC, which thereafter could only be decided after having received notice, if any, to the show-cause notice by the appellant surety. However, interestingly, in the case at hand, appellant surety despite forfeiture of bail bonds furnished by him appeared in the court below on 31.3.2018, and assured the court below to cause presence of the accused on 3.5.2018. No doubt, on 3.5.2018, neither accused came present nor appellant surety was able to cause his presence, but in that eventuality, court before passing any order with regard to imposition of penalty ought to have afforded opportunity of hearing to the appellant surety, especially when he pursuant to notice dated 20.2.2018 had come present on 3.5.2018. Interestingly, in the case at hand, on 22.5.2018, appellant surety caused presence of Udham Singh in the court and thereafter, he was sent to judicial custody. Zimini orders placed on record reveal that reply to notice under Section 446 of CrPC was filed and thereafter matter was ordered to be listed for consideration on 24.10.2018. If it is so, it is not understood that how on 3.5.2018, court below without looking into reply, if any, filed by the appellant surety to the notice under Section 446 Cr.PC, could proceed to impose penalty to the tune of Rs. 1.00 lac. If court had imposed penalty of Rs. 1.00 lac on 3.5.2018, after having taken note of the absence of

appellant surety despite his having received notice under Section 446 Cr.PC, proceedings under Section 446 Cr.PC would have come to an end on that day and thereafter there was no occasion, if any, for the court below to consider the reply, if any, filed by the appellant surety, to the notice under Section 446 Cr.PC. Zimini orders placed on record reveal that reply filed by the appellant surety, to the show cause notice under Section 446 Cr.PC, never came to be considered, rather matter remained pending and court below without affording an opportunity of being heard to the appellant surety, who subsequently, caused presence of the accused, proceeded to impose penalty upon him to the tune of Rs. 1.00 lac. Zimini orders clearly reveal that no final decision till date has been taken by the court below in the proceedings under Section 446 Cr.PC initiated against the appellant surety on account of his failure to cause presence of the accused. At this juncture, learned Additional Advocate General states that proceedings are pending for the reason that warrant of recovery under Section 421 Cr.PC is yet to be effected, but such plea of him cannot be accepted for the reason that order dated 19.9.2018 passed by the court below itself reveals that reply to the notice under Section 446 Cr.PC has been filed and thereafter, matter was ordered to be listed for consideration on 24.10.2018, meaning thereby, order dated 3.5.2018, imposing penalty to the tune of Rs. 1.00 lac filed by the court below was passed by the court without affording opportunity of hearing to the appellant surety. Leaving everything aside, this Court is of the view that once factum with regard to production of the accused by the appellant surety had come to the notice of the court below on 22.5.2018, it ought to have recalled order dated 3.5.2018, which otherwise is nonest and without jurisdiction for the reason that before passing of such order, no opportunity of hearing ever came to be afforded to the appellant surety.

5. Since pursuant to notices issued by the court below appellant surety had already caused appearance of the accused and accused is in

judicial custody, there appears to be no justification to let the order dated 3.5.2018, sustain and as such, same is quashed and set-aside, as a consequence of which, subsequent proceedings of recovery are also quashed and set-aside. In the aforesaid terms, appeal is allowed and disposed of accordingly. Pending applications stand disposed of.

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

Between:-

SHRI PUSHAP RAJ
S/O SH. DAYA RAM,
R/O VILLAGE TARWAI,
PO KAPAHI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

(BY SH.ATUL JHINGAN, ADVOCATE)

....PETITIONER

AND

1. SH. ANIL KUMAR
S/O SH. RAJU,
RESIDENT OF VILLAGE TARWAI,
PO KAPAHI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

2. SMT.MANORMA
W/O SH. RAJU,
RESIDENT OF VILLAGE TARWAI,
PO KAPAHI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

3. SMT. KALASNO
W/O SH. PREM SINGH,

RESIDENT OF VILLAGE TARWAI,
PO KAPAHI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

4. SH.LEKH RAM
S/O SH. HIRDA RAM,
RESIDENT OF VILLAGE TARWAI,
PO KAPAHI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

5. SH. NARESH KUMAR
S/O SH.BHAGAT RAM,
RESIDENT OF VILLAGE TARWAI,
PO KAPAHI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

….RESPONDENTS

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

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC
NO.346 OF 2015
DECIDED ON: 22.11.2021

Code of Criminal Procedure, 1973 – Section 482 – Sections 397, 482 Criminal Procedure Code – Revision petition dismissed by Sessions Judge, Mandi on the ground of maintainability in view fo section 378(4) of Code of Criminal Procedure and on the ground that against order / judgment of acquittal, revision petition is not maintainable – Held – Magistrate had not taken cognizance of the offence against the respondent as the complaint was dismissed at the stage of section 203 Cr. PC – Trial court instead of taking cognizance of commission of offence and issuing process against respondent has dismissed the complaint under section 203 Cr. PC, which had not resulted in acquittal of accused – Hence, revision found to be wrongly dismissed. [Paras 4 & 5]

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

O R D E R

This petition has been filed against the order 05.06.2015, passed by learned Sessions Judge, Mandi, in Cr. Revision Petition No.24/2014, titled as *Pushap Raj vs. Anil Kumar & others*, whereby Revision Petition preferred by the petitioner has been dismissed on the ground that it was not maintainable in view of provisions of Section 378(4) of the Code of Criminal Procedure (in short 'Cr.P.C.') by observing that against order/judgment of acquittal, Revision Petition is not maintainable but appeal shall lie.

25. Petitioner herein had filed a private complaint before the trial Magistrate, wherein trial Magistrate after recording preliminary evidence as provided under Section 200 of cr.P.C. and thereafter, considering statement of the complainant and the witnesses, had dismissed the complaint under Section 203 of Cr.P.C. without issuing notice to the respondent/accused.

26. No cognizance of the commission of offence was ever taken by the trial Magistrate against the respondent as the complaint was dismissed at the stage of Section 203 Cr.P.C. Whereas, commencement of the proceedings before Magistrate against the respondent shall have to be after issuance of process under Section 204 Cr.P.C., on taking cognizance of commission of offence. As trial Magistrate, instead of taking cognizance and issuing process against respondents, has dismissed the complaint under Section 203 Cr.P.C., therefore, there is no acquittal of the respondent/accused in the complaint filed by the petitioner.

27. In view of above, learned Sessions Judge, Mandi has committed not only material irregularity, but major illegality in dismissing the Revision

Petition preferred by the petitioner against dismissal of the complaint under Section 203 Cr.P.C.

28. Accordingly, impugned order dated 05.06.2015, passed by learned Sessions Judge, Mandi, District Mandi, H.P., in Cr. Revision No.24 of 2014, titled as *Pushap Raj vs. Anil Kumar & others,* is set aside and case is remanded back to learned Sessions Judge, Mandi, to decide the same afresh, by reviving the Revision Petition, on its own merit, in accordance with law.

29. Parties are directed to appear before learned Sessions Judge, Mandi, on 15.12.2021. It is made clear that no fresh notice shall be issued to the parties for their appearance before learned Sessions Judge, Mandi.

30. Copy of this order is directed to be transmitted to learned Sessions Judge, Mandi.

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

32. 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.

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

Between:-

SHRI VIJAY KUMAR SOOD
SON OF SHRI JAGDISH CHAND,
RESIDENT OF WAWRD NO.3,
NAGAR PANCHAYAT JUBBAL
PROP: V.K. ENTERPRISES BUS STAND JUBBAL, DISTRICT SHIMLA, H.P.
AGED 55 YEARS

(BY SH.INDER SINGH CHANDEL, ADVOCATE)

.....PETITIONER

AND

SHRI BIRENDER CHAUHAN
SON OF LATE SHRI HARI SINGH CHAUHAN,
RESIDENT OF VILLAGE RAMPURI, JUBBAL, P.O. & TEHSIL JUBBAL, DISTRICT SHIMLA

(NEMO)

…RESPONDENT

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC
NO.555 OF 2021
Decided on:17.11.2021

Code of Criminal Procedure, 1973 - Section 482 - Application under Section 311 of code of Criminal procedure for re-examination of complaint dismissed by Ld. Trial Court – challenged by way of petition under section 482 Cr. PC – Held sufficient opportunity granted for cross examination – Petition dismissed. [Paras 4 & 5]

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

O R D E R

Petitioner has approached this Court against order dated 22.07.2021, passed by Judicial Magistrate First Class, Jubbal, District Shimla, H.P., whereby application filed by the petitioner-accused under

Section 311 of the Code of Criminal Procedure (in short 'Cr.P.C.'), with a prayer to re-examine the complainant with regard to questioning him about his source of income, has been rejected.

2. It is observed by the trial Magistrate that complainant was examined on 07.02.2017 and he was thoroughly cross-examined by learned counsel for the accused on the point of source of income and a question with respect to source of income was categorically put to the complainant in his cross-examination, in response whereto, complainant had replied that he had earned `5-6 lacs in Apple season in the year 2015 and it has also been observed that there is lengthy cross-examination leaving nothing to be discussed in present case.

3. Application under Section 311 Cr.P.C. was filed on 22.11.2019 i.e. about 2 ½ years after examination and cross-examination of the complainant when case reached at the stage of arguments.

4. Prayer for granting one opportunity has been made on the ground that the then Advocate engaged by the petitioner could not put certain question to the complainant which were necessary for adjudication of claim of complainant with respect to his source of income. In my considered opinion it is not a valid ground to recall the witness for cross-examination.

5. I find no infirmity, illegality or perversity in the impugned order dated 22.07.2021, passed by learned Judicial Magistrate First Class, Jubbal, District Shimla, H.P. Therefore, I do not find any reason to interfere in the impugned order.

6. Accordingly, petition is dismissed, so also pending application(s), if any.

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

BETWEEN:

STATE OF HIMACHAL PRADESH

..... APPLICANT/APPELLANT

(BY SH. ASHOK KUMAR, A.G. WITH MR. RAJINDER DOGRA, SR. ADDL. ADVOCATE GENERAL, MR VINOD THAKUR, MR. SHIV PAL MANHANS,MR. HEMANSHU MISRA, ADDL. A.GS. & MR. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL)

AND

1. MADAN LAL, SON OF SHRI BRIJ LAL, AGED 50 YEARS.

2. VISHAL, SON OF SHRI MADAN LAL, AGED 25 YEARS.

BOTH RESIDENTS OF ADARSH NAGAR, PO PUTRIAL, TEHSIL AND P.S NADAUN, DISTRICT HAMIRPUR, H.P.

..... NON-APPLICANTS/RESPONDENTS

(BY SH. SHANTI SWAROOP, ADVOCATE)

CRIMINAL MISCELLANEOUS PETITION
NO. 17/2020 IN CRIMINAL APPEAL No . 135 of 2020
RESERVED ON:17.11.2021
DECIDED ON: 26.11.2021

Code of Criminal Procedure, 1973 - Section 391 and 311 read with 482 Cr. PC – Application filed to place on record DNA report and for remand back of case to Ld. Trial Court for deciding alongwith on basis of DNA report – Held – Mere fact that victim has not supported the prosecution case during trial

cannot be a valid reason to disallow the prayer for additional evidence especially when same is in the shape of an expert opinion – Held – Report of S.F.S.L. in respect of DNA profiling of samples of products of conception and accused are relevant piece of evidence. [Paras 12 & 14]

Cases referred:

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

Rajendra Prashad Vs. Narcotic Cell (1999) 6 SCC 110;

This application coming for orders this day ***Hon'ble Mr. Justice Satyen Vaidya***, passed the following;

ORDER

This is a State appeal against the judgment of acquittal dated 02.05.2019, passed by learned Special Judge, Hamirpur in Sessions Trial No. 07 of 2018. Respondents herein were charged under Sections 376(2) D, 506 read with Section 34 of IPC and Sections 4 & 6 of Protection of Children from Sexual Offences Act, 2012 (POCSO) and have been acquitted after the trial. The victim is none other than daughter of respondent No.1 and step sister of respondent No.2.

2. During pendency of the appeal, applicant/appellant has filed an application under Section 391, 311 read with Section 482 of Cr.P.C. for following reliefs:

> *" It is, therefore, respectfully prayed that in view of the reasons stated above the present application may kindly be allowed and Annexure A/1, DNA report may kindly be taken on record and the case may be remanded back to the Ld. Trial Court for fresh decision after perusing the DNA report and the investigating agency may also be permitted to file fresh supplementary charge sheet under Section 173(8) Cr.P.C in the interest of justice and justice be done."*

3. It is stated in the application that the victim at the time of registration of case was pregnant. The pregnancy eventually was medically terminated. Sample products of conception were preserved for the purposes of DNA matching. During investigation the blood samples of victim and non-applicants/respondents were also obtained and preserved. All these samples were sent to State Forensic Science Laboratory, Junga (SFSL) on 20.11.2017. Report of DNA profiling is stated to have been received by the police from SFSL on 01.07.2019. The date of preparation of such report is stated to be 22.06.2019. A copy of the DNA report has been placed on record as Annexure A/1. The contention of the applicant-appellant is that due to the reason of delay in submission of SFSL report in respect of DNA profiling, the same could not be placed and proved on record during the trial. According to the applicant/appellant, the SFSL report in respect of DNA profiling is an important piece of evidence in the case, without which, the interest of justice is likely to suffer adversely. It has further been submitted that SFSL report Annexure A/1 incriminates non-applicant/ respondent No.1.

4. In response, it has been submitted on behalf of the non-applicants/respondents that the victim was a psychiatric patient and was taking medicines for this purpose. The victim used to leave her house without consent of her parents. It has also been asserted that none of the prosecution witnesses including victim had deposed against the non-applicants/respondents during the trial. The DNA report, Annexure A/1 is said to be fabricated and highly suspicious, having seen the light of the day after a long period of alleged collection of samples. It has further been submitted that keeping in view the conduct of the victim, before and after the trial, it cannot be said that she will suffer in absence of the SFSL report sought to be placed on record. It has been contended that the non-applicants/respondents shall be seriously prejudiced if the application is allowed.

5. We have heard learned counsel for the parties and have also perused the records.

6. Record reveals that Dr. Arti Chauhan, PW-5, had taken sample products of conception for DNA and had handed over the same to the police. Blood samples of non-applicants/respondents were obtained by Dr. B.S. Rana, PW-7, on FTA Cards and were submitted to the police. All these samples were deposited in police "Malkhana". On 20.11.2017, the above noticed samples were handed over to Constable Rajiv Kumar vide R.C. No. 162 of 2017 for being deposited at SFSL, Junga. The said witness (PW-19) deposited the samples for DNA profiling at SFSL, Junga, on 20.11.2017. It is pertinent to notice that the case had been registered vide FIR No. 100 of 2017 on 09.11.2017.

7. Perusal of Annexure A/1 i.e. copy of report of DNA profiling prepared by SFSL, Junga, reveals that the samples were received in the laboratory on 20.11.2017 through Constable Rajiv Kumar No. 282 (PW-19). Thus, it is evident that the investigating officer had acted with sufficient promptitude in collecting the evidence and sending it for scientific analysis and expert opinion. The report Annexure A/1 is signed on 21.6.2019 by Dr. Vivek Sahajpal, Assistant Director, DNA Division, State Forensic Science Laboratory, Directorate of Forensic Science, H.P., Shimla Hills, Junga. This makes it evident that the report was prepared after more than one year and eight months of the submission of samples. Strangely, duration of examination has been mentioned from 23.11.2017 to 21.06.2019. It is not understandable, as to how, it can take more than 20 months for completion of scientific analysis of the samples for the purpose of DNA profiling.

8. Be that as it may, coming to the merits of the application, we find that the report prepared and submitted by SFSL in respect of DNA profiling of the samples of products of conception and the accused is a relevant piece of evidence and needs to be placed and proved on record in

accordance with law. The charge against the non-applicants/respondents is of commission of rape on the victim. The relevancy and admissibility of scientific evidence in the shape of DNA profiling is well established. Such report, if proved, being relevant under Section 45 of the Evidence Act, cannot be brushed aside.

9. The reason that the report was submitted belatedly does not lead to inevitable conclusion that the same is procured. It is not in dispute that the samples were submitted to the SFSL, Junga, on 20.11.2017 and the fact that report was prepared at a much belated stage cannot be a factor to ignore such an important piece of evidence. The purpose of the adjudication by Courts of Law in India is to arrive at truth of the matter and to impart justice to the parties. This salutary purpose cannot be allowed to be defeated or frustrated merely on technical grounds. The inclusion of the provisions of Section 391 of the Code of Criminal Procedure itself suggests that the Appellate Court is empowered to take additional evidence even after the conclusion of the trial, if found necessary.

10. Reference can be made to the observations made by Hon'ble Supreme Court in ***Zahira Habibulla H. Sheikh and another.*** *V.* ***State of Gujarat and others, (2004) 4 SCC 158,*** which is reproduced as under:-

> "47. Section 391 of the Code is another salutary *provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of*

further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution test the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of a guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. If the appellate court thinks that it is necessary in the interest of justice to take additional evidence, it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of discretion of the appellate court. As reiterated supra, the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions".

11. The object of Section 391 of the Code of Criminal Procedure is to sub-serve the cause of justice. The Court has to keep this valuable principle

in view. The only caveat is that the discretion vested in the Appellate Court is to be exercised judicially by recording reasons there for.

12. Adverting to the objections raised on behalf of the non-applicants-respondents, we are constrained to observe that, mere fact that the victim has not supported the case of the prosecution during trial, cannot be a valid reason to disallow the prayer for additional evidence, especially, when the same is in the shape of an expert opinion. The report Annexure A/1 is revealing by itself on scientific analysis of samples of the victim and non-applicants/respondents. The alignment of witnesses with accused in criminal trials, in our country, is well known. It cannot be ignored that in the instant case, the victim is daughter of non-applicant/respondent No.1 and sister of non-applicant/respondent No.2. It is true that probative and evidentiary value of Annexure A/1 is not to be looked at this stage by this Court. Nonetheless, the content of the report are definitely a factor in holding the necessity of such piece of evidence to be placed on record by way of additional evidence.

13. In ***Rajendra Prashad*** *Vs*. ***Narcotic Cell (1999) 6 SCC 110,*** the Hon'ble Apex Court has held as under:-

> *"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better".*

14. Thus, we are of the considered view, that the report of SFSL, Junga, Annexure A/1, is necessary to be proved in the facts and circumstances of the case and for such purpose, the application under consideration is allowed. The matter is, accordingly, remitted back to learned Special Judge, Hamirpur, for affording the prosecution an opportunity to place and prove on record report dated 21.06.2019 of SFSL Junga, Annexure A/1 in accordance with law by strictly adhering to the provisions of Chapter-XXIII of the Code of Criminal Procedure. Learned Special Judge, Hamirpur, shall thereafter certify such evidence to this Court. The parties are directed to appear before learned Special Judge, Hamirpur, on 6.12.2021. On said date, learned Special Judge, Hamirpur, shall fix further date, affording opportunity to the applicant/appellant to prove above noticed additional evidence in accordance with law. This entire exercise shall be completed by learned Special Judge, Hamirpur, on or before 31.12.2021 and the compliance shall be reported to this Court on or before 6.1.2022.

15. Before parting we must express our anguish and despair on the extreme remissness and casual approach in which prosecution has been conducted in the case. Despite the fact that samples for DNA profiling were submitted at SFSL, Junga on 20.11.2017, no effort was made to procure and submit the DNA report before learned trial court before conclusion of trial. It is also equally disturbing that SFSL Junga took more than 20 months to prepare its report. The seriousness of the matter requires a thorough probe and therefore, we direct the Secretary Home, Government of Himachal Pradesh to get the entire matter of delay in preparation and submission of DNA Report dated 21.6.2019, in FIR 100/2017 registered at Police Station, Nadaun, District Hamirpur, by SFSL, Junga and also the conduct of prosecution agency, enquired from an officer not below the rank of Inspector General of Police and to report compliance to this Court on or before 6.1.2022.

16. Perusal of the impugned judgment also reveals that learned

Special Judge has noticed in para-16 of judgment as under:-

> *"16. The medical evidence only proves that the victim was pregnant. However, the source of pregnancy was not detected. The police had obtained the blood samples of the accused and the victim. The fetus was also preserved. These were lying with the police.* ***However, they were never sent for analysis to determine whether the accused were the father of the baby****. It was stated in the charge-sheet that result from SFSL Junga is awaited regarding DNA profiling. The charge-sheet was filed on 20.1.2018. It is impossible to believe that the sample could not have been analyzed in more than one year and three months. Therefore, in the absence of DNA profiling, there is nothing to connect the accused with the commission of an offence".*

17. There was overwhelming material on record to show that the relevant samples were collected during investigation, preserved and submitted for DNA profiling at SFSL, Junga, on 20.11.2017. This fact was recorded in the charge sheet and was also noticed by learned Special Judge as detailed hereinabove. It had come in the statement of PW-19, Constable Rajiv Kumar that he had deposited the samples with SFSL, Junga, on 20.11.2017. This being so, it is not understandable that on what basis, learned Special Judge had observed that the blood samples of the accused and victim as well as samples of fetus were never sent for analysis. The concerned Special Judge should have been more careful in his approach, while deciding matter involving serious offences.

18. The application is accordingly disposed of in above terms. The matter be listed for compliance of this order on 6.1.2022. Records of trial Court with a copy of this order be immediately remitted to learned Special Judge, Hamirpur for compliance.

Registry is also directed to forthwith send copies of this order to Secretary Home, Government of Himachal Pradesh for compliance and also to

concerned Special Judge.

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

Between:-

DR. RAKESH PANWAR,
SON OF SHRI HARI RAM PANWAR,
AGED 54 YEARS, RESIDENT OF
E-3, BLOCK E, BHALLA APARTMENTS,
UPPER BHARARI, SHIMLA PRESENTLY,
POSTED AS TUTOR PATHOLOGY,
DR. Y.S. PARMAR MEDICAL COLLEGE,
NAHAN, DISTRICT SIRMOUR,
HIMACHAL PRADESH.

....PETITIONER

(SH. TARA SINGH CHAUHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH PRINCIPAL SECRETARY (HEALTH),
TO THE GOVERNMENT OF HIMACHAL PRADESH,

2. DIRECTOR HEALTH SERVICES,
HIMACHAL PRADESH, SHIMLA-9.

...RESPONDENTS

(SH. AJAY VAIDYA SR. ADDITIONAL ADVOCATE GENERAL)

2. CIVIL WRIT PETITION 4504 OF 2021

Between:

DR. PAWAN LAL SHARMA,
SON OF LATE SH. SURAT RAM,

R/O VILLAGE BAROG, P.O. DHAMANDRI,
TEHSIL THEOG, DISTRICT SHIMLA, H.P.

....PETITIONER

(BY SH. TARA SINGH CHAUHAN, ADVOCATE)

AND

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

2. DIRECTOR HEALTH SERVICE,
HIMACHAL PRADESH, SHIMLA-9.

3. DR. AMRITANSHU SHARMA,
S/O SH. KRISHAN KUMAR,
R/O VILLAGE SALIHARI,
P.O. KANDAGHAT, DISTT. SOLAN, H.P.
PRESENTLY POSTED AS MEDICAL OFFICER
(SENIOR SURGEON SPECIALIST)
AT PT. DEEN DAYAL UPADHAYAYA
HOSPITAL, SHIMLA H.P.-1.

...RESPONDENTS

(SH. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL FOR R-1 & 2).

(SH. NARENDER SHARMA, ADVOCATE, FOR R-3).

CIVIL WRIT PETITION
NO. 4210 OF 2020 A/W CIVIL WRIT PETITION
NO. 4504 OF 2021
Reserved on: 11.11.2021
Decided on: 17 .11.2021

Constitution of India, 1950 – Article 226 – Writ Petitioners are aggrieved by non-consideration of their names for promotion to the post of Assistant Professor in the department of Pathology and Surgery respectively in Indira

Gandhi Medical College on the ground that department of personnel, Government of Himachal Pradesh had issued instruction dated 1.9.2010 and 3.12.2014, whereby the procedure for post having more than one channel of promotion from feeder post to next higher post was prescribed – Held – Himachal Pradesh Health and Family Welfare Department, Himachal Pradesh Block Medical Officer, Class-I gazetted, recruitment and promotion rules are still in vogue and distinct than 1995 rules – Petitioner being Block medical officers cannot stake claim to be appointed as Assistant Professors by selection, as they are not members of Himachal Pradesh Civil Medical Service – Petition dismissed. [Paras 5 & 12]

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

O R D E R

Both these petitions have been heard and are being decided together, as common question of facts and law are involved.

2. Petitioners are aggrieved against non-consideration of their names for promotion to the post of Assistant Professors in the Departments of Pathology and Surgery respectively in Indira Gandhi Medical College, Shimla (for short, "IGMC").

3. It is not in dispute that initially the appointments of the petitioners were made as Medical Officers (for short, "MOs") in Health and Family Welfare Department, Government of Himachal Pradesh and were subsequently promoted as Block Medical Officers (for short, "BMOs") on their respective turn as per seniority. The petitioners during their service tenure acquired post-graduation qualification in their respective subjects and also acquired teaching experience by working as Tutor and Senior Resident respectively. The fact of the matter remains that the petitioners are serving in the cadre of Block Medical Officers (BMOs).

4. On 26.6.2021, Secretary (Health) to the Government of Himachal Pradesh requisitioned service particulars along with other necessary documents of all eligible and willing GDOs/MOs (Specialist/Super Specialist) for consideration on promotion to the post of Assistant Professors in IGMC. The names of the petitioners along with relevant documents were stated to have been forwarded to the competent authority for consideration. Petitioner in CWP No. 4210 of 2020 applied for the post of Assistant Professor in Department of Pathology and petitioner in CWP No. 4504 of 2021 applied for the said post in Department of General Surgery.

5. Petitioners were eventually not considered for the above noted posts of Assistant Professors on the ground that Department of Personnel, Government of Himachal Pradesh had issued instructions initially on 1.9.2010 and subsequently on 3.12.2014, whereby the procedure for the post having more than one channel of promotion from the feeder post to next higher post(s) was prescribed. According to official respondents, since petitioners had once exercised their options to be promoted as BMOs, they were not entitled for being considered to be promoted as Assistant Professors.

6. Appointment to the post of Assistant Professors in IGMC is governed by the Himachal Pradesh Medical Education Service Rules, 1999 (for short, "1999 Rules"). The channel for appointment to said post is 50% by promotion, failing which by direct recruitment and 50% by direct recruitment. The relevant extract of the Recruitment and Promotion Rules for the post of Assistant Professors is as under:-

Name of post	Age	Mode of recruitment	Eligibility
Assistant Professor (Class 1) Gazetted.	Not applicable	50% by way of promotion failing which direct recruitment	By promotion from amongst the lecturers, who possess 3 years regular service or regular combined with adhoc service (rendered upto 31.3.1998) if any in the grade

			in the concerned specialty failing which by appointment (by selection from amongst the members of HP Civil Medical Services (General Wing) having recognized PG Degree or its equivalent qualification in the concerned specialty and possesses at least 3 years teaching experience as lecturer/ registrar/ demonstrator/tutor/Senior Resident/Chief resident in the concerned specialty after doing post graduation in the specialty failing which by direct recruitment.

7. Thus, the eligibility for 50% quota of promotion is firstly from the Lecturers, who possessed three years regular service or regular combined with ad-hoc service (rendered up to 31.3.1998), if any, in the grade in the concerned specialty. In case of non-availability of any candidate in this category, the above noted rule provides for appointment, by selection from amongst the members of Himachal Pradesh Civil Medical Service (General Wing) (for short, "General Wing Members") , having recognized PG Degree or its equivalent qualifications in the concerned specialty with at least three years teaching experience as Lecturer/Registrar/Demonstrator//Tutor/Senior Resident/Chief Resident in the concerned specialty after completion of post graduation in the specialty.

8. In order to succeed in these petitions, it is incumbent upon the petitioners to satisfy that they are eligible for being promoted or selected to the post of Assistant Professors. The channel of promotion is available only to the Lecturers which is a substantive cadre under "1999 Rules" with three years

regular service or regular combined with ad-hoc service, rendered up to 31.3.1998 in the grade in concerned specialty. Admittedly, none of the petitioners possesses this eligibility. Petitioners were neither appointment as Lecturers at any point of time nor have worked as such. This being so, the petitioners can stake claim under second criteria i.e. by selection from amongst the General Wing Members with requisite and prescribed qualifications.

9. Respondent No.1 framed and notified Himachal Pradesh Civil Medical Service (General Wing), Rules 1995 (for short, "1995 Rules"). Under these rules different posts of Medical Officers and Block Medical Officers were categorized. The 1995 Rules defined "service" as the Himachal Pradesh Civil Medical Service (General Wing) (rule 2(r)), and the incumbents holding posts under different cadres of these rules were defined as its members (rule 2(n)). Evidently, it is on the basis of these nomenclatures that the eligibility condition for the post of Assistant Professors, as noticed above, in the second category required the candidates to be the General Wing Members.

10. The petitioner in CWP No. 4210 of 2020 was already holding the post of Medical Officer at the time of promulgation of 1995 Rules and petitioner in CWP No. 4504 of 2021 became member of Himachal Pradesh Civil Medical Service (General Wing) on his appointment on 25.7.1996. On 5.7.2006, an amendment was carried in 1995 Rules, whereby separate Recruitment and Promotion Rules for the post of Block Medical Officers, (Class-I), Gazetted were formulated and the 1995 Rules were repealed to the extent as were applicable to the post of Block Medical Officers. By these amendments, the post of Block Medical Officer was made promotional post to the extent of 100%, whereas under 1995 Rules originally, Medical Officers were entitled to be placed as Block Medical Officers after eight years of service. The eligibility criteria as per amended rules for the post of Block Medical Officers was prescribed by promotion from amongst the Medical Officers with

ten years of regular service or regular combined with continuous ad-hoc service, rendered if any, in the grade out of which three years service in hard/rural areas was made essential.

11. The necessary consequence of aforesaid amendment was that the Block Medical Officers ceased to be the members of Himachal Pradesh Civil Medical Service (General Wing). This interpretation becomes inevitable, as Himachal Pradesh Civil Medical Service (General Wing), was creation of 1995 rules and the repeal of said rules to the extent of their applicability to the post of Block Medical Officers had taken the Block Medical Officers out from the membership of Himachal Pradesh Civil Medical Service (General Wing).

12. It is also not in dispute that the Himachal Pradesh Health and Family Welfare Department, Himachal Pradesh Block Medical Officer, Class-I Gazetted, Recruitment and Promotion Rules, 2006 are still in vogue and are distinct than 1995 Rules. In view of above position, the petitioners being Block Medical Officers cannot also stake claim to be appointed as Assistant Professors by selection, as they are not members of Himachal Pradesh Civil Medical Service (General Wing).

13. Having failed to establish their eligibility either as Lecturers or Members of Himachal Pradesh Civil Medical Service (General Wing), the petitioners cannot succeed in these petitions.

14. In light of what has been held hereinabove, the question as to whether the official respondents have rightly or wrongfully refused to consider the candidatures of the petitioners for the post of Assistant Professors in view of notification dated 3.12.2014 remains only of academic interest. Nonetheless, in the considered view of this Court, the refusal by the respondents to the candidatures of the petitioners for the post of Assistant Professors on the basis of notification dated 3.12.2014 is not justified, for the reason that firstly there is nothing on record that the petitioners were afforded any opportunity to exercise option strictly in accordance with the notification

dated 3.12.2014 at the time of promoting them as BMOs and secondly it is highly doubtful that the mode of appointment by selection from the members of Himachal Pradesh Civil Medical Service (General Wing), can be said to be a promotional channel. A plain reading of Recruitment and Promotion Rules for the post of Assistant professors, it is abundantly clear that the channel of promotion was available only to the Lecturers with requisite numbers of service to their credit and the alternative mode was a mode of appointment by selection from a limited class confined to the members of Himachal Pradesh Civil Medical Service (General Wing) with requisite qualifications. In any case, the petitioners are not going to be benefited, as they have been held to be ineligible under the Recruitment and Promotion Rules for the post of Assistant Professors.

15. In light of above discussion, the petitions are dismissed with no orders as to costs. Pending applications, if any, also stand disposed of.

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

Between:-

NEK RAM SON OF SHRI SUNDER SINGH,
RESIDENT OF VILLAGE & POST
OFFICE DAIN, TEHSIL BARSAR,
DISTRICT HAMIRPUR, H.P. PRESENTLY WORKING
AS BELDAR IN HPPWD SUB-DIVISION SAMIRPUR,
DIVISION BHORANJ, CIRCLE HAMIRPUR,
DISTRICT HAMIRPUR, H.P.

...PETITIONER

(BY SH. R.L. CHAUDHARY &SH. H.R. SIDHU,
ADVOCATES)

AND

7. STATE OF H.P. THROUGH PRINCIPAL SECRETARY (PW) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
8. ENGINEER-IN-CHIEF, HPPWD, NIRMAN

BHAWAN, NIGAM VIHAR, SHIMLA-171002
9. SUPERINTENDING ENGINEER, HPPWD CIRCLE HAMIRPUR, DISTRICT HAMIRPUR, H.P.
10. EXECUTIVE ENGINEER, HPPWD DIVISION BHORANJ, DISTRICT HAMIRPUR, H.P.
11. SHRI MANOHAR LAL SON OF SHRI KRISHAN DASS, PRESENTLY WORKING AS BELDAR IN HPPWD SUB-DIVISION SAMIRPUR, DIVISION TAUNI DEVI, CIRCLE HAMIRPUR, DISTRICT HAMIRPUR, H.P.
12. SHRI PANNA RAM SON OF SHRI MAHANT RAM, PRSENTLY WORKING AS BELDAR IN HPPWD SUB-DIVISION SAMIRPUR, DIVISION TAUNI DEVI, CIRCLE HAMIRPUR, DISTRICT HAMIRPUR, H.P.

.... RESPONDENTS.

(SH.RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR R-1 TO 4.

RESPONDENTS NO. 5 & 6, PROCEEDED EXPARTE)

CIVIL WRIT PETITION
No. 56 OF 2020
RESERVED ON:12.11.2021.
DECIDED ON: 26.11.2021.

Constitution of India, 1950 – Articles 226 , 227 – The petitioner claims that he was employed as daily wager "Beldar" in the year 1993 and after continuously working for 240 days in each calendar year for eight years has become entitled to be regularized as per regularization policy dated 3.4.2000 of the Government of Himachal Pradesh – Department of personnel circulated vide No. PER (AP) – C-B (2)-2/97 Vol.IV (loose)- the impugned order has been passed on fallacious ground in view of judgment in Gian Singh case – The order dated 17.10.2019 passed by respondent No.2 quashed and set aside and the respondent held entitled for benefit of regularization w.e.f. 1.1.2001. [Paras 17 & 19]

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

O R D E R

By way of instant petition, petitioner has prayed for the following substantive reliefs:

> *(i) That writ of certiorari may kindly be issued, quashing and setting aside the impugned order dated 17.10.2019 (Annexure-PD), since the same has been passed in violation of the ratio laid down by this Hon'ble Court in judgment date 24.09.2014 passed by the Hon'ble Court in CWP No. 7140/2012 Gian Singh Versus State of H.P. & Others (Annexure-PC) and judgment dated 23.04.2015 passed in CWP No. 1044/2015, titled as Jai Singh Vs. State of H.P. & Others (Annexure-PE)*
>
> *(ii) That writ of mandamus may kingly be issued, directing the respondents to regularize the service of the petitioner w.e.f. 2000 with all consequential benefits, since he was engaged on daily wage basis in the year 1993 and he has completed his 8 years service with 240 days in the year 2000 and the respondent department has deprived the petitioner to get the said regularization without any justification, whereas the private respondents who were juniors to the petitioner in all respect, since they were engaged in the year 1994, their services were regularized w.e.f. 01.01.2002 and the petitioner was regularized w.e.f. 01.01.2003, although the petitioner was also entitled to get regularization as per existing policy for the year 2000 i.e. Annexure A-1 of Annexure-PA.*
>
> *(iii) That writ of mandamus may kindly be issued, directing the respondents to place the petitioner in the seniority list prior to the private respondents in view of the factum that the petitioner is senior to the private respondents, in all respect, since the petitioner was engaged in the respondent department in the year 1993, whereas the*

private respondents were engaged in the respondent department in the subsequent year i.e. 1994."

2. The case of the petitioner is that he was employed as daily wage Beldar in the year 1993 by respondent No.4. He continuously worked for 240 days in each calendar year and thus became entitled to regularization on completion of 8 years of daily waged services as per regularization policy dated 3.4.2000 of the Government of Himachal Pradesh, Department of Personnel circulated vide No.PER(AP)-C-B(2)-2/97-Vol.IV (Loose). His further grievance is that instead of regularizing him from due date i.e. 01.01.2001, the official respondents regularized him w.e.f. 01.01.2003. According to petitioner, the private respondents were engaged on daily wages in 1994 i.e. one year after the engagement of petitioner, but they were regularized w.e.f. 01.01.2002 and have been wrongly, illegally made senior to petitioner.

3. Petitioner on 26.02.2019 raised all these grievances by way of legal notice addressed to respondent No.4. In response, the petitioner received reply dated 15.3.2019 in which the claim of the petitioner was denied on the grounds that the petitioner was regularized on completion of 10 years continuous service in compliance to decision taken by the Secretary Finance dated 20.02.2008 and the Principal Secretary (PW) dated 18.02.2008. It was also communicated that the private respondents were given the benefit of regularization on completion of 8 years on the basis of the judgment passed by this Court in CWP No. 2735 of 2010, titled Rakesh Kumar vs. State of H.P. and some orders issuedby the Hon'ble Apex Court on 15.01.2015.

4. Discontented with the response of official respondents, petitioner approached the Himachal Pradesh Administrative Tribunal (for short 'Tribunal') by way of O.A. No. 1834 of 2019 and sought parity as per judgment passed by learned Single Judge of this Court in CWP No. 7140 of 2012 titled Gian Singh vs. State of H.P. and others, decided on 24.09.2014. Learned Tribunal disposed of the said O.A. on 06.05.2019 in the following terms:

> *"4. The applicant claims the benefit of the judgment passed by the Hon'ble High Court of Himachal Pradesh in CWP No. 7140 of 2012, Gian Singh versus State of H.P. and others, decided on 24.9.2014 (copy is taken on record). Learned Additional Advocate General submits that the factual aspects are to be verified and if the applicant is found similarly situate, benefit of the judgment referred to above, shall be extended to him.*
>
> *5. In view of the above, the present original application is disposed of with a direction to 2nd respondent to extend the benefit of the judgment referred to above, to the applicant herein, in case he is similarly situate, within two months from today. The applicant shall produce certified copy of this order as well as copy of the judgment referred to above before 2nd respondent within a week."*

5. In compliance to the aforesaid order passed by the learned Tribunal, respondent No.2 considered the claim of petitioner and rejected the same vide order dated 17.10.2019.

6. Aggrieved against the order dated 17.10.2019 issued by respondent No.2, petitioner has approached this Court by way of instant petition.

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

8. Petitioner contends that the impugned order dated 17.10.2019 passed by respondent No.2 is wrong and illegal inasmuch as equals have been treated unequally which is against the basic cannons of law. As per petitioner, he was covered under the regularization policy dated 3.4.2000. According to petitioner, the impugned order is without any legal basis. The judgment rendered by the learned Single Judge of this Court inGian Singh's case has not been considered in right perspective, even factually wrong assertions have been made. The right given to Gian Singh could not be construed to be personal only to him as no such qualification was prescribed in the judgment passed by learned Single Judge.

9. In reply, the official respondents have controverted the claim of petitioner by reiteration of its previous stand taken in the reply to the notice as well as in the impugned order dated 17.10.2019 passed by respondent No.2.

10. In view of order dated 6.5.2019 passed by learned Tribunal in OA No. 1834 of 2019, the only controversy remained as to whether the case of petitioner was covered by the case of Gian Singh vs. State of H.P., CWP No. 7140 of 2012, decided by the learned Single Judge of this Court on 24.09.2014.

11. The facts of the case,by and large, are admitted. Petitioner was engaged as daily wage Beldar in 1993. He had completed 8 years continuous service in 2000. It is also admitted by official respondents that petitioner initially was offered regularization upon completion of 8 years' service with prospective effect under the Government regularization policy dated 30.04.2000. It is also not disputed that private respondents were engaged as daily waged workmen in 1994 and were regularized after 8 years continuous service w.e.f. 01.01.2002.

12. Respondent No.2 rejected the case of petitioner on following grounds:

a) the facts in the case of petitioner were different to the facts in Gian Singh's case;
b) Gian Singh was in engagement since 1992 and worked for 10 years till 31.12.2001 with 240 days in each calendar year and he along with other 60 workmen of Karsog Division were granted work charge status retrospectively w.e.f. 01.01.2000;
c) After dismissal of SLP in Gian Singh's case, COPC was filed by petitioner Gian Singh and the relief of work charge status w.e.f. 01.01.2000 was granted to him as a personal measure and hence cannot be treated as a precedent.
d) Review petition has been filed in the case of Gian Singh which was pending.
e) The petitioner was rightly conferred work charge status w.e.f. 01.01.2003 under the relevant Government regularization policy framed as per

judgment inMoolRaj's case and duly upheld in Gehar Singh's and GouriDutt's case.

13. Perusal of impugned order reveals that the reasons assigned for denying the claim of petitioner are unconscionable and also against the records. In Gian Singh's case the petitioner therein was an appointee of 1992 and was held to be entitled to the benefit of regularization after 8 years. The learned Single Judge in para-7 of the above noted judgment, has observed as under:

> *"7. There is no justification or reasonable explanation offered by the respondents as to why the services of the petitioner were regularized on 1.1.2002 after completion of alleged 10 years of continuous service when admittedly the policy issued vide letter dated 26.9.2005 and circulated on 24.10.2005 (Annexure R-1) clearly provided for regularization of services of all the daily wagers, who had completed 8 years or more daily wages continuous service as on 31.03.2000 with minimum of 240 days in each calendar year. Accordingly, the petitioner is entitled to be regularized w.e.f. 1.1.2000 i.e. the date when he had completed 8years of continuous service."*

14. In the present case also, the parties are ad- idem on one issue at least that regularisation policy dated 3.4.2000 was applicable to the petitioner. Reference can be made to the avermentsmade in sub para (B) of para-3 of the preliminary submissions and also para (B) of para (1) of reply on merits of the reply filed on behalf of official respondents, which reads as under:

> *"(B). That the Executive Engineer, HPPWD, Tauni Devi Division vide his order No.PW/TDD/EA-II/2006-9669-15 dated 22.11.2006 (copy of order is attached as Annexure R-1), the petitioner was offered regularization upon completion of 8 years of service with prospective effect under the Govt. regularization policy dated 30.04.2000....."*

15. Noticeably, petitioner is seeking his regularization under the policy dated 03.04.2000, whereas, the official respondents have mentioned the date of policy as 30.04.2000. A copy of the policy relied upon by petitioner is on record which mentions the date 03.04.2000. Respondents have not placed

any such policy which is dated 30.04.2000. It is difficult to imagine that the Government would advance two separate policies touching same subject within a month, therefore, this Court has reasons to assume that the policy dated 03.04.2000 is the same which has been referred to by the official respondents in para 3 (B) of preliminary submissions as policy dated 30.04.2000. In any case, there is no conflict between the parties regarding requirement of 8 years continuous service on daily wages for regularisation, be it policy dated 03.04.2000 or 30.04.2000. It is not clear on what basis respondent No.2 has arrived at a conclusion that Gian Singh's case had no relevance to the case of petitioner.

16. Another distinction drawn by respondent No.2 with Gian Singh's case on the ground that he was given retrospective benefit is again without substance as the petitioner was also given the benefit of regularization with retrospective effect. Further it has not been revealed as to what weighed with the authorities for considering the case of Gian Singh and 60 other workmen of Karsog Division to grant them retrospective work charge status w.e.f. 01.01.2000, therefore, also denial of claim of petitioner is whimsical.

17. Once the judgment in Gian Singh's case was affirmed by the Hon'ble Supreme Court, its efficacy or mandate could not be undermined by any subsequent pronouncement. No record of COPC allegedly filed in the case of Gian Singh has been produced so as to lend credence to the fact that relief granted to Gian Singh was personal to him.Thus, the impugned order has been passed on fallacious grounds. This court, therefore, is of considered view that no justifiable reason has been assigned by respondent No.2 in his order dated 17.10.2019, which can be said to be legally tenable for distinguishing the case of Gian Singh from the case of petitioner.

18. The stand of the respondents that petitioner and private respondents were covered by different policies and also that they were treated separately on the basis of different judgments of this Court or Hon'ble Apex

Court also remained unjustified in absence of any details. The State being model employer has to act with fairness.

19. In view of the above discussion, the petition is allowed and the order dated 17.10.2019 passed by respondent No.2 is quashed and set-aside. Petitioner is held entitled to the benefit of regularization w.e.f. 1.1.2001. Respondents No. 1 to 4 are directed to grant such benefit to the petitioner with all other consequential benefits within six weeks from the date of this judgment.

20. The petition is disposed of in the aforesaid terms with no order as to costs, so also the pending miscellaneous application(s), if any.

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

Between:-

SH. DURGA SINGH S/O LATE SH. ABHI RAM,
R/O VILLAGE CHALHOG, POST OFFICE SHAKRAH,
TEHSIL & DISTRICT SHIMLA, H.P.

.....PETITIONER

(BY SH. ROMESH VERMA, ADVOCATE)

AND

s

1. THE STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HPPWD), SHIMLA-1.

2. THE ENGINEER-IN-CHIEF,
H.P. PUBLIC WORKS DEPARTMENT,
NIRMAN BHAWAN, SHIMLA-171002.

3. THE SUPERINTENDING ENGINEER,
HPPWD, FOURTH CIRCLE,
WINTER FIELD, SHIMLA-3.

4. THE EXECUTIVE ENGINEER,
HPPWD, SHIMLA RURAL

DIVISION AT DHAMI,
TEHSIL & DISTRICT SHIMLA, H.P.

.....RESPONDENTS

(BY SH. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL WITH SH. KUNAL THAKUR & SH. VIKRANT CHANDEL, DEPUTY ADVOCATES GENERAL)

CIVIL WRIT PETITION
No. 4477 of 2015
Decided on: 23.11.2021

Constitution of India, 1950 – Article 226 – Petitioners aggrieved by the acts of the respondents whereby the land owned by the petitioner has been utilized by the respondents for construction of road without paying any compensation – The respondents department has clearly stated that they have neither possession the land in question nor they have constructed any road over it – Held – The respondents were directed to take steps to acquire land in Khasra No. 180 measuring 0-03-43 hectares situated in Mauja Chalog tehsil and district Shimla - The petition may take steps for correction of revenue entries in respect of his land comprised in Khasra No. 288. [Para 5]

Cases referred:

Hari Krishna Mandir Trust vs. State of Maharashtra and Others, (2020) 9 SCC 356;

Vidya Devi vs. State of Himachal Pradesh and Others, (2020) 2 SCC 569;

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

O R D E R

The grievance projected by the petitioner in the instant petition is that land owned by him comprised in Khasra Nos. 180 and 288 situated at Mauja Chalhog, Tehsil and District Shimla has been utilized by the respondents for construction of Ganahatti-Nalhatti-Arki road, however, no compensation in lieu of the same has been paid to him.

2. The case set up by the petitioner is that:-

2(i) A notification under Section 4 of Himachal Pradesh Road Infrastructure (Protection) Act, 2002 was issued by the respondents on 7.12.2006. At serial No. 6 of the notification was the Ganahatti-Arki road for construction of which various parcels of land were to be utilized by the respondents. Khasra Nos. 170, 177, 288 and 180 belonging to Mauza Chalhog figured at serial Nos. 26, 27, 29 and 31 under Ganahatti-Arki road in this notification.

2(ii) The land in question falls in the alignment of the road, however, it has not been acquired. No compensation qua the land utilized by the respondents-State for the construction of road in question was paid to the owners. Khasra Nos. 170 and 177 also falling in the road alignment were co-owned by the petitioner alongwith one Shri Rameshwar Lal. Said Rameshwar Lal instituted a civil suit for mandatory injunction against the State of Himachal Pradesh in respect of Khasra Nos. 170 and 177 in the year 2005. The respondents-State assured the plaintiff therein that notification under Section 4 of the Land Acquisition Act in respect of suit land i.e. Khasra Nos. 170 and 177 was going to be issued shortly. On the basis of this assurance, the civil suit was withdrawn by the plaintiff Rameshwar Lal on 13.3.2006. The order dated 13.3.2006 dismissing the suit filed by Rameshwar Lal as withdrawn reads as under:

> "Two witnesses present and examined. The plaintiff vide his separate statement recorded has stated in view of the statement deposed by PW-1 and PW-2 that proceeding before LAO of the suit land is pending and notification under Section 4 of the Land Acquisition Act is going to be notified. Due to this reason he does not want to proceed with this case and prayed that it be dismissed as withdrawn. In view of the statement of the plaintiff, this suit is dismissed as withdrawn. File after due completion be consigned to record room."

2(iii) Subsequently, acquisition proceedings were initiated by the respondents in respect of Khasra Nos. 170 and 177. Award No. 55/2011 was passed on 30.9.2011 under Section 11 of the Land Acquisition Act for these two Khasra numbers. Petitioner as well as Rameshwar Lal i.e the co-owners were compensated for acquisition of these two khasra Nos. i.e. 170 and 177.

2(iv) On 21.2.2012, the petitioner represented to the respondents that Khasra Nos. 180 and 288 exclusively owned by him and situated at Mauza Chalhog, Tehsil and District Shimla have also been utilized by them for the construction of Ganahatti-Nalhatti-Arki road. However, he has not been compensated for this land. Getting no response, the petitioner got issued legal notices to the respondents on 19.3.2013 and 10.5.2013. He also exchanged correspondence with the concerned officials of the respondent department with respect to acquisition of his land comprised in Khasra Nos. 180 and 288 total measuring 0-04-53 hectares. The response given by the respondents was that though the road has been constructed over the land in question, however, the same has not been acquired, therefore, no compensation can be paid to the petitioner for want of acquisition of the land i.e. Khasra Nos. 180 and 288.

3. It is in the above background that the petitioner has preferred instant petition praying for following substantive reliefs:

> " ii) That appropriate order and directions may be issued in favour of the petitioner and against the respondents that since they have utilized the land of the petitioner as entered against Khasra Nos. 180 as well as 288 situated at Mauja Chalhog, Tehsil and District Shimla, therefore, appropriate legal proceedings be initiated and finalized and the amount of compensation may be paid in accordance with law. For this purpose direction may be issued to them to complete the acquisition proceedings without further delay.
>
> iii) That in case the respondents still claim that they do not require area of Khasra No. 288 at Mauja Chalhog, in that

> event, necessary orders may kindly be passed, so that the land belonging to the petitioner whatsoever is found to have been occupied by the respondents is restored and physical possession thereof is handed over to the petitioner and the respondents may be directed to pay the amount of damage for the period from 2006 to date on account of unlawful occupation in accordance with law."

4. Learned counsel for the petitioner submitted that the respondents have utilized the land owned by the petitioner comprised in Khasra Nos. 180 and 288, situated in Mauza Chalhog, Tehsil and District Shimla for the construction of Ganahatti-Nalhatti-Arki road. However, this land has not been acquired by the respondents in accordance with law. Relying upon various judgments of Hon'ble Apex Court, learned counsel contended that the petitioner cannot be divested of his land save and except in accordance with land and since the respondents have utilized his land, therefore, land is required to be acquired in accordance with law and the compensation is liable to be paid to the petitioner.

Opposing the petition, learned Additional Advocate General submitted that the petitioner has raised the issue of acquisition of land after a long delay. The writ petition is not maintainable on grounds of delay and laches.

5. Two Khasra numbers involved in this petition are being considered hereinafter under different heads:-

5(i) <u>Khasra No. 180:</u>

5(i)(a) The respondents have not disputed that the Ganahatti-Arki road passes through Khasra No. 180 and that they have utilized Khasra No. 180 exclusively owned by the petitioner for the construction of the road in question. In fact, the petitioner has also placed on record a communication dated 11.12.2014 (Annexure P-19) from the office of Executive Engineer,

Shimla, Rural Division HPPWD Dhami addressed to the petitioner stating therein that the acquisition proceedings have been initiated for Khasra No. 180 as the road traverses through this khasra number. It would be appropriate to extract the relevant contents from this letter:

> "Sh. Durga Singh S/O Shri Abhi Ram
> R/O Village Chalog P.O Shakrah.
> Tehsil and Dist. Shimla H.P
>
> Subject:- Supply of information under Right to Information Act to Sh. Durga Singh Son of Sh. Abhi Ram R/O Village Chalog P.O Shakrah Teh. and Distt Shimla H.P In connection with supply of copy of Notification under Section-9 of the Land Acquisitions Act as well as copy of award passed in connection with acquisition of land for construction of road at Village Chalog
>
> With reference to your application No. Nil dated Nil on the subject cited above vide which you have sought the requisite information. In this connection it is intimated that acquisition proceedings have been started only for khasra No 180 because the road passes though only this khasra No. The revenue papers have been sent to S.D.M. (Rural) for obtaining inescapability Certificate vide letter no J.S.D./C-1/2014-15-1355-56 dated 8.12.2014 where in the land falling in khasra No 288 is not required by this department as already intimated to you vide this office letter No. 5158-59 dated 28.8.2014.
>
> Encl:- As above
>
> Executive Engineer
> Shimla Rural Division
> HPPWD Dhami.
>
> 1. Copy to Assistant Engineer Jutogh Sub-Division HPPWD Jutogh for information w.r. to his letter No. 1369 dated 10.12.2014.
>
> 2 Copy to P.I.O. Cum Executive Engineer (M&P) Nirman Bhawan Nigam Vihar HPPWD Shimla-171002 w.r.to his letter No. 8876-78 dated 21.11.2014."

5(i)(b) The fact that Khasra No. 180 exclusively owned by the petitioner has been utilized by the respondents for the construction of Ganahatti-Arki road has been fairly admitted by the respondents in their rely filed to the writ petition. Para-9 of the reply on merits reads as follows:-

> "That the contents of this para of the petition is matter of record hence not disputed. However, it is respectfully submitted that the respondent department had taken demarcation of the concerned land on 7-12-2013 which clearly shows that the road passes through only Khasra No. 180 and not in Khasra No. 288. It is further submitted that as per statement of R.K. Katoch JE dated 07-12-2013 it clearly shows that in revenue record Khasra No. 288 is shown as Gair Mumkin sarak however as per site, Khasra No. 288 is Ghasni and as per this statement the correction of the same can be got done by petitioner from revenue agency."

The plaintiff has also placed on record the jamabandi for the year 2007-2008 (Annexure P-6) where 'Gair Mumkin Sarak' has been shown to be constructed over khasra No. 180. According to the respondents the road in question was constructed during the year 1983 whereas according to the petitioner the same was constructed and completed in the year 2006. Hon'ble Apex Court in ***(2020) 2 SCC 569,*** titled ***Vidya Devi*** versus ***State of Himachal Pradesh and Others*** has held that ground of delay and laches cannot be raised in a case of continuing cause of action. The State was directed to pay compensation to the appellant therein in respect of utilization of her land for construction of road. The relevant paras from the judgment are as under:

> "12.1. The Appellant was forcibly expropriated of her property in 1967, when the right to property was a fundamental right guaranteed by Article 31 in Part III of the Constitution. Article 31 guaranteed the right to private property, which could not be deprived without due process of law and upon just and fair compensation.

12.2. The right to property ceased to be a fundamental right by the Constitution (Forty Fourth Amendment) Act, 1978, however, it continued to be a human right in a welfare State, and a Constitutional right under Article 300-A of the Constitution. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State cannot dispossess a citizen of his property except in accordance with the procedure established by law. The obligation to pay compensation, though not expressly included in Article 300-A, can be inferred in that Article.

12.9 In a democratic polity governed by the rule of law, the State could not have deprived a citizen of their property without the sanction of law. Reliance is placed on the judgment of this Court in *Tukaram Kana Joshi* v. *MIDC* wherein it was held that the State must comply with the procedure for acquisition, requisition, or any other permissible statutory mode. The State being a welfare State governed by the rule of law cannot arrogate to itself a status beyond what is provided by the Constitution.

12.12 The contention advanced by the State of delay and laches of the Appellant in moving the Court is also liable to be rejected. Delay and laches cannot be raised in a case of a continuing cause of action, or if the circumstances shock the judicial conscience of the Court. Condonation of delay is a matter of judicial discretion, which must be exercised judiciously and reasonably in the facts and circumstances of a case. It will depend upon the breach of fundamental rights, and the remedy claimed, and when and how the delay arose. There is no period of limitation prescribed for the courts to exercise their constitutional jurisdiction to do substantial justice."

In ***(2020) 9 SCC 356,*** titled ***Hari Krishna Mandir Trust*** versus ***State of Maharashtra and Others,*** it was held as under:

"96. The right to property may not be a fundamental right any longer, but it is still a constitutional right under

> Article 300-A and a human right as observed by this Court in Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel. In view of the mandate of Article 300-A of the Constitution of India, no person is to be deprived of his property save by the authority of law. The appellant trust cannot be deprived of its property save in accordance with law.
>
> 97. Article 300-A of the Constitution of India embodies the doctrine of eminent domain which comprises two parts, (i) possession of property in the public interest; and (ii) payment of reasonable compensation. As held by this Court in a plethora of decisions, including State of Bihar v. Project Uchcha Vidya, Sikshak Sangh; Jelubhai Nanbhai Khachar v. State of Gujarat.; Bishambhar Dayal Chandra Mohan v. State of U.P., the State possesses the power to take or control the property of the owner for the benefit of public. When, however, a State so acts it is obliged to compensate the injury by making just compensation as held by this Court in Girnar Traders vs. State of Maharashtra.
>
> 100. The High Courts exercising their jurisdiction under Article 226 of the Constitution of India, not only have the power to issue a Writ of Mandamus or in the nature of Mandamus, but are duty bound to exercise such power, where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a Statute, or a rule, or a policy decision of the Government or has exercised such discretion malafide, or on irrelevant consideration."

Hon'ble Apex Court in SLP No. 2373/2014, titled ***Raj Kumar*** versus ***State of H.P. & others*** decided on 29.10.2015 rejected the contention of the State that if the land owners do not raise any objection and voluntarily donate their lands for construction of road under PMGSY, then it is not open for them to approach the court of law to seek compensation. Following directions were issued in the matter:-

> "1) That Deputy Commissioner Collector, Solan shall undertake a verification and determine the exact extent of land utilized for construction of road in question out of Survey No. in which the appellant holds a share and thereby determine the exact extent of land which the appellant has been deprived of on account of such construction/utilization.
>
> 2) Upon determination of the extent of land of which the appellant has been deprived of by reason of construction of the road in question, the Deputy Commissioner shall determine the amount of compensation payable to him based on the amount determined towards compensation in Award No. 10 of 2008 relating to the land acquired for the very same road in favour of other owners including Kanwar Singh having regard to the classification of the land.
>
> 3) Upon determination of the amount so payable the Deputy Commissioner shall disburse the said amount within a period of three months form the date the determination is completed. The payment of the amount so determined shall represent the amount due and payable to the appellant in full and final settlement of all his claims towards the value of the land utilized for the construction of the road. In case however the payment is not made within the time so stipulated even after determination, the amount so determined shall start earning interest @ 12% p.a from the date the period of three months expires."

LPA No. 79 of 2017, titled ***State of H.P. and others*** versus ***Bhoop Ram*** instituted by the State was dismissed on 8.8.2017 following the judgment in *Raj Kumar's* case supra. To the similar effect is the judgment passed on 23.3.2021 in LPA No. 12 of 2019, titled ***State of H.P. & others*** versus ***Liaq Ram Dogra*** wherein while dismissing the appeal filed by the State with cost, it was held as under:

> "13. From the perusal of the aforesaid judgment, it is clear that right to property is not a fundamental right, however, the same is a human right in a welfare State and a Constitutional

right under Article 300-A of the Constitution and no person can be deprived of his property and the State cannot dispossess a citizen of his property except in accordance with the procedure established by law.

14. The procedure established by law is that if land of a person is acquired for construction of road etc., he or she is entitled to compensation, since the right to property is a human right.

15. As discussed hereinabove, once the plea raised by the State with regard to non-availability of land acquisition under PMGSY, has been rejected by the Hon'ble Supreme Court in Raj Kumar's case, supra and thereafter by this Court in Bhoop Ram's case, it is not open for the appellants-State to raise the same plea time and again. The present appeal appears to have been filed by the appellants without application of mind.

16. In view of the aforesaid discussion/observations, the appeal deserves to be dismissed and the same is accordingly dismissed with costs of Rs.50,000/-, which shall be paid by the appellants-PWD Department by depositing the same in Advocate's Welfare Fund."

In their instructions dated 6.4.2019 placed on record of the case, the respondents submitted that "*only Kh. no. 180 is falling on the alignment of the road. Since the petitioner has filed the CWP in the Hon'ble Court the process of the acquisition to acquire the land in Kh. No. 180 measuring 0-03-48 Hect. has been stopped in the pendency of the case in the Hon'ble High Court."* This stand was deprecated in the order dated 5.7.2019 passed in the petition.

Since in the instant case Khasra No. 180 owned by the petitioner has admittedly been utilized by the respondents for construction of Ganahati-Arki road, therefore, following the ratio of law discussed above, the land falling in this khasra number is required to be acquired by the respondents in accordance with law by paying the due and admissible compensation to the petitioner.

5(ii). Khasra No. 288:

On facts, learned Additional Advocate General submitted that Khasra No. 288 owned by the petitioner has not been utilized by the respondents for construction of road in question and further that the respondents have no intention to utilize this khasra number. In fact specific submissions in this regard were noticed in the order dated 22.11.2021 which reads as under:-

> "Learned Additional Advocate General on the basis of instructions submits that Khasra No.288 in question is neither in possession of the respondents/department nor they intend to utilize the same. At his request, list the matter on 23.11.2021."

In the revenue record i.e. Jamabandi for the year 2007-2008 (Annexure P-3), entry of 'Gair Mumkin Sarak' exists against Khasra No. 288.

In *Hari Krishana Mandir Trust's* case supra, the Hon'ble Apex Court had allowed the modification involving deletion of name of Pune Municipal Corporation as holder of the private road in view of the stand taken by the parties therein that the deletion of the entry was a minor modification. In the instant case, the respondents-department have clearly stated that they are neither in possession of Khasra No. 288, nor the road in question has been constructed by them over this Khasra number, nor they intend to utilize the same. Learned Additional Advocate General stated at bar that the respondents will have no objection for correction of revenue entry in respect of Khasra No. 288 to be recorded in ownership and possession of the petitioner after deletion of existing entry of 'Gair Mumkin Sarak' against this khasra number. In view of the stand taken, it shall be open for the petitioner to take appropriate steps in accordance with law for correction of the revenue entries in respect of Khasra No. 288.

In light of the above discussion, this writ petition is allowed. The respondents are directed to take steps in accordance with law for acquisition of Khasra No. 180 measuring 0-03-48 hectares situated in Mauja Chalhog, Tehsil and District Shimla within a period of six weeks from today. It shall also be open for the petitioner to take steps for correction of revenue entries in respect of Khasra No. 288 for recording the same in the ownership and possession of the petitioner after deletion of existing revenue entry of 'Gair Mumkin Sarak'. Pending application(s), if any, shall also stand disposed of.

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

Between: -

NARESH KUMAR TULI
SON OF LATE SH. BAST RAM TULI,
GOVERNMENT REGISTERED CLASS-A CONTRACTOR,
RESIDENT OF HOUSE NO. 419,
SECTOR-4, PANCHKULA,
HARYANA – 134112.

…PETITIONER

(BY SH. SUNIL MOHAN GOEL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH
   PRINCIPAL SECRETARY (HPPWD),
   GOVERNMENTOF HIMACHAL PRADESH,SHIMLA.
2. THE ENGINEER-IN-CHIEF,
   H.P. PUBLIC WORKS DEPARTMENT,
   NIRMAN BHAWAN, NIGAM VIHAR,
   SHIMLA – 171 002.
3. CHIEF ENGINEER, HPPWD DIVISION,
   HAMIRPUR, TEHSIL & DISTRICT HAMIRPUR.
4. EXECUTIVE ENGINEER, DHARAMPUR DIVISION,
   HPPWD, DHARAMPUR, DISTRICT MANDI.
5. M/S UNIPRO TECHNO INFRA PVT. LTD.
   THROUGH ITS DIRECTOR SH. ANIL MADAN,

SCO-36, SECTOR-7C, MADHYA MARG,
CHANDIGARH.
E-MAIL: mk_dattachd@yahoo.co.in

[

….RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH SH. R.S. DOGRA, SR. ADDL. ADVOCATE GENERAL,
SH. VINOD THAKUR, SH. HEMANSHU MSRA,
SH. SHIV PAL MANHANS, ADDITIONAL
ADVOCATE GENERAL, FOR R- 1 TO 4)

(SH. VIPUL SHARDA, ADVOCATE, FOR R-5)

CWP No. 6372 of 2021

Between:-

NARESH KUMAR TULI
SON OF LATE SH. BAST RAM TULI,
GOVERNMENT REGISTERED CLASS-A CONTRACTOR,
RESIDENT OF HOUSE NO. 419,
SECTOR-4, PANCHKULA,
HARYANA – 134112.

…PETITIONER

(BY SH. SUNIL MOHAN GOEL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH
   PRINCIPAL SECRETARY (HPPWD),
   GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. THE ENGINEER-IN-CHIEF,
   H.P. PUBLIC WORKS DEPARTMENT,
   NIRMAN BHAWAN, NIGAM VIHAR,
   SHIMLA – 171 002.
3. CHIEF ENGINEER, HPPWD DIVISION,
   HAMIRPUR, TEHSIL & DISTRICT HAMIRPUR.
4. EXECUTIVE ENGINEER, DHARAMPUR DIVISION,
   HPPWD, DHARAMPUR, DISTRICT MANDI.
5. M/S UNIPRO TECHNO INFRA PVT. LTD.
   THROUGH ITS DIRECTOR SH. ANIL MADAN,

SCO-36, SECTOR-7C, MADHYA MARG,
CHANDIGARH.
E-MAIL: mk_dattachd@yahoo.co.in

....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH SH. R.S. DOGRA, SR. ADDL. ADVOCATE GENERAL,
SH. VINOD THAKUR, SH. HEMANSHU MSRA,
SH. SHIV PAL MANHANS, ADDITIONAL
ADVOCATE GENERAL, FOR R- 1 TO 4)

(SH. VIPUL SHARDA, ADVOCATE, FOR R-5)

CIVIL WRIT PETITION
NOs.6371 &6372 OF 2021
RESERVED ON: 25.10.2021
DECIDED ON: 09.11.2021.

Constitution of India, 1950 – Article 226 – Bidders were separately required to pay Rs. 5000/- towards the cost of tender and Rs. 5, 00000 as earnest money as per the procedure prescribed in clause 23 & 24 of General Condition of contract **–** Clause 25 of General conditions of contract mandatorily required the bidders to submit the original documents evidencing the deposit of cost of tender and earnest money – Petitioner in both the petitions raised grievance of tender, his bid has been rejected – Held – The petitioner failed to comply directions, hence can not succeed – Government/ department has been directed to adopt a fully transparent and full proof mechanism in grant of government contract – The directions have been issued to respondent – State to issue guidelines that makes its mandatory to record transaction during floating of tender till finalization. [Paras 8,17 & 18]

These petitions coming on for admissionafter notice this day, ***Hon'ble Mr. Justice Satyen Vaidya****, passed the following:*

O R D E R

The petitioner has filed the instant petitions praying for the following reliefs:

CWP No. 6371 of 2021:

a) That this Hon'ble Court may be pleased to issue writ of certiorari quashing SMS dated 23.9.2021 (Annexure P-6), whereby the petitioner has been intimated that his bid has not been admitted and further the proceedings of the Technical Evaluation Committee dated 23.9.2021 (Annexure P-7) whereby the bid of the petitioner has not found to be substantially responsive as per the requirement of the bidding document.
b) That this Hon'ble Court may further be pleased to issue writ of mandamus directing the respondent department to consider the DD No. 773579 dated 22.9.2021 of Rs.5000/- as submitted online and FDR No.7939030002421 of Rs. 5.00 lacs as earnest money and further open the financial bid of the petitioner.

c) That this Hon'ble Court may further be pleased to issue writ of mandamus directing the respondents to hold a proper inquiry as to how in view of the fact that despite original DD and FDR were submitted in the sealed cover the same were not found on opening of the same.

CWP No. 6372 of 2021:

a) That this Hon'ble Court may be pleased to issue writ of certiorari quashing SMS dated 25.9.2021 (Annexure P-6), whereby the petitioner has been intimated that his bid has not been admitted and further the proceedings of the Technical Evaluation Committee dated 25.9.2021 (Annexure P-7) whereby the bid of the petitioner has not found to be substantially responsive as per the requirement of the bidding document.
b) That this Hon'ble Court may further be pleased to issue writ of mandamus directing the respondent department to consider the DD No. 773571 dated 22.9.2021 of Rs.5000/- as submitted online and further open the financial bid of the petitioner.

c) That this Hon'ble Court may further be pleased to issue writ of mandamus directing the respondents to hold a proper inquiry as to how in view of the fact that despite original DD and FDR were submitted in the sealed cover the same were not found on opening of the same.

2. Both the petitions have been heard and are being decided together as common question of facts and law areinvolved.

Brief facts in CWP No. 6371 of 2021:

3. Respondents No. 1 to 4 invited bids through the process of e-tender published on 7.9.2021 for "Construction of CHCMarhi, Tehsil

Dharampur, DistrictMandi". The total estimated cost of the work was Rs.9,50,88,613/-. The last date for submission of bids was 22.9.2021 and the bids were to be opened on 23.9.2021. The bids were required to be submitted on the online portal of respondents No. 1 to 4.

Brief facts in CWP No. 6372 of 2021:

4. Respondents No. 1 to 4 invited bids through the process of e-tender published on 31.8.2021 for "Construction of Multipurpose Hall in Government Degree College, Tehsil Dharampur, District Mandi". The total estimated cost of the work was Rs.6,33,08,957/-. The last date for submission of bids was 23.9.2021 and the bids were to be opened on 24.9.2021. The bids were required to be submitted on the online portal of respondents No. 1 to 4.

5. In both the above noted petitions, bidders were separately required to pay Rs.5000/- towards the cost of tender and Rs.5,00,000/- as earnest money. The procedure for online bidding was prescribed in Clauses 23 & 24 of the General Conditions of Contract, which read as under:

"23 Online bidding procedure: Scanned copies of the following documents shall be uploaded on the website http:#hptenders.gov.in from the appropriate place.

24.1 Cost of Tender: Indicated in schedule "E": The cost of tender may be deposited in shape of demand draft and uploaded as pdf document.
24.2 Earnest Money: The earnest money indicated in Schedule "E" and may be deposited in shape of Treasury Challan/ Deposit at Call Receipt/ FDR/Bank Guarantee of any Scheduled Bank Uploaded a pdf document.

24.3 Contractor's Registration: The contractor has to produce the enlistment of competent authority in appropriate class valid at the time of tender and upload as pdf refer general Rules No. 20.
24.4 GST Registration: The GST Registration document may be uploaded as pdf document refer HPPWD-6 16(3).

24.5 Work Done Certificate & Work in Hand Certificate:(only if required in tender document) the work done & work in hand may be filled up in the required performa shown in general rules no. 16 minimum amount of work done shown

schedule 'F' and these alongwith the work done certificate of competent authority may be uploaded as pdf document.
24.6 List of Machinery Tool & Plant (only if required in tender document) the detail of machinery, T&P may be filled up on the format as shown in schedule 'F' with reference to clause 18 and this alongwith proof (R.C., Affidavits, etc. may be uploaded as pdf document.

24.7 Bill of Quantity: The bill of quantity may be uploaded in XLS format.

24.8 The contractor is required to study general rules & directions, conditions, contract clauses, schedules 'A" to 'F' in tender document and thereafter fill HPPWD Form No. 8 and upload pdf document.

24.9 Any other documents as specified by the State in performa of schedule."

6. Clause 25 of the General Conditions of Contract, mandatorily required the bidders to submit the original documents evidencing the deposit of cost of tender and earnest money on any date before opening of technical/financial bid. Failure to submit the original documents, as noticed above, would render the technical bid non-responsive.

7. Clause 25 of the General Conditions of Contract reads as under:

"25 Submission of Original Documents: The bidders are required to submit (i) original demand draft towards the cost of bid document and (ii) original earnest money in approved form and on any date before the opening time of technical/ financial part of the tender, either by registered post or by hand in the office of authority inviting tender, failing which the tenders will be declared non-responsive."

8. Petitioner in both the petitions has raised common grievances that though he had complied with each and every term of the tender document including submission of original documents as required, yet his technical bid has been rejected as non-responsive on the ground that he failed to submit the original documents evidencing payment of cost of tender and earnest money respectively in both the cases. According to petitioner, he had duly submitted the originals of the documents evidencing the payment of cost of tender and earnest money respectively in a sealed cover within the requisite

time. Petitioner allegation is that the bid submitted by him has been rejected only to narrow down the arena of bidders. As per petitioner, he was fully aware about the requirement to submit the original documents before opening of the technical bid as he was in the business for the last more than 40 years. The petitioner has made reference to the Standard Operating Procedure of CPWD Works Manual, 2019 and has tried to take benefit of its Clauses.

9. In response, official respondents No. 1 to 4 have filed their joint reply in which they have specifically contested the claim of the petitioner with respect to submission of original documents before the opening of technical bid. The case of respondents No. 1 to 4 is that the petitioner had failed to submit the originals of the documents evidencing the payment of cost of tender and earnest money in the tender pertaining to construction of CHC Marhi and the documents evidencing the payment of cost of tender and earnest money in the tender pertaining to construction of Multipurpose Hall in Government Degree College, Tehsil Dharampur, District Mandi. Official respondents have pressed into service the Clause 6 (ii) of the Standard Bidding Document of HPPWD, which reads as under:

"6.(ii). As per the HPPWD-6 clause 6(ii) The tender and the earnest money shall be placed in separate sealed envelopes each marked "Tender" and "Earnest Money" respectively. Both the envelops shall be submitted together in another sealed envelope with the name of work and due date of opening written on envelope, which will be received by the tendering inviting authority up to 11: 00 AM on and will be opened by him or his authorised representative in his office on the same day at 11:30 A.M. The envelop marked "Tender" of only those tenders shall be opened, whose earnest money, placed in the another envelope, is found to be in order."

10. The official respondents have refuted the claim of the petitioner to avail benefit under the CPWD Works Manual, 2019 on the ground that the

said Manual was not applicable to the work in hand. It has been asserted on behalf of the official respondents that the petitioner was fully aware about the terms of the tender and had to strictly comply with its terms.

11. We have heard learned counsel for the parties and have also gone through the records of the case.

12. It is not in dispute that the specific condition of the tenders in question mandatorily required the bidders to submit the originals of the documents evidencing the payment of cost of tender and earnest money before the stipulation time either by way of registered post or by handing over in person.

13. The only issue raised before this Court is whether the petitioner had submitted the requisite documents, in original, within stipulated time with the prescribed authority or not? The contesting parties to the instant petitions have made their rival claims, as noticed above. Petitioner claims to have submitted the requisite documents within time, whereas, the official respondents have vehemently denied the claim of petitioner.

14. The domain of this Court under Article 226 of the Constitution of India is restrictive on issues which involve intricate and disputed questions of facts. Thus, this Court merely on the basis of rival assertions, without any specific proof, will not be in a position to give finding on the above noted issue one way or the other.

15. Noticeably, petitioner has been categoric in his assertion that he is Class-1 contractor and has experience of about 40 years as such. He was fully aware of the tender requirement to submit the originals of requisite documents within stipulated time. That being so, it is definite to believe that such an experienced contractor would not obtain the receipt of submission of original documents within stipulated time. Be that as it may, as noticed above, this Court will not be in a position to answer the issue for lack of evidence.

16. Irrespective of the fate of the instant petitions, a very disturbing situation has been highlighted by the facts of instant petitions. It is not the case of the official respondents that they maintain any record of receipt of original documents from bidders by recording date, time and acknowledgement of the person submitting such documents. This definitely leaves a veil of doubt on the entire transaction. In absence of any documentary evidence, it is very easy for officials, dealing with the tender(s), to deny the entertainment of any bid at their whims. This practice needs to be deprecated as it makes the very purpose of e-tendering process otiose. Understandably, the connectivity issues prevalent in various geographical areas prevent the respondent-State to adopt the e-tendering system with all force, whereby the payments of money could be transmitted through gateway provided by the system. This, however, does not mean that the respondent-State is absolved from its legal obligation to make and keep the public transactions transparent and foolproof.

17. The unsavory situation as has been brought before us, obligates us to direct the respondent-State to henceforth adopt a fully transparent and foolproof mechanism in grant of the government contracts. We specifically direct the respondent-State to issue guidelines that makes it mandatory to record in writing in specified form each and every transaction undertaken during the entire process right from floating of tender till its finalization under the signatures of competent/authorized officer/official duly acknowledged by the bidder or his authorized representative, wherever necessary. The respondent-State is directed to implement the aforesaid direction immediately and in no case later than one month from today.

18. The petitioner in the given circumstances cannot succeed. Clause 25 of the General Conditions of Contract read with Clause 6 (ii) of the CPWD Works Manual, 2019 are imminent and does not admit of any

exception. Failure to comply with the aforesaid conditions, entail the rejection of technical bid being non-responsive.

19. These petitions are accordingly dismissed with no orders as to cost. Pending miscellaneous application(s), if any, also stands disposed of.

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

BETWEEN:-

1. DR. SMRITI CHAUHAN, W/O DR. NITIN KAHYAP, RESIDENT OF AMAR NIWA, THE MALL, SHIMLA-171001 (H.P.), PRESENTLY WORKING AS SENIOR MEDICAL OFFICER AT DR. RAJENDRA PRASAD GOVERNMENT MEDICAL COLLEGE, KANGRA AT TANDA, DISTRICT KANGRA (H.P.).

2. DR. RAJNEESH SOOD, S/O SH. K.L. SOOD, RESIDENT OF RADHA BIHARI NIKUNJ, JAKHU, HOUSING COLONY, SHIMLA-171002, PRESENTLY WORKING AS MEDICAL OFFICER AT D.D.U. HOSPITAL, SHIMLA-171001.

3. DR. LATA RANI CHANDEL, W/O SHRI V.S. CHANDEL, RESIDENT OF VPO SALOA, C/O SHRI SHAMSHER SINGH CHANDEL, TEHSIL SHRI NAINA DEVI JI, DISTRICT BILASPUR H.P. 174201, PRESENTLY WORKING AS DESIGNATED ASSISTANT PROFESSOR DEPARTMENT OF MICROBIOLOGY, SLBS Govt. MEDICAL COLLEGE, NER CHOWK AT MANDI, DISTRICT MANDI H.P.

…PETITIONERS

(BY ADARSH K. VASHISTA, ADVOCATE.)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. DIRECTOR, MEDICAL EDUCATION AND RESEARCH, HIMACHAL PRADESH, SHIMLA, H.P.

3. DIRECTOR, HEALTH SERVICES, DEPARTMENT OF HEALTH AND FAMILY WELFARE, SHIMLA, H.P.

4. DR. RAMESH CHAND GULERIA, S/O SHRI H.S. GULERIA, RESIDENT OF HOUSE NO. 183/1, JAWAHAR NAGAR, MANDI, DISTRICT MANDI, H.P., PRESENTLY POSTED AS BLOCK MEDICAL OFFICER, DISTRICT HOPITAL, KULLU, DISTRICT KULLU, H.P.

5. DR. VINOD KUMAR MEHTA, S/O SH. B.R. MEHTA, R/O SHANTI BHAWAN, LOWER TUTIKANDI, NEAR ISBT, SHIMLA-171004, PRESENTLY WORKING AS SENIOR RESIDENT IGMC, SHIMLA, H.P. ...RESPONDENTS

(BY SH.AJAY VAIDYA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR RESPONENTS NO. 1 TO 3.)

(BY SH. DALIP SHARMA, SENIOR ADVOCATE,
ALONGWITH MS.SEEMA K. GULERIA AND
MR.MUNISH SHARMA, ADVOCATES, FOR
RESPONENT NO. 4.)

(BY SH. LOVNEESH KANWAR, ADVOCATE,
FOR RESPONENT NO. 5).

(NAME OF RESPODNENT NO. 6 IS DELETED
VIDE ORDER DATED 19.7.2021.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 37 OF 2019
Decided on: 17.11.2021

Constitution of India, 1950 – Articles 14 and 226 – Petitioner claimed her entitlement for promotion to the post of Assistant Professor from the date of acquiring the qualification for the said post as provided under Rule-III of 1999 – Held – It is apparent from Rule 1999 that teaching experience of three years has to be taken into consideration after acquiring the post graduate Degree or equivalent that not the teaching experience prior to acquire the post Graduate Degree – The court can not issue writ of mandamus commanding the respondents to reckon the seniority for promotion to the post of Assistant Professor from the date when the petitioner acquire qualification – Petition dismissed. [Paras 7 & 8]

Cases referred:

Punjab State Electricity Board Vs. Ashok Kumar Sehgal, AIR 1990 (P&H) 117;
Shailendra Dania and others Vs. S.P. dubey and others, (2007) 5 SCC 535;

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

J U D G M E N T

Present petition has been filed seeking following relief:-

"That the respondents may kindly be directed to draw a separate seniority of eligible candidates reckoning their seniority from the

date of acquisition of essential qualification (MD/MS) and 3 years of teaching experience for carrying out promotion to the post of Assistant Professor (Microbiology), in the interest of justice."

2. Petitioner is serving as Medical Officer and is a member of Himachal Pradesh Civil Medical Services (General Wing). Petitioner having passed Graduation Degree in Microbiology with three years experience as Senior Resident, after completion of Post Graduation, is eligible to be promoted to the post of Assistant Professor in Microbiology in Medical Colleges in State of Himachal Pradesh as provided in Rule 11 of Himachal Pradesh Medical Education Service Rules, 1999 (for short 'Rules 1999').

3. Petitioner has approached this Court seeking direction to respondents to reckon the seniority of eligible candidates for promotion to the post of Assistant Professor from the date of acquiring the qualification for the said post as provided under Rule 11 of Rule 1999. Whereas, respondents are considering eligible candidates on the basis of the seniority as mentioned as members of Civil Medical Services irrespective of date of acquiring/possessing the essential qualification provided under Rule 11 of Rules, 1999.

4. So far as this High Court is concerned, the aforesaid issue is not *res integra* as the said issue stands decided by Division Bench of this Court vide judgment dated 18.9.2014 passed in *CWP No. 3025 of 2014*, titled *Dr.Shikha Sood Vs. State of H.P. & another and CWP No. 2450 of 2014*, titled *Dr.Naineesh Sharma Vs. State of H.P. and others* wherein prayer of the petitioners therein was identical which reads as under:-

"(i) That a writ in the nature of mandamus may be issued directing the respondents to reckon the seniority for promotion to the post of Assistant Professor (Super Specialty) from the date a person acquires the qualification as provided in clause 11 of the HP Medical Education Service Rules, 1999 as amended vide notification dated 28/06/2008."

5. Learned counsel for the petitioner has tried to re-open the issue by submitting that in the judgment of Division Bench ratio of law laid down in ***Shailendra Dania and others Vs. S.P. dubey and others***, reported in ***(2007) 5 SCC 535*** and ***Challa Jaya Bhaskar & Others Vs. Thungathurthi Surrender & others, Civil Appeal No. 5579-5586 of 2001*** and also judgment passed by this High Court in ***S.S. Kutlehria & others Vs. State of H.P. & others, CWP No. 1358 of 2008***, has not been taken into consideration. To substantiate the claim of the petitioner, judgment passed by Punjab and Haryana High court in ***Punjab State Electricity Board Vs. Ashok Kumar Sehgal,*** reported in ***AIR 1990 (P&H) 117*** and Delhi High Court in ***M.A. Khan and another Vs. Municipal Council New Delhi & others, LPA No. 280 of 1997 Delhi High Court*** has also been referred. It has been submitted that ratio of aforesaid judgments is that service rendered prior to acquiring qualification is not to be taken into consideration towards eligibility for promotion to the next higher post.

6. I have gone through these judgments and I am of the considered opinion that ratio of these judgments is not relevant in present case and the plea raised on behalf of petitioner on the basis of it, is misconceived as in present case seniority of incumbent in Civil Medical Services is taken into consideration for determining the interse claim between eligible candidates and eligibility of candidates is decided on the basis of possession of requisite Post Graduate Degree with three years teaching experience as Lecturer/Registrar/ Demonstrator/Tuitor/Senior Resident/Chief Resident in the concerned specialty after doing Post-graduation in the concerned specialty which is essential qualification for falling in the zone of consideration amongst the Medical Officers serving in Civil Medical Services for promotion to the post of Assistant Professor.

7. It is apparent from Rules 1999 that teaching experience of a period of three years is taken into consideration only after acquiring the Post Graduate Degree or its equivalent but not the teaching experience prior to acquiring the Post Graduate Degree,

8. The Division Bench of this Court after taking into consideration various pronouncements of the Supreme Court on the issue in reference has concluded as under:-

> *"23. This Court cannot issue writ of mandamus commanding the respondents to reckon the seniority for promotion to the post of Assistant Professor (Super Specialty) from the date when a candidate acquires qualifications. This is the job and prerogative of the official respondents and not of this Court. This Court has only interpreted the Rules and as per the Rules, as discussed hereinabove, that a candidate, at the time of falling in the zone of consideration, must have Post Graduate degree alongwith three years teaching experience."*

I am in agreement with the aforesaid findings rendered by the Division Bench. Otherwise also I am bound by the judgment passed by the Division Bench and, therefore, present Writ Petition is dismissed alongwith pending application(s), if any.

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

Between:

MS. SARITA DEVI,
D/O SHRI PURAN CHAND,
R/O HOUSE NO. 197, WARD NO.4,
MANDI TOWN,
PRESENTLY STENO-TYPIST

IN THE OFFICE OF CONTROLLER,
DISTRICT FOOD CIVIL SUPLIES AND
CONSUMER AFFAIRS, MANDI,
DISTRICT MANDI.

....PETITIONER

(BY MR. TEK CHAND SHARMA
AND MR. K.C. SANKHYAN,
ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY
(FCS& CAFAIRS), GOVERNMENT OF HP,
SHIMLA-171002.

2. DIRECTOR, FOOD CIVIL SUPPLIES
& CONSUMER AFFAIRS, HIMACHAL
PRADESH, SHIMLA-171009

....RESPONDENTS

(BY MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATE GENERAL
WITH MR. KAMAL KISHORE SHARMA
AND MR. NARENDER THAKUR,
DEPUTY ADVOCATES GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 1420 OF 2019
DECIDED ON: 10.11.2021

Constitution of India, 1950 – Articles 14 and 226 –Petitioner was aggrieved as her case for promotion as Junior Auditor now designated as Senior Assistant not considered although her juniors were given the promotions – Held – When the petitioner being reverted to the post of Steno-Typist from the

post of Junior Scale Stenographer, although posts of Junior Auditor were available in the department against which petitioner could be considered from promotion – The petitioner has opted for the promotion to the post of Junior Auditor, so the department ought not have denied such promotion to her on the ground of junior auditor stand changed to Senior Assistant – Petitioner allowed and respondents are directed to give promotion to petitioner to the post of Junior Auditor promotion from date of her reversion from post of Sr. Scale Stenographer till date of merger of cadre of Junior Auditor [Paras 6 & 8]

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

O R D E R

Petitioner has approached this Court in the instant proceedings, praying therein for following main reliefs:

> *"i) That the impugned memo dated 28th July, 2014 (Annexure P-14) issued by the Respondent No.2, may kindly be quashed and set aside and the petitioner be allowed option for her promotion as Jr. Auditor/ Senior Asstt. from the due date with all consequential benefits..*
>
> *ii) That the respondent No.2 may kindly be directed to consider the case of petitioner for her promotion as Jr. Auditor/now designated as Senior Assistant under the provisions of R&P Rules, 1973 (Annexure P-2) from the date her juniors have already been promoted.*
> *iii) That the promotion order dated 18.1.2014 (Annexure P-12) as Jr. Scale Stenographer may kindly be declared null & Void."*

2. Precisely, the facts of the case, as emerge from the record are that the petitioner was appointed as Steno Typist in the Directorate of Food, Civil Supplies and Consumer Affairs, Himachal Pradesh, in September, 1996 on the recommendations of HP Public Service Commission, Shimla. The petitioner joined against the post as detailed herein above on 19.9.1996 and

thereafter, she was promoted to the post of Jr. Scale Stenographer in terms of R&P Rules for the post of Jr. Scale Stenographer in the Food and Supplies, vide government notification No.FDS-A(3)-4-99 dated 22.11.2003. As per aforesaid R&P Rules, wherever there are more than one channel for the promotion, option shall be taken from the person being considered for promotion. In the case at hand, respondent department before promoting the petitioner to the post of Jr. Scale Stenographer also took her option dated 27.5.2008 as is evident from Annexure R-1 adduced on record by the respondents alongwith their reply. Consequent upon aforesaid promotion, petitioner joined as Jr. Scale Stenographer on 25.9.2009 and during her such posting, she filed representation dated 19.10.2010 (Annexure P-3) to the department stating therein that since she is working as Jr. Scale Stenographer on probation, she is eligible for promotion as Junior Auditor. However, such request of her was not accepted by the department and department vide communication dated 25.11.2020 (Annexure P-4) apprised the petitioner that there is no provision available in the R&P Rules for promotion of the Jr. Scale Stenographer to the post of Junior Auditor.

3. Since prayer of the petitioner for promotion to the post of Junior Auditor was not accepted by the department, she vide communication dated 31.5.2011, requested the department to revert her back to the post of Steno Typist (Annexure P-5). Vide office order dated 4.7.20111, Directorate of Food, Civil Supplies and Consumer Affairs reverted the petitioner to the post of Steno Typist, against which, she was initially appointed in September, 1996. On 17.1.2012, petitioner by way of representation represented to the department that since she stands reverted to the psot of Steno Typist and she is number one in the seniority of Steno Typist, her case may be considered for promotion to the post of Junior Auditor (Annexure P-7), however, fact remains that aforesaid representation filed by the petitioner never came to be decided, rather remained pending for one reason or the other and in the meantime,

Government of Himachal Pradesh vide notification dated 4.10.2012, ordered for merger of the cadre of Junior Auditor with that of Senior Assistant (Annexure P-8). Petitioner again vide representation dated 28.12.2012 (Annexure P-9), requested the department to promote her to the post of Junior Auditor, but such prayer of her was not paid any heed. Interestingly, department totally ignoring the fact that petitioner was earlier promoted to the post of Steno Typist in September, 1996 and thereafter, she herself sought reversion from the post of Jr. Scale Stenographer, again called upon the petitioner to give option for her promotion to the post of Jr. Scale Stenographer. Vide order dated 18.1.2014, department once again promoted the petitioner to the post of Jr. Scale Stenographer, to which post, she otherwise stood promoted on 2009 and subsequently, was reverted back to the post of Steno Typist in July, 2011. Aforesaid promotion was not accepted by the petitioner and she again vide communication dated 11.4.2014, requested the department to consider her for promotion to the post of Junior Auditor but such prayer of her was rejected vide communication dated 28.7.2014, on the ground that there is no post of Junior Auditor in the department as cadre of Junior Auditor stands merged with the cadre of Senior Assistant. In the aforesaid background, petitioner has approached this court, praying therein for the reliefs as have been taken note herein above.

4. Before ascertaining the correctness and genuineness of the merit, if any, in the case of the petitioner herein, it may be apt to take note of the fact that this court after having heard learned counsel for the parties at length, deemed it necessary to summon the record. Pursuant to order dated 29.9.2021, Mr. Aman, Clerk, has come with the records. Record perused and returned.

5. There is no dispute *inter-se* parties that in the year, 1996, petitioner was appointed as Steno Typist on regular basis on the recommendation of the Public Service Commission and thereafter, she on the

basis of option was promoted to the post of Jr. Scale Stenographer. It is also not in dispute that petitioner herself sought her reversion from the post of Jr. Scale Stenographer to the post of Steno Typist and as such, request of her was accepted and since then, she had been regularly rendering her services in the capacity of Steno Typist. Though petitioner had been demanding, after her reversion, promotion to the post of Junior Auditor in terms of R&P Rules, but such prayer of her was not accepted and she was again ordered to be promoted to the post of Jr. Scale Stenographer in January, 2014, against which post, she otherwise stood promoted in the year, 2009. Once it is not in dispute *inter-se* parties that from the feeder category of Steno Typist and clerk, persons could be promoted either to the post of Junior Auditor or Jr. Scale Stenographer, there appears to be merit in the case of the petitioner that once she after her reversion from the post of Jr. Scale Stenographer had made representation for her promotion to the post of Junior Auditor, the department ought to have considered the same. Interestingly, department ignoring the material fact that earlier promotion granted to the petitioner to the post of Jr. Scale Stenographer was refused by her, again promoted her to that post in January, 2014.

6. Record made available to this court clearly reveals that after petitioner's being reverted to the post of Steno Typist from the post of Jr. Scale Stenographer, four posts of Junior Auditor were available in the department, against which, petitioner could be considered for promotion. Record/Noting i.e. N-158 to N-160, made available to this court clearly reveals that petitioner after being reverted to the post of Jr. Scale Stenographer specifically made an option that she be promoted to the post of Junior Auditor and at that time, sufficient posts of Junior Auditor were available in the department. Aforesaid noting further reveals that promotion to the post of Junior Auditor was sought to be denied to the petitioner on the ground that nomenclature of post of Junior Auditor stands changed to Senior Assistant. If

it is so, even then, case of the petitioner, who at that time was eligible to be promoted to the higher post, ought to have been considered by the department. However, it appears that matter remained pending adjudication before the competent authority on one count or the other. It is not in dispute that petitioner has been rendering her services as Steno Typist on regular basis since 1996 and till date, she has not been given the due promotion. No doubt, petitioner on the basis of her option was granted promotion to the post of Jr. Scale Stenographer, but since she herself sought reversion, option, if any, exercised by her at the time of her promotion to the post of Jr. Scale Stenographer, has lost its relevance, rather department having taken note of reversion of the petitioner to the post of Steno Typist coupled with the fact that she had made fresh prayer for promotion to the post of Junior Auditor, ought to have called for fresh option, which otherwise she appears to have given as mentioned in the aforesaid noting. Once petitioner had specifically opted for promotion to the post of Junior Auditor, department ought not have denied such promotion to her on the ground that nomenclature of post of Junior Auditor, stands changed to Senior Assistant. No doubt, vide notification dated 4.10.2012 (Annexure P-8), cadre of Junior Auditor merged with that of Senior Assistant, but at the time of making representation for promotion to the post of Junior Auditor by the petitioner in the year 2011-12, posts of Junior Auditor were available upto 4.10.2012, as is clearly evident from the record made available to this court and as such, promotion to the post of Junior Auditor could not have been denied to the petitioner on the ground of merger.

7. Mr. Tek Chand Sharma, learned counsel for the petitioner fairly states that petitioner, who is on the verge of retirement, is only interested in her promotion to the higher post and she would be content and satisfied in case benefit of promotion as is being claimed by her to the higher post is given to her on notional basis till the date of merger of two cadres.

8. Consequently, in view of the above, present petition is allowed and respondents are directed to give promotion to the petitioner to the post of Junior Auditor from the date of her reversion from the post of Sr. Scale Stenographer till the date of merger of the cadre of Junior Auditor with that of Senior Assistant on the notional basis and thereafter, to the post of Senior Assistant with all the consequential benefits. Since petitioner is on the verge of retirement, needful in terms of directions contained in the judgment, shall be done by the department, expeditiously, preferably within two months. In the aforesaid terms, present petition stands disposed of. Pending applications, if any, also stand disposed of.

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

Between:-

LIAQ RAM
S/O SHRI SITA RAM,
R/O VILLAGE KOT, POST OFFICE DOMEHAR,
TEHSIL ARKI, DISTRICT SOLAN, H.P.

……PETITIONER

(BY MRS. RANJANA PARMAR, SENIOR ADVOCATE WITH SH. KARAN SINGH PARMAR, ADVOCATE)

AND

1. H.P. STATE ELECTRICITY BOARD
   LIMITED THROUGH ITS SECRETARY,
   KUMAR HOUSE, SHIMLA

2. EXECUTIVE DIRECTOR (PERSONNEL),
   HPSEB LIMITED, KUMAR HOUSE, SHIMLA

……RESPONDENTS

(BY SH. ANIL KUMAR GOD, ADVOCATE)

CIVIL WRIT PETITION(ORIGINAL APPLICATION)
No.6096 of 2019
Decided on: 25.11.2021

Constitution of India, 1950 – Article 226 read with Rule 9 of CCS (Pension Rules), 1972 – Withholding of gratuity, leave encashment and GPF – The respondents have paid provisional pension to the petitioner but his retirement gratuity, leave encashment and balance pension amount is still to paid to him and the disciplinary proceedings which can be said to have been commenced after petitioner's superannuation were stopped by the respondents at the stage of inquiry report awaiting outcome of criminal case – Held – Petitioner has suffered a lot of denial of retiral benefits due to him for a long period so the respondent were directed to release the retiral benefits in favour of the petitioner – Petition allowed. [Paras 4 (iii) and 4 (iv)]

Cases referred:
Chief General Manager, Gujarat Telecom Circle, Bharat Sanchar Nigam Limited and others Versus Manilal Ambalal Patel and another, (2019) 14 SCC 232;
Dr. Hira Lal Versus State of Bihar and others, (2020) 4 SCC 346;
P.V. Mahadevan Versus MD, T.N. Housing Board, (2005) 6 SCC 636;
R.C. Goel Versus State of Himachal Pradesh, 2010 (3) Shim. LC 493;
Union of India, etc. etc. v. K.V. Jankiraman, etc. AIR 1991 SC 2010;

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

O R D E R

The petitioner is presently 65 years of age. His grievance in the instant petition is that the respondents have withheld his Gratuity, Leave Encashment and GPF. He seeks a direction to the respondents to release these benefits to him.

2. Facts:-

2(i). The petitioner was appointed as T-Mate in the respondent-Board on 02.05.1985. He was further promoted to Class-III post of Assistant

Lineman. The petitioner was to retire on 31.10.2014 on attaining the age of superannuation.

2(ii). On 09.10.2012, one Ram Sarup-the brother of the petitioner filed a complaint with the respondent-Board, requesting for inquiring into the date of birth of the petitioner. The complainant alleged that the date of birth of the petitioner was altered in the School Leaving Certificate from '01.04.1953' to '27.10.1956'.

2(iii). This complaint was inquired into by the respondents from Government Senior Secondary School (Boys) Arki as well as Government Primary School Domehar, from where the petitioner had passed his 10th& 5th class examinations, respectively. Both the schools certified that petitioner's date of birth at the time of admission in the school was recorded as '23.10.1953'. The matter was got verified from Gram Panchayat Domehar, Development Block Kunihar. It transpired that in three different Parivar Registers of the petitioner, his date of birth was differently recorded, i.e. 01.04.1953 (overwritten as 1956), 1956 and 01.04.1953.

2(iv). FIR No.8 of 2013 was registered against the petitioner in respect of tampering in his date of birth in the official records. The criminal case thereafter proceeded in the Court of learned Judicial Magistrate 1st Class, Arki.

2(v). A memorandum of charges was issued against the petitioner under Rule 14 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965 (in short 'CCS (CCA) Rules') on 30.10.2014 for submitting afalse school leaving certificate showing his date of birth incorrectly.

2(vi). The petitioner superannuated from service on 31.10.2014. His retiral benefits, i.e. Gratuity, Leave Encashment and GPF, were withheld by the respondents. In accordance with the provisions of Rule 69 of the CCS (Pension) Rules, 1972, provisional pension was paid to the petitioner.

2(vii). The respondents conducted an inquiry regarding date of birth of the petitioner. The two Members Inquiry Committee, constituting of Senior Executive Engineer and Superintendent Grade-II, submitted the inquiry report on 29.01.2015 to the effect that "from the scrutiny of records and statements of concerned authorities, it appears that Sh. Laiq Ram, Lineman (retired) had tempered the record to change his date of birth from 23.10.1953 to 23.10.1956, but the facts can only be verified from the forensic experts only or a judicial authority. Since the matter is pre-judicial as per record made available to the committee, the matter cannot be given a final conclusion. The enquiry committee is of the opinion that HPSEBL should wait for decision/final outcome of the case in the Court of Hon'ble Civil Court (JMIC) at Arki before taking action against or in favour of Sh. Laiq Ram, Lineman (retired)." The disciplinary proceedings were not further pursued against the petitioner since the Inquiry Committee was of the opinion that the Board should wait for the final outcome of the case pending against the petitioner in the Court of learned Judicial Magistrate 1st Class at Arki.

Aggrieved against withholding of his retiral benefits, viz. Gratuity, Leave Encashment and GPF, the petitioner has preferred the instant petition.

During pendency of the petition, the respondents released the amount of GPF due to the petitioner. However, other retiral benefits, viz. Gratuity and Leave Encashment, have been withheld.

3. Learned Senior Counsel for the petitioner contended that the complaint, on the basis of which memorandum of charges was issued against the petitioner, was received by the respondents on 09.10.2012, whereas, the memorandum of charges was issued two years later, i.e. on 30.10.2014. This was just one day prior to the superannuation of the petitioner on 31.10.2014. Learned Senior Counsel further submitted that the petitioner had received the memorandum of charges after his superannuation. The action of the respondents in withholding his retiral benefits, therefore, was not in

consonance with law. Learned Senior Counsel further submitted that the disciplinary proceedings initiated against the petitioner were stopped on 29.01.2015 in view of Inquiry Committee's report. The Inquiry Committee had reported that the facts were disputed and could be verified either from the Forensic Experts or from a judicial authority. The Committee had recommended that in view of the matter being sub-judice in the Court of learned Judicial Magistrate 1st Class, Arki, the outcome of the case should be awaited for taking further action against or in favour of the petitioner. However, no criminal case can be said to be pending against the petitioner on the date of his superannuation since charges were not framed against him by that time. Learned Senior Counsel prayed for release of all withheld retiral benefits to the petitioner.

Learned counsel for the respondents reiterated the stand taken by the respondents in the reply. Learned counsel also submitted that the charges against the petitioner in the criminal case were framed on 29.06.2017.

4. On hearing learned counsel for the parties and after considering the pleadings, I am of the considered view that this petition deserves to be allowed for the following reasons:-

4(i). The memorandum of charges issued under Rule 14 of the CCS (CCA) Rules was signed just a day prior to the superannuation of the petitioner. Its date of service upon the petitioner is not even placed on record. Apparently, the same might have been served upon him on some subsequent date since the same was to be served on him through registered post. A conclusion can safely be drawn that the memorandum was received by the petitioner after his superannuation.

4(ii). The complaint was received by the respondent-Board on 09.10.2012, whereas the memorandum of charges was prepared on 30.10.2014. No reasons for delayed preparation of memorandum of charges have been assigned in the reply filed by the respondents. The memorandum of

charges was issued after a lapse of long time and at a time when the petitioner was to go home on superannuation.

In ***R.C. Goel Versus State of Himachal Pradesh***, reported in ***2010 (3) Shim. LC 493***, the memorandum of charges was quashed by the Court on the ground of having been issued after a long and unexplained delay.

In ***(2005) 6 SCC 636***, titled ***P.V. Mahadevan Versus MD, T.N. Housing Board***, the respondent-employer could not explain the inordinate delay in initiating the departmental inquiry against the appellant-employee. It was held that in the circumstances of the case, allowing the respondent to proceed further with departmental proceedings at that distance of time would be very prejudicial to the appellant, who had already suffered enough on account of disciplinary proceedings. The memorandum of charges issued against the appellant was quashed. Relevant para of the judgment is as under:-

> *"11. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."*

4(iii). The respondents in their reply have taken the stand that according to Rule 69 of the CCS (Pension) Rules, 1972, a retiree, when departmental or judicial proceedings are pending against him, is entitled only for provisional pension and no gratuity can be paid to him until the conclusion of the departmental or judicial proceedings and issue of final orders thereon. Rule 69 of the CCS (Pension) Rules reads as under:-

> *"69. Provisional pension where departmental or judicial proceedings may be pending*
>
> *(1) (a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.*
>
> *(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the Competent Authority.*
>
> *(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon:*
>
> *Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.*
>
> *(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is*

reduced or withheld either permanently or for a specified period."

Rule 9 of the CCS (Pension) Rules grants power to withhold or withdraw pension. Sub-Rules (4) and (6) of this Rule read as under:-

"(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(6) For the purpose of this rule,-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceeding, on the date the plaint is presented in the Court."

In ***(2019) 14 SCC 232***, titled ***Chief General Manager, Gujarat Telecom Circle, Bharat Sanchar Nigam Limited and others Versus Manilal Ambalal Patel and another***, Hon'ble Apex Court, while elaborating what constitutes commencement of departmental or a judicial proceeding under Rule 9(6), held as under:-

"51. The other question also must be considered and that question is whether there was a judicial proceeding pending at the time of the retirement. A perusal of Rule 9 of the Pension Rules would show that the Government had a right to withhold the pension or gratuity or both either in full or in part or withdraw a pension in full or in part either permanently or for the specified period. The Government is also authorised to order recovery from

pension or gratuity of the whole or in part of any pecuniary loss caused, if in any departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service which includes service after re-employment. Thereafter, Rule 9(6) deals with what constitutes when a departmental or a judicial proceeding will be deemed to commence. Judicial proceedings are divided into two categories. First category is a criminal proceeding. Second category is civil proceeding. As far as civil proceeding is concerned, it is deemed to be instituted when a plaint is presented. In other words, upon presentation of a plaint in a civil case judicial proceeding commences. In the case of a criminal proceeding by the deeming provision, it is deemed to have been instituted for the purpose of Rule 9 when the complaint or report of a police officer is made, but that is not sufficient. In a case where a complaint or a report of a police officer is made to a court, it should culminate in cognizance being taken by the Magistrate, for the department to contend that the date of the complaint or report is to be the date of institution of the proceedings."

In ***AIR 1991 SC 2010***, titled ***Union of India, etc. etc. v. K.V. Jankiraman, etc. etc.***, it was held by the Hon'ble Supreme Court in para 6 of the judgment that "..... the promotion etc. cannot be withheld merely because some disciplinary/ criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee."

The respondents have paid provisional pension to the petitioner under Rule 69 of the CCS(CCA) Rules. The GPF amount due to the petitioner though has been released to him, but his retirement gratuity and leave encashment and balance pension amount is still to be paid to him. The fact remains that in the instant case, the disciplinary proceedings, which for all practical purposes can be said to have commenced only after petitioner's

superannuation, were stopped by the respondents at the stage of inquiry report. In the inquiry report dated 29.01.2015, the Inquiry Officers had recommended to await the outcome of the criminal case stated to be pending against the petitioner at that time.

During hearing of the case, learned counsel for the respondents informed that the charges in the criminal case were framed against the petitioner on 29.06.2017, i.e. way after the superannuation of the petitioner. The matter is still stated to be pending before the Court.

Hon'ble Apex Court in ***(2020) 4 SCC 346***, titled ***Dr. Hira Lal Versus State of Bihar and others***, while interpreting the Bihar Pension Rules etc., reiterated that pension and gratuity are not mere bounties, or given out of generosity by the employer. The employee earns these benefits by virtue of his long, continuous, faithful and unblemished service. The right to receive pension of a public servant was held to be covered under the "right to property" under Article 31(1) of the Constitution of India in Deokinandan Prasad v. State of Bihar, (1971) 2 SCC 330. The right to receive pension has been held to be a right to property protected under Article 300-A of the Constitution even after the repeal of Article 31(1) by the Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20-6-1979, as held in State of W.B. v. Haresh C. Banerjee, (2006) 7 SCC 651.

4(iv). Petitioner superannuated on 31.10.2014. He is presently aged 65 years. Departmental proceedings, initiated against him a day prior to his superannuation, were stopped on 29.01.2015 awaiting outcome of criminal case. Charges in the criminal case were framed against the petitioner on 29.06.2017, i.e. almost three years after his superannuation. The criminal case is still stated to be pending. Petitioner has already suffered a lot by denial of retiral benefits to him for a long period. In such circumstances, it would be unjust to deny the petitioner his retiral benefits any longer.

In view of the above discussion, the present petition is allowed. The respondents are directed to release the retiral benefits, viz. Leave Encashment and Gratuity alongwith statutory interest, in favour of the petitioner within a period of eight weeks from today.The release shall abide by the outcome of criminal case pending against him. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:-

1. BHOJIA DENTAL COLLEGE,
CHANDIGARH-NAHAGARH ROAD,
BUDH, (BADDI), TEHSIL NALAGARH,
DISTRICT SOLAN, (H.P.),
THROUGH ITS SECRETARY.

2. BHOJIA CHARITABLE TRUST,
FOR SCIENCE, RESEARCH &
SOCIAL WELFARE, SCO 855,
MANIMAJRA, CHANDIGARH (UT),
THROUGH ITS SECRETARY.

....PETITIONERS

(SH. RAJNISH MANIKTALA, SR. ADVOCATE WITH MR. NARESH VERMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH PRINCIPAL SECRETARY (HEALTH),
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171002 (H.P.).

2. THE SECRETARY (LAW)

TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-171002.

3. SONIA ANAND,
DAUGHTER OF SHRI BALA NAND ANAND,
VILLAGE BAGAIN, POST OFFICE CHHAILA,
TEHSIL THEOG, DISTRICT SHIMLA,
171220, (H.P.).

4. RAJ KUMAR BANSAL,
SON OF LT. SH. MADAN LAL,
VILLAGE & POST OFFICE PANJEHRA,
TEHSIL NALAGARH, DISTRICT SOLAN,
(H.P.).

5. ARUNA KUMARI,
DAUGHTER OF SHRI GURMUKH SINGH,
VILLAGE ATHMAN, POST OFFICE KARLUHI,
TEHSIL AMB, DISTRICT UNA, (H.P.).

6. DINESH ANAND,
SON OF SHRI RAM LAL ANAND,
VILLAGE DURAHA, TEHSIL NIRMAND,
DISTRICT KULLU-172033.

7. RANJEET BODH,
SON OF SHRI DILE RAM,
VILLAGE HATHITHAN,
POST OFFICE ZIA,
DISTRICT KULLU-175125.

8. TANZIN GIAGO,
SON OF SHRI SONAM DARGE,
VILLAGE & POST OFFICE KOLANG,
DISTRICT LAHAUL-SPITI, (H.P.).

9. POOJA SHARMA,

DAUGHTER OF SHRI T.C. SHARMA,
C/O O.P. BHATT, NEAR SILVER OAK'S HOTEL,
BANDLA ROAD, PALAMPUR,
DISTRICT KANGRA-176061.

10. INDER SINGH SOHAL,
SON OF SHRI HARI SINGH,
VILLAGE KHAROLI,
POST OFFICE GANGATH,
TEHSIL NURPUR, DISTRICT KANGRA-176204.

11. ANURADHA,
DAUGHTER OF SHRI JAGDISH CHAND,
VILLAGE & POST OFFICE NAROLA,
TEHSIL SARKAGHAT,
DISTRICT MANDI 175033, (H.P.).

12. NAMISH SHARMA,
DAUGHTER OF SHRI B.D. SHARMA,
VILLAGE & POST OFFICE KHARUL,
VIA DAROH, TEHSIL PALAMPUR,
DISTRICT KANGRA (H.P.).

13. MANJIT RANA,
SON OF SHRI R.P. RANA,
C/O GOVERNOR'S SECRETARIAT,
RAJBHAWAN, SHIMLA-171002.

14. PARUL KAPIL,
DAUGHTER OF SHRI HANS RAJ KAPIL,
NEAR P.G. COLLEGE,
DISTRICTBILASPUR-174001, (H.P.).

15. SARITA KUMARI,
DAUGHTER OF SHRI HIMMAT SINGH THAKUR,
VILLAGE & POST OFFICE-TISSA,
TEHSIL CHURAH, DISTRICT CHAMBA,
176316, (H.P.).

16. VIKRAM GUPTA,
SON OF SHRI YOGESH GUPTA,
HOUSE NO. 2717/10,
NEAR RANITAL, NAHAN,
DISTRICT SIRMOUR-173001, (H.P.).

17. SUNNY BANGA,
SON SHRI TILAK RAJ,
BINDRA COTTAGE, DINGU MANDIR ROAD,
SANJAULI, SHIMLA-171006.

18. VIVEK MALHAN,
SON OF SHRI VARINDER KUMAR,
S-3/45, BBMB COLONY,
SUNDERNAGAR, DISTRICT MANDI (H.P.).

19. RAJAT CHAUHAN,
SON OF SHRI INDERJIT CHAUHAN,
DHANLAIK NIWAS, NEAR FROOD KAMLA NAGAR,
SANJAULI, SHIMLA-171006, (H.P.).

20. ADITYA BHRDWAJ,
SON OF SHRI RATTAN LAL BHARDWAJ,
VILLAGE DHOG, POST OFFICE JAJWIN,
TEHSIL JHANDUTTA,
DISTRICT BILASPUR (H.P.).

21. SHRUTI VAID,
DAUGHTER OF SHRI KAMLESH CHAND VAID,
KUTHIALA MOHALLA,
VILLAGE & POST OFFICE PARAGPUR,
TEHSIL DEHRA, DISTRICT KANGRA,
177107, (H.P.).

22. SAMEER SHARMA,
SON OFSHRI AJEET KUMAR SHARMA,

VILLAGE & POST OFFICE CHMNED,
TEHSIL & DISTRICT HAMIRPUR,
177029, (H.P.).

23. KUNAL RAWAT,
SON OF SHRI BAL KRISHAN RAWAT,
THROCHHOUSE, SANJAULI,
SHIMLA-171006, (H.P.).

24. ISHA AUMTA,
DAUGHTER OF ER. K.L. AUMTA,
AUMTA COTTAGE, NEARBALI COTTAGE,
SANJAULI, SHIMLA-171006, (H.P.).

25. NEHA SHARMA,
DAUGHTER OF SHRI T.D. SHARMA,
C/O T.D. SHARMA, DIRECTOR IGCP,
PALAMPUR, DISTRICT KANGRA (H.P.)
AT PRESENT C/O PROJECT DIRECTOR,
SWAN PROJECT, UNA-174303, HP.

26. MOHIT PRASHAR,
SON OF SHRI PRITAM CHAND PRASHAR,
VILLAGE & POST OFFICE SERAVIA NADUAN,
DISTRICT HAMIRPUR (H.P.).

....RESPONDENTS

(SH. AJAY VAIDYA, SR. ADDL. A.G. FOR R-1 AND 2).

(SH. SANJEEV BHUSHAN, SR. ADVOCATE WITH SH. RAJESH KUMAR, ADVOCATE, FOR R-3, 5, 14 AND 15)

(SH. RAVINDER SINGH JASWAL, ADVOCATE, FOR R-4, 8, 10,11, 21 AND 22)

(SH. C.N. SINGH, ADVOCATE, FOR R-6, 7, 13, 18 AND 20.)

2. CIVIL WRIT PETITION NO. 879 OF 2016

Beteen:-

CAPT. JAGDISH CHAND VERMA,
S/OLATE SH. LASHKARI RAM,
R/O VPO NAROLA, DISTT. MANDI,
HIMACHAL PRADESH.

.....PETITIONER

(BY SH. RAVINDER SINGH JASWAL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH PRINCIPAL SECRETARY TO
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-02, HIMACHAL PRADESH.

2. THE SECRETARY (LAW),
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-02,
HIMACHAL PRADESH.

3. THE SECRETARY (HEALTH)
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-02
HIMACHAL PRADESH.

4. THE DIRECTORATE,
MEDICAL EDUCATION AND RESEARCH,
HIMACHAL PRADESH, SHIMLA-09
HIMACHAL PRADESH.

5. HIMACHAL PRADESH UNIVERSITY

THROUGH ITS REGISTRAR,
SUMMER HILL, SHIMLA-05,
HIMACHAL PRADESH.

6. BHOJIA DENTAL COLLEGE & HOSPITAL,
CHANDIGARH-NALAGARH ROAD,
BUDH (BADDI), TEHSIL NALAGARH,
DISTT. SOLAN, HIMACHAL PRADESH,
THROUGH ITS SECRETARY.

7. BHOJIA CHARITABLE TRUST FOR SCIENCE,
RESEARCH & SOCIAL WELFARE,
SCO 855, MANIMAJRA, CHANDIGARH (UT)
THROUGH ITS SECRETARY.

.....RESPONDENTS

(SH. AJAY VAIDYA, SR. ADDL. A.G., FOR R-1 TO 4)

(SH. RAJNISH MANIKTALA, SR. ADVOCATE WITH SH. NARESH VERMA, ADVOCATE, FOR R-6 AND 7).

3. CIVIL WRIT PETITION NO. 3145 OF 2016

1. DINESH ANAND,
S/O SHRI RAM LAL ANAND,
VILLAGE DURAHA, TEHSIL NIRMAND,
DISTRICT KULLU-172033.

2. ADITYA BHARDWAJ,
S/O SHRI RATTAN LAL BHARDWAJ,
VILLAGE DHOG, P.O. JAJWIN,
TEHSIL JHANDUTTA,
DISTRICT BILASPUR, H.P.

3. RANJIT BODH,
S/O SHRI DILE RAM,

VILLAGE HATHITHA, P.O. ZIA,
DISTRICT KULLU-175125.

4. MANJIT RANA,
S/O SHRI R.P. RANA,
C/O SH. P.S. RANA, GOVERNOR'S
SECRETARIAT, RAJBHAWAN,
SHIMLA-171002.

5. VIVEK MALHAN,
S/O SH. VARINDER KUMAR,
S-4/42, BBMB COLONY,
SUNDERNAGAR, DISTRICT MANDI, H.P.

....PETITIONERS

(BY SH. C.N. SINGH, ADVOCATE)

AND

1. STATE OF H.P.
THROUGH ADDITIONAL CHIEF SECRETARY (HEALTH)
TO THE GOVT. OF HIMACHAL PRADESH,
SHIMLA-2, H.P.

2. FEE COMMITTEE,
THROUGH ITS CHAIRMAN
(ADDITIONAL CHIEF SECRETARY (HEALTH)
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2, H.P.

3. DIRECTOR,
MEDICAL EDUCATION AND RESEARCH,
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-9, H.P.

4. BHOJIA DENTAL COLLEGE,

CHANDIGARH-NALAGARH ROAD,
BUDH (BADDI), TEHSIL NALAGARH,
DISTRICT SOLAN, H.P., THROUGH
ITS SECRETARH.

5. BHOJIA CHARITABLE TRUST FOR SCIENCE,
RESEARCH & SOCIAL WELFARE,
SCO 855 MANIMAJRA, CHANDIGARH (UT)
THROUGH ITS SECRETARY.

...RESPONDENTS

(SH. AJAY VAIDYA, SR. ADDL. A.G. FOR 1 TO 3)

(SH. RAJNISH MANIKTALA, SR. ADVOCATE WITH SH. NARESH VERMA, ADVOCATE, FOR R-4 AND 5).

4. EXECUTION PETITION 157 OF 2016.

Between:-

1. BHOJIA CHARITABLE TRUST FOR
SCIENCE, RESEARCH & SOCIAL WELFARE,
SCO 855, MANIMAJRA, CHANDIGARH (UT),
THROUGH ITS SECRETARY.

2. BHOJIA DENTAL COLLEGE,
CHANDIGARH-NALAGARH ROAD,
BUDH, (BADDI), TEHSIL NALAGARH,
DISTRICT SOLAN, (H.P.),
THROUGH ITS SECRETARY.

(BY SH. RAJNISH MANIKTALA SR. ADVOCATE WITH SH. NARESH VERMA, ADVOCATE).

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY (HEALTH),
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171002 (H.P.).

2. DIRECTOR,
MEDICAL EDUCATION & RESEARCH,
HIMACHAL PRADESH,
BLOCK NO.-18B, SDA COMPLEX,
KASUMPTI, SHIMLA-171009, (H.P.).

3. ASHISH KUMAR,
SON OF SHRI PIRTHI CHAND,
VILLAGE KALRUHI, POST OFFICE AMB,
TEHSIL AMB, DISTRICT UNA (H.P.)
PIN 177203.

4. MANISHA KAPILA,
DAUGHTER OF DR. RATTAN CHAND,
SET NO. 6, WILLY'S PARK,
NEAR CHAURA MAIDAN,
SHIMLA-171004, (H.P.).

5. NARENDER KUMAR,
SON OF SHRISIDHU RAM,
VILLAGE CHACHOGA, POST OFFICE MANALI,
DISTRICT KULLU (H.P.) PIN 175131.

6. RAJAT SAHOTRA,
SON OF SHRI P.C. SAHOTRA,
C/O KAPOOR CHAND,
VILLAGE KUTHIANA, POST OFFICE DANGRI,
TEHSIL & DISTRICT HAMIRPUR (H.P.)
PIN -171042.

7. SANCHETNA JARIYAL,
DAUGHTER OF SHRI RAM ALAL,

VILLAGE CHADIYARA, POST OFFICE GUTKAR,
TEHSIL SADAR, DISTRICT MANDI (H.P.),
PIN-175021.

8. NIVEDITA GAZTA,
DAUGHTER OF LATE COL. L.R. GAZTA,
C/O MS. KANTA GAZTA, 6401-B,
RAJEEV VIHAR BY AWHO,
MANIMAJRA, CHANDIGARH PIN 160101.

9. VIKAS SHARMA,
SON OF SHRI SUKHDEV SHARMA,
VILLAGE KWANGALTA, P.O. SALOUNI,
TEHSIL BARSAR, DISTRICT HAMIRPUR (H.P.).

10. VIJAYENDRA SINGH CHANDEL,
SON OF SUBEDAR CHARAN SINGH CHANDEL,
VILLAGE & POST OFFICE NANGAL,
TEHSIL NALAGARH, DISTRICT SOLAN (H.P.).

11. SHIKHA BAKSHI,
DAUGHTER OF LT. COL. S.R. BAKSHI,
HOUSE NO. 2628/1,
SECTOR 47-c, CHANDIGARH.

12. BHAWNA SINGAL,
DAUGHTER OF SHRI AMIN CHAND SANGAL,
HOUSE NO. 204 SECTOR 46A,
CHANDIGARH. PIN 160047.

13. SAMITA DEVI,
DAUGHTER OF SHRI SURINDER KUMAR,
WARD NO.4, NEAR PROF. COLONY,
MALAHAT NAGAR, UNA (H.P.).

14. DIMPAL DEHAL,
DAUGHTER OF SHRI BALDEV DAHAL,

VILLAGE & POST OFFICE CHAKMOH,
TEHSIL BARSAR, DISTRICT HAMIRPUR
(H.P.) PIN-174312.

15. BHABHISHAN KUMAR,
SON OF SHRI SUSHIL KUMAR,
VILLAGE SUNEHRA, P.O. UNA,
TEHSIL & DISTRICT UNA
(H.P.) PIN 174303.

16. JATINDER KUMAR,
SON OF SHRI MAST RAM,
VILLAGE AND POST OFFICE JEJWIN
TEHSIL JHANDUTTA, DISTRICT
BILASPUR (H.P.) PIN 174031.

17. ASHIMA BANSAL,
DAUGHTER OF SHRI SUNIL BANSAL,
HOUSE NO. 1455, KAMLA NAGAR,
KALKA DISTT. PANCHKULA
(HARYANA) PIN 133302.

18. SONAL CHOPRA,
DAUGHTER OF SHRI VIJAY KUMAR CHOPRA,
JAGDAMBA BHAWAN, WARD NO.7,
HOUSE NO. 108, HAMIRPUR (H.P.)
PIN 177001.

19. ASHISH SHARMA,
SON OF SHRI TILAK RAJ SHARMA,
KANOL BHAWAN, VIKAS NAGAR,
P.O. KASUMPTI SHIMLA-9 (H.P.)
PIN 171009.

20. SHWETA JAGOTA,
DAUGHTER OF SHRI AMAR NATH JAGOTA,
VILLAGE HARKURKAR P.O. &

TEHSIL GHUMRWIN, DISTT. BILASPUR
PIN 174021.

21. PRASHANT GUPTA,
SON OF SHRI RAVI CHAND GUPTA,
VILLAGE & POST OFFICE GURKURI,
TEHSIL & DISTRICT KANGRA (H.P.)
PIN 176001.

22. POOJA SHARMA,
DAUGHTER OF SHRI SURENDER SHARMA
C/O SAROCH PRINTING PRESS,
KACHEHRI ADDA, DHARMSHALA,
DISTRICT KANGRA (H.P.).

23. PRIYANKA,
DAUGHTER OF SHRI HARMESH RAJPOOT,
15, HILL VIEW HOUSING SOCIETY
JHALERA, UNA (H.P.) PIN 174303.

24. VIJAY KUMAR THAKUR,
S/O SH. K.C. THAKUR,
1-415, SAROJININ NAGAR,
NEW DELHI-110023 AT PRESENT
VILLAGE KARKUHI, POST OFFICE TULLAH,
TEH. JOGINDAR NAGAR, DISTT MANDI,
(H.P.) PIN-175015.

25. MAYANK SHARMA,
S/O SHRI RAJESH SHARMA,
HOUSE NO. 3759, SECTOR 22 D,
CHANDIGARH. PIN-160022.

26. RENU KAUSHAL,
DAUGHTER OF SHRI S.P. KAUSHAL,
SHASTRI COLONY, GHUMARWIN,
DISTRICT BILASPUR (H.P.) PIN 174021.

27. NEHA RANA,
DAUGHTER OF SHRI JAGMOHAN KUMAR RANA,
VILLAGE & POST OFFICE DAULATPUR CHOWK,
TEHSIL AMB, DISTRICT UNA,
(H.P.) PIN 177204.

28. RISHAB GUPTA,
SON OF LT. SHRI BALRAJ GUPTA,
HOUSE NO. 2752/10, BARA CHOWK,
JAIN GALI NAHAN, DISTRICT SIRMOUR
(H.P.) PIN 173001.

29. PUJA CHAUHAN,
DAUGHTER OF SHRI SHAYAM SUNDER,
MALONWALA BHOOD, TEHSIL NAHAN
DISTRICT SIRMOUR (H.P.) PIN- 173001.

30. ABHINAV KONDAL,
SON OF SHRI R.C. KINDAL,
VILLAGE & POST OFFICE PAPROLA,
TEHSIL BAIJNATH, DISTRICT KANGRA,
(H.P.) PIN 176115.

31. RUPINDER,
SON OF LATE SHRI DHANI RAM,
VILLAGE JAIGARH, POST OFFICE CHOWAI,
TEHSIL ANI, DISTRICT KULLU,
(H.P.) PIN 172032.

32. BINDU BALA,
DAUGHTER OF SHRI KISHNU RAM,
VILLAGE & POST OFFICE GANDHIR,
TEHSIL JHANDUTTA, DISTRICT BILASPUR,
(H.P.) PIN-174029.

33. ANKUR DHIMAN,

SON OF SHRI ANIL KUMAR DHIMAN,
VILLAGE DIALRI, POST OFFICE BHORANJ,
TEHSIL BHORANJ, DISTRICT HAMIRPUR,
(H.P.) PIN-176045.

34. ROHIT,
SON OF SHRI MANGAL CHAND,
VILLAGE THORANG, POST OFFICE GONDHLA,
DISTRICT LAHAUL-SPITI, (H.P.)
PIN-175140.

35. RUCHI CHOUDHARY,
DAUGHTER OF SHRI SHANTI SAWROOP CHAUDHARY
V.P.O BHARMAR, TEHSIL JAWALI,
DISTRICT KANGRA (H.P.)
PIN- 176021.

36. SHRADHA SHANDIL,
DAUGHTER OF SHRI SURESH SHANDIL,
RAMA NEWS AGENCY, THE MALL SHIMLA,
(H.P.) PIN- 171001.

37. KARAN KANWAR,
SON OF COL. N.S. KANWAR,
C/O DIRECTOR RVS HEADQUARTERS,
WESTERN COMMAND, CHANDIMANDIR
(HARYANA) PIN-134107.

38. SAMRIDHI SHARMA,
DAUGHTER OF SHRI SHAM LAL SHARMA,
VILLAGE & POST OFFICE AMB,
DISTRICT UNA (H.P.) PIN-177203.

39. GEETIKA KAUSHAL,
DAUGHTER OF SHRI PAWAN KUMAR KAUSHAL,
HOUSE NO. 44, WARDNO.-2, KAUSHAL NIWAS,
NEAR PNB, VILLAGE & POST OFFICE

SANTOKHGARH, TEHSIL & DISTRICT
UNA (H.P.).

40. AASTHA MAHAJAN,
DAUGHTER OF SHRI PRAVEEN KUMAR,
H. NO. 1767/1, SECTOR 39-B,
CHANDIGARH. PIN-160036.

41. AVNIMAHAJAN,
DAUGHTER OF DR. ANIL MAHAJAN,
SUB DIVISIIONAL HOSPITAL DEHRA GOPIPUR,
DISTRICT KANGRA (H.P.) PIN-177101.

42. SANGEETA RANI,
DAUGHTER OF SHRI OMKAR SINGH,
VILLAGE & POST OFFICE BHATOLI,
DISTRICT UNA (H.P.) PIN 174315.

43. GARIMA MAJAHAN,
DAUGHTER OF BRGD. ARVIND GUPTA,
VILLAGE & POST OFFICE SAMLOTI,
TEHSIL & DISTRICT KANGRA,
(H.P.) PIN- 176001.

44. VISHAL SHARMA,
SON OF SHRI PARDEEP KUMAR,
VILLAGE & POST OFFICE CHALET,
TEHSIL AMB, DISTRICT UNA,
(H.P.) PIN-177204.

45. RHYTHM BHARDWAJ,
SON OF SHRI BISHAN DASS BHARDWAJ,
HOUSE NO. 89, LAKHANPUR,
TEHSIL SADAR, DISTT. BILASPUR,
(H.P.) PIN-174001.

46. RAMANPREET KAUR,

D/O SH. SANTOKH SINGH
VILLAGE & POST OFFICE
DEHLAN (UPPER), TEHSIL AND DISTT UNA
(H.P.) PIN-174306.

47. AMIT SHARMA,
SON OF SHRI ASHOK KUMAR,
VILLAGE TUKARI, POST OFFICE
DARKATI, TEHSIL JAWALI,
DISTRICT KANGRA, (H.P. PIN-176023.

48. PALVI MAJAHAN,
DAUGHTER OF SHRI RISHI MAHAJAN,
FANCY CLOTH HOUSE, HOSPITAL GALI,
KANGRA (H.P.) PIN-176001.

49. SHILPA MANKOTIA,
DAUGHTER OF SHRI SURESH SINGH MANKOTIA,
VILLAGE & POST OFFICE PANJAWAR,
DISTRICT UNA (H.P.) PIN-177208.

50. NATASHA,
DAUGHTER OF SHRI HEM RAJ,
WARD NO.4, VIKASNAGAR KHAD PAAR,
NEAR FISHERY DEPARTMENT
UNA, (H.P.).

51. MANIK MAJAHAN,
SON OF SHRIAJAY KUMAR,
MOHALLA SAPRI, NEAR BUS STAND,
CHAMBA (H.P.) PIN-176310.

52. PREETI SAGAR,
DAUGHTER OF SHRI PREM SAGAR SHARMA
VILLAGE & POST OFFICE DHARAMSAL
MAHATAN, TEHSIL AMB,
DISTRICT UNA (H.P.) PIN-177203.

53. PALLAVI SHARMA,
DAUGHTER OF SHRI S.K. SHARMA,
HOUSE NO. 415/1, WARD NO.3,
NEAR CHIEF ENGINEER RESIDENCE (C.Z.)
M.G. ROAD, MANDI (H.P.) PIN-175001.

54. JYOTI SHARMA,
SON OF SHRI RAJENDER KUMAR SHARMA,
VILLAGE LADHYANI, POST OFFICE LEHRI SARAIL
TEHSIL GHUMARWIN, DISTRICT BILASPUR,
(H.P.) PIN-174027.

55. ABHAY KATOCH,
SON OF SHRI VINOD KATOCH,
VILLAGE PATHIAR, TEHSIL &
DISTRICT KANGRA, (H.P.) PIN-176047.
(BY SH. AJAY VAIDYA, SR. ADDL. A.G. FOR R-1 & 2.)

(SH. SANJEEV BHUSHAN, SR. ADVOCATE WITH SH. RAJESH KUMAR, ADVOCATE, FOR R-3, 5, 7, 8, 12, 14, 15, 16, 20, 22, 23, 25 TO 28, 30 TO 34, 38 TO 42, 44, 46, 47, 49, 51 TO 55).

EXECUTION PETITION
NO. 147 OF 2016 A/W CONNECTED MATTERS.
Reserved on: 4.10.2021
Decided on: 9.11.2021

Civil Procedure Code, 1908 – Order 21, Rule 111 – Petitioner has sought the directions for the recovery of balance fees from respondent – Held – In view of interdicts imposed by the Statute, the regulatory procedure to fix the fee was taken out of hands of execution petitioner and other educational institutions and was instead vested in independent authorities and further the mandate of judgment is binding on the petitioner – The objections raised in execution petitions lacks merits and are dismissed – The private respondents are directed to pay due and admissible amount of arrears of fee to petitioner within three months, failing which petitioner shall be at liberty to execute the order in accordance with part – C, Rule 16, Writ Jurisdiction (High Court of Himachal Pradesh) Rules, 1997. [Para 34]

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

O R D E R

CWP No. 879 of 2016 and CWP No.3145 of 2016 along with Execution Petition 147 of 2016 in CWP No. 1235 of 2007 and Execution Petition No. 157 of 2016 in CWP No. 384 of 2008 have been heard together and are being decided by a common judgment on account of involvement of common questions of facts and law.

2. By way of instant petitions, petitioners have prayed for following substantive reliefs respectively:

CWP No. 879 of 2016

(i) That the tuition fee for free/merit seats as notified by the respondent state in notification dated 15.9.2003 for the session 2003-04 for free/merit seats (i.e Rs. 20,000/- per seat per annum) may kindly be held applicable.

(ii) That the notification No. HFW-B(E)3-8/2014 dated 7.11.2015 i.e. Annexure P-2 which has been issued in violation of Apex Courts judgment and the direction of this Court may be kindly be quashed and set aside and declared null and void.

(iii) That notice reference No. BDC/BHUD/CWP-1235FR/SF-167-16089 dated 23.11.2015 i.e Annexure P-1 issued in violation the Apex Court Judgment and the directions of this Court may also be quashed and set aside in view of the above submissions.

CWP No.3145 of 2016

a. Issue a writ of certiorari, mandamus or appropriate writ order or direction as this Hon'ble Court deems fit quashing notification dated 17.11.2015 (Annexure P-6) passed by respondent No.1.

b. Issue a writ of certiorari, mandamus or appropriate writ order or direction as this Hon'ble Court deems fit quashing the decision dated 17.7.2015 (Annexure P-5) passed by respondent No.4/ fee committee held on 17.7.2015 for all intents and purposes.

c. Issue a writ of certiorari, mandamus as this Hon'ble Court deems fit quashing he very constitution of respondent No.2 "Fee Committee" by respondents being in defiance, non-compliance to the judgment dated 17.9.2013 passed by the Hon'ble Court in CWP No. 1235 of 2007 (Bhojia Dental College Vs State of H.P. and others) and CWP No. 384 of 2008) Bhojia Charitable Trust and another Vs State of H.P. and others) for all intents and purposes.

d. Issue a writ of certiorari, mandamus as this Hon'ble Court deems fit upholding the tuition fee as prescribed vide notification No. HFW-B(F)5-10/94-loose dated 15.9.2003, for the academic session of 2003-04 in respect of BDS course of Private Dental Colleges of Himachal Pradesh, may be upheld.

Execution Petition No. 147 of 2016 in CWP No. 1235 of 2007

(A) That the respondents 3 to 26 may be directed to pay the amount of balance fee as per details given in the body of petition.

(B) That the necessary certificate for the amount to be recovered from each respondent student as per details given in the body of the petition may be ordered to be given in favour of the petitioner.

Execution Petition No. 157 of 2016 in CWP No. 384 of 2008

(A) That the respondents 3 to 55 may be directed to pay the amount of balance fee as per details given in the body of petition.

(B) That the necessary certificate for the amount to be recovered from each respondent student as per details given in the body of the petition may be ordered to be given in favour of the petitioner.

3. Petitioner in CWP 879 of 2016 is father of Ms. Anuradha, who along with petitioners in CWP No. 3145 of 2016 were students of BDS course, commencing from 2003-04, in Bhojia Dental College and Hospital, Bhud, Nalagarh, Distt. Solan (HP) (for short, "Bhojia Dental College").

4. Government of Himachal Pradesh, after decision of Supreme Court in **Islamic Academy of Education versus State of Karnataka**, issued notification dated 15.9.2003, whereby the fee structure of Private Dental Colleges for academic session 2003-04 was determined. A sum of Rs. 20,000/- per student per annum was determined for 50% seats of Govt. sponsored students and Rs. 2.5 Lakhs per student per annum was fixed for 50% seats of management quota. These amounts, however, were inclusive of all charges except refundable security.

5. Vide notification dated 13.2.2004 Government of Himachal Pradesh constituted Fee Structure Committee for academic session 2004-05. The committee submitted provisional fee structure at Rs. 85,000/- for academic session 2004-05 for Bhojia Dental College in respect of both State as well as Management quotas. This provisional fee structure was subject matter of CWP No. 22 of 2004 and connected matters. The Division Bench of this Court vide decision dated 22.12.2004 disposed of the matters on the basis of

consensus arrived at between the parties to the effect that the Fee Structure Committee may be directed to re-assess, re-evaluate, re-examine and re-consider the entire gamut of the fee structure and all issues relating thereto with a view to find out, determine and ultimately prescribe a final fee structure, totally uninfluenced by the provisional fee structure already adopted/ assessed by it. Accordingly, directions were issued. It was also noted by the court that the committee while determining the final fee structure would also consider the cases of students who were admitted prior to academic session 2004-05.

6. Consequent upon the directions issued by High Court, the Fee Structure Committee submitted its recommendations to the State Government, who in turn, issued communication dated 28.7.2005 prescribing the fee for academic sessions 2003-04, 2004-04 and 2005-06. As regards Bhojia Dental College, final fee was fixed at Rs. 84,000/- per annum per student for both the categories i.e. free seats and management seats. This fee structure was challenged by students admitted in 2003-04 before this Court in CWP No.856 of 2005. The challenge was rejected by the court holding that judicial review of the decision of the Committee was not possible.

7. The State Legislature enacted The Himachal Pradesh Unaided Dental Colleges (Regulation of Admission and Fixation of Fee for Academic Year 2003-04) Act, 2006 (for short, "First Act of 2006"). Section 4 of the Act read as under:

> "4. **Fixation and Regulation of Fee**: Notwithstanding anything contained in any order or judgment passed by any competent Court or any order, notification or instruction issued, the students admitted against Government quota (merit seats) during academic year 2003-04 in Private Unaided Dental Colleges in the state shall continue to pay fee for the academic year 2003-2004 according to fee structure issued vide

notification No. HFW-B(F)5-10/94-loose, dated 15.9.2003 for the entire academic course of Bachelor of Dental Surgery."

8. The State Legislature enacted another Act titled as Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 (for short, "Second Act of 2006"). Section 3 of this Act provides for Regulation of Admission, fixation of fee and making of reservation for different categories in admissions to Private Medical Educational Institutions. Sub section (3) of Section 3 of said Act reads as under:

> "3(3) The State Government may constitute an Admission and Fee committee (hereinafter referred to as the 'Committee') consisting of such members as may be specified by the State Government, by notification, to recommend the mode of admission, making of reservation, allocation of seats and fixation of fees etc. to the State Government."
>
> Section 7 of the Act read as under:
>
> "7. Fixation of Fees: (1) The State government while determining, or the Committee constituted under sub section (3) of section 3 while recommending to the State Government, the fee to be charged by a Private Medical Education Institution, shall consider the following factors:
>
> (a) The location of the institution;
> (b) The nature of the medical course;
> (c) The cost of land and building;
> (d) The available infrastructure and equipment;
> (e) The expenditure incurred or being incurred on faculty, administration and maintenance;
> (f) The reasonable profit required for the growth and development of the institution;

(g) Any other relevant factor, which the State Government deems just and appropriate for the determination of fee.

(2) Before determining fee under sub section (1), the State Government or the said Committee, as the case may be, shall give the concerned Private Medical Educational Institutions and the representatives of the students already studying in such institutions and the representatives of the students who intend to seek admission in these institutions, a reasonable opportunity to express their view point in writing in respect to the fee determination.

(3) Notwithstanding anything contained in sub sections (1) and (2), the State Government may, in public interest, determine a provisional fee structure.

Provided that the fee shall be fixed in accordance with the provisions of sub section (1) and sub section (2) within a period of ninety days from the fixation of such provisional fee.

(4) Notwithstanding anything contained in sub sections (1) and (2), the State Government shall have power to review the fee structure fixed by the Committee, prior to commencement of this Act.

9. The Government of Himachal Pradesh vide notification dated 8.12.2006 fixed the provisional fee for the state quota students admitted in the academic years 2004-05 and 2005-06 at Rs. 50,000/- till the final outcome of the recommendation of the Review Committee. The Review Committee took final decision on 2.6.2008 and recommended the fee of Rs. 50,000/- per student per annum for students admitted against state quota seats during the academic years 2004-05 and 2005-06.

10. Whereas Section 4 of the First Act of 2006 was challenged in CWP No. 1235 of 2007 before this Court, notification dated 8.12.2006 issued

by the State Government and recommendation dated 2.6.2008 made by Review Committee was challenged in CWP No. 384 of 2008. Both the writ petitions were filed by Bhojia Dental College. Division Bench of High Court vide common judgment dated 17.9.2013 passed in CWP. Nos 1235 of 2007 and 384 of 2008 held section 4 of the First Act of 2006 invalid and null and void and as concomitant entire Act was rendered unenforceable and redundant. The decision of Review Committee dated 2.6.2008 was also quashed and set aside. The Division Bench of this Court in paras 40 to 43 of the said judgment held as under:

> "40. Having said this, the next question is what must be the fee structure of the petitioner-College for the relevant academic sessions 2003-04, 2004-05 and 2005-06. Should it be on the basis of the notifications, dated 15.9.2003 and 28.7.2005, as claimed by the petitioners? Indisputably, after notification dated 28.7.2005, the issue was required to be examined by the Review Committee constituted under section 7 of the Second Act of 2006. The Review Committee was constituted under Section 7(4) of the said Act vide notification dated 24.11.2006, to review the fee structure fixed earlier in respect of Private Unaided Dental Colleges in Himachal Pradesh. Neither this notification nor Section 7 of the Second Act of 2006 has been challenged by the petitioners before us. Whereas, the petitioners participated in the proceedings before the Review Committee so constituted. This Committee has determined the "final fee structure" for the relevant academic sessions 2003-04, 2004-05 and 2005-06. Vide decision dated 2.8.2008. It is a different matter that we have set aside that decision in terms of this judgment.

That, however, does not follow that the communication dated 28.7.2005 prescribing the fee structure for Private Unaided Dental Colleges in the context of final fee fixed by the Fee Structure Committee can be taken forward. Notably, the review committee was constituted in exercise of statutory powers under section 7(4) of the Second Act of 2006 to review the fee structure for the relevant academic sessions determined by the Fee Structure Committee. This being a statutory committee and the notification to constitute the said committee having not been challenged, coupled with the fact that the petitioners participated in the proceedings before the review committee, the petitioners cannot be permitted to fall back on the fee determined by the Fee Structure Committee for academic sessions 2003-04, 2004-05 and 2005-06, and notified in terms of communication dated 28.7.2005 or 15.9.2003. In other words, the Review Committee (Statutory Committee) must first examine the issue of fee structure keeping in mind the exposition of the Constitution Bench of the Apex Court in the afore-noted decisions.

41. Having set aside the decision of the Review Committee, the only logical direction that needs to be issued is to direct the Review Committee to re-examine the entire matter afresh and pass appropriate directions as may be advised, in accordance with law, expeditiously and preferably within 8 weeks from today. If the Review Committee upholds the claim of the petitioners, the petitioners would become entitled to recover deficit amount from its

students admitted in the college for the concerned academic years 2003-04 to 2005-06.

42. In view of above, we dispose of both the petitions on the following basis:

i) Section 4 of the Himachal Pradesh Private Unaided Dental Colleges (Regulation of Admissions and Fixation of Fee for Academic year 2003-04) Act, 2006 is declared illegal and null and void.

ii) The decision of the Review Committee in its meeting held on 13.5.2008 and notified vide notification dated 2.6.2008 (Annexure P-11 in CWP No. 384 of 2008) is quashed and set aside. Instead, the petitioners are relegated before the same review committee for reconsideration of the entire matter afresh in accordance with law, expeditiously and not later than 8 weeks from today after giving fair opportunity to the petitioners.

iii) Until the Review Committee finally determines the fee structure for the academic years 2003-04, 2004-05 and 2005-06, respectively, the petitioners shall not recover any further amount from the students admitted in the concerned academic years 2003-04, 2004-05 and 2005-06 save and except the fee already collected. However, in the event of Review Committee determines the final fee structure for the concerned academic years and if the same is in excess of the prescribed amount already collected by the petitioners, the petitioners would be free to recover such excess amount from its students, in accordance with law.

43. Both the petitions are disposed of with the above observations, with no orders as to costs.

11. The Review Committee vide proceedings dated 17.7.2015 decided that Bhojia Dental College will charge Rs. 84,000/- per student per annum from the batches of students of BDS course of the academic years 2003-04, 2004-05 and 2005-06. Government of Himachal Pradesh notified the said decision of Review Committee vide Notification dated 17.11.2015.

12. Petitioners in the instant petitions have assailed the above-mentioned notification dated 17.11.2015 issued by the State Government and also the decision dated 17.7.2015 of the Review Committee.

13. Petitioners have alleged that the constitution of the Committee was bad in law as the State Government had not taken any steps to nominate retired High Court Judge, Chartered Accountant, representative of MCI and AICTE etc to the committee in accordance with the mandate of Apex Court. The constitution of Review Committee has also been challenged on the ground that it was not the same which had taken decision dated 13.5.2008. Petitioners were not afforded opportunity of being heard. Fixation of fee at Rs. 84,000/- per annum was in violation of judgment dated 17.9.2013 of this court in CWP No. 1235 of 2007, whereby the decision of Fee Structure Committee dated 17.7.2005 fixing the fee at Rs. 84,000/- per annum had been set aside. It has also been contended that Review Committee had not applied its mind in as much as the fee fixed for 2015-16 session was Rs. 73,000/- per annum for free/ merit seats. Further the challenge has been made on the ground that the impugned notification and decision of Review Committee was in violation of Directions of Apex Court judgment in Islamic Academy of Education Vs State of Karnataka as the Review Committee had blatantly neglected the fixed criteria of 6% to 15% as surplus for expansion of the system and development of education. As per petitioners the State Government had issued impugned notification only to further the business

interest of Bhojia Dental College, which was not running educational institution for charitable purposes. The decision of the State Government has also been assailed on the ground of financial constraints of the petitioners. It has been alleged, had they known before getting admitted to BDS course that they would be charged such huge fee, they would have not got themselves admitted.

14. The official respondents have supported and justified their action being in accordance with the mandate of Apex Court as well as this Court. It has been stated that the fee for academic sessions 2003-04 to 2005-06 was fixed strictly in accordance with the established guidelines and criteria.

15. Bhojia Dental College has also contested the claim of petitioners. After narrating the entire sequence of events on factual side has controverted the allegations of the petitioners. It has been asserted that the fixation of fee by the Review Committee vide proceedings dated 17.7.2015 and notified by the State Government vide notification dated 17.11.2015 was strictly in compliance to law laid down by Constitution Bench of Apex Court in TMA Pai and Islamic Academy of Education and also to the directions issued by this Court in CWP No. 1235 of 2007. In CWP 879 of 2016, the petition is stated to be not maintainable on behalf of the father of the student, who herself was major on the date of filing of petition.

16. We have heard the parties and have also gone through the records.

17. The Division Bench of this Court while rendering judgment dated 17.9.2013 in CWP Nos. 1235 of 2007 and 384 of 2008 had taken note of exposition made by Constitution Benches of Apex Court in TMA Pai, Islamic Academy of Education and P.A. Inamdar and had observed in para 21 as under:

> "21. From the extracted portion of the aforesaid decisions, there is no manner of doubt that it is the prerogative muchless

> right of the educational institution to decide its own fee structure. The Review Committee has to evaluate as to whether that fee structure does or does not result in profiteering, commercialization or demanding capitation fee. The Review Committee is expected to examine the justification given by the educational institution and record its satisfaction, one way or the other, by a speaking order and reasons to be recorded therefor. The Committee has to bear in mind broad contours delineated by the Apex Court in paragraph 155 of the Islamic Academy and paragraph 149 of P.A. Inamdar(supra).

18. Indisputably, the judgment passed by the Division Bench of this Court in CWP Nos 1235 of 2007 and 384 of 2008 has attained finality. Petitioners in CWP No. 879 of 2016 and daughter of petitioner in CWP 3145 of 2016 were parties to the above noted lis in CWP No. 1235 of 2007. Resultantly, the legality and validity of the impugned notification dated 17.11.2015 of the State Government and decision dated 17.7.2015 of Review Committee can be tested only to the limited extent, whether the same are in conformity with the directions issued by this court?

19. Judged on the touchstone of above noticed observations/directions, the decision of Review Committee dated 17.7.2015 cannot be faulted. Perusal of minutes of meeting of Review Committee reveal that after taking into consideration the past instances of fee fixation having taken place from time to time it was noted in paragraphs 4 and 6 as under:

> "4. The committee reviewed the income-expenditure statement submitted by the applicant i.e. Shri Vikram Bhojia, Secretary, Bhojia Dental College, Bhud, Nalagarh, District Solan. The committee also reviewed the three options of fee structure of BDS course submitted by the applicant for the academic years under reference. The applicant submitted that (a) if the fees is

fixed @ Rs. 20,000/- for state quota and @ Rs. 2.50 Lakh for management quota seats, the net receipt would be Rs. 2,73,20,100/- and (b) if the fees is fixed @ Rs. 84,000/- for all seats, then total receipt will be Rs. 1,81,44,000/- and (c) further if the fees is fixed @ Rs. 20,000/- for state quota seats and Rs. 84,0000/- for management quota seats, the receipt would be Rs. 86,32,000/-. The applicant further submitted that if the committee re-fixes the fees as per option (a), the institute will be in profit, if the fees is fixed as per option (b), there will be no profit or no loss and if the option (c) is chosen then the institute will be in loss.

6.The committee noted that as per law laid down by the Apex Court, the committee was required to review and moderate the fee structure to be proposed by the college. In the instant case, the fee was to be reviewed for three years commencing 2003 onwards. Students admitted to these sessions had already passed out and the college would have to resort to innovative mechanism to recover the amount due or refund the excess fees received. The committee further observed that expenditure figures in respect of 2003-04, 2004-05 and 2005-06 had already achieved finality as audited balance sheets and statements of accounts were available. The only variable was the tuition fee. In view of the three options given by the applicant college, option No. II was the only permissible option that could be considered."

20. At this stage we find it appropriate to quote paragraph 155 of Islamic Academy of Education and Paragraph 149 of P.A. Inamdar:

"155. While determining the fee structure, safeguard has to be provided for so that professional institutions do not become auction houses for the purposes of selling seats. Having regard to

the statement of law laid down in para 56 of the judgment, it would have been better, if sufficient guidelines could have been provided for. Such a task which is difficult one has to be left to the Committee. While fixing he fee structure the committee shall also take into consideration, inter alia, the salary or remuneration paid to the members of faculty and other staff, the investments made by them, the infrastructure provided and the plans for the future development of the institution as also expansion of the educational institution, Future planning or improvement of facilities may be provided for. An institution may want to invest in an expansive device (for medical colleges) or a powerful computer (for technical college). Those factors are also required to be taken care of. The State must evolve a detailed procedure for constitution and smooth functioning of the committee."

"149. However, we would like to sound a note of caution to such committees. The learned counsel appearing for the petitioners have severely criticised the functioning of some of the committees so constituted. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by Islamic Academy. Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their job and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers

> against the salary permitted by the Committees. Retired High Court judges heading the committees are assisted by experts in accounts and management. They also have benefit of hearing the contending parties. We expect the committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regards for realities. They should refrain from generalising fee structure and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution."

21. Thus, what was required from Review Committee was to ensure that the fixation of fee was recommended in the manner which on one hand would not unduly enrich the educational institution so as to make it profitable institution and on the other hand would not render it financially unviable. In the instant case the audited balance sheets for the relevant years as also account statements of the institution were before the Review Committee. On the basis of such accounts three different options were proposed. The Review Committee recommended the option which in its opinion was best suited in the facts of the case. There was nothing before the Review Committee suggesting that there was some component of capitation fee in the proposed options. In fact, options mooted by the institutions were nothing but permutations and combinations of different fee structures proposed or employed in the past. It can also not be said that the recommended fee structure would in any manner have taken out the institution from category of charitable institution or had made it a commercial organisation. In either of the petitions before us the petitioners have not placed on record any material to doubt the bonafide of the Review Committee in decision making. It is equally noteworthy that the findings recorded by the Review Committee on the basis of accounts before it has not been proved to be incorrect. We cannot

lose sight of another fact that vide judgment dated 6.12.2005 in CWP No. 856 of 2005 Division Bench of this Court had upheld the fee structure for academic year 2003-04 for Bhojia dental College at Rs. 84,000/- per annum for all category of seats after holding that the committee, which was constituted for the purpose had taken into consideration all the matters, which ought to have been taken into consideration. Accordingly, the court had refused to go into merits of the case by judicial review. This judgment had also attained finality. That being so, the specific findings recorded in the above noted judgment is a definite indicator that the fee fixed by Review Committee vide impugned decision is not exorbitant.

22. As regards, objection as to constitution of Review Committee, it has been stated that the Review Committee was not constituted in accordance with the direction passed by Apex Court and also that the committee that took the impugned decision was not the same that had taken decision dated 13.5.2008. The objection deserves to be rejected for the reason that after coming into force of Second Act of 2006, the statutory committees envisaged therein had substituted the committee suggested by Apex Court in TMA Pai. The said Act provided for constitution of committee by the State Government by notification. Thus, the statutory committee under the Act has to be viewed as an institution in perpetuity notwithstanding its membership being changed from time to time.

23. Another objection raised by the petitioners is that they were not afforded any opportunity of being heard by the committee before taking the decision which ultimately affected them. The matter was referred to the Review Committee under the directions of Division Bench of this Court in CWP NO. 1235 of 2007 whereby the said committee was under no mandate to afford opportunity of being heard to the petitioners herein. In another view of the matter the power to review the fee structure fixed by any committee before commencement of Second Act of 2006 is vested with State Government under

Section 7(4) of said Act, which does not envisage any such opportunity. Even otherwise Section 7(2) provides for opportunity to express view point in writing, before committee determining fee structure under section 7(1), to the representatives of the students who either were already studying in the educational institution concerned or were seeking admission. In none of the cases the petitioners herein were entitled to be heard by the Review Committee as they had passed out from the institutions long back and also that the fee structure was not being determined under sub section (1) of Section 7 of Second Act of 2006. It is not the case that the petitioners herein were not aware about the decision rendered by Division Bench of this Court in CWP No. 1235 of 2007 and CWP No. 384 of 2008 as they were parties to said litigation. Had they been serious in their endeavour, they could have easily approached the Review Committee with the material, if any, to dislodge the claim of Bhojia Dental College. The petitioners have also not been able to produce before us any material which may cast some doubt on the proceedings of the Review Committee or its ultimate analysis. The petitioners have been afforded sufficient opportunity of hearing in the present petitions and their inability to show any serious prejudice to their rights on account of their non-participation in the proceedings of Review Committee otherwise pales into insignificance. It is significant to notice that students of Bhojia Dental College had represented to the committee against imposition of Rs 84,000/- fee for all categories of students for academic years 2003-04 to 2005-06. The committee had considered and rejected their objections in its meeting dated 8.12.2015 and there is no challenge to such findings of the committee in the instant petitions.

24. Petitioners have contended that for 2015-16 session the same committee has fixed the fee for state quota seats @ Rs. 73,000/- per annum, thus it was absurd that the fee for academic sessions 2003-04 to 2005-06 was fixed at Rs.84,000/- per annum. Perusal of minutes of meeting dated

8.12.2015 reveal firstly that the constitution of committee was substantially not the same and secondly the recommendation made by said committee was in the context of notification dated 27.5.2014 whereby three tier fee structure for state quota students of BDS course in Private Dental Colleges in the State was prescribed. In any case the proceedings dated 28.12.2015 of the committee is not in challenge before us nor are we seized of material to adjudicate upon its legality or otherwise. It is also not clear whether the recommendation of said committee has been accepted by the State Government or not.

25. The petitioners have also raised the plea of estoppel on the ground that the fee structure changed after their joining the course was not binding on them and had they known the change in fees beforehand, they would not have got themselves admitted. It is not in dispute that the change in fee structure was necessitated with the purpose to comply with mandate of Apex Court in TMA Pai which had overruled Unnikrishnan on relevant aspect to limited extent. That being so, the plea of estoppel is not available to the petitioners. Moreover, petitioners never assailed the changes in fee structure proposed by different committees from time to time, therefore, they cannot be allowed to raise this issue in present proceedings, where the scope of challenge has its own restrictions as noticed above.

26. In view of above discussion, we do not find it necessary to rule on the objection of Bhojia Dental College with respect to maintainability of writ petition No. 879 of 2016 on behalf of father of one of the students.

27. Bhojia Dental College has preferred Execution Petition No.147 of 2016 in CWP 1235 of 2007 and Execution Petition No. 157 of 2016 in CWP 384 of 2008. The fact remains that both the Writ Petitions i.e. 1235 of 2007 and 384 of 2008 were decided by a common judgment dated 17.9.2013 by Division Bench of this Court with directions as noticed above in paragraph 10 of this judgment.

28. In Execution Petition No. 147 of 2016 private respondents Nos. 6,7,13,18 and 20 have submitted their reply and respondent No.11 has submitted objection petition separately. Respondents 6,7,13,18 and 20 in Execution Petition No. 147 of 2016 are the petitioners in CWP No.3145 of 2016 and respondent No. 11 in the said execution petition is daughter of petitioner in CWP No. 879 of 2016. The reply and objection petition submitted by above referred private respondents respectively contain the grounds which are *Pari Materia* the same on which they have preferred CWP Nos 3145 of 2016 and 879 of 2016 respectively. Since we have already considered the grounds raised in CWP Nos 3145 of 2016 and 879 of 2016 in paras *supra* and have recorded specific findings, the same shall apply *mutatis mutandis* to the objections raised in Execution Petition No. 147 of 2016. No other private respondent has raised any objection in said execution petition.

29. In Execution Petition No. 157 of 2016 an objection petition is purportedly filed by respondents 3, 5 to 9, 12, 14 to 16, 19 to 23, 25 to 28, 30 to 34, 36, 38 to 42, 44, 46, 47, 49 and 51 to 55 but the same has been signed only by Shri Bhabhishan Kumar (Respondent-15) and nothing on record suggests that said respondent No.15 had authority from other above noted respondents to file the objection petition on their behalf also. Respondent No. 45 has separately filed his objections.

30. Noticeably, none of above referred objectors in Execution Petition No. 157 of 2016 had assailed judgment dated 17.9.2013 passed by the Division Bench of this Court. They had also accepted the decision dated 17.7.2015 of the Review Committee and notification dated 17.11.2015 issued by the State Government.

31. The objection of objectors in Execution Petition No. 157 of 2016 primarily is that judgment dated 17.9.2013 did not carry any mandatory direction and the tool of execution cannot be used by the execution petitioner to recover the due amount, if any, from the objectors.

32. The right of execution petitioner to receive fees from students including objectors is not in question. The bone of contention has been the rate at which the fee is to be paid. Admittedly, on account of various interdicts imposed by statute and judicial pronouncements, the regulatory procedure to fix the fee was taken out of hands of execution petitioner and other similarly situated educational institutions and was instead vested in independent authorities. Decisions taken by authorities, from time to time, to fix fee payable to execution petitioner could not attain finality as is evident from details of facts narrated in earlier part of this judgment. Judgment dated 17.9.2013 passed by Division Bench of this Court, in execution in instant proceedings has attained finality. The direction No. iii) of said judgment was preceded by specific mandate of the Court as contained in para 41 of the judgment as under:

> "41. Having set aside the decision of the Review Committee, the only logical direction that needs to be issued is to direct the Review Committee to re-examine the entire matter afresh and pass appropriate directions as may be advised, in accordance with law, expeditiously and preferably within 8 weeks from today. **If the Review Committee upholds the claim of the petitioners, the petitioners would become entitled to recover the deficit amount from its students admitted in the college for the concerned academic years 2003-04 to 2005-06.**

Thus, the Writ Court has pronounced a positive mandate in favour of execution petitioner and the same cannot remain a mere paper decree. All the objectors were parties to the judgment in execution and the above said mandate is binding on them without any shadow of doubt, judgment having attained finality and Review Committee having upheld the claim of execution petitioners. To direct execution petitioners at this stage to institute

independent claims against individual private respondents in execution petitions will be nothing but travesty of justice.

33. Objectors in Execution Petition No. 147 of 2016 have also raised an objection that the execution petition is not maintainable in view of Notification No. HHC/Rules/Vol. V/97-1-26000-26019 dated 23/24.09.2013 whereby Rule 16, under Part C, "Civil Writ" of the Rules known as "High Court of Himachal Pradesh (Original Side) Rules 1997 has been deleted. The objection is wholly misconceived and untenable in view of The High Court of Himachal Pradesh (Original Side) (9th Amendment), Rules notified vide notification No. HHC/Rules/Vol. V/97-I dated 9.4.2014.

34. In view of above, we do not find any merit in the writ petitions and also the objections raised in execution petitions Nos. 147 and 157 of 2016 and the same are dismissed with no orders as to costs. Private respondents in both the execution petitions are directed to pay due and admissible amount of arrears of fee to the execution petitioners within a period of three months from today, failing which the execution petitioners shall be at liberty to take steps to execute the order in accordance with law especially Part-C, Rule 16, Writ Jurisdiction (High Court of Himachal Pradesh) Rules, 1997. All miscellaneous pending applications, if any, are accordingly disposed of.

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

Between:-

JAI NAND
SON OF SHRI NARD CHAND
R/O VILLAGE AND POST SHIKAWARI, TEHSIL THUNAG, DISTRICT MANDI, H.P.

.....PETITIONER (BY

SH. NAVEEN K. BHARDWAJ, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION) TO THE GOVT. OF HIMACHAL PRADESH, H.P.

SHIMLA, H.P.

2. THE DEPUTY DIRECTOR(HIGHER EDUCATION), MANDI, H.P..

3. DEPUTY DIRECTOR (ELEMENTARY EDUCATION) MANDI, H.P.

4. THE PRINCIPAL GOVERNMENT SENIOR SECONDARY SCHOOL

(BOYS) MANDI, H.P..

5. THE PRINCIPAL/HEAD MASTER GOVERNMENT MIDDLE SCHOOLSANGLWARA, TEHSIL THUNGA, DISTRICT MANDI, H.P.

.....RESPONDENTS

(SH. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL WITH SH. VIKRANT CHANDEL AND SH. KUNALTHAKUR, DEPUTY ADVOCATES GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.1222 of 2019
DECIDED ON: 18.11.2021

Constitution of India, 1950 – (A) Article 226 read with Rule 14 of the Central Civil Services (CCA) Rules – Illegal termination – The principles of natural justice have not been compiled with no record for service of charge sheet on the petitioner at any point of time – Inquiry conducted in violation of the prescribed rules – Order of termination set aside. [Para 4 (iv)]

Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Rule 19 – Exercise of powers – Illegal termination – Entitlement for back wages – Held – The question of back wages is to be decided by the concerned authority in accordance with law. [Para 5]

Cases referred:

Dr. Vijayakumaran C.P.V. Vs. Central University of Kerala, 2020 (12) SCC 426;

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

O R D E R

Services of the petitioner, a regular employee, were terminated by respondent No.2 vide order dated 17.11.2018. This order has been assailed in the instant petition.

2. Facts

2(i) The petitioner was appointed as a part time water carrier on 02.08.1997. He was made a whole time contingent employee on 11.03.2005. On 07.08.2008, petitioner was made a

regular Class-IV employee and posted as such in Government Middle School Sangalwara, District Mandi.

2(ii) As per the respondents:-

2(ii)(a) The petitioner remained willfully absent from the duties w.e.f. 20.10.2006 to 13.06.2007 and from 19.06.2007 to 05.08.2008.

On 07.08.2008, the petitioner was made a regular Class-IV employee.

2(ii)(b) The petitioner applied for casual leave w.e.f. 22.02.2010 to 02.03.2010 i.e. for nine days, but thereafter, did not apply for extension of leave and remained willfully absent from the duties. He was asked to explain his position by the respondents, vide letter dated 11.02.2010, but he failed to furnish any explanation.

2(ii)(c) On 05.04.2010, the Principal, Government Senior Secondary School Jarol, District Mandi, was directed to inquire into the matter. The Principal submitted his inquiry report on 22.04.2010. On the basis of this inquiry report, an office order was issued by respondent No.2- the Deputy Director, Higher Education, Mandi, District Mandi on 04.06.2010, warning the petitioner not to repeat such act in future.

It will be appropriate to extract operative part of this office order:-

> "*Now therefore, the undersigned taking a lenient view at this time hereby warns the said Sh. Jai Nand, Peon GMS Sangalwara U/C GSSS Janjehli, District Mandi, H.P.*

not to repeat such an act in future, failing which action as warranted under the Rules will be initiated against him."

2(iii) The record produced by the respondents during the hearing of this case showed that a fact finding report regarding 'personal application of the petitioner' was conducted by the Principal, GSSS Jhungi, District Mandi. The fact finding report was submitted to respondent No.2-the Deputy Director Higher Education, District Mandi, on 29.12.2012. Subsequently, a memorandum of charges under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, [CCS (CCA) Rules] was issued against the petitioner on 05.08.2015 by respondent No.2 with the following article of charge:-

"That Sh. Jai Nand, Peon, presently posted at GMS Sangalwara U/C Govt. Sr. Sec. School, Janjehli Distt Mandi remained willfully absent from duties w.e.f. 03.03.2010 to till date. This act and conduct of Sh. Jai Nand, Peon, GMS Sangalwara U/C GSSS Janjehali, is of doubtful integrity and unbecoming of a Govt. servant and tantamounts to misconduct under Rule 3 of CCS (Control) Rules 1964."

The charge against the petitioner was that he was willfully absent from the duties w.e.f. 03.03.2010 and that his act and conduct was of doubtful integrity and unbecoming of a government servant tantamounting to misconduct under Rule 3 of CCS (Conduct) Rules, 1964.

2(iv). Memorandum of charges dated 05.08.2015 issued under Rule 14 of CCA (CCA), eventually led to issuance of order dated 17.11.2018, whereby, respondent No.2-the Deputy

Director Higher Education, Mandi, District Mandi, terminated petitioner's services w.e.f. 03.03.2010 with retrospective effect.

It is in the aforesaid background that the petitioner has preferred the instant writ petition, assailing the order dated 17.11.2018.

3. Contentions

Learned counsel for the petitioner contended that the Memorandum of charges dated 05.08.2015, produced by the respondents during hearing of the case was never served upon petitioner. The respondents never associated the petitioner with the disciplinary proceedings said to have been initiated against him under the charge sheet. The respondent-employer has not complied with the mandatory procedure laid down under the CCS (CCA) Rules for holding the disciplinary proceedings.. Therefore, order dated 17.11.2018 is required to be quashed and set aside.

Learned Additional Advocate General submitted that the petitioner was a habitual absentee. He never diligently attended to his duties. Ever since 2006, he continued to remain absent from school for no justifiable cause. The fact finding report was submitted and preliminary inquiry was also conducted by the respondents, which proved the charges leveled against the petitioner. Therefore, the impugned order dated 17.11.2018, terminating the petitioner's services, does not suffer from any illegality.

4 Observations

4(i) Learned counsel for the petitioner on facts submitted that the petitioner had fallen sick and proceeded on leave

from 22.02.2010 to 02.03.2010. After recovering from illness, he was not allowed to join duties in the school. It transpired that correspondence in this regard was being exchanged amongst the respondents and other officials. On 04.06.2010, an office order was issued by the respondents warning the petitioner to be careful and not to repeat such acts in future. However, attendance of the petitioner was still not being marked at GMS Sanglwara, though he regularly attended the school w.e.f. 03.03.2010. On mutual transfer basis, he was transferred to GPS Shikwari, but he was not allowed to join there also. His attendance was not marked in any school. His service book was not prepared. He requested all concerned authorities in writing, seeking their help. Correspondence was though exchanged, but he did not get any relief. Feeling harassed, he instituted Civil Writ Petition No.9580 of 2012 [subsequently registered as OA(T) in the erstwhile HP State Administrative Tribunal]. The petitioner prayed therein for directing therespondents to allow him to join his duties.

The relief clause of CWP No.9580 of 2012, as originally filed by the petitioner reads as under:-

> ***"a*** *Issue a writ of mandamus directing the respondents to allow the petitioner to join his duties in Government Middle School Sanglwara U/C GSSS Janjehli, District Mandi as Class-IV peon and to give his due remuneration/salary for his duty period for which he has been deprived of and absent period, if any, may kindly be treated as the leave of the kind due.*
>
> ***b.*** *To regularize the petitonr as Class-IV peon w.e.f.6.10.2006 when his juniors were regularized as Class-IV peon with all consequential benefits."*

During pendency of the writ petition, the respondents issued office order on 17.11.2018 terminating petitioner's services. Petitioner amended the writ petition and after incorporating the subsequent developments, prayed for following reliefs:-

> *"(i) That the order of termination dated 17.11.2018 (Annexure A-14), may kindly be quashed and set aside being illegal, arbitrary and after thought just to deprive the applicant from the government job.*
>
> *(ii) That applicant may kindly be allowed to join his duties in Government Middle School Sanglawara U/C GSSS Jangehali, District Mandi, as Class-IV peon and to give his due remuneration/salary for his duty period for which he has been deprived of and absent period, if any, may kindly be treated as the leave of the kind due.*
>
> *(iii) To regularize the applicant as Class-IV peon w.e.f. 6.10.2006 when his juniors were regularized as Class–IV peon with all consequential benefits."*

The argument raised on behalf of the petitioner is that for all practical purposes, services of the petitioner were orally terminated by the respondents on 03.03.2010. The petitioner was not allowed to mark his attendance in the school w.e.f. 03.03.2010. He had approached all concerned authorities with a request to allow him to join duties. However, his efforts did not yield any positive result. Petitioner, therefore, filed a writ petition before this Court in the year 2012. During pendency of the writ petition, the respondents terminated his services vide order dated 17.11.2018. By way of an amendment carried out in the writ petition, the petitioner prayed for quashing of order dated 17.11.2018.

The case of the respondents is that the fact finding inquiry stood already conducted against the petitioner in the year, 2012. Therefore, subsequent to the issuance of Memorandum of charges to the petitioner on 05.08.2012 and getting no response from him to the memorandum, his services were terminated on 17.11.2018.

4(iii) The impugned order dated 17.11.2018 terminated petitioner's services retrospectively w.e.f. 03.03.2010. Admittedly, vide office order issued on 04.06.2010, the petitioner was warned by the respondents to be careful in future. The respondents have not explained as to under what authority of law, they could terminate petitioner's services retrospectively w.e.f. 03.03.2010 under the impugned order issued on 17.11.2018.

4(iv) Petitioner was a regular employee of the respondents. According to the record produced by the respondents during hearing of the case, the Memorandum of charges (charge-sheet) was issued to him on 05.08.2015 for remaining absent from the duties. The charge sheet was issued under the provisions of Rule 14 of CCS (CCA) Rules, 1965. Stand of the respondents during hearing of the case was that though the charge sheet was served upon the petitioner, however, he did not file any reply to it. Whereas, it was submitted on behalf of the petitioner that the petitioner was never served with any charge sheet under Rule 14 of CCS (CCA) Rules. That no notice either of the charge sheet or of the disciplinary/ inquiry proceedings was ever served upon the petitioner. During hearing of the case, save and except an endorsement at the bottom of the Memorandum of charges dated 05.08.2015, the respondents could not produce any document to show service of charge sheet upon the petitioner. Respondents did not produce any document to

show that regular inquiry proceedings, ex-parte or otherwise were conducted in the charge sheet issued against the petitioner. The stand taken by the respondents during hearing of the case was that regular inquiry proceedings were not held against the petitioner since, he had not filed his defence to the charge sheet. Therefore, on the basis of already existing reports dated 22.04.2010 and 29.12.2012, impugned order was passed on 17.11.2018 terminating petitioner's services.

The inquiry report submitted by the Principal, GSSS Jarol, dated 22.04.2010 resulted in issuance of office order dated 04.06.2010, whereby, warning was issued to the petitioner not to repeat "such act" in future. Subsequently, a fact finding inquiry report was submitted by the Principal GSSS Jhungi on 29.12.2012. However, this fact finding inquiry report cannot be made sole basis for terminating services of the petitioner vide the impugned order dated 17.11.2018. Petitioner was a regular employee of the respondents. The respondent had issued a Memorandum of charges against the petitioner on 05.08.2015 under Rule 14 of CCS (CCA) Rules, 1965. A regular inquiry had to be held on the charges leveled against the petitioner in the charge sheet dated 05.08.2015. Though, no record has been produced before the Court to show that the charge sheet dated 05.08.2015 was actually served upon the petitioner, yet even assuming that this charge sheet was served upon the petitioner and he did not file his written defence to the same then also no document has been placed on record to show that any inquiry officer was appointed and if appointed, he conducted regular inquiry in the matter. In terms of Rule 14 (5)(b) of CCS (CCA) Rules, if no written statement of defence is submitted by the employee then the disciplinary authority may itself inquire

into the article of charge or may if it considers necessary to do so, appoint under Sub-rule(2) an inquiry authority for the purpose. Detailed further procedure for conduct of inquiry proceedings has been prescribed in the Rules. The allegations of the respondents are that the petitioner did not associate with the inquiry proceedings. However, the record produced by the respondents does not show that any regular inquiry was actually conducted against the petitioner by the respondents. It appears from the record that some departmental communications were exchanged by the respondents and other officials and on the basis of that, a show-cause noticewas issued to the petitioner on 31.10.2018. Subsequently, termination order was passed on 17.11.2018. It is, thus, evident that the respondents have given a complete go-by to the entire procedure contemplated under the CCS (CCA) Rules, 1965. The principles of natural justice have not been complied with. In such circumstances, the impugned order dated 17.11.2018 cannot be sustained.

4(v) Impugned order shows that it has been passed by respondent No.2 in exercise of powers under Rule 19(i) of CCS (CCA) Rules, 1965. As per Rule 19 of CCS (CCA) Rules, notwithstanding anything contained in Rule 14 to 18, where a penalty is imposed on a Government servant on the ground of conduct which had led to his conviction on a criminal charge or where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or where the President is satisfied that in the interest of security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, then the disciplinary authority may consider the

circumstances of the case and pass such orders thereon as it deems fit, provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under Clause (i). Rule 19 being relevant is extracted as under:-

> *"19. Special procedure in certain cases:-*
>
> *Notwithstanding anything contained in Rule 14to 18-*
>
> *(i) where a penalty is imposed on a Government servant on the ground of conduct which had led to his conviction on a criminal charge, or*
>
> *(ii) where the Disciplinary Authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or*
>
> *(iii) where the President is satisfied that in the interest of security of the State, it is not expedient to hold any inquiry in the manner provided in these rules.*
>
> *The Disciplinary Authority may consider the circumstances of the case and make such orders thereon as it deems fit:*
>
> *Provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under Clause (i):*
>
> *Provided further that the Commission shall be consulted, where such consultation is necessary, and the Government servant has been given an opportunity of representing against the advice of the Commission, before any orders are made in any case under this rule."*

Hon'ble High Apex Court in (2001) 3 SCC 414 titled Union of India Vs. Sunil Kumar Sarkar held that Rule 19 of CCS

(CCA) Rules provides a summary procedure for taking disciplinary action against a Government Servant who is already convicted in a criminal proceeding. The very foundation of imposition of punishment under Rule 19 is that there should be a prior conviction on a criminal charge.

Provisions of Rule 19(i) of CCS (CCA) Rules, are not at all applicable to the facts in hand. Impugned order dated 17.11.2018 passed in purported exercise of power under Rule 19(i) CCS(CCA) Rules, is , therefore, not sustainable.

No record other than that referred to in preceding paras was produced by the respondents during hearing of the case.

5. In **2020 (12) SCC 426, , titled as Dr. Vijayakumaran C.P.V.** Vs. **Central University of Kerala**, the Hon'ble Apex Court in somewhat similar circumstances held that the question whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement if ordered should invariably be left to be decided by the authority concerned according to law. Relevant para in this regard is as under:-

> *"11. A priori, we have no hesitation in concluding that the impugned termination order dated 30.11.2017 is illegal being ex-facie stigmatic as it has been issued without subjecting the appellant to a regular inquiry as per the service rules. On this conclusion, the appellant would stand reinstated, but whether he should be granted backwages and other benefits including placing him under suspension and proceeding against him by way of departmental or regular inquiry as per the service rules, is, in our opinion, a matter to be taken forward by the authority concerned in accordance with law. We do not intend to issue any direction in that regard keeping in mind the principle underlying the exposition of the*

Constitution Bench in Managing Director, ECIL, Hyderabad & Ors. vs. R. Karunakar & Ors.. In that case, the Court was called upon to decide as to what should be the incidental order to be passed by the Court in case after following necessary procedure, the Court/Tribunal was to set aside the order of punishment. The Court observed thus:-

> *"31. .....*
>
> *Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."*
>
> *(emphasis supplied)*

Following the principle underlying the above quoted exposition, we proceed to hold that even though the

impugned order of termination dated 30.11.2017 is set aside in terms of this judgment, as a result of which the appellant would stand reinstated, but at the same time, due to flawed approach of the respondent No.1-University, the entitlement to grant backwages is a matter which will be subject to the outcome of further action to be taken by the University as per the service rules and in accordance with law."

For all the foregoing reasons, the instant petition is allowed. The order dated 17.11.2018 is quashed and set-aside. Consequential action of petitioner's reinstatement shall follow. In the facts and circumstances of the case the questions of back wages, placing him under suspension etc. as per service rules are left to be decided by the concerned authority in accordance with law. The respondents shall, however, be at liberty to proceed against the petitioner in accordance with law by holding inquiry against him in accordance with the procedure laid down in the CCS(CCA) Rules, 1965, on the basis of Memorandum of charges dated 05.08.2005. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:-

1. MANISH SHARMA, S/O LATE SHRI OM PRAKASH SHARMA, R/O VPO PANJGAIN TEHSIL SADAR, DISTRICT BILASPUR, H.P. DEPARTMENT-SALES AS SALES MANAGER.
2. SUNIL KUMAR S/O LATE SHRI ANANT RAM R/O VILLAGE LALYAR, PO BAGWARA, TEHSIL TAUNI DEVI (BAMSAN), DISTRICT HAMIRPUR, H.P.

HOUSEKEEPING AS TR. SUPERVISOR.

3. ANIL KAUSHAL, S/O SHRI MANOHAR KAUSHAL, R/O VILLAGE PADHIARA, PO KOSHALA, TEHSIL JWALAMUKHI, DISTRICT KANGRA, H.P. FRONT OFFICE AS SR. G.S.A.
4. ISHAN THAKUR S/O HAJ THAKUR, R/O VILLAGE KARIAN, PO HARDASPURA, TEHSIL AND DISTRICT CHAMBA, H.P. DEPARTMENT-FNB PRODUCTION.
5. HARNAM SHARMA, S/O SHRI CHAMAN LAL R/O VILLAGE SARAH, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P. HOUSEKEEPING, SNR. GSA.
6. KULJESH KUMAR S/O LATE SHRI AMAR NATH, R/O VILLAGE SAKRI, PO REHAN, TEHSIL DHARAMSHALA, DISTRICT KANGRA, HP. ENGINEERING PLUMBER.
7. MADAN LAL SON OF SITA RAM RESIDENT OF VILLAGE BANORU, YOL CANTT., TEHSIL DHARAMSHALA, DISTRICT KANGRA, HP. ENGINEERING PLUMBER.
8. MANOJ KUMAR SON OF LATE SHRI PARTAP CHAND R/O ODER PO GAROH, TEH. DHARAMSHALA, DISTRICT KANGRA, HP. DEPARTMENT-ENGINEERING AS AN ELECTRICIAN.

…….PETITIONERS

(BY MR. ANUP RATTAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THOUUGH SECRETARY (DISASTER MANAGEMENT) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. SECRETARY (LABOUR & EMPLOYMENT) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. DEPUTY COMMISSIONER, KANGRA AT DHARAMSHALA, HIMACHAL PRADESH.
4. COMMISSIONER LABOUR AND EMPLOYMENNT, HIMACHAL PRADESH, SHIMLA.
5. H.P. CRICKET ASSOCIATION (HPCA), DHARAMSHALA, DISTRICT KANGRA, H.P.
6. HOTEL PAVILION BY H.P. CRICKET ASSOCIATION, (HPCA) THROUGH ITS MANAGER, DHARAMSHALA, DISTRICT KANGRA, H.P.

.....RESPONDENTS

(M/S ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS FOR RESPONDENTS NO. 1 TO 4;
MR. SUDHIR THAKUR, SENIOR ADVOCATE WITH MR. KARUN NEGI, ADVOCATE, FOR RESPONDENTS NO. 5 AND 6.)

CIVIL WRIT PETITION
No.230 of 2021
Reserved on:20.09.2021
Decided on:27.09.2021

Constitution of India, 1950 – Articles 14 and 226 – Grievance raised by the petitioners is that their services were arbitrarily terminated by the respondent without following the provisions of the Industrial Disputes Act – Held – The

issues primarily being disputed questions of fact and otherwise also covered under provisions of Industrial Disputes Act, cannot be adjudicated by way of writ petition and further the dispute of Private respondents cannot be decided by this court in exercise of its jurisdiction under Article 226 of Constitution of India. [Paras 16 & 17]

Cases referred:

Ficus Pax Private Ltd. and Others vs. Union of India and others, (2020) 4 SCC 810;

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

O R D E R

By way of this writ petition, the petitioners have prayed for the following reliefs:-

> *"(i) That the respondents No 5 and 6 be directed to reinstate the petitioner immediately as per their statement made before Labour Inspector as recorded in the order dated 25.9.2020.*
>
> *(ii) That termination of petitioner be declared illegal, null and void and respondents no. 5 and 6 be directed to engage the petitioner in service in a time bound manner.*
>
> *(iii) That the respondents No. 5 and 6 may kindly be directed to pay salary to the petitioners from April, 2020 till the date of their engagement.*
>
> *(iv) That the respondents No. 1 to 4 be directed to compassionate the petitioners for the loss suffered by them and also provide rehabilitation package to the petitioners.*
>
> *(v) That the order dated 13.11.2020 (Annexure P-6) directing the petitioners to approach HMIC may kindly be*

declared illegal and the same may be quashed to such extent in the interest of justice and fair play.

(vi) that the respondents may kindly be burdened with costs.

(vii) that the entire record of the case may kindly be summoned.

Or

Such other orders which this Hon'ble Court deems fit and proper in the facts and circumstances of the case may kindly be passed in favour of the petitioners and against the respondents."

2. The case of the petitioners is that they were serving with respondents No. 5 and 6 and said respondents disengaged and dispensed with their services at such a time when the petitioners were in dire need of employment. The details of the petitioners, with regard to their engagement with the respondents, as mentioned in the petition, is as under:-

Petitioner Sunil Kumar was engaged as Tr. Supervisor in Housekeeping, joined 1st August, 2016 and laid off on 28.08.2020;

Petitioner Anil Kaushal was engaged as Sr. GSA in Front Officer, joined on 1st December, 2016, laid off on 28.08.2020;

Petitioner Ishan Thakur was engaged in fnb production, joined on 12.03.2020, laid off on 28.08.2020;

Petitioner Harnam Sharma was engaged as Sr. GSA in Housekeeping department, joined on 01.07.2017;

Petitioner Manoj Kumar was engaged Electrician, joined on 01.01.2011, laid off on 22.09.2020,

Maneesh Sharma was engaged as Sales & Sales Manager, joined on 01.10.2018, laid off on 28.08.2020,
Petitioner Madan Lal was engaged as Plumber, joined 2.03.2011, laid off on 18.09.2020;
Petitioner Manohar Lal was engaged as a SYP Technician, joined on 01.11.2019, laid off on 02.09.2020;
Petitioner Kuljesh Kumar joined on 04.07.2016 and laid off on 01.09.2020.

3. According to the petitioners, the Hotel in issue (respondent No. 6), in which they were serving, is being run by respondent No. 5, which is an affiliated body of the Board of Cricket Control of India. During the lockdown, that was imposed on account of COVID-19 pandemic, a Notification was issued, i.e. Notification dated 24th March, 2020 (Annexure P-1), which was subsequently withdrawn by the Central Government. The Hotel Industry was unlocked in August, 2020, and since then, respondent No. 6 (Hotel) is functioning, and since September, 2020, all activities are going on in the State of Himachal Pradesh, including activities in Hotel industry. The contention of the petitioners is that they were terminated by respondents No. 5 and 6 in August, 2020, when Hotel Industry had re-started its operations. This termination was done by arbitrarily pressurizing the petitioners as well as by adopting exploitive tactics by respondents No. 5 and 6. Petitioners made various representations to the respondents to allow them to serve. Respondents did not following the principle of last come first go and they also violated the provisions of the Industrial Disputes Act. Their requests fell upon deaf ears. Petitioners were not paid salary for the months of April and May, 2020, though, they remained on the rolls of the Hotel till August, 2020.

4. It is further the contention of the petitioners that after the termination of their services, they raised an industrial dispute and the Labour Officer called upon them and the respondents for conciliation. These

proceedings were closed by the Labour Inspector with the direction that the petitioners and other employees may file an appropriate case before the Judicial Magistrate First Class. According to the petitioners, the Labour Inspector, rather than referring the matter to the Labour Court for taking recourse under Disaster Management Act, directed the petitioners to approach the Court of Judicial Magistrate First Class. The petitioners thereafter got a legal notice issued to the respondents in terms of the orders passed by Hon'ble Supreme Court of India in **Ficus Pax Private Ltd. and Others vs. Union of India and others**, (2020) 4 SCC 810, dated 12.06.2020 and called upon them to re-engage their services A copy of the order passed by Hon'ble Supreme Court of India is appended with the petition as Annexure P-7. Copy of legal notice is appended with the petition as Annexure P-8. Copy of the order passed by Labour Inspector, vide which, the petitioners were called upon to approach Judicial Magistrate First Class, dated 13.11.2020, is appended with the petition as Annexure P-6. According to the petitioners, act of the respondents of not re-engaging their services is highly arbitrary, unjust and discriminatory, and in this background, the petition stands filed with the prayers already enumerated hereinabove.

5. Respondents No. 1 and 3 have taken the stand in the response filed by them that as no fundamental right of the petitioners has been violated, therefore, the writ petition is not maintainable. They have further taken the stand that they have acted under the provisions of Disaster Management Act to safeguard the source of livelihood of the people during COVID-19 pandemic, and as far as the petitioners are concerned, no representation was received from the petitioners by them with regard to the grievance mentioned in the petition.

6. In the reply filed by respondents No. 2 and 4, the stand of the said respondents is that after the receipt of the complaint, endeavour was made to have the matter reconciled but as reconciliation failed, the petitioners

were directed by the Labour Inspector to raise demand notice under Section 2-A of the Industrial Disputes Act, however, this was not done by them and the petitioners approached the this Court by way of this writ petition.

7. Respondents No. 5 and 6 in their reply have taken the stand that it was incorrect that Hotel Industry was unlocked in August, 2020, or since then, respondent No. 5 was functioning. They have denied the claim of the petitioners that Hotel activities were going on in the State of Himachal Pradesh since August, 2020. According to these respondents, the services of the petitioners were not terminated but rather laid off and salary was paid to them till the month of August, 2020 alongwith one month's advance salary in lieu of notice, as was also evident from notices issued to the petitioners, which stand appended with the reply of said respondents as Annexure R-1 (colly.) Said respondents further took the stand that the petitioner No. 6 Harnam Singh submitted his resignation vide Annexure R-2 and when Labour Inspector, Dharamshala, was seized of the matter, the petitioners were directed to raise a Demand Notice under Section 2-A of the Industrial Disputes Act and to appear before him on 19.01.2020, but rather than doing so, they filed present writ petition. As per said respondents, the allegations made against them are incorrect, as they have not acted in any illegal and unconstitutional manner, as alleged by the petitioners.

8. By way of rejoinder filed to the reply filed by respondents No. 5 and 6, the petitioners have reiterated their stand.

9. During the course of hearing of this petition, this Court had directed the petitioners to place on record their appointment letters, and in response thereto, vide CMP No. 9366 of 2021, appointment letters of some of the petitioners were placed on record.

10. Mr. Anup Rattan, learned Counsel for the petitioners has argued that the petitioners are entitled to the reliefs in terms of the order of Hon'ble Supreme Court passed in **Ficus Pax Private Ltd. and Others vs. Union of**

India and others, (2020) 4 SCC 810, dated 12.06.2020. According to him, the petitioners are squarely covered by this order, and therefore, this writ petition be allowed by directing the respondents to comply with the directions issued therein by the Hon'ble Supreme Court. In fact, during the course of arguments, no other point was urged by learned Counsel for the petitioners, as he, by relying upon paras 27, 29, 34 and 37 of the order passed by Hon'ble Supreme Court (supra), prayed that the directions so passed by the Apex Court be implemented qua the petitioners also.

11. On the other hand, learned Additional Advocate General has argued that the petition was not maintainable against the State as no relief was being prayed against them, whereas learned Senior Counsel appearing for respondents No. 5 and 6 has strenuously argued that the writ petition was not maintainable and the petitioners were not covered by the order passed by Hon'ble Supreme Court.

12. I have heard learned Counsel appearing for the parties and also gone through the pleadings, including the order passed by Hon'ble Supreme Court of India referred to above, which has been heavily relied upon by the petitioners.

13. If one carefully goes through the pleadings, same demonstrates that as per the petitioners, the cause of action accrued in their favour in the month of August, 2020, when allegedly their services were "terminated" by respondents No. 5 and 6 illegally. When one peruses the order passed by the Hon'ble Supreme Court (supra), perusal thereof demonstrates that the Hon'ble Supreme Court therein was seized with the challenge, which stood made by the appellants before the Hon'ble Supreme Court of India, to the D.O. dated 20.03.2020, issued by the Secretary, Government of India, Ministry of Labour and Employment and Order dated 29.03.2020 issued by Government of India, Ministry of Home Affairs, in exercise of powers vested under Section 10(2)(I) of the Disaster Management Act, 2005. The prayers, which were made in the

matters before it, stand quoted by Hon'ble Supreme Court in its order. Now a perusal of para-21 of the said order demonstrates that Order dated 29.03.2020 passed in exercise of power under Section 10(2)(I) of the Disaster Management Act, 2005, stood withdrawn by subsequent Order dated 17.05.2020 w.e.f. 18.05.2020. Hon'ble Supreme Court held that the consequence of subsequent Order dated 17.05.2020 was that the obligation cast upon the employer to make payment of wages of their workers at their workplace, without any reduction, for the period their establishments are under closure during the lockdown is no longer in operation, however, the issue regarding obligation of the employer, as per Order dated 29.03.2020, when it remained in force, is still to be answered. Thereafter, in para 34 of the order, Hon'ble Supreme Court was pleased to hold as under:-

> *"34. As noted above, all industries/establishments are of different nature and of different capacity, including financial capacity. Some of the industries and establishments may bear the financial burden of payment of wages or substantial wages during the lockdown period to its workers and employees. Some of them may not be able to bear the entire burden. A balance has to be struck between these two competitive claims. The workers and employees although were ready to work but due to closure of industries could not work and suffered. For smooth running of industries with the participation of the workforce, it is essential that a via media be found out. The obligatory orders having been issued on 29.03.2020 which has been withdrawn w.e.f. 18.05.2020, in between there has been only 50 days during which period, the statutory obligation was imposed. Thus, the wages of workers and employees which were required to*

be paid as per the order dated 29.03.2020 and other consequential notification was during these 50 days."

14. In this background, the directions, which were issued by Hon'ble Supreme Court are contained in para 37, which read as under:-

"37. We thus direct following interim measures which can be availed by all the private establishment, industries, factories and workers Trade Unions/ Employees Associations etc. which may be facilitated by the State Authorities: -

i) The private establishment, industries, employers who are willing to enter into negotiation and settlement with the workers/employees regarding payment of wages for 50 days or for any other period as applicable in any particular State during which their industrial establishment was closed down due to lockdown, may initiate a process of negotiation with their employees organization and enter into a settlement with them and if they are unable to settle by themselves submit a request to concerned labour authorities who are entrusted with the obligation under the different statute to conciliate the dispute between the parties who on receiving such request, may call the concerned Employees Trade Union/workers Association/ workers to appear on a date for negotiation, conciliation and settlement. In event a settlement is arrived at, that may be acted upon by the employers and workers irrespective of the order dated 29.03.2020 issued by the Government of India, Ministry of Home Affairs.

ii) Those employers' establishments, industries, factories which were working during the lockdown period although not to their capacity can also take steps as indicated in direction No.(i).

iii) The private establishments, industries, factories shall permit the workers/employees to work in their establishment who are willing to work which may be without prejudice to rights of the workers/employees regarding unpaid wages of above 50 days. The private establishments, factories who proceed to take steps as per directions (i) and (ii) shall publicise and communicate about their such steps to workers and employees for their response/participation. The settlement, if any, as indicated above shall be without prejudice to the rights of employers and employees which is pending adjudication in these writ petitions.

iv) The Central Government, all the States/UTs through their Ministry of Labour shall circulate and publicise this order for the benefit of all private establishment, employers, factories and workers/ employees."

15. Thus, it is evident from the order of the Hon'ble Supreme Court that the directions, which have been passed therein are relatable to those 50 days when the Notification which stood impugned before the Hon'ble Supreme Court was in force. This period when the obligatory Orders were in force, is from 29.03.2020 to 18.05.2020. However, when one peruses the pleadings made in the petition, the grievance of the petitioners is not relatable to this particular period, which stands mentioned in the order passed by Hon'ble

Supreme Court of India as the contention of the petitioners expressly is that they are primarily aggrieved by termination of their services by respondents No. 5 and 6, which, as per the petitioners, was done on 28.08.2020. In other words, the cause of action, on the basis of which, this writ petition has been filed, is post the period contemplated in the order passed by Hon'ble Supreme Court referred to above, relied upon by the petitioners. In fact, in this background, when one peruses the documents appended by the petitioners, the first complaint appended therewith addressed to the authorities is dated 24.09.2020, i.e. post 18.05.2020 when the Notification stood rescinded. It is on the basis of this complaint that Labour Inspector undertook the reconciliation proceedings.

16. This Court is of the considered view that the case of the petitioners is not covered by the order passed by Hon'ble Supreme Court, upon which much reliance has been placed by them. As the allegation of the petitioners is that their services have been arbitrarily terminated without following the provisions of the Industrial Disputes Act and the stand of the private respondents is that services of the petitioners were laid off on account of the reasons specified in the reply, this court is of the considered view that these issues primarily being disputed questions of fact and otherwise also covered under the provisions of Industrial Disputes Act, cannot be adjudicated by way of this writ petition. The order of the Hon'ble Supreme Court being relied upon by the petitioners is dated 12.06.2020, yet, in the Annexure P-2, there is neither any reference of it nor it can be inferred from the said Annexure that the grievance being raised by the petitioners was akin to the one with the Hon'ble Supreme Court was seized of.

17. At the cost of repetition, this Court is stating that the grievance raised vide Annexure P-2 by the petitioners was that their services were arbitrarily terminated on 28.08.2020 by the employer. Therefore, in view of discussion held hereinabove, this Court is of the considered view that as the

petitioners are not covered by the order passed by Hon'ble Supreme Court, being relied upon by them, and further as the issue of their alleged termination by the private respondents cannot be decided by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, this writ petition, is devoid of merit. Accordingly the same is dismissed. No order as to costs. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

DISHA KUMARI, DAUGHTER OF SH. PARAS RAM, RESIDENT OF VILLAGE CHHANI, P.O. PUKHRI, TEHSIL AND DISTRICT CHAMBA, H.P.

…….PETITIONER

(BY MR. KUL BHUSHAN KHAJURIA, ADVOCATE)

AND

1. THE STATE OF HP THROUGH PRINCIPAL SECRETARY (EDUCATION), GOVERNMENT OF HP, SHIMLA-02.
2. The DIRECTOR OF ELEMENTARY EDUCATION, GOVERNMENT OF HP, SHIMLA-01.
3. THE DEPUTY DIRECTOR OF ELEMENTARY EDUCATION, CHAMBA, DISTRICT CHAMBA, H.P.
4. THE HEADMASTER, GHS SHAKTI DEHRA, DISTRICT CHAMBA, H.P.

…….RESPONDENTS

(MR. ASHOK SHARMA, ADVOCATE GENERAL WITH M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 1673 of 2020
Decided on: 16.11.2021

Constitution of India, 1950 – Article 226 –Petitioner aggrieved by the order passed by the authority concerned whereby she was warned – Held – If the disciplinary authority was not satisfied with the response of the petitioner to the show cause notice then also before warning the petitioner some sort of inquiry should have been ordered by the authority and after inquiry reasoned order should have been passed by the authority against the petitioner – Petition allowed. [Para 10]

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

O R D E R

There is a very short controversy involved in this petition. The petitioner is serving as a Trained Graduate Teacher (Arts) at Government High School, Shakti Dehra, District Chamba, H.P. A show cause notice dated 20.12.2019 (Annexure P-1) was issued to the petitioner by the Director Elementary Education, Himachal Pradesh, wherein it was alleged that the petitioner was habitual late comer to the school and had not mended her ways despite being warned by the Headmaster of the school. Therefore, she was issued a show cause notice by the Director Elementary Education for providing her an opportunity with regard to her defence, within three days from the receipt of said show cause notice, as to why disciplinary action be not initiated against her under the relevant rules for the above stated misconduct.

2. The petitioner submitted her reply to the same, copy whereof is appended with the petition as Annexure P-2, in which, she categorically refuted the allegations leveled against her and also contended that she has always been respectful to her seniors and had obeyed all orders of the seniors and the factum of her allegedly coming to school late could be well judged by installing a Biometric Machine in the school, so that truth may be ascertained. It was further mentioned in the reply that she used to arrive at school well in time and she left the school after school hours only. There was no complaint against her work, and in case, there was any, then, copy thereof be supplied to her so that she could mend her way in future.

3. After submission of response to the show cause notice by the petitioner, without providing her copies of alleged complaints made against her or even providing any opportunity of being heard to the petitioner, vide Annexure P-3, the Director Elementary Education, has passed the impugned order which reads as under:-

> *"Whereas it has been brought to the notice of undersigned by the Deputy Director of Elementary Education, Chamba, Distt. Chamba that Ms. Disha Kumari, TGT (Arts) posted in Govt. High School Shakti Dehra, Distt. Chamba, is habitual of late coming and her behavious is also not up to the mark.*
>
> *And whereas, the said Ms. Disha Kumari TGT (Arts) had been served upon with a show cause notice vide memorandum issued to her on 20.12.2020 for the above said lapse affording her an opportunity to submit her reply to the show cause notice within three days.*
>
> *And whereas, reply to the show cause notice submitted by Ms. Disha Kumari TGT (Arts) on dated 13.1.2020 has not been found satisfactory. Above mentioned lapse records sheer negligence on part of Ms. Disha Kumari TGT (Arts) warranting*

disciplinary action against her under relevant rules. However, taking lenient view, Ms. Disha Kumari TGT (Arts) is hereby warned to be punctual and not to repeat such misconduct in future. Any lapse would be viewed seriously and strict disciplinary action as deemed fit, shall be taken under relevant rules."

4. Feeling aggrieved, the petitioner has filed the present petition against the order of the Director Elementary Education.

5. Mr. K. B. Khajuria, learned Counsel for the petitioner, has argued that the impugned order has been passed by the authority concerned without any due application of mind, which is evident from the fact that the same, besides being a non-speaking order, also does not contains any reasoning as to why warning was issued to the petitioner in the first place, which warning was ordered to be recorded in the service book of the petitioner. He submits that the impugned order has civil consequences as far as the petitioner is concerned and it is settled law that no order, which has civil consequences, can be passed at the back of a person. He has further argued that the impugned order is a sham order for the reason that alongwith it, neither any complaint, purportedly made against the petitioner, was supplied to her nor any document was made available to her, on the strength of which, it could be stated or held by the department that she was a habitual late comer to the school as alleged. Accordingly, learned Counsel for the petitioner has prayed that as the impugned order has been passed without any due application of mind and without strictly adhering to the principles of natural justice, the petition be allowed and impugned order be quashed and set aside.

6. Mr. Adarsh Sharma, learned Additional Advocate General while defending the impugned action, has argued that it was on the basis of complaints received against the petitioner, copy whereof stands appended with the reply, that a show cause notice was issued to her, and further even by way

of order, which stands impugned, no strict action has been taken against the petitioner and she only has been warned to mend her ways. He submits that the impugned order calls for no intervention or interference for the reason that the Authority has been extremely lenient to the petitioner and she has been let off without being charged with any strict disciplinary action against her even though allegations against her were serious.

7. Learned Counsel for the petitioner in rebuttal submits that the documents appended with the reply, upon which, reliance has been placed by learned Additional Advocate General, were, in fact, never supplied to the petitioner, and accordingly, he submits that the petition be allowed.

8. I have heard learned Counsel for the parties and gone through the pleadings as well as documents appended therewith.

9. It is not in dispute that the impugned order has been passed by the authority concerned on the basis of show cause notice Annexure P-1 and response made to the same by the petitioner Annexure P-2. During the course of arguments, it could not be demonstrated before the Court that any complaint etc. purportedly made against the petitioner to the effect that she was a habitual later comer to the school, was ever handed over or communicated to the petitioner so that she could have responded to the same. Not only this, the impugned order makes for an interesting reading. After recording the factum of issuance of the show cause notice and the factum of response having been filed thereto by the petitioner, all that the authority states is that as the reply to the show cause notice has not been found to be satisfactory, therefore, this lapse amounts to sheer negligence on the part of the petitioner and warrants disciplinary action.

10. This Court is of the considered view that the conclusion so arrived at by the authority herein sans any reason. It is well settled law that when an authority, may be on the administrative side, passes an order which has civil consequences, then, the same not only has to be passed by adhering

to the principles of natural justice but the same has to be a reasoned and speaking order. In this case, the authority i.e. the disciplinary authority, issued a show cause notice to the petitioner as to why disciplinary proceedings be not initiated against her. Service jurisprudence demands that wherever a show cause notice is issued to an incumbent, calling upon him/her to submit his or her response to the contents mentioned in the show cause notice, then, the annexures or the documents, on the basis of which the show cause notice has been issued, necessarily have to be supplied to the party concerned, so that it can refer to the same and rebut the same in response to be filed. In this case, except bald allegations made in the show cause notice that the petitioner was habitual late comer to the school, no material was appended with the show cause notice to substantiate this fact. In these circumstances, but natural, the only option available with the petitioner was to deny such bald allegations, which was done and rightly so by the petitioner. Now, if the disciplinary authority was not satisfied with this response and if it intended to warn the petitioner, then also, because this warning has been entered in the service record of the petitioner and would have been a blot on the career of petitioner, the minimum requirement of law was that some sort of inquiry should have been ordered in the issue by the authority and after affording an opportunity to the petitioner of putting forth her case, a reasoned and speaking order should have been passed by the authority against the petitioner, may be limiting itself to just warning the petitioner not to repeat such acts in future. The Court is making this observation for the reason that the very fact that a warning has been issued by the disciplinary authority to the incumbent demonstrates the fact that the disciplinary authority has come to the conclusion that the petitioner is guilty of a misconduct. This, but natural, will remain as a blot on the service career of the petitioner and the same could not have been done by the authority concerned without holding an inquiry.

11. Accordingly, in view of reasoning assigned hereinabove, this petition is allowed and impugned order dated 13.03.2020 (Annexure P-3) is quashed and set aside but with liberty to the disciplinary authority that in case it intends to take the show cause notice issued by it to its logical conclusion, then, an inquiry of some essence, be ordered in the same and after giving the petitioner reasonable opportunity of being heard by providing her the documents, including the complaints etc, which stand filed against her, appropriate decision be taken in the matter by the Authority as per Rules.

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

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

Between:-

GIAN CHAND SON OF SH. CHUHARI RAM, AGED ABOUT 52 YEARS, RESIDENT OF VILLAGE BHATER, POST OFFICE TAUR JAJJJAR, TEHSIL SARKAGHAT, DISTT. MANDI, H.P. WORKING AS HDM (ELECT) IN THE OFFICE OF SUPERINTENDEING ENGINEER (DESIGN) ELECTRICAL SYSTEM HPSEBL HAMIRPUR, H.P.

…….PETITIONER

(BY MR. KUL BHUSHAN KHAJURIA, ADVOCATE)

AND

1. HPSEB LTD THROUGH EXECUTIVE DIRECTOR, HPSEBL, VIDYUT BHAWAN, SHIMLA-4.
2. THE SUPERINTENDING ENGINEER, (DESIGN) ELECTRICAL SYSTEM HPSEBL HAMIRPUR, H .P.

……..RESPONDENTS

(MR. TARA SINGH CHAUHAN, ADVOCATE)

CIVIL WRIT PETITION
No. 3273 of 2021
Reserved on :09.09.2021
Decided on: 18.11.2021

Constitution of India, 1950 – Articles 14, 16 and 226 – Petitioner aggrieved by the order of his transfer dated 7.6.2021 to the office of Senior Executive Engineer, Electricity Division, HPSEBL, Dharampur from the office of Superintending Engineer Design Electrical System HPSEBL, Hamirpur (H.P.), which distance is more than 70 kilometres and the petitioner has been transferred without TTA/JT from his present place of posting – Held – The impugned transfer order has been passed without any independent application of min, in arbitrary manner and the same is the result of the colourable exercise of power and not on account of administrative exigency or public interest – Petition allowed. [Para 7]

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 his transfer effected vide office order (Annexure P-1), dated 07.06.2021, to the office of Senior Executive Engineer, Electricity Division, HPSEBL, Dharmapur, from his present place of working, i.e. the office of the Superintending Engineer (Design), Electrical System HPSEBL, Hamirpur, H.P.

2. Brief facts necessary for the adjudication of the present petitioner are that the petitioner is serving as a Head Draughtsman (Elect.) with respondent No. 1. He is stated to have joined the respondent-Board in the year 2002 as a Draughtsman, and in his said capacity, he is stated to have served at various places like Shimla, Una, Kaza, Ghumarwin and Hamirpur. He is further stated to have served as HDM in the office of respondent No. 3 at Hamirpur, which place he joined in the year 2018. His grievance is with regard

to his transfer to the office of Senior Executive Engineer (Elect.) Division, HPSEBL, Dharampur, against vacant post vide Annexure P-1, which transfer, as per the petitioner, has been ordered just to harass him. Accordingly, a prayer has been made for quashing of the said transfer order *inter alia* on the ground that the same has been issued, on the basis of recommendations of the local MLA which demonstrated that the transfer order is not on account of administrative exigency.

3. Reply to the petition stands filed, in which, the stand of the respondent-Board is that a note was received with regard to transfer of the petitioner in the office of Hon'ble the Chief Minister and based upon approval of the Hon'ble Chief Minister, the petitioner was transferred vide the order, which has been assailed by way of this petition.

4. During the course of hearing of this case, this Court had directed the respondent-Board to produce the record pertaining to the transfer of the petitioner. The record demonstrated that Minister (JS/Revenue/Horticulture/SWD, vide his note dated 20.04.2021, which was referred to Hon'ble the Chief Minister, requested the approval of transfer of the petitioner to the office of HPSEBL Electricity Division, Dharmapur, District Mandi, against vacant post in *condonation* of short stay in relaxation of ban on transfer. Based upon the same, Joint Secretary to the Hon'ble Chief Minister, wrote to the Executive Director of the respondent-Board vide communication dated 23.05.2021, that the petitioner be transferred in *condonation* of short stay and without TTA/JT from his present place of posting to Electricity Division, HPSEBL, Dharampur, District Mandi, H.P. against vacant post in relaxation of ban on transfer as approved by Hon'ble the Chief Minister. This led to passing of impugned transfer order.

5. This Court is of the considered view that where an incumbent/ employee is to be posted is the prerogative of the employer, however, this prerogative has to be exercised in a prudent and rationale manner by the

employer. Though it is well settled that transfer is an incidence of service, however, transfer cannot be used as a tool to harass an employee.

6. In this case, on the asking of a Minister, who happens to be Member of State Legislative Assembly from Dharampur constituency, District Mandi, H.P., the petitioner has been transferred vide impugned order. The distance of said two stations of transfer is more than 70 kilometres, yet, the petitioner has been ordered to be transferred without TTA and joining time. Such orders are passed only if an incumbent is transferred on his request, and in this case, the petitioner has not sought his transfer.

7. The reasons, which entail transfer, primarily are exigency of service and public interest. In this case, had the intent of the Minister, on whose behalf, the petitioner has been transferred, been bonafide, then, as per this Court, he should have had called upon the Board or the Hon'ble Chief Minister to ensure that the post of HDM at Dharampur Electrical Division was filled up, as expeditiously as possible. Why the transfer of the petitioner particularly was requested is beyond the comprehension of the Court. This is more so when the department/Board, of which, the petitioner is an employee, was not with the Minister concerned. Besides this, in this case, the impugned transfer order has been passed by the respondent-Board, without any independent application of mind, simply on the basis of a communication received from the office of Hon'ble Chief Minister. This Court is alive to the situation that during the period, when the impugned transfer order was passed, there was ban on transfers and as per the transfer policy of the State, a transfer can be effected during this period only upon the approval of Hon'ble Chief Minister. However, this does not means that the transfer has to be initiated from the office of Worthy Chief Minister, on the asking of his Minister, that too pertaining to a department, which was not with the Minister concerned. The condition of the transfer policy that, during the period of ban on transfers, the transfer has to be approved by Hon'ble Chief Minister,

implies that the transfer has to be mooted by the department concerned, be it on administrative exigency or in public interest, but the same cannot be given effect to without the approval of Hon'ble Chief Minister. Be that as it may, as this Court is satisfied that in the present case, the impugned transfer order has been passed by the respondent-Board, in an arbitrary manner and the same is a result of colourable exercise of power and not on account of administrative exigency or in public interest, this petition is allowed by quashing impugned order of transfer dated 07.06.2021 (Annexure P-1).

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

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

Between:-

KAMAL DEV, S/O SH. DURGA DASS, RESIDENT OF VILLAGE & POST OFFICE KHAGAL, TEHSIL & DISTRICT HAMIRPUR, HIMACHAL PRADESH.

…….PETITIONER

(BY MR. SURENDER SHARMA, ADVOCATE)

AND

1. HIMACHAL PRADESH STATE ELECTRICITY BOARD LIMITED, THROUGH ITS EXECUTIVE DIRECTOR (PERSONNEL), VIDYUT BHAWAN, SHIMLA-4.
2. THE ACCOUNTS OFFICER (P/G), F&a WING HPSEB LIMITED, VIDYUT BHAWAN, SHIMLA-4.
3. THE CHIEF ENGINEER, (GEN.), HPSEB LIMITED, SUNDERNAGAR,

DISTRICT MANDI, HIMACHAL PRADESH.

…….RESPONDENTS

(MR. LAKSHAY THAKUR, ADVOCATE)

CIVIL WRIT PETITION
No.3479 OF 2020
Decided on: 25.11.2021

Constitution of India, 1950 – Article 226 –Retiral benefits of the petitioner i.e. Leave Encashment and gratuity withheld despite of the fact the petitioner superannuated from the service – Held – Wrong fixation of the pay by the respondent board was on account of mistake of the respondent department – As such , recovery cannot be affected from the petitioner who is a retired employee in view of law laid down by the Hon'ble Supreme Court in Rafiq Masih's case – Petition allowed [Paras 7 & 8]

Cases referred:

State of Punjab and Others vs Rafiq Masih (White Washer) and others, (2015) 4 SCC 334;

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

O R D E R

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

> *"I. That the respondents may kindly be directed to release/disburse the retiral benefits of the petitioner, i.e. Leave Encashment and Gratuity, within a period of one month;*
> *III. That the respondent may kindly be directed to pay the statutory interest on delayed payment of Gratuity and also to pay interest @ 9% per annum on delayed payment of Leave Encashment w.e.f. 30th April, 2018 till the date of its realization;"*

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

According to the petitioner, he was enrolled in Indian Navy on 25.06.1979. While in service, he was awarded a Bachelor of Engineering equivalent Degree by Indian Navy in the year 1989. He was discharged from Indian Navy after rendering approved military service of 17 years 05 months and 05 days on 30.11.1996. He was appointed as Junior Engineer (E&C) on batch wise basis against a post reserved for Ex-servicemen, which post, he joined on 01.11.2008. Pay of the petitioner was fixed in the pay scale of `10,900-34800+4500(GP), after granting him benefit of approved military service of 15 years on 15.11.2011. This pay of the petitioner was again re-fixed in the pay band of `10900-34800+4500(GP) after granting him benefit of approved military service of 17 years on 15.03.2013.

3. The petitioner thereafter superannuated from service on 30.04.2018 but after his superannuation, no retiral benefits have been released in his favour, and as a result thereof, his gratuity and leave encashment remain unpaid. It is in this background that the petitioner is praying for the reliefs, already enumerated hereinabove.

4. The petition is resisted by the respondent-Board *inter alia* on the ground that the pay of the peytitoner was erroneously fixed in the year 2013, by taking into consideration the entire active military service rendered by him, which was done by ignoring the fact that the petitioner could have been given the benefit of military service for the purpose of pay fixation only from the date he acquired requisite qualification to hold the post, to which he was appointed in his capacity as an Ex-serviceman.

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

6. During the course of arguments, Mr. Lakshay Thakur, learned Counsel for the respondents-Board, has drawn the attention of this Court to Annexure R-7, appended with the reply, which is a copy of office order dated 15.11.2020 and on the strength of the same, he submits that the contents

thereof clearly demonstrate as to how the pay of the petitioner was erroneously fixed by giving him the benefit of active military service for a period of 17 years, because the benefit could have been given to him from the date when he acquired minimum eligibility qualification required for the post in issue.Therefore, the reason, as to why retiral benefits of the petitioner have been withheld, is that certain recoveries are to be effected from the petitioner and after effecting those recoveries, what is due and admissible, shall be paid to the petitioner.

7. Mr. Surender Sharma, learned Counsel for the petitioner, while placing reliance on the judgment passed by Hon'ble Supreme Court of India in **State of Punjab and Others** vs **Rafiq Masih (White Washer) and others**, *(2015) 4 Supreme Court Cases 334*, submits that as no recovery was effected from the petitioner when he was in service, therefore, now the department is estopped from effecting any recovery, in view of law laid down by Hon'ble Supreme Court of India in abovementioned case.

8. It is not much in dispute that the wrong fixation of the pay by the respondent-Board was on account of the mistake of the respondent-department by counting that period of active military service also, during which period, he was not possessing the qualification for being appointed against the post of Junior Engineer. But, fact of the matter remains that there is nothing on record from which it can be inferred that, on account of any overt act of the petitioner this was done by the department. Thus, mistake, in this regard, was committed at the level of respondent-Board itself, and since the year 2013 up to the year 2018, when the petitioner superannuated from service, there was enough time available with the respondent-Board to rectify its mistake, which it did not. It is not in dispute that no steps were taken by the employer to effect recovery of excess payment made to the petitioner while he was in service in accordance with law. In these circumstances, this Court is of the considered view that no recovery can be effected from the petitioner in

view of law laid down by Hon'ble Supreme Court of India in Rafiq Masih's case supra, wherein Hon'ble Supreme Court has been pleased to hold that recovery would be impermissible in law, *inter alia* from the retired employees.

9. In view of law laid down by Hon'ble Supreme Court of India and findings returned hereinabove, this petition is disposed of with the direction that due and admissible retiral benefits be released in favour of the petitioner, as expeditiously as possible, by further holding that Annexure R-7 shall not come in the way of the respondents in paying said dues to the petitioner. It is further held that as withholding of the dues by the respondents-Board was a bonafide act, therefore, in case, due and admissible retiral benefits, are paid to the petitioner within a period of three months from today, then, the respondent-Board will not be liable to pay interest to the petitioner, however, in case, said dues are not paid within the period of three months as from the date of passing of this judgment, then, the same shall entail simple interest at the rate of 6% per annum from the date of passing of this judgment.

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

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

Between:-

SMT. LALITA THAKUR W/O SURINDER THAKUR, R/O VILLAGE AND P.O. THEOF, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

.....PETITIONER

(BY MR. V.D. KHIDTTA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH UITS SECRETARY (FOREST) TO THE GOVERNMENT OF H.P. SHIMLA-02

2. THE PRINCIPAL CHIEF CONSERVATOR OF FOREST TALLAND, SHIMLA-02.
3. THE ACCOUNTANT GENERAL (A & E) HIMACHAL PRADESH SHIMLA-3.

.....RESPONDENTS

(MR. ASHOK SHARMA, ADVOCATE GENERAL WITH M/S ADARSH SHARMA, SURESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS AND MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL FOR R-1 AND 2;
MR. TARA CHAND CHAUHAN, ADVOCATE FOR R-3)

CIVIL WRIT PETITION
No. 3513 OF 2021
Decided on: 24.11.2021

Constitution of India, 1950 – Article 226 –The retired benefits of the petitioner alongwith pension not paid – Held – when work status conferred upon the petitioner subject to the vacancy of clerk available in the Forest department she had a right to be regularized against the valid post with effect from the said date – Held – The period spent by the petitioner on work charge basis was liable to be counted for purpose of counting the qualifying service of petitioner for clause – Act by respondent of denial of pension to the petitioner by not counting the period of service rendered by her as work charge employee is bad in the eyes of law – Petition allowed. [Paras 9 & 10]

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

O R D E R

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

> *"(i) That the impugned order dated 07.09.2021 (Annexure P-14) passed by respondent No. 2 may kindly be quashed and set aside and the respondents may kindly be directed to*

consider, decide and pay all retiral benefits including pension with interest till date."

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

Petitioner herein was engaged on daily wage basis as a Typist/Clerk in the office of Divisional Forest Officer, Theog, District Shimla, H.P. w.e.f. 17th December, 1992. Her services were regularized as a Clerk w.e.f. 13.04.2007. For the purpose of conferment of work charge status upon her after completion of requisite number of years in terms of the Policy of the State Government, the petitioner approached this Court by way of CWP(T) No. 3930 of 2010. In compliance to the judgment passed by the Court in the said petition preferred by the petitioner, she was conferred work charge status w.e.f. 17.12.2002. She continued to serve the department as a Clerk till her superannuation on 30.06.2020. The grievance of the petitioner is about denial of pension to her. As per her, denial of pension by the State is an arbitrary act as she is entitled for grant of pension on the strength of the services rendered by her with the department by counting the period spent by her with the department on work charge basis as well as on regular basis. In other words, according to the petitioner, the period spent by her in service of the respondent-department since 17.12.2002 has to be considered and taken into account for the purpose of eligibility and payment of pension and other pensionary benefits to her.

3. The petition is resisted by the State *inter alia* on the ground that as the petitioner was regularized after 15.05.2003, therefore, she is not entitled for pension under CCS Pension Rules, 1972, because the employees engaged by the Government of Himachal Pradesh after 15.05.2003, which also includes the employees whose services were regularized after this date, were not entitled for pension under CCS Pension Rules, 1972 but they were entitled for pension under Himachal Pradesh Contributory Pension Scheme (New

Pension Scheme), 2006. It is further the stand of the State that the petitioner being a Class-III employee cannot equate herself with those Class-IV employees whose work charge period has been counted for the purpose of grant and calculation of pension.

4. Mr. V.D. Khidtta, learned Counsel for the petitioner, has argued that denial of pension to the petitioner is arbitrary and discriminatory, especially in view of the fact that this issue is no more *res integra* as this Court in *Sh. Sukru Ram* vs. *The State of H.P. and others*, CWP No. 6167 of 2012, decided on 06.03.2013, has categorically held that the time spent as a work charge employee has to be counted for the purpose of grant of pension, which judgment was unsuccessfully challenged by the State before the Hon'ble Supreme Court of India. Learned Counsel has also relief upon the judgment passed by this Court in CWPOA No. 52 of 2019, Beli Ram vs. State of H.P. and another, decided on 10.09.2020, in which, again this principle has been reiterated.

5. Opposing the petition, Mr. Adarsh Sharma, learned Additional Advocate General while drawing the attention of this Court to Annexure R-6, has submitted that the petitioner was not similarly situated as Sukru Ram which was evident from the fact that Shri Sukru Ram was a Class-IV employee whereas the petitioner belonged to Class-III category. Accordingly, a prayer has been made on behalf of the State for dismissal of the petition.

6. I have heard learned Counsel for the parties and gone through the pleadings as well as the documents appended therewith as also the judgments relied upon by the parties.

7. It is not in dispute that work charge status stood conferred upon the petitioner against the post of Clerk/Typist w.e.f. 17.12.2002. It is further not in dispute that she was regularized against the post of Clerk w.e.f. 13.04.2007. These facts are clearly borne out from Annexure P-1, which is an office order dated 01.08.2011, issued by the office of Principal Chief

Conservator of Forests, Himachal Pradesh, vide which, work charge status was conferred upon the petitioner.

8. The reason and rationale as to why work charge status is conferred upon a daily wager is that when a daily wager puts in requisite number of years of service, by serving for more than 240 days in each calendar year, in terms of the policy of the Government, then, right of regularization stands accrued upon him/her. However, this right of regularization is, of course, subject to availability of posts. Therefore, to meet with the interregnum period, during which, the right of regularization stands accrued upon such an employee and the day on which he/she is actually regularized, work charge status is conferred upon such an employee so that the sword of unceremoniously being thrown out of the job no more hangs over the head of such an employee. In other words, as on 17.12.2002, when work charge status was conferred upon the petitioner, had there been any vacancy of Clerk available in the Department of Forests vis-a-vis the seniority position of the petitioner, then, she had a right to be regularized against said post with effect from said date. Now keeping this logic in mind, this Court is of the considered view that it is but natural that the period which has been spent by an employee while serving a department on work charge basis has to be clubbed together with the period which an employee serves as a regular incumbent for the purpose of computation of the pension.

9. This is exactly what has been held by this Court in Sukru Ram's case supra. Therein the petitioner was conferred work charge status on 01.04.2001 and he was regularized w.e.f. 02.04.2007. It was held by this Court that the period spent by the petitioner on work charge basis was liable to be counted for the purpose of counting the qualifying service of the petitioner for calculation of pension. Reiterating this view, this Court in CWPOA No. 52 of 2019, titled as Beli Ram vs. State of H.P. and others (supra), has again held that the period of service rendered by a person as a work

charge employee with any establishment of the Government of Himachal Pradesh is to be counted as qualifying service for pensionary benefits, irrespective of the fact that said department is a work charge establishment or not.

10. Accordingly, in view of above discussion, this Court holds that the act of the respondent-State of denial of pension to the petitioner by not counting the period of service rendered by her as a work charge employee for considering her eligibility, is arbitrary, bad, and thus, not sustainable in the eyes of law. Accordingly, this petition is allowed by holding that the petitioner is entitled for grant of pension which be calculated by the department by counting the period of service rendered by the petitioner on work charge basis clubbed with the service thereafter rendered on regular basis for the purpose of eligibility and quantum. It is further directed that henceforth regular pension be paid to the petitioner after going through all the codal formalities and the arrears etc be paid within a period of three months from the date of passing of this judgment. It is ordered that in case payment of arrears etc is not paid to the petitioner within a period of three months from today, then the same shall entail simple interest at the rate of 6% per annum from the date of passing of this judgment.

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

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

Between:-

SHRI RAM PRATAP SON OF SHRI RAM LAL,
RESIDENT OF VILLAGE SALAMU,
ABBERNI, P.O. SAI, TEHSIL BADDI,
DISTRICT SOLAN, H.P.

.....PETITIONER

(BY MR. ASHOK KUMAR ADVOCATE VICE

MR. V.D. KHIDTTA, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (PWD) TO THE GOVERNMENT OF HIMACHAL PRADESHH, SHIMLA-2.
2. THE ENGINEER-IN-CHIEF, HPPWD NIGAM VIHAR, SHIMLA-2.
3. THE EXECUTIVE ENGINEER, HPPWED DIVISION NALAGARH, DISTRICT SOLAN, H.P.
4. SHRI RAMESH DUTT SON OF SHRI ARJUN DEV, PRESENTLY WORKING AS WORK INSPECTOR/ SUPERVISOR, IN THE OFFICE OF HPPWD DIVISION SOLAN, DISTRICT SOLAN, H.P.
5. SHRI SOBHA RAM SON OF SHRI ANOKHI RAM, PRESENTLY WORKING AS WORK INSPECTOR/SUPERVISOR, IN THE OFFICE OF HPPWD DIVISION SOLAN, DISTRICT SOLAN, H.P.
6. SHRI BALAK RAM SON OF SHRI GULABA RAM, PRESENTLY WORKING AS WORK INSPECTOR/ SUPERVISOR IN THE OFFICE OF HPPWD DIVISION ARKI, DISTRICT SOLAN, H.P.

.....RESPONDENTS

(M/S SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH M/S J.S. GULERIA AND KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENEALS, FOR R-1 TO R-3;
ISSUANCE OF NOTICE TO R-4 TO R-6 DEFERRED)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.5414 OF 2019
Decided on:17.11.2021

Constitution of India, 1950 – Article 226 – Petitioner was aggrieved by the act of the respondent as his name was not considered for promotion as work inspection Supervisor – Held – The petitioner is not entitled for being promoted to the post of Work Inspector from the post of Beldar as the petitioner was promoted to the post of Mate in the year 2012 from feeder post of Beldar and on accepting this promotion without objection the petitioner gave up his right – The petitioner has laso not proved that any person junior to him in seniority of Beldars was promoted directly as Work Inspector over and above the petitioner – Petition dismissed. [Para 8]

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 prayed for the following substantive reliefs:-

> *"(i) That the impugned order dated 4.2.2015 (Annexure A-11) may kindly be quashed and set aside.*
> *(ii) That the respondents No. 1 to 3 may kindly be directed to consider the case of the applicant and promote him as Work Inspector/Supervisor w.e.f. 12.7.2006 with all the consequential benefits, from which date, the juniors have been promoted and given benefit.*
> *(iii) That the respondents No. 1 to 3 may kindly be directed to produce the entire record pertaining to the case of the applicant."*

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

The petitioner herein was initially engaged as a Beldar on daily wage basis w.e.f. 01.01.1985. He continued working as such till his regularization, post completion of requisite number of years. He was thereafter promoted to the post of Mate w.e.f. 05.07.2012. The contention of the petitioner is that he should have been promoted to the post of Work Inspector from the post of Beldar and not from the post of Mate, as has been done by

the respondents, especially, in view of the fact that the persons junior to the petitioner, have been promoted as Work Inspector.

3. The stand of the State is that the petitioner was engaged with the respondent-department w.e.f. 02.08.1985 and after completion of 10 years continuous daily wage service, he was regularized vide order dated 02.07.1996, as Beldar w.e.f. 01.01.1995, in terms of judgment passed by Hon'ble Supreme Court of India in Mool Raj Upadhyay's case. Thereafter as per seniority and availability of posts in the Division/Circle, the petitioner was promoted as regular Mate on 05.07.2012. The respondent-department had promoted few incumbents to the post of Work Inspector but said incumbents were working as Mates at the relevant time and not as Beldars. Said incumbents, who stood promoted as Work Inspectors, were already working as Mates before the petitioner was promoted to the post of Mate and the petitioner would also be considered for promotion as Work Inspector as per his seniority.

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

5. Record demonstrates that the petitioner had earlier approached this Court praying for same/similar reliefs by way of CWP No. 2553 of 2014, titled as Ram Partap vs. State of Himachal Pradesh and others, which petition stood disposed of by this Court on 19.08.2014 in the following terms:-

> *" Learned Counsel for the petitioner submits that his client has already made various representations for the redressal of his grievance to the respondent authorities and one of them is made on 2.1.2014 (Annexure P-14), which has not been decided till date.*
>
> *2. Accordingly, present writ petition is disposed of with a direction to the responde3nts to decide the representation, Annexure P-14) within a period of ten weeks from today, by passing a speaking/detailed order. Pending applications, if any, are also disposed of."*

6. In compliance to this order, office order dated 04.02.2015 (Annexure A-11), was passed by the Engineer-in-Chief, HPPWD, quashing of which is being sought by way of this petition. A perusal of this order would demonstrate that the prayer of the petitioner for being promoted against the post of Work Inspector, has been rejected by the competent authority *inter alia* on the ground that earlier the seniority of feeder category for the purpose of promotion to the post Work Inspector was maintained Circle wise, but after the year 2008, the same is maintained at the State level and in terms of his seniority in the feeder channel vis-a-vis the number of posts of Work Inspector available with the department, the petitioner is not yet in the zone of promotion.

7. During the course of arguments, it could not be demonstrated by learned Counsel for the petitioner that the contents of this office order are incorrect. The petitioner has not been able to demonstrate that any Beldar, who was regularized after the petitioner, stood promoted either to the post of Mate or to the post of Work Inspector. Besides this, as is apparent from the reply filed by the respondent-State, promotion to the post of Work Inspector, is not solely dependent incumbent being in the feeder category and having put in requisite number of years in the feeder category, but the same is also dependent upon the incumbent possessing the qualifications as are contained in the Recruitment and Promotion Rules. The mode of promotion is well spelled out in the preliminary submissions of the reply of the respondent-department and during the course of arguments, it could not be demonstrated that averments contained therein are incorrect. It stands spelled out in the reply that the petitioner is a matriculate and he is covered under Rule-11(iii) of the relevant Recruitment and Promotion Rules against 10% quota meant for the category of Mate, but as the petitioner, at the time of filing of the reply, was not fulfilling the criteria of 10 years regular service in the feeder category

of Mate for promotion as Work Inspector, as such, the claim of the petitioner was premature.

8. As far as the contention of learned Counsel for the petitioner that the petitioner is entitled for being promoted to the post of Work Inspector from the post of Beldar is concerned, this Court is of the considered view that there is no merit in the same. The petitioner was promoted to the post of Mate in the year 2012 from the feeder post of Beldar. Assuming that the petitioner was having a right of promotion against the post of Work Inspector even from the feeder channel of Beldar, subject to his fulfilling the eligibility criteria prescribed under the relevant Recruitment and Promotion Rules, then also, in the considered view of this Court, the petitioner gave up this right of his, when he accepted the post of Mate without any objection/protest. Now he is estopped from putting forth the case that a mandamus be issued to the respondents to promote him against the post of Work Inspector. Even otherwise, as has been mentioned hereinabove, the petitioner has not been able to demonstrate that any person junior to him in the seniority of Beldars, was either promoted directly as a Work Inspector over and above the petitioner or has been promoted as such from the feeder post of Mate.

In view of above discussion, as this Court finds no merit in the present petition, the same is accordingly dismissed, so also pending miscellaneous application(s), if any.

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

Between:-

SH. JOGINDER SINGH, S/O SH. NARAIN SINGH,
RESIDENT OF VILLAGE DUGGA-KHURD,
PO DUGGA, TEHSIL AND DISTRICT HAMIRPUR, HP.

.....APPELLANT/PLAINTIFF

(BY SH. G.D. VERMA, SENIOR ADVOCATE WITH SH. B.C. VERMA, ADVOCATE)

AND

SMT. MEENA KUMARI,
WIDOW OF LATE SH. ASHWANI KUMAR,
RESIDENT OF PARTAP GALI,
WARD NO. 6. M.C. AREA, HAMIRPUR,
P.O. TEHSIL AND DISTT. HAMIRPUR, HP.

.....RESPONDENTS/DEFENDANTS

(BY SH. NEERAJ GUPTA, SENIOR ADVOCATE WITH
SH. AJEET PAL JASWAL, ADVOCATE)

REGULAR SECOND APPEAL
NO. 490 of 2010
Decided on: 16.11.2021

Specific Relief Act, 1963- Specific Performance Section 20 – The plaintiff was aggrieved by the judgment of the Ld. First Appellate Court whereby the suit decreed by the Ld. Trial Court was reversed – The agreements were executed in favour of the plaintiff by Ritu Udhyog Association, Dugga Khurd, Tehsil and District Hamirpur through its Manager and the agreement has been signed by SHri Ashwani Sharma, Manager of Ritu Udhyog Association for the owner Ritu Udhyog Association, who is owner in possession of the suit land – Hence, the suit was required to filed against the owner – Appeal dismissed. [Paras 5 (i) and 5 (v)]

Cases referred:

Gurmit Singh Bhatia vs. Kiran Kant Robinson and Others, (2020) 13 SCC 773;
Kasturi vs Iyyamperumal and others(2005) 6 SCC 733;

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

J U D G M E N T

Suit for specific performance of contract filed by the appellant against the respondent was decreed by the learned trial Court. This decree was reversed in appeal by the learned first Appellate Court. Aggrieved, the plaintiff has instituted this regular second appeal.

Parties hereinafter are referred to as they were before the learned trial court.

2. Facts

2(i) Suit for possession by way of specific performance of agreement to sell dated 20.2.1996 in respect of land entered in Khata No. 58 Khatoni No. 60 Khasra No. 7 measuring 0-9 Marlas of 2/3 share measuring 0-6 Marlas, Khata No. 59 Khatoni No. 61 Khasra No. 6 measuring 1 Kanal 4 Marlas of 1/6 share measuring 0-4 Marlas, total area of both the Khatas measuring 0-10 Marlas, situate in Tika Dugga Khurd, Tappa Matti-Morian, Tehsil and District Hamirpur H.P. was instituted by the appellant. The appellant/plaintiff pleaded that Shri Ashwani Kumar-husband of the defendant was owner in possession of the suit property. He entered into an agreement to sell with the plaintiff on 20.2.1996 in respect of the suit land for sale consideration amount of Rs. 2.25 lacs. Plaintiff paid a sum of Rs. 40,000/- to Shri Ashwani Kumar at home and Rs. 60,000/- were paid by the plaintiff by way of two different cheques. Pursuant to the agreement, possession of the suit land was handed over to the plaintiff. In terms of the agreement dated 20.2.1996, the sale deed was to be executed by Shri Ashwani Kumar, the husband of the defendant on or before 31.7.1996. The sale deed was not executed by 31.7.1996. Rather on 31.7.1996, Shri Ashwani Kumar executed another agreement in continuation of the agreement dated 20.2.1996. The plaintiff paid Rs. 15,000/- and Rs. 35,000/- by way of cheques to Shri Ashwani Kumar on 31.7.1996. The balance consideration amount of Rs. 75,000/- in terms of the agreement dated 31.7.1996 was to be paid to Shri Ashwani Kumar at the time of registration of the sale deed which was to be executed on or before 31.12.1996. Shri Ashwani

Kumar, husband of the defendant kept on postponing the execution of the sale deed. On 31.12.1996, he, however, agreed to execute the sale deed by 31.3.1997. Shri Ashwani Kumar died on 26.1.1997. The plaintiff thereafter approached widow of Sh. Ashwani Kumar- the defendant for executing the sale deed in terms of the agreements dated 20.2.1996 and 31.7.1996. Legal notices were also issued to the defendants in this regard on 21.3.1997, 10.7.1997 and 23.12.1997. These were not responded by the defendant. All this led the plaintiff to file the civil suit praying for decree for possession by way of specific performance of the agreement to sell dated 20.2.1996.

2(ii) Written statement was filed by the defendant. She denied that any such agreement as asserted by the plaintiff was ever executed by her late husband. She denied receipt of payments allegedly made by the plaintiff to her husband. Defendant also raised an objection that suit was not maintainable against her.

2(iii) The parties led evidence in support of their respective contentions. Oral as well as documentary evidence was produced. On consideration of the pleadings, evidence and contentions of the parties, learned trial Court decreed the suit vide judgment and decree dated 17.5.2007. While decreeing the suit, learned trial Court held that in the revenue record, Sh. Ashwani Kumar-husband of the defendant was recorded as owner in possession alongwith several other co-sharers. He had executed the agreement to sell the suit land in favour of plaintiff. After death of Shri Ashwani Kumar-mutation of suit land was attested in favour of defendant. Therefore, she was liable to execute the sale deed.

2(iv) The appeal preferred by the defendant against the judgment and decree passed by learned trial court was allowed by the learned District Judge on 3.8.2010. Learned District Judge held that suit land was owned by Ritu Udhyog Association. The agreement to sell was executed by Ritu Udhyog Association through its Manager, Ashwani Kumar-husband of the appellant.

Sale deed of suit land could be executed by the owner of suit land, who was not impleaded as a party to the lis. The suit for specific performance filed by the plaintiff was held to be not maintainable against the defendant.

It is in the aforesaid background that present second appeal has been filed by the plaintiff.

3. Vide order dated 26.11.2010, this appeal was admitted on the following substantial questions of law:

> "1. Whether material admissions about the claim of the appellant on the part of respondent have wrongly been ignored?
>
> 2. Whether Ld. District Judge has acted illegally and he has mis-read and mis-construed pleadings of the parties as well as oral and documentary evidence on record?
>
> 3. That whether well reasoned judgment recorded by Ld. trial court has wrongly been upset and since there were no legal and valid grounds, therefore, the Ld. District Judge below was not justified in interfering with the same?"

4. Contentions

Learned senior counsel for the appellant argued that the judgment passed by the learned trial Court was well reasoned and in consonance with the pleadings and evidence adduced by the parties, whereas the learned District Judge reversed the judgment and decree passed by the learned trial Court on grounds which were not pleaded by the defendant. That the defendant had admitted the contents of the plaint wherein plaintiff had pleaded that the suit land was owned by her husband. That subsequent to the death of Sh. Ashwani Kumar, mutation of suit land was attested in favour of defendant. The defendant did not plead Ritu Udhyog's ownership over the suit property, therefore, she could neither be allowed to put forward this plea nor the evidence led by her in this regard could be considered. In

support of such submissions, learned senior counsel for the plaintiff/appellant referred to the oral evidence adduced by the parties as well as the documentary evidence placed on record. Learned senior counsel cited various judgments on the above points.

Learned senior counsel for the respondent/defendant argued that it was for the plaintiff to prove the case pleaded by him. On the basis of various documents on record and the oral evidence adduced by the parties, it was contended that plaintiff had miserably failed to prove his pleaded case. The agreement for specific performance for which the suit was filed by the plaintiff was allegedly executed by him with Ritu Udhyog Association. The suit was not maintainable against the defendant.

5. Observations

The substantial questions of law formulated in instant appeal relate to factual aspects of the matter and can be answered on consideration of oral and documentary evidence on record.

5(i) The suit was filed by the plaintiff for specific performance of agreement dated 20.2.1996. It was also his case that subsequent to this agreement, another agreement was executed on 31.12.1996 to the effect that the sale deed of the suit land would be executed by 31.3.1997. The defendant has denied the execution of these agreements by her husband for want of knowledge. The agreements have been put forward by the plaintiff. A bare perusal of the agreement dated 20.2.1996 (Ex. PW1/A) shows that this was executed in favour of the plaintiff by the Ritu Udhyog Association, Dugga Khurd, Tehsil and District Hamirpur though its Manager Shri Ashwani Kumar. The averments in the body of the agreement reflect that the agreement was executed by the Ritu Udhyog as owner in possession of the suit land. Shri Ashwani Kumar had signed the document as Manager of the Ritu Udhyog Association for the owner-Ritu Udhyog.

The subsequent agreement dated 31.7.1996 (Ex. PW1/B) was executed in favour of plaintiff again by the Ritu Udhyog Association, Dugga Khurd, Tehsil and District Hamirpur through its Manager Shri Ashwani Kumar. This agreement also has been signed by Shri Ashwani Kumar as Manager of the Ritu Udhyog Association for the owner Ritu Udhyog.

It is, therefore, obvious that the agreements were not executed by Shri Ashwani Kumar in his individual capacity. Agreements were executed by the Ritu Udhyog Association through its Manager Ashwani Kumar. The executant of the agreement in favour of the plaintiff was the Ritu Udhyog Association.

5(ii) The jamabandi for the year 1991-92 (Ex. P1) reflects that suit land had 24 shares out of which 16 shares were owned by the Ritu Udhyog Association, Dugga Khurd, Tehsil and District Hamirpur through its Manager Ashwani Kumar in Khasra No. 7 and 4 shares in Khasra No. 6. Same position is reflected in Ex. P1 i.e. 'misal hakiyat' for the year 1992-93.

5(iii) Shri Ashwani Kumar died on 26.1.1997. The remarks column on jamabandi for the year 1992-93 (Ex. PZ) reflect that vide mutation No. 274 attested on 24.4.1999 the Ritu Udhyog Association through Smt. Meena Kumari widow of Shri Ashwani Kumar was entered as co-owner of the suit land. In the subsequent jamabandi on record for the year 2002-2003 (Ex. PY), the Ritu Udhyog Association through Smt. Meena Kumari, widow of Shri Ashwani Kumar was reflected as co-owner of the suit land.

5(iv) Hon'ble Apex Court in ***(2005) 6 SCC 733,*** titled ***Kasturi*** versus ***Iyyamperumal and others*** held that necessary parties in a suit for specific performance of the contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. Necessary parties are those in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the

proceedings and proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person. Relevant paras from the judgment are extracted hereinafter:

> "7. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party.
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> 13. From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the Court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the Court would be necessary in order to enable the Court effectually and completely to

adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person."

The judgment in Kasturi's case supra was considered by Hon'ble Apex Court in ***(2020) 13 SCC 773,*** titled ***Gurmit Singh Bhatia*** versus ***Kiran Kant Robinson and Others.*** *Relevant paras from the judgment are* as under:

"5.4. In the aforesaid decision in Kasturi, it was contended on behalf of the third parties that they are in possession of the suit property on the basis of their independent title to the same and as the plaintiff had also claimed the relief of possession in the plaint and the issue with regard to possession is common to the parties including the third parties, and therefore, the same can be settled in the suit itself. It was further submitted on behalf of the third parties that to avoid the multiplicity of the suits, it would be appropriate to join them as party defendants. This Court did not accept the aforesaid submission by observing that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It is further observed and held that in a suit for specific performance of the contract to sell the lis between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not open to the

Court to decide whether any other parties have acquired any title and possession of the contracted property.

5.5. It is further observed and held by this Court in Kasturi that if the plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as partydefendants in such suit. The aforesaid observations are made by this Court considering the principle that plaintiff is the dominus litis and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the rule of law."

5(v) In the instant case, the agreements dated 20.2.1996 and 31.7.1996 sought to be executed by the plaintiff against the defendant were actually executed with him by the Ritu Udhyog Association through its Manager Shri Ashwani Kumar. The agreements have been set up by the plaintiff himself. In these agreements the Ritu Udhyog Association has been shown as owner in possession of the suit land. Plaintiff while executing the agreements was aware of the ownership of the Ritu Udhyog Association over the suit land. The jamabandi for the year 1992-93 was mentioned in the agreement wherein Ritu Udhyog figures as owner of the suit land alongwith others. Plaintiff had executed the agreements with the owner of suit land i.e. Ritu Udhyog Association. He admitted this fact while deposing as PW-1. Alleged admission of defendant with respect to Ashwani Kumar being owner of

suit land will not advance the case of plaintiff. The plaintiff had filed the civil suit seeking decree for specific performance of the agreements against the defendant who is widow of Shri Ashwani Kumar. The suit for specific performance was not maintainable against the defendant as the agreements in question were executed on behalf of owner Ritu Udhyog Association by its Manager Shri Ashwani Kumar. The agreements wee not executed by Shri Ashwani Kumar in his personal capacity. Therefore, the suit was not maintainable against the widow of Shri Ashwani Kumar. In the revenue record, the Ritu Udhyog Association through Smt. Meena Kumari, widow of Shri Ashwani Kumar is reflected as co-owner of the suit land along with several others. The ownership of the property in question continues in the name of the Ritu Udhyog Association. Therefore, learned Appellate Court was justified in observing that the suit was required to be filed against the owner. The defendant as widow of Shri Ashwani Kumar could not have executed the sale deed.

Accordingly, all questions of law as extracted in para-3 are decided against the appellant/plaintiff. Therefore, I find no merit in the instant appeal and the same is accordingly dismissed, so also the pending application(s), if any.