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Code of Criminal Procedure, 1973- Pre-trial incarceration is not the rule- Past history of accused immaterial in adjudging the merits of the petition- Held that the respondent has not expressed any serious apprehension of petitioner tampering with the prosecution evidence in case of his release on bail. It has also not been apprehended that in such situation, the trial of the case will be adversely affected. The only concern of this Court at this stage is to facilitate fair and expeditious trial, for which, the petitioner can be put to appropriate terms. (Para 12) Title: Rajesh Kumar vs. State of H.P. Page-180

Code of Criminal Procedure, 1973- Section 438- Pre-trial incarceration is

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Constitution of India, 1950 - Article 226 - Affirmed the Order passed by Presiding Judge, Labour Court-cum-Industrial Tribunal- violation of principle of 'last come first go' was denied- The jurisdiction under Article 226 of the Constitution of India though is wide, but needs due care and great circumspection, while dealing with the orders of the Tribunals constituted under special legislations. Held that it is otherwise trite law that this Court will not sit in appeal on the decisions of the Tribunals created under special statutes. It is only in the case of absolute illegality or perversity in the award passed by the Industrial Tribunal-cum-Labour Court that interference by way of writ jurisdiction may be required. The facts of instant case do not warrant

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Constitution of India, 1950 - Article 226 - **Central Civil Services (Temporary Service) Rules, 1965**- Protection of Article 311 is available even to temporary employees- **CCS (Conduct Rules), 1964**- **Recruitment & Promotion Rules**- The services of the petitioner, therefore, were governed by provision of CCS (Conduct Rules), 1964, as also Recruitment & Promotion Rules and not with the provisions of Industrial Disputes Act- Held that the petitioner had undisputedly worked against the post of Forest Guard for more than nine years continuously. It is not the case of respondents that the appointment of petitioner to the aforesaid post was not in terms of R & P Rules framed by the respondents. Rather, the respondents in their reply have submitted that the petitioner was appointed as Forest Guard on temporary basis under the provision of Recruitment & Promotion Rules framed for said category.- Petitioner having served for such a long period was entitled for being heard before terminating her services in the aforesaid manner.(Para 15) Title: Lalita Jindal vs. State of H.P. & others Page-192

Constitution of India, 1950 - Article 226 - Completion of 240 days of daily wage employment- Automatic conformant of work charge status- Held that the petitioner has rendered continuous daily wage service with 240 days in a calendar year since 1999 and was regularized in 2010. Thus, petitioner will be entitled for work charge status on completion of eight years of continuous daily wage service w.e.f. 1999. The action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory hence cannot be sustained.(Para 8 & 12) Title: Gulzari Lal vs. State of H.P. Page-244

Constitution of India, 1950 - Article 226 - **Modified Assured Career Progression Scheme (MACPS)-** Two objections have been taken by the respondents not to accede to the request of the petitioner- The first being lack of territorial jurisdiction and the second that the respondents are already seized of the matter- Held that not only is the petitioner a retiree, but currently is a senior citizen aged more than 60 years and, therefore, whatever decision has to be taken by the respondents, must be taken at the earliest. In the given facts and circumstances of the case, we deem it appropriate to dispose of the instant petition by directing the respondents to review/reconsider the case for waiver of recovery of excess amount within a period of six weeks. (Paras 5 & 6) Title: Madan Lal vs. Union of India & others

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Constitution of India, 1950 - Article 226 - **Recruitment & Promotion Rules**- Petitioner started getting less pay that his junior- Stepping up of pay- The respondents were directed to grant the petitioner pay at the same rate, which was fixed in the case of his junior- Held that the petitioner and his junior were holding the same lower cadre as Lecturer. They both had become eligible for being promoted to next higher post of Senior Lecturer, but were denied the opportunity by not holding the DPC in time. Simply because the junior got opportunity to be promoted as Senior Lecturer for about three months, cannot be used to the detriment of petitioner, as he was also eligible for being promoted as Senior Lecturer and could have been done in the first instance.(Para 14) Title: Yatinder Nath Sharma vs. State of H.P. & others Page-170

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Constitution of India, 1950- Article 226- Affirmed the Order passed by Presiding Judge, Labour Court-cum-Industrial Tribunal- It is more than settled that while exercising the jurisdiction under Article 226 of the Constitution, this Court is not to sit as Court of appeal over the decisions of Tribunals constituted under special laws. It is only in the case where the award passed by the Labour Court-cum-Industrial Tribunal suffers from absolute illegality or perversity that interference may be required.(Para 11) Title: Rajiv Chandel vs. State of H.P. Page-510

Constitution of India, 1950- Article 226-**Recruitment and Promotion Rules**- Regularization of petitioner- H.P. Civil Services (Revised) Pay Scale Rules, 1998- Held that the rejection of the case of the petitioner that he was not entitled for the higher pay scale on the ground that he was being correctly paid the pay scale of Laboratory Assistant is not sustainable in law. The omission on the part of the respondents to frame the Recruitment and Promotion Rules for the last 15 years cannot act to the deterrent of the petitioner. (Para 6) Title Manmohan Singh vs. State of H.P. & others Page- 1

Constitution of India, 1950- Articles 39(d), 14 and 16-**Recruitment & Promotion Rules in the State of Himachal Pradesh, the Himachal Pradesh**

Civil Services (Revised Pay) Rules - Disparity in pay scale between Clerks and Restorers in the office of Advocate General- Stand taken by the respondent to reject the claim of the petitioners' category is not sustainable in the eye of law because this Court can take judicial note of the fact that repeatedly, respondent-State keeps on changing its stand with regard to application of pay-scale prevalent in the Punjab Government. In some cases, respondent-State takes the stand that they are not bound to give pay-scale as per Punjab Government pattern, but in some other cases, they take the stand that pay-scales as prevalent in the state of Punjab are payable to the Himachal Pradesh because Punjab Pay pattern is generally followed by the State of Himachal Pradesh. True, it is that repeatedly, it has been held by the Hon'ble Apex Court as well as this court that State is not bound to follow each and every revision, if any, made by the Punjab Government but in the instant case, where the category of restorer is at par with the category of clerk, especially in the office of respondent No.3 for all intents and purposes as has been discussed herein above in detail, ground raised in communication dated 10.2.2021 Annexure R-1 for rejecting the claim of the petitioners is not tenable in the eye of law. Though the categories of clerk and restorers working in the office of respondent No.3 are being governed by the different set of Recruitment & Promotion Rules, but if Recruitment & Promotion Rules governing the service conditions of Punjab Government are perused juxtaposing each other, they are para-materia same with regard to qualification and pay scales. Since Restorers working in the office of respondent No.3 are performing similar duties as are being performed by the clerks in the office of respondent No.3, benefit of pay revision as is being sought by the category of the petitioners cannot be denied on the ground that pay of the category of clerks has been revised on the basis of pay revision made by the Punjab government. Though there is no material with regard to decision, if any, taken by the Punjab government with regard to revision of pay of category of restorers working in the office of Advocate General, but since it has been repeatedly claimed by respondent-State that they are not bound to follow each and every revision of the pay-scale ordered by the State of Punjab, respondents having taken note of the fact that category of restorer and clerk working in the respondent No.3 are performing similar duties, ought to have granted the similar benefit of pay revision to the petitioners/restorers, who being working/performing the similar duties in the same department are otherwise entitled to the similar pay scale on the principle of "equal pay for

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Delhi High Court Act, 1966- Clause 10- State utilized the lands of the respondents for constructing a road without compensating under the Land Acquisition Act and paying just and fair compensation with interest- **Held**- Constitution protects against deprivation of property except by authority of law- State bears higher responsibility when acquiring private land for public use- dispossession without due process or delay in compensation, violate the rule of law- delay alone cannot defeat substantive justice- where State fails to act promptly or selectively initiates legal proceedings only after court intervention, equity demands that affected parties be compensated without being prejudiced by delays- appeal dismissed sans merit. (Para 10) Title: State of H.P. vs. Kalyan Singh & others **(D.B.)** Page-314

Delhi High Court Act, 1966- Section 10- Petitioner was lecturer in college and her services were not taken over when the college and services of teachers and non teaching staff was taken over by State Govt – **Held** - R&P Rules 2004 for the post of Lecturer (College Cadre) prescribed the eligibility criteria of possessing Post-Graduation Degree with minimum 55% marks along with NET/SET qualification- As per UGC notification dated 14.06.2006, candidates having M.Phil degree are exempted from possessing NET for undergraduate level teaching- petitioner satisfied the criteria for taking over of her services as Lecturer (College Cadre) under R&P Rules read with UGC guidelines- Not in dispute that by now the writ petitioner has qualified NET/SET and has also completed her Ph.D.- Appeal dismissed as meritless. (Para 4) Title: State of H.P. and others vs. Pooja and another **(D.B.)** Page-382

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Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983- Section 30 (ii)- The petitioner-State assailed order passed by learned Special Judge whereby the respondent has been discharged for offence punishable under Section 30 (ii) of the Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983- Held that the cognizance for offence under Section 30 (ii) of the Act cannot be said to be barred on police report, the only mandatory requirement is to have the report of Authorized Officer. The report of the Authorized Officer admittedly has been made part of the police report and placed before the Court. (Para 18) Title: State of H.P. vs. Labh Singh & another Page-43

Hindu Marriage Act, 1995- Section 24- Maintenance pendente lite- Held that once it is *prima-facie* shown that the respondent had no independent source of income sufficient to maintain herself and her children, the liability of the petitioner to maintain her by payment of maintenance pendente lite under Section 24 of the Hindu Marriage Act arises. (Para 9) Title: Tarlochan Singh vs. Mohinder Kaur Page-25

'I'

Indian Evidence Act, 1872- Chapter VII- Rules of Evidence- The burden to prove a fact never shifts, whereas the onus to prove an issue keeps on shifting- Held that once the issues are framed, the onus to prove the issues is also fixed on the basis of rules of evidence provided under Chapter-VII of the Indian Evidence Act, 1872. The burden to prove a particular fact, as a general rule, lies on the person who asserts such facts. The onus to prove an issue lies upon the person for whom it becomes incumbent to prove the facts constituting the issue. The burden to prove a fact never shifts, whereas the onus to prove an issue keeps on shifting.- Order 18- Order 18 of the CPC merely provides procedure for examination of witnesses. Rule 1 of Order 18 provides a right to the plaintiffs to begin the hearing of the suit unless the claim is admitted by defendant, in which case, the defendant has right to begin. Under Rule 2 of Order 18, the party having right to begin is obliged to state his case and produce his evidence in support of the issues which he is bound to prove.- Section 102- Section 102 of the Evidence Act prescribes that

the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Thus, the preference to lead evidence does not affect the burden of proof. (Paras 11 & 12) Title: Rakesh Babu & others vs. Rajan Babu Sood Page-30

Indian Evidence Act, 1872- Section 35- **Indian Penal Code, 1860**- Sections 363, 374- Appeal against conviction passed by Additional Sessions Judge- Entry in any public or official book- Held that Section 35 of the Indian Evidence Act though suggests that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty is itself a relevant fact, but till the time record on the basis of which such entry came to be made in the certificate is not produced and proved by the person, who made entry, it cannot be said that such certificate stands proved. In the case at hand, in the absence of evidence to show on what material the entry of date of birth in the matriculation certificate was made, mere production of a copy of matriculation certificate, though a public document, in terms of Section 35, is/was not sufficient to prove the age of the deceased. To render a document admissible under Section 35, provisions are required to be satisfied i.e. entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. (Paras 18 & 19) Title: Pawan Kumar vs. State of H.P. Page-63

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Indian Penal Code, 1860- Grant of bail under Sections 302, 201, 297 and 34 **-** Pre-trial incarceration is not the rule- The accused is of young age and his prolonged incarceration will be an impediment in his career prospects. He has undertaken to abide by all the terms and conditions imposed against him. The cause of death of the deceased has been opined excessive intake of drug

"amphetamine". The conduct of the petitioner in disposing of the body of deceased without disclosing the facts to his parents or to the authorities, casts doubt, but the allegations are to be proved during trial. It is also not in dispute that both were friends and were addict to using drugs. There is no direct evidence that the dose of drug was forcibly given to the deceased against his wish. Keeping in view the facts and circumstances of the case especially the age of the petitioner, no fruitful purpose shall be served by prolonging his incarceration till the conclusion of trial. The investigation is complete and challan has been presented. It is not apprehended by the respondent that the petitioner has potential to tamper with the prosecution evidence. Even otherwise pre-trial incarceration is not the rule. Appropriate conditions can be imposed to secure the free and expeditious trial. There is no apprehension of petitioner fleeing from the course of justice, hence bail granted subject to just conditions.(Paras 5, 8 and 9) Title: Parul Thakur vs. State of H.P. Page-546

Indian Penal Code, 1860- Grant of regular bail- Challan filed in competent court of law- State filed the status report- Object of bail- Held object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.(Para 14) Title: Sanjeev Kumar@ Sanju vs. State of H.P. Page-119

Indian Penal Code, 1860- Sections 224 & 323- Appeal against judgment of acquittal- Escaping lawful custody- Held that there is no explanation that when spot of occurrence is/was a crowded place, why no independent witness ever came to be associated. In order to bring the guilt of the accused under Section 224 of the IPC, it was required to be proved that accused was detained in a custody, which was lawful and he escaped from that custody. (Para 12) Title: State of H.P. vs. Miya Lal Page-49

Indian Penal Code, 1860- Section 376- Grant of bail under Section 439 - **Code of Criminal Procedure, 1973**- Held that the allegations against the petitioner are yet to be proved. Pre-trial incarceration is not the rule. No

fruitful purpose shall be served by keeping the petitioner in custody for indeterminate period as the trial is likely to take some time before conclusion. It is not the case of the respondent that the release of petitioner on bail will result in adversely affecting the trial. The only concern of the Court at this stage is to facilitate the fair and expeditious trial. For procurement of petitioner for the purpose of trial, he can be bound by appropriate conditions.(Paras 7 & 8) Title: Viresh vs. State of H.P. Page-115

Indian Penal Code, 1860- Sections 279, 337 & 304-A- Appeal against judgment of conviction- The petitioner was charged for commission of offences under Sections 279, 337 and 304-A IPC and Section 187 of the Motor Vehicles Act- Held that the identification of accused by a witness for the first time in Court is a substantive piece of evidence and if a witness had any particular reason to remember about the identity of accused, such evidence can be relied upon to convict the accused. (Para 12) Title: Sohan Lal vs. State of H.P. Page-140

Indian Penal Code, 1860- Sections 363, 376, 504, 506 - **Protection of Children from Sexual Offences Act**- Section 4, **Information Technology Act**, Section 67-B- Petitioner has sought bail- Petition is allowed- Held that the Petitioner is about 21 years of age. His prolonged incarceration before trial is likely to affect his life as a whole and career prospects in particular. No apprehension has been expressed by the respondent regarding the possibility of petitioner fleeing from the course of justice. It is also not the case of respondent that in case of grant of bail to petitioner, the trial shall be effected adversely. There is no previous criminal history attached to the petitioner. The concern regarding the completion of fair and expeditious trial can be taken care of by putting the petitioner to appropriate terms. (Paras 10 & 11) Title: Karanjeet Singh vs. State of H.P. Page-110

'L'

Land Acquisition Act, 2013- Reconveyance of land is not permitted by the Government- Once the land is acquired and it vests in the State, free from all encumbrances, it is not the concern of the land owner, whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes persona non-grata once the land vests in the State. He has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. The State neither has the requisite power to reconvey the

land to the person- interested, nor can such person claim any right of restitution on any ground, whatsoever, unless there is some statutory amendment to this effect. (Para 5) Title: Sukh Dev and others vs. Union of India and others Page-444

Limitation Act, 1963- Section 173- Whether the belated advise of a counsel can be considered as sufficient cause prescribed in second proviso to Section 173 of the Act- Held that no such advise was rendered to the applicant by the counsel, who had conducted her compensation case before learned Tribunal and also had rendered assistance to her during execution proceedings. It was only, when applicant allegedly met another counsel that she was advised to take a chance. This cannot be said to be a sufficient cause. Such interpretation would be too absurd and will open flood gates for all litigants to file the appeal at their whims by taking shelter of legal advise. By applying the criteria of reasonableness, the case in hand fails. After huge delay of two years and eight months, the other side has acquired legal vested rights which cannot be taken away lightly by raising the plea of liberal interpretation.(Para 15) Title: Kamla Devi vs. Vinod Kumar & others Page-14

'M'

Motor Vehicles Act, 1988 - Liability to satisfy the awarded amount- Held that the Insurance Company having not only cancelled the Insurance policy, but also having duly intimated the appellant (insured) and the concerned RTO about cancellation of the policy months before the accident, is not required to satisfy the award or to indemnify the insured towards third party liability. The insurer, therefore, had discharged its obligation that was required from it in law. It had not only cancelled the Insurance Policy on account of dishonor of cheque issued by the insured, but had also timely intimated this fact to all concerned including the appellant/insured, and the concerned RTO. The accident was caused months after cancellation of the insurance policy. The relevant documents in this regard have been placed on record and proved by the insurer.(Para 4)Title: Vishal Kumar vs. Bhushan Kumar Sharma & others Page-216

Motor Vehicles Act, 1988- Section 166- Compensation on account of injury/disability suffered as a result of motor vehicle accident- Assessment of the loss of future earning- The claimant had not adduced any independent corroboration to his stand of having become incapable to do physical work.

There is no medical opinion regarding the functional disability, hence there is no merit in the appeal.(Para 11) Title: Sat Pal vs. Jatinder Kumar and others Page-541

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT granting compensation of Rs.10,29,700/- alongwith interest @ 9% pa- liability was fastened upon transferee and driver of vehicle- Held- There can be transfer of title by payment of consideration and delivery of the vehicle, but owner is the person whose name is reflected in records of the registering authority- so long as the name of registered owner continues in the certificate of registration, he would be liable to third party- insured registered owner and insurer cannot escape liability to pay compensation- award to the extent it places liability upon the appellants to pay compensation amount, is quashed and set aside- liability to be borne by insurer- appeal allowed. (Para 4) Title: Anil Kumar & others vs. Jyoti & others Page-250

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT on grounds that deceased was a gratuitous passenger and that in absence of proof of his income on record, daily wage as per government notification was liable to be considered- **Held**- In absence of contract to contrary, the insurer would not be liable to indemnify for compensation payable in respect of death or bodily injury to the passenger travelling in a goods vehicle- Words "injury to any person" would only mean a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise- Act does not enjoin any statutory liability on the owner of a vehicle to keep his vehicle insured for any passenger travelling in a goods vehicle - Exception is that the statutory liability of insurer under Section 147, covers the owner of the goods or his authorised representative, carried in the vehicle- evidence not on record to show that deceased wa owner of goods- award modified to the extent that insurer is exonerated to pay compensation- appeal partly allowed. (Paras 17,18,19) Title: Reliance General Insurance Co. Ltd. vs. Reeta Devi & others Page-273

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT on grounds that deceased were gratuitous passengers and not owners of goods in goods carriage vehicle and also sitting capacity was only for two persons including driver- **Held**- applications for additional evidence to produce copy of registration of certificate of offending vehicle and insurance policy stand

allowed for effective adjudication- vehicle was goods carriage vehicle- Act does not enjoin statutory liability on owner of vehicle to keep it insured for any passenger travelling in a goods vehicle- "injury to any person" only means a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise- registration certificate shows sitting capacity of two persons only including driver- proved that four persons were in the vehicle- policy shows that coverage is for person more than the authorised sitting capacity of the vehicle- coverage cannot be extended to more than persons authorised to sit- FAO No. 6 of 2016 appeal dismissed- rest allowed to the extent insurer/appellant is absolved from indemnifying the insured to pay compensation. (Para 16) Title: ICICI Lombard General Insurance Co. Ltd. vs. Tilak Raj & others & others Page-285

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT granting compensation of Rs. 6,24,000 on ground that income of deceased assessed on higher side- **Held**- Criteria assessing the income of deceased adopted by MACT is a prudent criteria- No assessment on higher side- Vehicle was being driven by minor who could not have possessed driving licence on date of accident- Violation of insurance policy- Owner of offending vehicle to compensate- Appeal dismissed. (Paras 14,16) Title: Rajinder Kumar Dutta vs. Gian Devi & others Page-415

Motor Vehicles Act, 1988- Section 173- appeal no. 414 by claimant for enhancement of award amount and appeal no. 420 by insurer assailing the quantum- **Held**- neither insurer challenged version of salary nor any evidence was led in rebuttal- assessment of monthly income cannot be said to be illegal or unjustified- fact of claimant getting incentive is not rebutted- Cannot be disentitled from benefit of monthly payment for assessment of compensation- Education has no direct nexus with earning capacity- Assessment of loss of future prospects at rate the of 5% is unjustified, as less education does not mean no potential to earn- entitled for 40%- Claim for amount paid to an attendant cannot be termed to be unjustified- Modified both appeals- Compensation amount increased. (Paras 15,18) Title: Pushpinder Singh @ Monu vs. Rajesh Mehta & others Page-342

Motor Vehicles Act, 1988- Section 173- Appellant has sought enhancement in the amount of compensation awarded- **Held**- The right arm of appellant had to be amputated- Appellant had suffered disablement to the extent of 75% as

per medical opinion- Settled law that victim of accident having suffered permanent disablement is entitled for consideration of loss of future prospects for compensation- Functional disability would be to the extent of 100%- with one arm, not able to drive the vehicle- It cannot be presumed that a person at the age of 45 years would not be earning even a single penny- he was a professional driver so his source of income gone- Appellant had suffered 100% loss of his income- Since, permanently disabled, there was no requirement to make any further deduction out of income towards personal and living expenses- Award modified- Appeal allowed. (Para 12) Title: Prem Chand vs. Yoginder Kumar & another Page-327

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 & 37- 2 kg 225 grams charas which is commercial quantity- The petition for bail was dismissed by a Coordinate Bench of High Court- Held that the learned Special Judge has already framed charge against the petitioner for offence under Section 20 of the NDPS Act, thus, it cannot be said that prima-facie case is not made out against the petitioner. Therefore, the plea for bail is barred under Section 37 of the NDPS Act. The petitioner is not entitled to seek bail in view of earlier rejection of his bail plea, without showing change in circumstance. No such change in circumstance has been shown, save and except the contention that the delay in conclusion of trial itself is a change in circumstance.(Para 7 & 8) Title: Talbe Ram vs. State of H.P. Page-132

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 29 and 37- 2 kg. 840 grams of Charas- The contraband involved in the case is of commercial quantity. Rigors of Section 37 of the NDPS Act are applicable with all forces- Petitioner was one of the occupants of the car from which huge quantity of Charas was recovered by the police. Held that in order to get rid of rigors of Section 37 of the NDPS Act, petitioner has to show prima-facie that he is not involved in the crime. The burden that lies on the petitioner is not discharged by merely stating that he is a government servant and had taken the lift in the car. The NDPS Act carries provision for reverse burden and such burden is to be discharged by the accused. Thus, in view of given facts & situation, it cannot be said that there is no prima-facie material to involve the petitioner in the case. It being so, Section 37 of the NDPS Act places an embargo in grant of bail to the petitioner. Even in the absence of fulfillment of

one of dual conditions prescribed in Section 37 of the NDPS Act, bail cannot be granted.(Paras 7 & 8) Title: Rajender Kumar vs. State of H.P. Page-137

Narcotic Drugs and Psychotropic Substances Act, 1985, Section 21(b) of ND & PS Act- 10 kilograms of poppy husk- Appeal against conviction- Petitioner remained on bail throughout the trial- The appeal filed by the petitioner has been admitted for hearing. Held- There are arguable issues raised by the appellant/petitioner, which need detailed consideration. The final disposal of the appeal is likely to take some time. Petitioner after conviction has surrendered and is undergoing the sentence. Meaning thereby that petitioner has no intent to abscond from the course of justice. The conviction of petitioner is for offence involving intermediate quantity of poppy husk. Without commenting on the merits of the contention raised on behalf of the appellant, such contention cannot be out rightly rejected and needs consideration. No past criminal antecedents have been attributed to the petitioner. Nothing has been placed on record to show that the release of petitioner will be a threat to the society at large.(Paras 6 & 7) Title: Vijay Kumar vs. State of H.P. Page-106

'P'

Prohibition of Benami Property Transaction Act, 1988- Benami Transaction explained- a transaction or an arrangement; where a property is transferred to or is held by a person and consideration for such property has been provided or paid by another person and property is held for immediate or future benefit, direct or indirect, of the person who has provided the consideration; under the provisions of Prohibition of Benami Property Transaction Act, 1988 has been termed as Benami Transaction; however, any property; purchased by the person in the name of his spouse or in the name of child of such individual by providing consideration for such property out of known sources of that person; shall not be considered as a Benami transaction, and such purchase of property, unless contrary is proved, shall be presumed to have been purchased for the benefit of wife/child.(Para 31) Title: Sandeep Sethi vs. Nidhi Kuthiala Page-226

Protection of Women from Domestic Violence Act, 2005- Section 29- Powers and jurisdiction of Appellate Court- Section 29 of the Act vests the Court of Sessions to hear and decide the appeal against the order made by the Magistrate under the Act. There is no embargo on appellate power of Court of

Sessions. The jurisdiction to hear and decide the appeal is vested in Court of Sessions, thus, will include all the powers to set right the illegality or irregularity made out in the order impugned before such Appellate Court. The Appellate Court has jurisdiction to look into the legality and propriety of the order impugned before it and the same can be done, if noticed, even without raising of an issue by the appellant or the other side. The learned Appellate Court cannot shut its eyes to the glaring illegality and impropriety found in the order being scrutinized by it in exercise of its appellate jurisdiction under the Act.(Paras 12 & 13) Title: Pawan Kumar vs. Yogmaya Page-433

'R'

Recruitment & Promotion Rules- Relaxation in the educational qualifications prescribed in the Recruitment & Promotion Rules of the Senior Assistants for promotion- Vacancies arose prior to the amendment of the rules shall be fulfilled only in accordance with the un-amended rules. Court has reason to presume and believe that respondents are purposely and willfully not implementing the judgment with a view to defeat the genuine claim of the petitioners, which has accrued to them pursuant to directions issued by the Division Bench of this Court. The respondents are directed to comply with/release all financial benefits to the petitioners pursuant to their promotion to the post of Senior Assistants from the due date. (Para 15) Title: Ram Parkash Sharma & others vs. State of H.P. **(D.B.)** Page-491

Rules for Grant of Incentives to Tourism Industry in H.P., 1993, Doctrine of legitimate expectation and promissory estoppel- The 1993 Rules shall be deemed to have been continued and in force for grant of incentives to the petitioner even after issuance of 2001 notification. The explanation accorded by the State in denying incentives to the petitioner under the 1993 Rules on the ground that the petitioner was not entitled to the benefits under the said Rules after coming into force of 30.04.2001 notification cannot be accepted. There is no such embargo in the notification issued on 30.04.2001. Not inclined to interfere on the ground of delay alone when the judgment is based on legally sustainable principles. The delay of the respondent in filing a writ petition by itself should not defeat the claim unless the position of the State has been so altered that it cannot be retracted on account of a lapse of time or the inaction of the writ petitioner.(Paras 4(v) and 4(vi) Title: Ganpati Ropeways Pvt. Ltd. vs. State of H.P. **(D.B.)** Page-515

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

Shri Manmohan Singh ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

For the petitioner: Mr. Jagan Nath, Advocate.

For the respondents: M/s Sumesh Raj & Dinesh Thakur, Additional Advocate Generals, with Mr. Amit Kumar Dhumal, Deputy Advocate General.

CWPOA No. 04 of 2022
Decided on: 18.11.2022

Constitution of India, 1950- Article 226-**Recruitment and Promotion Rules**- Regularization of petitioner- H.P. Civil Services (Revised) Pay Scale Rules, 1998- Held that the rejection of the case of the petitioner that he was not entitled for the higher pay scale on the ground that he was being correctly paid the pay scale of Laboratory Assistant is not sustainable in law. The omission on the part of the respondents to frame the Recruitment and Promotion Rules for the last 15 years cannot act to the deterrent of the petitioner. (Para 6)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has prayed for issuance of a direction to the respondents to grant him the pay scale of Rs.5000-8100/- from the initial date of his appointment, i.e., 29.05.1999 as a Laboratory Technician. The case of the petitioner is that he was initially serving as a

Laboratory Technician on daily wage basis with the respondent-Irrigation & Public Health Department and his services were regularized vide Memorandum, dated 29th August, 1999 (Annexure A-1) w.e.f. 01.01.1998 in the pay scale of Rs.3120-5160/-. According to the petitioner, at the time when his services were regularized in the said pay scale as a Laboratory Technician, the pay scale of a Laboratory Technician was Rs.5000/8100/- and accordingly, he made a representation on 06.08.1999 (Annexure A-2) to the respondent-Department to grant him the said pay scale. It is further borne out from the documents appended with the petition that the Engineer-in-Chief, I & PH Department, vide Annexure A-8, dated 10th March, 2000, informed the Chief Engineer (Mechanical), PMU, I & PH Department, Shimla that the pay scale of Laboratory Assistant in the I & PH Department notified vide Financial Commissioner-Cum-Secretary (IPH) to the Government of H.P., Shimla letter dated 14.02.1997 was Rs.950-1800, which was revised to Rs.3120-5160 in H.P. Civil Services (Revised) Pay Scale Rules, 1998 and as the pay scale of Rs.3120-5160/- of Laboratory Assistant was notified in the Recruitment and Promotion Rules of the I&PH Department, therefore, the request of the petitioner was not accepted. It is in this background that the petitioner filed the petition praying for the relief already mentioned hereinabove.

2. Learned counsel for the petitioner has argued that the petitioner has been regularized by the respondent-Department against the post of

Laboratory Technician and not as a Laboratory Assistant. He further submitted that it is a matter of record that there are no Recruitment and Promotion Rules framed till date by the respondent-Department with regard to the post of Laboratory Technician in the I &PH Department and result thereof is that the petitioner is being paid the salary of lower post, i.e., Laboratory Assistant. Learned Counsel further submitted that besides the I&PH Department, there are Laboratory Technicians working in the Municipal Corporation, Shimla as well as in the Health Department of the State Government and the pay scale which is being demanded by the petitioner is on the analogy of the pay scale which is being paid to the Laboratory Technicians working in the Municipal Corporation, Shimla as well as Health Department of the Government of Himachal Pradesh. He further argued that as the petitioner is fully qualified to hold the post of Laboratory Technician and further as there is no difference in the work or duties that are being performed by the petitioner as Laboratory Technician in the I & PH Department as compared to the Laboratory Technicians of Municipal Corporation, Shimla or the Health Department of the respondent-State, therefore, the present petition be allowed and the petitioner be granted the pay scale of Rs.5000-8100/- w.e.f. 29.05.1999, with all consequential benefits.

3. The petition is resisted by the State, *inter alia*, on the ground that the appointment of the petitioner is against the post of Laboratory Assistant and the pay scale of Laboratory Assistant, as is reflected in the Recruitment and Promotion Rules of Laboratory Assistant is being granted to him. Learned Additional Advocate General further informed the Court that in fact draft Rules of the post of Laboratory Technician in the Department of I & PH were prepared in the year 2005, but the same have till date not been finalized and in this view of the matter also, the petitioner is not entitled for the relief as is being prayed for. Learned Additional Advocate General by

referring to the reply of the respondent-Department also submitted that the functions and responsibilities of the post of Laboratory Technician in the Health Department are quite different from that of I & PH Department and therefore also, the petitioner is not entitled to seek parity with the Laboratory Technicians of the Health Department.

4. Learned counsel for the petitioner, in rebuttal, has submitted that there is no dissimilarity either in the functions or the duties of the Laboratory Technicians, be it the Municipal Corporation, Shimla, Health Department or the I & PH Department of the Government of Himachal Pradesh. By referring to communication dated 24.11.2005 appended with the rejoinder as Annexure A-11, in terms whereof the proposal was sent by the Irrigation and Public Health Department on the application of the petitioner for allowing pay scale of Rs.5000-8100/-, learned counsel for the petitioner has submitted that perusal thereof makes it amply clear that the Engineer-in-Chief of the respondent-Department has stated that the duties being performed by the petitioner are akin to the duties being performed by the Laboratory Technician in similar Departments.

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

6. It is not much in dispute that the I & PH Department presently does not has any Recruitment and Promotion Rules of the post of Laboratory Technician. In the absence of the Rules, how the petitioner was appointed to the post is not being gone into by the Court for the reason that it is the respondent-Department which regularized the services of the petitioner against the post of Laboratory Technician, as is evident from Annexure A-11. As the petitioner was not regularized as a Laboratory Assistant, therefore, there is no occasion for the petitioner to be satisfied with the pay scale of Laboratory Assistant. It is not much in dispute that at the time when services of the petitioner were regularized as a Laboratory Technician, the pay scale of

Laboratory Technician in the Health and Family Welfare Department was Rs.5000-8100/-. In this backdrop, when one peruses Annexure A-8, dated 10th March, 2000, obviously the rejection of the case of the petitioner that he was not entitled for the higher pay scale on the ground that he was being correctly paid the pay scale of Laboratory Assistant is not sustainable in law. Besides, a perusal of Annexure A-11, dated 24.11.2005, which is appended by the petitioner alongwith the rejoinder demonstrates that it was mentioned therein by the Engineer-in-Chief, I & PH Department, Shimla while addressing the communication to the Principal Secretary (I &PH), Government of H.P. that the proposal for framing Recruitment and Promotion Rules for the post of Laboratory Technician could not be sent earlier, as prior to regularization of the petitioner, this post was not existing in the Department and thereafter, the matter remained under correspondence with the Health & Family Welfare Department and Superintending Engineer, Water Supply & Sewerage Circle, Shimla. It is further mentioned in this communication that a copy of Recruitment and Promotion Rules for the post of Senior Laboratory Technician has been obtained and accordingly, draft Recruitment and Promotion Rules for the above post were being sent for necessary action. Para-3 of this communication states that a Committee to define the duties of various categories including Laboratory Technician and Laboratory Assistant was constituted by the Department and the duties proposed by the Committee have already been sent to the office of Principal Secretary vide letter dated 22.10.2005. The duties which have been spelled out of the post of Laboratory Technician in this communication are as under:-

> *"(i) Sample taking.*
> *(ii) Sterilization of glass ware.*
> *(iii) Prepare chemical for physical and chemical tests.*
> *(iv) Prepare media for bacteriological test and bacteriological analysis of water.*

(v) Help with chemists for physical and chemical tests and other techniques."

It is further mentioned in this communication that the petitioner was engaged in the year 1987 on the same analogy as of staff posted in Municipal Corporation, Shimla, Division No.-II as this Division was transferred from Municipal Corporation to IPH Department in the year 1983. His counterparts engaged in the Municipal Corporation stood appointed as Laboratory Technician in the old pay scale, corresponding pay scale of which w.e.f. 01.01.1996 was Rs.5000-8100/-. Accordingly, it was mentioned in this communication by the Engineer-in-Chief that the official, i.e., the petitioner was entitled to pay scale of Rs.5000-8100/- at par with his counter parts in Municipal Corporation, Shimla, as he was carrying out the same work in Shimla Laboratory in respect of Schemes of the Department.

7. This Court is of the considered view that in the light of the contents of this communication, which was addressed by the Engineer-in-Chief of the respondent-Department and that too as far back as in the 2005, there can not be any serious dispute that the petitioner in fact is entitled to the pay scale of Rs.5000-8100/-, as it is an admission on the part of the respondent-Department itself that not only the services of the petitioner were engaged on the same analogy as Laboratory Technician in Municipal Corporation, Shimla, but he was performing same duties, as were performed by his counter parts in Municipal Corporation, Shimla. The omission on the part of the respondents to frame the Recruitment and Promotion Rules for the last 15 years cannot act to the deterrent of the petitioner, as admittedly, appointment of the petitioner after regularization was against the post of Laboratory Technician. Therefore, he cannot be denied the pay scale of Laboratory Technician, as is being paid to his counter parts in the other

Departments, in view of the fact that all the Departments, at the end of the day, are of the Government of Himachal Pradesh.

8. Accordingly, this petition is allowed. It is held that the petitioner is entitled for the pay scale of Rs.5000-8100/-, as revised from time to time with effect from the date of issuance of Memorandum Annexure-1, i.e., 29.05.1999. Respondents are directed to grant the said pay scale as revised from time to time, as from the date of his regularization. Needful be done by the Department within a period of three months from today, failing which, the petitioner will be entitled for simple interest @6% per annum, upon arrears, as from the date of passing of the judgment. The petition stands disposed of, so also pending miscellaneous applications, if any.

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

Lal Chand ….Petitioner.

Vs.

Sant Ram

…..Respondent.

For the petitioner: Mr. K.B. Khajuria, Advocate.

For the respondent: Mr. Jagat Pal, Advocate.

Civil Revision No. 88 of 2022
Date of Decision: 15.11.2022

Code of Civil Procedure, 1908- Section 115, Order 39, Rules 1 and 2- The application was dismissed- Held that the defendant was able to demonstrate that partition took place between the parties and he was put in possession of part of the land in terms of the said partition, hence any injunction passed by the Court against the respondent would cause irreparable loss to the said respondent. (Para 5)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Section 115 of the Code of Civil Procedure, the petitioner has, *inter alia,* prayed for following reliefs:-

> *"1. That the impugned order dated 28.05.2022 passed in Civil Misc. Appeal No. 11-14 of 2022 titled as Lal Chand Versus Sant Ram passed by Additional District Judge, Ghumarwin, District Bilaspur may kindly be quashed and set aside, whereby the appeal filed by the petitioner has been dismissed and affirmed and the order dated 4.3.2022 in CMP No. 134/6 of 2021, titled as Lal Chand Vs. Sant Ram passed by the Senior Civil Judge, Bilaspur, whereby the application under Order 39, Rules 1 and 2 of CPC was dismissed.*
>
> *2. That the application under Order 39 Rules 1 and 2 may kindly be ordered to be allowed and the respondent may*

kindly be restrained from raising any construction over the suit land."

2. Brief facts necessary for the adjudication of the present petition are that a suit for permanent prohibitory injunction, restraining the defendant from raising any kind of construction exceeding his share, digging the land, cutting trees standing thereupon, changing nature and occupying the best portion of the suit land has been filed by the petitioner/plaintiff against the respondent/defendant. The case of plaintiff is that he is joint owner-in-possession of the suit land alongwith defendant and other co-sharers. On 07.05.2021, the defendant forcibly started digging the suit land to raise construction of a house over best portion of the suit land without partition thereof and turned down the requests of the plaintiff not to do so and threatened the plaintiff to dispossess him from the joint ownership of the suit land. A copy of the plaint is on record as Annexure P-1. In the written statement, which is also on record, the defendant has denied the fact that the suit land is jointly owned by the parties and the defence which has been taken is that the suit land has been partitioned in the year 2015, i.e., on 26.11.2015 among the co-sharers, including the defendant as well as the plaintiff and the parties have already been given separate possession of the land so partitioned by the revenue authority on the spot on 26.11.2017 in terms of *Rapat Rojnamcha* dated 14.06.2017. Alongwith the suit, an application was filed under Order XXXIX, Rules, 1 and 2 of the Code of Civil Procedure by the plaintiff, seeking injunction against the defendant from raising construction on the suit land, changing the nature, cutting trees standing thereupon or occupying the best portion of the suit land during the pendency of the suit. The application was dismissed by the Court of learned Senior Civil Judge, Bilaspur, District Bilaspur, H.P. in terms of order dated 04.03.2022, copy whereof is appended with the petition as Annexure P-4. While dismissing the

application, learned Trial Court observed that the plaintiff was claiming that the suit land was jointly owned and possessed by the parties, whereas, the defendant was claiming the suit land having been partitioned and separate possession thereof having been delivered to the defendant in terms of the partition. Learned Trial Court further observed that the defendant had placed on record the copy of order, copy of compromise and copy of *rapat* and said documents demonstrated that the suit land has been partitioned and possession as per partition stood delivered to the defendant. Learned Court further observed that the factum of partition was not denied by the plaintiff by filing rejoinder/replication and, therefore, the suit land could not be considered to be joint between the parties and other co-sharers. On these basis, it held that there was no *prima facie* case or balance of convenience in favour of the plaintiff and the plaintiff had not approached the Court with clean hands. The application was accordingly dismissed.

3. In appeal, learned Appellate Court upheld the order passed by the learned Trial Court by*inter alia* holding that the material placed on record demonstrated that the suit land, which was shown to be joint in the Jamabandi filed by the plaintiff, stood partitioned and the defendant was put into possession of his share in the suit land. Learned Appellate Court also held that it could be gathered from the pleadings of the parties that the plaintiff had not revealed the factum of partition which took place between the parties and in fact the plaintiff in response to the plea of partition had not even denied the said fact and the only stand taken by the plaintiff was that the factum of partition or compromise was not in his knowledge till the filing of the reply by the defendant before the learned Trial Court. Learned Appellate Court held that this contention of the plaintiff appeared to hold no force, in view of the fact that he was party to the appeal against the partition proceedings, which were decided on 17.12.2018 and, therefore, it could not be accepted that he did not inquire about the fate of the proceedings filed by him

in the year 2017, which purportedly were being attended upon by one Khokhdia Ram till filing of the suit before the learned Trial Court. Learned Court also held that in the light of documents placed on record, it was *prima facie* demonstrated before the Court that the suit land was no more joint between the parties, as pleaded by the plaintiff. On these basis, learned Appellate Court dismissed the appeal filed by the plaintiff. Feeling aggrieved, the present revision petition has been filed by the plaintiff.

4. I have heard learned counsel for the parties and have also gone through the orders under challenge.

5. In exercise of powers so conferred upon this Court under Section 115 of the Code of Civil Procedure, the scope of interference is very limited and the Court can interfere with the order(s) passed by the learned Courts below provided any of the following conditions are met: (a) the Court has exercised jurisdiction not vested in it; or (b) the Court has not exercised the jurisdiction vested in it; or (c) the Court has exercised the jurisdiction vested in it with material irregularity. It fact, first two conditions are not argued before this Court and it is not the case of the petitioner that the orders passed by the learned Courts below are without jurisdiction. Now, as far as the power having been exercised by the Court with material irregularity is concerned, this Court is of the considered view that after carefully perusing the findings which have been returned by the learned Trial Court as well as the learned First Appellate Court in the orders which have been passed, both in the application filed under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure as well as the appeal, it cannot be said that these orders have been passed by the learned Courts below by exercising the jurisdiction vested in them with material irregularity. It is settled law that in order to succeed underOrder XXXIX, Rules 1 and 2 of the Code of Civil Procedure, a party has to establish a *prima facie* case, balance of convenience and irreparable loss in case of non-grant of interim protection before the Court. The order which has

been passed by the learned Trial Court under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure demonstrates that it stands observed therein that the plea of the plaintiff that the suit land was jointly owned, stood rebutted by the defendant by placing on record documents which demonstrated that the suit land was partitioned and the possession in terms of the partition, stood delivered to the defendant. Learned Court also observed that the plea of partition which was raised in response by the defendant was not rebutted by the plaintiff by filing rejoinder/replication. During the course of arguments, learned counsel for the petitioner could not demonstrate that there was any perversity in the findings returned by the learned Trial Court. In other words, the findings returned by the learned Trial Court that the plea of land having been partitioned could not be rebutted by the plaintiff are duly borne out from the record of the case, as the plaintiff did not produce anything on record to prove to the contrary. Similarly, if one peruses the order passed by the learned Appellate Court, it is apparent from the perusal thereof that the stand which was taken by the petitioner before the learned First Appellate Court was that he was not aware of the partition of suit land which took place between the parties and the reasoning which was put forth before the learned Appellate Court by the petitioner was that though earlier the petitioner alongwith other co-sharers had filed an application for partition of the suit land and their uncle Khokhdia Ram used to attend the hearing of said proceedings. Khokhdia Ram died in the year 2020 and during his life time, he did not disclose to the plaintiffs regarding decision in partition application and it was only during the pendency of civil suit before the learned Trial Court that the plaintiff came to know about the compromise arrived at between the respondent and late Khokhdia Ram. It is also apparent from the order passed by the learned First Appellate Court that further stand of the petitioner before the said Court was that petitioner had not entered into any settlement with the respondent with respect to the suit land and the compromise dated

10.12.2018 between late Khokhdia Ram and the respondent which took place in the absence of plaintiff and was not binding upon the plaintiff. Be that as it may, the fact of the matter remains that the stand which was taken by the petitioner before the learned First Appellate Court impliedly was conceding to the factum of the suit land having been partitioned. Now, whether that partition is good or bad in law, is a separate matter and it is not the subject matter to be decided before this Court. However, the fact of the matter remains that as the plaintiff could neither prove before the learned Trial Court nor before the learned First Appellate Court*prima facie* that the suit property was jointly owned by the parties, both the learned Courts below were right in rejecting both the application as well as the appeal filed by the plaintiff, as the plaintiff had failed to demonstrate before the learned Court below that either there was a *prima facie* case in his favour or the balance of convenience was in his facour. This Court is of the considered view that as the defendant was able to demonstrate that partition took place between the parties and he was put in possession of part of the land in terms of the said partition, hence any injunction passed by the Court against the respondent would cause irreparable loss to the said respondent.

6. In view of the above, as this Court finds no infirmity with the orders under challenge, the present petition being devoid of any merit is dismissed. However, it is made clear that the findings which have been returned by this Court in this order are only for the purpose of adjudication of the present petition and shall not influence the course of trial before the learned Trial Court. Miscellaneous applications, if any, also stand disposed of.

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

Between:

KAMLA DEVI, WIFE OF SH. MOHINDER SINGH, AGED 53 YEARS, RESIDENT OF VILLAGE AND P.O. KAMAND, TEHSIL ANNI, DISTRICT KULLU. H.P.

.....APPLICANT/APPELLANT

(BY MR. J.L. BHARDWAJ,ADVOCATE)

AND

1.SHRI VINOD KUMAR, SON OF SHRI CHADDAR SAIN, RESIDENT OF VILLAGE AND P.O.CHAGAON, TEHSIL NICHAR, DISTRICT KINNAUR, H.P. (OWNER OF VEHICLE NO. HP-62-2051 PRIVATE BUS).

2.MOHD. SULEMAN, (DRIVER OF BUS NO. H.P.62-2051) THROUGH SHRI VINOD KUMAR, REGISTERED OWNER OF BUS NO. HP-62-2051 (FRIENDS COACH).

3.M/S SHRIRAM GENERAL INSURANCE COMPANYLtd. E-8 EPIP RILCO INDUSTRIAL AREA SITAPUR JAIPUR, RAJASTHAN, THROUGH ITS CHAIRMAN-CUM-MANAGING DIRECTOR.

.....NON-APPLICANTS/RESPONDENTS

(BY MR. VIRENDER SHARMA, ADVOCATE FOR R-3;

RESPONDENTS NO. 1 AND 2 *EX-PARTE,* VIDE HON'BLE COURT'S ORDER DATED 18.11.2021)

CIVIL MISCELLANEOUS PETITION (MAIN)
NO.77 of 2021 IN FAO
Reserved on: 28.10.2022
Decided on: 04.11.2022

Limitation Act, 1963- Section 173- Whether the belated advise of a counsel can be considered as sufficient cause prescribed in second proviso to Section

173 of the Act- Held that no such advise was rendered to the applicant by the counsel, who had conducted her compensation case before learned Tribunal and also had rendered assistance to her during execution proceedings. It was only, when applicant allegedly met another counsel that she was advised to take a chance. This cannot be said to be a sufficient cause. Such interpretation would be too absurd and will open flood gates for all litigants to file the appeal at their whims by taking shelter of legal advise. By applying the criteria of reasonableness, the case in hand fails. After huge delay of two years and eight months, the other side has acquired legal vested rights which cannot be taken away lightly by raising the plea of liberal interpretation.(Para 15)

Cases referred:

Brahampal alias Sammay and another Vs. National Insurance Company (2021)6 SCC 512;

Collector, Land Acquisition, Anantnag and another Vs. MST. Katiji and Ors. (1987) 2 SCC 107;

This application coming on for pronouncement of orders this day,the Court passed the following:-

O R D E R

By way of instant application, a prayer has been made to condone the delay of 1019 days in filing the appeal under Section 173 of Motor Vehicles Act, 1988 against award dated 01.09.2017, passed by Motor AccidentClaims Tribunal-II, Kinnaur at Rampur Bushehr, District Shimla, H.P. in M.A.C. Petition No. 73-R/2 of 2016/2015.

2. Applicant contends that she had met the counsel representing her in the instant application in January, 2021 and was advised that the award passed by learned Tribunal was on lower side and she could take the chance of enhancement in compensation by preferring the appeal before this Court.

3. As per averments made in the application, the applicant had filed execution petition after passing of the award and had received the awarded amount in August, 2020. It is also submitted that applicant was under mental depression on account of death of her young son.

4. As per applicant, the delay in filing the appeal was not intentional. She, otherwise, was not aware about the period of limitation prescribed to file the appeal. It is further contended that applicant would have achieved nothing by delaying the filing of the appeal.

5. The prayer of the applicant is contested on behalf of respondent No.3, on the ground that the application is abuse of process of law as no cogent and satisfactory reason has been assigned for condonation of huge delay of 1019 days.

6. I have heard learned counsel for the parties and have gone through the record.

7. The plea that applicant was under depression as she had lost her son, has remained unsubstantiated. Except for the bald assertions made in the application, nothing has been placed on record to prove the same. The reason, so assigned, otherwise, also does not appear to be convincing as there is nothing to infer as to when applicant had lost her son. If the reference is to the death of son of the applicant, for whom, she has been compensated through award sought to be impugned, the same dates back to the year 2015. Applicant had filed the petition herself under Section 166 of the Motor Vehicles Act. She had contested the same and thereafter received the awarded amount after preferring execution. In such circumstances, it cannot be said that the applicant suffered from the depression, as claimed.

8. Another fact that cannot be ignored is that applicant was throughout represented by a counsel right from the date of filing of petition under Section 166 of the Motor Vehicles Act till the culmination of execution proceedings in August, 2020. Even after the passing of award, applicant had

contacted her counsel for filing execution. The counsel, who had contested the claim of the applicant had not advised her to file appeal for enhancement of compensation.

9. As per the case of applicant, she decided to prefer the appeal as well as instant application only when she was advised by another counsel to take a chance by preferring the appeal. Thus, applicant has filed the appeal accompanied by present application on the advise of a counsel, who had not represented her before the learned Tribunal.

10. Mr. J.L. Bhardwaj, Advocate, learned counsel for the applicant has contended with vehemence that the Motor Vehicles Act is a beneficial legislation and the Court should take lenient and pragmatic view while deciding the present application. He has placed reliance upon the judgment passed by Hon'ble Supreme Court in ***Collector, Land Acquisition, Anantnag and another*** *Vs.* ***MST. Katiji and Ors. (1987) 2 SCC 107***, in which it was observed as under:-

> ***"3.*** *The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaning- ful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-*
>
> *1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the*

highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a step motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient

*cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore. set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.***"**

11. Mr. Bhardwaj, has also placed reliance on judgment passed by three Judge Bench of Hon'ble Supreme Court in ***Brahampal alias Sammay and another*** *Vs.* ***National Insurance Company (2021)6 SCC 512*** and has laid stress on the observations made as under:-

"10. Section 173 provides that, any person aggrieved by the award passed by the Tribunal may approach the High Court within ninety days. However, the second proviso states that the High Court "may" still entertain such appeal even after the expiry of ninety days, if the appellant satisfies the Court that there exists sufficient reason behind the delay.

11. Ordinarily, the word "may" is not a word of compulsion. 1 It is an enabling word and it only confers capacity, power or authority and implies discretion.2 "It is used in a statute to indicate that something may be done which prior to it could not be done".

12. The legislature by usage of the word "may" in Section 173 of the Act, conferred sufficient discretionary powers upon the Court to entertain appeals even beyond the period of ninety days. The pertinent issue before us relates to what the extent of such discretionary power is.

13. In order to understand the extent of conferment of power by the usage of the word "may", we may observe Official Liquidator v. Dharti Dhan (P.) Ltd., (1977) 2 SCC 166, wherein this Court held:

> *"10. The principle laid down above has been followed consistently by this Court whenever it has been contended*

> *that the word "may" carries with it the obligation to 1 Justice G.P. Singh in Principles of Statutory Interpretation, 14th Edn.,page 519 2 Chinnamarkathian alias Muthu Gounder v. Ayyavoo alias Periana Gounder, (1982) 1 SCC 159 3 Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd., 1962 Supp (3) SCR 973 exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner".*

14. *This Court has firstly held that purpose of conferment of such power must be examined for the determination of the scope of such discretion conferred upon the court. [refer to Bhaiya Punjalal Bhagwandin v. Dave Bhagwatprasad Prabhuprasad, AIR 1963 SC 120; Shri Prakash Chand Agarwal v. Hindustan Steel Ltd., (1970) 2 SCC 806] . Our analysis of the purpose of the Act suggests that such discretionary power is conferred upon the Courts, to enforce the rights of the victims and their dependents. The legislature intended that Courts must have such power so as to ensure that substantive justice is not trumped by technicalities.*

15. Secondly, it has been held that if the specific conditions wherein the power could be exercised is also provided in the statute, then the Court must exercise the aforesaid discretion in the manner as specified by the statute itself. In the second proviso to Section 173 it is stated that Court has the power to condone delay only if it is satisfied that there existed "sufficient cause".

16. At this juncture, we need to interpret the term "sufficient cause" as a condition precedent for the granting of the discretionary relief of allowing the appeal beyond the statutory limit of ninety days. Although this Court has held that provisions of the Limitation Act, 1963 does not apply while deciding claims under the Motor Vehicles Act, but it is relevant to note that even while interpreting "sufficient cause" under the Limitation Act Courts have taken a liberal interpretation. This Court in the case

of Perumon Bhagvathy Devaswom, Perinadu Village v. Bhargavi Amma (Dead) by LRs, (2008) 8 SCC 321, observed that:

> *"13.…The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause" in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."*

17. *The aforesaid view was reiterated in the case of Balwant Singh (Dead) v. Jagdish Singh, (2010) 8 SCC 685, wherein this Court held that:*

> *"25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.*
>
> *26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."*

18. The Court in the abovementioned cases, highlighted upon the importance introducing the concept of "reasonableness" while giving the clause "sufficient

cause" a liberal interpretation. In furtherance of the same, this Court has cautioned regarding the necessity of distinguishing cases where delay is of few days, as against the cases where the delay is inordinate as it might accrue to the prejudice of the rights of the other party. In such cases, where there exists inordinate delay and the same is attributable to the party's inaction and negligence, the Courts have to take a strict approach so as to protect the substantial rights of the parties.

19. The aforesaid view was taken by this Court in the case of Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157 wherein the Court held that:

> *"23. What needs to be emphasized is that even though a liberal and justiceoriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.*
>
> *24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."*

20. Therefore, the aforesaid provision being a beneficial legislation, must be given liberal interpretation to serve its object. Keeping in view the substantive rights of the parties, undue emphasis should not be given to technicalities. In such cases delay in filing and refiling cannot be viewed strictly, as compared to commercial claims under the Arbitration and Conciliation Act, 1996 or the Commercial Courts Act, 2015."

12. The judgments relied upon by learned counsel for the applicant are distinguishable for the reason that in the matter of Mst. Katiji (supra), the delay was only of four days and in Brahampal @ Sammy (supra), the delay was of forty five days, whereas the delay in the instant case is of two years and eight months.

13. Undoubtedly, the Motor Vehicles Act being a beneficial legislation its provisions have to be considered and construed liberally. However, it does not mean that the right of appeal provided under Sub-Section 1 of Section 173 of the Act, is to be construed, in such a manner that the second proviso thereof is rendered nugatory or redundant. Even in Brahampal @ Sammy(supra), the three Judge Bench of Hon'ble Supreme Court has taken into consideration the underlined value of law of limitation as substantive law and having definite consequences on the right and obligations of the parties. In the cases of inordinate delay, the Hon'ble Supreme Court has observed as under:

> *"18. The Court in the abovementioned cases, highlighted upon the importance introducing the concept of "reasonableness" while giving the clause "sufficient cause" a liberal interpretation. In furtherance of the same, this Court has cautioned regarding the necessity of distinguishing cases where delay is of few days, as against the cases where the delay is inordinate as it might accrue to the prejudice of the rights of the other party. In such cases, where there exists inordinate delay and the same is attributable to the party's inaction and negligence, the Courts have to take a strict approach so as to protect the substantial rights of the parties."*

14. Liberal interpretation does not mean that the party can be allowed to approach the Court, at any time, without showing any cause which can be termed to be sufficient. Considering such aspect, Hon'ble Supreme Court in Braham Pal @ Semi (supra) address the issue as under:-

> *"22.Undoubtedly, the statute has granted the Courts with discretionary powers to condone the delay, however at the same time it also places an obligation upon the party to justify that he was prevented from abiding by the same due to the existence of "sufficient cause". Although there exists no strait jacket formula for the Courts to condone delay, but the Courts must not only take into consideration the entire facts and circumstances of case but also the conduct of the parties. The concept of reasonableness dictates that, the Courts even while taking a liberal approach must weigh in the rights and obligations of both the parties. When a right has accrued in favour of one party due to gross negligence and lackadaisical attitude of the other, this Court shall refrain from exercising the aforesaid discretionary relief."*

15. The question, thus, arises as to whether the belated adviseof a counsel can be considered as sufficient cause prescribed in second provisoto Section 173 of the Act. The facts of the case in hand reveal that no such advise was rendered to the applicant by the counsel, who had conducted her compensation case before learned Tribunal and also had rendered assistance to her during execution proceedings. It was only, when applicant allegedly met another counsel that she was advised to take a chance. This cannot be said to be sufficient cause. Such interpretation would be too absurd and will open flood gates for all litigants to file the appeal at their whims by taking shelter of legal advise. By applying the criteria of reasonableness, the case in hand fails. After huge delay of two years and eight months, the other side has acquired legal vested rights which cannot be taken away lightly by raising the plea of liberal interpretation.

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

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

Tarlochan Singh ....Petitioner.

Versus

Mohinder Kaur ...Respondent.

For the petitioner : Ms. Shrutika, Advocate.

For the respondent : Ms. Devyani Sharma, Advocate.

CMPMO No. : 30 of 2022
Reserved on: 14.11.2022
Decided on : 18.11.2022

Hindu Marriage Act, 1995- Section 24- Maintenance pendente lite- Held that once it is *prima-facie* shown that the respondent had no independent source of income sufficient to maintain herself and her children, the liability of the petitioner to maintain her by payment of maintenance pendente lite under Section 24 of the Hindu Marriage Act arises. (Para 9)

Cases referred:

Amarjit Kaur vs. Harbhajan Singh and Another, (2003) 10 SCC 228;
Jasbir Kaur Sehgal vs. District Judge, Dhradun and others, (1997) 7 SCC 7;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

Petitioner has taken exception to order dated 23.11.2021, passed by learned Additional Principal Judge(1), Family Court, Una, H.P., in H.M.A. No. 306 of 2021 in H.M.A. Petition No. 30/2021, whereby petitioner has been ordered to pay maintenance pendente lite to the respondent @ Rs. 5,000/- per month besides payment of litigation expenses @ Rs. 12,000/-

2. Respondent has filed a petition against petitioner for a decree of divorce, on the ground of cruelty, which is pending adjudication before

learned Additional Principal Judge (1), Family Court, Una, H.P. as H.M.A. Petition No. 30/2021.

3. Respondent filed an application under Section 24 of the Hindu Marriage Act in the aforesaid proceedings for grant of maintenance pendente lite. She averred that the petitioner was owner of a *Dhaba* and was earning more than Rs. 80,000/- per month, but had not been providing any maintenance to respondent. It was further submitted that the respondent was unable to maintain herself as well as her children. She had to depend upon her poor parents for survival. Respondent had no independent source of income. Accordingly, maintenance pendente lite @ Rs. 20,000 was claimed.

4. In response, petitioner submitted that he was earning only Rs.8,000/-per month. As per petitioner, respondent had landed property in her name and was also working as partner having 50% share in project under the name and style of M/s Standard Agro Project. It was alleged that respondent was earning more than Rs.80,000/-per month. Petitioner also submitted that respondent was being maintained by him and she was being provided with all necessities of life.

5. Learned Trial Court allowed the application of respondent for grant of maintenance pendente lite in terms as noticed above and hence this petition.

6. I have heard learned counsel for the parties and have gone through the record.

7. Perusal of impugned order reveals that learned Trial Court has considered the relevant material placed before it. Learned Trial Court relied upon the affidavit placed by the respondent on record in support of her averments. It has also been noticed that petitioner had failed to place any material on record to show that respondent was having independent source of income sufficient to maintain herself and her children. The findings

returned by learned Trial Court cannot be faulted as are found to be borne from the material on record.

8. Learned counsel for the petitioner has argued with vehemence that the fact of respondent having independent source of income is borne from the documents placed on record as Annexures P-6 and P-7. The arguments so advanced deserved to be rejected for the reason that from perusal of these documents it cannot be inferred that respondent has any earning of her own. Annexure P-6 is jamabandi, whereby ownership of respondent over a piece of barren land measuring 120 sq. mtrs.is recorded. It is not explained that how and in what manner respondent is generating income from such a small piece of land. Similarly, Annexure P-7 is a copy of an agreement executed by respondent on 05.12.2018. This document also does not justify the contention raised on behalf of the petitioner. There is nothing in agreement dated 05.12.2018, which can suggest that respondent was having any earning from the partnership business mentioned therein.

9. Once it is *prima-facie* shown that the respondent had no independent source of income sufficient to maintain herself and her children, the liability of the petitioner to maintain her by payment of maintenance pendente lite under Section 24 of the Hindu Marriage Act arises. Admittedly, petitioner is owner of a *Dhaba*. In order to *prima-facie* convince the Court about his income, petitioner could have placed some tangible material on record, in absence of which, it can be inferred that the monthly income disclosed by the petitioner from his *Dhaba* is not genuinely correct.

10. Section 24 of the Hindu Marriage Act provides for grant of maintenance pendente lite in case either wife or husband, as the case may be, has no independent income sufficient for her or his support. The aforesaid provision also provides for grant of necessary expenses for proceedings. In ***Amarjit Kaur*** *vs.* ***Harbhajan Singh and Another, (2003) 10 SCC 228,*** Hon'ble Supreme Court observed that the relevant statutory consideration

under Section 24 of the Hindu Marriage Act is that the applicant has no independent income sufficient for support, if such fact exists, then the interim maintenance has to be granted. The only discretion thereafter left with the Court is with reference to reasonableness of the amount.

11. In the facts of the instant case, as noticed above, the applicant/wife has no independent source of income. Respondent/husband has not been able to place on record any material to show that the applicant/wife had been earning sufficiently since the date of filing of application till date. It being so, applicant/wife is entitled to maintenance pendente lite from respondent/husband. Since, the children of the parties is also being maintained by the applicant/wife, it also will be the relevant consideration in deciding the present application.

12. In ***Jasbir Kaur Sehgal*** *vs*. ***District Judge, Dhradun and others, (1997) 7 SCC 7***, the Hon'ble Supreme Court has observed as under:-

> "*6 The wife says that the husband has not given true account of his assets and income and has rather suppressed the same. Though the wife has not been able to give any specific evidence to support her contention but circumstance show that the husband has not given true state of affairs of his income. He has pleaded that both his wife and his eldest daughter are earning Rs. 10,000/- per month but there is no basis for such an allegation. The fact remains that the wife has no source of income and she is also maintaining her eldest unmarried daughter. Under the Hindu options & Maintenance Act, 1956 it is the obligation of a person to maintain her unmarried daughter if she is unable to maintain herself. In this case since the wife has no income of her own, it is the obligation of the husband to maintain her and her two unmarried daughters one of whom is living with wife and one with him. Section 24 of the Act no doubt talks of maintenance of wife during the pendency of the proceedings but this section,* ***in our view, cannot be read in isolation and cannot be given restricted meaning to hold that it is maintenance of the wife alone and no one else. Since wife is maintaining the***

eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter. This fact has to be kept in view while fixing maintenance pendente lite for the wife. *We are aware of the provisions of Section 26 of the Act providing for custody of minor children, their maintenance and education but that section operates in its own field."*

13. In result, there is no merit in the petition and as such, the same is dismissed.

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

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

Between:

SHRI RAKESH BABU (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:

(a) SMT. KAMLESH SOOD
(AGE:69 YEARS), WIFE

(b) SHRI RAHUL SOOD
(AGE:37 YEARS), SON OF LATE SHRI RAKESH BABU.

BOTH RESIDENTS OF VILLAGE, P.O. AND TEHSIL AMB, DISTRICT UNA, H.P.

…….PLAINTIFFS-PETITIONERS

(BY MR. NEERAJ GUPTA, SR. ADVOCATE, WITH MR. AJEET JASWAL, ADVOCATE)

AND

SHRI RAJAN BABU SOOD, SON OF SHRI RAM ROOP, RESIDENT OF VILLAGE, P.O. AND TEHSIL AMB, DISTRICT UNA, H.P.

…….DEFENDANT-RESPONDENT

(Mr. ATUL JHINGAN, ADVOCATE)

CIVIL MISCELLANEOUS PETITION MAIN (ORIGINAL)
No. 370/2022
Reserved on: 04.11.2022
Decided on: 14.11.2022

Indian Evidence Act, 1872- Chapter VII- Rules of Evidence- The burden to prove a fact never shifts, whereas the onus to prove an issue keeps on shifting- Held that once the issues are framed, the onus to prove the issues is also fixed on the basis of rules of evidence provided under Chapter-VII of the Indian

Evidence Act, 1872. The burden to prove a particular fact, as a general rule, lies on the person who asserts such facts. The onus to prove an issue lies upon the person for whom it becomes incumbent to prove the facts constituting the issue. The burden to prove a fact never shifts, whereas the onus to prove an issue keeps on shifting.- Order 18- Order 18 of the CPC merely provides procedure for examination of witnesses. Rule 1 of Order 18 provides a right to the plaintiffs to begin the hearing of the suit unless the claim is admitted by defendant, in which case, the defendant has right to begin. Under Rule 2 of Order 18, the party having right to begin is obliged to state his case and produce his evidence in support of the issues which he is bound to prove.- Section 102- Section 102 of the Evidence Act prescribes that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Thus, the preference to lead evidence does not affect the burden of proof. (Paras 11 & 12)

Cases referred:

Neelam Rai Vs. Surjit Kumar and others, AIR 2011 Himachal Pradesh 39;

This petition coming on for pronouncement of judgment, this Court passedthe following:-

ORDER

By way of instant petition, petitioners have assailed order dated 09.05.2022, passed by learned Senior Civil Judge, Court No. 1, Amb, District Una, H.P. in CMA No. 183-VI-2022, filed in Civil Suit No. 72-1 of 2015, whereby, the prayer made by the petitioners was partially rejected.

2. Brief facts necessary for adjudication of the petition are that Civil Suit No. 72-1 of 2015 filed by the petitioners against respondent is pending adjudication before the learned Senior Civil Judge, Court No. 1, Amb, District Una, H.P. The suit was initially filed by Mr. Rakesh Babu, Predecessor-in-interest of petitioners, who died during its pendency. The original plaintiff Sh. Rakesh Babu and respondent herein/defendant were sons of late Sh. Ram Roop. The subject matter of the suit is the estate left behind by Sh. Ram Roop. Whereas,

Sh.Rakesh Babu claimed to have inherited the estate of Sh. Ram Roop alongwithdefendant in equal shares and on such premise sought declaration as to joint ownership and possession with defendant over the properties left behind by Sh. Ram Roop, defendant has propounded a Will of Sh. Ram Roop in his favour and has claimed inheritance to the properties left behind by Sh. Ram Roop in accordance with Will. Plaintiffs have also assailed the Will propoundedby defendant to be the result of fraud,mis-representation and undue influence.

3. Defendant has also filed a counter claim against the plaintiffs seeking declaration that the land comprised in Khasra No.1715 measuring 00-28-99 hects, situated in Village Amb Khas, Tehsil Amb, District Una, H.P. has fallen to the share of defendant/counter claimant under the Will dated 08.09.2010 executed by late Sh. Ram Roop and the revenue entries depicting the ownership and possession of plaintiffs over the said land are wrong, illegal and void. In addition, a money decree of Rs. 16,72,301/- has also been prayed for by the counter claimant.

4. Learned Trial Court framed following issued on 26.02.2019:-

"1. Whether the plaintiff is entitled for decree of declaration to the effect that parties are joint owner in possession of the suit land? OPP

2. Whether the plaintiff is entitled for decree of declaration to the effect that impugned Will dated 8.9.2010 is outcome of fraud, misrepresentation and undue influence, as alleged? OPP

3. Whether the Will is further required to be declared null and void and it was executed without possession sound disposition of mind since 2009 due to Parkinson diseases as alleged? OPP

4. Whether the plaintiff has suppressed true and material facts from this court, as alleged? OPD

5. Whether the plaintiff has no locus-standi to file the present suit? OPD

6. *Whether the suit is liable to be dismissed on the ground of maintainability, as alleged? OPD*

7. *Whether the plaintiff is estopped by his act and conduct to file the present suit, as alleged? OPD*

8. *Whether the impugned Will dated 8.9.2010 is duly executed in due process of law, as alleged? OPD.*

COUNTER- CLAIM

9. *Whether the counter claimant/defendant is entitled decree of declaration on the basis of registered Will dated 8.9.2010, as alleged? OPD/CC*

10. *Whether the counter claimant/defendant is entitled for money decree of Rs.16,72,301/- on the basis of Will dated 8.9.2010, as alleged? OPD/CC*

11. *Whether the counter claim is liable to be dismissed on the ground of maintainability?OPP/Non-CC*

12. *Whether the counter claimant has no cause of action, as alleged/OPP/Non-CC*

13. *Whether the counter claim is time barred, as alleged, OPP/Non-CC*

14. *Whether the counter claimant has suppressed material facts from the court, as alleged?OPP/Non-CC*

15. *Whether the counter claim is not properly valued as alleged?OPP/Non-CC*

16. *Whether the counter claimant has no locus standi, as alleged?OPP/Non-CC*

17. Whether this court has no jurisdiction, as alleged?OPP? Non-CC
18 Relief."

5. Subsequent to framing of issues, plaintiffs filed an application before learned Trial Court under Order 14 Rules 1 and 5 read with Section 151 of Code of Civil Procedure with prayers as under:-

"(a) Issues No. 3 and 10 as framed on 26.02.2019 may be ordered to be struck off, being superfluous.

(b) Issue No. 2 as framed on 26.02.2019 may be ordered to be recast/re-framed/amended as under:-

Issue No.2: If Issue No.8 is proved in affirmative, whether plaintiff is entitled for a decree of declaration to the effect that the impugned Will dated 8.9.2010 is an outcome of fraud, misrepresentation and undue influence as alleged?OPP.

(c) Issue No.9 as framed on 26.2.2019 may also be ordered to be recast/reframed/amended as under:-

Issue No.9: If findings under Issue No.8 are in affirmative, whether the counter claimant-defendant is entitled for a decree of declaration on the basis of Will dated 8.9.2010, as alleged and is also entitled for a decree for a sum of Rs. 16,72,301/-, as alleged?OPD-Counter Claimant.

(d) Additionalissues maybe ordered to be framed as under:-

(i) Whether plaintiff is entitled for a decree for permanent prohibitory injunction, as alleged? OPP

(ii) Whether Mutations No. 901,1299 and1015 attested on the basis of alleged Will dated 8.9.2010 are liable to be declared null and void, having no effect on the rights, title and interest of the plaintiff, as alleged?OPP

(e) Any other order that this learned Court deems fit in the facts and circumstances of the case mayalso be passed in favour of plaintiff-applicant in the interest of justice."

6. Vide impugned order, learned Trial Court partially allowed the application of plaintiffs. Issue No. 3 framed in the suit was ordered to be struck off being covered under issue No.2. Additional issues as issues No. 3 and 3(a) were also ordered to be framed as follows:-

"3) Whether Mutation No. 901, 1299 and 1015 attested on the basis of alleged Will dated 8.9.2010 are liable to be declared null and void, having no effect on the rights, title and interest of the plaintiff, as alleged? OPP.

3-A) Whether the plaintiff is entitled for a decree for permanent prohibitory injunction, as alleged? OPP"

Remaining prayers made by the plaintiffswere rejected.

7. Thus, the prayers to strike off issue No. 10 and to reframe issue Nos. 2 and 9 were rejected. Learned Trial Court rejected the aforesaid prayers by holding that such allowance will violate the provisions of Order 18 Rule 1 of the Code of Civil Procedure, according to which, it is the plaintiff who has to begin the evidence. It has further been held that since the allegations regarding Will of late Sh. Ram Roop being result of fraud,

misrepresentation and undue influence were not admitted by defendant, the reframing of issues No. 2 and 9 would amount to calling upon the defendant to lead evidence in first instance. Learned Trial Court also inferred that the plaintiffs had made a prayer that issue No. 8 be directed to be proved by defendant prior to proving of issue No. 2 by plaintiffs.

8. I have heard learned counsel for the parties and gone through the record.

9. At the very outset, this Court is constrained to observe that learned Trial Court has misapplied the provisions of Order 18 Rule 1 of Code of Civil Procedure, while considering the questions posed before it. The procedure prescribed in Rule 1 of Order 18 of CPC has no direct relation with the framing of issues in a suit, the onus to prove such issues and burden to prove the same. Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The material propositions are those propositions of law or fact which plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Issues can be of fact and of law or a mixed issue of fact and law.

10. It is enjoined upon the Court to ascertain upon what material proposition of fact or of law, the parties are at variance and accordingly to frame and record the issues on which the right decision of the case appears to depend.

11. Once the issues are framed, the onus to prove the issues is also fixed on the basis of rules of evidence provided under Chapter-VII of the Indian Evidence Act, 1872. The burden to prove a particular fact, as a general rule, lies on the person who assertssuch facts. The onus to prove an issue lies upon the personfor whom it becomes incumbent to prove the facts constituting the issue. The burden to prove a fact never shifts, whereas the onus to prove an issue keeps on shifting.

12. Order 18 of the CPC merely provides procedure for examination of witnesses. Rule 1 of Order 18 provides a right to the plaintiffs to begin the hearing of the suit unless the claim is admitted by defendant, in which case, the defendant has right to begin. Under Rule 2 of Order 18, the party having right to begin is obliged to state his case and produce his evidence in support of the issues which he is bound to prove. From the reading of aforesaid provision of Code of Civil Procedure, it cannot be implied that it affects the burden to prove a particular fact that lies on the party in accordance with the provisions of Chapter-VII of the Indian Evidence Act, 1872. Section 102 of the Evidence Act prescribes that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Thus, the preference to lead evidence does not affect the burden of proof.

13. Adverting to the facts of the case, the dispute primarily revolves around the rights of inheritance of the parties to the property of their predecessor-in-interest. Defendant has propounded a Will. Law provides specific mode for attestation of Will undersection 63 of the Indian Succession Act. The Will is mandatorily required to be attested by at least two witnesses. For using the Will as evidence, it is mandatorily requiredunder Section 68 of the Indian Evidence Act that at least one attesting witness is called upon for purpose of proving its execution. On the basis of Section 102 of the Indian Evidence Act, it is settled proposition of law that the propounder of Will has to prove its attestation in accordance with law so as to make it worthy of use as evidence. The burden to prove due execution of Will is always on the propounder. Such burden does not shift. In such view of the matter, even if the plaintiffs in the instant case begin the evidence, the burden to prove issue No. 8 will remain on defendant. In case defendant succeeds in discharging the burden, it will be for the plaintiffs to prove their allegations regarding Will being result of fraud, misrepresentation and undue influence.

14. Further, learned Trial Court has also not noticed the provision of Rule 3 of Order 18 of CPC, according to which, in case where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and , in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case. This provision normally provides an option to the plaintiffs to lead evidence on the issues, the burden of proving which lies on the defendant, or reserve it by way of answer to the evidence produced by the defendant. This process goes on and that is why it is said that onus keeps on shifting but burden does not.

15. At this stage, the exposition made by a Coordinate Bench of this Court in case ***Neelam Rai*** *Vs.* ***Surjit Kumar and others, AIR 2011 Himachal Pradesh 39***, on Rule 3 of Order 18 of CPC, can be gainfully referred, which is as under:-

> *"15. It would be pertinent to deal with the phrase relied upon by the respondent that the "party beginning will be entitled to reply generally on the whole case." In case* ***Order 18, Rule 3 of the CPC*** *is read as a whole, it is obvious that when several issues are framed normally it would be the plaintiff who would lead evidence if onus to prove certain factual issues has been placed on the plaintiff. Therefore, instead of the word 'party beginning' I am reading in this sub rule the word 'plaintiff' and instead of the word 'other party', the word 'defendant'. Therefore, where there are several issues, onus to prove some of which is on the plaintiffs and of some on the defendants and the plaintiff leads evidence only on the issues, the onus to prove which is on him, then he can reserve his right to lead rebuttal evidence on the issues, onus to prove which is on the defendant. Thereafter, the defendant would be required to lead evidence on all issues and then the plaintiff*

would have the right to lead evidence in rebuttal only on those issues, the onus to prove which was on the defendant. This is obvious from the words used in this rule that in the latter case the party beginning may produce evidence on those issues after the other party has produced its own evidence. It is only when the defendant is again given a right to lead evidence either by way of additional evidence or otherwise, i.e, in case of a counter claim to lead further evidence that the plaintiff would get a right to lead rebuttal evidence again and it is only in this eventuality that the plaintiff can reply generally on the whole case."

16. Plaintiffs had prayed for reframing/recasting of issues No. 2 and 9, as noticed above, which did not make any difference either on the onus to prove such issues or the burden to prove the facts necessary for proving the issues. Reframing of aforesaid issues, thus, will not change the consequences to lead evidence as provided by Rules 1 and 2 of Order 18 of Code of Civil Procedure.

17. In view of above discussion, the petition is allowed.Order dated 09.05.2022, passed by learned Senior Civil Judge, Court No. 1, Amb, District Una, H.P. in CMA No. 183-VI-2022, filed in Civil Suit No. 72-1 of 2015 to the extent it rejected the prayer for amendment of issues No. 2 and 9 is set aside and application of the petitioner herein/plaintiffs under Order 14 Rule 1 and 5 read with Section 151 of Code of Civil Procedure to above extent is also ordered to be allowed.

18. Accordingly, the petition is disposed of, so also the pending miscellaneous application(s), if any.

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

Between:-

1. DURGA SINGH AGED ABOUT 63 YEARS, SON OF LATE SHRI GANGA RAM RESIDENT OF SHALI BAZAAR THEOG, PO AND TEHSIL THEOG, DISTRICT SHIMLA HP

2. UDAY SINGH AGED ABOUT 61 YEARS SON OF LATE SHRI GANGA RAM RESIDENT OF SHALI BAZAAR THEGO, PO AND TEHSIL THEOG, DISTRICT SHIMLA H.P.

....PETITIONERS

(BY MR. RAJINDER SINGH CHANDEL,
ADVOCATE)

AND

1. ABHISHEK VASHISHTH SON OF LATE SHRI PAWAN KUMAR R/O SHALI BAZAAR THEOG, PO AND TEHSIL THEOG, DISTT. SHIMLA H.P.

2. ABHILOV VASHISHTH SON OF LATE SHRI PAWAN KUMAR, RESIDENT OF SHALI BAZAAR THEOG, PO AND TEH. THEOG, DISTRICT SHIMLA HP

...RESPONDENT

(BY MR. ROMESH VERMA,
ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO. 526 OF 2022
Decided on: 28.10.2022

Code of Civil Procedure, 1908- Execution- Order passed by Executing Court has been sought to be deferred/stayed on the ground that tenant has filed SLP along with interim application before the Supreme Court which is pending adjudication- Held there is no provision or logic to stay an order passed by an Executing Court for filing of Special Leave Petition in the Supreme Court unless such execution is stayed by the Supreme Court. Filing of an appeal does not operate as a stay against the impugned order and further that interim stay, if any, is to be granted by the Court wherein impugned order has been assailed. (Paras 8 & 9)

This petition coming on for order before notice this day, the Court passed the following:

O R D E R

Notice. Mr. Romesh Verma, Advocate, appears, waives service and accepts notice on behalf of respondents.

2 Heard. Present petition has been filed for passing an order to defer/stay the order dated 24.9.2022 passed by Executing Court, Theog in Case No. 5-10 of 2015, titled as Abhishek vs. Durga Singh whereby Executing Court has issued warrant of possession to execute the order of eviction passed against petitioner/tenant in eviction petition filed by landlord.

3 Eviction petition was filed in the year 2001 which was allowed by the Rent Controller. Eviction order was affirmed by the Appellate Authority and thereafter tenant had approached the High Court by filing Civil Revision Petition. The said Civil Revision Petition was disposed of by High Court vide order dated 31.3.2011 as tenant(s) had consented to vacate the premises on approval and sanction of plan/map by concerned authority.

4 In the year 2015, landlord filed Execution Petition on the basis of approved and sanctioned plan by concerned authority.

5 In Execution Petition, tenants had preferred objections which were dismissed by Executing Court whereupon petitioners had approached this Court by filing CMPMO No. 285 of 2021 titled Durga Singh vs. Abhishek Vashishth which was dismissed by this Court on 31st August, 2022.

6 After dismissal of aforesaid petition of tenants vide order dated 31.8.2022, Executing Court has passed order dated 24.9.2022 to execute the order of eviction passed against the tenants.

7 In present petition, order passed by Executing Court has been sought to be deferred/stayed on the ground that tenant has filed SLP along with interim application before the Supreme Court which is pending adjudication.

8 Execution petition, to execute consent order to vacate passed in the year 2011, is pending since 2015. In present petition, no order passed by the Executive Court, has been assailed. There is no provision or logic to stay an order passed by an Executing Court for filing of Special Leave Petition in the Supreme Court unless such execution is stayed by the Supreme Court.

9 Filing of an appeal does not operate as a stay against the impugned order and further that interim stay, if any, is to be granted by the Court wherein impugned order has been assailed. This Court has already rejected the plea of petitioners vide order dated 31.8.2022 referred supra and thereafter Executing Court had passed further order which is not under challenge in this petiton.

10 Considering entire facts and circumstances of the case, I find no merit in this petition and accordingly, petition is dismissed being misconceived. Pending application, if any, also stands disposed of.

By taking a lenient view, keeping in view the fact that petitioners may be acting under the wrong advise of Advocate, for filing of present petition, no cost is being imposed.

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

Between:-
STATE OF HIMACHAL PRADESH

...PETITIONER

(BY MR.DESH RAJ THAKUR, ADDL. A.G. WITH
MR. NARENDER THAKUR, DY. A.G.)

AND

1. SH. LABH SINGH SON OF LATE SH. TODAR RAM (RTD. KANUNGO), RESIDENT OF VILLAGE BATNAHAR, P.O. NOUHLI, TEHSIL JOGINDER NAGAR, DISTRICT MANDI, H.P.
2. SH. SUNIL DUTT SON OF SH. BHADAR SINGH (THE THEN PATWARI), RESIDENT OF VILLAGE CHUHLA, P.O. TULAH, TEHSIL LADBHADOL, DISTRICT MANDI, H.P.

...RESPONDENTS

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

CRIMINAL REVISION
NO. 151 OF 2022
Reserved on: 01.11.2022
Decided on:04.11.2022

Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983- Section 30 (ii)- The petitioner-State assailed order passed by learned Special Judge whereby the respondent has been discharged for offence punishable under Section 30 (ii) of the Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983- Held that the cognizance for offence under Section 30 (ii) of the Act cannot be said to be barred on police report, the only mandatory requirement is to have the report of Authorized Officer. The report of the Authorized Officer admittedly has been made part of the police report and placed before the Court. (Para 18)

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

O R D E R

The petitioner-State has assailed order dated 13.09.2021, passed by learned Special Judge, Mandi, District Mandi, H.P. in CNR No.HPMA010008182020, Registration No. 02/2020, whereby the respondent has been discharged for offence punishable under Section 30 (ii) of the Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983 (for short, "the Act").

2. After investigating FIR No. 02/2017, registered at Police Station State Vigilance and Anti-Corruption Bureau (for short, "SV&ACB"), Mandi dated 20.04.2017, challan was presented against the respondent under Section 30 (ii) of the Act.

3. The learned Special Judge held that cognizance had not been properly taken for want of report of the Authorized Officer under Section 36 of the Act. Accordingly, the proceedings before the learned Special Judge, were held to be bad and the respondent was discharged.

4. Petitioner-State has assailed the impugned order on the grounds that the learned Special Judge hasmisread the provisions of Section 36 of the Act. As per the petitioner, the submission of report by the Authorized Officer under Section 36 of the Act, to the Court, was not a sine qua non for taking cognizance of the offences under the Act. The only requirement was the making of the repot under the aforesaid provision by the Authorized Officer. In the case in hand, the report of the Authorized Officer was made part of the report under Section 173 Cr.P.C. (for short, "The Code"), therefore, the cognizance was rightly taken.

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

6. It is revealed from the impugned order that the learned Special Judge has considered the provisions of Section 36 of the Act as pari-materia provision contained in Antiquities and Arts Act, 1972 and has thus arrived at the conclusion that the Court was prohibited from taking cognizance

except upon a complaint in writing. Learned Special Judge has drawn the inference, from Section 36 of the Act and Rule 3 of the Rules framed thereunder, that the Court could take cognizance of offence under the Act only on the basis of complaint filed by the Authorized Officer and the police report could not be said to be a substitute for such complaint.

7. Section 36 of the Act reads as under:

> *"36.* ***Cognizance of offences****.- No court shall take cognizance of an offence under this Act against any person unless a report in writing is made by such an officer not below the rank of an Under Secretary as the State Government as it may by a notification, specify:*
>
> *Provided that no such report shall be made against a member of judicial service of State saves with the prior concurrence of the High Court."*

8. The above noted provision speaks of prohibition of cognizance of offences under the Act by any Court unless a "report" in writing is made by the Authorized Officer to be notified by the State Government. The Authorized Officer should not be below the rank of an "Under Secretary".

9. The question arises whether making of "report" is to be construed as report being made to Court by Authorized Officer as a pre-condition for taking of cognizance. For answer, it is to be understood in what context the term "report" has been used in Section 36 of the Act? Such understanding has to be drawn by taking into consideration the enabling provision as contained in the Code. Section 39 of the Act makes provision of this Special Act in addition and not in derogation to the Code.

10. Section 190 of the Code empowers the Magistrates to take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

11. The police report is prescribed in Section 173 of the Code. As per sub section (2) of Section 173, immediately on completion ofinvestigation, the Officer-in-Charge of Police Station is mandated to forward to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government. The power to investigate cognizable and non-cognizable offence vest in the Police Officer as per the procedure prescribed under the Code. Hence, the cognizance upon police report as provided in Clause (b) of sub section (1) of Section 190 shall mean report under Section 173(2) of the Code.

12. Chapter XV of the Code provides for complaints to Magistrates and the procedure to be adopted by Magistrates on receipt of complaints. The complaint as prescribed under sub section (a) of sub section (1) of Section 190 has reference to Chapter XV of the Code. As regards, Clause (c) of sub section (1) of Section 190, the Magistrate shall proceed in accordance with the provisions of Sections 191 and 192 of the Code.

13. Thus, under the Code, the report can be filed only by the police under Section 173 of the Code. Any other person can only file a complaint. The designated officer under Section 36 of the Act definitely is not the Police Officer and, as such, he cannot file a report before the Magistrate.

14. Even otherwise, Section 36 of the Act, does not provide for making of a report by the designated Officer to the Court. It only speaks about making of report by the Authorized Officer. Learned Special Judge has noticed Rule 3 of the Rules framed under the Act, which says that the report shall be made in writing by the competent authority empowered by the State Government under Section 36 of the Act, to the Court to take cognizance of an offence under the Act, in the proforma attached to the Rules.

15. The rule making power has been vested in the State Government by virtue of Section 40 of the Act. Such provision authorizes the State

Government to make rules for the purpose of carrying into effect the provisions of the Act. It is trite that in exercise of power to make rules, the rules cannot be so framed to oversidethe provisions of the Act itself. Section 36 of the Act itself does not provide for the making of report by the Authorized Officer to the Court. It only provides for making of report by such officer not below the rank of Under Secretary as may be specified by the State Government by a notification. The plain reading of Section 36 thus clearly provides that the State Government by notification can specify the Authorized Officer, who can make the report, with the caveat that such officer should not be below the rank of Under Secretary. In this view of the matter, Rule 3 of the Rules under the Act, cannot be interpreted to bar the power of the Court to take the cognizance in absence of report being made to it by the Authorized Officer.

16. Viewed from another angle, Section 36-A of the Act provides power to investigate any offence punishable under the Act, however, with the condition that Police Officer should not be below the rank of Deputy Superintendent of Police. Exception has also been provided whereby the State Government by general or specific order may authorize a Police Officer not below the rank of Inspector to investigate the offence punishable under the Act. When the power of investigation is with the police, the necessary corollary would be that the police can register the FIR also. The offence punishable under Section 30 (ii) of the Act is punishable with imprisonment upto three years and thus is cognizable. The police on receipt of information regarding cognizable offence is otherwise under legal mandate to register the FIR.

17. Once the police has power to register the case and to investigate the same, it is not understandable as to what will be the use and fate of such investigation, when the report is to be submitted by the Authorized Officer.

18. In view of above discussion, it is held that the cognizance for offence under Section 30 (ii) of the Act cannot be said to be barred on police report, the only mandatory requirement is to have the report of Authorized Officer, which is available in the case in hand. The report of the Authorized Officer admittedly has been made part of the police report and placed before the Court.

19. Resultantly, the criminal revision is allowed. The order dated 13.09.2021, passed by learned Special Judge, Mandi, District Mandi, H.P. in CNR No. HPMA010008182020, Registration No. 02/2020, is set-aside. Learned Special Judge, Mandi is directed to proceed further with the case in terms of the observations made hereinabove.

20. The criminal revision stands disposed of in the aforesaid terms, so also the pending application(s), if any.

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

State of H.P.

.....Appellant/State

Versus

Miya Lal

.....Accused/Respondent

For the appellant: Mr. Sudhir Bhatnagar, Additional Advocate General, with Mr. Sunny Dhatwalia, Assistant Advocate General.

For the respondent: Mr. Rajan Kahol, Advocate.

Criminal Appeal
No.112 of 2022
Date of Decision: 15.11.2022

Indian Penal Code, 1860- Sections 224 & 323- Appeal against judgment of acquittal- Escaping lawful custody- Held that there is no explanation that when spot of occurrence is/was a crowded place, why no independent witness ever came to be associated. In order to bring the guilt of the accused under Section 224 of the IPC, it was required to be proved that accused was detained in a custody, which was lawful and he escaped from that custody. (Para 12)

Cases referred:

C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645;

1. The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal filed under Section 378 of Cr.PC, lays challenge to the judgment of acquittal dated 7.12.2021, passed by the learned Judicial Magistrate First Class-VII, Shimla, District Shimla, H.P., in Criminal Case No. 1035/20/2001, whereby learned court below acquitted the accused

for having committed the offenses punishable under Sections 224 and 323 of IPC.

2. Briefly stated facts of the case as emerge from the record are that on 4.5.2001, complainant-Constable Naresh Kumar (PW2) lodged a complaint at PS Sadar, Shimla, alleging therein that he alongwith Constable Satpal (PW3), under the supervision of HC Lal Singh (PW7) had obtained three days' judicial custody of the accused-respondent Miya Lal from SDM, Shimla. He alleged that while they were taking the accused to Sub-Jail Kaithu after obtaining jail warrant, the accused escaped from their custody near Victory Tunnel. He alleged that though Constable Naresh Kumar (PW2) had held the accused from the collar of his jacket, but the accused pushed him and ran away from his custody. He alleged that accused jumped over the railing towards jungle, but he was again arrested by Constable Naresh Kumar (PW2) and during the scuffle, Constable Naresh Kumar (PW2) and accused sustained injuries on their person. In the aforesaid background, FIR (Ext.PW2/A) came to be lodged against the accused.

3. After completion of the investigation, police presented challan in the competent court of law, who on being satisfied that prima facie case exists against the accused, put notice of accusation to him for having committed offences under Sections 224 and 323 of IPC, to which he pleaded not guilty and claimed trial. Prosecution with a view to prove its case examined as many as ten witnesses, whereas accused in his statement recorded under Section 313 Cr.PC, pleaded his innocence and claimed that police officials have deposed falsely against him.

4. Learned trial Court on the basis of evidence collected on record by the prosecution held the accused not guilty of having committed offences punishable under Sections 224 and 323 of IPC and accordingly, discharged him. Being aggrieved and dissatisfied with the aforesaid judgment of acquittal recorded by the court below, appellant-State has approached this Court by

way of instant proceedings, seeking therein conviction of the respondent-accused after setting aside the judgment of acquittal recorded by the court below.

5. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the judgment of acquittal recorded by the court below, this Court finds no force in the submissions of Mr. Sudhir Bhatnagar, learned Additional Advocate General that impugned judgment of acquittal is not based upon proper appreciation of evidence, rather this court finds that prosecution miserably failed to prove the custody, if any, given by the SDM, Shimla, to the police officials, who were allegedly taking the accused to the Sub-Jail Kaithu while he attempted to run away. Moreover, though prosecution witnesses claimed that in the scuffle, Constable Naresh Kumar (PW2) and the accused suffered injuries, but interestingly, no doctor ever came to be examined to prove the aforesaid claim of the prosecution, rather record nowhere reveals that after the scuffle, accused as well as Constable Naresh Kumar were taken to the hospital for medical examination.

6. PW2 Constable Naresh Kumar deposed that on 4.5.2001, he and Constable Satpal (PW3) were on duty to take the accused to Kaithu Jail. He further deposed that when they reached near Victory Tunnel, accused pushed him and jumped over the railing and ran towards the Annandale side. He further testified that he and Constable Satpal (PW3) also jumped over the railing and caught the accused. He deposed that they produced the accused before SDM (Urban) Shimla, who sent him for three days' judicial remand. During cross-examination, this witness deposed that they were taking the accused to Sub-Jail Kaithu at 7:30pm and he was deputed for the aforesaid purpose at 6:30pm. He also admitted that while they were taking the accused to Sub-Jail Kaithu, there was a huge traffic on the road. He further admitted that there is a market and a locality where the aforesaid incident took place.

He admitted that they have not made any noise when the accused escaped from their custody, but self-stated that he jumped over the railing behind the accused. This witness categorically stated that they did not call any person from the locality.

7. PW3 Constable Satpal deposed that he alongwith HC Lal Singh (PW7) had produced the accused before SDM, Shimla, who sent the accused on judicial remand from 4.5.2001 to 8.5.2001. This witness deposed that he was deputed to take the accused to Sub-Jail Kaithu alongwith Constable Naresh Kumar (PW2) and when they reached ahead of Victory Tunnel, the accused pushed Constable Naresh Kumar (PW2) and jumped over the railing. He deposed that Constable Naresh Kumar also jumped over the railing to apprehend the accused. This witness deposed that Constable Naresh Kumar caught the accused and during the scuffle, he and the accused also sustained injuries. In his cross-examination, this witness stated that accused was arrested on 3.5.2001, during night hours from the bus-stand and thereafter, was produced before the SDM, Shimla, at about 5:30 pm. He admitted that he along with HC Lal Singh (PW7) produced the accsued before SDM, Shimla, at about 5:30pm and Constable Naresh Kumar was not with them when they procured the judicial remand of the accused. He further admitted that there was no rush at the spot of the occurrence as there was no vehicle moving on the road. This witness also admitted that there is a market and a locality where the alleged incident took place.

8. If the statements made by both these witnesses are read in conjunction juxtaposing each other, there are material contradictions and inconsistencies because Constable Naresh Kumar (PW2) claimed that he along with Constable Satpal (PW3) produced the accused before the SDM, Shimla, whereas Constable Satpal (PW3) categorically stated that he produced the accused alongwith HC Lal Singh (PW7) before the SDM. Apart from above, Constable Naresh Kumar (PW2) deposed that he was deputed for the aforesaid

purpose at 7:30pm, whereas as per statement of Constable Satpal (PW3), they produced the accused before the SDM, Shimla, at 5:30 pm and took the judicial remand of the accused at about 5:30pm. If it is so, it is not understood that why it took more than two hours for the police officials to bring the accused from SDM court to Victory Tunnel, which is hardly at the distance of half kilometer. Constable Satpal (PW3) also admitted that there was rush on the spot of occurrence and there was no vehicle moving on the road.

9. PW7 HC Lal Singh while proving on record Jail Warrant (Ext.P2) deposed that he after giving food to the accused, deputed Constable Naresh Kumar (PW2) and Constable Satpal (PW3) to take the accused to Sub-Jail Kaithu and thereafter, he came to the know that the accused had escaped from the custody of the aforesaid officials. In his cross-examination, this witness (PW7) deposed that accused was arrested on 3.5.2001 and was produced before the SDM, Shimla at 4:30pm by him and Constable Satpal (PW3), whereafter they took the judicial custody of the accused at 5:00pm. He admitted that Constable Naresh Kumar (PW2) was not with them when the accused was produced before the SDM, Shimla, for his remand purpose. PW7 categorically deposed that he had deputed PW2 and PW3 to take the accused to Sub-Jail Kaithu. If the statements of aforesaid witnesses are read in conjunction, it cannot be said that Constable Naresh Kumar was present on the spot while accused was being produced before the SDM, Shimla. PW7, in his cross-examination, deposed that accused was arrested on 3.5.2001 and was produced before the SDM at 4:30pm by him and Constable Satpal (PW3), which version of him is completely contrary to the version put forth by Constable Satpal (PW3), who deposed that accused was produced before the SDM, Shimla, at 5:30pm.

10. PW8, I.O. HC Sahib Singh proved on record jacket of the accused Ext.PW1/B, which was taken into possession by the police. During his cross-

examination, this witness deposed that C. Naresh Kumar (PW2) and HC Lal Singh (PW7) produced the accused before the SDM Shimla, which statement is contrary to the statement made by Mr. Lal Singh (PW7) and Constable Satpal (PW3), who deposed that they both had produced the accused before the SDM, Shimla.

11. Though prosecution also examined PW1 Sher Singh, PW4 HC Jai Singh, PW5 SI Ramesh Sharma, PW9 C. Hem Raj and PW10 C. Nanak Chand, but their testimony may not be much relevant for determining the guilt, if any, of the accused, rather in that regard, reliance is to be placed upon the statements made by aforesaid prosecution witnesses. PW2 C. Naresh, PW3 C. Satpal, PW7 HC Lal Singh and PW8 HC Sahib Singh nowhere supported the case of the prosecution. Testimony of the aforesaid witnesses fail to prove the guilt of the accused beyond reasonable doubt. PW8 HC Sahib Singh i.e. I.O. of the case, deposed that C. Naresh and H.C. Lal Singh produced the accused before the SDM Office for remand purpose, however other witnesses have stated that C. Naresh was not with HC Lal Singh when the accused was produced before the SDM, Shimla.

12. Leaving everything aside, there is no explanation that when spot of occurrence is/was a crowded place, why no independent witness ever came to be associated. In order to bring the guilt of the accused under Section 224 of the IPC, it was required to be proved that accused was detained in a custody, which was lawful and he escaped from that custody, but in the case at hand, prosecution miserably failed to establish beyond reasonable doubt that accused was in the custody of C. Naresh (PW2), C. Satpal (PW3) and HC Lal Singh (PW7).

13. Having carefully perused the evidence available on record, this Court is persuaded to agree with the contention of learned counsel representing the respondent-accused that since there are material contradictions in the statements made by prosecution witnesses, learned

court below rightly did not place reliance upon same. Reliance is placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 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 emphasise, 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 Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)
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> > "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."
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> 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 situations 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 consistency in evidence amongst all the witnesses."

14. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no reason to differ with the well reasoned judgment passed by the learned Court below, which otherwise appears to be based upon the proper appreciation of evidence adduced on record and the same is accordingly upheld. Accordingly, the appeal is dismissed being devoid of any merits.

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

Between:

STATE OF HIMACHAL PRADESH

.....APPELLANT

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL)

AND

1. KARTAR SINGH, SON OF SHRI KIRPA RAM, R.O. VILLAGE DOHARU, PO DADHOL, PS BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

2. KULDEEP SINGH, SON OF KARTAR SINGH, RO VILLAGE DOHARU, PO DADHOL, PS BHARARI, TEHSIL GHUMARWIN, DISTT. BILASPUR, H.P.

.....RESPONDENTS

(BY MR. MOHIT THAKUR, ADVOCATE)

CRIMINAL APPEAL
NO. 302of 2010
Reserved on:31.10.2022
Decided on: 04.11.2022

Indian Evidence Act, 1872- Section 378- Appeal against judgment of acquittal- Upheld- Held that it is trite that if two reasonable conclusions are possible on the basis of evidence on record, the view favoring accused is to be preferred. It is also settled that if the view taken by learned Trial Court is a possible view the Appellate Court should not reverse the acquittal merely on the premise that the other view could have been taken.(Para 13)

Cases referred:

C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645;
Chandrappa and others Vs. State of Karnataka (2007) 4SCC 415;
State of Rajasthan Vs.Kistoora Ram, AIR 2021 SCC 766;

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

J U D G M E N T

By way of instant appeal, State has taken exception to judgment of acquittal dated24.04.2010, passed by learned Judicial Magistrate First Class,Court No-2, Ghumarwin, District Bilaspur, H.P,. in Criminal Case No. 8/2 of 2008.

2. On 19.02,2008, at about 2:15 PM, FIR was registered at Police Station Bharari, District Bilaspur, H.P. at the instance of complainant Joginder Singh (PW-1) alleging *inter alia* that on 18.02.2008, at about 8:30/8:45 PM, he was on way to his home. Accused Kartar Singh blamed him for having stolen his pipes.The complainant refuted the allegation,but accused Kartar Singh came with a stick in his hand, obstructed the path of complainant and gave him beatings with stick. Kuldeep Singh and Kala Devi also came on spot and they also gave beatings to the complainant with fists and kicks. Kartar Singh gave a stick blow on left hand of the complainant. He was threatened and when he raised alarm, the mother and uncle of the complainant reached the spot and saved the complainant. The complainant had received injuries. After investigation, the challan was presented. Prosecution examined total nine witnesses. Complainant was examined as PW-1. The mother and uncle of the complainant were examined as PW-2 and PW-3, respectively. PW-4, Dr. Bhanu Kanwar was examined to prove the MLC. PW-5, Dev Raj Sharma, Radiographer, proved the X-Ray report Ext. PW5/A. PW-6 to PW-8 were the police officials. Lastly, PW-9 was examined as Investigating Officer.

3. Respondents-accused were examined underSection 313 of Cr.P.C., they did not lead any defence evidence. Respondents were acquitted by learned Trial Court, hence the present appeal.

4. I have heard learned Additional Advocate General for the appellant as well as learned counsel for the respondents and have also gone through the record.

5. Complainant, while being examined as PW-1 had stated that he was given beatings by accused persons as also the wife of accused Kartar Singh. He did not remember the date of incident. According to PW-1, none other had come on the spot. He, however, clarified that his mother had reached the spot on hearing the commotion and then he alongwith his mother had visited police station where FIR Ext. PW1/A was registered. He further stated that accused persons had threatened him of life. He was medically examined at Bharari Hospital. In cross-examination, PW-1 stated that he had consulted his villagers before appraoching the police. He admitted that nothing had been recovered by police in his presence. He further stated that first of all, he was beaten by Kartar Singh and seven injuries were inflicted on him with stick. Kuldeep Singh had inflicted4-5 injuries on him with stick and 3-4 injuries were inflicted by Kala Devi. He stated that none had come on the spot even after hearing his commotion. He denied that the injuries were suffered by him as a result of fall. PW-2, Smt. Satya Devi is the mother of complainant. She stated that about one year prior to making of her statement in the Court, at about 9:00PM,she and Hoshiar Singh ran towards the spot on hearing commotion, but they came back as noises had stopped. In the meanwhile, PW-1 Joginder Singh met her, who was injured. He had fracturedhis hand. PW-1 had disclosed her that accused persons and Kala Devi had given him beatings with sticks. In cross-examination, PW-2,admitted that houses of Baldev, Laxman, Lekh Ram, Ishwar Dass and Jagdish were adjacent to the house of accused persons. She also stated that her house was at the distance of ½ Kilometers from the house of the accused. The commotion was heard by many other people. She admitted that she had not noticed the altercation. As per PW-2, her son had

suffered 15-20 injuries. PW-3, Hoshiar Singh stated that about 5-6 months before his making statement in the Court, he was asleep in the night. His sister-in-law (Bhabhi) Satya Devi came to him and disclosed that there was some commotion. In the meanwhile, PW-1, Joginder Singh arrived and disclosed that kartar Singh and his family members had given him beatings. He had noticed injury on the hand of Kartar Singh and no other injury was noticed. This witness was declared hostile and was cross-examined by learned Public Prosecutor. On being cross-examined on behalf of the accused persons, PW-3, Hoshiar Singh admitted that 8-10 houses existed near the place of incident. He also admitted that in between the house of accused persons and his house, there were 8-10 other houses. He further admitted that the place of incident was in the mid of the village.

6. From perusal of statements of PW1 to PW-3, a lot of inconsistencies are noticeable. According to PW-1, his mother PW-2 had reached the spot, but PW-2 stated differently that she alongwith PW-3 had started towards the spot, but had met PW-1 on the way. PW-3 made altogether a different version. According to him, PW-2 had waken him up from sleep and in the meanwhile PW-1 Jogiinder Singh had also arrived. Further, PW-2 and PW-3 have admitted that there are many houses around the house of accused persons, which was stated to be place of incident. According to PW-2, her house was at the distance of ½ kilometers from the house of the complainant/accused persons. PW-2 and PW-3 had also admitted that there were many houses in between the house of accused persons and their houses. According to PW-2, she had heard commotion, while she was at her home. In case, the noise could be heard at a distance of ½ kilometers, the same would have been heard by the residents of the houses which were quite close to the place of incident. Strangely, none from such houses has been examined as witness. It is unexplained, whether the

Investigating Officer had examined any of the residents of the area to verify the allegation levelled by complainant.

7. The incident had allegedly occurred at 8:30 PM on 18.02.2008, but the FIR was registered on the next date at about 2:15PM. There is no explanation, as to why, such delay had occurred. The matter could have been reported telephonically. PW-2 specifically admitted in her cross-examination that there were 6-7 telephones in the village.

8. PW-4 admitted in his cross-examination that the injuries found on the person of PW-1 could be suffered as a result of fall from stairs.

9. The reading of statements of PW-6 and PW-8 reveal that as per these witnesses, the police had recovered weapon of offence i.e. stick from Kartar Singh on 21.02.2008 from the spot. Whereas, PW-9, ASI Ram Dass, Investigating Officer of the case categorically stated that accused had presented the stick in police station.

10. Thus, there were many gaps in the prosecution story which remained unexplained. The prosecution carries a heavy burden to prove its case beyond all reasonable doubts. The evidence produced on record by prosecution was not convincing for the reasons noticed above.

11. Learned Trial Court extended the benefit of doubt to the accused persons by taking into consideration the contradictions, improvements and embellishments in the statements of prosecution witnesses. Learned Trial Court also noticed that non association of independent evidence was sufficient to create doubt about veracity of prosecution case. It was also noticed that as per MLC Ext. PW4/B, seven injuries were found on the person of PW-1, whereas according to him many more injuries were inflicted upon him by accused persons.

12. Another fact which needs notice is that during investigation police had not found any material to implicate the wife of respondent-Kartar Singh. She was not impleaded as accused. This by itself is sufficient to doubt

the prosecution version as the complainant had levelled allegations against her also. It is not understandable, as to why, the same allegations were disbelieved, insofar as those related to the wife of accused Kartar Singh, as were believed against the respondents.

13. The view taken by learned Trial Court is borneout from the evidence as a possible view. It is trite that if two reasonable conclusions are possible on the basis of evidence on record, the view favoring accused is to be preferred. It is also settled that if the view taken by learned Trial Court is a possible view. The Appellate Court should not reverse the acquittal merely on the premise that the other view could have been taken. Reference can be made to judgment passed by Hon'ble Supreme Court of India in ***Chandrappa and others Vs. State of Karnataka (2007) 4SCC 415,*** in which it was observed as under:-

> *"42.From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;*
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> *(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;*
>
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;*
>
> *(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.*

> *(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
>
> *(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

14. In ***State of Rajasthan*** *Vs.* ***Kistoora Ram, AIR 2021 SCC 766,*** Hon'ble Supreme Court has reiterated as under:-

> *"8. The scope of interference in an appeal against acquittal is very limited. Unless it is found that the view taken by the Court is impossible or perverse, it is not permissible to interfere with the finding of acquittal. Equally if two views are possible, it is not permissible to set aside an order of acquittal, merely because the AppellateCourt finds the way of conviction to be more probable. The interference would be warranted only if the view taken is not possible at all."*

15. Thus, keeping in view the facts of the case and weighing them as against the exposition of law noticed above, I find no merit in the appeal and the same is dismissed. The judgment of acquittal dated 24.04.2010, passed by learned Judicial Magistrate First Class, Court No-2, Ghumarwin, District Bilaspur, H.P., in Criminal Case No. 8/2 of 2008, is affirmed.

16. Accordingly, the appeal is disposed of, so also the pending miscellaneous application(s), if any,

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

Between:

PAWAN KUMAR,
S/O SH. PREM SINGH, R/O CHAJWALI THANA BALH, DISTRICT MANDI, H.P.

….APPELLANT

(MR. BIMAL GUPTA, SENIOR ADVOCATE WITH MS. KUSUM CHAUDHARY, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

(MS. SVANEEL JASWAL, DEPUTY ADVOCATE GENERAL)

….RESPONDENT

CRIMINAL APPEAL
NO. 141 OF 2008
Decided on:27.10.2022

Indian Evidence Act, 1872- Section 35- **Indian Penal Code, 1860**- Sections 363, 374- Appeal against conviction passed by Additional Sessions Judge- Entry in any public or official book- Held that Section 35 of the Indian Evidence Act though suggests that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty is itself a relevant fact, but till the time record on the basis of which such entry came to be made in the certificate is not produced and proved by the person, who made entry, it cannot be said that such certificate stands proved. In the case at hand, in the absence of evidence to show on what material the entry of date of birth in the matriculation certificate was made, mere production of a copy of matriculation certificate, though a public document, in terms of Section 35, is/was not sufficient to prove the age of the deceased. To render a document admissible under Section 35, provisions are required to be

satisfied i.e. entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. (Paras 18 & 19)

Cases referred:

Alamelu and Anr v. State represented by Inspector of Police (along with connected matters) 2011 (2)385;
Babloo Pasi v. State of Jharkhand and Anr, (2008) 13 SCC 133;
Birad Mal Singhvi v. Anand Purohit, 1988 (Supp) SCC 604;
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645;
State of Madhya Pradesh v. Anoop Singh, 2015 7 SCC 773;

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

JUDGMENT

Instant criminal appeal filed under Section 374 of Cr.PC, lays challenge to the judgment dated 15.3.2008, passed by the learned Additional Sessions Judge, Mandi, H.P., in Sessions Trial No. 42 of 2003, titled *State of HP v. Pawan Kumar*, whereby learned court below while holding the appellant-accused guilty of having committed offence punishable under Section 363 of IPC convicted and sentenced him to undergo rigorous imprisonment for a period of two years and pay fine of Rs. 1000/- and in default of payment of fine, he shall undergo rigorous imprisonment for one month; and under Section 366 IPC, rigorous imprisonment for three years and pay fine of Rs. 2000/- and in default of payment of fine, rigorous imprisonment for one month.

2. Briefly stated facts of the case as emerge from the record are that deceased Anjana, daughter of complainant Mohan Singh PW1, resident of Village Chajwali, Tehsil Sadar, District Mandi, who at that relevant time was

studying in school went missing on 26.4.2002. In the evening of 26.4.2002, Smt. Bimla Devi, mother of the deceased Anjana (PW2) after having found that her daughter Anjana is missing from the house rang up her husband Mohan Singh, who had gone to Kullu that their minor daughter was missing from the house. Mohan Singh came from Kullu next morning and alongwith his brother in law went in search of his daughter Anjana. On enquiry, it transpired that accused Pawan Kumar, who happens to be nephew of the complainant Mohan Singh had kidnapped his daughter from the village in a taxi of person namely Jagdish PW11 to Sundernagar and from Sundernagar, he took the deceased Anjana in the taxi of Lekh Ram (PW6) to Shimla. Mohan Singh (PW1) and his brother in law Chint Ram went to Shimla in order to trace out Anjana and the accused, however, they failed to trace out them and as such, lodged report at Police post Shimla.

3. On 29.4.2002, Mohan Singh received information on telephone from his wife that his daughter Anjana has expired at Theog in District Shimla and as such, he went to Theog, where he was told that his daughter had expired and her body has been sent to Shimla for post mortem examination. On enquiry, complainant Mohan Singh came to know that accused had kidnapped his minor daughter to Theog, where they both consumed poison. Unfortunately, Anjana expired at Theog, whereas accused survived and case under Section 309 IPC came to be registered against him at PS Theog. The accused was subjected to trial and ultimately, was sentenced to simple imprisonment for one month by the learned trial court vide impugned judgment dated 15.10.2004.

4. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction and order of sentence passed by the learned trial court, accused preferred an appeal under Section 374 (3) Cr.PC. Learned Additional Sessions Judge Shimla vide order dated 7.4.2005 after having taken note of report of concerned Probation Officer, recommended for grant of benefit of provision of

Section-4 of the Probation of Offender's Act, as a consequence of which, accused came to be released on probation, subject to his furnishing personal bonds with one surety in the like amount with condition that he shall appear before the court, if called to do so within six months from the date of passing of the order.

5. After more than 2 months of the alleged incident of kidnapping, complainant Mohan Singh lodged a complainant at PS Balh, District Mandi, H.P., alleging therein about kidnapping of his minor daughter by the accused with an intention to marry her. On the basis of aforesaid report, FIR Ext.PW1/A came to be lodged against the appellant accused under Section 363 and 336 of the IPC. After completion of investigation, police presented challan in the competent court of law, which after having found prima-facie case against the accused, charged him under Sections 363 and 336 of the IPC, to which he pleaded not guilty and claimed trial.

6. Prosecution with a view to prove its case examined as many as 12 witnesses, whereas accused was afforded an opportunity to lead evidence, but he failed to lead any evidence in defence, however, he in his statement recorded under Section 313 Cr.PC, denied the case of the prosecution in *toto.*

7. Learned trial court on the basis of evidence collected on record by the prosecution held the accused guilty of having committed offence punishable under Sections 363 and 336 of IPC and accordingly, convicted and sentenced him as per description given herein above. In the aforesaid background, accused has approached this Court in the instant appeal, praying therein for his acquittal after setting aside the judgment of conviction and order of sentence recorded by the court below.

8. Mr. Bimal Gupta, learned Senior counsel appearing for the accused vehemently argued that there is no plausible explanation available on record qua the delay in lodging the FIR, save and except bald statement of PW1 Mohan Singh and PW2 Bimla Devi i.e. parents of the deceased Anjana

that they remained under the impression that action with regard to the alleged incident of kidnapping of their daughter at the hands of the accused would be taken by Police Station Theog. He submitted that once parents of the deceased never reported the matter with regard to the alleged kidnapping of their daughter at PS Theog, there was otherwise no occasion for the Police Station Theog to take any action, rather PS Theog after having taken note of the death of deceased registered case under Section 309 IPC for abatement of suicide against the accused, for which proper trial was held and accused was held guilty, but ultimately was given benefit of Section 4 of the Probation of Offenders Act. He further submitted that at no point of time, prosecution ever succeeded in proving that at the time of the alleged incident of kidnapping, age of the deceased Anjana was less than 16 years and as such, court below after having noticed the conduct of the deceased ought to have acquitted the accused with whom deceased of her own volition had gone to Theog. He submitted that PW1 Mohan Singh categorically deposed that at the time of the alleged incident, age of his deceased daughter was 16 ½ years, but yet court below placing undue reliance upon the matriculation certificate Ext.PW1/13 wrongly proceeded to hold that at the time of the alleged incident deceased was less than 16 years of age. He further submitted that PW8 Rakesh Kumar Panchayat Secretary categorically deposed while proving birth certificate that there is interpolation of record. He argued that initially, name of the deceased was Nirmala, but subsequently same was changed to Anjana and there is no initial upon the same of any official of the Panchayat and as such, very basis of recording the date of birth on the matriculation certificate goes and in that event, court below had no option but to ignore the date of birth recorded in the matriculation certificate Ext.PW1/B. Lastly Mr. Gupta, argued that if the statements of all the material prosecution witnesses are read in conjunction juxtaposing each other, it clearly reveals that there are lot of contradictions

and inconsistencies and as such, ought to have been ignored by the court below while ascertaining the guilt, if any, of the accused.

9. To the Contrary, Ms. Svaneel Jaswal, learned Deputy Advocate General while supporting the impugned judgment of conviction and order of sentence recorded by the court below strenuously argued that delay in lodging the FIR has been properly explained because admittedly matter with regard to the alleged kidnapping of the deceased Anjana was very much in the knowledge of the Police Station Theog and as such, PW1 and PW2 are right in contending that they remained under the impression that action with regard to kidnapping of their daughter at the hands of the accused shall be taken by the PS Theog. She further submitted that matriculation certificate Ext.PW1/B taken into consideration by the court below is /was sufficient to conclude that at the time of the alleged incident, age of the deceased was less than 16 years because as per Section 35 of the Indian Evidence Act, any public document is per-se admissible. She further submitted that if date of birth recorded in the matriculation certificate is perused juxtaposing birth certificate Ext.PW1/A issued by the concerned Gram Panchayat, which duly came to be proved by PW8 Rakesh Kumar, Secretary Gram Panchayat, no illegality can be said to have been committed by the court below while returning finding that at the time of the alleged incident, deceased was less than 16 years of age. While making this Court peruse statements of material prosecution witnesses especially, PWs 1 and 2, learned Deputy Advocate General strenuously argued that there are no inconsistencies and contradictions because both have stated that their daughter Anjana had gone missing on 26.4.2002 and they subsequently came to know that accused kidnapped her with an intention to solemnize marriage. Lastly learned Deputy Advocate General contended that it is not in dispute that in criminal proceedings, accused was convicted, however, he was subsequently released by the appellate court by extending

the benefit of Section 4 of the Probation of Offenders Act, which fact itself establishes guilt, if any, of the accused under Sections 363 and 366 of IPC.

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

11. Having heard Mr. Bimal Gupta, learned Senior counsel appearing for the accused and Ms. Svaneel Jaswal, learned Deputy Advocate General representing the State vis-à-vis reasoning assigned in the impugned judgment of conviction and order of sentence recorded by the court below, there appears to be merit in the contention of the learned Senior counsel appearing for the accused that court below has failed to appreciate the evidence in its right perspective, as a consequence of which, findings to the detriment of the accused have come to the fore. First of all this Court finds from the record that alleged incident of kidnapping happened on 26.4.2002, whereas FIR qua the aforesaid incident came to be lodged on 29.6.2002 i.e. approximately after two months and three days.

12. It is not in dispute that FIR Ext.PW1/A, which is subject matter of the present case, was instituted on 29.6.2002, whereas alleged incident of kidnapping took place on 26.4.2002. Though in the case at hand, both PW1 and PW2 Mohan Singh and Bimla Devi i.e. parents of the deceased Anjana, attempted to justify delay in lodging of FIR by stating that they remained under impression that case with regard to kidnapping already stands registered against the accused at PS Theog, but after some time, villagers inquired about the fate of the case and they went to police station Balh and lodged the FIR. Though it is well settled by now that delay in lodging of FIR may not be fatal to the case of the prosecution, especially when there is plausible explanation rendered on record qua the delay, but here in the case at hand, explanation rendered on record by the complainant PW1 Mohan Singh and his wife PW2 Bimla Devi, does not appear to be plausible.

13. Interestingly, when factum with regard to kidnapping, if any, of the deceased Anjana had come to the notice of the complainant PW1 Mohan Singh on 26.4.2002, it is not understood that what prevented him to lodge FIR then and there, rather as per his own statement, he after having received the information with regard to missing of his daughter from his wife Bimla Devi, he came back to Balh and from there, he alongwith his brother in law Chint Ram went to Shimla. It is not understood that on what information Mohan Lal alongwith Chint Ram proceeded to Shimla because factum with regard to accused alleging having taken the deceased to Theog came to the notice of PW1 Mohan Singh after one day of his arrival at Shimla. It has come in his statement that though he tried to find out whereabouts of his daughter Anjana at Shimla, but once she was not found, he lodged report at police post, Bus stand Shimla. Interestingly, there is no record with regard to report, if any, lodged by Mohan Singh at Bus-stand Shimla. He deposed in his statement that his wife PW2 Bimla Devi telephonically informed him that he should go to Theog, but nowhere stated that some policemen came to her house at Balh informing therein factum with regard to death of their daughter Anjana, which fact otherwise has been stated by PW2 Bimla Devi while making deposition before the court below. Interestingly, PW1 in his statement deposed that while he alongwith his brother in law was going back to Balh, same police men came and said that he know about the whereabouts of his daughter and he should go to the Theog. He deposed that after having reached Theog, he came to know that his daughter Anjana and accused consumed poison and dead body of his daughter is in the dead house, from where same was taken to IGMC for post mortem. He categorically deposed that he did not meet the accused at Theog, though he was admitted in the hospital. PW1 further deposed that he after having received information with regard to missing of his daughter from his wife reached Balh in the morning of 27th and from there, directly went to Shimla alongwith his brother in law

Chint Ram, whereas PW2 in her statement deposed that her husband after having reached home from Kullu went to Sundernagar alongwith brother in law Chint Ram and Father in law Mal Ram, whereas PW1 Mohan Singh has not stated something specific with regard to Ram Mal i.e.father of the PW2 Bimla Devi. PW1 Mohan Singh though deposed that he was informed by PW11 Jagdish Singh that he saw his daughter going in taxi with the accused towards Sundernagar. He further deposed that above named Jagdish also told him that accused hired another taxi of Lekh Ram PW6 from Sundernagar to Shimla. PW6 Lekh Ram deposed that he after having dropped the accused and Anjana at Shimla, came back to Sundernagar. PW1 nowhere stated that before his arrival at Shimla, he could see PW6 Lekh Ram, in whose Taxi allegedly accused and deceased Anjana had travelled to Shimla. Interestingly, neither Chint Ram nor Mal Ram, ever came to be examined by the prosecution. As per PW1 Chint Ram accompanied him to Shimla, where he allegedly lodged report at police post bus stand Shimla, but no effort ever came to be made by the prosecution to associate aforesaid witnesses, which could be relevant and material to the prosecution case. Similarly, police men, who allegedly told PW1 Mohan Singh that he should go to Theog, also never came to be examined. PW2 Bimla Devi in her statement stated that on the 3rd day, police came to her house and told her that Anjana had died at Theog and thereafter, she informed her husband that Anjana had died at Theog, however aforesaid fact never came to be deposed by PW1 complainant in the court, rather he deposed that he received a call in the evening of the same day at Theog by which time, he had already come to know factum with regard to death of her daughter. PW1 in his cross-examination categorically stated that age of his elder daughter is about 25 years and age of his younger daughter is 22 to 23 years. He further admitted that there is age difference of 2 to 3 years in between his children. He stated that Anjana had done her matriculation and he had sent Anjana to School when she was six years old. He

categorically deposed that when Anjana had completed matriculation her age was 16 ½ years.

14. If the statements of both the material prosecution witnesses PW1 and 2 are read in conjunction juxtaposing each other, this Court is persuaded to agree with Mr. Bimal Gupta, learned Senior counsel, appearing for the petitioner that there are material contradictions and inconsistencies in the statements of both the aforesaid witnesses. Moreover two material prosecution witnesses, apart from PW1 and PW2, who had information with regard to alleged kidnapping of Anjana by the accused namely Chint Ram and Mal Ram never came to be examined by the prosecution. There is contradiction with regard to receipt of information with regard to death of deceased Anjana at Theog by PW1 and PW2. As per PW1, he was informed with regard to whereabouts of his missing daughter by some policeman and thereafter, he proceeded to Theog, whereas PW2 deposed that on 3rd day of the alleged incident, she was informed by the police that her daughter is found dead at Theog in the morning, whereafter she allegedly informed her husband at Shimla. If it is so, it means that PW1 Mohan Singh was in Shimla for three days as per her version, whereas as per version of Mohan Singh, he was in Shimla for 1 and 2 days and thereafter after having received information from the police about whereabouts of his daughter proceeded to Theog, where information was given to him that his daughter Anjana has died after consuming poison. It has nowhere come in the statement of PW1 Mohan Sing that at Theog, he lodged report, if any, with regard to alleged kidnapping of his daughter by the accused, rather he after having received information with regard to death accompanied the police to IGMC Shimla and from there, he took body of the deceased daughter to his village for cremation.

15. There are two other material prosecution witnesses PW4 Lali Devi and PW5 Ram Pal, at whose residence at Theog, both the accused and deceased Anjana stayed during the day time before the unfortunate death of

the deceased Anjana. As per these witnesses, accused was known to them as he had worked in their shop 2-3 years back. As per these witnesses, accused had introduced the deceased Anjana as his wife and thereafter they both had gone in a room for rest. PW4 deposed that at about 3-4 pm, when she went to wake the accused and Anjana in the room, accused Pawan Kumar stated that Anjana is not feeling well and she was inside the room. PW4 further deposed that accused told her that he had consumed liquor and as such was not feeling well. She alleged that her husband came home at 7pm and then accused told him that he and Anjana had consumed poison. PW5 Ram Pal called the neighbour Banka Ram and went to the police station Theog. Police came from police station Theog and found Anjana dead in the room. Interestingly, Banka Ram, who accompanied PW5 Ram Pal, never came to be examined by the prosecution. Though it clearly emerges from the statements of aforesaid material prosecution witnesses that accused had introduced the deceased Anjana as his wife, but at no point of time, deceased Anjana complained with regard to her alleged kidnapping by the accused, rather she of her own volition stayed in the room with the accused for some time in the house of PW4 and PW5. PW4 has categorically deposed that when Anjana reached her house, she was not frightened or perplexed and told her that they have come from Sundernagar and they would go in the evening.

16. Leaving everything aside, this Court finds from the record that though dead body of deceased Anjana was taken for post mortem to IGMC, Shimla, but if the post mortem report placed on record Ext.PW3/C is perused in its entirety, it nowhere stated something specific with regard to cause of death, rather it has been stated that report of death shall be given after the receipt of chemical examination of the Viscera. Final report of post mortem on the basis of viscera, if any, never came to be placed on record. Though omission on the part of the prosecution to place on record postmortem report complete in all respects may not be of much relevance as far as this case is

concerned, but certainly it creates doubt with regard to story of the prosecution. Since there are material contradictions and inconsistencies in the statements of material prosecution witnesses, especially PW1 and PW2, court below ought to have exercised due caution and care while placing reliance on the statements of aforesaid witnesses. If the statements of both the aforesaid witnesses are read in conjunction, it clearly emerges that accused was their nephew and he was residing in the same house. Though prosecution has attempted to carve out a case that accused kidnapped the deceased Anjana with a view to solemnize marriage, but there is no whisper, if any, in the statement of PW1 and PW2 with regard to intimate relationship, if any, inter-se accused deceased Anjana, rather both PW1 and PW2 have categorically deposed that accused was their nephew and he had been residing with them only. Aforesaid statements made by PW1 and PW2 gains significance on account of statement made by PW6 Lekh Ram, who dropped the accused and deceased Anjana in his taxi from Sundernagar to Shimla. He deposed that in the year, 2002, one boy and girl came to him. Boy claimed that girl was his sister and he hired taxi to Shimla. He also deposed that girl was feeling some sort of tiredness while coming to Shimla. Though he stated that next day, one person inquired as to where he had taken the passengers to the Shimla and he had told him that one boy and girl had hired his taxi to Shimla but he cannot identify the person who had hired his taxi.

17. No doubt, PW4 in her statement deposed that accused Pawan Kumar told her that Anjana was his wife but that may not be sufficient to conclude intimate relationship, if any, inter-se accused and deceased Anjana, especially when she in her cross-examination admitted that deceased was appearing from her dress and make up to be unmarried girl. She further stated in her cross-examination that she did not inquire from the accused as to when their marriage was solemnized. Though PW1 in initial complaint given to the police claimed that accused had kidnapped his daughter with a

view to solemnize marriage, but on what basis he gave this information to the police, is totally missing. Neither PW1 nor PW2 deposed that in past their daughter and accused had some kind of relationship and they wanted to solemnize marriage. It is difficult to believe that though accused was living in the house of the complainant and he had no knowledge/intimation with regard to his relationship with his daughter. Leaving everything aside, version putforth by PWs 1 and 2 being totally contradictory, otherwise could not be given much weightage by the court while holding the accused guilty of his having committed offence punishable under Section. Reliance is placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 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 emphasise, 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 Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)
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> > "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."
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> 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 situations 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 consistency in evidence amongst all the witnesses."

18. Though after having carefully perused the statements of material prosecution witnesses, this Court has no hesitation to conclude that

prosecution was unable to prove beyond reasonable doubt that accused kidnapped the deceased Anjana on the date of the alleged incident, but even if for the sake of arguments, it is presumed that accused with a view to solemnize marriage kidnapped the deceased Anjana, this Court having taken note of the conduct of the deceased that she of her own volition and without there being any external pressure joined the company of the accused and thereafter, introduced herself as wife of the accused to PW4 Smt. Lali Devi, this Court finds it difficult to agree with Ms. Svaneel Jaswal, learned Deputy Advocate General that accused taking undue advantage of innocence of minority and innocence of the victim-prosecutrix, made her elope with him. No doubt, in the instant case, prosecution has succeeded in proving the age of the deceased to be less than 16 years by placing on record matriculation certificate, but now question remains whether aforesaid certificate ever came to be proved on record by leading cogent or convincing evidence or not. No Doubt, PW1 complainant placed on record the aforesaid certificate to prove that at the time of the alleged incident, age of the deceased was less than 16 years but whether mere exhibition of aforesaid document is sufficient to prove the same is a question needs to be determined at the first instance. Section 35 of the Indian Evidence Act though suggests that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty is itself a relevant fact, but till the time record on the basis of which such entry came to be made in the certificate is not produced and proved by the person, who made entry, it cannot be said that such certificate stands proved in the case at hand. On one hand, prosecution placed on record birth certificate Ext.PW8/A, which came to be proved by PW8 Rakesh Kumar i.e. Panchayat Secretary, who deposed that date of birth of Anajana Kumari is recorded in the record is 22.10.1986 and her name is entered at page No. 20. However in his cross-examination, he admitted that there is

cutting in the name of Anjana. While stating that cutting was not made by him, he stated that cutting in the name has not been initialed or attested by any of the officials of the panchayat. Prosecution while proving matriculation certificate has not been able to prove that date of birth recorded in the matriculation certification is based upon birth certificate issued by the Panchayat Secretary, Gram Panchayat, rather prosecution attempted to prove from the record of Gram Panchayat that date of birth of the deceased Anjana was 22.10.1986. However as has been taken note herein above, statement of PW8 Rakesh Kumar becomes doubtful on account of his admission made in the cross-examination that there is interpolation in the record. He stated that initially Nirmala Devi was written in the first column and there is cutting and name Anjana is mentioned and there are no initials of the any of the official of the Panchayat on the cutting.

19. In the absence of evidence to show on what material the entry of date of birth in the matriculation certificate was made, mere production of a copy of matriculation certificate, though a public document, in terms of Section 35, is/was not sufficient to prove the age of the deceased. To render a document admissible under Section 35, provisions are required to be satisfied i.e. entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. Reliance is placed upon judgment passed by the Hon'ble Apex Court in **Babloo Pasi v. State of Jharkhand and Anr, (2008) 13 SCC 133**, wherein it has been held as under:

> "27.Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any

public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact.

28. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: Birad Mal Singhvi Vs. Anand Purohit)

29.Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order whether 1988 (Supp) SCC 604 the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent. Insofar as the High Court is concerned, there is no indication in its order as to in what manner Rule 22(5)(iv) has been ignored by the Board. The learned Judge seems also to have accepted the opinion of the Medical Board in terms of the said Rule as conclusive. Therefore, the afore- stated ground on which the High Court has set aside the opinion of the Board and holding the accused to be a juvenile, cannot be sustained."

20. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. In this regard, reliance is placed upon judgment passed by the Hon'ble Apex Court in **Birad Mal Singhvi v. Anand Purohit**, 1988 (Supp) SCC 604. Paras 14 and 17 of the afore judgment read as under:

> "14 We would now consider the evidence produced by the respondent on the question of age of Hukmi Chand and Suraj Prakash Joshi. The respondent examined Anantram Sharma PW 3 and Kailash Chandra Taparia PW5. Anantram sharma PW 3 has been the Principal of New Government Higher Secondary School, Jodhpur since 1984. On the basis of the scholar's register he stated before the High Court that Hukmi Chand joined school on 24.6. 1972 in 9th class and his date of birth as mentioned in scholar's register was 13.6.1956. He made this statement on the basis of the entries contained in the scholar's register Ex. 8. He admitted that entries in the scholar's register are made on the basis of the entries contained in the admission form. He could not produce the admission form in original or its copy. He stated that Hukmi Chand was admitted in 9th class on the basis of transfer certificate issued by the Government Middle School, Palasni from where he had passed 8th standard. He proved the signature of Satya Narain Mathur the then Principal who had issued the copy of the scholar's register Ex. 8. Satya Narain Mathur was admittedly alive but he was not examined to show as to on what basis he had mentioned the date of birth of Hukmi Chand in Ex. 8. The evidence of Anantram Sharma merely proved that Ex. 8 was a copy of entries in scholar's register. His testimony does not show as to on what basis the entry relating to date of birth of Hukmi Chand was made in the scholar's register. Kailash Chandra Taparia PW 5 was Deputy Director (Examination) Board of Secondary Education, Rajasthan, he produced the counter foil of Secondary Education Certificate of Hukmi Chand Bhandari. a copy of which has been

filed as Ex. 9. He also proved the tabulation record of the Secondary School Examination 1974, a copy of which has been filed as Ex. 10. In both these documents Hukmi Chand's date of birth was recorded as 13.6.1956. Kailash Chandra Taparia further proved Ex. 11 which is the copy of the tabulation record of Secondary School Examination of 1977 relating to SuraJ Prakash Joshi. In that document the date of birth of Suraj Prakash Joshi was recorded 11.3.1959 Kailash Chandra Taparia stated that date of birth as mentioned in the counter foil of the certificates and in the tabulation form Ex. 12 was recorded on the basis of the date of birth mentioned by the candidate in the examination form. But the examination form or its copy was not produced before Court. In substance the statement of the aforesaid two witnesses merely prove that in the scholar's register as well as in the Secondary School examination records the date of birth of a certain Hukmi Chand was mentioned as 13.6.1956 and in the tabulation record of Secondary School Examination a certain suraj Prakash Joshi's date of birth was mentioned as 11.3.1959. No evidence was produced by the respondent to prove that the aforesaid documents related to Hukmi Chand and Suraj Prakash Joshi who had filed nomination nation papers. Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9. 10. 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth

of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or some one having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved. The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made in the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 1(). 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of HukmiChand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts. namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.

17. The appellant was declared elected aS he had polled majority of valid votes. His election could not be set aside unless the respondent-election petitioner was able to prove that Hukmichand and Suraj Prakash Joshi had attained the age of 25 years on the date of nomination by producing cogent and reliable evidence before the High Court. The burden to prove that fact was on the respondent throughout and he could not and did not discharge that burden merely by producing the documentary evidence Ex. 8, 9, 10, 11 and 12 or on the basis of oral testimony of Anantram Sharma PW 3 and Kailash Chandra Taparia PW 5. As discussed earlier these documents do not conclusively prove the dates of birth of Hukmi Chand and Suraj Prakash Joshi. The entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in the school record was examined. In the absence of the connecting evidence the documents produced by the respondent, to prove the age of the aforesaid two candidates have no evidentiary value. The High Court committed serious documents. In our view the High Court's entire approach in considering the question of dates of birth was wholly misconceived. The burden to prove the fact in issue, namely, the dates of birth of Hukmichand and Suraj Prakash Joshi was on the respondent who was the election petitioner. The respondent could not succeed if no evidence was produced by the appellant on the question of age of the aforesaid candidates and his election could not be set aside merely on the ground that the respondent had made out a prima facie case that the entry contained in the electoral roll regarding the age of two candidates was incorrect. It appears that in his list of witnesses the appellant had included the name of Suraj Prakash Joshi and his father Maghdutt Joshi as witnesses but they were not examined by him. Similarly, Hukmi Chand was also cited by the appellant but he was also not examined instead Navratan Mal Bhandari, brother of Hukmi Chand was examined as PW 4 and Ghanshyam Chhangani was examined as PW 6 by the appellant, who supported the appellants case that Hukmi Chand

and Suraj Prakash Joshi had not attained the age of 25 years on the date of nomination. Since the appellant had not examined Hukmi Chand. Suraj Prakash Joshi or their parents, the High Court drew adverse inference against him. The High Court committed serious error in doing so. There was no question of drawing adverse inference against the appellant, as the burden to prove the age of Hukmi Chand and Suraj Prakash joshi was on the election petitioner and since he had failed to prove the same by cogent evidence no adverse inference could be drawn against the appellant. In fact. burden was on the respondent to prove his case by producing the Hukmichand and Suraj Prakash Joshi, or their parents to prove and corroborate the dates of birth as mentioned in the school register and the certificate. If he failed to do that he could not succeed merely because appellant had not produced them. In the circumstances no adverse inference was at all possible to be drawn against the appellant for not examining Hukmi Chand and Suraj Prakash Joshi or their parents."

21. In **Alamelu and Anr v. State represented by Inspector of Police (along with connected matters) 2011 (2)385**, it has been held as under:

"42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of Birad Mal Singhvi Vs. Anand Purohit1, observed as follows:-

"14.....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish

> evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted." (emphasis supplied).

43. The same proposition of law is reiterated by this Court in the case of Narbada Devi Gupta Vs. Birendra Kumar Jaiswal2, where this Court observed as follows:-

> "The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"."

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an (2003) 8 SCC 745 individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be

possible to give a firm opinion that the girl was definitely below 18 years of age.

46.In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.3, In the aforesaid judgment, it is observed as follows:-

> "9.....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of Ravinder Singh Gorkhi Vs. State of U.P.4 held as follows:-

> "38. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor.

> A court of law for the purpose of determining the age of a (2006) 5 SCC 584 party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.
>
> (emphasis supplied)."

22. It is quite apparent from the aforesaid exposition of law laid down by the Hon'ble Apex Court that court of law for the purpose of determining the age of party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standards in civil as well as criminal cases. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution. Since in the case at hand though prosecution placed on record matriculation certificate showing date of birth of the deceased to be 22.10.1986, but since no record on the basis of which such entry came to be incorporated in the matriculation certificate came to be placed on record or proved by official, who made such entry, no much reliance could be placed upon the same. Apart from above, another document placed on record to prove date of birth of deceased Anjana is Panchayat Certificate, wherein though date of birth of deceased has been shown as 22.10.1986, but as has been noticed herein above, PW8 Rakesh Kumar, has categorically admitted that there is interpolation in the records and while cutting, none of

the official has initialed the same and as such, court below otherwise could not have placed much reliance upon the same.

23. Leaving everything aside, (PW1) father of the deceased in his statement categorically stated that age of his daughter was 16 ½ years at the time of the alleged incident. If it is accepted, there is contradiction on account of certificates placed on record by the prosecution to prove the age of the deceased. At this stage, Ms. Svaneel Jaswal, learned Deputy Advocate General placed reliance upon judgment passed by the Hon'ble Apex Court in ***State of Madhya Pradesh v. Anoop Singh,*** **2015 7 SCC 773** to contend that certificate proving the age of prosecutrix to be below sixteen is sufficient to hold the accused guilty of having committed offence punishable under Sections 363 366 and 376 of IPC, relevant paras of the aforesaid judgment read as under:

> "12. We believe that the present case involves only one issue for this Court to be considered, which is regarding the determination of the age of the prosecutrix.
>
> 13. In the present case, the central question is whether the prosecutrix was below 16 years of age at the time of the incident. The prosecution in support of their case adduced two certificates, which were the birth certificate and the middle school certificate. The date of birth of the prosecutrix has been shown as 29.08.1987 in the Birth Certificate (Ext. P/5), while the date of birth is shown as 27.08.1987 in the Middle School Examination Certificate. There is a difference of just two days in the dates mentioned in the abovementioned Exhibits. The Trial Court has rightly observed that the birth certificate Ext. P/5 clearly shows that the registration regarding the birth was made on 30.10.1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under-aged in view of the possibility of the incident in question. We are of the view that the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in

presuming that the documents could not be relied upon in determining the age of the prosecutrix.

14. This Court in the case of Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr., (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

> "Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –
>
> (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

15. This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) as under:

> "Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well." (Emphasis supplied)

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In paragraph 13, this Court observed:

> "13.In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the proseuctrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same."

16. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P/5 and P/6 cannot be discarded. Therefore, the Trial Court was correct in relying on the documents.

17. The High Court also relied on the statement of PW-11 Dr. A.K. Saraf who took the X-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more

> than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in the absence, the medical opinion should have been sought. We find that the Trial Court has also dealt with this aspect of the ossification test. The Trial Court noted that the respondent had cited Lakhan Lal Vs. State of M.P., 2004 Cri.L.J. 3962, wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18½ years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the Trial Court rightly held that in the present case the ossification test is not the sole criteria for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed.
>
> 18. Thus, keeping in view the medical examination reports, the statements of the prosecution witnesses which inspire confidence and the certificates proving the age of the prosecutrix to be below 16 years of age on the date of the incident, we set aside the impugned judgment passed by the High Court and uphold the judgment and order dated 24.04.2006 passed by the third Additional Sessions Judge, Satna in Special Case No.123/2003."

24. However, having carefully perused the aforesaid judgment, this court finds no application of the aforesaid judgment in the case at hand because facts are totally different. In the aforesaid case, question before the Hon'ble Apex Court was whether court was right in placing reliance on the report of ossification test given by the radiologist ignoring other documents placed on record suggestive of the fact that age of victim-prosecutrix at the time of the alleged incident was less than 16 years. Hon'ble Apex Court having taken note of Rule 12 (3) (b) of Juvenile Justice (Care and Protection of children) Rules 2007, ruled that medical opinion can be sought from the duly constituted medical board only if matriculation or equivalent certificate of date of birth certificate are not available. Since in that case, matriculation and birth certificate were available, but court placing reliance upon ossification

test report given by the radiologist proceeded to hold that victim was above 16 years of age, Hon'ble Apex Court set aside the judgment. Herein, as as been discussed in detail, matriculation certificate as well as date of birth certificate issued by board of school education and Gram Panchayat never came to be proved in accordance with law and as such, court below may not have placed much reliance upon the same while holding the deceased to be less than 18 years of age.

25. Consequently, in view of the detailed discussion made herein above as well as law taken into consideration, this Court has no hesitation to conclude that court below has failed to appreciate the evidence in its right perspective and as such, judgment of conviction and order of sentence dated 15.3.2008 is not sustainable in the eye of law and accordingly, same are quashed and set aside and appellant is acquitted of the charge framed against him. Bail bonds if any, discharged. Present appeal is disposed of alongwith pending applications if any

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

Sanjay Chottani

.....Petitioner

Versus

State of Himachal Pradesh and Anr.

.....Respondents

For the Petitioner: Mr. Rajesh Batra, Ms. Sonia Kukreja and Mr. Janesh Gupta, Advocate.

For the Respondents: Mr. Sudhir Bhatnagar and Mr. Narender Guleria, Additional Advocates General with Ms. Svaneel Jaswal, Deputy Advocate General and Mr. Sunny Dhatwalia, Assistant Advocate General.

Cr.MMO No. 417 of 2021

Date of Decision:16.11.2022

Himachal Pradesh Minimum Wages Rules, 1978 - Rule 28 (7) **& the Minimum Wages Act, 1948-** Appeal was filed being aggrieved with order passed by the learned Chief Judicial Magistrate against summoning order and complaint- Complaint made under Rule 28(7) of the Rules is not maintainable- Held since no documents were placed and court merely on the basis of allegations contained in the complaint proceeded to issue process, same cannot be said to be in accordance with law and as such, being not sustainable in the eye of law deserves to be quashed and set-aside. Had the court below bothered to look into the reply filed by the petitioner to the show cause issued by the Labour Inspector before filing complaint, probably, it would have not issued the process because bare reading of the same suggests that identity cards, if any, were to be issued by the Contractor, not by the management of the company and if it is so, no violation of Rule 28(7) of the Himachal Pradesh Minimum Wages Rules, 1978 can be said to have been committed by the petitioner. Besides above, order issuing process is totally non-speaking. It is not understood that why and for what reason, court found it necessary to issue process/summon to the accused. Bare perusal of order impugned in the instant proceedings reveals that court merely after having

received complaint issued process, which otherwise is not permissible in the eye of law. (Para 10)

Cases referred:

Dayle De'souza v. Governemnt of India, 2021 SCC Online SC 1012;

S.S. Gokul Krishnan and Ors v. State Thr. Food Inspector Govt. of NCT of Delhi, 209 (108) DRJ 669;

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 20.4.2021, passed by the learned Chief Judicial Magistrate, Una, District Una, H.P., whereby it having taken note of the complaint filed under Section 18 of the Minimum Wages Act, 1948 read with Rule 28 (7) of the Himachal Pradesh Minimum Wages Rules, 1978, filed the respondent-State, issued process against the petitioner herein (Mr. Sanjay Chottani) i.e. Factory Manager of unit of M/s Nestle India Limited, situate at Industrial Area Tahliwal, Tehsil Haroli, Una, District Una, Himachal Pradesh, petitioner has approached this Court under Section 482 Cr.PC, praying therein to set-aside aforesaid impugned summoning order as well as complaint dated 10.2.2020 (Annexure P-1).

2. Briefly stated facts as emerge from the record are that Labour Inspector, Tahliwal, District Una, H.P., inspected the factory of M/s Nestle India Limited, situate at Industrial Area Tahliwal, Tehsil Haroli, Una, District Una, Himachal Pradesh on 27.11.2019. Since during inspection, aforesaid Labour Inspector noted certain violations allegedly made by the Management of the Company with regard to provisions contained in the Minimum Wages Act, 1948 and the Himachal Pradesh Minimum Wages Rules, 1978, he served show cause notice upon the management of the factory named herein above. Since despite there being notice, management of the company failed to produce any authentic record with regard to issuance of identity cards to its

workers, Labour Inspector after having obtained necessary approval from the competent authority, , proceeded to file complaint under Section 18 of the Minimum Wages Act, 1948 read with Rule 28(7) of the Himachal Pradesh Minimum Wages Rules, 1978 in the court of learned Chief Judicial Magistrate, Una, District Una on 10.2.2020 (Annexure P-1), which having taken note of the averments contained in the complaint proceeded to issue process vide order dated 20.4.2021 (Annexure P-2). Vide aforesaid order, court below directed the petitioner herein Mr. Sanjay Chottani, who at that relevant time, was the Factory Manager of the concerned Nestle Factory, to come present before the court on 21.6.2021. In the aforesaid background, petitioner herein has approached this Court in the instant proceedings, praying therein to set-aside afore summoning order precisely on the grounds that **i.)** *order issuing process does not contain any reasoning whatsoever for summoning the accused and as such, being non-speaking order is not sustainable in the eye of law*; **ii.)** *complaint was filed on 10.2.2020, which was not accompanied by any document and as such, court while taking cognizance of the offence on 20.4.2021 had no occasion to peruse the essential documents like inspection report, reply to show cause notice and sanction etc., meaning thereby, cognizance order issuing process was without any application of mind*; and **iii.)** *since factum with regard to non-placing of documents at the time of filing of the complaint stood proved on account of filing of the application with the complaint dated 10.8.2021 under Section 311 Cr.PC (Annexure P-4), court below ought to have accepted the prayer made by the petitioner to quash the complaint as well as summoning order.*

3. Mr. Rajesh Batra, Advocate, appearing for the petitioner while inviting attention of this Court to the complaint dated 10.2.2020, on the basis of which, process came to be issued against the petitioner, vehemently argued that save and except bald statement with regard to violation of certain provisions of the Rules, no document ever came to be placed on record with

the aforesaid complaint and as such, court below ought to have rejected the complaint at its very threshold. While making this Court to peruse application dated 10.8.2021 filed under Section 311 Cr.PC, Mr. Batra, further argued that documents, if any, in support of the complaint, for the first time came to be placed on record on 10.8.2021, by which time, court below had already issued process that too on the basis of averments contained in the complaint, meaning thereby, at the time of issuing process vide order dated 20.4.2021, court below had no occasion to see the essential document, rather it simply on the basis of averments contained in the complaint proceeded to issue process. While making this Court peruse various provisions of aforesaid Rules, especially proviso to Rule 28 (7) Himachal Pradesh Minimum Wages Rules, 1978, Mr. Batra, argued that petitioner had no obligation to comply with the aforesaid provision because proviso to aforesaid provision clearly reveals that where employment card is required to be issued under the Contract Labour (Regulation and Abolition) Act, Himachal Pradesh Rules, 1974, there shall be no need to issue Identity cards to the employees/workers under the provisions of Himachal Pradesh Minimum Wages Rules, 1978. While referring to the Rule 76 of the Contract Labour (Regulation and Abolition) Act, Himachal Pradesh Rules, 1974, Mr. Batra argued that since employment cards were required to be issued under the aforesaid provision of law, there was no requirement for issuance of Identity cards under the Himachal Pradesh Minimum Wages Rules, 1978 and as such, no illegality can be said to have been committed by the petitioner while not issuing identity cards to its contract workers under the Himachal Pradesh Minimum Wages Rules, 1978. He further submitted that since record clearly reveals that employees, who were issued identity cards were on contract, they were required to be issued identity cards by the contractor under Section 76 of the Contract Labour (Regulation and Abolition) Act, Himachal Pradesh Rules, 1974. While making this Court peruse reply to show cause notice, Mr. Batra, learned counsel

argued that had the court below bothered to peruse the reply filed by the petitioner to the show cause notice issued by the department after filing the complaint, it would have not issued process because bare reading of the same suggests that there was no violation, if any, on the part of the petitioner with regard to provisions contained under the Himachal Pradesh Minimum Wages Rules, 1978. Lastly, Mr. Batra, submitted that at the time of issuing process save and except averments contained in the complaint, there was no material available with the court, enabling it to satisfy that whether violations alleged to have been made by the petitioner, were actually made as have been stated in the complaint or not. He submitted that document in support of the complaint for the first time came to be placed on 10.8.2021, by which time, court below had already issued the process and as such, it is clear cut case of non-application of mind while issuing process. While referring to the notification dated 12.5.2017 issued by the department of Labour and Empowerment, Government of Himachal Pradesh (Annexure P-6 annexed with Cr.MMO No. 467 of 2017), above named counsel, submitted that specific procedure for conducting inspection of the premises/factory is required to be followed by the Labour Officer. As per aforesaid notification, no prosecution should be lodged against the violators, provided he is given 15 days time to rectify the mistake. Since in the case at hand, aforesaid instructions issued by the government, never came to be complied with, complaint filed by the Labour Inspector is otherwise not sustainable.

4. Mr. Narender Guleria, learned Additional Advocate General while supporting the impugned order and refuting the aforesaid contentions raised by the learned counsel for the petitioner argued that since during inspection, employees working in the factory premises were found without there being identity cards, Labour Inspector rightly lodged prosecution against the management of the factory under various provisions of labour laws. Learned Additional Advocate General further submitted that true it is that, at the time

of filing of the complaint, no document was annexed with the same, but once petitioner pursuant to process issued against him put in appearance in the court and thereafter, entire material came to be placed on record by the complainant, submission made by the petitioner to quash and set-aside the complaint on account of non-exhibition of the documents alongwith the complaint is not maintainable at this stge. He further submitted that since complainant has already subjected himself to the jurisdiction of the court, present petition, which has been filed for quashing of process has rendered infructuous, rather complaint, which is subject matter of the present case, is required to be decided on its own merits.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds that on 27.11.2019, Labour Officer, Una, inspected the Company in question and after having found the certain discrepancies with regard to issuance of identity cards, deemed it necessary to inspect the record with regard to issuance of identity cards, which is otherwise mandatory as per Rule 28(7) of the Himachal Pradesh Minimum Wages Rules, 1978, which reads as under:

> "(7) (a) Every employer shall submit employees/workers Identity Cards to the area Labour Officer within three days from the date of employment of the employees/workers on the prescribed Form-XIII and the Labour Officer shall return the Identity Card to the employer within a period of seven days duly attested for further distribution to the concerned employee/worker :
>
> Provided further that if the employee/workman is required to be issued Employment Card/Pass Book under the Contract Labour (Regulation and Abolition) Act, Himachal Pradesh Rules, 1974 or under the Himachal Pradesh Migrant Workmen (Regulation of Employment & Condition of Service) Himachal Pradesh Rules, 1983, respectively, there shall be no need to issue employees/workers Identity Cards under the provisions of the Himachal Pradesh Minimum Wages Rules,' 1978. However, if an identity card is required to be issued under the Minimum Wages

rules 1978 and ticket is required to be issued under the item No. 3 of Schedule 1 under Rule 3 of Industrial Employment (Standing order) Himachal Pradesh Rules 1973 and amendment Rules 1991 the same shall be issued under the former.

6. Though bare reading of the aforesaid provision suggests that every employer shall submit employees/workers identity cards to the area Labour Officer within three days from the date of employment of the employee/workers on the prescribe Form-XIII and the Labour Officer shall return the identity cards to the employer within a period of seven days duly attested for further distribution to the concerned employee, however proviso to aforesaid rule clearly provides that where identity card is required to be issued under the Contract Labour (Regulation and Abolition) Act, Himachal Pradesh Rules, 1974, there shall be no need to issue employees/workers Identity Cards under the provisions of the Himachal Pradesh Minimum Wages Rules, 1978.

7. Old Rule 76 of the Contract Labour (Regulation and Abolition) Act, Himachal Pradesh Rules, 1974, reads as under:

> " Rule 76 employment card (i) Every contractor shall issue an employment card in Form XIV to each worker within three days for the employment of the worker.
> (ii) The card shall be maintained up-to-date, and any change in the particulars shall be entered therein."

8. Aforesaid provision came to be amended w.e.f. 5.6.2007 and was made pari materia to Rule 28(7) of the HP Minimum Wages (Amendment) Rules, 2006. The amended Rule 76 reads as under:

> "(1) Every Contractor shall submit Employment/Identity Card in Form XIV within three days from the date of employment of Contract Labour to the Office of the area Labour Officer and the Labour Officer shall return the same to the contractor within a period of seven days duly attested for further distribution to the concerned contract laborers".-
> Provided that when an Employment/Identity card is issued with respect to contract labour under these Rules, the Contractor

> shall not be required to issue Identity Cards under the Himachal Pradesh minimum wages Rules, 1978 and Industrial Employment. (Standing Orders) Himachal Pradesh Rules, 1973 or any other similar provisions of other rule under the labour laws, as the case may be.
>
> (2) The Employment/Identity Cards shall be maintained up to date and any changes in Identity Card and corresponding Form-XIII and XII,-A including addition, deletion and alteration shall be intimated to the concerned Licensing/ Registering Officer (Labour Officer) within seven days from such changes by the Contractor and shall be attested by the concerned Labour Officer."

9. Bare perusal of the aforesaid provision reveals that every contractor shall submit employment/Identity Card in Form-XIV within three days from the date of employment of Contract Labour to the Office of the area Labour Officer and the Labour Officer shall return the same to the contractor within a period of seven days duly attested for further distribution to the concerned contract laborers.

10. Statements of some of the employees/workers, who were not allegedly issued the identity cards while making their statements before the Labour Inspector categorically stated that they have been appointed through contractor as named in their statements (available at page 106 to 117). If it is so, Mr. Batra, learned counsel for the petitioner is right in contending that since workers, who were not issued identity cards by the management were actually not the employees of factory, rather, they were working on contract basis with a contractor and as such, it was the obligation of the contractor under Rule 76 of the Contract Labour (Regulation and Abolition) Act, to provide them identity cards. Mr. Narender Guleria, learned Additional Advocate General, has not been able to dispute the aforesaid factum with regard to employment of the workers in the factory premises through contractor and as such, prima-facie, complaint filed against the Factory Manager of the Company concerned appears to be not maintainable, especially

under provisions of Himachal Pradesh Minimum Wages Rules, 1978. It may be noticed that precise allegation against the petitioner is that identity cards as prescribed under Rule 28(7) of the Himachal Pradesh Minimum Wages Rules, 1978, were not issued to the workers, but as has been taken note herein above, employees being employed through contractor were required to be issued identity cards, if any, by the contractor, not by the management and as such, complaint made under Rule 28(7) of the Rules is otherwise not maintainable and hence, cognizance of the same ought not have taken by the court below. This court having carefully perused copy of the compliant as well as contents thereof finds force in the submission of Mr. Batra, learned counsel for the petitioner that since court below had no document annexed with the complaint to peruse at the time of issuing process, there was no occasion for it to issue process, rather before that it ought to have asked the complainant to place on record material to satisfy the allegations contained in the complaint. Though factum with regard to non-placement/exhibition of documents alongwith the complaint has not been disputed by Mr. Narender Guleria, learned Additional Advocate General, but even otherwise, such fact stands established on record on account of the fact that after issuance of process, Labour Inspector filed an application under Section 311 Cr.PC, seeking therein permission of the court to place on record certain documents in support of the complaint. Since no documents in support of allegations contained in the complaint ever came to be placed on record alongwith the complaint, it can be safely inferred that court did not apply its mind vis-à-vis correctness of the allegations contained in the complaint before issuing process. Needless to say, after taking cognizance and before issuing process, it is the duty of the court to satisfy itself that allegations contained in the complaint have some truth or same are supported by some documentary evidence. Though in private complaint, preliminary evidence is to be recorded in support of the complaint, but since complaint at hand was filed by a public

servant i.e. Labour Inspector, court ought to have called for the documents in support of the complaint to ascertain the veracity of allegations contained in the complaint. Since in the case at hand, no documents were placed and court merely on the basis of allegations contained in the complaint proceeded to issue process, same cannot be said to be in accordance with law and as such, being not sustainable in the eye of law deserves to be quashed and set-aside. Had the court below bothered to look into the reply filed by the petitioner to the show cause issued by the Labour Inspector before filing complaint, probably, it would have not issued the process because bare reading of the same suggests that identity cards, if any, were to be issued by the Contractor, not by the management of the company and if it is so, no violation of Rule 28(7) of the Himachal Pradseh Minimum Wages Rules, 1978 can be said to have been committed by the petitioner. Besides above, order issuing process is totally non-speaking. It is not understood that why and for what reason, court found it necessary to issue process/summon to the accused. Bare perusal of order impugned in the instant proceedings reveals that court merely after having received complaint issued process, which otherwise is not permissible in the eye of law. Hon'ble Apex Court in **Dayle De'souza v. Governemnt of India, 2021 SCC Online SC 1012**, has categorically held that though public servant is not required to be examined at the time of filing of the complaint, but it is the duty of the Magistrate to apply its mind to see whether basis of allegation and evidence, prima-facie case for taking cognizance in summoning the accused is made out or not. Since in the case at hand, there was no material annexed with the complaint, it cannot be said that court applied its mind. Apart from above, it has been further held in the aforesaid judgment that order issuing process should be a reasoned order reflecting application of mind, which in the case at hand, is totally missing, paras 36 to 38 of the aforesaid judgment read as under:

"36. Almost every statute confer operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case. The passage from Hindustan Steel Ltd. (supra) highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but only when applied to the relevant facts of the case. Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

37. There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused to stand trial has serious consequences21. They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.

38. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. Under the proviso (a) to Section 200 of the 1973 Code, there may lie an exemption from recording pre-summoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the

duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a prima facie case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in National Small Industries Corporation Limited v. State (NCT of Delhi) and Others:22

> "12. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. (See Nirmaljit Singh Hoon v. State of W.B.) Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process."

11. There is another aspect of the matter, as has been taken note herein above, Government of Himachal Pradesh vide notification dated 12.5.2017 (Annexure P-6), issued certain guidelines for conducting inspection of the establishment/industries in a manner stated therein. One of the instruction in the aforesaid notification is that after inspecting the establishment, inspecting authority will give 15 days' time to the employer for compliance/rectifying its mistake and thereafter their premises will be re-inspected and in case, after expiry of the aforesaid period, management fails to rectify its mistake, then by way of issuing show cause notice, Labour Inspector can proceed to file the complaint. Since in the case at hand, Labour Inspector after having inspected the premises straightaway issued show-cause notice to the management of the factory to explain why action be not taken against them for its having violated the provisions contained under Rule 28(7) of the Himachal Pradseh Minimum Wages Rules, 1978, complaint sought to be quashed in the instant proceedings is otherwise not sustainable.

12. Reliance is placed upon judgment dated 30.9.2021, M/s **Pepsico India Holdings v. State of HP and Ors.,** passed in **Cr.MMO No. 225 of 2019**, wherein coordinate Bench of this Court having taken note of various judgments passed by the various constitutional courts held that all old cases filed under the prevention of food adulteration Act, ought to have been withdrawn in terms of the policy decision taken by the government.

> "23. Similar stand was taken by the Hon'ble High Court of Gujarat at Ahmadabad in case PepsiCo India Holdings Pvt. Ltd. Vs UOI R/Special Criminal Application No.2281 of 2008 and also the Hon'ble High Court of Rajasthan in Ramkishan Agarwal Versus State of Rajasthan through PP S.B. Criminal Miscellaneous (Petition) No.2223 of 2013 and connected matters.
>
> 24. The judgment passed by the Hon'ble Supreme Court in Nemi Chand's case (supra) applies to the present case on all fours. The trial for misbranding is continuing from 31st December 2003. The original company M/s Aradhana Soft Drinks Company Limited, stands amalgamated with M/s PepsiCo India Holdings Private Limited. The concerned Officers and the Directors of erstwhile M/s Aradhana Soft Drinks Company Limited would not have any excess to its record, which would seriously prejudice them at this belated stage. The accused were not responsible for delaying the trial. In the entirety of the facts and circumstances of the case, it is a fit case where a petition can be allowed, and the complaint and all consequential proceedings are required to be quashed.
>
> 25. Since, the original accused had filed application under Section 20-A of PFA Act to implead the person, from whom they had purchased the stock, eventually pushing down the responsibility to the manufacturer, therefore, there would be no justification to continue proceedings even against them. The silence of manufacturer about the product being spurious and absence of any allegation that the company was not a manufacturer would also be valid reasons to terminate prosecution of the retailers, suppliers and the dealers. Given above, the complaint and proceedings deserve to be quashed in entirety."

13. Reliance is placed on judgment passed in **S.S. Gokul Krishnan and Ors v. State Thr. Food Inspector Govt. of NCT of Delhi, 209 (108) DRJ 669,** wherein Delhi High Court held that policy being in force at the relevant time should have been adhered to by the department before it decided to file a complaint in the court for offences under Section 7/16 of the PFA Act. Relevant paras of the aforesaid judgment read as under:

> "29. The policy being in force at the relevant time should have been adhered to by the department before it decided to file a complaint in the court for offences under Section 7/16 of the PFA Act. The petitioners are therefore within their rights to seek protection under the said policy which was in existence at the relevant time.
>
> 30. In view of my discussion as above, it is not a case of misbranding within the meaning of Rule 32 of the Act. Also there is non-compliance of the policy No. F6(228) /85/ENF/P.F.A. by the department. The complaint deserves to be quashed and is accordingly quashed. The impugned summoning order dated 6.10.2006 and other proceedings conducted therein also stand quashed. Petition stands allowed accordingly."

14. Since in the case at hand, respondents have not been able to place on record any document suggestive of the fact that aforesaid policy decision taken vide notification dated 10.10.2017 was superseded or withdrawn, court below before initiating process either should have followed the procedure prescribed in the notification or ought to have rejected the complaint.

15. Consequently, in view of the detailed discussion made herein above as well as law taken into consideration, this court finds merit in the present petition and accordingly same is allowed, as a consequence of which, complaint dated 10.2.2020 and summoning order dated 20.4.2021 (Annexure P-1 and P-2 respectively) are quashed and set-aside. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Vijay Kumar .....Appellant.

Versus

State of Himachal Pradesh .....Respondent

For the appellant : Mr. Bimal Gupta, Sr. Advocate with Mr. Varun Thakur, Advocate.

For the respondent: Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

Cr.M.P No.: 2663 of 2022
in Cr. Appeal No. 282 of 2022
Reserved on: 18.11.2022
Decided on: 23.11.2022

Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 21(b) of ND & PS Act- 10 kilograms of poppy husk- Appeal against conviction- Petitioner remained on bail throughout the trial- The appeal filed by the petitioner has been admitted for hearing. Held- There are arguable issues raised by the appellant/petitioner, which need detailed consideration. The final disposal of the appeal is likely to take some time. Petitioner after conviction has surrendered and is undergoing the sentence. Meaning thereby that petitioner has no intent to abscond from the course of justice. The conviction of petitioner is for offence involving intermediate quantity of poppy husk. Without commenting on the merits of the contention raised on behalf of the appellant, such contention cannot be out rightly rejected and needs consideration. No past criminal antecedents have been attributed to the petitioner. Nothing has been placed on record to show that the release of petitioner will be a threat to the society at large.(Paras 6 & 7)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

By way of this application, a prayer has been made to suspend substantive sentence imposed upon the petitioner, vide judgment and sentence order dated 30.07.2022, passed by learned Special Judge-II, Sirmour District at Nahan, in Sessions Trial No. 59-N/7 of 2013.

2. Petitioner has been convicted for offence under Section 21(b) of ND & PS Act. He has been found to be in exclusive possession of 10 kilograms of poppy husk, which is intermediate quantity. The small quantity of poppy husk is less than 1 kilogram and commercial quantity is more than 50 Kilograms. Petitioner has been sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 50,000/-. In default of payment of fine, petitioner has been ordered to undergo simple imprisonment for three months.

3. It is contended on behalf of the petitioner that he has good arguable case and there is every likelihood of acceptance of the appeal filed by him. Stress has been laid on the fact that the prosecution case was full of doubts. No independent witness was associated, despite opportunity to do so. The alleged apprehension of the petitioner was in the most thickly habitated area. The road on which petitioner was allegedly apprehended was a busy road for traffic. It is further submitted that the fine amount has been deposited by the petitioner. He had remained on bail throughout the trial and has not misused such liberty at any point of time.

4. Despite opportunity, respondent/State has not filed reply to the application.

5. Record reveals that petitioner was arrested on 28.08.2013 and was released on bail on 20.09.2013. Nine years have elapsed thereafter and there is no complaint whatsoever against petitioner that he had

misused the liberty of bail at any point of time or had shown any indulgence in unlawful activities.

6. The appeal filed by the petitioner has been admitted for hearing. There are arguable issues raised by the appellant/petitioner, which need detailed consideration. The final disposal of the appeal is likely to take some time.

7. Petitioner after conviction has surrendered and is undergoing the sentence. Meaning thereby that petitioner has no intent to abscond from the course of justice. The conviction of petitioner is for offence involving intermediate quantity of poppy husk. Without commenting on the merits of the contention raised on behalf of the appellant, such contention cannot be out rightly rejected and needs consideration.

8. No past criminal antecedents have been attributed to the petitioner. Nothing has been placed on record to show that the release of petitioner will be a threat to the society at large.

9. Keeping in view the entirety of facts and circumstances, the application is allowed. Substantive sentence imposed upon the petitioner vide judgment and sentence order dated 30.07.2022, passed by learned Special Judge-II, Sirmour District at Nahan, H.P. in Sessions Trial No. 59-N/7 of 2013, is ordered to be suspended till final disposal of appeal, subject to petitioner depositing the fine amount, if not already deposited, in the trial court and also his executing personal bond in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned Special Judge, specifically undertaking therein that the petitioner will cause his appearance before this Court, during the pendency of the appeal, as and when required and also that he will immediately surrender before learned Trial Court to receive the sentence in the event of his appeal being dismissed.

10. Petitioner be released from custody on his fulfilling all the terms and conditions of this order. Application stands disposed of.

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

_Karanjeet Singh .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr. Ashok K. Tyagi, Advocate.

For the respondent: Mr. Desh Raj Thakur, Addl. A.G., with Mr. Narender Thakur, Dy. A.G.

Cr. M.P.(M) No. 2237 of 2022
Reserved on: 18.11.2022
Decided on: 23.11.2022

Indian Penal Code, 1860- Sections 363, 376, 504, 506 - **Protection of Children from Sexual Offences Act**- Section 4, **Information Technology Act**, Section 67-B- Petitioner has sought bail- Petition is allowed- Held that the Petitioner is about 21 years of age. His prolonged incarceration before trial is likely to affect his life as a whole and career prospects in particular. No apprehension has been expressed by the respondent regarding the possibility of petitioner fleeing from the course of justice. It is also not the case of respondent that in case of grant of bail to petitioner, the trial shall be effected adversely. There is no previous criminal history attached to the petitioner. The concern regarding the completion of fair and expeditious trial can be taken care of by putting the petitioner to appropriate terms. (Paras 10 & 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

The petitioner is an accused in case FIR No. 25 of 2022, dated 07.03.2022 under Sections 363, 376, 504, 506 IPC, Section 4 of the Protection of Children from Sexual Offences Act and Section 67-B of I.T. Act, registered at

Police Station, Shillai, District Sirmaur, H.P. Petitioner is in custody since 16.03.2022.

2. The above noted case was registered on the written complaint of victim presented by her to the police on 07.03.2022 alleging therein that the petitioner was her facebook friend and they had been on talking terms with each other for the last about one year. The petitioner had visited Shillai and had taken the victim to Dehradun on motorcycle by making her to drink something, whereafter he indulged in indecent activities and kept making physical relations with her under promise to marry. Keeping in view her age, she was sent back by the family members of petitioner to her home. On her return, petitioner started threatening her and misusing her photographs. He even made her photographs available to others through a fake facebook ID of her father. She further alleged that the petitioner had been threatening her that in case she did not marry him he would kill some of her family member. The victim disclosed her age as 15 years.

3. The status report filed on behalf of the respondent reveals that the investigation is complete and challan has been presented on 04.05.2022.

4. The challan has been presented with the same allegations as levelled by victim in her complaint. Nothing has been suggested in the status report about past criminal record, if any, of petitioner. The date of birth of victim is stated to be 25.06.2008 and the petitioner is stated to be about 21 years of age.

5. On the other hand, petitioner has pleaded his innocence and false implication. It is contended on behalf of the petitioner that the victim and her family members have concocted a false story to coerce the petitioner to marry the victim. On 09.11.2021, the victim of her own came to Herbertpur near Dehradun and compelled the petitioner to either take her to his home or she would commit suicide. Petitioner took the victim to his home and

produced her before his mother. The victim was immediately handed over to police. Her parents were informed by the police, but they showed their inability to reach Dehradun on the same day. During night, the victim was housed in a Nari Niketan and on next day she was handed over to her father. In support of such contention, petitioner has placed on record the copies of daily diary reports maintained at Police Station, Dalanwala, Dehradun. Petitioner further alleged that the victim has been time and again contacting him and forcing him to marry her. As per the petitioner he has not committed any wrong much less the offences alleged against him.

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

7. The version putforth by petitioner regarding the victim having visited Dehradun on 09.11.2021 is prima-facie found to have substance. The sequence of events have been recorded in daily diary maintained at Police Station, Dalanwala, Dehradun. In her complaint dated 07.03.2022, the victim has alleged that she was taken by petitioner from Shillai to Dehradun on motorcycle and at that time the petitioner had committed sexual assault on her. Noticeably, no date of such incident has been mentioned. No mention has been made regarding the incident of 09.11.2021. The allegations regarding the preparation of fake ID of victim's father and making her picture viral have not been established to be the handwork of petitioner. The aforesaid observations have been made only for prima-facie assessment of seriousness and gravity of offences alleged against petitioner.

8. The conduct of victim suggests that her version has to be taken with a pinch of salt. The case includes counter-versions which are subject to proof during trial.

9. Pre-trial incarceration cannot be ordered as a matter of rule. Petitioner is already in custody since 16.03.2022. Since the challan has been

presented, no fruitful purpose shall be served by prolonging the custody of petitioner till conclusion of trial, which is likely to take some time.

10. Petitioner is about 21 years of age. His prolonged incarceration before trial is likely to affect his life as a whole and career prospects in particular. No apprehension has been expressed by the respondent regarding the possibility of petitioner fleeing from the course of justice. It is also not the case of respondent that in case of grant of bail to petitioner, the trial shall be effected adversely. There is no previous criminal history attached to the petitioner.

11. The concern regarding the completion of fair and expeditious trial can be taken care of by putting the petitioner to appropriate terms.

12. In view of peculiar facts and circumstances of the case, petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 25 of 2022, dated 07.03.2022 under Sections 363, 376, 504, 506 IPC, Section 4 of the Protection of Children from Sexual Offences Act and Section 67-B of I.T. Act, registered at Police Station, Shillai, District Sirmaur, H.P., on his furnishing personal bond in the sum of Rs.50,000/- (Rupees Fifty thousand) with one surety in the like amount to the satisfaction of the learned trial Court. This order, however, shall be subject to following conditions: -

(i) That the petitioner shall make himself available during the entire trial of the case.

(ii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police.

(iii) That the petitioner shall not leave India without the prior permission of the Court.

13. 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 herein above.

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

Between:-

VIRESH AGED ABOUT 22 YEARS,
S/O SH. SUDHIR, R/O VILLAGE
LASHAKRPUR OIA, POST OFFICE AND
POLICE STATION, ISLAM NAGAR,
TEHSIL VILSI, DISTT. BADAYUN, U.P.

....PETITIONER.

(BY MR. KASHMIR SINGH THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

...RESPONDENT.

(BY MR. DESH RAJ THAKUR, ADDL. ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No. 2251 OF 2022
Reserved on: 31.10.2022
Decided on : 04.11.2022

Indian Penal Code, 1860- Section 376- Grant of bail under Section 439 - **Code of Criminal Procedure, 1973**- Held that the allegations against the petitioner are yet to be proved. Pre-trial incarceration is not the rule. No fruitful purpose shall be served by keeping the petitioner in custody for indeterminate period as the trial is likely to take some time before conclusion. It is not the case of the respondent that the release of petitioner on bail will result in adversely affecting the trial. The only concern of the Court at this stage is to facilitate the fair and expeditious trial. For procurement of petitioner for the purpose of trial, he can be bound by appropriate conditions.(Paras 7 & 8)

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

O R D E R

Petitioner is accused in case FIR No. 183 of 2022, dated 22.08.2022, registered at Police Station, Baddi, District Solan, H.P., under

Section 376 of the Indian Penal Code. Petitioner was arrested on 23.08.2022 and is in judicial custody since 25.08.2022.

2. The petitioner has prayed for grant of bail under Section 439 Cr.P.C. in the above noted case, on the ground that he is innocent and has been falsely implicated. It is submitted that it was the prosecutrix, who had called the petitioner at the Jhugi of one Smt. Gori and the allegations as alleged in the FIR were cooked up. Even as per the allegation of prosecutrix, petitioner was not instrumental in making any objectionable video. Petitioner has undertaken to abide by the conditions as may be imposed against him.

3. On notice, the respondent has filed the status report. It is revealed that on 22.08.2022, the prosecutrix reported to the police that petitioner was known to her for the last two-three months and petitioner had committed forcible sexual intercourse with her about 10-12 days back. Somebody had made her video viral and the name of maker of video was stated to be Babu. On registration of the case, the police started investigation. Petitioner was arrested on 23.08.2022. He remained in police custody for three days, whereafter he was remanded to judicial custody. The date of birth of the prosecutrix is stated to be 15.04.2004. After completion of investigation, the challan is stated to have been filed in the Court.

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

5. Though the petitioner has been charged with serious allegations, but this Court is not precluded from assessing the gravity and seriousness of allegations from the available facts. There is no explanation as to why the prosecutrix remained silent for 10-12 days after commission of offence. The offence is alleged to have been committed in a Jhugi of Smt. Gori. It is highly unlikely that despite the claim of prosecutrix of having raised noise, none noticed the same. Police has also not been able to find any evidence with respect to involvement of petitioner in making of objectionable video.

6. The prosecutrix is major and can be presumed to be of sufficient maturity unless proved otherwise. The silence of prosecutrix for such a long period has to be taken with a pinch of salt.

7. The allegations against the petitioner are yet to be proved. Pre-trial incarceration is not the rule. No fruitful purpose shall be served by keeping the petitioner in custody for indeterminate period as the trial is likely to take some time before conclusion.

8. It is not the case of the respondent that the release of petitioner on bail will result in adversely affecting the trial. The only concern of the Court at this stage is to facilitate the fair and expeditious trial. For procurement of petitioner for the purpose of trial, he can be bound by appropriate conditions.

9. Keeping in view the entirety of the facts and circumstances of the case, the petition is allowed and petitioner is ordered to be released on bail in case FIR No. 183 of 2022, dated 22.08.2022, registered at Police Station, Baddi, District Solan, H.P., under Section 376 of the Indian Penal Code, on his furnishing personal bond in the sum of Rs.50,000/- (Rupees Fifty Thousand) with one surety in the like amount to the satisfaction of the learned trial Court, who necessarily should have sufficient immoveable assets in the State of Himachal Pradesh, however, subject to following conditions:-

(i) That the petitioner shall regularly attend the hearings of the case before learned trial Court and shall not delay the proceedings thereof.

(ii) That the petitioner shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

(iii) That the petitioner shall be liable for immediate arrest in the instant case in the event of petitioner violating the conditions of this bail.

(iv) That the petitioner shall not leave the country without the express permission of the trial Court;

10. However, it is made clear that the observations made hereinabove shall have no bearings on the merit of the case and shall be construed for the disposal of the present petition only.

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

Between:

SANJEEV KUMAR @ SANJU AGED 44 YEARS S/O SH. GIAN CHAND R/O VILLAGE BAHI, P.O. BHAMBLA, TEHSIL BALDWARA, DISTRICT MANDI, H.P.
....PETITIONER

(MR. KASHMIR SINGH THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.
....RESPONDENT

(MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERAL, WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No.2252 of 2022
Decided on: 31.10.2022

Indian Penal Code, 1860- Grant of regular bail- Challan filed in competent court of law- State filed the status report- Object of bail- Held object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.(Para 14)

Cases referred:

Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218;
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;
Sanjay Chandra versus Central Bureau of Investigation (2012)1 SCC 49;
Umarmia Alias Mamumia v. State of Gujarat, (2017) 2 SCC 731;

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

O R D E R

Bail petitioner namely Sanjeev Kumar, who is behind the bars since 19.9.2021, has approached this court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail, in case FIR No. 97/21 dated 18.9.2021, registered at Police Station Hatli, Tehsil Baldwara, District Mandi, Himachal Pradesh, under Sections 302, 341, 323, 504 and 506 read with Section 34 of the IPC.

2. Pursuant to order dated 12.10.2022, respondent-state has filed the status report. ASI Pyare Lal, PS Hatli, has also come present with the records. Records perused and returned.

3. Close scrutiny of record/status report reveals that on 18.9.2021, deceased Ravi Kumar alias Panku got his statement recorded at PS Baldwara alleging therein that on 17.9.2021, at 9pm while he was in Bhambla Bazar, person namely Neetu along with his one friend, whose name is not known to him but he recognizes him, gave him beatings with iron rods, as a result of which, he suffered injuries on his left eye and several parts of the body. He also alleged that above named Neetu and his friend also obstructed his path and gave him beatings with kicks, fists and iron rod. He alleged that with great difficulty, he was able to escape from the clutches of both the persons, but while leaving, they also extended threats. On the basis of aforesaid complainant, FIR detailed herein above, came to be lodged against the accused named in the FIR. Since investigation in the case is complete and nothing remains to be recovered from the accused, he has approached this Court in the instant proceedings, praying therein for grant of regular bail.

4. Mr. Narender Guleria, learned Additional Advocate General while fairly admitting factum with regard to filing of the challan in the competent court of law contends that though nothing remains to be recovered from the

bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency. While making this Court peruse the evidence adduced on record by the prosecution, especially statement of PW4 Smt. Spana, who happens to be sister of the deceased, Mr. Guleria further submits that it has clearly emerged in the evidence that deceased before succumbing to the injuries suffered by him in the alleged incident disclosed to the police that he was given beatings by three persons including the present bail petitioner and as such, it cannot be claimed that petitioner herein has been falsely implicated. While fairy admitting the factum with regard to the fact that sole eye witness PW1 has turned hostile, Mr. Guleria submits that though in his cross-examination, aforesaid witness has not been able to dispute his statement given to the police under Section 161 Cr.PC, but even otherwise statement of PW4 Sapna is sufficient to conclude the guilt of the accused. Lastly, Mr. Guleria, submits that since statements of material prosecution witnesses yet remain to be recorded, it would not be in the interest of justice to enlarge the petitioner on bail, who in the event of being enlarged on bail may not only flee from justice, but may also temper with the prosecution evidence.

5. Mr. Kashmir Singh Thakur, learned counsel appearing for the petitioner while refuting the aforesaid submissions made by the learned Additional Advocate General states that at no point of time, deceased disclosed the name of the bail petitioner to the police because in that eventuality, police would have definitely recorded the name of the accused in the FIR at the first instance, rather his name came to be recorded on the basis of statements made by PW4 and her mother on 19.9.2021 i.e. after the death of the deceased and as such, no much reliance can be placed upon the same. Mr. Thakur further submits that prosecution witness PW1, who as per prosecution story had an occasion to see the incident has turned hostile and since statement made by PW4 is totally contradictory, same cannot be made basis to conclude

the guilt, if any, of the bail petitioner. Lastly, Mr. Thakur submits that petitioner is behind bars for more than one year and considerable time is likely to be consumed in conclusion of the trial and as such, it would not be in the interest of justice to curtail the freedom of the bail petitioner for indefinite period during trial, especially when he is behind the bars for more than one year and 31 prosecution witnesses are yet to be examined. While placing reliance upon the judgments passed by the Hon'ble Apex Court in **Criminal Appeal Nos. 152 of 2020, Prabhakar Tewari v. State of UP and Anr (alongwith connected matter) and Criminal Appeal No. 98 of 2021, Union of India v. K.A. Najeeb**, Mr. Thakur submits that when there is every likelihood of delay in conclusion of the trial, court can order for enlargement of the bail petitioner on bail subject to stringent conditions.

6. Having heard learned counsel for the parties and perused material available on this record, this Court finds that on 18.9.2021, deceased Ravi Kumar got this statement recorded under Section 154 Cr.PC, wherein admittedly, he never named the present bail petitioner, rather in his statement given to the police, he stated that on 17.9.2021, at 9pm, he was given beatings by persons namely Neetu alongwith his friend, who is driver by profession in Bhambla Bazar, in the shop of PW1, who while getting statement recorded before the court below has turned hostile and has not supported the case of the prosecution. Though police while placing heavy reliance upon the statements made by PW4 Sapna sister of deceased and mother of the deceased has claimed that deceased before his death disclosed the name of all the accused including the present bail petitioner, if it is so, it is not understood that what prevented the police to record the name of all the accused including the bail petitioner in the FIR at the time of recording of FIR on 18.9.2021, rather their names came to be recovered in the FIR after recording the statement of PW4 and her mother under Section 161 CrPC, wherein they claimed that police recorded the statement of deceased in hospital in their

presence and therein he deposed that all the persons including the present bail petitioner gave him beatings.

7. Record reveals that statements of PW4 and her mother under Section 161 was recorded on 19.9.2021 i.e. after the death of the deceased, who admittedly expired on 18.9.2021, in a hospital at Baldwara. It is not in dispute that initially, deceased namely Ravi in his statement recorded under Section 154 Cr.PC, on the basis of which, police lodged FIR, named only one person namely Neetu. It is only after recording of the statements of PW4 and her mother, names of the accused including the present bail petitioner came to be inserted in the FIR. Interestingly, sole eye witness Sh. Krishan Chand PW1 has not supported the case of the prosecution. He specifically denied factum with regard to beatings, if any, given by the accused named in the FIR to the deceased Ravi Kumar. Cross-examination conducted upon this witness by the public prosecutor nowhere suggests that prosecution was able to extract something contrary to what he stated in the examination in chief. Apart from above, another material prosecution witness PW4 Sapna stated before the court below that after having received information with regard to beatings, she reached the hospital at Baldwara and in front of them, her deceased brother disclosed to the police the name of all the accused including the present bail petitioner, but she also admitted that her statement under Section 161 was recorded at her village Kanjia on 19.9.2021. Even if for the sake of argument, statement given by PW4 with regard to disclosure of the name made by deceased in her presence at hospital Baldwara is presumed to be correct, there is no explanation that why police failed to array all the accused named by deceased in the FIR at the first instance because admittedly FIR at the first instance came to be recorded on the basis of statement made by the deceased under Section 154 Cr.PC. Otherwise also, if the statement of PW4 is read in its entirety, there appears to be lot of contradictions and inconsistencies.

8. Though case at hand is to be decided by the court below in the totality of facts/evidence collected on record by the prosecution, but keeping in view the aforesaid glaring aspect of the matter, there appears to be no reason for this court to curtail the freedom of the bail petitioner for indefinite period, especially when he has already suffered for more than one year and till date, only 4 prosecution witnesses out of total 35 prosecution witnesses have been examined. This court has reason to presume and believe that in any probability, approximately 2-3 years would be taken by the court below to conclude the evidence and if during that time, petitioner is kept behind bars, it would amount to pre-trial conviction.

9. Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat*, (2017) 2 SCC 731**, has held delay in criminal trial to be in violation of right guaranteed to an accused under Article 21 of the Constitution of India. Relevant para of the afore judgment reads as under:-

> *"11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See: Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731; Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).*

10. Reliance is placed upon judgment passed by Hon'ble Apex Court in **Union of India v. K.A. Najeeb, Criminal Appeal No. 98 of 2021**, wherein it has been held as under:

> "18. It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA perse does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

11. Reliance is also placed upon judgment passed by Hon'ble Apex Court in **Prabhakar Tewari v. State of U.P. and Anr, Criminal Appeal No. 152 of 2020**, wherein it has been held as under:

> "2. The accused is Malkhan Singh in this appeal. He was named in the FIR by the appellant Prabhakar Tewari as one of the five persons who had intercepted the motorcycle on which the deceased victim was riding, in front of Warisganj Railway Station (Halt) on the highway. All the five accused persons, including Malkhan Singh, as per the F.I.R. and majority of the witness statements, had fired several rounds upon the deceased victim. The statement of Rahul Tewari recorded on 15th March, 2019, Shubham Tewari recorded on 12 th April, 2019 and Mahipam Mishra recorded on 20th April 2019 giving description of the offending incident has been relied upon by the appellant. It is also submitted that there are other criminal cases pending against him. Learned counsel for the accused- respondent no.2 has however pointed out the delay in recording the witness statements. The accused has been in custody for about seven months. In this case also, we find no error or impropriety in exercise of discretion by the High Court in granting bail to the accused Malkhan Singh. The reason why we come to this conclusion is broadly the same as in the previous appeal. This appeal is also dismissed and the order of the High Court is affirmed."

12. In the aforesaid judgment, Hon'ble Apex Court has held that while considering the prayer for grant of bail, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence.

13. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time guilt, if any, of his/her is not proved in accordance with law and as such, this Court sees no reason to curtail the freedom of the bail petitioner indefinitely during trial. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

14. Needless to say, object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

15. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

> *" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person*

will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

16. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail

as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

17. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(ii) nature and gravity of the accusation;
(iii) severity of the punishment in the event of conviction;
(iv) danger of the accused absconding or fleeing, if released on bail;
(v) character, behaviour, means, position and standing of the accused;
(vi) likelihood of the offence being repeated;
(vii) reasonable apprehension of the witnesses being influenced; and
(viii) danger, of course, of justice being thwarted by grant of bail.

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

> *"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.*
>
> *3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by*

this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is

enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

19. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 2,00,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

(a) *He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;*

(b) *He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;*

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

(d) *He shall not leave the territory of India without the prior permission of the Court.*

20. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

21. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. The petition stands accordingly disposed of.

22. The petitioner is permitted to produce copy of order downloaded from the High Court Website and the trial court shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

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

Between:-

TALBE RAM 28 YEARS SON OF SH. VOERU RAM RESIDENT OF VILLAGE SHALANAL, POST OFFICE THALOUT TEHSIL AUT DISTRICT MANDI, HIMACHAL PRADESH.

PRESENTLY IN JUDICIAL CUSTODY AND CONFINED DISTRICT JAIL DHARMSHALA, DISTRICT KANGRA, HIMACHAL PRADESH.

....PETITIONER

(SH. BHUPINDER SINGH AHUJA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(DESH RAJ THAKUR ADDL. AG WITH SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION MAIN
NO. 2064 OF 2022
Reserved on: 2.11.2022
Date of decision: 7.11.2022

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 & 37- 2 kg 225 grams charas which is commercial quantity- The petition for bail was dismissed by a Coordinate Bench of High Court- Held that the learned Special Judge has already framed charge against the petitioner for offence under Section 20 of the NDPS Act, thus, it cannot be said that prima-facie case is not made out against the petitioner. Therefore, the plea for bail is barred under Section 37 of the NDPS Act. The petitioner is not entitled to seek bail in view of earlier rejection of his bail plea, without showing change in circumstance. No such change in circumstance has been shown, save and

except the contention that the delay in conclusion of trial itself is a change in circumstance.(Para 7 & 8)

Cases referred:

Babu Singh & others vs. State of UP, AIR 1978 SC 527;
Bhagwan Dass Etc vs. State of H.P. 2002 (2) Shimla Law Cases 305;
Dharampal Singh vs. State of Punjab, 2010 (9) SCC 608;
Mukesh Kumar vs. State of H.P. 2014 (3) Shimla Law Cases 1721;
State of MP vs. Kajad, 2001 (7) SCC 673;
Union of India vs. K.A. Najeeb, 2021 (3) SCC 713;
Vinod Bhandari vs. state of M.P., 2015 (11) SCC 502;

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

O R D E R

Petitioner has approached this Court for grant of bail under Section 439 Cr.P.C. in case FIR No. 23 of 2019 dated 1.2.2019, under Section 20 of the Narcotics and Psychotropic Substances Act, 1985, (for short the Act), registered at Police Station, Bhuntar, District Kullu, H.P.

2. The contraband involved in the case is 2 kg 225 grams of charas, which is commercial quantity. Petitioner is in custody since 31.1.2019.

3. Earlier also, petitioner had approached this Court for grant of bail in above noted case by filing Cr.MP(M) No. 233 of 2021. After considering the merits, the petition was dismissed by a Coordinate Bench of this Court vide order dated 2.8.2021.

4. The petitioner is under trial in above noted case and his contention is that he is entitled to bail on the premise that his constitutional right to expeditious trial is being violated.

5. I have heard the learned counsel for the parties and have also gone through the record carefully.

6. Petitioner has been charged for offence under Section 20 of the NDPS Act having been found in possession of 2.kg 225 grams charas. The allegation is that on 31.1.2019, police searched Bus No.DL01PC-4550 at Bajora in District Mandi, H.P. Petitioner and one Megh Singh were found sitting on Seat Nos. 1 and 2 of the said bus. Both of them got perplexed on seeing the presence of police. One briefcase was found underneath the legs of petitioner and said Megh Singh. The contraband was found placed in the briefcase.

7. The learned Special Judge has already framed charge against the petitioner for offence under Section 20 of the NDPS Act. Thus, it cannot be said that prima-facie case is made not out against the petitioner. Therefore, the plea for bail is barred under Section 37 of the NDPS Act.

8. Even otherwise, the petitioner is not entitled to seek bail in view of earlier rejection of his bail plea, without showing change in circumstance. No such change in circumstance has been shown, save and except the contention that the delay in conclusion of trial itself is a change in circumstance.

9. In ***State of MP vs. Kajad, 2001 (7) SCC 673***, it has been held as under:-

> *"It has further to be noted that the factum of the rejection of his earlier bail application bearing Miscellaneous Case No. 2052 of 2000 on 5-6.2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in Hari Singh Mann v. Harbhajan Singh Bajwa and various other judgments."*

10. Learned counsel for the petitioner has placed reliance on ***Babu Singh & others vs. State of UP, AIR 1978 SC 527, Vinod Bhandari vs. state of M.P., 2015 (11) SCC 502*** to support his contention regarding

maintainability of successive bail application. The judgments so relied upon cannot help the cause of petitioner for the reason that above referred cases involved offence under IPC, whereas in the instant case, petitioner is enable to cross a barrier imposed by Section 37 of the NDPS Act.

11. As regards, the delay in conclusion of trial, reference can be gainfully made to the observations made by a three Judges Bench of Hon'ble Supreme Court. Para 20 of the judgment passed in ***Union of India*** vs. ***K.A. Najeeb***, ***2021 (3) SCC 713*** the Hon'ble Supreme Court has held as under:-

> "*20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under the UAPA. Instead, Section 43D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc".*

12. In K.A. Najeeb (supra), the Hon'ble Supreme Court while dealing with the provisions of Section 43D(5) of UAPA, drew a distinction with Section 37 of the NDPS Act by holding that the aforesaid provisions of UAPA was less stringent.

13. Further, the learned counsel for the petitioner has placed reliance on ***Dharampal Singh vs. State of Punjab, 2010 (9) SCC 608, Mukesh Kumar vs. State of H.P.*** decided by a Division Bench of this Court and reported in ***2014 (3) Shimla Law Cases 1721 and Bhagwan Dass Etc vs. State of H.P.,*** also decided by a Division Bench of this Court, reported in ***2002 (2) Shimla Law Cases 305*** in support of his contention that when the contraband was allegedly recovered from underneath of seats occupied by two different persons, exclusivity of possession cannot be attributed to one. The

contention so raised relating to merits of the case, which can only be established after conclusion of trial. It is sufficient at this stage, as noticed above, that petitioner has already been charged by learned Special Judge and hence, this Court will not impliedly set aside the findings of existence of prima-facie case against the petitioner, returned by learned Special Judge. Even otherwise, there is prima-facie material available against petitioner.

14. In result, no merit is found in the petition and the same is accordingly dismissed.

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

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

Between:-

RAJENDER KUMAR S/O SH. KHUB RAM, R/O VILLAGE MAHERA, P.O. BALAG, TEHSIL NIHRI, DISTRICT MANDI, H.P.
AGED 39 YEARS, AT PRESENT UNDER JUDICIAL CUSTODY IN MODEL CENTRAL JAIL,MANDI, DISTRICT MANDI, H.P.

....PETITIONER

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

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
NO. 2300 OF 2022
Decided on: 31.10.2022

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 29 and 37- 2 kg. 840 grams of Charas- The contraband involved in the case is of commercial quantity. Rigors of Section 37 of the NDPS Act are applicable with all forces- Petitioner was one of the occupants of the car from which huge quantity of Charas was recovered by the police. Held that in order to get rid of rigors of Section 37 of the NDPS Act, petitioner has to show prima-facie that he is not involved in the crime. The burden that lies on the petitioner is not discharged by merely stating that he is a government servant and had taken the lift in the car. The NDPS Act carries provision for reverse burden and such burden is to be discharged by the accused. Thus, in view of given facts & situation, it cannot be said that there is no prima-facie material to involve the petitioner in the case. It being so, Section 37 of the NDPS Act places an embargo in grant of bail to the petitioner. Even in the absence of fulfillment of one of dual conditions prescribed in Section 37 of the NDPS Act, bail cannot be granted. (Paras 7 & 8)

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

O R D E R

Petitioner is an accused in case registered vide FIR No. 147 of 2021 dated 23.11.2021 at Police Station, BSL Colony, Sundernagar, District Mandi, H.P. under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short , "NDPS Act").

2. Petitioner was arrested on 23.11.2021 and remained in police custody till 26.11.2021, whereafter, petitioner is in judicial custody till date.

3. The case of respondent is that on 23.11.2021, car bearing No.HP-31C-7010 was apprehended at Police Naka on road leading from Rohanda to Pandar within the jurisdiction of Police Sation, BSL Colony, Sundernagar, District Mandi, H.P. Three persons including petitioner were occupying the car. Petitioner was sitting on rear seat. Suspicion was entertained from the conduct of occupants of the car. On checking a bag was found on the footmat in front of the front passenger seat of the car. 2 kg. 840 grams of Charas was found from the bag. Case was registered. All the occupants of the car were arrested. As per police case, the contraband had been produced by accused Bhagat Ram. Petitioner and other accused Jagdish Kumar had promised Bhagat Ram to help them in selling the contraband and hence all three were together in the car alongwith contraband. The challan is stated to have been filed.

4. Petitioner has prayed for grant of bail under Section 439 Cr.P.C. in the above noted case on the ground that he is innocent. It is submitted on behalf of the petitioner that petitioner is serving as Animal Attendant MSC Dhanog and was not aware about the presence of contraband in the car. Petitioner had availed casual leave on 22.11.2021 and 23.11.2021 and was

returning from his native village to his place of posting. On way, he had taken lift from Jagdish Kumar.

5. I have heard learned counsel for the petitioner and learned Additional Advocate General for the State and alsohave gone through the status report.

6. The contraband involved in the case is of commercial quantity. Rigors of Section 37 of the NDPS Act are applicable with all forces.

7. Admittedly, petitioner was one of the occupants of the car from which huge quantity of Charas was recovered by the police. In order to get rid of rigors of Section 37 of the NDPS Act, petitioner has to show prima-facie that he is not involved in the crime. The burden that lies on the petitioner is not discharged by merely stating that he is a government servant and had taken the lift in the car. The NDPS Act carries provision for reverse burden and such burden is to be discharged by the accused.

8. Thus, in view of given facts situation, it cannot be said that there is no prima-facie material to involve the petitioner in the case. It being so, Section 37 of the NDPS Act places an embargo in grant of bail to the petitioner. Even in the absence of fulfillment of one of dual conditions prescribed in Section 37 of the NDPS Act, bail cannot be granted.

9. In view of aforesaid discussion, there is no merit in the petition and the same is dismissed.

10. Any observation made in this order shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Sohan Lal .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr.DineshKumar, Advocate.

For the respondent: Mr. Narender Thakur, Deputy Advocate General.

Cr. R. No. 46 of 2011
Reserved on: 10.11.2022
Decided on: 18.11.2022

Indian Penal Code, 1860- Sections 279, 337 & 304-A- Appeal against judgment of conviction- The petitioner was charged for commission of offences under Sections 279, 337 and 304-A IPC and Section 187 of the Motor Vehicles Act- Held that the identification of accused by a witness for the first time in Court is a substantive piece of evidence and if a witness had any particular reason to remember about the identity of accused, such evidence can be relied upon to convict the accused. (Para 12)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

By way of instant revision petition, petitioner has assailed judgment dated 05.03.2011 passed by learned Sessions Judge, Shimla in Cr. Appeal No. 86-S/10 of 2009, affirming judgment and sentence order dated 21.08.2009, passed by learned Judicial Magistrate 1st Class (1), Shimla in Case No. 38/2 of 2005, whereby the petitioner has been convicted and sentenced as under:-

Sr.No.	Under Section	Imprisonment	Fine amount	In default
1.	279 IPC	S.I. for six months	Rs.1000/-	S.I. for one month
2.	337 IPC	S.I. for six months	Rs.5000/-	S.I. for one month
3.	304-A IPC	S.I. for one year.	Rs.5000/-	S.I. for two months.

Out of fine amount, a sum of Rs.7,000/- has been ordered to be paid as compensation to legal representatives of deceased Vidya and Rs.2,000/- each as compensation to injured Shobha and Asha.

2. The petitioner was charged for commission of offences under Sections 279, 337 and 304-A IPC and Section 187 of the Motor Vehicles Act, on the allegations that on 21.03.2005 while driving Ambassador car bearing registration No. HP-03-4045 in a rash and negligent manner, the petitioner caused accident resulting in death of Smt. Vidya and injuries to Ms. Shobha and Ms. Asha.

3. The prosecution examined total 16 witnesses to prove its case and also placed reliance on various documents. PW-1 Asha Verma, PW-2 Shobha Thakur, PW-14 Ashwani Kumar, PW-15 Puneet Kumar and PW-16 Tara Chand were examined as eye witnesses to the occurrence. In fact, PW-1 and PW-2 both were the victims. PW-7 was the Officer of Central Bank of India to whom the offending vehicle belonged. PW-3 H.C. TulsiDass, PW-11 H.C. Gian Chand and PW-12 HC Hira Lal were the police witnesses, out of whom, PW-12 HC Hira Lal was the Investigating Officer. PW-4 Sant Ram had stood surety for the petitioner. PW-6 Dr. SangeetDhillon had conducted the autopsy on deceasedMs. Vidya, PW-9 Dr. Dinesh Sharma had conducted the medical examination of Shobha Thakur and had issued MLC. PW-8 Inder

Mohan was a press photographer and had snapped some photographs of the spot.

4. Petitioner was examined under Section 313 Cr.P.C. Petitioner examined DW-1 Hari Ram in defence.

5. On appraisal of the records, both the Courts have convicted and sentenced the petitioner, as noticed above, hence the present revision petition.

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

7. Learned counsel for the petitioner has assailed impugned judgment on the ground that the identification of the person driving the offending vehicle was highly doubtful, keeping in view the evidence on record. He submitted that the vehicle in question belonged to Central Bank of India and the bank had employed one Sohan Lal son of Sh. Kiru Ram as driver, whereas, the petitioner was Sohan Lal son of Sh. SukhDass. The vehicle was being driven by Sohan Lal S/o Sh. Kiru Ram and since he was not having proper driving licence, the petitioner was falsely named as driver of the offending vehicle to avoid liability under the Motor Vehicles Act. It is further submitted that there was ample evidence on record to prove that the petitioner had visited the office of Central Bank of India on 21.03.2005 for the first time, that too, at the asking of DW-1 Hari Ram for the reason that the services of driver were required there. In this background, the petitioner came to be falsely implicated.

8. On the other hand, Sh. Narender Thakur, learned Deputy Advocate General has contended that the findings recorded by both the Courts are in accordance with the evidence available on record and none of such findings can be said to be illegal or perverse.There is positive evidence on record in the shape of statements of PW-2 and PW-7 which directly implicate the petitioner as perpetrator of the offence.

9. Noticeably, the defence raised by the petitioner was that he was not driving the vehicle at the time of accident. He has tried to take benefit of the fact that PWs 15 and 16 had refused to identify him. However, PW-2 Shobha Thakur one of the victims had categorically stated that she alongwithVidya, Asha and Monika had alighted from a bus near St.Edward School, Shimla. All of them were standing towards the hill side. Ambassador car No. HP-03-4045 came from the side of Kamla Nehru Hospital in a high speed and caused the accident. Vidya expired on the spot, whereas injuries were suffered by her and Asha. As per this witness, she was pressed against the wall by the offending car. She categorically stated that the accused present in the Court was driver of the vehicle. She also mentioned that the car had struck against a parked bus and the accused present in the Court had fled from the scene. In cross-examination, PW-2 though stated that she was not knowing the petitioner previously, however, she volunteered that she had noticed the petitioner coming out of the car.

10. In addition to the statement of PW-2, the statement of PW-7 Raj Kumar reveals that he was posted as Regional Manager of Central Bank of India, Shimla during the relevant period. He deposed that vehicle No. HP-03-4045 belonged to the bank. On 21.03.2005, the petitioner was driver of the said vehicle and after dropping PW-7 in the office, had left for parking the vehicle. He was again called alongwith vehicle as this witness had to attend some meetings with the auditors and while bringing the vehicle from parked place to the office, petitioner had caused the accident. In cross-examination of PW-7, he revealed that though Sohan Lal S/o Sh. Kiru Ram was employed as driver by the bank for the last about 7-8 years, but was on leave since few days prior to accident. It was also disclosed by this witness that the petitioner was performing the duties of driver with bank since 18.03.2005. He specifically denied that Sohan Lal S/o Sh. Kiru Ram had committed the accident.

11. Learned counsel for the petitioner raised an argument that learned trial Court had rightly disbelieved the version of PW-2 Shobha Thakur regarding identification of petitioner on the ground that the said witness might have hadonly a passing glimpse of the driver and without conduct of test identification parade, it was not prudent to rely upon such version. He further stated that if the statement of PW-2 is excluded, no other person examined as prosecution witness had identified the petitioner to be the driver of the offending vehicle at the time of accident. As regards the statement of PW-7, learned counsel for the petitioner has submitted that he clearly was an interested witness and in order to save the bank from liability to pay compensation under the Motor Vehicles Act, the name of petitioner was falsely implicated.

12. The first contention of the petitionerthat learned trial Court had disbelieved the version of PW-2 Shobha Thakur will not help him for the simple reason that the judgment passed by learned trial Court has merged with the judgment passed by learned appellate Court. While deciding the appeal, the learned appellate Court haddisagreed with the findings recorded by learned trial Court. Learned appellate court held that simply because PW-2 had not seen the petitioner earlier, her version cannot be rejected as it was not a case where accident had taken place at odd hours and the said witness was not in a position to see the driver. The identification of accused by a witness for the first time in Court is a substantive piece of evidence and if a witness had any particular reason to remember about the identity of accused, such evidence can be relied upon to convict the accused. Reference in this regard can be made to judgment passed by Hon'ble Supreme Court in Ravi BansiGohar Vs State of Maharashtra and others reported in (1998) 6 SCC 609.

13. Noticeably, the date of accident is 21.03.2005. PW-2 Shobha Thakur was examined as a witness in the Court on 15.09.2005 i.e. after a gap

of about less than six months. It being so, there was nothing abnormal that PW-2 was able to identify the accused. The fact gains importance because PW-2 had not seen petitioner just by chance, she was victim of accident and it was natural for her to have given a deeper look on the person, who had caused the accident. It was bright day light. The evidence also suggests that the door on driver side of the offending vehicle was jammed as it had struck against a bus. The driver of the offending vehicle had alighted from other side, therefore, it can easily be inferred that PW-2 had got sufficient time to see the driver getting out from the car. Thus, the findings recorded by learned appellate Court cannot be faulted with.

14. As regards the other submission of petitioner that PW-7 was interested to save his company from consequences of the accident also does not sound very convincing. PW-7 had categorically stated that Sohan Lal S/o Sh. Kiru Ram was on leave and the petitioner had started coming to the office to drive the vehicle w.e.f. 18.03.2005. Since, the petitioner was defending himself by raising a specific defence that the vehicle was being driven by Sohan Lal S/o Sh. Kiru Ram, it was for petitioner to have availed opportunity to rebut the contention of PW-7 by summoning the concerned record of the leave of Sohan Lal S/o Sh. Kiru Ram from the office of Central Bank of India, Shimla. One cannot ignore that PW-7 cannot be faulted for not having brought the leave record of Sohan Lal S/o Sh. Kiru Ram forthe reason that the police had investigated the case and PW-7 was cited as a witness only to narrate the factual position regarding accident,the defence later taken by petitioner could not have been presumed in advance. Both the Courts have rightly believed the version of PW-7 to the effect that the petitioner was deputed to drive the vehicle on 21.03.2005 and the accident was caused while he was driving the same.

15. Viewed from another angle, it is not in dispute that petitioner was arrested in the case on the same day. It is highly improbable that a

person having been falsely implicated in a case where death had occurred, would not make efforts to prove his innocence at the earliest. There is nothing on record to suggest that before taking the defence in the trial of the case by way of cross-examination of witnesses, petitioner had made any complaint to any higher authority in the Government or Central Bank of India regarding injustice being done to him. In these circumstances, the defence raised by petitioner is nothing but a concoction and after-thought. It had been proved beyond doubt that petitioner was the driver of offending vehicle at the time of accident.

16. Both the Courts below have concurrently held that the accident was caused on account of rash and negligent driving of the petitioner. Such findings are borne from the evidence on record. No mechanical defect was found in the vehicle. At the site of accident, a bus was parked and passengers were alighting from it. PW-1 and PW-2 both have stated that the vehicle was being driven in high speed and hit the parked bus and passengers having alighted from it. Even PW-5 has stated that he had seen the offending vehicle driven in a high speed, which had crushed three ladies and thereafter had struck against a parked bus. The findings so recorded by learned Courts below regarding accident being result of rash and negligent driving of vehicle cannot be interfered with as the same are borne from the material on record. Even otherwise, while exercising the revisional jurisdiction under Section 397 Cr.P.C., the findings of facts can be interfered with by this Court only if such findings are patently illegal or perverse.

17. In result, there is no merit in the revision petition and the same is dismissed. Judgment dated 05.03.2011 passed by learned Sessions Judge, Shimla in Cr. Appeal No. 86-S/10 of 2009, affirming judgment and sentence order dated 21.08.2009, passed by learned Judicial Magistrate 1st Class (1), Shimla in Case No. 38/2 of 2005, is affirmed. Bail bonds furnished by the

petitioner are cancelled. He is directed to surrender before the learned trial Court to receive the sentence.

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

Between:-

1.THE STATE OF HIMACHAL PRADESH
THROUGH PR. SECRETARY (FORESTS)
TO THE GOVERNMENT OF HIMACHAL PRADESH.

2. THE DIVISIONAL FOREST OFFICER,
JOGINDER NAGAR FOREST DIVISION,
JOGINDER NAGAR DISTRICT MANDI (H.P.)

…PETITIONERS

(BY SH. ARVIND SHARMA, ADDITIONAL ADVOCATE GENERAL)

AND

1. SHRI SOHAN LAL SON OF SHRI
GANGA RAM, R/O VILLAGE KARALADHI
POST OFFICE URLA TEHSIL PADHAR DISTRICT
MANDI (H.P.)
2. PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM LABOUR COURT, DHARAMSHALA.

…. RESPONDENTS.

(SH.RAHUL MAHAJAN, ADVOCATE, FOR RESPONDENT NO.1)

CIVIL WRIT PETITION
No. 2131OF 2016
Reserved on: 20.10.2022
Decided on: 31.10.2022

Constitution of India, 1950 - Article 226 - Affirmed the Order passed by Presiding Judge, Labour Court-cum-Industrial Tribunal- violation of principle of 'last come first go' was denied- The jurisdiction under Article 226 of the Constitution of India though is wide, but needs due care and great circumspection, while dealing with the orders of the Tribunals constituted under special legislations. Held that it is otherwise trite law that this Court will not sit in appeal on the decisions of the Tribunals created under special statutes. It is only in the case of absolute illegality or perversity in the award passed by the Industrial Tribunal-cum-Labour Court that interference by way of writ jurisdiction may be required. The facts of instant case do not warrant

any interference. The findings returned by learned Tribunal are borne from the record and thus no perversity can be attached to such findings.(Para 12)
Cases referred:
Sadhu Ram vs. Delhi Transport Corporation (1983) 4 SCC 156;

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

O R D E R

By way of instant petition, petitioners have taken exception to the award dated 30.06.2015 passed by learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala, (Camp at Mandi), H.P. (for short,"the Tribunal") in Reference No. 33/2014 whereby the relief in following terms was granted to respondent No.1-workman: -

> *"18. As sequel to my findings on foregoing issues, it is held that the petitioner was in continuous uninterrupted service with the respondent from the date of his initial engagement and that the breaks given by the respondent being fictional in nature shall have no effect on the seniority and continuity of service of the petitioner and his seniority shall be reckoned from his initial date of engagement. Accordingly, claim of petitioner is hereby allowed in part and reference is accordingly answered in favour of petitioner. The petitioner shall thus be deemed to be in continuous service of respondent with all consequential benefits* ***except back wages****. He shall, however, be considered for regularization by respondent at the time when his juniors have been regularized as per policy governing daily wagers as framed by State Government and operative from time to time. The parties, however, shall bear their own costs."*

2. Brief facts necessary for adjudication of the petition are that the workman raised an industrial dispute against the action of employer whereby the workman was being subjected to repeated fictional breaks with a purpose to deny him the benefit of completion of 240 days of service in one calendar year and resultant continuity in service. The workman further claimed

discrimination vis-à-vis his juniors, who were allowed to continue to work for 240 days in a year whereas by employing fictional breaks against petitioner he was not allowed to complete the requisite mandays.

3. The appropriate Government made the following reference for adjudication of the Tribunal:

> *"Whether time to time termination of the services of Shri Sohan Lal, S/o Shri Ganga Ram, R/o Village Kraladhi, P.O. Urla, Tehsil Padhar, District Mandi, H.P. during 2006 to 2012 by the Divisional Forest Officer, Joginder Nagar Forest Division, Joginder Nagar, District Mandi, H.P., without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"*

4. The workmanin his claim petition filed before the learned Tribunal reiterated his stand. The employercontested the claim of the workman on the grounds that he was engaged in forest department as casual labourer and not as daily waged forest worker. The engagement of petitioner was only for seasonal forestry works keeping in view the availability of funds and work. The violation of principle of 'last come first go' was also denied.

5. On the pleadings of the parties, learned Tribunal framed the following issues:

> *"1. Whether time to time termination of services of the petitioner by the respondent is illegal and unjustified as alleged. If so, its effect? OPP*
>
> *2. Whether the claim petition is not maintainable in the present form? OPR*
> *3. Whether the petition is bad on account of delay and laches as alleged. If so, its effect? OPR*
> *4. Relief.*

Issue No. 1 was decided in affirmative and petition was allowed in terms as noticed above.

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

7. Shri Arvind Sharma, learned Additional Advocate General has contended that the award passed by the learned Tribunal is absolutely erroneous. The findings returned by learned Tribunal to the effect that the fictional breaks were being granted to respondent No.1-workman were against the material available on record. Shri Arvind Sharma, learned Additional Advocate General further submitted that the engagement of workman against seasonal work was duly proved on record and in such view of the matter the findings regarding fictional breaks being granted to the workman are not sustainable.

8. On the other hand, Shri Rahul Mahajan, Advocate, representing respondent No.1-workman has supported the award. He contended that the impugned award suffers from no illegality or perversity. The findings recorded therein are borne out from the available evidence.

9. It is not denied that the workman was initially employed in 2005. The mandays chart Ext.RW-1/B relied upon by the respondents proved that the workman had been working since 01.05.2005 with 92, 89, 31, 182, 211, 212, 122 and 120 days in each successive year till 2013. Evidently, the engagement of petitioner for 182 days, 211 days, 212 days and 122 days in successive years cannot be said to be engagement for casual or seasonal work. Further, the Divisional Forest Officer, Joginder Nagar while appearing as RW-1 admitted that one Shri Shyam Singh, who was junior to petitioner, was retained in service above the petitioner.

10. The jurisdiction of this Court under Article 226 of the Constitution of India though is wide, but needs due care and great circumspection, while dealing with the orders of the Tribunals constituted under special legislations. The Hon'ble Supreme Court in ***Sadhu Ram*** vs. ***Delhi Transport Corporation (1983) 4 SCC 156*** has observed as under:

> "*We are afraid the High Court misdirected itself. The jurisdiction under* Art. 226 *of the Constitution is truly wide but for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate court over Tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to re-adjudicate upon questions of fact decided by those Tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management. There was a conciliation proceeding, the conciliation had failed and the Conciliation Officer had so reported to the Government. The Government was justified in thinking that there was an industrial dispute and referring it to the Labour Court."*

11. In ***State of H.P. and another*** vs. ***Biri Singh and another***, CWP No. 217 of 2016 decided by a Co-ordinate Bench of this Court on 22.09.2016, in almost identical facts it has been observed as under:

> ***"9.*** *It has been the well-established principle that industrial adjudication is not merely adjudicating contractual rights based on strict principles of law. The higher Courts can interfere against the awards passed by the Labour Courts only if there are manifest errors or the order is contrary to the provisions of law and the order has been passed without jurisdiction and that is the scope of jurisdiction of this Court under Article 226 of the Constitution of India. It was held that the High Court cannot sit on appeal over the findings recorded by the competent tribunal by converting itself into a court of appeal."*

12. It is otherwise trite law that this Court will not sit in appeal on the decisions of the Tribunals created under special statutes. It is only in the case of absolute illegality or perversity in the award passed by the Industrial Tribunal-cum-Labour Court that interference by way of writ jurisdiction may be required. The facts of instant case do not warrant any interference. The findings returned by learned Tribunal are borne from the record and thus no perversity can be attached to such findings.

13. Even otherwise it can be seen that the employer has not placed on record any material to establish that the services of the workman were engaged for undertaking forestry works only or to establish that the work was seasonal and dependant upon the grant from the Government.

14. Apart from above, RW-1, the then Divisional Officer revealed on oath that one Shyam Singh was junior to the workman and had been regularized by counting his seniority from the date of initial appointment. On such basis, the violation of Section 25-G was found by the learned Tribunal. The conclusion so drawn by learned Tribunal cannot be faulted in view of the material on record.

15. In result, I find no merit in the petition and the same is accordingly dismissed, so also the pending miscellaneous application(s) if any.

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

Kashi Ram ...Petitioner.

Versus

State of Himachal Pradesh & others ..Respondents.

For the Petitioner: Mr.Balwant Singh Thakur, Advocate.

For the Respondents: Ms.Seema Sharma, Deputy Advocate General, for respondents No.1 and 2.

Mr.Bhagwati Chander Verma, Advocate, for respondent No.3.

CWP No. 144 of 2022
Decided on: 24.11.2022

Constitution of India, 1950 - Article 226 - **Recruitment and Promotion Rules (R&P Rules)-** Grant-in-aid not released in favour of petitioner- petition to release admissible dues of remuneration/salary- Held that it is the duty of respondents' Department, being functionary of the State, to provide sufficient teachers in schools opened by State. It is not the case of State that there was no necessity of Shastri Teacher in school. Therefore, there was lapse or failure on the part of respondents/State to provide a teacher. Hence the SMC was constrained to appoint the petitioner to cater the needs of students. Nothing was done by the respondents/State to provide teacher to teach the students, rather School Management Committee was allowed to appoint and when responsibility to pay arises, the State/Department washed its hands by posing that teacher was engaged by SMC, not State/Department. It is strange behavior on the part of State that for teaching the students, a candidate is considered to be suitable and eligible, but, for making the payment of Grant-in-Aid or other emoluments equivalent to similarly situated persons, the same candidate is considered ineligible for want of certain formalities to be performed by SMC as well as Department on behalf of respondents/State and

for want of requisite qualification. Such behavior of State is unwarranted. (Para 13)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Petitioner has approached this Court by filing this petition seeking direction to the respondents to release admissible dues of remuneration/salary in favour of the petitioner w.e.f. 02.05.2012 till date alongwith interest @ 12% till realization thereof.

2. It is undisputed fact that for shortage of staff, petitioner was engaged by School Management Committee (in short 'SMC') as a Shastri on SMC basis w.e.f. 02.05.2012 and since then he was permitted to continue as such by passing subsequent resolution in the year 2013 and 2014 and, thereafter, without passing any resolution, he has been continued as SMC Teacher.

3. Claim of petitioner is that she is fully eligible to be appointed as Shastri Teacher for fulfilling essential qualification prescribed under Recruitment and Promotion Rules (R&P Rules) to this post and after appointment, respondents/State has formulated a Policy dated 17.7.2012 with respect to grant-in-aid to teachers appointed on SMC basis for tribal and difficult areas and the said Policy as notified vide communication dated 20th September, 2014 was extended to all schools which were upgraded during academic sessions 2013 and 2014 irrespective of area in which she falls and to all those sanctioned posts of teaching cadre which were vacant since more than two years from the date of issue of notification dated 16.8.2014. Resultantly, the area of Government High School Kuhal, Tehsil Rampur,

District Shimla, H.P., also came in the area for which Policy to engage teacher(s) through SMC was extended.

4. Respondents have opposed the claim of the petitioner by filing reply, stating therein that though petitioner was engaged by SMC vide resolution dated 02.05.2012 against the post of Shastri for academic Session 2012-2013 and was continued thereafter for 2013-2014 and 2014-2015, but thereafter, engagement of the petitioner was not continued by SMC by passing any further resolution. Further that, petitioner was engaged on 02.05.2012. Whereas, terms and conditions of Policy to engage Teacher(s), through SMC purely on period basis in Elementary/Higher Education Department of Himachal Pradesh in tribal/difficult areas, was formulated vide notification dated 17.07.2012 and the Policy was applicable for tribal/difficult areas and it was made applicable to other parts of the State w.e.f. 16.08.2014.

5. It has further been submitted by learned Deputy Advocate General that vide amendment dated 27.08.2012, as essential qualification for appointment as Shastri Teacher, a person should have passed Teacher Eligibility Test (TET) with 50% marks. She has further submitted that as per Grant-in-Aid to Parent Teachers Association Rules, 2006, a person should be eligible for appointment to the post as per Recruitment and Promotion Rules (in short 'R&P Rules') and otherwise such person is not entitled for Grand-in-Aid, as prayed.

6. Petitioner was engaged by SMC in May 2012 as respondents had failed to provide Shastri Teacher to teach the students. At that time, amendment dated 27.08.2012 was not there and petitioner was having qualification of essential eligibility as per R&P Rules existing and prevailing on that day and after amendment, prescribing passing of TET as essential qualification, petitioner has qualified Shastri Teacher Eligibility Test in the year 2016 during his continuation as Shastri Teacher in the School. Therefore, plea of the State that petitioner was not eligible at the time of appointment

and/or is not eligible as on date to be appointed as a Shastri is contrary to the record and, thus, not sustainable. Otherwise also it is also undisputed that Government of Himachal Pradesh has granted an opportunity to the candidates to acquire qualification who are found in service but were ineligible to be engaged in the service for lacking essential qualification as notified after passing of Right to Education Act and Guidelines issued by NCET.

7. Learned counsel for petitioner has contended that present case, on the issue being agitated, is squarely covered by judgment passed by Coordinate Bench of this Court in ***CWP No. 2467 of 2015,*** titled as ***Villam Singh vs. State of H.P. and others***, wherein direction was issued to respondents to release grant-in-aid to petitioner therein who was similarly situated to present petitioner and in the said case, not only LPA No. 53 of 2018, preferred by respondents department, was dismissed by the Division Bench of this Court vide judgment dated 26.11.2018, but also SLP (c) No. 19103 of 2019 preferred by respondents' department was dismissed by the Supreme Court vide judgment dated 9.8.2019.

8. In ***Villam Singh's case***, Villam Singh was appointed as Lecturer (Political Science) under SMC policy in the school concerned. He was otherwise eligible for appointment as Lecturer fulfilling the essential qualification prescribed in R&P Rules to such post. The SMC Policy was formulated by State on 17.7.2012 and it was made applicable to all schools including the school wherein Villam Singh was appointed vide notification dated 16.8.2014.

9. Taking into consideration aforesaid facts in ***Villam Singh's case***, a Coordinate Bench of this Court had observed that only reason to deny the petitioner's grant-in-aid was that he had been engaged prior to the notification dated 16.8.2014 read with SMC Policy dated 17.7.2012 and, therefore, he was not entitled to claim the benefit under SMC Policy. It was observed by the Court that it was not the case of respondents department that

petitioner's appointment was in any manner illegal or contrary to law or that he was not qualified.

10. As submitted by learned counsel for the petitioner that findings returned and observations made in ***Villam Singh's Case*** have attained finality after dismissal of Special Leave Petition, preferred by State/respondents, by the Supreme Court, in present case also, it is not a case of respondents' department that appointment of petitioner was illegal in any manner or contrary to law or he was not qualified.

11. The facts of present case are similar. Petitioner was appointed prior to notification dated 16.8.2014 whereas SMC policy dated 17.7.2012 was made applicable to school of petitioner vide notification dated 16.8.2014.

12. In ***Villam Singh's case***, it was concluded by the Coordinate Bench of this Court that action of respondent in not paying the grant-in-aid to petitioner w.e.f. 16.8.2014 was illegal and arbitrary and, therefore, same could not be countenanced or sustained and thus petition was allowed with direction to respondent-State to release grant-in-aid in favour of petitioner in accordance with Rules w.e.f. 20th September, 2014.

13. There is another aspect of the case. It is the duty of respondents' Department, being functionary of the State, to provide sufficient teachers in schools opened by State. In present case, it is not the case of State that there was no necessity of Shastri Teacher in school. Therefore, there was lapse or failure on the part of respondents/State to provide a teacher. Hence the SMC was constrained to appoint the petitioner to cater the needs of students. Nothing was done by the respondents/State to provide teacher to teach the students, rather School Management Committee was allowed to appoint and when responsibility to pay arises, the State/Department washed its hands by posing that teacher was engaged by SMC, not State/Department. It is strange behaviour on the part of State that for teaching the students, a candidate is considered to be suitable and eligible, but, for making the payment of Grant-

in-Aid or other emoluments equivalent to similarly situated persons, the same candidate is considered ineligible for want of certain formalities to be performed by SMC as well as Department on behalf of respondents/State and for want of requisite qualification. Such behaviour of State is unwarranted.

14. Following observations of this Court made in judgment dated 26.5.2018 passed in ***CWP No. 384 of 2017 titled Renuka Devi vs. State of HP*** in this regard would also be relevant:-

> "16. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of State is welfare of people and exploitive actions of rulers have always been deprecated and history speaks that such rulers were always reprimanded and punished. "Rule of Law" was and is Fundamental Principle of "Raj Dharma". Dream of our forefathers, to establish "Rule of Law" after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution."

15. On comparing the facts of ***Villam Singh's case,*** with present case and verdict of Court therein, I am of the considered view that present case is squarely covered by judgment passed in ***Villam Singh' case,*** referred supra. Therefore, it is concluded that in present case also, action of respondents in not paying Grant-in-Aid to petitioner w.e.f. 16.8.2014 is illegal and arbitrary and not sustainable.

16. In view of above, respondents are directed to release grant-in-aid in favour of petitioner in accordance with relevant Rules w.e.f. 16.8.2014 and

except for his appointment prior to issuance and extension of SMC policy in the school. Arrears of grant-in-aid of petitioner shall be paid as expeditiously as possible preferably before 31.01.2023. Failure in making the payment of Grant-in-Aid in the aforesaid period, respondent-Department shall be liable to pay interest @ 5% from the date of passing of the order.

17. Petition is disposed in aforesaid terms, so also pending application(s), if any.

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

Between:-

DILPREET SINGH SON OF SHRI YASHWANT SINGH
AGE 26 YEARS, RESIDENT OF WARD NO.7,
NANGRAN, TEHSIL AND DISTRICT UNA, H.P.

....PETITIONER

(BY SH. AJAY CHANDEL, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY SH. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL)

2. Cr. M.P.(M) No. 2350 of 2022

Between:

GURPREET SINGH SON OF LATE
SH. GURMUKH SINGH, AGE 35 YEARS,
RESIDENT OF WARD NO. 7, NANGRAN,
TEHSIL AND DISTRICT, UNA, H.P.

....PETITIONER

(BY SH. AJAY CHANDEL, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY SH. NARENDER THAKUR,

DEPUTY ADVOCATE GENERAL)

3. Cr. M.P.(M) No. 2351 of 2022

Between:

AMRIK SINGH SON OF SH. DAYA SINGH,
AGED ABOUT 46 YEARS, RESIDENT OF
WARD NO. 7, NANGRAN, TEHSIL AND
DISTRICT UNA, H.P.

....PETITIONER

(BY SH. AJAY CHANDEL, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY SH. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
NO. 2349 OF 2022 ALONGWITH CR.M.P.(M)
Nos. 2350 AND 2351 of 2022
Reserved on: 11.11.2022
Decided on: 15.11.2022

Code of Criminal Procedure, 1973- Bail applied by under-trial petitioners- Petitioners have prayed for grant of bail on the grounds firstly that a number of witnesses have been examined and secondly, that the petitioners are in custody since long and the delay in trial is violating their constitutional right of expeditious trial- Held that the petitioners have not been able to place on record any material to suggest that the trial of the case was being intentionally delayed. Though, a person accused of any offence has constitutional right to expeditious trial, but availability of such right always depends on a number of factors which operate in our criminal justice delivery system. Unless the accused are able to show intentional or deliberate delay in conclusion of their

trial, the reservation on their right to bail in serious offence like murder does not get diluted.(Para 8)

These petitionscoming on for pronouncement of judgment this day, the Court passed the following:

O R D E R

All these petitions are being decided by a common order as these arise out of the same FIR and also involve common questions of facts and law.

2. Petitioners are accused in case FIR No. 107 of 2021, dated 01.04.2021, registered at Police Station SadarUna, District Una, H.P. under Sections 302, 120-B IPC and Sections 25-54-59 of the Arms Act. Petitioners are under-trials and are facing trial before the learned Additional Sessions Judge (I), Una, H.P.

3. A case was registered vide FIR No. 107 of 2021, dated 01.04.2021, at Police Station SadarUna, District Una, H.P. under Sections 302, 120-B IPC and Sections 25-54-59 of the Arms Act with the allegations that on 01.04.2021 at about 8.00 A.M. the deceased Vipin Kumar son of Sh.RamKrishan was busy in agricultural pursuits in his field alongwith his labourer. At about 8.30 A.M. petitioners alongwith their co-accused Jaswant Singh came on the spot in a green colouredmaruti gypsy bearing registration No. HP-20-6188, which was being driven by petitioner Gurpreet Singh and the co-accused of petitioners Jaswant Singh was holding a 12 bore double barrel gun in his hand. Jaswant Singh alighted from the vehicle and shouted at the deceased Vipin Kumar that he would be killed. All the petitioners also came out of the vehicle and openly stated that the land belonged to them and he (Vipin Kumar) should be killed. At this, Jaswant Singh alias Bittu fired at the deceased Vipin Kumarfrom his double barrel gun. The deceased Vipin Kumar fell on the ground. The labourers working in his field were also scared away by

the petitioners and Jaswant Singh. All the accused persons then fled away from the scene in their vehicle. The motive for crime is stated to be the enmity between Jaswant Singh and Vipin Kumar with respect to the land, which was subject matter of litigation also.

4. On completion of investigation, the challan was filed. Petitioners were charged for offences under Sections 302, 120-B IPC and Sections 25-54-59 of the Arms Act and are presently facing trial before the learned Additional Sessions Judge (I), Una, H.P.

5. Petitioners have prayed for grant of bail on the grounds firstly that a number of witnesses have been examined but nothing incriminating has been stated against them and secondly, that the petitioners are in custody since 01.04.2021 and the delay in trial is violating their constitutional right of expeditious trial.

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

7. Petitioners have been charged for offences under Sections 302 and 120-B IPC and Sections 25-54-59 of the Arms Act. The allegations against petitioners are very serious. After having found prima-facie material against the petitioners, learned trial Court has framed charges against them. The prosecution evidence is in progress. The status report reveals that 13 out of 30 witnesses have been examined before preparation of such report which bears the date 10.11.2022. It is also revealed from the status report that trial was further fixed for examination of prosecution witnesses from 9.11.2022, 10.11.2022 and 11.11.2022. More witnesses must have been recorded during this period.

8. Petitioners have not been able to place on record any material to suggest that the trial of the case was being intentionally delayed. Though, a person accused of any offence has constitutional right to expeditious trial, but availability of such right always depends on a number of factors which operate

in our criminal justice delivery system. Unless the accused are able to show intentional or deliberate delay in conclusion of their trial, the reservation on their right to bail in serious offence like murder does not get diluted.

9. Petitioners are facing serious allegations. It is alleged against them that they criminally conspired with co-accused Jaswant Singh and killed the deceased Vipin Kumar by indulging in cold blooded murder. It is trite that the gravity and seriousness allegations/charges operate as detriment in grant of bail to the accused persons.

10. As noticed above, already a substantial number of witnesses have been examined by the prosecution and in all probabilities the trial is going to be concluded within reasonable time. Even otherwise, learned trial Court is expected to conclude the trial on priority keeping in view the seniority of trials in its docket.

11. As regards the prayer of petitioners to grant them bail, keeping in view the statements of the prosecution witnesses already recorded, suffice it to say that this Court will not appreciate the prosecution evidence at this stage for the reasons that such exercise will prejudice the trial. The prosecution evidence is to be appreciated by the learned trial Court at appropriate stage.

12. Learned counsel for the petitioners has placed reliance on an order dated 31.10.2022 passed by a co-ordinate Bench of this Court in Cr.M.P.(M) No. 2252 of 2022, titled as Sanjeev Kumar @ Sanju vs. State of H.P., to lay stress on the argument that on the ground of expected delay in trial, the bail was granted in a case involving offence under Section 302 IPC. There is no dispute as to proposition of law, but the petitioners cannot draw any benefit from the aforesaid order passed by a co-ordinate Bench of this Court for the reason that such order was passed in the peculiar facts of that case. Noticeably, only 4 out of 35 prosecution witnesses had been examined in the said case when the order relied upon by the petitioners was pronounced.

As noticed above, in the instant case, a large number of witnesses have already been examined.

13. Keeping in view the entirety of the facts and circumstances, all the bail petitions are dismissed.

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

Petitions stand disposed of.

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

Madan Lal .....Petitioner.

Versus

Union of India and others .....Respondents.

For the Petitioner : Mr. P.D. Nanda and Mr. Suresh Saini, Advocates.

For the Respondents: Mr. Balram Sharma, Deputy Solicitor General of India.

CWP No.4846 of 2022.
Date of decision: 22.11.2022.

Constitution of India, 1950 - Article 226 - **Modified Assured Career Progression Scheme (MACPS)-** Two objections have been taken by the respondents not to accede to the request of the petitioner- The first being lack of territorial jurisdiction and the second that the respondents are already seized of the matter- Held that not only is the petitioner a retiree, but currently is a senior citizen aged more than 60 years and, therefore, whatever decision has to be taken by the respondents, must be taken at the earliest. In the given facts and circumstances of the case, we deem it appropriate to dispose of the instant petition by directing the respondents to review/reconsider the case for waiver of recovery of excess amount within a period of six weeks. (Paras 5 & 6)

Cases referred:

Shanti Devi @ Shanti Mishra vs. Union of India and others (2020) 10 SCC 766;

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

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

> "i) That writ petition may kindly be allowed and the impugned orders dated 6.6.2022 (**Annexure P-6)**, 8.6.2022 (**Annexure P-7)**, 10.6.2022 (**Annexure P-8)**, and letter dated 22.6.2022 (**Annexure P-10)** may kindly be set aside with directions to maintain status quo be ordered to be maintained with regard to the MACP benefit already granted w.e.f. 12.11.2008 to the petitioner before passing the impugned orders and to calculate his retirement dues based on the aforesaid orders without effecting any recovery with further directions to release his retirement benefits without any further delay.
>
> ii) In case this Hon'ble Court come to the conclusion, that the petitioner was not entitled to the benefit under MACPS as ordered earlier, in that event the respondents may be directed not to effect any recovery from the retirement benefits of the petitioner in view of principles laid down by the Hon'ble Supreme Court in its judgment titled State of Punjab Versus Rafiq Masih.
>
> iii) The respondents may be directed to pay retirement dues to the petitioner with interest @ 15% PA which is the borrowing rate of interest, from the date the same fell due till actual payment and to refund the recovery, if any made from his last salary for the month of June, 2022."

2. Mainly, two objections have been taken by the respondents not to accede to the request of the petitioner. The first being lack of territorial jurisdiction and the second that the respondents are already seized of the matter.

3. As regards the first objection, admittedly, the petitioner is a retiree, who is receiving pension within the territorial jurisdiction of the Himachal Pradesh. If that be so, obviously, this Court would have territorial jurisdiction, more particularly, in view of the judgment rendered by Hon'ble three Judge Bench of the Hon'ble Supreme Court in ***Shanti Devi @ Shanti Mishra*** *vs.* ***Union of India and others (2020) 10 SCC 766*** and the following relevant observations have been made in para-32, which read as under:-

> "32……..A retired employee, who is receiving pension, cannot be asked to go to another court to file the writ petition, when he has

> a cause of action for filing a writ petition in the Patna High Court. For a retired employee convenience is to prosecute his case at the place where he belonged to and was getting pension. The submission of the learned counsel for respondent Nos.1 to 3 on principle of *forum non conveniens* has no substance."

4. Now, coming to the second objection, it would be noticed that the respondents in their reply, more particularly, in para-10 thereof, have clearly stated that the case for waiver of recovery of the excess amount "*paid to the petitioner is being reviewed/reconsidered and the outcome of the same will be communicated to the petitioner, once a final decision is arrived at*".

5. We notice that not only is the petitioner a retiree, but currently is a senior citizen aged more than 60 years and, therefore, whatever decision has to be taken by the respondents, must be taken at the earliest.

6. Therefore, in the given facts and circumstances of the case, we deem it appropriate to dispose of the instant petition by directing the respondents to review/reconsider the case for waiver of recovery of excess amount within a period of six weeks from today. Ordered accordingly.

7. Pending application, if any, also stands disposed of.

8. For compliance, to come on **03.01.2023.**

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

Yatinder Nath Sharma ...Petitioner

Versus

State of H.P. & others ...Respondents

For the petitioner : Mr. J. L. Bhardwaj, Advocate.

For the respondents : Mr. Desh Raj Thakur, Addl. A.G., and Mr. Manoj Bagga, Asst. A.G.

CWP No. 2247 of 2022
Decided on: 28.11.2022

Constitution of India, 1950 - Article 226 - **Recruitment & Promotion Rules**- Petitioner started getting less pay that his junior- Stepping up of pay- The respondents were directed to grant the petitioner pay at the same rate, which was fixed in the case of his junior- Held that the petitioner and his junior were holding the same lower cadre as Lecturer. They both had become eligible for being promoted to next higher post of Senior Lecturer, but were denied the opportunity by not holding the DPC in time. Simply because the junior got opportunity to be promoted as Senior Lecturer for about three months, cannot be used to the detriment of petitioner, as he was also eligible for being promoted as Senior Lecturer and could have been done in the first instance.(Para 14)

Cases referred:

Gurcharan Singh Grewal vs. Punjab State Electricity Board & others, 2009 (3) SCC 94;

Union of India & another vs. R. Swaminathan & others, 1997 (7) SCC 690;

Union of India & others vs. C.R. Madhava Murthy & another, 2002 (6) SCC 183;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge (Oral)

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

> *"i) That a writ in the nature of certiorari may kindly be issued for quashing communications/ orders dated 18.02.2020" (Annexure P-7), 08.03.2021 (Annexure P-10) and 27.12.2021 (Annexure P-15) issued by respondent No2.*
>
> *ii) That a writ in the nature of mandamus may kindly be issued directing the respondents to pay the difference of the salary being drawn by Shri Ashok Kumar Bhardwaj and the petitioner w.e.f. 01.04.2016 along with interest @ 9% per annum from the date the same fell due till its realization.*
>
> *iii) That a writ in the nature of mandamus may kindly be issued thereby directing the respondents to promote the petitioner to the post of Senior Lecturer (mechanical Engineering) w.e.f. 26.03.2015, when Shri Ashok Kumar Bhardwaj was promoted."*

2. The facts of the case are not disputed. Petitioner was appointed as Lecturer (Mechanical Engineering) in the Department of Technical Education and he had joined at Government Polytechnic, Sundernagar on 9.2.2000. One Sh. Ashok Kumar Bhardwaj was also appointed in the same cadre and had joined on 10.2.2000 at Government Polytechnic, Hamirpur. Petitioner was rightly placed above said Sh. Ashok Kumar Bhardwaj in the seniority list of the Lecturer (Mechanical Engineering). Petitioner was promoted as Head of Department (Mechanical Engineering) on 26.3.2015 in the pay scale of Rs. 15600-39100 + Grade Pay of Rs. 7800/-. On the same day i.e. 26.3.2015, Sh. Ashok Kumar Bhardwaj was also promoted as Senior Lecturer (Mechanical Engineering) in the pay scale of Rs. 15600-39100 + Grade Pay of Rs. 6600/-. Sh. Ashok Kumar Bhardwaj was further promoted as Head of Department (Mechanical Engineering) in the pay scale of Rs. 15600-39100 + Grade Pay of Rs. 7800/- on 3.2.2016. Having been promoted from the post of Senior Lecturer (Mechanical Engineering), the salary of said

Sh. Ashok Kumar Bhardwaj came to be fixed at rate higher than the salary of petitioner w.e.f. 1.4.2016.

3. Thus, the grievance of the petitioner was that his junior was getting higher salary than him and the petitioner represented to the respondents. His representation was rejected firstly on 18.2.2020 vide Annexure P-7. Petitioner again represented but his representation met with the same fate vide rejection order Annexure P-10 dated 8.3.2021. Thereafter, the petitioner made yet another representation by quoting the Office Memo dated 26.10.2018, issued by the Government of India, Ministry of Personnel, Public Grievance and Pensions Department but he again remained unsuccessful and rejection letter was issued on 4.2.2022 vide Annexure P-15.

4. Having remained unsuccessful in his attempts to get his grievance redressed from respondents, petitioner has approached this Court by way of instant petition. The case of petitioner is that an anomaly has been created by grant of higher pay to a junior, whereas the senior on the same post in the same cadre is being paid less salary. Petitioner has claimed his right on the basis of FR-22 I (a) (1) and Office Memoranda regarding removal of anomaly by stepping up of pay of senior on promotion drawing less pay than his junior issued by Government of India from time to time.

5. Respondents have contested the plea of petitioner on the ground that he was not entitled to the benefit of FR 22 1 (a) (1) and Office memorandum, issued in respect of removal of anomaly by stepping up the pay of senior on promotion drawing less pay than his junior. As per respondents, petitioner was directly promoted as Head of Department from lower post of Lecturer, whereas Sh. Ashok Kumar Bhardwaj was promoted in the first step as Senior Lecturer and in the second step as Head of Department. In such situation, Sh. Ashok Kumar Bhardwaj got the benefit of FR 22 twice and as such, his pay was fixed at higher scale than the petitioner. According to the

respondents, there is no anomaly and hence, the petitioner was not entitled for stepping up of his pay as prayed for by him.

6. I have heard learned counsel for the parties and have also gone through the records carefully.

7. The Government of India has issued orders from time to time for removal of anomaly by stepping up of pay. One such order dated 4.2.1966 reads as under:-

> *"22 Removal of anomaly by stepping up of pay of Senior on promotion drawing less pay than his junior (a) As a result of application of FR 22 C. [Now FR 22 (I) (a) (1)]. In order to remove the anomaly of a Government servant promoted or appointed to a higher post on or after 141961 drawing a lower rate of pay in that post than another Government servant junior to him in the lower grade and promoted or appointed subsequently to another identical post, it has been decided the in such cases the pay of the senior officer in the higher post should be stepped up to a figure equal to the pay as fixed for the junior officer in that higher post. The stepping up should be done with effect from the date of promotion or appointment of the junior officer and will be subject to the following conditions, namely:*
>
> *(a) Both the junior and senior officers should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;*
>
> *(b) The scales of pay of the lower and higher posts in which they are entitled to draw pay should be identical;*
>
> *(c) The anomaly should be directly as a result of the application of FR22C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments, the above provisions will not be invoked to step up the pay of the senior officer."*
>
> *The orders refixing the pay of the senior officers I accordance with the above provisions shall be issued under FR27. The next increment of the senior officer will be drawn on completion of the requisite qualifying service with effect from the date of refixation of pay".*

8. The clear import of above mentioned order is to remove the anomaly, arising from a situation where government servant promoted to a higher post draws lower rate of pay than another government servant junior to him in the lower grade and promoted subsequently to another identical post and thereafter to step up his rate of pay to a figure equal to pay as fixed for the junior officer in that higher post from the date from which date the junior officer was promoted. The above rule, however, is subject to the following condition (i) both the junior and senior officers should belong to the same cadre, (ii) the post on which they have been promoted should be identical and in the same cadre, (iii) the scale of pay of the lower and higher post in which they are entitled to draw pay should be identical and (vi) the anomaly should directly be as a result of the application of FR 22 (c).

9. Reverting to the facts of the case, the petitioner and Sh. Ashok Kumar Bhardwaj belonged to the same cadre and posts. Both of them were initially appointed as Lecturer (Mechanical Engineering) were entitled to the same scale of pay as Lecturers and became entitled to the same scale of pay as Head of Departments (Mechanical Engineering). At this stage, it is relevant to notice that as per Recruitment & Promotion Rules, prevalent in Department of Technical Education, a Lecturer after five years of service is eligible for promotion to the post of Senior Lecturer. For the post of Head of Department, the eligibility is that the incumbent should have served as Senior Lecturer for three years' and in absence of such eligible person, a lecturer having served for eight years on such post would be considered.

10. Petitioner was appointed as Lecturer in 2000. He became eligible for the post of Senior Lecturer in 2005. It is the case of petitioner that despite availability of vacancies in the post of Senior Lecturer, the respondents did not convene the DPC in time and as a result of which, petitioner could not be considered for such promotional post till 2015 i.e. even after serving as lecturer for fifteen years. It is in such circumstances, that the petitioner was

promoted directly as Head of Department (Mechanical Engineering) on 26.3.2015, as at that time, only two Senior Lecturers were eligible to be promoted to the post of Head of Department (Mechanical Engineering). There were four vacancies to the post of Head of Departments (Mechanical Engineering) and as such, by virtue of his seniority, petitioner got a chance to be promoted directly as Head of Department. On the other hand, Sh. Ashok Kumar Bhardwaj was promoted as Senior Lecturer on the same day i.e. 26.3.2015 and he started getting the pay scale of Senior Lecturer.

11. The above, in my considered view, is clearly an anomalous situation. It was not the fault of petitioner that he was not promoted as Senior Lecturer despite of being eligible and also despite of being availability of vacancies. The above said order issued by Government of India clearly applies to the fact situation in hand. Recently, in ***Union of India & others*** vs. ***C.R. Madhava Murthy & another***, ***2002 (6) SCC 183***, the Hon'ble Supreme Court dealt with a fact situation where the juniors were being paid higher pay scale than senior on the same post by virtue of having been benefited by upgradation under ACP Scheme. A submission was made that since the seniors were already promoted, therefore, there was no question of granting any stepping up of pay to them under the ACP Scheme. Negating such contention, it has been held as under:-

> *"9. Having heard Ms. Madhvi Divan, learned ASG and considering the facts and circumstances of the case, which has emerged from the impugned judgment and order passed by the High Court, it cannot be said that the original writ petitioners were as such claiming the stepping up of the pay under the ACP Scheme. Their grievance was with respect to the anomaly in the pay scale and their grievance was that while granting upgradation under the ACP Scheme, their juniors were getting higher salaries than what they receive. Therefore, it was a case of removal of anomaly by stepping up of pay of seniors on promotion drawing a less pay than their juniors.*
>
> *11. Therefore, it was a case where a junior was drawing more pay on account of upgradation under the ACP Scheme and there*

was an anomaly and therefore, the pay of senior was required to be stepped up. Hence, in the facts and circumstances of the case, the High Court has rightly directed the appellants herein to step up the pay of the original writ petitioners keeping in view of pay scale which has been granted to the juniors from the date they have started drawing lesser pay than their juniors. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for".

12. In ***Gurcharan Singh Grewal*** vs. ***Punjab State Electricity Board & others, 2009 (3) SCC 94***, the Hon'ble Supreme Court taking note of settled principle of law that a senior cannot be paid lesser salary than his junior has held as under:-

"15. Mr. Chhabra also attempted to justify the disparity in the pay of Shri Shori and the appellant No.1 by urging that the appellant No. 1 had been granted the promotional scale with effect from 1st January, 1996, where the benefits of increment in the scale were lower. On the other hand, Shri Shori who joined the services of the Board in 1974, was granted the promotional scale on 17th May, 2006, with effect from 1st September, 2001, when the increments and the pay-scales were higher. Mr. Chhabra submitted that it is the disparity in the incremental benefits that led to the anomaly of the appellant No.1 getting a lower salary in the promotional scale.

16. Having regard to the submissions made on behalf of the respective parties, we have little hesitation in accepting Mr. Gupta's submissions that since the writ petition had been jointly filed on behalf of the appellants, whose interest was common, the prayer therein should not have been confined to the appellant No.2 alone and that the High Court should have granted relief to the appellant No.1 also by directing that his pay also be stepped up to that of his junior, Shri R.P. Shori. Although, this question does not appear to have been gone into by the High Court for the simple reason that the writ petition was disposed of only on the averments contained in paragraph 7 of the written statement filed on behalf of respondents that the grievance of the appellant No.2 duly addressed, there ought to have been at least some discussion in the judgment of the High Court regarding the claim of the appellant No.1. Unfortunately, the case of the appellant No.1 was not considered at all by the High Court.

17. Something may be said with regard to Mr. Chhabra's submissions about the difference in increment in the scales which

> *the appellant No.1 and Shri Shori are placed, but the same is still contrary to the settled principle of law that a senior cannot be paid lesser salary than his junior. In such circumstances, even if, there was a difference in the incremental benefits in the scale given to the appellant No.1 and the scale given to Shri Shori, such anomaly should not have been allowed to continue and ought to have been rectified so that the pay of the appellant No.1 was also stepped up to that of Shri Shori, as appears to have been done in the case of the appellant No.2.*
>
> *18. We are unable to accept the reasoning of the High Court in this regard or the submissions made in support thereof by Mr. Chhabra, since the very object to be achieved is to bring the pay scale of the appellant No.1 at par with that of his junior. We are clearly of the opinion that the reasoning of the High Court was erroneous and the appellant No.1 was also entitled to the same benefits of pay parity with Shri Shori as has been granted to the appellant No.2."*

13. Mr. Desh Raj Thakur, learned Additional Advocate General vehemently submitted that it was not a case of anomaly, rather Sh. Ashok Kumar Bhardwaj was already drawing higher scale in the grade of Senior Lecturer, therefore, petitioner could not draw parity with him. He has placed reliance on ***Union of India & another*** vs. ***R. Swaminathan & others***, ***1997 (7) SCC 690***. After considering the submissions and the judgment sited by learned Additional Advocate General, I have no hesitation to say that the case of petitioner will not be covered by said judgment, as in that case, Hon'ble Three Judges were dealing with a fact situation where the juniors had already officiated on promotional post for more than twelve months and, therefore, were getting higher pay of the promotional post by virtue of proviso of FR 22 (i) and FR 26 (a). It was in such situation that the Hon'ble Supreme Court was pleased to hold that the seniors were not entitled for stepping up as the juniors in their own right were getting the higher pay scale by virtue of aforesaid rules.

14. In the instant case, the fact situation is different. Petitioner and Sh. Ashok Kumar Bhardwaj were holding the same lower cadre as Lecturer.

They both had become eligible for being promoted to next higher post of Senior Lecturer, but were denied the opportunity by not holding the DPC in time. Simply because Sh. Ashok Kumar Bhardwaj got opportunity to be promoted as Senior Lecturer for about three months, cannot be used to the detriment of petitioner, as he was also eligible for being promoted as Senior Lecturer and could have been done in the first instance. As a matter of fact, subsequent to rejection of his initial representation, petitioner made another representation praying for grant of initial promotion as Senior Lecturer and subsequent promotion as Head of Department but even such prayer made by him was rejected on the ground that it cannot be considered belatedly. Clause (b) of above noticed Office Memorandum dated 4.2.1966, issued by the Government of India speaks about the requirement of scales of pay on lower and higher posts to be identical in case of both junior and senior incumbents. Had the petitioner been promoted as Senior Lecturer in first instance, he would have been entitled to for the same scale which Sh. Ashok Kumar Bhardwaj started getting after being promoted to the post of Senior Lecturer. Viewed from another angle, at the time of promoting petitioner directly from Lecturer to the post of Head of Department, no option was sought from the petitioner.

15. In view of above discussion, the petition is allowed. Orders dated 18.02.2020 (Annexure P-7), 08.03.2021 (Annexure P-10) and 27.12.2021 (Annexure P-15) are quashed and set aside. The respondents are directed to grant the petitioner pay at the same rate, which was fixed in the case of Sh. Ashok Kumar Bhardwaj w.e.f. 1.4.2016. The needful be done within two months from the date of passing of this judgment and the consequent arrears, if any, be disbursed to the petitioner within the aforesaid period, failing which, the respondents shall be liable to pay interest at the rate of 9% per annum on the amount of arrears w.e.f. 1.4.2016, till actual date of payment.

16. The petition is accordingly disposed. Pending applications, if any, also stand disposed of.

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

Rajesh Kumar ...Petitioner

Versus

State of H.P. ...Respondent

For the petitioner : Mr. N. K. Thakur, Sr. Advocate with
Mr. Divya Raj Singh, Advocate.

For the respondent : Mr. Desh Raj Thakur, Addl. A.G. with Mr.
Narender Thakur, Dy.A.G.

Cr.MP(M) No.2296 of 2022
Reserved on:15.11.2022
Decided on :18.11.2022

Code of Criminal Procedure, 1973- Pre-trial incarceration is not the rule- Past history of accused immaterial in adjudging the merits of the petition- Held that the respondent has not expressed any serious apprehension of petitioner tampering with the prosecution evidence in case of his release on bail. It has also not been apprehended that in such situation, the trial of the case will be adversely affected. The only concern of this Court at this stage is to facilitate fair and expeditious trial, for which, the petitioner can be put to appropriate terms. (Para 12)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant petition, petitioner has prayed for grant of bail in case FIR No. 119 of 2022 dated 23.7.2022, registered at Police Station Damtal, District Kangra, Himachal Pradesh under Sections 307, 325 and 34 of IPC and Sections 24-54-59 of the Arms Act.

2. Petitioner is in custody since 12.8.2022.

3. On notice, respondent has filed status report, which reveals that the above noted case was registered on the basis of versions of complainant

Vishal Kumar, recorded under Section 154 Cr.P.C. As per contents of above noted FIR, on 23.7.2022, the complainant had left home at about 6.40/6.45 P.M. for Jai Shiva & Company, G.T. Road Damtal. He found two vehicles parked at some distance from his office. 3-4 persons alighted from those vehicles with pistols in their hands. Complainant identified two persons namely Raj Kumar @ Sethi and Amit Kumar. It was also alleged that Amit Kumar fired at the complainant and the bullet had hit his right wrist. The wound started bleedings. Thereafter, Raj Kumar @ Sethi also fired at the complainant but he escaped. Another bullet was fired towards the office of complainant, which caused the office window to break. The complainant ran towards his house and was chased by others, who were having sickle like weapons in their hands. The incident was witnessed by Jamit Rai and Rajesh Kumar. The complainant was taken to Amandeep Hospital, Pathankot in the first instance and whereafter, he was taken to Government Hospital, Indora, District Kangra, H.P.

4. The challan is stated to have been filed in the Court on 31.10.2022.

5. The specific allegation against the petitioner is that he was one of the persons, who had attacked the complainant. It has also been alleged that the petitioner was uncle of Amit Kumar and said Amit Kumar had handed over the pistol after its use to petitioner. It has also been alleged that petitioner is accused in three cases registered at Police Station, Chihata, Amritsar, Punjab. Out of these cases, two are under Excise Act whereas the third is under NDPS Act.

6. Petitioner has prayed for grant of bail on the ground that he has been falsely implicated in the case. It is submitted that during the entire investigation, no legal evidence has been found against the petitioner. The implication of petitioner is only on the basis of statements of co-accused. It has also been contended on behalf of the petitioner that the investigation is

complete and no fruitful purpose shall be served by keeping the petitioner in custody. The petitioner is stated to be permanent resident of Arjun Nagar, Bhatta, P.O. Chihata, Tehsil and District Amritsar, Punjab. He has undertaken to abide by all the terms and conditions, as may be imposed against him.

7. I have heard learned counsel for the parties and have also gone through the case file carefully.

8. Police has completed the investigation. Though, this Court while deciding the bail application will not minutely scan the evidence collected by investigating agency, but the same can always be looked into for prima-facie assessing the gravity and seriousness of allegations against the bail petitioner. The implication of petitioner is primarily on the basis of versions given by him during interrogation or the versions of his co-accused, which cannottakethe form of legal evidence. The presence of petitioner at the spot of incident is also being shown on the basis of contents of CCTV footage. Such electronic evidence needs close scrutiny during trial. This also gainssignificance in light of the fact that respondent has not been able to show any medical evidence that the injury received by the complainant was result of gunshot. As per allegations two bullets were fired but the police could recover only one shell. Police has also not been able to recover the weapon of offence. There is no allegation that the gunshot was fired by petitioner or any other injury was caused by him.

9. The allegations against the petitioner are yet to be proved during trial. Despite investigating the matter for more than two months, police hasonly been able to lay hands on evidence, as noticed above.

10. Since challan has already been filed and the petitioner is already in judicial custody, no fruitful purpose shall be served by prolonging his pre-trial incarceration till conclusion of trial, which is likely to take considerable time. Otherwise also, pre-trial incarceration is not the rule.

11. As regards the past criminal history attributed to the petitioner that cannot be an impediment in adjudging the merits of the instant petition. Except for registration of cases against petitioner at Police Station, Chihata, Amritsar, no details of their present status have been provided. Those cases are under Excise and NDPS Acts and have to be decided on their own merits. The fact that petitioner is not in custody in any of such cases shows that the petitioner has been granted bail in such cases.

12. The respondent has not expressed any serious apprehension of petitioner tampering with the prosecution evidence in case of his release on bail. It has also not been apprehended that in such situation, the trial of the case will be adversely affected. The only concern of this Court at this stage is to facilitate fair and expeditious trial, for which, the petitioner can be put to appropriate terms.

13. In view of peculiar facts and circumstances of the case, petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 119 of 2022 dated 23.7.2022, registered at Police Station Damtal, District Kangra, Himachal Pradesh under Sections 307, 325 and 34 of IPC and Sections 24-54-59 of the Arms Act, on his furnishing personal bond in the sum of Rs. 25,000/- with one surety in the like amount, who necessarily should have immoveable assets in State of Himachal Pradesh, to the satisfaction of learned trial Court. This order shall, however, be subject to the following conditions: -

i) That the petitioner shall appear before learned trial Court on each and every date and shall not delay the trial.

ii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

iii) That breach of any of the bail condition by the petitioner shall entail cancellation of the bail.

iv) That the petitioner shall not leave India without prior permission of the Court.

14. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Sh. Sharwan Kumar ....Petitioner.

Versus

State of Himachal Pradesh and others

...Respondents.

For the petitioner	:	Mr. Rakesh Kumar Dogra, Advocate.
For respondents No.1 to 3:		Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General
For respondent No.5	:	Mr. Dalip Sharma, Sr. Advocate with Mr. Manish Sharma, Advocate.

CWP No. 4509 of 2019
Decided on: 17.11.2022

Constitution of India, 1950 - Article 226 - **CCS Conduct Rules, 1964**- Petition against order passed by the Director of Higher Education, Himachal Pradesh and order passed by the Appellate Authority - Held that the orders passed by the Disciplinary Authority as also by the Appellate Authority are without any reasons. It is trite that disciplinary proceedings are quasi judicial in nature and are mandatorily required to be held by strictly adhering to principles of natural justice.(Para 5)

Cases referred:

Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs. Jagdish Sharvan Varshney and others (2009) Vol 4 SCC 240;

S.D. Sharma Vs. State of H.P., 2005 Labour Industrial Cases 696;

S.N. Mukherjee VS. Union of India, (1990) 4 SCC 594;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

Heard.

2. By way of instant petition, petitioner has prayed for following substantive reliefs:-

> *" (i) That the impugned punishment order dated 25.02.2019 contained in Annexure P-8 passed by the Director of Higher Education, Himachal Pradesh-respondent No. 2 read with order dated 19.12.2019 contained in Annexure P-12 passed by the learned Appellate Authority-respondent No. 1 may kindly be quashed and set aside with all consequential service benefits, being non-speaking, un-reasoned, arbitrary, illegal, discriminatory and not based on true facts of the case, by issuing writ of Certiorari.*
> *(i) That the respondent–Department may kindly be directed to release the pending due and admissible salary from March, 2019 onward along with interest @ 9% per annum to the petitioner forthwith, by issuing writ of mandamus."*

3. Petitioner, while posted as Lecturer in History in Government Senior Secondary School, Chah-Ka-Dohra, District Mandi, H.P., was accused of misbehavior with female student of Class 10+2. The alleged conduct of the petitioner being in violation of Rules 3(1)(i), (ii) and (iii) of CCS Conduct Rules,1964, petitioner was charged to have committed misconduct. Inquiry was conducted and the charge was held to have been proved.

4. The Disciplinary Authority, vide order dated 25.02.2019, Annexure P-8, imposed major penalty on petitioner under Rule 11 of CCS (CCA) Rules, 1965 and he was ordered to be compulsorily retired from government service with immediate effect. The appeal filed by the petitioner to the Appellate Authority was also dismissed, vide order dated 19.12.2019, Annexure P-12.

5. Noticeably, the orders passed by the Disciplinary Authority as also by the Appellate Authority are without any reasons. It is trite that

disciplinary proceedings are *quasi judicial* in nature and are mandatorily required to be held by strictly adhering to principal of natural justice.

6. A Constitution Bench of Hon'ble Supreme Court in ***S.N. Mukherjee VS. Union of India, (1990) 4 SCC 594*** has held as under:-

> *"35. The decisions of this Court referred to above indicate that with regard to the requirement to record reasons the approach of this Court is more in line with that of the American Courts. An important consideration which has weighed with the Court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Courts under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision making. In this regard a distinction has been drawn between ordinary Courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.*
>
> *36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the re- cording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority*

exercising quasi judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

37. Having considered the rationale for the requirement to record the reasons for the decision of an administrative authority exercising quasi-judicial functions we may now examine the legal basis for imposing this obligation. While considering this aspect the Donoughmore Committee observed that it may well be argued that there is a third principle of natural justice, namely, that a party is entitled to know the reason for the decision, be it judicial or quasi- judicial. The committee expressed the opinion that "there are some cases where the refusal to give grounds for a decision may be plainly unfair; and this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise" and that "where further proceedings are open to a disappointed party, it is contrary to natural justice that the silence of the Minister or the Ministerial Tribunal should deprive them of the opportunity." (P 80) Prof. H.W.R. Wade has also ex- pressed the view that "natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice." (See Wade, Administrative Law, 6th Edn. P. 548). In Siemens Engineering Co. case (Supra) this Court has taken the same view when it observed that "the rule requiring reasons to be given in support of an order is, like the principles of audi alteram parlem, a basic principle of natural justice which must inform every quasi-judicial process." This decision proceeds on the basis that the two well-known principles of natural justice, namely (i) that no man should be a Judge in his own cause and (ii) that no person should be judged without a hearing, are not exhaustive and that in addition to these two principles there may be rules which seek to ensure fairness in the process of decision-making and can be regarded as part of the principles of natural justice. This view is in

consonance with the law laid down by this Court in A.K. Kraipak and Others v. Union of India and Others, [1970] 1 SCR 457, wherein it has been held:

> *"The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (i) no one shall be a Judge in his own cause (nemo dabet esse judex propria causa) and (ii) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice."*

7. In ***Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank*** *Vs.* ***Jagdish Sharvan Varshney and others (2009) Vol 4 SCC 240***, Hon'ble Supreme Court has held that even where the appellate authority agrees with the disciplinary authority, the order passed by it must contains some reasons, at least in brief, so that one can know whether the appellate authority has applied its mind while affirming the order of the disciplinary authority.

8. In ***S.D. Sharma*** *Vs.* ***State of H.P., 2005 Labour Industrial Cases 696***, it has been held by this Court that appellate authority must consider and decide all the grounds raised in the appeal and issue a complete and self- contained order.

9. In ***CWP No. 1119 of 2021***, titled as ***Babu Ram*** *Vs.* ***H.P. University***, a Division Bench of this Court has held as under:-

> *"11. Arbitrariness in making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. Application of mind is best demonstrated by disclosure of mind by the authority making the order and disclosure is best done by recording the reasons that led the authority to pass the order in*

question. Absence of reasons either in the order passed by the authority is clearly suggestive of the order being arbitrary hence legally unsustainable."

10. Adverting to the facts of the case, while imposing major penalty of compulsory retirement, the Disciplinary Authority did not provide any reasons. Relevant extract of such order dated 25.02.2019, Annexure P-8 is noticed as under:-

> *" AND WHEREAS as per the inquiry report submitted by the Injury Officer the charges against Sh. Sharwan Kumar the then Lecturer in History Govt. Sr. Sec. School Chah-Ka-Dohra, District Mandi, H.P. presently posted at Govt. Sr. Sec. School Balag, District Mandi, H.P. have been proved. He was given an opportunity to make representation against the proposed penalty notice dated 7th December, 2018. The representation (dated 03.01.2019) submitted by said Sh. Sharwan Kumar, Lecturer in History, was considered and not found satisfactory.*
> *NOW THEREFORE, the undersigned hereby imposes major penalty under Rule 11 of CCS (CCA) 1965 and accordingly the said Sh. Sharwan Kumar the then Lecturer in History Govt. Sr. Sec. School Chah-K Dohra, District Mandi, H.P. presently posted at Govt. Sr. Sec. School Balag, District Mandi, H.P. is hereby* ***"COMPULSORY RETIRED"*** *from Government services with immediate effect."*

11. Record reveals that petitioner filed an appeal before the Appellate Authority. A copy of written arguments/submissions submitted on behalf of the petitioner before the Appellate Authority has also been placed on record as Annexure P-11, which reveals that detailed submissions were made on behalf of the petitioner. However, order dated 19.12.2019, Annexure P-12, passed by Appellate Authority again was passed without assigning any reason. The relevant extract of Annexure P-12 is being noticed as under:-

> *"AND WHEREAS Sh. Sharwan Kumar was called for personal hearing on 06.08.2019 when he appeared alongwith his Defence Counsel. He also submitted a statement on 13.08.2019 which was also taken on record.*

The Undersigned has heard Sh. Sharwan Kumar in person, gone through the relevant record and his written statement. Nothing has been brought on record by Sh. Sharwan Kumar. Lecturer History to justify interference in the decision of the Director of Higher Education

Now therefore, the undersigned does not find any ground to interfere with the penalty of ***"COMPULSORY RETIRED****" imposed by the Director of Higher Education, Himachal Pradesh in this case. Accordingly, the appeal is dismissed/rejected."*

12. Thus, applying the above noticed exposition of law to the facts of the case, the impugned order dated 25.02.2019 Annexure P-8, passed by Disciplinary Authority and order dated 19.12.2019, Annexure P-12, passed by Appellate Authority, cannot be sustained. The impugned orders have definitely resulted in denial of justice to petitioner as right to reason is an indispensable part of a sound judicial system.

13. In result, the petition is allowed. The impugned order dated 25.02.2019, Annexure P-8, passed by Disciplinary Authority and order dated 19.12.2019, Annexure P-12, passed by Appellate Authority, are set-aside. Respondent No. 2 is directed to pass a reasoned order afresh as Disciplinary Authority, in accordance with law.

14. The petition is accordingly disposed of, so also the pending miscellaneous application, if any.

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

Smt. Lalita Jindal ....Petitioner.

Versus

State of Himachal Pradesh and others

...Respondents.

For the petitioner : Mr. B.M. Chauhan, Sr. Advocate with Mr. Amit Himalvi, Advocate.

For respondents: Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General

CWPOA No. : 995 of 2020
Reserved on: 16.11.2022
Decided on : 23.11.2022

Constitution of India, 1950 - Article 226 - **Central Civil Services (Temporary Service) Rules, 1965**- Protection of Article 311 is available even to temporary employees- **CCS (Conduct Rules), 1964**- **Recruitment & Promotion Rules**- The services of the petitioner, therefore, were governed by provision of CCS (Conduct Rules), 1964, as also Recruitment & Promotion Rules and not with the provisions of Industrial Disputes Act- Held that the petitioner had undisputedly worked against the post of Forest Guard for more than nine years continuously. It is not the case of respondents that the appointment of petitioner to the aforesaid post was not in terms of R & P Rules framed by the respondents. Rather, the respondents in their reply have submitted that the petitioner was appointed as Forest Guard on temporary basis under the provision of Recruitment & Promotion Rules framed for said category.- Petitioner having served for such a long period was entitled for being heard before terminating her services in the aforesaid manner.(Para 15)

Cases referred:

Jai Shanker Vs. State of Rajasthan, AIR 1966 SC 492;
Parshotam Lal Dhingra Vs. Union of India, AIR 1958 SC 36;
Ram Kishore Pandey Vs. Govt. of India, (3) SLR 629;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

By way of instant petition, petitioner has prayed for following substantive reliefs:-

> *" (i) That the impugned termination order dated 30.04.1006 (Annexure A-2) is void-ab-initio, illegal, unfair and not in accordance with law and such the same be quashed and set aside.*
> *(ii) That the applicant be reinstated in service from the date of her illegal termination will all consequential benefits of arrears, seniority and other benefits."*

2. The case of the petitioner in nutshell is that she was appointed as Forest Guard w.e.f. 28.02.1986. She had to proceed on leave w.e.f 07.08.1995 to 09.08.1995, on account of ill health of her mother-in-law. She could not rejoin as the health condition of her mother-in-law did not improve. Petitioner applied for extension of leave for 15 days by sending a telegram to respondent No.3. Similar request was once again made on 14.09.1995. Petitioner could not join her duties till 01.05.1996, on account of her domestic circumstances. However, on 01.05.1996, she was informed that her services had been terminated by respondent No. 3, vide order dated 30.04.1996.

3. Petitioner initially assailed her termination by raising industrial dispute. The Industrial Tribunal-cum-Labour Court, vide award dated 20.09.2012, dismissed the claim of the petitioner by holding the same to be not maintainable. Petitioner challenged the award passed by learned Tribunal before this Court in CWP No. 373/2013. However, on 30.11.2016, a Co-ordinate Bench of this Court allowed the petitioner to withdraw the claim petition under Industrial Disputes Act, on the premise that remedy of the

petitioner was not before Labour Court and liberty was granted to the petitioner to approach the appropriate Forum/Tribunal within six weeks from the date of order passed in CWP No. 373/2013. It was further ordered that in case petitioner availed such remedy within the time allowed by the Court, the same would be adjudicated upon without going into question of limitation. Thereafter, petitioner filed an Original Application No. 7035 of 2016 before State Administrative Tribunal and on closure of said Tribunal, the application came to be transferred to this Court and was registered as CWPOA No. 995 of 2020 i.e the instant petition.

4. Petitioner has assailed her termination order dated 30.04.1996 being in violation of her constitutional rights. It is submitted on behalf of the petitioner that the impugned order of termination is against the principles of natural justice. The mandate of Article 311 of the Constitution of India, has been violated. No inquiry, whatsoever, was held against the petitioner. As per petitioner, since the consequence of impugned order was punitive in nature, the services of the petitioner could not have been terminated without due process of law.

5. Respondents have contested the claim of the petitioner. It is submitted that petitioner was a temporary employee. She was habitual of taking leave on one pretext or the other. The department had sent a telegram to the petitioner on 28.12.1995 asking her to join the duties, but she did not respond. Finally, a notice was published in the newspaper on 23.03.1996. She was required to join the duties by 16.04.1996, failing which her services would be terminated. Respondents claim that despite the publication of notice, petitioner did not respond and finally her services were terminated on 30.04.1996, vide order Annexure A-2. It is further submitted on behalf of the respondents that due procedure was followed under CCS (Conduct Rules),1964 before terminating the services of the petitioner.

6. I have heard learned counsel for the parties and have gone through the record.

7. Perusal of termination order, Annexure A-2 reveals that the services of the petitioner were terminated by respondent No. 3 by exercising powers under Rule 5 of Central Civil Services (Temporary Service) Rules,1965. A reference was made to the reminders sent to petitioner asking her to join duties and finally notice published in the newspaper on 23.03.1996, as noticed above.

8. Rule 5 of Central Civil Services (Temporary Service) Rules, 1965, reads as under:-

> ***"5. <u>Termination of temporary service.</u>***
>
> *(1) (a) The services of a temporary Government servant shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant;*
>
> *(b) the period of such notice shall be one month.*
>
> *Provided that the services of any such Government servant may be terminated forthwith and on such termination, the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or as the case may be, for the period by which such notice falls short of one month.*
>
> *NOTE:- The following procedure shall be adopted by the appointing authority while serving notice on such Government servant under clause (a).*
>
> *(i) The notice shall be delivered or tendered to the Government servant in person.*
>
> *(ii) Where personal service is not practicable, the notice shall be served on such Government servant by registered post, acknowledgement due at the address of the*

Government servant available with the appointing authority.

(iii) If the notice sent by registered post is returned unserved it shall be published in the Official Gazette and upon such publication, it shall be deemed to have been personally served on such Government servant on the date it was published in the Official Gazette.

(2) (a) Where a notice is given by the appointing authority terminating the services of a temporary Government servant, or where the service of any such Government servant is terminated on the expiry of the period of such notice or forthwith the Central Government or any other authority specified by the Central Government in this behalf or a head of Department, if the said authority is subordinate to him, may, of its own motion or otherwise, reopen the case and after making such inquiry as it deems fit-

(i) confirm the action taken by the appointing authority;
(ii) withdraw the notice;
(iii) reinstate the Government servant in service; or
(iv) make such other order in the case as it may consider proper.

Provided that except in special circumstances, which should be recorded in writing, no case shall be re-opened under this sub-rule after the expiry of three months-

(i) from the date of notice, in a case where notice is given;
(ii) from the date of termination of service, in a case where no notice is given.

(b) Where a Government servant is reinstated in service under sub-rule (2) the order of reinstatement shall specify –

(i) the amount or proportion of pay and allowances, if any, to be paid to the Government servant for the period of his absence between the date of termination of his services and the date of his reinstatement; and
(ii) whether the said period shall be treated as a period spent on duty for any specified purpose or purposes."

9. Admittedly, the services of the petitioner were terminated without issuing her show cause notice and providing her opportunities of being heard much less by holding a regular inquiry under CCS (Conduct Rules), 1964.

10. On one hand the respondents in their reply have submitted that the petitioner was a temporary employee, on the other their stand is that the services of the petitioner were terminated after following due process under CCS (Conduct Rules), 1964. Petitioner has alleged that her termination is not even in accordance with Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965.

11. Be that as it may, the Constitutional guarantee envisaged under Article 311 is available even to temporary employees. A three Judges Bench of Hon'ble Supreme Court in ***Parshotam Lal Dhingra*** *Vs.* ***Union of India,*** reported in ***AIR 1958 Supreme Court 36,*** has held as under:-

> *"14. Article 311 does not, in terms, say that the protections of that article extend only to persons who are permanent members of the services or who hold permanent civil posts. To limit the operation of the protective provisions of this article to these classes of persons will be to add qualifying words to the article which will be. contrary to sound principles 'of interpretation of a Constitution or a statute. In the next place, el. (2) of Art. 311 refers to "such person as aforesaid" and this reference takes us back to cl. (1) of that article which speaks of a " person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State". These persons also come within Art. 3 10(1) which, besides them, also includes persons who are members of a defence service or who hold any post connected with defence. Article 310 also is not, in terms' confined to persons who are permanent members of the specified services or who hold permanent posts connected with the services therein mentioned. To hold that that article covers only those persons who are permanent members of the specified services or who hold posts connected with the services therein mentioned will be to say that persons, who are not permanent members of those services or who do not hold permanent posts*

therein, do not hold their respective offices during the pleasure of the President or the Governor, as the case may be-a proposition which obviously cannot stand scrutiny. The matter, however, does not rest here. Coming to Art. 31 1, it is obvious that if that article is limited to persons who are permanent members of the services or who hold permanent civil posts, then the constitutional protection given by cls. (1) and (2) will not extend to persons who officiate in a permanent post or in a temporary post and consequently such persons will be liable to be dismissed or removed by an authority subordinate to that by which they were appointed or be liable to be dismissed, removed or reduced in rank without being given any opportunity to defend themselves. The latter classes of servants require the constitutional protections as much as the other classes do and there is nothing in the language of Art. 311 to indicate that the Constitution makers intended to make any distinction between the two classes. There is no apparent reason for such distinction. It is said that persons who are merely officiating in the posts cannot be said to " hold " the post, for they only perform the duties of those posts. The word " hold " is also used in Arts. 58 and 66 of the Constitution. There is no reason to think that our Constitution makers intended that the disqualification referred to in cl. (2) of the former and cl. (4) of the latter should extend only to persons who substantively held permanent posts and not to those who held temporary posts and that persons officiating in permanent or temporary posts would be eligible for election as President or Vice- President of India. There could be no rational basis for any such distinction. In our judgment, just as Art. 310, in terms, makes no distinction between permanent and temporary members of the services or between persons holding permanent or temporary posts in the matter of their tenure being dependent upon the pleasure of the President or the Governor, so does Art. 311, in our view, make no distinction between the two classes, both of which are, therefore, within its protections and the decisions holding the contrary view cannot be supported as correct."

12. A similar reiteration can be found in ***Jai Shanker Vs. State of Rajasthan***, reported in ***AIR 1966 Supreme Court 492,*** wherein it has been held as under:-

"6. It is admitted on behalf of the State Government that discharge from service of an incumbent by way of punishment amounts to

removal from service. It is, however, contended that under the Regulation all that Government does, is not to allow the person to be reinstated. Government does not order his removal because the incumbent himself gives up the employment. We do not think that the constitutional protection can be taken away in this manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other, a person is entitled to continue in service if be wants until his service is terminated in accordance with law. One circumstance deserving removal may be over-staying one's leave. This is a fault which may entitle Government in a suitable case to consider a man as unfit to continue in service. But even if a regulation is made, it is necessary that Government should give the person an opportunity of showing cause why he should not be removed. During the hearing of this case we questioned the Advocate General what would happen if a person owing to reasons wholly beyond his control or for which he was in no way responsible or blameable, was unable to return to duty for over a month, and if later on he wished to join as soon as the said reasons disappeared? Would in such a case Government remove him without any hearing, relying on the regulation ? The learned Advocate General said that the question would not be one of removal but of reinstatement and Government might reinstate him. We cannot accept this as a sufficient answer. The Regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is ordered to be discharged or removed from service. The question of reinstatement can only be considered if it is first considered whether the person should be removed or discharged from service. Whichever way one looks at the matter, the order of the Government involves a termination of the service when the incumbent is willing to serve. The Regulation involves a punishment for overstaying, one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause. It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by over-staying his leave, but we do not think that Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing causes why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise. It may be

convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority, that the removal is automatic and outside the protection of Art. 31 1. A removal is removal and if it is punishment for over-staying one's Leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Art. 31 1 and this is what has happened here.

7. In our judgment, Jai Shanker was entitled to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was to him his removal from service was illegal. He is entitled to this declaration. The order of the High Court must therefore be set aside and that of the District Judge, Jodhpur restored. The question of what back salary is due to Jai Shanker must now be determined by the trial Judge in accordance with the rules applicable, for which purpose there shall be a remit of this case to the civil Judge, Jodhpur."

13. Keeping in view the facts in hand, reference can be gainfully made to a judgment passed by learned Single Bench of Allahabad High Court in ***Ram Kishore Pandey*** *Vs*. ***Govt. of India,*** reported in ***1981 (3) SLR 629,*** in which it has been held as under:-

"6. Learned counsel for the respondent on the other hand submitted that the plaintiff was a habitual absentee. He had been absenting himself without intimation or prior sanction. Consequently on the facts found by the courts below R. 14 mentioned above was applicable in terms to the plaintiff and as the services of the plaintiff, who was a temporary employee, were terminated in terms of that rule, he would be deemed to have resigned his appointment. Under these circumstances Article 311 of the Constitution of India could not have any application to the case.

7. Having heard learned counsel for the parties, I am of the opinion that the contentions raised by the learned counsel for the appellant are well founded.

8. In order to appreciate the controversy it will be necessary to state a few facts. It was not disputed by the defendants at any stage that the plaintiff was not afforded the opportunity contemplated under Article 3??? of the Constitution of India. It is

undisputed that before serving the notice of termination dated 21st of November, 1966, the plaintiff was not called upon to show cause against the proposed discharge of his services. The impugned order reads thus:—

> "Services terminated with effect from 7-11-1965 F.N after availing six months leave on medical ground without pay from 7-5-1965 to 6-11-1965."

9. From a perusal of the written statement filed on behalf of the Union of India as well at the aforesaid order terminating the services of the plaintiff, it seems to hare been established beyond doubt that the services of the plaintiff were terminated simply on the ground that he had over stayed the leave or that he had been absent on leave beyond the period permissible under the applicable service rules. It is thus a plain and simple case of discharge of the plaintiff from service on the ground that he absented himself from work beyond the leave available to him.

10. On these facts, I have no manner of doubt that Article 311 of the Constitution of India clearly became attracted to the case of the plaintiff. In **Shiv Shanker v. State of Rajasthan** (A.I.R 1966 S.C 492), their Lordships of the Supreme Court had occasion to consider a somewhat similar situation. There also the services of the concerned employee had been terminated on the ground of his having ever-stayed the leave sanctioned to him His services were sought to be terminated in terms of a service Regulation which was in pari materia with the one with which I am concerned. The plea taken by the Government in that case was that as the services of the concerned employee had been terminated in accordance with the relevant Statutory Regulations. Article 311 could have no application. This contention was repelled by the Supreme Court. Their Lordships observed:—

> "The order of the government terminating the services of the incumbent on the ground of having over-stayed the leave sanctioned to him clearly implied removal from service and it amounted to punishing the incumbent on a specific charge end the fact that there existed a statutory rule entitling the government to terminate the services of an incumbent did not obviate the necessity of complying with Article 311 of the Constitution of India."

11. This decision of the Supreme Court has, been followed in almost all the aforesaid decision cited by the learned counsel for the appellant All the various High Courts dealing with an identical controversy have unanimously and consistently taken the view

> *that **Rule 14, or statutory provisions** analogous thereto, do not relief the Government of the obligation to comply with the mandate of Article 311 of the Constitution of India.*
> *12. In **B.N Tripathi v. State of U.P** reported in 1971 Lab. I.C 9??? this court had occasion to consider an identical statutory provision. The controversy was the same. Relying on the decision of the Supreme Court in the case of **Jai Sharker v. State of Rajasthan** (A.I.R 1966 S.C 492) (supra) this Court held that removal of a Government servant from service for over-staying his leave without complying with the provisions of Art. 311 of the Constitution of India was illegal even though it was sanctioned by the service regulations. This Court also observed that the fact??? that the Government employee was a temporary Government servant made no difference and that the Government was bound to give the opportunity contemplated under Art. 311 of the Constitution of India to the concerned Government servant before terminating his services on the ground of over*-staying leave."

14. Though, from the aforesaid exposition of law, it is clear that protection of Article 311 is available even to temporary employees, this Court considers it expedient to ascertain the nature of employment held by the petitioner under respondents. Petitioner was appointed as Forest Guard, vide Annexure A-1 w.e.f. 28.02.1986. The disputed period of her leave started from 07.08.1995, which means that from February 1986 till August, 1995, she had been working on the same post. According to learned Deputy Advocate General, the appointment of petitioner was purely on temporary basis and for such argument he has placed reliance on recital in Annexure A-1, which reads as under:-

> ***"**The appointment being temporary the services of the official are liable to be terminated on one month notice from either side."*

15. The fact remained that petitioner had undisputedly worked against the post of Forest Guard for more than nine years continuously. It is not the case of respondents that the appointment of petitioner to the aforesaid post was not in terms of R & P Rules framed by the respondents. Rather, the respondents in their reply have submitted that the petitioner was

appointed as Forest Guard on temporary basis under the provision of Recruitment & Promotion Rules framed for said category. It is further submitted by them that the services of the petitioner, therefore, were governed by provision of CCS (Conduct Rules), 1964, as also Recruitment & Promotion Rules and not with the provisions of Industrial Disputes Act. At the time of hearing of the case, learned counsel for the petitioner had made available Recruitment & Promotion Rules for the post of Forest Guard for perusal in this Court. As per these rules, the person appointed as Forest Guard was to remain on probation for a period of two years extendable by maximum period of another two years. On facts, it is clear that petitioner had worked for much more period than the prescribed period of probation. Her services were not dispensed with within the period of probation. In such circumstances, her services would be deemed to have been confirmed. In such view of the matter also, petitioner having served for such a long period was entitled for being heard before terminating her services in the aforesaid manner.

16. Viewed from another angle, even Rule 5 of Central Civil Services (Temporary Service) Rules, 1965, has not been strictly complied with, in the facts of the instant case. Such rule requires one month prior notice to be issued by Appointing Authority, in case of termination of temporary services of an employee. Notice was required to be delivered or tendered to the government servant in person and where personal service was not practicable, the notice was required to be served through registered post at the address of the government servant and if the notice still remained unserved then by publication in official gazette. In the instant case, respondents have not been able to show compliance of aforesaid provision. It can be seen additionally that the appointing authority could terminate the services of the temporary employee under aforesaid rule forthwith without

issuance of notice, but in such event, the employee became entitled to one month salary plus allowances for the period of notice.

17. In light of above discussion, the petition is allowed to the extent that the termination order dated 30.04.1996, Annexure A-2, is held to be bad in law and the same is accordingly quashed and set aside. However, liberty is reserved to the respondents to proceed against petitioner, strictly in accordance with law, if so advised. Needless to say, consequences, in accordance with law, shall follow.

18. The petition is accordingly disposed of, so also the pending miscellaneous application, if any.

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

Between:-

BABU RAM S/O LATE SH. RUKSAMAL, RESIDENT OF VILLAGE PEKHADHAR,P.O. KHADRALA, TEHSIL ROHRU,DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS REGULAR CHAINMAN AT SETTLEMENT KANUNGO CIRCLE, ROHRU, DISTRICT SHIMLA.

...PETITIONER

(BY SH. YOGESH KUMAR CHANDEL,ADVOCATE).

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (REVENUE) TO THE STATE OF HIMACHAL PRADESH, SHIMLA-2.

2. THE SETTLEMENT OFFICER, SETTLEMENT DIVISION, SHIMLA, SHIMLA-9.

....RESPONDENTS

(BY SH. NARENDER SINGH THAKUR,
DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 1462 of 2019
RESERVED ON: 31.10.2022.
DECIDED ON: 04.11.2022

Constitution of India, 1950 - Article 226 - **CCS (Pension) Rules, 1972 & H.P. Civil Services Contributory Pension Rules, 2006-** Work charge service of petitioner as qualifying service for pensionary benefits and seniority- Conferment of work charge status on actual basis. Held- It is more than settled now that work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits. The service of petitioner as work charge employee, followed by regular appointment is liable to be counted for the purpose of pension and other retiral benefits, hence the distinction drawn by respondents on the ground that petitioner was regularized after the cutoff date i.e. 15.5.2003 cannot be sustained. Merely because respondents termed the conferment of work charge status upon petitioner as notional, the efficacy of status is not reduced. Petitioner had earned such status as a matter of right under the policy of the State Government- Once the work charge employment of the petitioner is held liable to be counted for the grant of pensionary

benefits to him, as a natural corollary, he will be governed under CCS Pension Rules, 1972 and the Contributory Pension Scheme will not be applicable to him.(Paras 8, 9 & 11)

Cases referred:

Prem Singh vs. State of U.P. & others 2019 (10) SCC 516;

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

O R D E R

By way of instant petition, the petitioner has prayed for following substantive reliefs:

> i*) That writ in the nature of certiorari may kindly be issued to quash Annexure P-3 as far as it gave notional work charge status to the petitioner.*
>
> *ii) That the writ in the nature of mandamus may kindly be issued to the respondents to give work charge status to the petitioner with effect from 02.06.2002 on actual basis alongwith entire consequential benefits along with others incidental benefits thereof such as arrears of salary, GPF deduction, pensionary benefits and seniority etc."*

2. Brief facts necessary for adjudication of the petition are that the petitioner was engaged as daily waged Chainman by the respondents on 02.06.1992. He worked continuously with the respondents in Shimla Division with 240 days in each calendar year. Petitioner was regularized on 20.12.2007. Subsequently, vide Annexure P-3 dated 02.01.2012, petitioner was conferred work charge status w.e.f. 02.06.2002 on notional basis.

3. The grievance of the petitioner is that he was entitled to work charge status in terms of the policy adopted by the State on completion of 10 years continuous service on daily wages and hence the grant of such benefit notionally was not justified. He further seeks all consequential benefits including pensionary benefits and seniority etc. on the premise that he was

entitled for conferment of work charge status w.e.f. 02.06.2002 on actual basis and not on notional basis.

4. The respondents have filed the reply. It is submitted that the petitioner has been allowed actual financial benefits w.e.f. 21.12.2009 i.e. for the period three years prior to filing of the petition. The matter regarding grant of pensionary benefits was referred by the Administrative Department to the Finance Department, but the Finance Department rejected the case of petitioner on the ground that the CCS (Pension) Rules, 1972, were applicable only to regular Government employees appointed on or before 14.05.2003. All Government employees appointed on or after 15.05.2003, on regular basis, are covered under the Contributory Pension Scheme and also New Pension Scheme and such employees are governed by the H.P. Civil Services Contributory Pension Rules, 2006. Accordingly, the respondents have taken a stand that the work charge service of petitioner cannot be taken as qualifying service for pensionary benefits and seniority.

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

6. In ***State of H.P. and others*** vs. ***Sukru Ram and another, CMPM no. 423 of 2017,*** decided by a Division Bench of this Court on 23.5.2017, it was held as under:

> *"The issue is no longer res integra, which stands settled by the Hon'ble Supreme Court of India in Punjab State Electricity Board and another v. Narata Singh and another, (2010) 4 SCC 317, as also earlier decision of this Court in CWP No. 2240 of 2008, titled as The State of H.P. and others v. Sh. Tulsi Ram, decided on 31.5.2012, in which learned Single Judge, while holding the service rendered by the writ petitioner on work-charged basis from 1.4.2001 to 2.4.2017 to be counted for the purpose of pension"*

7. Later in ***State of H.P. & others*** vs. ***Matwar Singh & another, CWP No. 2384 of 2018***, decided by a Division Bench of this Court on 18.12.2018, it was held as under:-

> *"It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/struck down, in the light of view taken by this Court in CWP No.6167 of 2017, titled Sukru Ram vs. State of H.P. & others, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in Keshar Chand vs. State of Punjab through the Secretary P.W.D. B & R Chandigarh and others, (1988) 94(2) PLR 223, also dealt with an identical issue where Rule 3.17 (ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."*

8. Similarly, in ***CWP No. 2956 of 2019***, decided on 13.7.2021, another Division Bench of this Court observed as under:-

> *"It has also been contended by respondents that the petitioners were granted work charge status only vide order dated 13.10.2015 and the expression used therein was "work charge regularization". In any case, be it conferment of work charge status or regularization in favour of petitioner vide office order dated 13.10.2015, the same will not affect the outcome of this petition. In view of the law laid down by this Court in CWP No. 6167 of 2017, titled Sukru Ram vs. State of H.P. &Ors., CWP No. 2384 of 2018 titled State of Himachal Pradesh &Ors. Vs. Matwar Singh and also by Hon'ble Supreme Court in Prem Singh Vs. State of H.P. (2019) 10 SCC 516, the work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits."*

Thus, it is more than settled now that work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits.

9. Adverting to the facts of the present case, the petitioner was conferred work charge status on 02.06.2002 and was followed by his regularization in 2007. Thus, the service of petitioner as work charge employee, followed by regular appointment is liable to be counted for the purpose of pension and other retiral benefits, hence the distinction drawn by respondents on the ground that petitioner was regularized after the cutoff date i.e. 15.5.2003 cannot be sustained. Merely because respondents termed the conferment of work charge status upon petitioner as notional, the efficacy of status is not reduced. Petitioner had earned such status as a matter of right under the policy of the State Government.

10. It is apt to reproduce the observations made by Hon'ble Supreme Court in para-31 of the judgment rendered in case of ***Prem Singh*** vs. ***State of U.P. & others 2019 (10) SCC 516***, which read as under:-

> *"In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment".*

11. Once the work charge employment of the petitioner is held liable to be counted for the grant of pensionary benefits to him, as a natural corollary, he will be governed under CCS Pension Rules, 1972 and the Contributory Pension Scheme will not be applicable to him.

12. For the aforesaid reasons, the present petition is allowed. Respondents are directed to consider the period of work-charge employment of the petitioner, followed by his regular service for the purpose of grant of pensionary benefits and for that purpose to grant him GPF Number, within a period of three months from today.

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

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

Between:-

PURAN CHAND, S/O SH. DURGA RAM, R/O VILLAGE BEE, P.O. COW, TEHSIL KARSOG, DISTT. MANDI, H.P.

....PETITIONER

(SH. DALIP K. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY HPPWD GOVT. OF H.P. SHIMLA-2.

2. EXECUTIVE ENGINEER, KARSOG DIVISION, HPPWD, KARSOG, DISTT MANDI, H.P.

....RESPONDENTS

(SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 5214 of 2020
Reserved on:28.10.2022
Date of decision:04.11.2022

Constitution of India, 1950 - Article 226 - Benefit of work charge status- The State Government had abolished the work charge establishment w.e.f. 19.8.2005- Held that the action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory hence cannot be sustained.(Para 9)

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

O R D E R

By way of instant petition, petitioner has prayed for the following substantive relief:-

> *"i). Respondents be directed to grant the work charge status to applicant from the date after the completion of eight years of service with all the benefits incidental thereof such as back wages, pension, seniority and pay fixation with interest.*
>
> *ii) The applicant be further held entitled for the pensionary benefits."*

2. The petitioner was engaged as Daily Wage Labourer in HP PWD Sub Division, Karsog in 1997. The services of petitioner were regularized as Beldar vide office order dated 25.7.2007. Petitioner seeks conferment of work charge status immediately on completion of eight years continuous service.

3. Respondents in their reply have submitted that petitioner had not completed 240 days in the year 1997. It was w.e.f. the year 1998 that petitioner had completed 240 days in each calendar year and hence remained in continuous service thereafter. According to respondents, the petitioner completed eight years continuous service on 31.12.2005. Respondents further submitted that the State Government had abolished the work charge establishment for Class-IV employees w.e.f. 19.8.2005. Thus, on completion of eight years of continuous service of petitioner, the work charge establishment did not exist in HP PWD and hence petitioner was not entitled for grant of work charge status.

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

5. The facts of the case are not in dispute. Petitioner has rendered continuous daily wage service with 240 days in calendar year since 1998. He was regularized in 2007. Thus, petitioner would be entitled for work charge status on completion of eight years of continuous daily wage service w.e.f. 1998. As per admission made by respondents, petitioner had completed eight

years of continuous service on 31.12.2005. In this view of the matter, petitioner became entitled for grant of work charge status w.e.f. 1.1.2006.

6. The petitioner has been denied the benefit of work charge status even w.e.f. 1.1.2006 on the premise that the State Government had abolished the work charge establishment w.e.f. 19.8.2005 and in absence of availability of work charge establishment, on completion of eight years of daily wage continuous service of petitioner, he cannot be granted such benefit.

7. The aforesaid reasons assigned by respondents cannot be countenanced. Judging the ground of rejection against the contention raised on behalf of the petitioner, this Court is of considered view that the objection so raised cannot be sustained in view of judgment passed by a Division Bench of this Court in CWP No. 3111 of 2016, titled ***State of H.P. & Others*** vs. ***Ashwani Kumar***, in which it has been held as under:

> *"6. Having carefully perused material available on record, especially judgment rendered by this Court in Ravi Kumar v. State of H.P. and Ors., as referred herein above, which has been further upheld by the Hon'ble Apex Court in Special Leave to Appeal (C) No. 33570/2010 titled State of HP and Ors. v. Pritam Singh and connected matters, this Court has no hesitation to conclude that there is no error in the finding recorded by the learned Tribunal that work charge establishment is not a pre-requisite for conferment of work charge status. The Division Bench of this Court while rendering its decision in CWP No. 2735 of 2010, titled Rakesh Kumar decided on 28.7.2010, has held that regularization has no concern with the conferment of work charge status after lapse of time, rather Court in aforesaid judgment has categorically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV worker (Beldars) and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged category and as such, there is an obligation cast upon the department to consider the case of daily waged workman for conferment of daily work charge status, being on a work charged establishment on completion of required number of years in terms of the policy. In the aforesaid judgment, it has been specifically held that benefits which accrued on*

workers as per policy are required to be conferred by the department."

8. Recently in ***State of Himachal Pradesh*** vs. ***Smt. Reema Devi***, LPA No. 161 of 2021, decided on 23.05.2022, a Division Bench of this Court following Ashwani Kumar's case (supra) held as under, in the case where also the respondent department was involved: -

> *"11. Now adverting to the facts of the instant case, the grant of work charge status to late Shri Het Ram has been denied on the ground that Himachal Pradesh Forests Department had no work charge establishment. In Ashwani Kumar's case (supra) also right of the petitioner therein for grant of work charge status was considered when the HPPWD had ceased to be a work charge establishment.*
>
> *12. This Court while delivering judgment in Ashwani Kumar's case (supra) had, thus, decided the principle that work charge establishment was not a prerequisite for conferment of work charge status and thus, would not confine only to the petitioner in the said case. In view of this, the contention raised on behalf of the appellants that the judgment in Ashwani Kumar's case (supra) was a judgment in personam, cannot be sustained."*

9. Thus, the action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory hence cannot be sustained.

10. Petitioner has failed to make out any case for grant of pensionary benefits.

11. In view of the above discussion, the petition is partly allowed. The respondents are directed to grant work charge status to the petitioner w.e.f. 1.1.2006 till the date of his regularization. Needless to say that the consequential benefits shall also follow, subject however, to the condition that petitioner shall be entitled for consequential financial benefits, if any, only for a period of three years immediately preceding the date of filing of petition.

12. The petition is accordingly disposed of, so also the pending application(s), if any.

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

Between:-

VISHAL KUMAR S/O SH. RAMESH CHAND, R/O VPO BALDAYAN, DISTRICT SHIMLA, H.P. (OWNER OF INDICA CAR NO. HP-01A-0332)

.....APPELLANT

(BY MR. NEEL KAMAL SHARMA, ADVOCATE)

AND

1. BHUSHAN KUMAR SHARMA ALIAS SUNDER SHARMA, S/O LATE SH. KRISHAN, R/O VILLAGE SURAPUR, TEHSIL INDORE, DISTRICT KANGRA, H.P. PRESENTLY RESIDING AT MANALI, NEAR NEHARU KUND, TEHSIL MANALI, DISTRICT KULLU, H.P.

2. NATIONAL INSURANCE COMPANY LTD. SHIMLA THROUGH ITS BRANCH MANAGER SHIMLA, H.P. HIMLAND HOTEL,GROUND FLOOR, CIRCULAR ROAD, SHIMLA.

3. SMT. SOMA DEVI WD/O LATE SH. SURENDER NATH;

4. DINESH S/O LATE SH. SURENDER NATH;

5. RAMAN S/O LATE SH. SURENDER NATH;

6. RAJESH S/O LATE SH. SURENDER NATH

(RESPONDENTS NO.3 TO 6, ALL R/O VILLAGE BHORALIAN KALAN, P.O. BEHDALA, TEHSIL AND DISTRICT UNA, H.P. (OWNER OF TRUCK NO. HP-20-7785)

7. SATPAL SINGH S/O SH. RAM CHANDER, R/O VPO BANGARH, TEHSIL AND DISTRICT UNA, H.P. (DRIVER OF TRUCK NO. HP-20-7785)

8. ORIENTAL INSURANCE COMPANY LTD. RAILWAY ROAD, NANGAL DISTRICT ROPAR, PUNJAB, THROUGH ITS BRANCH MANAGER, BRANCH OFFICE RAILWAY ROAD, NANGAL, AT PRESENT BRANCH OFFICE AT COLLEGE GATE DHALPUR, KULLU, TEHSIL AND DISTRICT KULLU, H.P.

9. SHYAM LAL S/O SH. PARAS RAM, R/O VILLAGE KUTHEHRA, P.O. MALANGAN, TEHSIL JHANDUTA, DISTRICT BILASPUR, H.P. (DRIVER OF INDICA CAR NO. HP-01A-0332).

.....RESPONDENTS

(MR. NAVEEN K. BHARDWAJ, ADVOCATE, FOR R-1.

MS. DEVYANI SHARMA, ADVOCATE, FOR R-2

MR.RAJIV RAI, ADVOCATE, FOR R-3 TO R-7

MR. VIKRAM SINGH, ADVOCATE, VICE MR. J.S. BAGGA, ADVOCATE FOR R-8

MR.A.K.SHARMA, ADVOCATE, FOR R-9)

FIRST APPEAL FROM ORDER
NO.116 OF 2014
Decided on: 28.10.2022

Motor Vehicles Act, 1988 - Liability to satisfy the awarded amount- Held that the Insurance Company having not only cancelled the Insurance policy, but also having duly intimated the appellant (insured) and the concerned RTO about cancellation of the policy months before the accident, is not required to satisfy the award or to indemnify the insured towards third party liability. The insurer, therefore, had discharged its obligation that was required from it in law. It had not only cancelled the Insurance Policy on account of dishonor of cheque issued by the insured, but had also timely intimated this fact to all concerned including the appellant/insured, and the concerned RTO. The accident was caused months after cancellation of the insurance policy. The relevant documents in this regard have been placed on record and proved by the insurer.(Para 4)

Cases referred:

Anita Sharma & others Vs. New India Assurance Company Ltd. & another (2021) 1 SCC 171;

United India Insurance Company Vs. Laxmamma and others 2012 (5) SCC 234;

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

J U D G M E N T

The appellant is owner of Indica car No.HP-01A-0332. This car met with an accident on 21.02.2008 that also involved a truck bearing No. HP-20-7785. The accident resulted in causing injuries to one Bhushan Kumar Sharma. He filed a claim petition under Section 166 of the Motor Vehicles Act. The learned Motor Accident Claims Tribunal (in short the Tribunal) vide its award dated 20.12.2013 allowed compensation of Rs.3,85,472/- alongwith interest @ 7.5% per annum from the date of filing of the petition till realization of the amount in favour of the claimant. The liability to satisfy the awarded amount was fastened upon the owner and driver of the car. Feeling aggrieved, owner of the car has preferred instant appeal.

2. Learned counsel for the appellant has advanced submissions on the following **main points: -**

(i) The findings of the learned Tribunal that accident in question occurred due to rash and negligent driving of the car by appellant's driver Shyam Lal (respondent No.9), is contrary to the pleadings and evidence on record. The accident was caused due to rash and negligent driving of the truck by respondent No.7.

(ii) Even if it is held that the accident was caused because of negligent driving by respondent No.9 then also the liability to pay the awarded compensation amount should have been fastened upon respondent No.2-Insurance Company (the insurer of Indica car).

3. I have heard learned counsel for the parties and with their assistance have also seen the record.For convenience, the above two main points, around which learned counsel for the parties made their submissions, are being discussed separately hereinafter.

4. **Point No.1: Issue of negligence**

The **relevant facts** may first be noticed.

4(i)(a) On 21.02.2008, the claimant was travelling in Tata Indica car No.HP-01A-0332 and going from Mandi to Indore. This vehicle was being driven by respondent No.9. The appellant was the owner of this vehicle. Near 'Kawari Dhank', District Mandi, this vehicle struck against a truck No. HP-20-7785, being driven by Satpal Singh (respondent No.7).The accident resulted in giving multiple injuries toclaimant Bhushan Kumar Sharma. He remained admitted in Zonal Hospital Mandi, PGI Chandigarh and Fortis Hospital Chandigarh. He also received treatment from Harihar Hospital Mandi and Kullu Valley Hospital, District Kullu, H.P. On 12.04.2010, Bhushan Kumar instituted claim petition under Section 166 of the Motor Vehicles Act, claiming Rs.10,00,000/- as compensation alongwith interest. The learned Tribunal vide its award dated 20.12.2013 held that the accident in question was caused because of rash and negligent driving by respondent No.9 i.e. driver of car, owned by the appellant. The payable compensation to the claimant was worked out at Rs.3,85,472/- alongwith interest @7.5% per annum.

4(i)(b) Learned counsel for the **appellant contended** that the findings returned by the learned Tribunal regarding accident having been caused due to rash and negligent driving of car by respondent No.9 was contrary to the pleadings and evidence on record. It was argued that the claimant had specifically averred in para-24 of the claim petition about the accident having been caused due to rash and negligent driving of the truck by respondent No.7. Once the claimant had himself pleaded negligent driving of the truck by respondent No.7 as cause of the accident learned Tribunal could not have returned findings that the accident occurred because of rash and negligent driving of car by respondent No.9. It was also submitted that Satpal (respondent No.7)-the truck driver did not step into the witness-box, hence adverse inference had to be necessarily drawn against him about his rash and negligent driving of the truck. Learned counsel for the appellant relied upon certain judgments in support of his contention.

4(i)(c) Observations

I am afraid the submissions advanced by learned counsel for the appellant cannot be accepted in the facts of the case. **Firstly,** there is no definitive or affirmative pleading of the claimant about the accident having been caused due to rash and negligent driving of the truck.The claimant in his pleadings is unsure as to whose negligent driving had caused the accident. All that he has pleadedin his claim petition is that 'the accident took place due to rash and negligent driving of the truck in question. However, in case the Tribunal comes to the conclusion that the accident took place due to rash and negligent driving of the Indica Car, even in that event, the claimant is entitled to compensation from the owner, driver and insurer of Tata Indica car'. Quite clearly the claimant hadnot positively pleaded negligenceonly on part of the truck driver.He had not ruled out the possibility of accident happening on account of rash and negligent driving of car by respondent No.9. It has also to be kept in mind that the claimant was himselftravelling in the car.

4(i)(d) **Secondly,** the FIR No.88/2008 regarding the accident was registered on 22.02.2008 at Police Station Sadar, District Mandi, H.P. The FIR records that the accident occurred on account of rash and negligent driving by the driver of car (respondent No.9). A criminal case was registered against him under Sections 279, 337 and 338 of Indian Penal Code. Learned counsel for the appellant argued that the driver of the car has since been acquitted in the said criminal case. But the fact remains that acquittal of car driver in the criminal trial will not come to his aid in the Motor Accident Claim case. It is settled principle that the degree of proof required in criminal trial is at much higher pedestal than required in motor accident claim case. In this regard it will be appropriate to refer to following paras of (***2021) 1 Supreme Court Cases 171, Anita Sharma and others Vs. New India Assurance Company Limited and another: -***

"21. Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eyewitnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true.

22. A somewhat similar situation arose in Dulcina Fernandes v. Joaquim Xavier Cruz wherein this Court reiterated that:

"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pickup van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt."

4(i)(e) The learned Tribunal has independently examined the facts of the case to come to the conclusion that the accident had occurred because of rash and negligent driving of car by respondent No.9. Reference in this regard can be aptly made to following findings recorded in paragraph 15 of the judgment: -

"15. Moreover, respondents have also filed on record the copies of the statements of witnesses recorded by Mandi police in the criminal case which are Ex.RW4/D-1 to Ex.RW-4/D-6. The copy of site plan prepared by the police in criminal case Ex.PW5/E has also been filed on record. This site plan is revealing that truck No. HP-20-7785 was on extreme left side of the road and there is about one and half feet vacant road on the left side of the truck, whereas the collusion between the truck and car took place on the middle of the road shown as mark-B and there is about fourteen feet road on the left side of the car. That means the car driver was not on the left side of the road when collusion between both the vehicle took place. This fact goes to establish that the car driver had

> *turned his vehicle towards middle of the road i.e. right side of the road which caused accident in question. This fact goes to suggest that certainly driver of the car was not having full control over his vehicle when he was driving it on public highway and he failed to keep his vehicle towards the left side of the road and this omission in nothing but rash and negligent driving on the part of car driver respondent No.2 in committing the accident in question."*

I have seen the site plan proved as Ex.PW-5/E on record of the case. The site plan does go to show that the car driver had turned his vehicle towards the middle of the road, whereas the truck was being driven on the extreme left side of the road. The collusion between the truck and car took place in the middle of the road with around 14 feet road available on the left side of the car. This establishes that the accident in question had occurred because of rash and negligent driving of car by respondent No.9.

4(i)(f) The mere fact that respondent No.7 (truck driver) did not step into the witness-box is not sufficient in the facts of the case to draw adverse inference against him regarding his driving the truck negligently, as has been contended for the appellant. Each case has to be examined on its own facts. In the facts of the instant case, it is quite clear that the accident in question was caused because of rash and negligent driving of car by respondent No.9. I see no good reason to interfere with the findings returned in this regard by the learned Tribunal. Point No.1 is accordingly answered against the appellant.

4(ii) **Point No.II: Liability to pay the compensation:**

It is the case of the petitioner that his Tata Indica car was duly insured with respondent No.2-insurance company, therefore liability to pay the compensation amount should have been fastened upon respondent No.2.

4(ii)(a) The appellant's above submission is *de hors*the facts of the case and against settled legal position. The accident in question took place on 21.02.2008. The Insurance cover note was issued in favour of the appellant by

respondent No.2 (Insurance Company) on 23.04.2007, covering the period up to 22.04.2008. The record shows that the appellant had paid premium of Rs.9490/- towards the insurance policy vide cheque dated 20.04.2007 (Ex.RW3/A). This cheque was dishonoured by the ICICI Bank vide memo dated on 28.04.2007 (Ex.RW3/B). Consequently, the insurer (respondent No.2) cancelled the insurance policy and sent specific intimation in this regard to the appellant on 03.05.2007 (Ex.RW4/A and Ex.RW4/E). The Regional Transport Officer, Shimla was also intimated by the insurer about cancellation of the insurance policy vide separate communication dated 03.05.2007 (Ex.RW4/D). The insurer has also placed on record the postal receipts (Ex.RW-4/B) of the communications sent to the appellant. The relevant extract of dispatch register was proved as Ex.RW-4/F.

4(ii)(b) In the given facts of the case, it will be appropriate to notice here ***2012 (5) SCC 234, titled as United India Insurance Company Vs. Laxmamma and others*****,** wherein it was held that when cheque issued towards payment of insurance premium gets dishonoured and Insurer cancels the insurance policy subsequent to the accident, in such circumstances the insurer has to stand by the award as its statutory liability to indemnify third partiessubsists on the day of accident. Insurer could only recoverthe amount from insured.Relevant para from the judgment is as under: -

> *"26. In our view, the legal position in this: where the policy of insurance is issued by an authorized insurer on receipt of cheque towards the payment of premium and such a cheque is returned dishonoured, the liability of the authorized insurer to indemnify the third parties in respect of the liability which that policy covered subsists and it has to satisfy the award of compensation by reason of the provision of Section 147(5) and 149(1) of the MV Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonoured and*

> *before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

In the instant case, the insurance policy was issued on 23.04.2007. Within a view days of issuance, it was cancelled on 03.05.2007 on account of dishonouring of cheque issued by the appellant. The intimation of cancellation of the insurance policy was duly sent by it to the insured-appellant as well as the concerned RTO on 03.05.2007 itself. The accident in question occurred on 22.02.2008. In view of law laid down in *Laxmamma's casesupra,* Insurance Company having not only cancelled the Insurance policy, but also having duly intimated the appellant (insured) and the concerned RTO about cancellation of the policy months before the accident, is not required to satisfy the award or to indemnify the insured towards third party liability. Learned counsel for the appellant tried to raise a plea that the Junior Assistant of concerned RTO office, who stepped into the witness box as RW-5, denied having received intimation about the cancellation of the insurance policy. However, holistic reading of the statement of RW-5 makes it evident that he as a Junior Assistant had only denied that any record regarding the receipt of the cancellation of insurance policy was kept in their office. The insurer, therefore, had discharged its obligations that was required from it in law. It had not only cancelled the Insurance Policy on account of dishonor of cheque issued by the insured, but had also timely intimated this fact to all concerned including the appellant/insured, and the concerned RTO. The accident was caused months after cancellation of the insurance policy. The relevant documents in this regard have been placed on record and proved by the insurer.

The findings of learned Tribunal in fastening the liability to satisfy the awarded amount upon the appellant (owner of car) and his driver (respondent No.9) are thus in order. Point is answered accordingly against the appellant.

5. For the foregoing reasons, I see no merit in the instant appeal. The same is accordingly dismissed, so also pending miscellaneous application(s), if any.

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

Between:-

SANDEEP SETHI, SON OF SHRI ASHOK SETHI, RESIDENT OF SETHI NIWAS, NEAR DADA CHELA RAM ASHRAM DEONGHAT, TEHSIL AND DISTRICT SOLAN HP AT PRESENT RESIDENT OF H.NO.97 SECTOR 21, CHANDIGARH (UT)

....DECREE HOLDER

(BY SHRI NAVNEET KUMAR BHALLA, ADVOCATE)

AND

SMT. NIDHI KUTHIALA, WIFE OF SH.RAMIT KUTHIALA, RESIDENT OF LANDED PROPERTY NO.C-44, UPPER MARBLE ARCH., MANIMAJRA CHANDIGARH (UT) ALSO RESIDENT OF M/S HAKAM MAK TANI MAL, 36, LOWER BAZAR, SHIMLA H.P.

...JUDGMENT DEBTOR

(BY MR RAJESH KUMAR PARMAR, ADVOCATE)

MR. KUSH SHARMA ADVOCATE FOR APPLICANT/OBJECTOR SHRI RAMIT KUTHIALA)

ORIGINAL MISCELLANEOUS APPLICATION
NO. 340 OF 2021
IN EXECUTION PETITION NO. 31 OF 2020
Decided on: 31.10.2022

Prohibition of Benami Property Transaction Act, 1988- Benami Transaction explained- a transaction or an arrangement; where a property is transferred to or is held by a person and consideration for such property has been provided or paid by another person and property is held for immediate or future benefit, direct or indirect, of the person who has provided the consideration; under the provisions of Prohibition of Benami Property Transaction Act, 1988 has been termed as Benami Transaction; however, any property; purchased by the person in the name of his spouse or in the name of child of such individual by providing consideration for such property out of known sources of that person; shall not be considered as a Benami transaction, and such purchase of property, unless contrary is proved, shall be presumed to have been purchased for the benefit of wife/child.(Para 31)

Cases referred:

Ashan Devi and another vs. Phulwasi Devi and others, (2003)12 SCC 219;

Bhanwari Lal vs. Satyanarain and another, (1995)1 SCC 6;
Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and another, (1997)3 SCC 694;
Debika Chakraborty vs. Pradip Chakraborty AIR 2017 Calcutta 11;
Gangamma etc. Vs. G. Nagarathnamma and others AIR 2009 SC 2561;
Har Vilas vs. Mahendra Nath and others, (2011)15 SCC 377;
Laxman Sakharam Salvi vs. Balkrishna Balvant Ghatage, AIR 1995 Bombay 190;
Mt. Hakiman vs. Mt. Badr-un-nisa and another, AIR 1934 Labore 658;
N.S.S. Narayana Sarma and others vs. Goldstone Exports (P) Ltd. and others, (2002)1 SCC 662;
Shreenath and another vs. Rajesh and others, (1998)4 SCC 543;
Silverline Forum Pvt. Ltd vs. Rajiv Trust and another, AIR 1998 SC 1754;
Tanzeem-e-Sufia vs. Bibi Haliman and others, AIR 2002 SC 3083;
Vaddeboyina Tulasamma and others vs. Vaddeboyina Sesha Raddi (dead) by LRs, AIR 1977 SC 1944;

This petition coming on for presence of parties this day, the Court passed the following:

O R D E R

By way of this application, Ramit Kuthiala, husband of Judgment Debtor Nidhi Kuthiala, has filed objections under Orders 21 Rule 97-101 of Code of Civil Procedure against execution of judgment and decree dated 19.9.2019 passed by this High court in COMS No. 35 of 2018, titled Sandeep Sethi, vs. Nidhi Kuthiala.

2 Facts emerging from the record are that vide sale deed dated 7th August, 2012, Radha Krishan Kuthiala sold suit property to Nidhi Kuthiala wife of Ramit Kuthiala son of Shri Rajiv Kuthiala for consideration of Rs.2,40,00,000/- after receiving consideration through various cheques, detailed in sale deed, and property was transferred in favour of Nidhi Kuthiala to have and hold the suit property as an absolute owner thereof from the date of execution of sale deed along with all rights of easement, paths, passages,

liberties and advantages wheresoever appertaining or occupied or enjoyed with the suit property, and legal and physical possession of property was also handed over to Nidhi Kuthiala. It was mentioned in sale deed that there was one occupant/tenant Dr.I.N. Verma on the top floor of suit property and Nidhi Kuthiala was entitled to take rent from or to seek eviction of the said tenant.

3 The aforesaid sale deed was assailed by one Brig.S.C.Kuthiala by filing the Civil Suit No. 137 of 2012 titled as Brig.S.C. Kuthiala vs. Radha Krishan and another wherein Nidhi Kuthiala was defendant No.2. The said suit was withdrawn on 24.10.2017 after a compromise. As per compromise, an amount of Rs.40 lacs was paid by Nidhi Kuthiala to Brig. S.C. Kuthiala through Demand Draft No. 962147 and legal expenses of Rs.5 lacs were paid to learned counsel for plaintiff therein vide Demand Draft No. 962148 drawn on Union Bank of India.

4 Case of Decree Holder is that Nidhi Kuthiala was not having money to be paid to Brig. S.C. Kuthiala for settling the dispute of Civil Suit No. 137 of 2012 and, therefore, Decree Holder was approached for arranging the payment and suit property was agreed to be sold to Decree Holder for consideration of Rs.3 crores only with further agreement that Decree Holder had to pay Rs.1,50,00,000/- immediately, out of which Rs. 40 lacs and 5 lac were directly paid by Decree Holder through Drafts referred supra to Brig.S.C. Kuthiala and learned counsel of Brig.S.C. Kuthiala and thereafter, on very same day on 24.10.2017, when Civil Suit No. 137 of 2012 was dismissed as withdrawn in terms of compromise, an agreement was executed between Decree Holder and Judgment Debtor Nidhi Kuthiala for selling the suit property to Decree Holder for consideration of Rs.3 crore.

5 According to Decree Holder, Rs. 1,50,00,000/- was paid to Nidhi Kuthiala in following manner:-

(1) Rs. 10,000/- paid in cash on 7.9.2017.

(2) Rs. 9,40,000/- paid through RTGS vide UTR No. UBINH17250497333 dated 07.09.2017.

(3) Rs. 40,00,000/- paid to Brig. S.C. Kuthiala (Satish Kuthiala) vide D.D. No. 962147 issued by Union Bank of India.

(4) Rs.5,00,000/- paid to Sh.Dushyant Dhadwal, Advocate vice D.D. No. 962148 issued by Union Bank of India.

(5) Rs. 70,50,000/- paid through Cheuqe No. 166318 dated 27.10.2017 drawn on Union Bank of India.

(6) Rs.1,50,000/- paid through bank transfer vide UTR No.UBINN171426060 dated 10.11.2017.

(7) Rs.23,50,000/- paid vide cheque No.166322 dated 02.12.2017 drawn on Union Bank of India.

Total Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs only).

6 Remaining sale consideration of Rs.1,50,00,000/- was to be paid by Decree Holder-plaintiff to Nidhi Kuthiala defendant at the time of registration and execution of sale deed.

7 Claiming that Judgment Debtor-Defendant was avoiding execution of sale deed on one pretext or the other, on 24.10.2018, Decree Holder filed Civil Suit i.e. COMS No. 35 of 2018 for specific performance of aforesaid agreement for sale dated 24.10.2017.

8 In COMS No. 35 of 2018, a joint application OMP No. 406 of 2018, under Order 23 Rule 3 CPC was filed on 11th September, 2019 for placing on record the compromise and passing a decree in terms of compromise dated 04.09.2019 arrived at between the parties.

9 In furtherance thereto, after recording statements of parties a compromise decree was passed in terms of prayer made in joint application as per settlement between the parties.

10 In aforesaid compromise agreement dated 4th September, 2019, Judgment Debtor Nidhi Kuthiala had endorsed the execution of agreement dated 24.10.2017 to sell the suit property for consideration of Rs.3 crore and acknowledged the receipt of Rs.1,50,00,000/-. In terms of compromise, Nidhi Kuthiala had agreed to pay double amount of earnest money of Rs.1,50,00,000/-, i.e. Rs.3crore to Decree Holder within 180 calender days from the date of compromise with further condition that in case amount of Rs. 3 crores is not paid as agreed within stipulated period then she shall execute the sale deed of suit property in favour of Decree Holder in terms of agreement to sell dated 24.10.2017 and in such eventuality, balance consideration of Rs.1,50,00,000/- shall be paid by Decree Holder at the time of registration of sale deed and delivery of vacant peaceful possession on spot.

11 Time of 180 days stipulated in compromise was expiring on 4th March, 2020. On 3rd March, 2020, Nidhi Kuthiala filed an application OMP No. 133 of 2020 in COMS No. 35 of 2018 for extension of time to comply the compromise agreement dated 4.9.2019 along with communication dated 24.2.2020 sent to Decree Holder with request to extend the time to pay Rs.3 crore till 15th June, 2020. This application was listed in Court on 14.7.2020 on which date on request of learned counsel for Nidhi Kuthiala it was adjourned for 14th August, 2020 with direction to non-applicant/Decree Holder to file reply in meanwhile.

12 On 14.8.2020 further time was sought on behalf of Nidhi Kuthiala to arrange the money and on the basis of statement made by learned counsel for Decree Holder that damage was being caused by Judgment Debtor to the suit property, Nidhi Kuthiala was restrained from causing any damage to suit property in any manner.

13 After filing reply by Decree Holder, the application was listed on 15.9.2020, 22.9.2020, 6.10.2020 and 8.3.2021. In the meanwhile, on 26.9.2020, Decree Holder filed present Execution Petition No. 31 of 2020 and

the same was listed in Court on 6.10.2020 wherein notices were issued to Judgment Debtor on her two addresses i.e. at the address(es) of Shimla and Chandigarh. Judgment Debtor was personally served at her address of Chandigarh and notice on the address of Shimla, sent through registered post as well as through Process Serving Agency, was served upon her through her father-in-law Rajiv Kuthiala on 13.10.2020 and 17.10.2020 respectively who had received the notices by stating that they were living jointly in the family.

14 On 30.10.2020, Execution Petition No. 31 of 2020 and OMP No. 133 of 2020 filed in Civil Suit COMS No. 35 of 2018 for extension of time were listed in the Court. On that day, learned counsel, appearing for Judgment Debtor in OMP No. 133 of 2020, had appeared in both matters and the matters were adjourned for 1.12.2020 directing the Judgment Debtor to file reply/compliance affidavit on or before 24.11.2020 with further direction to Registry to accept the amount, if any, deposited by Nidhi Kuthiala/Judgment Debtor. Thereafter, on 1.12.2020, matter was not listed due to Covid restrictions. Judgment Debtor changed her counsel on 4.3.2021 and on his request, matter was listed on 8.3.2021.

15 By 08.03.2021, Nidhi Kuthiala could not pay entire amount as agreed in compromise dated 4.9.2019 but she had submitted that against said amount, a payment of Rs.25 lacs was acknowledged by Decree Holder and Rs.20 lacs was being deposited by her in Registry of Court.

16 Rs.20 lacs were deposited by Judgment Debtor in the Registry of Court on 24.3.2020. On 26.3.2021, Judgment Debtor undertook to deposit balance amount with claim that Rs.25 lacs have been directly paid to Decree Holder in October, 2020. On that day, case was adjourned permitting the Judgment Debtor to deposit the balance amount as Decree Holder had also consented to grant time. But it was directed on that day that failing in depositing the balance amount, Judgment Debtor shall remain present in Office of Sub Registrar concerned to execute the sale deed in favour of Decree

Holder on 20.4.2021 and case was ordered to be listed on 26.4.2021. Thereafter, Judgment Debtor deposited Rs.8 lacs and Rs.20 lacs in the Registry of this Court.

17 Case was listed on 27.4.2021. On that day, it was informed that Nidhi Kuthiala was tested positive for Corona virus in the month of April, 2021 and therefore, her entire family was isolated and she could not deposit the amount within extended time. On 23.03.2021, an application OMP No. 140 of 2021 was also filed by Judgment Debtor for placing on record Whatsapp chat to substantiate direct payment of Rs.25 lacs to the Decree Holder in October, 2020. On 24.4.2021, Decree Holder also filed an application OMP No 187 of 2021, seeking permission to deposit the Demand Draft with respect to sale consideration of amount along with copy of sale deed, receipt dated 19.4.2021 of payment of stamp duty of Rs.18 lacs, payment of Registration fee Rs.6,00,010/- and other documents including valuation report, revenue record required for adjudication of sale deed and also copy of Demand Draft dated 17.4.2021 in favour of Nidhi Kuthiala for Rs.1,47,00,000/- drawn at HDFC Bank Panchkula, Sector 11 Chandigarh, Panchkula. On 27.4.2021, three weeks' time to file reply to this application was also granted. Matter was adjourned for 28th May, 2021, but due to COVID matter was not listed on 28.5.2021.

18 In the meanwhile, applicant Ramit Kuthiala filed present application OMP No. 340 of 2021 as objections, on 27.5.2021. Thereafter, matter was taken up for consideration on 28th July, 2021.

19 Objections/OMP No. 340 of 2021 has been filed on various grounds including that Judgment Debtor has not approached the Court with clean hands for not disclosing entire factual position before the Court and is estopped from filing Execution Petition for his acts, deeds, conduct and acquiescence, with further claim that suit property was purchased by his

family by contributing amount from their sources to pay consideration amount to Radha Krishan Kuthiala and at that time, Nidhi Kuthiala, hardly of 30 years of age, was not having any income or funds of her own to purchase the property, and though suit property was purchased in her name but for all intends and purposes objector, husband of Nidhi Kuthiala, was owner of suit property and his wife Nidhi Kuthiala was merely an ostensible owner having no authority, either expressed or implied, to enter into agreement of sale or to sell the suit property and objector is in possession and is maintaining the suit property since its purchase till date by making payments of entire bills, dues, cesses, payments etc with respect to suit property without any assistance or contribution from Judgment Debtor Nidhi Kuthiala, and all these facts were well within knowledge of Decree Holder. Further that agreement to sell in reference in COMS No. 35 of 2018, alleged compromise therein during pendency of said suit and resultant judgment and decree dated 19.9.2019 were not in knowledge of objector whereas the suit for specific performance and judgment and decree obtained in favour of Decree Holder is an outcome of fraud and misrepresentation having been played upon the Court by concealing the factual position from the Court in a deceitful and mischievous manner and, therefore, it has been claimed that objector cannot be ousted from suit property in question being owner in possession thereof.

20 In objections, details of payment of consideration, made at the time of execution of sale deed in the name of Nidhi Kuthiala in the year 2012, for purchasing the suit property from Radha Krishan Kuthiala, regarding contribution of family members have been given by stating that Rs.14 lacs, 50 lacs, 15 lacs and 5 lacs were paid by grandfather of objector Gian Chand Kuthiala by way of cheques issued on different dates, Rs.14,50,000/- was paid by his mother Pratibha Kuthiala through cheque and Rs.61,50,000/- was paid in cash which was derived out of sale of property at Hoshiarpur belonging to grandfather of objector namely Gian Chand Kuthiala, and though balance

amount of consideration was paid by Judgment Debtor by making payment Rs.25, lacs, 20 lacs, 22,50,000/- and Rs.12,50,000/- through cheques issued on different dates but this payment by Judgment Debtor was not out of her earnings and savings but out of amount transferred to her account by objector from time to time and, thus, there was no contribution of Judgment Debtor towards the purchase of suit property. It has been claimed by objector that minimum cost of suit property is Rs.10,32,00,000/- as assessed by registered valuer whereas it has been agreed to be sold for Rs.3 crore which indicates that agreement executed between the parties was unconscionable, an outcome of fraud and misrepresentation and thus no legally executable decree could have been passed on the basis of the same.

21 It has been claimed by objector that he came to know about alleged agreement of sale, judgment and decree dated 19.9.2019 and present execution petition only on 20.5.2021 when the same were disclosed to him for the first time by Judgment Debtor and it was shock to him and thus, he immediately contacted the lawyer and filed objections but without desired and complete record because of situation prevailing on account of Covid-19 pandemic,.

22 It has been further submitted by learned counsel for objector that for determining whether Judgment Debtor Nidhi Kuthiala is ostensible or absolute owner of property issue is required to be framed and the said issue deserves to be decided after granting opportunity to parties to lead evidence.

23 In response to objection petition, it has been contended that objector has no legal right to file objection petition having no cause of action, locus standi or legal right in his favour to seek relief under Order 21 Rule 97 and Rule 101 CPC and claim of objector is barred by provisions of Prohibition of Benami Transaction Act, 1988, according to which, for sale deed executed in favour of Nidhi Kuthiala, suit property has to be presumed to have been purchased for her benefit unless the contrary is proved as provided in Section

3(2) (a) of said Act. It has been further contended that provisions of Benami Transaction Act, as in force at the time of execution and registration of sale deed dated 7.8.2012, shall be applicable in present case, which provides that purchase of property by any person in the name of his wife shall be presumed, unless contrary is proved, that said property had been purchased for benefit of wife.

24 According to Decree Holder, Judgment Debtor Nidhi Kuthiala, herself, handed over original sale deed to Decree Holder for perusal, which clearly reflected that Judgment Debtor was owner of suit property for all intends and purposes and was put in possession by previous owner by delivering the possession on spot to her and further that sale deed nowhere disclosed that sale consideration amount was paid by objector or Gian Chand or Smt. Pratibha. Further that Decree Holder visited the suit property along with Judgment Debtor and objector, and objector narrated and described the boundary of suit property and further enquiries were made from neighbours also. A rent petition for eviction of a portion of suit property in possession of tenant preferred by Judgment Debtor Nidhi Kuthiala was also provided by Judgment Debtor and objector, and in Civil Suit No. 137 of 2012 filed by Brig. S.C. Kuthiala, which was decided on 24.10.2017, Judgment Debtor Nidhi Kuthiala was defendant on the basis of her title along with previous owner Radha Krishan Kuthiala from whom property was purchased by Judgment Debtor Nidhi Kuthiala. Decree Holder after perusal of sale deed, rent petition, verification of facts on spot, perusing the facts of Civil Suit No. 137 of 2012 and verifying the revenue record, found that Judgment Debtor was lawful sole owner of suit property, and he purchased the suit property for a lawful consideration acting in good faith. After making all enquiries and investigations, with regard to title and possession of Judgment Debtor, mutation was also attested in favour of Judgment Debtor only and in revenue record, name of Judgment Debtor has been reflected as sole owner. In the

light of aforesaid facts, it has been contended that Judgment Debtor is not an ostensible owner and she had agreed to transfer the suit property to Decree Holder for consideration and if any arrangement was there between husband and wife, the same was in special knowledge of Judgment Debtor and her husband (Objector) which could not have been known by Decree Holder by any stretch of imagination who was an outsider.

25 It has been contended that Judgment Debtor and her husband (objector) live together in the same house and they have entered into a well planned conspiracy by suppressing material facts and manipulating the circumstances and present objection application/ petition has been preferred in order to harass the Decree Holder with ulterior motive and false assertion, as earlier Judgment Debtor, wife of applicant/objector, kept on delaying the matter by giving false undertaking before the Court by submitting that Judgment Debtor would be either depositing the entire amount on or before 16.4.2021 or shall execute and register the sale deed on 20.4.2021 and now in furtherance to conspiracy, objector and Judgment Debtor, who are hand in glove, are trying to linger on the proceedings and manipulate the circumstances. It has also been contended that objector and Judgment Debtor are residing together under one roof and therefore, plea of Objector that he came to know about the present litigation only on 20.5.2021 is also a figment of imagination. Whereas, Judgment Debtor had been appearing in Court and seeking adjournments by making false statements, despite the fact that petitioner has paid half of consideration amount, i.e. Rs.1,50,00,000/- by way of bank transactions except Rs.10,000/- which was paid in cash and out of remaining, an amount of Rs.45 lacs, i.e. Rs. 40 lacs plus Rs. 5 lacs, was paid by Decree Holder on request of Judgment Debtor for settlement of Civil Suit No. 137 of 2012 and this payment was made through Bank Drafts No. 962147 and 962148, referred supra.

26 It is the case of Decree Holder that at the time of adjudication of Civil Suit No. 137 of 2012, Judgment Debtor approached Decree Holder for financial help and thereafter arrangement for amount was made during meetings and negotiations among the Decree Holder, Judgment Debtor and applicant/Objector and Judgment Debtor in presence of her husband (Objector) offered the Decree Holder to sell the entire property as mentioned in decree and Execution Petition. According to Decree Holder, all three parties i.e. Decree Holder, Judgment Debtor and Objector had agreed for selling and purchasing the suit property for Rs.3 crore only and on request of Judgment Debtor, Decree Holder had paid Rs.40 lacs and Rs.5 lacs immediately. It has been submitted on behalf of Decree Holder that Agreement to Sell was executed in presence of witnesses Manav Mehra and Gurdial Singh and as a matter of fact, Manav Mehra is brother-in-law of Objector, and Rs.10,000/- was paid in cash whereas Rs.1,49,90,000/- were paid through Bank Drafts, bank transactions and cheques etc. It has been further submitted that Decree Holder had already spent more than Rs.24 lacs on account of Stamp Duty, Registration Charges and had appeared in the Office of Sub Registrar Shimla on 20.4.2021 for the purpose of execution of sale deed in compliance of order passed by this Court. It has been further submitted on behalf of Decree Holder that Judgment Debtor was delaying the execution proceedings on one pretext or the other by assuring payment of amount, but instead thereof, Judgment Debtor started dismantling the building and Decree Holder was constrained to obtain injunction order against her to stop the work. It has been submitted that it is the case of Objector that Nidhi Kuthiala is not having any independent source of income but he is not explaining that from where and how Rs.45 lacs to compromise the Civil Suit No. 137 of 2012 were arranged by Judgment Debtor.

27 Separate reply has been filed by Judgment Debtor wherein she has asserted that she was absolute owner in possession of suit property and

funding by family members to purchase the suit property did not create any embargo on independent right of Judgment Debtor to dispose of property in the manner she considered best. It has been denied that she was merely an ostensible owner and had no authority to enter into any Agreement to Sell or sell the land/suit property. It is also denied that decree sought to be executed is an outcome of collusion between Judgment Debtor and Decree Holder or they have played a fraud upon the objector or Court. It has been claimed that immediately after execution of sale deed dated 7.8.2012 Judgment Debtor had acquired exclusive right on suit property and building standing thereon.

28 To substantiate right to file objections and to dismiss the execution petition on the ground taken in objections, learned counsel for objector has placed reliance on ***Mt. Hakiman vs. Mt. Badr-un-nisa and another,*** reported in ***AIR 1934 Labore 658; Laxman Sakharam Salvi vs. Balkrishna Balvant Ghatage,*** reported in ***AIR 1995 Bombay 190; Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and another,*** reported in ***(1997)3 SCC 694; Shreenath and another vs. Rajesh and others,*** reported in ***(1998)4 SCC 543; N.S.S. Narayana Sarma and others vs. Goldstone Exports (P) Ltd. and others,*** reported in ***(2002)1 SCC 662; Tanzeem-e-Sufia vs. Bibi Haliman and others,*** reported in ***AIR 2002 SC 3083; Ashan Devi and another vs. Phulwasi Devi and others,*** reported in ***(2003)12 SCC 219; Tanzeem-e-Sufia vs. Bibi Haliman and others,*** reported in ***AIR 2002 SC 3083;*** and ***Har Vilas vs. Mahendra Nath and others,*** reported in ***(2011)15 SCC 377.***

29 To substantiate his plea, learned counsel for Decree Holder, has referred pronoucements in cases ***Vaddeboyina Tulasamma and others vs. Vaddeboyina Sesha Raddi (dead) by LRs,*** reported in ***AIR 1977 SC 1944; Bhanwari Lal vs. Satyanarain and another,*** reported in ***(1995)1 SCC 6; Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and another,*** reported in ***(1997)3 SCC 694***; ***Silverline Forum Pvt. Ltd vs. Rajiv Trust***

and another, reported in ***AIR 1998 SC 1754; Gangamma etc. Vs. G. Nagarathnamma and others*** reported in ***AIR 2009 SC 2561;*** and ***Debika Chakraborty vs. Pradip Chakraborty,*** reported in ***AIR 2017 Calcutta 11.***

30 Undisputedly, Judgment Debtor acquired title on suit property on the basis of sale deed dated 7.8.2012. Certified copy of sale deed is available on record of COMS No. 35 of 2018 titled Sandeep Sethi vs. Nidhi Kuthiala. In the sale deed, it has been recorded that Radha Krishan Kuthiala is seller and Nidhi Kuthiala is purchaser. It is stated in it that total consideration of Rs.2,40,00,000/- was also paid to seller by purchaser by way of Account Payee cheques referred in sale deed but no where it has been reflected that Objector or Gian Chand or Pratibha or any other person made this payment on behalf of buyer. Sale deed depicts that purchaser paid the sale consideration and it is recorded in sale deed that legal and physical possession of property was handed over by seller to purchaser. Nakal Jamabandi for the year 2006-2007, available on record of suit, also indicates that suit property referred in sale deed was in exclusive ownership of Radha Krishan Kuthiala as per mutation No. 375 and thereafter, vide sale/Conveyance No. 401 of 2012, dated 7.8.2012 ownership of the suit property was transferred by Radha Krishan Kuthiala to Nidhi Kuthiala. The aforesaid document nowhere indicates that Nidhi Kuthiala was limited owner or ostensible owner or other family members including the Objector had any right or lien over the suit property, purchased in the name of Nidhi Kuthiala.

31 Undoubtedly, a transaction or an arrangement; where a property is transferred to or is held by a person and consideration for such property has been provided or paid by another person and property is held for immediate or future benefit, direct or indirect, of the person who has provided the consideration; under the provisions of Prohibition of Benami Property Transaction Act, 1988 has been terms as Benami Transaction; however, any property; purchased by the person in the name of his spouse or in the name

of child of such individual by providing consideration for such property out of known sources of that person; shall not be considered as a Benami transaction, and such purchase of property, unless contrary is proved, shall be presumed to have been purchased for the benefit of wife/child.

32 In present case, even if it is considered that on 7.8.2012 property in question was purchased, by paying consideration by family members or husband, it shall not be considered as Benami transaction but a transaction made for benefit of Judgment Debtor. Otherwise also, a woman under provisions of Section 14 of Hindu Succession Act is an absolute owner of property devolved upon her in any manner and has a right to enjoy, utilize, dispose of or transfer etc. in any manner.

33 Copy of decision dated 24.10.2017 passed in Civil Suit No. 137 of 2012 titled Brig. S.C. Kuthiala vs. Radha Krishan Kuthiala and another has been placed on record along with statements of parties whereby suit was dismissed as withdrawn in terms of compromise against payment made of Rs.40 lacs to plaintiff through Demand Draft No.37962147 drawn at Union Bank of India. It is the same demand draft which has been claimed by Decree Holder to have been paid by him on request of Judgment Debtor for arranging the amount for compromising the Civil Suit No. 137 of 2012. Though such claim of Decree Holder has been denied by Objector but neither in objections nor in rejoinder, Objector has disclosed or placed on record the source of Rs.40 lacs paid to Brig. S.C. Kuthiala and Rs.5 lacs paid as legal expenses to Counsel.

34 Agreement to Sell executed between Decree Holder and Judgment Debtor has also been placed on record in COMS No. 35 of 2018 wherein details of amount paid by Decree Holder to Judgment Debtor have been narrated, and as per agreement, total sale consideration was Rs.3 crore and out of that, Rs.1,50,00,000/- was paid by Decree Holder and remaining Rs.1,50,00,000/- was to be paid at the time of execution or registration of

transfer papers of sale deed. It was provided that seller can back out from deal by paying double amount of earnest money, i.e. Rs.3 crore.

35 Decree Holder, on the basis of aforesaid Agreement to Sell, filed the Civil Suit for specific performance wherein in terms of agreement, matter was compromised and instead of executing the sale deed, Judgment Debtor preferred to back out from Agreement to Sell and chose to pay double amount of earnest money to Decree Holder within 180 days. It was agreed that in case Rs.3 crore was not paid to Decree Holder by Judgment Debtor, then Judgment Debtor shall register the sale deed of property in favour of Decree Holder in terms of Agreement to Sell dated 24.10.2017 and Decree Holder shall pay remaining Rs.1,50,00,000/- to Judgment Debtor at the time to registration of sale deed.

36 The aforesaid compromise decree was passed on 19th September, 2019. As per compromise, 180 days expired on 4th March, 2020. But by that time, Judgment Debtor did not pay Rs.3 crore to Decree Holder and ultimately, Decree Holder preferred present Execution Petition on 23.9.2020.

37 As recorded supra, Judgment Debtor was always seeking time to make payment of Rs.3 crore to Decree Holder instead of agreeing to execute the sale deed of property in favour of Decree Holder. Had there been connivance between Decree Holder and Judgment Debtor, Judgment Debtor would have agreed for execution of sale deed in favour of Decree Holder either on first day or any subsequent date but instead thereof, she continuously tried to buy time and lingering on Execution Petition on one pretext or other and also deposited Rs.20 lacs and 10 lacs in the Registry of this Court with further assurance that she would be arranging balance amount by next date for making the payment thereof to Decree Holder. She also claimed payment of Rs.25 lacs directly to Decree Holder. She was directed to appear in Court for execution of sale deed but she did not appear and agree for executing sale deed and preferred to seek time to pay. Therefore, on the basis of material on

record, for conduct of Judgment Debtor during proceedings of Execution Petition or otherwise, it does not appear that she hatched a conspiracy to dispose of the property in favour of Decree Holder on account of collusion.

38 It is claim of the objector that Judgment Debtor did not disclose about entering into an Agreement to Sell, filing of Civil Suit, passing of judgment therein as well as filing of execution petition, and he came to know about it only on 20.5.2021.

39 Record reveals that notice issued to Judgment Debtor in Execution Petition directing the Judgment Debtor to appear in Court on 30th October, 2020 was served upon her at two addresses, i.e.on Mani Majra Chandigarh as well as on M/s Hakam Mal Tani Mal, 36, Lower Bazar, Shimla H.P. Notice at Mani Majra was received by Judgment Debtor herself on 14.10.2020, whereas notice issued at address of Lower Bazar, Shimla, through Registered AD as well as Process Serving Agency, were received by Rajeev Kuthiala, who is father of objector and father-in-law of Judgment Debtor. Notice through Process Server was served on 17.10.2020. It was received under signatures by Rajeev Kuthiala on behalf of Nidhi Kuthiala and affidavit of Process Server to that effect is also on back side of office copy of summons. Notice, through Registered AD, issued to Judgment Debtor on the address of Lower Bazar was also received by Rajeev Kuthiala on 13.10.2020. Claim of objector that he was not knowing about execution petition appears to be a false, a concocted story for justifying filing the objections after a considerable long time of service of summons. Therefore, plea of objector that Nidhi Kuthiala did not disclose about Agreement to Sell, Civil Suit, Judgment and Execution Petition, is not sustainable as father of Objector had acquired the knowledge about Execution Petition in October, 2020. It is not a case of Objector that his father is also acting in connivance with Judgment Debtor and Decree Holder. It appears from the conduct of Judgment Debtor that in suit filed for specific performance of the agreement to sell the suit property,

she tried to save the property by entering into compromise with assurance to pay double of earnest money by backing out from Agreement to Sell as permissible under agreement. During Execution Petition also, she took time to pay and deposited Rs.30 lacs in the Registry of the High Court instead of executing sale deed and she did not attend the Office of Sub Registrar to execute the sale deed and contested the Execution Petition and tried to buy time for making payment and, therefore, it is not apparent on record that she was acting in connivance with Decree Holder.

40 From documents on record and also keeping in view the provisions of law, it is apparent on record that Judgment Debtor was absolute owner of suit property and was having every right to sell it. Family arrangements inter se the family members as claimed in these objections were never brought on record and there is nothing on record to justify the claim of Objector that Judgment Debtor was not an exclusive owner of property but was ostensible owner and it was and is Objector who was and is in possession of property. Being husband, he may be residing with Judgment Debtor but his possession over the property cannot be considered in exclusion of possession of Judgment Debtor Nidhi Kuthiala entitling him to file objections against the execution of decree passed in favour of Decree Holder. There is no material on record to justify the claim of Objector to frame issues and to allow the parties to lead evidence in support of objections or in response thereto. The material on record is sufficient to consider and decide the objections filed by Objector.

In view of aforesaid discussion I do not find any merit in objections preferred by husband of Judgment Debtor. Accordingly objections are rejected and application is dismissed and disposed of.

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

Between:-

GULZARI LAL S/O SH. RATTAN SINGH, RESIDENT OF VILLAGE AND PO BADOH, TEHSIL AMB, DISTRICT UNA, H.P., PRESENTLY WORKING AS BELDAR (CLASS IV) IN THE OFFICE OF EXECUTIVE ENGINEER, I &PH FLOOD PROTECTION, DIVISION GAGRET, DISTRICT UNA.

....PETITIONER

(SH. SUBHASH SHARMA, ADVOCATE)

AND

1. STATE OF HP THROUGH SECRETARY (I&PH), GOVERNMENT OF HP, SHIMLA.

2. ENGINEER IN CHIEF, I&PH US, CLUB, SHIMLA.

3. EXECUTIVE ENGINEER, I&PH FLOOD PROTECTION, DIVISION GAGRET, DISTRICT UNA, HP.

....RESPONDENTS

(SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.2045 of 2020
Reserved on:27.10.2022
Date of decision:01.11.2022

Constitution of India, 1950 - Article 226 - Completion of 240 days of daily wage employment- Automatic conformant of work charge status- Held that the petitioner has rendered continuous daily wage service with 240 days in a calendar year since 1999 and was regularized in 2010. Thus, petitioner will be entitled for work charge status on completion of eight years of continuous daily wage service w.e.f. 1999. The action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8

years' continuous service as daily wager is clearly arbitrary and discriminatory hence cannot be sustained.(Para 8 & 12)

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

O R D E R

By way of instant petition, petitioner has prayed for the following substantive relief:-

> *"i). To quash and set aside Annexure A-6 dated 24.12.2016 passed by respondent department.*
> *ii) Respondent department may kindly be directed to grant work charge status to the applicant on completion of 8 years of service, i.e. 1.1.2003.*
> *iii) That the respondent department may further kindly be directed to grant all consequential benefits to the applicant."*

2. The claim of petitioner is for grant of work charge status w.e.f. 1.1.2003 by counting his service to be continuous from 1995.

3. Respondents are contesting the claim of petitioner on the grounds that from 1995 till 1998, petitioner had not completed 240 days in any of the calendar years. It was w.e.f. 1999 that petitioner could complete 240 days of his daily wage employment. Thus, petitioner completed eight years of continuous service as daily wager on 31.12.2006 but since the State Government had abolished the work charge status for Class-IV employees w.e.f. 12.12.2005, petitioner was not entitled for automatic conformant of work charge status even on completion of eight years. Petitioner became entitled for regularization in 2010 and was accordingly regularized from due date.

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

5. The instant litigation has a chequered history. The services of petitioner were disengaged in 1998. Petitioner approached the erstwhile State Administrative Tribunal by way of O.A. No. 2304 of 1998. The said application was disposed of by the erstwhile Tribunal vide order dated 4.6.1999 in following terms:-

> *"The learned Additional Advocate General has represented that the Department is ready to engage the applicant as daily-waged Beldar in another Section which is situated at a distance of 30 kms from the present place where the applicant was working. The aforesaid officer is accepted by the learned counsel for the applicant and therefore, in view of the aforesaid offer given by the learned Additional Advocate General, the applicant be re-engaged without any undue delay.*
>
> *With these observations, the present application stands disposed of. However, the applicant shall not be entitled for back wages but the period of absence shall be treated for the purpose of seniority."*

6. After his reengagement, petitioner once again approached this Court by way of CWP No. 4527 of 2012, seeking work charge status w.e.f. 1.1.2003 on the basis of his daily wage service, rendered by him since 1995 and a Coordinate Bench of this Court vide judgment dated 16.10.2014, passed in CWP No. 4527 of 2012, directed the respondents to consider the case of petitioner. Respondents rejected the case of petitioner vide office order dated 25.4.2015. Petitioner then approached the erstwhile State Administrative Tribunal by filing O.A. No. 1387 of 2015, which was disposed of vide order dated 27.2.2016 in following terms:-

> *"The present original application, therefore, is allowed with the following directions:-*
>
> *i) Consequently, the respondents are directed to consider the case of the applicant for granting him work charge status on completion of 8 years service, that is, with effect from 1st January, 2003.*
>
> *ii) The respondents are further directed to grant all consequential benefits to the applicant within a period of one month on production of certified copy of this order."*

7. The aforesaid order passed by the learned erstwhile Tribunal was assailed by respondents by way of CWP No. 3010 of 2016 but the same was dismissed by a Division Bench of this Court on 8.12.2016. Respondent No.3 again rejected the case of petitioner vide office order dated 24.12.2016, which is the subject matter of present petition.

8. The facts of the case now are not in dispute. Petitioner has rendered continuous daily wage service with 240 days in a calendar year since 1999 and was regularized in 2010. Thus, petitioner will be entitled for work charge status on completion of eight years of continuous daily wage service w.e.f. 1999. As per admission made by respondent No.3 in impugned order dated 24.12.2016, petitioner had completed eight years of continuous service as on 31.12.2006. In this view of the matter, petitioner became entitled for grant of work charge status w.e.f. 1.1.2007.

9. The petitioner has been denied the benefit of work charge status even from 1.1.2007 on the premise that the State Government had abolished the work charge establishment w.e.f. 12.12.2005 and in absence of availability of work charge establishment, on completion of eight years of daily wage continuous service of petitioner, he could not be granted such benefits.

10. The aforesaid reasons assigned by respondents cannot be countenanced. Judging the ground of rejection against the contention raised on behalf of the petitioner, this Court is of considered view that the impugned rejection order, Annexure P-6, cannot be sustained in view of the judgment passed by a Division Bench of this Court in CWP No. 3111 of 2016, titled ***State of H.P. & Others*** vs. ***Ashwani Kumar***, in which it has been held as under:

> *"6. Having carefully perused material available on record, especially judgment rendered by this Court in Ravi Kumar v. State of H.P. and Ors., as referred herein above, which has been further upheld by the Hon'ble Apex Court in Special Leave to Appeal (C) No. 33570/2010 titled State of HP and Ors. v. Pritam Singh and*

connected matters, this Court has no hesitation to conclude that there is no error in the finding recorded by the learned Tribunal that work charge establishment is not a pre-requisite for conferment of work charge status. The Division Bench of this Court while rendering its decision in CWP No. 2735 of 2010, titled Rakesh Kumar decided on 28.7.2010, has held that regularization has no concern with the conferment of work charge status after lapse of time, rather Court in aforesaid judgment has categorically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV worker (Beldars) and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged category and as such, there is an obligation cast upon the department to consider the case of daily waged workman for conferment of daily work charge status, being on a work charged establishment on completion of required number of years in terms of the policy. In the aforesaid judgment, it has been specifically held that benefits which accrued on workers as per policy are required to be conferred by the department."

11. Recently in ***State of Himachal Pradesh*** vs. ***Smt. Reema Devi***, LPA No. 161 of 2021, decided on 23.05.2022, a Division Bench of this Court following Ashwani Kumar's case (supra) held as under, in the case where also the respondent department was involved: -

"11. Now adverting to the facts of the instant case, the grant of work charge status to late Shri Het Ram has been denied on the ground that Himachal Pradesh Forests Department had no work charge establishment. In Ashwani Kumar's case (supra) also right of the petitioner therein for grant of work charge status was considered when the HPPWD had ceased to be a work charge establishment.

12. This Court while delivering judgment in Ashwani Kumar's case (supra) had, thus, decided the principle that work charge establishment was not a prerequisite for conferment of work charge status and thus, would not confine only to the petitioner in the said case. In view of this, the contention raised on behalf of the appellants that the judgment in Ashwani Kumar's case (supra) was a judgment in personam, cannot be sustained."

12. Thus, the action of the respondents in denying the claim of the petitioner for grant of work charge status after completion of 8 years' continuous service as daily wager is clearly arbitrary and discriminatory hence cannot be sustained.

13. In view of the above discussion, the petition is allowed and the impugned office order dated 24.12.2016, Annexure P-6, is quashed and set-aside. The respondents are directed to grant work charge status to the petitioner w.e.f. 1.1.2007 till the date of his regularization. Needless to say that the consequential benefits shall also follow, subject however, to the condition that petitioner shall be entitled for consequential financial benefits, if any, only for a period of three years immediately preceding the date of filing of petition.

14. The petition is accordingly disposed of, so also the pending application(s), if any.

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

Anil Kumar and others ....Appellants

Versus

Jyoti and others ...Respondents

For the appellants: Mr. Ashok Kumar Thakur, Advocate.

For the respondents: Mr. Anup Rattan, Advocate, for respondents No. 1 to 3.

Mr. Anuj Gupta, Advocate, for respondent No.6.

Mr. Ashwani Sharma, Senior Advocate, with Mr. Ishan Sharma, Advocate, for respondent No.7.

FAO No.242 of 2018
Decided on: 25.11. 2022

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT granting compensation of Rs.10,29,700/- alongwith interest @ 9% pa- liability was fastened upon transferee and driver of vehicle- Held- There can be transfer of title by payment of consideration and delivery of the vehicle, but owner is the person whose name is reflected in records of the registering authority- so long as the name of registered owner continues in the certificate of registration, he would be liable to third party- insured registered owner and insurer cannot escape liability to pay compensation- award to the extent it places liability upon the appellants to pay compensation amount, is quashed and set aside- liability to be borne by insurer- appeal allowed. (Para 4)

Cases referred:

Balwant Singh & Sons Vs. National Insurance Company Ltd. & another (2020) 11 SCC 745;

Deepak Parkash Vs Sunil Kumar 2014(2) Shim. LC 822;

Narbada (Smt.) and others Vs Smt. Rajni Kanta and others 2004 (2) Shim. L.C. 478;

National Insurance Co. Ltd. Vs. Ishroo Devi and others 1999 ACJ 615;

Naveen Kumar Vs. Vijay Kumar and others (2018) 3 SCC 1;

Prakash Chand Daga Vs. Saveta Sharma and others (2019) 2 SCC 747;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

In a motor accident claim case involving transfer of the vehicle, the correctness of the liability fastened upon the transferee and driver of the vehicle to satisfy the compensation amount awarded by the learned Motor Accident Claims Tribunal (learned Tribunal in short) is in question in this appeal.

2. One Sh. Yugal Kishore died in a motor accident on 04.08.2010. His wife, two minor children and parents preferred a claim petition under Section 166 of the Motor Vehicles Act (Act hereinafter). The vehicle in question was registered in the name of Smt. Rajni Gupta (respondent No.6). The insurance policy of the vehicle on the date of accident was also in the name of registered owner of the vehicle. The vehicle, however, was transferred in the name of Anil Kumar (appellant No.1). The transferee of the vehicle had admitted purchasing the vehicle from its registered owner (transferor). The facts regarding transfer of vehicle were admittedly not disclosed to the insurer of the vehicle (respondent No.7). The learned Tribunal vide its award dated 15.12.2017, allowed compensation of Rs.10,29,700/- alongwith interest @ 9 % per annum from the date of filing of the petition till its realization in favour of the claimants. The liability to satisfy the award was fastened upon Sh. Anil Kumar (transferee of the vehicle) and Sh. Kewal Krishan (driver of the vehicle having been held liable to satisfy the award, the transferee and the driver of the vehicle have preferred the instant appeal.

3. Contentions

3(i). Learned counsel for the appellants submitted that the vehicle in question was registered in the name of respondent No.6 (Smt. Rajni Gupta). The insurance policy of the vehicle was also standing in the name of its

registered owner Smt. Rajni Gupta. The insurer was respondent No.7-Company. The accident involving the vehicle in question that resulted in death of Sh. Yugal Kishore, had occurred on 04.08.2010. The insurance policy was alive on that date. There was privity of contract between the registered owner of the vehicle and the Insurance Company i.e. respondent No.7 on the date of the accident. The liability to satisfy the award, therefore was incorrectly fastened upon the appellants. It should have been borne by the insurer of the vehicle. In support of such contentions, reliance was placed upon ***(2020) 11 SCC 745*** titled ***Balwant Singh and Sons Vs. National Insurance Company Limited and another.***

3(ii) Learned counsel for respondent No.6, the registered owner and transferor of the vehicle while supplementing the submissions of the appellants, contended that the learned Tribunal had not properly scrutinized the documents while fastening the liability to pay the compensation amount upon the appellants. The finding that there was no privity of contract between the owner of the vehicle and the Insurance Company, was incorrect and *de hors* the documents placed on record. On the date of accident, the registered owner of the vehicle was respondent No.6. The insurance policy of the vehicle was standing in the name of respondent No.6 on the date of accident. Hence, it was respondent No.6 and consequently the Insurance Company (respondent No.7), which should have borne the liability to pay the compensation amount.

3(iii) Learned senior counsel for respondent No.7 (Insurer) strenuously defended the impugned award. Referring to various documents placed on record including the registration certificate of the vehicle in question, the insurance policy and the statement of appellant No.1 (transferee of the vehicle), it was contended that the insurance policy was though in the name of respondent No.6, but the address given therein was that of appellant No.1. That appellant No.1, while appearing in the witness-box as RW-1, had admitted having purchased the vehicle from its registered owner i.e.

respondent No.6 in the year 2002. No information w.r.t. purchase of the vehicle was imparted to the Insurance Company either by the transferor (respondent No.6) or by the transferee (appellant No.1) of the vehicle. The accident occurred eight years after the alleged transfer of the vehicle. In the given facts, the Insurance Company cannot be held liable to satisfy the awarded compensation amount. It was also contended that respondent No.6 (registered owner/transferor of the vehicle) had been proceeded ex-parte before the learned Tribunal. The transferee had also chosen not to file separate reply to the claim petition. He had adopted the reply filed by appellant No.2 i.e. driver. The statement given by appellant No.1 (transferee) as RW-1 was beyond the scope of pleadings and as such could not be looked into. Reliance in this regard was placed upon ***2014(2) Shim. LC 822,*** titled ***Deepak Parkash Vs Sunil Kumar***. Learned Senior counsel also submitted that the judgment of the Hon'ble Apex Court in *Balwant Singh case (supra)* was in a different factual scenario, where policy of insurance was issued by the insurer in the name of transferor, but it reflected the name of transferee as well. The said judgment, which originated from a decision of National Consumer Disputes Redressal, will not have any applicability to the instant case which arises from an award passed by the Motor Accident Claims Tribunal under the provisions of the Motor Vehicles Act. Referring to ***2004 (2) Shim. L.C. 478,*** titled ***Narbada (Smt.) and others Vs Smt. Rajni Kanta and others*** and ***Pushpa (Smt.) and others Vs. Shakuntla and others*** and ***1999 ACJ 615,*** titled ***National Insurance Co. Ltd. Vs. Ishroo Devi and others,*** it was submitted that liability to satisfy the award was justly fixed upon the appellants. For the fault of transferor and transferee of the vehicle in not intimating the fact of transfer of the vehicle to Insurance Company, it cannot be held liable to pay the compensation amount to the claimants.

4. Observations

Having heard learned counsel for the parties on both sides and on going through the record, I am of the considered view that this appeal deserves to be allowed for the following reasons: -

4(i) The vehicle in question was a Maruti Van bearing No. DL-4CN-1782. It was registered in the name of Smt. Rajni Gupta (respondent No.6) on 23.07.2000. The registration certificate of the vehicle is Ex.R-1. Insurance policy of the vehicle is also on record as Ex.RX. The period of insurance commenced from 07.09.2009. The insurance policy was valid till 06.09.2010. The insurance policy was in the name of respondent No.6 Smt. Rajni Gupta, c/o Anil Kumar. It is not in dispute that the accident occurred on 04.08.2010 i.e. during subsistence of the insurance policy (Ex.RX). It is also not in dispute that registered owner of the vehicle on the date of accident was the insured i.e. Smt. Rajni Gupta (respondent No.6).

4(ii) The Hon'ble Apex Court in (**2018) 3 SCC 1, titled Naveen Kumar Vs. Vijay Kumar and others,** was considering a situation where the registered owner had purported to transfer the vehicle but continued to be reflected in the record of registering authority as owner of the vehicle. The Apex Court considered the definition of "Owner" in Section 2(30) of the 1988 Act and in Section 2(19) of the 1939 Act as under: -

> "6 *The expression 'owner' is defined in Section 2(30) of the Act, 1988, thus:*
>
> *"2(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."*
>
> *The person in whose name a motor vehicle stands registered is the owner of the vehicle for the purposes of the Act. The use of the expression 'means' is a clear indication of the position that it is the registered owner who Parliament has regarded as the owner of*

the vehicle. In the earlier Act of 1939, the expression 'owner' was defined in Section 2(19) as follows:

> *"2. (19) 'owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, the person in possession of the vehicle under that agreement."*

Comparing the definition of 'owner' as given in both the Acts, it was held that under the 1988 Act, the owner of the vehicle would be the person in whose name the motor vehicle stands registered. Para-7 of the judgment reads as follows:-

> *"7. Evidently, Parliament while enacting the Motor Vehicles Act, 1988 made a specific change by recasting the earlier definition. Section 2(19) of the earlier Act stipulated that where a person in possession of a motor vehicle is a minor the guardian of the minor would be the owner and where the motor vehicle was subject to a hire purchase agreement, the person in possession of the vehicle under the agreement would be the owner. The Act of 1988 has provided in the first part of Section 2(30) that the owner would be the person in whose name the motor vehicle stands registered. Where such a person is a minor the guardian of the minor would be the owner. In relation to a motor vehicle which is the subject of an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement would be the owner. The latter part of the definition is in the nature of an exception which applies where the motor vehicle is the subject of a hire purchase agreement or of an agreement of lease or hypothecation. Otherwise the definition stipulates that for the purposes of the Act, the person in whose name the motor vehicle stands registered is treated as the owner."*

Section 50 of the Motor Vehicles Act, which deals with the procedure for transfer of the ownership was also noticed in the judgment.

After adverting to its several previous authorities on the subject, the Hon'ble Supreme Court held that the principle underlying the provisions of Section 2(30) is that the victim of a motor accident or in the case of death, the

legal heirs of the deceased should not be left in the state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. Failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. There can be transfer of title by payment of consideration of delivery of the vehicle, but for the purposes of the Act, the person whose name is reflected in the records of the registering authority, is the owner. The owner within the meaning of Section 2(30) is liable to compensate. Para 13 and 14 of the judgment relevant to the context reads as under:-

> *"13 The consistent thread of reasoning which emerges from the above decisions is that in view of the definition of the expression 'owner' in Section 2(30), it is the person in whose name the motor vehicle stands registered who, for the purposes of the Act, would be treated as the 'owner'. However, where a person is a minor, the guardian of the minor would be treated as the owner. Where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement is treated as the owner. In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the registering authority as the owner of the vehicle, he would not stand absolved of liability. Parliament has consciously introduced the definition of the expression 'owner' in Section 2(30), making a departure from the provisions of Section 2(19) in the earlier Act of 1939. The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. In the present case, the First respondent was the 'owner' of the vehicle involved in the accident within the*

meaning of Section 2(30). The liability to pay compensation stands fastened upon him. Admittedly, the vehicle was uninsured. The High Court has proceeded upon a misconstruction of the judgments of this Court in Reshma and Purnya Kala Devi.

14. The submission of the Petitioner is that a failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. In Dr T V Jose, this Court observed that there can be transfer of title by payment of consideration and delivery of the car. But for the purposes of the Act, the person whose name is reflected in the records of the registering authority is the owner. The owner within the meaning of Section 2(30) is liable to compensate. The mandate of the law must be fulfilled."

To the similar effect is the judgment in ***(2019) 2 SCC 747,*** titled ***Prakash Chand Daga Vs. Saveta Sharma and others***. The law relating to the liability of registered owner/transferee of the vehicle was summarized is as under:-

"9. The law is thus well settled and can be summarized:-

"4……..Even though in law there would be a transfer of ownership of the vehicle, that, by itself, would not absolve the party, in whose name the vehicle stands in RTO records, from liability to a third person … … … Merely because the vehicle was transferred does not mean that such registered owner stands absolved of his liability to a third person. So long as his name continues in RTO records, he remains liable to a third person."

In ***(2020) 11 SCC 741,*** **titled *Balwant Singh and Sons Vs. National Insurance Company Limited and another***, provisions of the Motor Vehicles Act were under consideration. Taking note of various precedents in time line including the above referred judgments in *Prakash Chand Daga and Naveen Kumar cases* (*supra*), it was held that so long as the name of the registered owner continues in the certificate of registration in the records of the RTO, that person as an owner would continue to be liable to a third party,

under Chapter XI of the Act. It would be appropriate to extract the relevant para from the judgment hereinafter: -

> "*19. The principle that emerges from the precedents of this Court is that even though in law there would be a transfer of ownership of the vehicle, that by itself would not absolve the person in whose name the vehicle stands in the registration certificate, from liability to a third party. So long as the name of the registered owner continues in the certificate of registration in the records of the RTO, that person as an owner would continue to be liable to a third party under Chapter XI of the Motor Vehicles Act, 1986. The above decisions, therefore, deal with the obligation of the registered owner to meet third party claims."*

4(iii) It is not in dispute that the vehicle in question was sold by respondent No.6 to appellant No.1. The exact date of such sale cannot be discerned from the record. Respondent No.6 was proceeded ex-parte whereas appellant No.1 adopted the reply filed by the driver of the vehicle. While appearing as RW-1, the appellant No.1 stated having purchased the vehicle from respondent No.6 in the year 2002. However, no such pleading or document to this effect is available on record.

4(iv) The contention of insurer is that in view of the statement of RW-1, it has to be considered that the vehicle was transferred by respondent No.6 in favour of appellant No.1 prior to coming into force of insurance policy (Ex.RX). There is no document to establish this assertion. No concrete evidence to this effect is available on record. Insurance policies for the period prior to 07.09.2009 are also not on record. In the reply, this plea has not been taken by the insurance company (respondent No.7). The stand there is that there is no privity of contract between the (appellant No.1) transferee and the Insurance Company. In Balwant Singh's case, supra, premium was accepted by the insurer from the transferee and policy document was issued to the transferee. If the contention of the insurer is accepted in the present case, the question then arises as to why the Insurance Company accepted the premium

in the name of registered owner of the vehicle, but with a different address given that of transferee. It is a fact that the vehicle was insured in the name of Smt. Rajni Gupta. The insurance policy was issued in the name of registered owner of the vehicle (respondent No.6) i.e. Smt. Rajni Gupta c/o Anil Gupta (the transferee-appellant No.1). The vehicle was standing in the name of its registered owner in the concerned RTO record on the date of accident. The vehicle as on that date was duly insured by respondent No.7 (insurer) showing the registered owner of the vehicle as the insured. It has been repeatedly held by the Hon'ble Apex Court that even though in law, there would be a transfer of ownership of the vehicle but that by itself would not absolve the person in whose name the vehicle stands in the registration certificate from liability to a third party. The claimants-the third parties cannot be made to suffer. They cannot be deprived of benefits flowing from Chapter XI of the beneficial legislation, i.e. the Motor Vehicles Act. Hence, in view of the law laid down by the Hon'ble Apex Court, the insured-registered owner (respondent No.6) and consequently the insurer (respondent No.7) cannot escape liability to pay the awarded compensation amount to the claimants.

5. For the aforesaid reasons, the appeal is allowed. The impugned award dated 15.12.2017 to the extent it places liability upon the appellants for satisfying the payment of awarded compensation amount, is quashed and set aside. It is held that since respondent No.6 was the registered owner of the vehicle in question, which was duly insured by respondent No.7 at the time of accident, the liability to satisfy the award shall be borne by respondent No.7. Accordingly, respondent No.7 is ordered to deposit the entire compensation amount in terms of the award in the Registry of this Court within a period of six weeks.

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

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

Between:-

STATE OF HIMACHAL PRADESH
THROUGH COLLECTOR,
DISTRICT BILASPUR, H.P.

..APPELLANT/DEFENDANT

(BY MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL.

AND

1. NIKKI DEVI, AGED 44 YEARS, DAUGHTER OF SH. LALA RAM, SON OF SH. SARANU, RESIDENT OF VILLAGE KASOL, PARGNA AND TEHSIL SADAR, DISTT. BILASPUR, H.P.

…RESPONDENT/PLAINTIFF

2. N.T.P.C. KOL DAM OFFICE AT BARMANA, PARGNA AND TEHSIL SADAR, DISTRICT BILASPUR, H.P. THROUGH GENERAL MANAGER.

…PROFORMA RESPONDENT

(MR. SANKET SANKHYAN, ADVOCATE, FOR RESPONDENT NO.1.

MR. NEERAJ GUPTA, SR. ADVOCATE, WITH MS. RINKI KASHMIRI, ADVOCATE, FOR PROFORMA RESPONDENT NO.2.)

REGULAR SECOND APPEAL
No. 420 OF 2019
Reserved on:09.11.2022
Decided on:14.11.2022

Code of Civil Procedure, 1908- Section 100- second appeal- defendant preferred appeal against suit by plaintiff for declaration and mandatory injunction that she be declared as oustee and that she was entitled to benefits conferred under rehabilitation and resettlement scheme and that defendant who has acquired immovable properties including land owned by plaintiff be

directed to pay houseless grant- **Held**- plaintiff residing in village at the time of issuance of notification under section 4 of Land Acquisition Act- her property was subjected to acquisition, therefore, she was an oustee and entitled to benefits- mere absence of name in Parivar Register on date of issuance would not disentitle her- findings are present in record and cannot be said to be illegal and perverse- even a single member can constitute family and she had every right to live separately and constitute single member family- even if single person family does not have name in Parivar Register but otherwise qualified to be oustee, that person could not be denied the benefits of the scheme- no substantial question of law- appeal dismissed. (Para 12,14)

This appeal coming on for pronouncement of judgment this day, the Courtpassed the following: -

J U D G M E N T

Heard.

2. By way of instant Regular Second Appeal, judgment and decree dated 03.05.2019 passed by learned District Judge,Bilaspur, District Bilaspur, H.P. in Civil Appeal No. 19/13 of 2018, affirming judgment and decree dated 28.08.2018passed by learned Senior Civil Judge, Bilaspur, District Bilaspur, H.P. in Civil Suit No. 41/1 of 2014, is sought to be assailed by the appellant.

3. The parties hereinafter shall be referred to by the same status which they held before the learned trial Court. Respondent No.1 herein, was the plaintiff, whereas the appellant and proforma respondent herein, were the defendants 1 and 2 respectively.

4. Brief facts necessary for adjudication of appeal are that defendant No.1 acquired immoveable properties under the Land Acquisition Act for public purpose namely construction of Kol Dam Hydro Electric Project in the area of Villages Harnora and Kasol in District Bilaspur, H.P. The notification under Section 4 of the Land Acquisition Act, for the purposes of such acquisition was issued on 23.11.2000.

5. 16 biswas of land including the structure thereon, owned by the plaintiff, was also acquired. Plaintiff was paid Rs. 5,72,826.27 as compensation for land and Rs.1,13,564 for structure standing thereon.

6. A TripartiteAgreement Ext. DW-1/B, had been executed between defendants as first and second parties thereto and Himachal Pradesh State Electricity Board as third party on 26.02.2000. Clause 3.01 of the agreement Ext.DW-1/B provided for Resettlement & Rehabilitation issues of Kol Dam oustees. Defendant No.2 had undertaken Resettlement and Rehabilitation Scheme (R & R), as detailed in Annexure-II to the agreement and defendant No.1 had undertaken to extend all necessary assistance and inputs in implementing the R&RS. The costs of R&RS were to be incurred by defendant No.2.

7. The Scheme for Rehabilitation and Resettlement for the oustees of KoldamHEP was detailed in Annexure-II to the agreement. As per Clause 2.1.1 the entitlement of Resettlement grant was as under:

> "**2.1.1.Resettlement Grant.**
> Each oustee family which will be rendered houseless on account of acquisition of land/house for the KOLDAM Project shall be entitled to:
> a. A compensation of Rs. 60,000/- in the form of houseless grant, and
>
> b. infrastructural facility in the oustee colony which will include developed house site measuring 50' x 40' (one plot for each family), electrification for street lights line fordrinking water suitable, pacca approach road/path and Sulabh Sauchalaya.
>
> Families who do not opt for plot of land (including other infrastructure) will be entitled for Rs.25,000/- as infrastructure grant in the same line."

8. Similarly, the landless grant and eligible family grant was to be provided in terms of Clauses 2.2.1 and 2.2.2 of Annexure –II as under:

"**2.2.1 Landless Grant**

The families who are rendered landless on account of acquisition of their land shallbe eligible for landless grant in the following manner :-

i) Family which having more than 5 Bighas land rendered landless- Rs 50,000/-.

ii) Family whose land holding was less than 5 Bighas and rendered landless Rs. 45,000/-.

iii) Families who are left with less than one Biswa after acquisition will be treated as landless.

2.2.2 Eligible Family Grant

Eligible families shall be those who do not become landless but their land holding is rendered to less than 5 Bighas on account of acquisition.

i) Families who are left with land more than one Biswa and upto 2-10-0 Bighas one time grant of =Rs.40,000/-.

ii) Families who are left with more than 2-10-0 Bighas but less than 5 Bighas one time grant of = Rs.35,000/-.

The Deputy Commissioner concerned will be the sanctioning authority for Rehabilitation grant, which shall be provided by the project authorities and placed at the disposal of the concerned Deputy Commissioner, for disbursement to eligible families. All these grants shall be in addition to the compensation paid under Land Acquisition Act."

9. The plaintiff, by filing the suit before learned trial Court, raised her grievance with respect to non-conferment of the benefits of R&R Scheme on her despite demand. She sought the declaration to the effect that the plaintiff was Kol Dam oustee and was entitled to a residential plot in Jumthal

Colony alongwith houseless grant and all other benefits permissible to the oustees of Kol Dam as per the R & R Scheme. Mandatory injunction was also sought against the defendants directing them to pay the houseless grant to the plaintiff alongwith costs of suit.

10. The defendants contested the suit primarily on the ground that the plaintiff after her marriage was not residing in village Kasol, District Bilaspur and her name was not figuring in the family register maintained by the Gram Panchayat, Harnora. As per the defendants, only those persons were entitled to the benefit of R & R Scheme whose names were recorded in the Parivar Register of concerned Panchayat on the date of issuance of notification under Section 4 of the Land Acquisition Act. Such defence was based by the defendants by taking into consideration the definition of family provided in Clause 1.2 (b) of R & R Scheme, which reads as under:

> **"(b).** "Family" means husband/wife, who is entered as owner/co-owner of land in the Revenue Record, their children including step or adopted children and includes his/her parents and those brothers and sisters who are living jointly with him/her as per entries of Panchayat Parivar Register as on the date of Notification under Section-4 of the Land Acquisition Act, 1894. Provided that only the Panchayat Parivar Register entry, as it stood on the date of Notification under Section-4 of the Land Acquisition Act, 1894 shall be taken into account for the purpose of 'Separate Family' for Rehabilitation benefit i.e. consideration for employment etc."

11. Learned trial Court as also the learned Appellate Court concurrently returned the following findings on facts:-

(i) The plaintiff had her origin from village Kasol, Gram Panchayat, Harnora, District Bilaspur, H.P.

(ii) The plaintiff was married outside the limits of Gram Panchayat, Harnora in the year 1986 and thereafter her name was struck off from the family register of Gram Panchayat, Harnora wherein the

members of family headed by her father were recorded.

(iii) A matrimonial dispute arose between her and her husband and she returned back to village Kasol in April, 2000 and thereafter started residing there.

(iv) The notification under Section 4 of the Land Acquisition Act was issued on 23.11.2000 and at the time of issuance of such notification, plaintiff was residing in Village Kasol. The marriage of plaintiff with her husband was ordered to be dissolved by a decree of court of competent jurisdiction in the year 2006.

(v) The name of plaintiff was re-entered as a separate family in the Parivar Register of Gram Panchayat, Harnora in the year 2009.

12. On the basis of aforesaid findings, both the Courts below have held that since the plaintiff was residing in village Kasol at the time of issuance of notification under Section 4 of the Land Acquisition Act and her property was also subjected to acquisition, she was the oustee of Kol Dam Hydro Electric Project and was entitled to the benefits of R & R Scheme. It has further been held by both the Courts below that merely absence of name of plaintiff in Parivar Register on the date of issuance of Section 4 of the Notification would not dis-entitle her from the benefits of R & R Scheme.

13. As far as the findings of facts recorded by both the Courts below, no fault can be found. Such findings are borne from the record and cannot be said to be perverse, illegal or unwarranted.

14. Additionally, it is worth-noticing that the plaintiff was awarded the compensation amount for the acquisition of property, which was owned and possessed by her. As per Clause 1.2 of the R&R Scheme, the term “oustee” has been defined. As per this definition, any landowner, who has been deprived of his house or land, or both on account of acquisition

proceedings/private negotiation in connection with the construction of Kol Dam Project and entitled to compensation in lieu thereof was an oustee. Even his successors were included in such definition. Thus, plaintiff by all means was an oustee of Kol Dam HEP.

15. The Resettlement grant, Rehabilitation and Eligible family grants under Clauses 2.1.1., 2.2.1 and 2.2.2. of the R&R Scheme were made applicable to oustee families, meaning thereby that each family as one unit could avail the benefits of scheme and not each and every individual member of the family would be entitled to benefits under the scheme separately.

16. The defendants, however, propounded an interpretation to above said clauses of R&R Scheme to mean that the grants could be available to only such person whose name was recorded in the family register of concerned Panchayat at the time of issuance of notification under Section 4 of the Land Acquisition Act. This purportedly has been done by reading Clauses 2.1.1, 2.2.1 and 2.2.2 of the R & R Scheme alongwith Clause 1.2 (b) thereof, which defined "family".

17. On minute reading of the definition of "family", it is found that the interpretation so drawn by the defendants is incorrect. The reference in the said definition is to a family having more than one member. It is in this context that the prescription has been made for grant of benefit of the scheme to the families. The purpose must be to avoid disbursement of grants to different persons separately, who otherwise formed one family.

18. Viewed from yet another angle, clause 2.1(b) of the R&Rs, which defines "family" starts as "Family" means husband/wife, who is entered as owner/co-owner of land in the Revenue Record. So, the initial requirement is a person who is entered as owner or co-owner of land in revenue record. The reference to entry in Parivar Register, on the date of Notification under section 4 of the Act, to their children, parents and those brothers and sisters who are living jointly with him/her and such reference is only for the purpose of forming one

unit of family to avail the benefits of scheme by the family as a whole. The proviso to the definition of family in the scheme has its own specific area of operation and will become applicable when the benefit of scheme by way of grant of employment is to be given and to avail such benefit one has to have separate family. The purpose again is to avoid grant of benefits to multiple members of same family.

19. It cannot be taken to mean that where the family includes only a single person, he/she would not be entitled to the benefits of the scheme even though qualified to be an "oustee". Even a single member can constitute a separate family. In 2009, the name of plaintiff was recorded in the family register maintained by the Gram Panchayat, Harnora as a single member of the family. It was rightly done as the plaintiff after divorce was not obliged to live or reside with her parents or brothers/sisters. She had every right to live separately and constitute the single member family.Even if the single person family does not have his/her name recorded in Parivar Register but was otherwise qualified to be an oustee, he could not be denied the benefits of the scheme.

20. In view of aforesaid discussion, no substantial question of law arises in the appeal. Even otherwise, nothing has been shown on behalf of the appellant/State that the findings of facts recorded by the Courts below were not warranted by evidence on record. Further, it is not understandable as to how the State was aggrieved against the impugned judgment and decree. The responsibility and burden to implement the R & R Scheme was entirely on defendant No.2, which has chosen not to assail the impugned judgment.

21. In result, the appeal is dismissed, so also the pending application(s) if any.

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

National Insurance Company Ltd.

....Appellant.

Versus

Govind Ram and another

...Respondents.

For the appellant : Mr. Deepak Bhasin, Advocate.

For respondent No.1 :Mr. Vijay Chaudhary, Advocate,

FAO No.: 453 of 2014
Reserved on:17.11.2022
Decided on : 23.11.2022

Employees Compensation Act, 1923- Section 30- Appeal- Filed by insurer against the award on ground of beach of policy- Claimant applied for compensation on account of injuries and disability suffered by him in accident in the course of employment while driving bus as driver for respondent- owner admitted injuries during course of employment- Claimant has been declared permanently disabled to the extent of 20%- no evidence on record as to loss of earning capacity- Ld. Commissioner considered the loss of earning capacity to the same extent of 20% which is not illegal- Claimant is not entitled to reimbursement of medical expenses as the cause of action arose before the relevant amendment in the Act- Person becomes entitled to compensation on the date of cause of action- Amendment has no retrospective effect- Appeal partly allowed. (Paras 10,12)

Cases referred:

Kerala State Electricity Board and Anrs. Vs. Valsala K. and anr. (1999) 8 SCC 254;

K. Shivaramana and Ors. Vs. P. Satish Kumar and anr., (2020) 4 SCC 594;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

Heard.

2. This is an appeal filed by insurer against the award dated 04.06.2014, passed by learned Civil Judge, Court No. 1, Mandi, H.P., in case No. 49/2010, under the provisions of Employees Compensation Act,1923 (for short the 'Act').

3. The claimant by way of an application under the Act, claimed compensation on account of injuries and disability suffered by him while driving Bus No. HP.31-4425 in the course of his employment as driver for respondent No.2. The accident had taken place on 30.04.2007, at about 3:45 PM, at place Gutkar on Sundernagar Mandi, Highway. The claimant was referred to I.G.M.C. and Hospital Shimla, for treatment. He remained as indoor patient from 01.05.2007 to 17.05.2007 and 04.06.2007 to 10.07.2007. Documents Ext. PW2/J and PW2/K are the discharge slips issued by I.G.M.C., Shimla. The claimant has suffered multiple fractures in right leg. He was subjected to surgical intervention and his leg was protected with the help of implant. Finally, the disability of the petitioner was assessed at 20%. Claimant had also suffered shortening of leg by two inches.

4. The owner of the vehicle admitted the factum of claimant having received injuries during the course of his employment. It was admitted that claimant was being paid Rs. 5,000/-per month by the employer.

5. The insurer contested the claim of the claimant on the grounds of breach of policy. His employment under respondent was also denied.

6. Learned Commissioner framed the following issues:-

"1. Whether the accident of applicant Govind Ram took place during the course of employment as driver of respondent No.1, as alleged? OPP

2. Whether the applicant received multiple grievous injuries in the said accident, as alleged/OPP

3. Whether the applicant is entitled for compensation, as prayed for ? OPP

4. Whether the petition is not maintainable/OPR

5. *Whether the applicant was not holding a valid and effective driving license at the time of accident, as alleged/OPR*

6. Relief."

7. Claimant examined three witnesses including himself. PW-2, Dr. Sandeep Vaidya, proved disability of claimant to be 20% in relation to right lower limb.

8. Learned Commissioner awarded a sum of Rs. 1,01,664/- in favour of the claimant. In addition, a sum of Rs. 45,926/- was also awarded on account of reimbursement of medical expenses. The awarded amount was ordered to be paid alongwith interest @ 12% per annum w.e.f 30.05.2007. The liability to pay the awarded amount was fastened on the insurer.

9. Learned counsel for the appellant/insurer has taken exception to impugned award on two grounds, firstly, that the loss of earning capacity of claimant had not been proved and secondly, learned Commissioner had erred in granting the medical expenditure of Rs. 45,926/- in favour of the claimant, without their being any provisions for such grant available in the Act at the relevant time.

10. As regards first contention raised on behalf of the appellant/insurer, there appears to be no justification in interfering with the award passed by learned Commissioner. It is relevant to notice that the claimant had been declared permanently disabled to the extent of 20% vide

disability certificate, Ext. AW1/A. PW-2, Dr. Sandeep Vaidya, has also proved the said factum, though, in his statement recorded before learned Commissioner. PW-2 stated that the disability was qua the right lower limb of the claimant. As a matter of fact, there is no evidence on record in respect of the loss of earning capacity of the claimant. Learned Commissioner, by taking into consideration 20% disability of the claimant considered the loss of earning capacity to same extent i.e. 20%. Such finding of learned Commissioner cannot be said to be illegal or perverse. Claimant, undisputedly, was a driver by profession engaged by a private transport operator. He was driving heavy vehicle. Evidence on record suggests that right leg of the claimant has been shortened by two inches. The disability of claimant will definitely affect his working capacity and in private service, normally, the income is commensurate with the working capacity of a person. Thus, no fault can be found with the amount of compensation awarded to the claimant by learned Commissioner, which has been found to be in accordance with Section 4(c) (ii) of the Act.

11. The second contention raised on behalf of the appellant/insurer, however, is liable to be accepted. The date of accident was 30.04.2007. Sub-Section 2-A of Section 4 of the Act, was brought by way of an amendment which became effective w.e.f. 18.01.2010. Under such amending provision, the employee became entitled to reimbursement of actual medical expenses incurred by him for treatment of injuries caused during the course of employment. It is under this Head, learned Commissioner had awarded a sum of Rs. 45,926/- to the claimant.

12. It is no more *res integra* that person becomes entitle to compensation under the Act, on the date on which cause of action arises. In this case, the cause of action arose on 30.04.2007. The provisions of amending Act No. 45 of 2009, have no retrospective effect. Reference in this regard can be made to the judgments rendered by Hon'ble Supreme Court in

Kerala State Electricity Board and Anrs. *Vs.* ***Valsala K. and anr., (1999) 8 SCC 254 and also K. Shivaramana and Ors.*** *Vs.* ***P. Satish Kumar and anr., (2020) 4 SCC 594.***

13. The substantial questions of law, as framed at Serial No. 1 and 2 are answered, accordingly.

14. It is more than settled that the cause of action for filing claim petition under the Act arises on the date of accident, therefore, compensation also becomes payable on the date the cause of action arise and as necessary corollary the interest under the Act also becomes payable from the same date. Substantial questions of law, as framed at Serial No. 3, is decided accordingly.

15. In light of above discussion, the appeal is partly allowed. The impugned award dated 04.06.2014, passed by learned Civil Judge, Court No. 1, Mandi, H.P., in case No. 49/2010, is set aside to the extent it awarded a sum of Rs. 45,926/- on account of reimbursement of medical expenditure. Remaining part of the award is affirmed. The impugned award is accordingly modified.

16. The appeal is accordingly disposed of, so also the pending miscellaneous application, if any.

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

Reliance General Insurance Co. Ltd. ...Appellant

Versus

Reeta Devi & others ...Respondents

For the appellant : Mr. Jagdish Thakur, Advocate.

For the respondents : Mr. V. S. Chauhan, Sr. Advocate with Mr. Ajay Kashyap, Advocate, for respondents No. 1 to 4.

Mr. Sarthak Mehta, Advocate, for respondents No. 5 and 6.

FAO No. 211 of 2015
Reserved on:14.11.2022
Decided on : 25.11.2022

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT on grounds that deceased was a gratuitous passenger and that in absence of proof of his income on record, daily wage as per government notification was liable to be considered- **Held**- In absence of contract to contrary, the insurer would not be liable to indemnify for compensation payable in respect of death or bodily injury to the passenger travelling in a goods vehicle- Words "injury to any person" would only mean a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise- Act does not enjoin any statutory liability on the owner of a vehicle to keep his vehicle insured for any passenger travelling in a goods vehicle - Exception is that the statutory liability of insurer under Section 147, covers the owner of the goods or his authorised representative, carried in the vehicle- evidence not on record to show that deceased wa owner of goods- award modified to the extent that insurer is exonerated to pay compensation- appeal partly allowed. (Paras 17,18,19)

Cases referred:

Anita Sharma v. New India Assurance Co. Ltd (2021) 1 SCC 171;
Anu Bhanvara Vs IFFCO TOKIO General Insurance Co. (2020) 20 SCC 632;
Bharti AXA General Insurance Co. Ltd. Vs Aandi 2019 ACJ 1975;

Manuara Khatun Vs Rajesh Kumar Singh (2017) 4 SCC 796;
National Insurance Co. Ltd. vs Rattani & others 2009 (2) ACJ 925;
National Insurance Co. Ltd. v. Baljit Kaur (2004) 2 SCC 1 ;
National Insurance Co. Ltd. v. Bommithi Subbhayamma (2005) 12 SCC 243;
National Insurance Co. vs. Baljeet Kaur, 2004 ACJ 428;
National Insurance Company ltd. Vs Parvathneni (2018) 9 SCC 657;
New India Assurance Company Limited vs. Asha Rani, 2003 (2) SCC 223;
Oriental Insurance Company vs. Premlata Shukla & others, 2007 (13) SCC 476;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant appeal, appellant/insurer has assailed the award dated 25.8.2014, passed by learned Motor Accident Claims Tribunal (III), Shimla, H.P.(for short "the Tribunal") in MAC petition RBT No. 148-S/2 of 2012/10 on the grounds, firstly that deceased Roshan Lal, on account of whose death, compensation was claimed, was sitting in the Goods Carriage Vehicle as gratuitous passenger and secondly in alternative, in absence of any proof of his income on record, the daily wage as per the Government notification, issued by the Labour Department during the relevant period was liable to be considered.

2. Brief facts necessary for adjudication of appeal are that on 13.3.2010 at about 7.00 PM, vehicle (Bolero Pickup) No. HP-08A-0462 met with an accident. Respondent No.6 herein was the driver of the said vehicle. The vehicle was owned by respondent No.5 herein. Two persons namely Roshan Lal and Liak Ram were occupants in the vehicle besides the driver. Sh. Roshan Lal died as a result of injuries suffered by him on account of the aforesaid accident. Respondents No. 1 to 4 herein/claimants were the legal representatives of late Sh. Roshan Lal.

3. The claim petition was filed under Section 166 of the Motor Vehicles Act (for short "the Act") by the claimants for grant of compensation on

account of death of Sh. Roshan Lal. It was alleged that the vehicle was being driven by the driver in rash and negligent manner, which caused the accident. Sh. Roshan Lal was claimed as occupant of the vehicle in the capacity of owner of goods. It was averred that deceased was carrying sand in the vehicle.

4. The owner and driver of the vehicle filed their reply to the claim petition. It was submitted by them that deceased was sitting in the vehicle as owner of goods. The insurer separately contested the petition on various grounds including breach of terms and conditions of policy, deceased being gratuitous passenger in the vehicle etc.

5. Learned Tribunal framed the following issues:-

"i) Whether deceased Roshan Lal had died in a motor vehicle accident on 13.03.2010 due to rash and negligent driving of respondent No.2? OPP.

ii) If issue No.1 is proved in affirmative to what amount of compensation petitioners are entitled to? OPP.

iii) Whether respondent No.3 can be held liable to indemnify the owner?OPR-2.

iv) Whether the driver was not having valid driving licence at the time of accident? OPR-3.

v) Whether the vehicle in question was driving in breach of terms and conditions of insurance policy? OPR-3.

vi) Whether deceased was travelling as a gratuitous passenger in the vehicle at the time of accident? OPR-3.

vii) Relief."

Issues No. 1 to 3 were decided in affirmative and remaining issues were decided in negative. The claim petition was allowed and a sum of Rs. 11,96,520/- was awarded in favour of claimants with interest at the rate of 7.5% per annum from the date of filing of the claim petition. The liability to pay the compensation amount was fastened upon the insurer.

6. I have heard learned counsel for the parties and have also gone through the record carefully.

7. It is not in dispute that the vehicle No. HP-08A-0462, "Bolero Camper" was a Goods Carriage Vehicle. The question arises whether the

deceased person Shri Roshan Lal was travelling in the vehicle as owners of goods.

8. Section 147 of the Act reads as under:-

> ***"147 Requirements of policies and limits of liability. —***
> *(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—*
> *(a) is issued by a person who is an authorised insurer; and*
> *(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—*
> *(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;*
> *(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:*
> *Provided that a policy shall not be required—*
> *(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—*
> *(a) engaged in driving the vehicle, or*
> *(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or*
> *(c) if it is a goods carriage, being carried in the vehicle, or*
> *(ii) to cover any contractual liability."*

9. A three Judges Bench of Hon'ble Supreme Court, in ***New India Assurance Company Limited*** vs. ***Asha Rani***, reported in ***2003 (2) SCC 223***, has held that meaning of the words "any person" in Section 147 of the Act would relate only to a third party and thus, the Act does not enjoin any

statutory liability on the owner of a vehicle to keep his vehicle insured for any passenger travelling in a goods vehicle. In absence of any contract to the contrary, the insurer would not be liable to indemnify the insured for any compensation payable in respect of death or bodily injury to the passenger travelling in a goods vehicle. The effect of the 1994 Amendment came up for consideration in ***National Insurance Co. Ltd.* v. *Baljit Kaur*** (2004) 2 SCC 1 wherein Supreme Court following *Asha Rani* opined that the words "injury to any person" would only mean a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise. The question came up for consideration again in ***National Insurance Co. Ltd.* v. *Bommithi Subbhayamma* (2005) 12 SCC 243** wherein upon taking into consideration a large number of decisions, the said view was reiterated.

10. The only exception is that the statutory liability of insurer under Section 147, covers the owner of the goods or his authorized representative, carried in the vehicle. The goods carried in a Goods Carriage Vehicle will also necessarily mean the hiring of such vehicle.

11. The policy of insurance whereby the vehicle in question was insured on the date of accident has been proved on record as Ext. RW-2/A. Its perusal reveals that the insured paid basic premium towards risk on own damage, basic liability, compulsory personal cover for owner and driver and LLP paid driver (IMT 40) for two persons.

12. Deceased Roshan Lal was not a third party being an occupant of the Goods Carriage Vehicle. The insurer would be liable to indemnify insured in respect of compensation payable on account of death of Sh. Roshan Lal, if he was proved to be the owner of goods carried in the vehicle or if the contract of insurance permitted otherwise.

13. As noticed above, as a matter of fact, the claimants had specifically pleaded that the deceased Sh. Roshan Lal was occupying the vehicle at the time of accident as owner of goods as he was carrying sand in

the said vehicle. The question that arises for determination is whether the factum of deceased Sh. Roshan Lal occupying the vehicle at the time of accident as owner of goods was proved?

14. Issue No.6 was specifically framed regarding status of deceased in the vehicle. Learned Tribunal has held that the statement of RW-3 HC Om Prakash, relied upon by the insurer was of no help, as this witness had not deposed on the basis of material in case file. Learned Tribunal further drew presumption that the entire sand must have fallen down immediately, when the vehicle rolled down from the road and thus necessarily, the same would not be available at the spot where the vehicle was lying. It was further observed that the insurer had not raised a plea of collusion between the claimants on one hand and the owner and driver on the other. Thus, it has been held that the insurer had failed to discharge the onus of proving issue No.6.

15. Once the parties have led evidence, onus becomes redundant. The issues involved in legal proceedings are to be decided on the basis of appreciation of material on record that is available in the shape of legal evidence.

16. In the given facts of the case, the claimants themselves had relied upon the contents of FIR Ext. PW-1/B. PW-1 Smt. Reeta Devi wife of deceased Roshan Lal had tendered the document in her examination-in-chief. The FIR was recorded on the complaint of Sh. Liak Ram, who was another occupant of the vehicle at the time of accident. He had stated that on 13.3.2010, he along with Roshan Lal were travelling in Bolero Pickup No. HP-08A-0462. There is nothing in the FIR to suggest that the aforesaid vehicle was carrying sand at the time of accident or the sand belonged to deceased Roshan Lal. Though the FIR is not substantive evidence on facts stated therein by itself. However, when a party to litigation relies upon the contents of FIR, it cannot subsequently turn around to show that the contents thereof

were not correct. In ***2009 (2) ACJ 925, National Insurance Co. Ltd.*** vs ***Rattani & others***, the Hon'ble Supreme Court has observed as under:-

> *"7. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same.*
>
> *13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.*
>
> *As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose."*

Similarly, in ***Oriental Insurance Company*** vs. ***Premlata Shukla & others***, reported in ***2007 (13) SCC 476***, the Hon'ble Supreme Court has held as under:

> *"12. In Narbada Devi (supra) whereupon reliance has been placed, this Court held that contents of a document are not automatically proved only because the same is marked as an Exhibit. There is no dispute with regard to the said legal proposition.*
>
> *13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.*
>
> *14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the*

document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In Hukam Singh (supra), the law was correctly been laid down by the Punjab and Haryana High Court stating;

> *"8. Mr. G.C. Mittal, learned counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Ram Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge, while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to appropriate and reprobate."*

17. The owner and driver in their joint reply have specifically admitted that deceased Roshan Lal was travelling in the vehicle as owner of goods. The owner of the vehicle Sh. Suresh Kumar appeared as RW-2 and stated that the sand was loaded in the vehicle at the time of accident and deceased Roshan Lal had hired his vehicle for the said purpose. In cross-examination by insurer, it was suggested to this witness that nothing was lying on the spot, he volunteered that sand was scattered there. Admittedly RW-2 was not in the vehicle at the time of accident. He has also not stated that he had visited the spot after the accident. The best person to vouch for true facts was the driver of the vehicle, but he was not examined. The statement of RW-2 is to be taken with a pinch of salt for the simple reason that for avoiding the liability to pay compensation, he had every reason to make an incorrect statement. In absence of the examination of the driver, adverse inference is liable to be drawn against their stand.

18. None of the witnesses examined on behalf of the claimants were the eye witnesses. In any case, they had every interest in showing the success of the case of claimants and for obvious reason that the imposition of liability on insurer would make recovery of compensation easy for them.

19. RW-3 was Investigating Officer of the case. He was examined as witness by insurer. This witness had categorically stated that he had visited the site of accident on the next day and had found no sand scattered on the spot. He has been disbelieved only on the ground that he was not deposing on the basis of records, which in my considered opinion is a view wrongly taken by the learned Tribunal. The statement made by Investigating Officer was itself substantive evidence. There was nothing on record to suggest that RW-3 had not visited the spot as stated by him. Merely, because he has deposed after four years does not mean that he would not remember the factual position. In any case, if the insured or the claimants intended to confront this

witness with respect to anything contrary in the records of investigation, they had every opportunity to do so.

20. Additionally, it can be seen that no details were provided by the insured regarding hiring of the vehicle by deceased Roshan Lal. Nothing was stated that what was the tariff and in what manner it was paid. It has also not been shown on record that from where the sand was procured or purchased by the deceased. Sand is not a commodity that the deceased could have collected from anywhere. Clearly in the case, the best evidence was not produced either by the claimants or by the insurer. As noticed above, the statement of RW-3 could not be brushed aside especially keeping in view other evidence on record.

21. Learned counsel for respondents No. 5 and 6 Mr. Sarthak Mehta has placed reliance on extract contained in para 21 of the judgment passed by Hon'ble Supreme Court in ***Anita Sharma v. New India Assurance Co. Ltd*** (***2021) 1 SCC 171***,

> ***21.*** *Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of courts while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eyewitnesses, as may happen in a criminal trial; but, instead should be only to analyse the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true.*

22. The aforesaid dictum will not help the cause of insured keeping in view the specific facts and circumstances of the case. It is not that an issue is being decided only by drawing adverse inference for non-examination of a

witness; entire available material has been considered at the touchstone of preponderance of probabilities.

23. In light of above discussion, it is held that the deceased Roshan Lal was travelling in the vehicle at the time of accident as gratuitous passenger and thus the appellant insurance company would not be liable to pay the compensation by indemnifying the insured.

24. In view of the fact that the insurer has been held to be not liable to pay the compensation, there is no need to delve upon the second contention of the insurer regarding the income of the deceased assessed by learned Tribunal.

25. Learned counsel for the claimants contended in the last that the insurer should be made liable to pay the compensation to the claimants in the first instance and thereafter it may recover the same from insured. Reliance has been placed on judgments in Manuara Khatun Vs Rajesh Kumar Singh **(2017) 4 SCC 796** and Anu Bhanvara Vs IFFCO TOKIO General Insurance Co. **(2020) 20 SCC 632.** The contention so raised merits rejection for the reason; ***firstly*** that there is no provision in the Act which allows the insurer to pay in the first instance and recover later from the insured where the claim relates to gratuitous passenger in a Goods Carriage Vehicle and ***secondly*** in view of the law settled in ***New India Insurance Company Ltd***. vs. ***Asha Rani, 2003 ACJ (1)***, ***National Insurance Co.*** vs. ***Baljeet Kaur, 2004 ACJ 428***. Both these judgments by three judges benches expounded the law with respect to liability of insurer to indemnify the insured in respect of claims arising out of death or bodily injury to a gratuitous passenger in a Goods carriage Vehicle and held in favour of insurer. The judgments cited by learned counsel for claimants do not lay down law with regard to principle of "pay and recover' in so far as liability arises in respect of gratuitous passenger in a Goods Carriage Vehicle as the question as such was not before the Hon'ble Supreme Court for consideration. Those are the judgments on their own facts.

Even the larger bench of Hon'ble Supreme Court in ***National Insurance Company ltd. Vs Parvathneni*** in ***(2018) 9 SCC 657*** has kept the question of law open on the issue whether the Supreme Court in exercise of powers under Article 142 of the Constitution can direct the insurer to pay and recover, where the liability otherwise does not arise in case of gratuitous passenger. This court while expressing above view has drawn support from judgment passed by a Division Bench of High Court of Judicature at Madras in ***Bharti AXA General Insurance Co. Ltd. Vs Aandi*** reported in ***2019 ACJ 1975***.

26. In result, the appeal is partly allowed and the award dated 25.8.2014, passed by learned Motor Accident Claims Tribunal (III), Shimla, H.P., in MAC petition RBT No. 148-S/2 of 2012/10 is modified to the above extent and the insurer is exonerated from liability to pay compensation to the claimants. The appeal is accordingly disposed of. All pending miscellaneous application(s), if any, also stand disposed of. Records be sent back forthwith.

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

ICICI Lombard General Insurance Co. Ltd.

...Appellant

Versus

Tilak Raj & others & others ...Respondents

2. **FAO No. 6 of 2016**

ICICI Lombard General Insurance Co. Ltd.

...Appellant

Versus

Gandhi & others ...Respondents

3. **FAO No. 7 of 2016**

ICICI Lombard General Insurance Co. Ltd.

...Appellant

Versus

Rano Devi & others ...Respondents.

For the petitioner : Mr. Jagdish Thakur, Advocate, for the appellant in all the appeals.

For the respondent : Mr. Vinod Thakur, Advocate for respondents No. 1 to 4 in FAO No. 4 of 2016, for respondents No. 1 to 3 in FAO No. 6 of 2016 and for respondents No. 1 to 5 in FAO No. 7 of 2016.

Mr. Vijay Chaudhary, Advocate, for respondents No. 5 in FAO No. 4 of 2016, for

respondent No.4 in FAO No. 6 of 2016 and for respondent No.6 in FAO No. 7 of 2016.

Mr. Prashant Chaudhary, Advocate, for respondent No.6 in FAO No. 4 of 2016, for respondent No.5 in FAO No. 6 of 2016 and for respondent No. 7 in FAO No. 7 of 2016.

FAO Nos. 4, 6 & 7 of 2016
Reserved on:17.11.2022
Date of decision : 25.11.2022

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT on grounds that deceased were gratuitous passengers and not owners of goods in goods carriage vehicle and also sitting capacity was only for two persons including driver- **Held**- applications for additional evidence to produce copy of registration of certificate of offending vehicle and insurance policy stand allowed for effective adjudication- vehicle was goods carriage vehicle- Act does not enjoin statutory liability on owner of vehicle to keep it insured for any passenger travelling in a goods vehicle- "injury to any person" only means a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise- registration certificate shows sitting capacity of two persons only including driver- proved that four persons were in the vehicle- policy shows that coverage is for person more than the authorised sitting capacity of the vehicle- coverage cannot be extended to more than persons authorised to sit- FAO No. 6 of 2016 appeal dismissed- rest allowed to the extent insurer/appellant is absolved from indemnifying the insured to pay compensation. (Para 16)

Cases referred:

Bharti AXA General Insurance Co. Ltd. Vs Aandi 2019 ACJ 1975.20;
National Insurance Co. Ltd. Vs Rattani and others 2009 ACJ 925;
National Insurance Co. Ltd. v. Baljit Kaur (2004) 2 SCC 1;
National Insurance Co. Ltd. v. Bommithi Subbhayamma (2005) 12 SCC 243;
National Insurance Company ltd. Vs Parvathneni (2018) 9 SCC 657;
National Insurance Company Ltd. vs. Cholleti Bharatma, reported in 2008, ACJ, 2;
New India Assurance Company Limited vs. Asha Rani, 2003 (2) SCC 223;
Oriental Insurance Company vs. Premlata Shukla & others, 2007 (13) SCC 476;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

All these appeals are being decided by a common judgment, as the facts involved therein germinate from the occurrence of same accident involving motor vehicle and thus involving common question of facts and law.

1. In all these appeals, insurer/appellant has assailed the awards passed by learned Motor Accident Claims Tribunal (for short "the Tribunal") on the grounds that the occupants of the vehicle, on account of whose death, compensation has been awarded, were gratuitous passengers. The specific contention of insurer is that the vehicle involved in the accident was a "Goods Carriage Vehicle" and was not permitted to carry passengers, save and except to the extent as permissible under Section 147 of the Motor Vehicles Act (for short "the Act"). As per appellant/insurer, the claimants had failed to prove that the deceased persons were travelling in the vehicle as owners of goods and in alternative, it is submitted that even said plea was not available to the claimants, as the vehicle in question permitted sitting capacity of only two persons including the driver and the policy of insurance has to be read in such context only.

2. In all these appeals, the insurer/appellant has filed applications under Order 41 Rule 27 read with Section 151 CPC for production of additional evidence, whereby a copy of registration certificate of the offending vehicle and also of insurance policy purchased by insured have been sought to be placed on record. In FAO No. 4 of 2016, the application bears CMP No. 238 of 2016, in FAO No. 6 of 2016, such application bears CMP No. 241 of 2016 and in FAO No. 7 of 2016, it bears CMP No. 243 of 2016. These applications deserve to be allowed, as all the parties have relied upon the policy of insurance. Even otherwise, the documents sought to be placed on record, as noticed above, are found necessary for complete and effective adjudication of

the issues involved in the cases. Accordingly, all the applications bearing CMP Nos. 238, 241 and 243, filed in FAO Nos. 4, 6 and 7 respectively are allowed and the copies of registration certificate as well as insurance policy are taken on record.

3. Brief facts, commonly involved and necessary for adjudication of all these appeals are that on 2.6.2013 at about 12.10 PM vehicle bearing registration No. HP-73-2802, "Bolero Camper", manufactured by Mahindra & Mahindra, met with an accident, at place Bhalog Dhar in District Chamba. Admittedly, the aforesaid vehicle was a Goods Carriage Vehicle. The registration certificate of the vehicle placed on record reveals that it had sitting capacity for two persons including driver. At the time of accident, the vehicle was being driven by respondent Jagdish @ Jaggu.

4. Four persons namely (1) Smt. Rekha Devi wife of Sh. Tilak Raj, (2) Smt. Rekha wife of Gandhi, (3) Shri Virender son of Sh. Bhimo and (4) PW-2 Shri Sunil Kumar were traveling in the offending vehicle at the time of accident and except for Shri Sunil Kumar all of them had died as a result of injuries suffered by them.

5. The legal heirs/representatives of all the above mentioned deceased persons filed separate claim petitions under Section 166 of the Act. The petition for compensation on account of death of Smt. Rekha Devi wife of Sh. Tilak Raj was registered as MAC Petition No. 518 of 2013, the petition for compensation on account of death of Smt. Rekha wife of Sh. Gandhi was registered as MAC Petition No. 516 of 2013 and petition for compensation on account of death of Sh. Virender son of Bhimo was registered as MAC Petition No. 514 of 2013.

6. It was averred in all these petitions that on the fateful day, "Jatar" (religious ceremony) was organized by Smt. Rekha Devi wife of Sh. Gandhi at place known as "Kangar". All the deceased persons were occupying the vehicle as owners of goods, as they were carrying different articles for the "Jatar

Ceremony". In all the petitions, the cause of accident was alleged as rash and negligent driving of the driver. The insurer, owner and driver filed their separate replies. It was pleaded on behalf of the owner that the deceased persons were travelling in the vehicle as owners of goods and the accident had taken place due to sudden mechanical defect. The driver also raised the same defence with respect to cause of accident. The insurer raised various objections including that the deceased persons were travelling as gratuitous passengers. It was further pleaded that at the time of accident, the vehicle was carrying about 30 persons as gratuitous passengers, as was also evident from the copy of FIR and the accident had taken place due to overloading of the vehicle.

7. The issues framed in MAC Petition No. 518 of 2013 are being reproduced herein as all other cases also involved the similar/identical issues. The issues framed in aforesaid cases are as under:-

"i) Whether on 2.6.2013, at place Bhalog Dhar, Tehsil Bhattiyat, District Chamba deceased Rekha wife of Tilak Raj has died in an accident due to the rash and negligent driving of vehicle No. HP 73-2802 by its driver i.e. respondent No.3 as alleged? OPP

ii) If issue No.1 is proved in the affirmative, as to what amount of compensation, the petitioners and proforma respondent No.4 are entitled to and from whom? OPP

iii) Whether the petition is not maintainable in the present form? OPRs.

iv) Whether the driver of the vehicle in question was not holding a valid and effective driving license at the time of accident as alleged? OPR1.

v) Whether the vehicle in question was being driven in contravention of the terms and conditions of the Insurance Policy? OPR1.

vi) Whether the deceased was gratuitous passenger? OPR1

vii) Relief."

8. Learned Tribunal answered issues No. 1 and 2 in affirmative and all other issues in negative and thereby allowed all the claim petitions. In

MAC Petition Nos. 516 and 518, a sum of Rs. 6,16,000/- each was awarded and in MAC Petition No. 514 of 2016, a sum of Rs. 4,62,000/- was awarded. All the deceased persons were held to be travelling in the vehicle as owners of goods.

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

10. It is not in dispute that the vehicle No. HP-73-2802, "Bolero Camper" was a Goods Carriage Vehicle. The question arises whether all the deceased persons were travelling in the vehicle as owners of goods and if proved to be so, was the insurer liable to indemnify the insured in respect of compensation payable to all the claimants.

11. Section 147 of the Act reads as under:-

> ***"147 Requirements of policies and limits of liability. —***
> *(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—*
> *(a) is issued by a person who is an authorised insurer; and*
> *(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—*
> *(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;*
> *(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:*
> *Provided that a policy shall not be required—*
> *(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—*

(a) engaged in driving the vehicle, or
(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or
(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability."

A three Judges Bench of Hon'ble Supreme Court, in ***New India Assurance Company Limited*** vs. ***Asha Rani***, reported in ***2003 (2) SCC 223***, has held that meaning of the words "any person" in Section 147 of the Act would relate only to a third party and thus, the Act does not enjoin any statutory liability on the owner of a vehicle to keep his vehicle insured for any passenger travelling in a goods vehicle. In absence of any contract to the contrary, the insurer would not be liable to indemnify the insured for any compensation payable in respect of death or bodily injury to the passenger travelling in a goods vehicle. The effect of the 1994 Amendment came up for consideration in ***National Insurance Co. Ltd.* v. *Baljit Kaur*** (2004) 2 SCC 1 wherein Supreme Court following *Asha Rani* opined that the words "injury to any person" would only mean a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise. The question came up for consideration again in ***National Insurance Co. Ltd.* v. *Bommithi Subbhayamma* (2005) 12 SCC 243** wherein upon taking into consideration a large number of decisions, the said view was reiterated.

12. The only exception is that the statutory liability of insurer under Section 147, covers the owner of the goods or his authorized representative, carried in the vehicle. The goods carried in a Goods Carriage Vehicle will necessarily mean the hiring of such vehicle.

13. In all the instant cases, the learned Tribunal has held the deceased persons to be the owners of the goods. The evidence before learned Tribunal was the statements of claimants and another witness namely Sh. Sunil

Kumar, examined as PW-2 on behalf of the claimants. Respondents No. 1 and 2 examined the driver of the vehicle as their witness. The insurer examined three witnesses. RWs-2 Dr. Rajiv Kumar and RW-3 Dr. Sanjay Gupta proved issuance of number of MLCs by them, whereas RW-4 Sh. Sangat Ram was examined to prove the record of criminal proceedings before criminal Court having arisen from the accident in question. The claimants had stated that the deceased persons had hired the vehicle for carrying rice, goods and other articles for "Jatar". Admittedly, the claimants were not present on the spot at the time of accident. In his cross-examination PW-1 in MAC Petition No. 516 of 2013 admitted that in the vehicle Rekha Devi wife of Sh. Tilak Raj, Rekha (his wife) and two other persons were traveling. Witness Sh. Sunil Kumar also deposed that all the deceased persons had hired the vehicle for carrying their articles. This witness further admitted that he was also sitting in the ill-fated vehicle at the time of accident. The driver of the vehicle deposed that all the deceased had hired the vehicle. He admitted that a FIR was registered against him in respect of the accident in question. RW-4 proved the final report under Section 173 Cr.P.C., submitted by the police before the criminal Court, after investigation of FIR No. 43 of 2013. He also produced on record the list of witnesses submitted along with said report as Ext. PW-4/B.

14. The Insurer tried to prove from statements of RWs 2 to 4 that the vehicle in question was occupying about 30 persons at the time of accident. Noticeably, the MLCs prepared by RWs 2 and 3 were not placed and proved on record. From the oral statements of these witnesses, the MLCs stated to have been issued by them could not be linked to the accident in question. Similarly, the report under Section 173 Cr.P.C. presented by State after investigation of FIR No. 43 of 2013 and list of witnesses annexed therewith were not the substantive pieces of evidence. However, it was proved on record that at least four persons were occupants of the vehicle at the time of accident,

besides the driver. Three were the deceased persons and fourth was PW-2 Sh. Sunil Kumar.

15. The certificate of registration of the vehicle in question clearly shows that it had sitting capacity of two persons only including the driver, meaning thereby that the cabin was meant for sitting of one person other than the driver. It has been proved on record that four persons were in the vehicle. The copy of policy of insurance placed on record also does not show that it had provided coverage to person more than the authorized sitting capacity of the vehicle. The vehicle details provided in the policy also mention carrying capacity as of two persons. The premium had been paid for own damage and basic third party liability. Additional Rs. 50/- was paid for coverage to paid driver and Rs. 100/- was paid for coverage of personal accident of owner-driver to the extent of Rs. Two lakhs. Thus, the insurer would be liable to indemnify the insured of the vehicle involved in these cases to the extent of third-party liabilities, paid driver and the owner and driver to the extent, as noticed above. It is only by virtue of the amended provisions of Section 147 that the owner of the goods is provided coverage under the statutory insurance policy and can it be taken to mean that under the shadow of such statutory provision, insurer will be liable to indemnify the insured even for the claims of the persons, who were occupying the vehicle beyond its sitting capacity. In my considered view the answer has to be in negative. The coverage provided to passengers as owner of goods under Section 147 of the Act has to be read in context of the sitting capacity of the vehicle. A vehicle permitting the seating of only one person besides driver cannot lawfully be allowed to carry more than one person. In fact, there will not be space for accommodating more persons than prescribed. An act which otherwise is unlawful cannot be legitimized under the garb of statutory provision of section 147 of the Act without considering such provisions in its real perspective. The

coverage to the owner of the goods in case of Goods Carriage Vehicle, thus, cannot be extended to more than the persons authorized to sit in the vehicle.

16. Reference can be gainfully made to the judgment passed by this Court in ***Oriental Insurance Co.*** vs. ***Amri Devi*** in ***FAO (MVA) No. 402 of 2010***, decided on ***7.7.2016***, wherein after placing reliance upon the judgment of Hon'ble Supreme Court in ***National Insurance Company Ltd.*** vs. ***Cholleti Bharatma, reported in 2008, ACJ, 268***, it was held that the deceased who were not proved to have been travelling in the cabin of the vehicle, they would not be entitled to compensation.

17. Reverting to the facts of the case, it cannot be said that four persons could be accommodated inside the cabin of the vehicle, which was meant to seat only one person.

18. Learned counsel for the claimants contended that in case the deceased were held as gratuitous passengers, insurance company still should be directed to pay them the compensation amount in the first instance and to recover it from the insured later. The contention so raised merits rejection for the reason; ***firstly*** that there is no provision in the Act which allows the insurer to pay in the first instance and recover later from the insured where the claim relates to gratuitous passenger in a Goods Carriage Vehicle and ***secondly*** in view of the law settled in ***New India Insurance Company Ltd***. vs. ***Asha Rani, 2003 ACJ (1)***, ***National Insurance Co.*** vs. ***Baljeet Kaur, 2004 ACJ 428***. Both these judgments by three judges benches expounded the law with respect to liability of insurer to indemnify the insured in respect of claims arising out of death or bodily injury to a gratuitous passenger in a Goods carriage Vehicle and held in favour of insurer. Hon'ble Supreme Court in ***National Insurance Company ltd. Vs Parvathneni*** in ***(2018) 9 SCC 657*** has kept the question of law open on the issue whether the Supreme Court in exercise of powers under Article 142 of the Constitution can direct the insurer to pay and recover, where the liability otherwise does not arise in case of

gratuitous passenger. This court while expressing above view has drawn support from judgment passed by a Division Bench of High Court of Judicature at Madras in ***Bharti AXA General Insurance Co. Ltd. Vs Aandi*** reported in ***2019 ACJ 1975***.20.

19. In view of the above discussion, it is held that only one of the deceased at the most can be held to have coverage as owner of goods. Accordingly Rekha wife of Sh. Gandhi Ram can be held to be the occupant of the vehicle as owner of goods and hirer of vehicle on the basis of material on record. The FIR was recorded on the basis of version provided by Sh. Sunil Kumar son of Sh. Jodha Singh, who was examined as PW-2 in all the petitions. In the cross-examination, this witness had feigned ignorance regarding lodging of FIR by him. In the FIR his version was that on 2.6.2013, the "Jatar" was being organized by his Aunt Rekha wife of Gandhi Ram and all their relatives were to participate. Three vehicles including one Alto Car and two Jeeps including the Pickup No. HP-73-2802 were used for the purpose and PW-2 was also one of the occupants of the vehicle No. HP-73-2802. Noticeably, the claimants have relied upon the contents of FIR by tendering the same on record as Ext. P-2. Though, an FIR is not substantive piece of evidence as to its contents. However, the party placing reliance on it cannot subsequently turn around and say that contents thereof were not correct. In **2009 ACJ 925, National Insurance Co. Ltd. Vs Rattani and others**, the Hon'ble Supreme Court has observed as under:

> *"7. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same.*
>
> *13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as*

to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose."

Similarly, in ***Oriental Insurance Company*** vs. ***Premlata Shukla & others***, reported in ***2007 (13) SCC 476***, the Hon'ble Supreme Court has held as under:

"12. In Narbada Devi (supra) whereupon reliance has been placed, this Court held that contents of a document are not automatically proved only because the same is marked as an Exhibit. There is no dispute with regard to the said legal proposition.

13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.

14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our

opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In Hukam Singh (supra), the law was correctly been laid down by the Punjab and Haryana High Court stating;

> *"8. Mr. G.C. Mittal, learned counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Ram Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge, while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to appropriate and reprobate."*

20. Thus, from the facts inferable from material on record it would be the organizer of “Jatar” who would have hired the vehicle and would have carried her goods necessary for such purpose.

21. In result, the FAO No. 6 of 2016 is dismissed. FAO Nos. 4 and 7 of 2016 are allowed to the extent that the insurer/appellant is absolved from

indemnifying the insured to pay compensation arising out of death of Rekha Devi wife of Sh. Tilak Raj and Virender son of Sh. Bhimo.

22. All the appeals are disposed of accordingly. All pending miscellaneous application(s), if any, also stand disposed of. Records be sent back forthwith.

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

Between:-
KIMTU DEVI D/O SH.GEHRU, S/O SH.BINU,NOW WIFE OF SH. ROOP SINGH, R/O VILLAGE GHURDOR,P.O. LARANKAILO TEHSIL AND DISTT. KULLU, H.P.

(BY SH.AJAY KUMAR DHIMAN, ADVOCATE)

AND

….PLAINTIFF

1. STATE OF HIMACHAL PRADESH, THROUGH CHIEF SECRETARY IN THE GOVT. OF H.P., H.P. SECRETARIAT, SHIMLA-2

2. DEPUTY COMMISSIONER, DISTT. KULLU AT KULLU, H.P.

….APPLICANT

3. YUNUS KHAN S/O NOT KNOWN,DEPUTY COMMISSIONER KULLU AT KULLU, H.P.

(BY MR.ANKUSH DASS SOOD, SENIOR ADVOCATE, ALONGWITH MR.MOHIT SHARMA, ADVOCATE, AND MS.SEEMA SHARMA, DEPUTY ADVOCATE GENERAL)

….DEFENDANTS

4. TEK CHAND S/O SH.CHET RAM,R/O VILLAGE KANIYAL, P.O. CHIYAL, TEHSIL MANALI, DISTT. KULLU, H.P.

5. DR.WANGMO W/O NOT KNOWN,R/O VILLAGE GHURDOR, P.O. LARANKAILO, TEHSIL & DISTT. KULLU, H.P.

(BY MS.KOMAL CHAUDHARY, ADVOCATE FOR APPLICANTS-DEFENDANTS NO.4 & 5)

….APPLICANTS-DEFENDANTS

ORIGINAL MISC.PETITION
NOS.113 & 120 OF 2019
IN COMMERCIAL SUIT
NO.34 OF 2018
Decided on:31.10.2022

Code of Civil Procedure, 1908- Order 7 Rule 5,11- suit for declaration that plaintiff is owner in possession of the suit land and declaration that order of escheat of property is illegal and suit for damages on account of mental torture and loss of reputation- **Held**- no other material except plaint and documents filed therewith are to be considered- plea of res judicata is to be determined independently- parties in both the suits are different- further material is required for adjudication of issue of bar of res judicata- stay from Supreme Court can be basis to stay the suit but cannot be a ground to reject the plaint unless judgment based on which plaintiff has asserted his right is set aside- Plaintiff has mentioned in the plaint about the judgments conferring right upon her on the suit property alongwith findings upheld by the Supreme Court wherein she was not considered legal heir of deceased- no concealment of fact by plaintff- applications dismissed. (Para 29)

Cases referred:

A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies, Salem, (1989) 2 SCC 163;
Azhar Hussain vs. Rajiv Gandhi, 1986 (Supp) SCC 315;
Bhagirath Prasad Singh vs. Ram Narayan Rai & another, AIR 2010 Patna 189;
Bhau Ram vs. Janak Singh & others, AIR 2012 SC 3023;
C. Natrajan vs. Ashim Bai and another, (2007) 14 SCC 183;
K.S. Varghese and others vs. Saint Peter's and Saint Paul's, (2017) 15 SCC 333;
Kuldeep Singh Pathania vs. Bikram Singh Jaryal, (2017) 5 SCC 345;
Kutchi Lal Rameshwar Ashram Trust Evam Anna Kshetra Trust Through Velji Devshi Patel vs. Collector, Haridwar and others, (2017) 16 SCC 418;
Ram Prakash Gupta vs. Rajiv Kumar Gupta and others, (2007) 10 SCC 59;
Srihari Hanumandas Totala vs. Hemant Vithal Kamat and others, (2021) 9 SCC 99;
State of Punjab vs. Balwant Singh and others; 1992 Supp (3) SCC 108;
T. Arivandandam s. T. V. Satyapal and another, AIR 1977 SC 2421;

Zee Telefilms Limited vs. Suresh Productions and others, (2020) 5 SCC 353;

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

O R D E R

These applications have been filed by applicants-defendant No.2 and defendants No.4 and 5 respectively under Order 7 Rule 11 of the Code of Civil Procedure (in short 'CPC') for rejection of the plaint. For involvement and appreciation of common question of law and facts, these applications are being decided by this common order.

2. Non-applicant/plaintiff has approached this Court by filing suit for declaration that plaintiff is owner in possession of the suit land with further declaration that order dated 19.07.2018, passed by Deputy Commissioner, Kullu, H.P., ordering escheat of property of Gehru in favour of State of Himachal Pradesh, is illegal, without jurisdiction and against provisions of Himachal Pradesh Land Revenue Act, 1954 (hereinafter referred to as 'Revenue Act') having no bearing on the rights of the plaintiff, and also suit for damages on account of mental torture and loss of reputation etc.

3. Claim of the plaintiff is that she is daughter of late Gehru, who was a big landlord, but being deaf and dumb person by birth, was a person under legal disability, having low intelligence. Further that, his property was being managed by his mother till 1960 and his mother had brought Devku as wife of her son, but she did not bear any child and left the house of Gehru of her own free will. Thereafter, another wife namely Sevti was brought by mother of Gehru, who gave birth to plaintiff on 05.12.1957, but Sevti died soon after the birth of plaintiff and, thereafter, one Sobhi was brought by mother of Gehru as his third wife. Lateron, mother of Gehru died.

4. To prove her relationship with Gehru, as a daughter, School Leaving Certificate of plaintiff has been placed on record, with further averment that Register, available with the school authorities, having entries of plaintiff as a daughter of Gehru was also produced before the Court in RSA No.127 of 1994.

5. Plaintiff is claiming her right on the basis of judgments and decrees passed in Civil Suit Nos.31 of 1981 and 63 of 1983, preferred by Gehru in this High Court, wherein, after death of Gehru plaintiff alongwith Devku was brought on record as his legal representatives.

6. Civil Suit No.31 of 1981 was decreed by learned Single Judge of this High Court on 18.10.1985 and appeal filed before the Division Bench against that, was dismissed. Further, Special Leave Petition was also dismissed by the Apex Court.

7. Civil Suit No. 63 of 1983 was dismissed by learned Single Judge of this High Court. However, in appeal, Division Bench had decreed the suit in favour of the plaintiff. No further appeal was preferred in this case before the Supreme Court.

8. On the basis of aforesaid judgments and decrees, Revenue Authorities put plaintiff in possession of the suit land in the year 1998 and it is claimed that since then, plaintiff has been in possession of the suit land without interference from anybody, including the State of Himachal Pradesh and nobody had ever raised any objection to the possession of the plaintiff or tried to disturb her ownership and possession. It has been further stated in the plaint that several suits were filed by the plaintiff challenging many sales made by Sobhi on the basis of authority of her Power of Attorney obtained from Gehru and most of these cases have been compounded and compromised by the plaintiff with respective vendees. However, one Civil Suit No.35 of 1987 filed in the Court of learned Civil Judge, Kullu, was never compromised and in this suit it was held that Gehru was not a person under any legal disability

and, further that, Kimtu (plaintiff herein) also had failed to prove that she was a daughter of Gehru. Thereafter, though this High Court, in RSA No.127 of 1994, had held that Gehru was person under legal disability and Kimtu was his daughter, but these findings were set aside by the Supreme Court and suit of the plaintiff was dismissed. It has been claimed by the plaintiff that finding of the Supreme Court is applicable only in that particular case and cannot and does not set aside the decrees and other orders which had attained finality in due course and, therefore, it has been contended that defendant No.2, Deputy Commissioner, has no power or authority under any law of land to set aside the decree passed in Civil Suit Nos.31 of 1981 and 63 of 1983, which have attained finality and on the basis of which right of ownership in the suit land has been conferred upon the plaintiff and has been duly incorporated in revenue record after following due procedure.

9. On the basis of plaint of defendant No.4, defendant No.2, Deputy Commissioner, Kullu, passed an order dated 03.10.2017 without hearing plaintiff, which was assailed by the plaintiff by filing CWP No.2925 of 2017 and the said order was quashed by this Court on 29.12.2017. Thereafter, another notice was issued on behalf of Deputy Commissioner, by one of his subordinates, asking the plaintiff to appear before him on 17.01.2018. However, no formal notice was issued and plaintiff was verbally asked to file reply to the plaint filed by defendant No.4. This order was challenged by the plaintiff before the Financial Commissioner (Revenue) Shimla, on the ground that it was without jurisdiction as cognizance of any revenue matter can be taken by statutory authority under the Revenue Act only on the application of the interested person, but not otherwise. Before final adjudication of such application, preferred by the plaintiff, defendant No.2 passed impugned order dated 19.07.2018, whereby, on the basis of judgment dated 16.05.1990 passed in Civil Suit No.35 of 1987 by Senior Sub-Judge Lahaul and Spiti at Kullu, concluding that Kimtu-plaintiff is not daughter of Gehru and, as such,

she is not legitimate legal heir of Gehru who has been reported by Sub Divisional Officer (Civil) Kullu, to have died issueless leaving behind no legal heir at present and, thus, property of Gehru inherited by Kimtu-plaintiff being his daughter and legal heir of Gehru, has been ordered to be escheated in favour of the State under Section 29 of the Hindu Succession Act, 1956 with further direction to Assistant Collector, Kullu, to attest mutation to this effect within a week and take possession of such property within one month positively and further direction has been issued to Sub Divisional Magistrate, Kullu, to ensure compliance of the order within due time.

10. Claim of the plaintiff is that right conferred upon the plaintiff in implementation and operation of the judgments and decrees passed in Civil Suit Nos. 31 of 1981 and 63 of 1983, which have attained finality uptill the Supreme Court, cannot be set aside and withdrawn by relying upon the judgment passed in Civil Suit No.35 of 1987 as judgment in Civil Suit NO.35 of 1987 is not a judgment in *rem* but judgment in *personam* and is applicable only in that particular case between the parties to the said suit, as finding is not that Kimtu is not daughter of Gehru, but is that Kimtu had failed to prove that she was daughter of Gehru.

11. These applications have been filed on the ground that suit of the plaintiff is barred by law as for findings in Civil Suit No.35 of 1987 referred supra, on account of principle of *res judicata*, plaintiff is precluded from claiming right and entitlement upon suit land, by claiming her to be daughter of Gehru as in the said suit, it has been categorically held that plaintiff was not daughter of Gehru and, therefore, issue that Kimtu was not daughter of Gehru stands substantially decided by the competent Civil Court. Therefore, it cannot be re-agitated by the plaintiff, in present proceedings and, therefore, plea that plaintiff is daughter of Gehru is not only misleading, but also amounting to play a fraud upon the Court by concealing the material fact or to reopen and re-agitate the issue which stands finally decided by the Supreme

Court. Further that, present litigation finds its roots in three separate rounds of litigation, which have also been settled by the Supreme Court and claim of Kimtu of inheritance of property of Gehru being his daughter stood rejected by all the Courts. Further that, State of Himachal Pradesh was never impleaded as party in any suit. It is further case of the applicants-defendants that in SLP (Civil) Diary No.24947 of 2020, titled as *State of H.P. vs. Kimtu & another,* effect and operation of the judgments and orders, under challenge therein, has been ordered to be stayed by the Supreme Court, wherein judgments and orders passed conferring right upon Kimtu as daughter of Gehru have been assailed and, as such, findings rendered in favour of the plaintiff have been put in abeyance by the Supreme Court, and thus judgments of High Court in Civil Suits No.31 of 1981 and 63 of 1983, cannot be relied on, in any manner, in any proceedings, including in present suit, to claim right on the suit property. It has also been submitted that decrees relied upon by the plaintiff have been obtained by fraud and, therefore, they are nullity in the eyes of law.

12. Prayer for rejection of plaint has also been made on the ground that plaintiff does not disclose real cause of action, as suit has been filed for declaration to the effect that Kimtu is owner in possession of the land by virtue of inheritance from Gehru being his legal heir as daughter. Whereas, in Civil Suit NO. 35 of 1987, clear cut finding has been given that Kimtu is not daughter of Gehru. Therefore, there is no cause of action for Kimtu to file and maintain the plaint, but cause of action has been created by way of clever drafting of plaint creating illusion and, therefore, such vexatious litigation should not be allowed to continue and consume time of the Court.

13. It has been further contended that mutation relied upon by the plaintiff does not confer title upon her over the suit property and, therefore, on the basis of mutation of entry, plaintiff is not entitled to maintain suit and, thus, plaint is liable to be rejected on this count also, as entitlement claimed on the basis of mutation is misconceived and barred by law.

14. Lastly, it has been contended that plaintiff has concealed earlier proceedings and suits and has made declaration in para-19 of the plaint by stating that no other suit or proceeding has been filed in respect of same cause of action and, therefore, suit deserves to be rejected and proceedings for committing perjury are required to be initiated against the plaintiff. It has been further contended that this frivolous and vexatious suit has been filed by the plaintiff in order to grab the property of Gehru, for which plaintiff is not legally entitled, by deceiving and misleading the Courts and abusing process of law and, therefore, prayer to reject the plaint under Order 7 Rule 11 CPC has been made.

15. It has been contended on behalf of the applicants/defendants that present suit has been filed with intent to deceive and mislead the Courts, initiating proceedings without full disclosure of facts and coming to the Court with unclean hands and, therefore, plaintiff is neither entitled to be heard on merit of the case nor entitled for any relief, as setting up claim without disclosing complete facts and proceeding initiated amounts to abuse of process of the Court and further that, plaintiff has not disclosed adjudication of another suit holding that plaintiff is not daughter of Gehru and, therefore, on this count, plaint deserves to be rejected.

16. It has been contended on behalf of the applicants-defendants that remedy under Order 7 Rule 11 CPC is an independent and special remedy, wherein Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence and conduct a trial, on the basis of evidence adduced, in case Court is satisfied that the action should be terminated on any of the grounds contained in this provision. Further that underline object of Order 7 Rule 11 (a) CPC is that if in a suit, no cause of action is disclosed, Court would not permit the plaintiff to unnecessarily protract the proceedings in the suit and it would be necessary to put an end to such sham litigation so that further judicial time is not wasted.

17. Pleas of applicants have been refuted by learned counsel for the plaintiff by submitting that plaintiff has not concealed any material fact in the plaint and has also disclosed passing of order in Civil Suit No.35 of 1987 alongwith passing of judgments and decrees in Civil Suit Nos.31 of 1981 and 63 of 1983, clearly stating in the plaint that in one set of litigation plaintiff inherited the property of Gehru as daughter, whereas, in one suit she was ousted by holding that she had failed to prove that she was daughter of Gehru and, therefore, there is no suppression or concealment of any material fact. It has further been submitted that rights in the property conferred upon the plaintiff by application of law by adopting due process on the basis of judgment and decree passed by the Court, which had attained finality, have been withdrawn on the basis of judgment passed in some other litigation and the said property was and is being enjoyed by the plaintiff and, therefore, for deprivation of her rights and enjoyment of property, conferred upon her in accordance with law, she has every cause of action to maintain and file the suit to protect her rights as permissible under law and, thus, there is legal, just and valid cause of action available to the plaintiff to file and maintain suit. It has been further contended that there is no concealment or perjury in the declaration made in para-19 of the plaint as everything has been disclosed clearly in the plaint and documents filed therewith.

18. It has been contended on behalf of the plaintiff that Deputy Commissioner has set aside two decrees which have been affirmed by the High Court as well as Supreme Court whereas he has no right, jurisdiction and authority to do so unless or until judgments and decrees passed in Civil Suit No.31 of 1981 and Civil Suit No.63 of 1983 are set aside by the competent Court. Plaintiff cannot be deprived from her entitlement on the suit property in this illegal manner. It has been contended that finding returned in Civil Suit No.37 of 1987 is question of fact, determined between different set of parties and, therefore, such finding is not binding in adjudication of matter in

different suit between different parties. It has also been contended that question of law determined in a suit may be binding in another suit between different parties, but the same principle cannot be made applicable to the question of fact.

19. Learned counsel for the applicants have relied upon judgments passed in ***T. Arivandandam s. T. V. Satyapal and another, AIR 1977 SC 2421; Azhar Hussain vs. Rajiv Gandhi, 1986 (Supp) SCC 315; A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies, Salem, (1989) 2 SCC 163; State of Punjab vs. Balwant Singh and others; 1992 Supp (3) SCC 108; Ram Prakash Gupta vs. Rajiv Kumar Gupta and others, (2007) 10 SCC 59; Bhagirath Prasad Singh vs. Ram Narayan Rai & another, AIR 2010 Patna 189; K.S. Varghese and others vs. Saint Peter's and Saint Paul's, (2017) 15 SCC 333;*** and ***Kutchi Lal Rameshwar Ashram Trust Evam Anna Kshetra Trust Through Velji Devshi Patel vs. Collector, Haridwar and others, (2017) 16 SCC 418.***

20. Leaned counsel for the plaintiff has relied upon judgments passed in ***A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies, Salem, (1989) 2 SCC 163; C. Natrajan vs. Ashim Bai and another, (2007) 14 SCC 183; Bhau Ram vs. Janak Singh & others, AIR 2012 SC 3023; Kuldeep Singh Pathania vs. Bikram Singh Jaryal, (2017) 5 SCC 345; Zee Telefilms Limited (now known as Zee Entertainment Enterprises Limited) vs. Suresh Productions and others***, ***(2020) 5 SCC 353***; and ***Srihari Hanumandas Totala vs. Hemant Vithal Kamat and others, (2021) 9 SCC 99.***

21. In principle, there is no quarrel with respect to ratio of law related to Order VII Rule 11 CPC and cause of action, and the pronouncements of the Supreme Court relied upon by both sides.

22. Basic principle is that for adjudicating an application under Order VII Rule 11 CPC, no other material except plaint and documents filed therewith are to be considered.

23. In ***Srihari Hanumandas Totala vs. Hemant Vithal Kamat and others, (2021) 9 SCC 99,*** a Two Judges' Bench of Supreme Court has summarized principles for adjudication of application under Order 7 Rule 11 CPC as under:-

> "25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11*(d)* can be summarized as follows:
> 25.1 To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to.
> 25.2 The defence made by the defendant in the suit must not be considered while deciding the merits of the application.
> 25.3 To determine whether a suit is barred by res judicata, it is necessary that *(i)* the "previous suit" is decided *(ii)* the issues in the subsequent suit were directly and substantially in issue in the former suit; *(iii)* the former suit was between the same parties through whom they claim, litigating under the same title; and *(iv)* that these issues were adjudicated and finally decided by as court competent to try the subsequent suit.
> 25.4 Since an adjudication of the plea of res judicata requires consideration on the pleadings, issues and decision in the "previous suit", such a plea will be beyond the scope of Order 7 Rule 11*(d)*, where only the statements in the plaint will have to be perused."

24. In present case, plaintiff has claimed right on the suit property on the basis of judgments of Civil Suit No.31 of 1981 and Civil Suit No.63 of 1983. The judgments in these suits have attained finality. Matter in Civil Suit No.31 of 1981 was contested up till Supreme Court. Whereas, in Civil Suit No.63 of 1983, after decision of the Division Bench of this High Court, no appeal was filed before the Supreme Court. In these suits plaintiff was substituted as legal representative of deceased Gehru and on the basis of these judgments, revenue authorities put the plaintiff in possession of the suit

land in the year 1998 and since then till passing of impugned order dated 19.07.2018 by Deputy Commissioner Kullu, possession and entitlement of the plaintiff was never questioned or disturbed.

25. Impugned order dated 19.07.2018 has been passed by defendant No.2-Deputy Commissioner Kullu, on filing complaint by defendant No.4, but on the basis of findings of the Civil Court, which were upheld by the Supreme Court, in Civil Suit No.35 of 1987, titled as *Kimtu vs. Pritam Chand,* wherein it was decided that plaintiff was not daughter of Gehru. Plaintiff has mentioned Civil Suit No.31 of 1981 and Civil Suit No.63 of 1983 in the plaint and has also mentioned fact of finding, upheld by the Supreme Court that plaintiff had failed to prove that she was daughter of Gehru in a Civil Suit wherefrom RSA No.127 of 1994 had arisen and has also referred that on the basis of the said suit, impugned order dated 19.07.2018 has been passed. Copy of the said order has also been placed on record wherein details of Civil Suit No.35 of 1987, titled as *Kimtu vs. Pritam Chand,* have been mentioned specifically alongwith number of Civil Appeal No.58 of 1990 and RSA No.127 of 1994 as well as Special Leave to Appeal (C) No.24908 of 2008, arising of the said Civil Suit.

26. In the aforesaid facts, I afraid from holding that plaintiff has concealed any relevant material in the plaint and documents filed therewith. Plaintiff has mentioned in the plaint about the judgments conferring right upon her on the suit property and has also mentioned about findings upheld by the Supreme Court wherein she was not considered daughter of Gehru. Therefore, for the material on record, which can be considered for adjudication of application under Order 7 Rule 11 CPC, I am of the opinion that plaintiff has not concealed any fact for filing the plaint.

27. Plea that suit of the plaintiff is barred by *res judicata*, as held by the Supreme Court in ***Srihari Hanumandas Totala's case supra***, is to be determined independently by adjudicating the issues like that whether

judgment passed in Civil Suit No.35 of 1987 was judgment in *rem* or judgment in *personam* and whether issue related to question of fact decided between the parties to a particular suit can be *res judicata* in another suit between different parties, and for adjudication of such issues material other than plaint and documents filed therewith would be necessary. On the basis of pleadings and material on record, it cannot be said at this stage that suit is barred by *res judicata.*

28. Undisputedly, parties to the suit in Civil Suit No.31 of 1981, Civil Suit No.63 of 1983 and Civil Suit No.35 of 1987 except from Gehru and Kimtu on one side as plaintiff, were different on other side. Therefore, for adjudication of issue that suit is barred by *res judicata* or not further material is required and, therefore, in my considered opinion, plaint cannot be rejected under Order 7 Rule 11 CPC, in present case, on the basis of material on record.

29. Certain civil rights on the suit property were conferred upon the plaintiff in furtherance to judgments in Civil Suit No.31 of 1981 and Civil Suit No.63 of 1983, which were and are being enjoyed by the plaintiff since 1988 and mutation in this regard has also been attested in her favour. True it is that attestation of mutation does not confer any right on any party, but in present case, not only mutation has been attested in favour of the plaintiff but her possession was also assented and confirmed by the competent revenue authorities. The said right has been taken away by passing an order dated 19.07.2018. Plaintiff is claiming certain right on the basis of judgments and decrees passed by the Courts and the said right has been ordered to be illegal on the basis of judgment passed in another case and now issue involved in present case is as to whether right conferred upon a person in furtherance of a judgment of the Court, can be taken away without setting aside the said judgment and decree but only on the basis of another judgment and decree wherein judgment and decree conferring right was neither questioned nor in

issue. For agitating her right and adjudication of the aforesaid issues, plaintiff is definitely having cause of action to avail appropriate remedy and, therefore, it cannot be said that present suit has been filed without cause of action. Principle that attestation of mutation does not confer any right on the party has also no effect on the cause of action arisen to the plaintiff to contest her claim and defend right on the suit property. For the material placed on record and pleadings of the plaint, it cannot be said that by concealing any material, plaintiff has played a fraud upon the Court or filing of plaint is amounting to abuse of process of the Court.

30. Though, it has been claimed that by the Supreme Court, in SLP (C) Diary No.24947 of 2020, State of H.P. vs. Kimtu and another, effect and operation of the judgments and orders under challenge therein has been ordered to be stayed, but there is no material on record that effect and operation of judgments in Civil Suit No.31 of 1981 and Civil Suit No.63 of 1983 has also been stayed. In any case, stay from the Supreme Court, if any, can be basis to stay the suit, but could not be a basis for rejection of plaint under Order 7 Rule 11 CPC unless judgment and decree on the basis of which plaintiff is asserting her right, is set aside or quashed by the competent Court of law following due process.

31. In my opinion, judgment in Civil Suit No.35 of 1987 may be relevant piece of evidence as provided under Indian Evidence Act and for the said purpose evidence on the part of the defendants would be necessary to be led and, thus, at this stage, the said judgment cannot be made basis for rejecting the plaint under Order 7 Rule 11 CPC.

32. Contention of the applicants-defendants that decrees relied upon by the plaintiff have been obtained by fraud, they are nullity in the eyes of law is an issue, which requires adjudication on the basis of evidence led by the parties. Therefore, this plea is also not relevant for attracting rejection of the plaint under Order 7 Rule 11 CPC in present case as plaintiff is claiming

herself as a daughter of Gehru not only on the basis of judgments and decrees passed in Civil Suit No.31 of 1981 and Civil Suit No.63 of 1983, but also on the basis of other evidence, including School Leaving Certificate and as to whether finding in Civil Suit No.35 of 1987 would operate as a *res judicata,* is an issue requires adjudication by placing on record further material other than pleadings in the plaint and material placed on record therewith.

33. In view of aforesaid discussion I do not find any merit in the applications. Accordingly, applications are dismissed.

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

Between:-

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (PW) OF THE GOVT. OF H.P., SHIMLA.

2. SUPERINTENDING ENGINEER, H.P.P.W.D.,12TH CIRCLE, NAHAN, DISTRICT SIRMOUR, H.P.

.....APPELLANTS.

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. J.S. GULERIA, DEPUTY ADVOCATE GENERAL AND SH. RAJAT CHAUHAN, LAW OFFICER)

AND

1. KALYAN SINGH S/O SH. NAIN SINGH, R/O MUHAL SHILLAI, TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

2. SOBHA RAM, S/O SH. DHASI RAM, DECEASED THROUGH HIS LEGAL HEIRS:-

   2(a) SHRI DEVENDER SINGH SON RESIDENT OF MUHAL SHILLAI (DHAKOLI), TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

3. NAIN SINGH, S/O SH. KANSHUIA RAM, DECEASED THROUGH HIS LEGAL HEIRS:-

   3(a) SH. GEETA RAM
   3(b) SH BAHU RAM
   3(c) SH. JAI PRAKASH
   3(d) SMT. GANGI DEVI
   3(e) DEVO DEVI
   3(f) GEETA DEVI

3(g) BIMLA
3(h) SUREKHA

ALL SONS AND DAUGHTERS, RESIDENTS OF MUHAL SHILLAI (DHAKOLI), TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

4. ROOP SINGH S/O SH. SHAHI RAM, R/O MUHAL SHILLAI, (DHAKOLI), TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

5. GANGA RAM, S/O SH. MOHTU RAM, DECEASED THROUGH HIS LEGAL HEIRS:-

5-(a) SH. ATMA RAM
5-(b) SH. DAULAT RAM
5-(c) SH. BALBIR SINGH
5-(d) SH. NARENDER SINGH
5-(e) SH. RAGHUBIR SINGH

ALL SONS, RESIDENTS OF MUHAL SHILLAI (DHAKOLI), TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

6. GUMAN SINGH, S/O SH. DHARAM SINGH, R/O MUHAL SHILLAI, TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

7. RATTI RAM S/O SH. FISHKU RAM, R/O MUHAL SHILLAI, TEHSIL SHILLAI, DISTT.SIRMOUR, H.P.

8. TOTA RAM, S/O SH. SAHIBU RAM, R/O MUHAL SHILLAI, TEHSIL SHILLAI, DISTT.SIRMOUR, H.P.

9. BESU RAM SON OF SH. JHATHI, DECEASED THROUGH HIS LEGAL HEIR:-

9(a) SH. MANIYA

BROTHER, RESIDENT OF MUHAL SHILLAI, TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

.....RESPONDENTS.

(SH. G.C. GUPTA, SENIOR ADVOCATE WITH MS. MEERA DEVI, ADVOCATE, FOR RESPONDENT-1).

(SH. B.C. NEGI, SENIOR ADVOCATE WITH SH. GAMBHIR SINGH CHAUHAN, ADVOCATE, FOR RESPONDENTS 2(A), 3(A) TO 3(H), 5(A) TO 5(E) AND 9(A).

LETTERS PATENT APPEAL
NO.146 OF 2021
Decided on: 07.11.2022

Delhi High Court Act, 1966- Clause 10- State utilized the lands of the respondents for constructing a road without compensating under the Land Acquisition Act and paying just and fair compensation with interest- **Held**- Constitution protects against deprivation of property except by authority of law- State bears higher responsibility when acquiring private land for public use- dispossession without due process or delay in compensation, violate the rule of law- delay alone cannot defeat substantive justice- where State fails to act promptly or selectively initiates legal proceedings only after court intervention, equity demands that affected parties be compensated without being prejudiced by delays- appeal dismissed sans merit. (Para 10)

Cases referred:

Sukh Dutt Ratra and another vs. State of H.P. and others (2022) 7 SCC 508;
Tukaram Kana Joshi & others vs. Maharashtra Industrial Development Corporation & others (2013) 1 SCC 353;
Vidya Devi vs. State of H.P. and others (2020) 2 SCC 569;

This appeal coming on for orders this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan,*** delivered *the following:*

J U D G M E N T

CMP(M) Nos. 1137 & 1138 of 2022.

By medium of this application, being CMP(M) No.1137 of 2022, the applicants/appellants have sought to bring on record the legal

representative of deceased-respondent No.2, who is stated to have died on 28.06.2017. Along with this application, another application being CMP(M) No. 1138 of 2022 for condonation of delay in filing CMP(M) No. 1137 of 2022 has been filed. For the reasons stated in the applications, the same are allowed and the legal representative of deceased-respondent No.2, as mentioned in para-4 of CMP(M) No. 1137 of 2022, is ordered to be brought on record after condoning the delay. The applications stand disposed of.

CMP(M) Nos. 1139 & 1140 of 2022.

2. By medium of this application, being CMP(M) No.1139 of 2022, the applicants/appellants have sought to bring on record the legal representatives of deceased-respondent No.3, who is stated to have died on 25.08.2019. Along with this application, another application being CMP(M) No. 1140 of 2022 for condonation of delay in filing CMP(M) No. 1139 of 2022 has been filed. For the reasons stated in the applications, the same are allowed and the legal representatives of deceased-respondent No.3, as mentioned in para-4 of CMP(M) No. 1139 of 2022, are ordered to be brought on record after condoning the delay. The applications stand disposed of.

CMP(M) Nos. 1141 & 1142 of 2022.

3. By medium of this application, being CMP(M) No.1141 of 2022, the applicants/appellants have sought to bring on record the legal representatives of deceased-respondent No.5, who is stated to have died on 10.11.2020. Along with this application, another application being CMP(M) No. 1142 of 2022 for condonation of delay in filing CMP(M) No. 1141 of 2022 has been filed. For the reasons stated in the applications, the same are allowed and the legal representatives of deceased-respondent No.5, as mentioned in para-4 of CMP(M) No. 1141 of 2022, are ordered to be brought on record after condoning the delay. The applications stand disposed of.

CMP(M) Nos. 1143 & 1144 of 2022.

4. By medium of this application, being CMP(M) No.1143 of 2022, the applicants/appellants have sought to bring on record the legal representative of deceased-respondent No.9, who is stated to have died on 16.07.2012 Along with this application, another application being CMP(M) No. 1144 of 2022 for condonation of delay in filing CMP(M) No. 1143 of 2022 has been filed. For the reasons stated in the applications, the same are allowed and the legal representative of deceased-respondent No.9, as mentioned in para-4 of CMP(M) No. 1143 of 2022, are ordered to be brought on record after condoning the delay. The applications stand disposed of.

Amended memo of parties is ordered to be taken on record.

LETTERS PATENT APPEAL NO.146 OF 2021.

5. The State aggrieved by the judgment rendered by the learned Writ Court has filed the instant Letters Patent Appeal.

6. It is not in dispute that the lands of the respondents-writ petitioners was utilized by the appellants for construction of road namely "Shillai-Naya Gatta Mandwach" that too without payment of compensation and aggrieved thereby the petitioners had approached the learned Writ Court by filing CWP No.8130 of 2010 for grant of the following substantive relief:-

> "It is, therefore, most respectfully prayed that this petition may kindly be allowed and a writ of mandamus be issued against the respondents, directing them to initiate proceedings under the Land Acquisition Act to the petitioners and other similarly situated persons illegally taken possession for the construction of road known as "Shilla-Naya Gatta Mandwach Road" and pay just and fair compensation to them alongwith interest."

7. The appellants, who were respondents before the learned Writ Court contested the petition on the ground that the lands of the writ petitioners except petitioner Nos. 3 and 9 bearing Khasra No.5518, 895, 5270,963, 1027, 848 and 5271 have been utilized for construction of the aforesaid road, but that was in late sixties and now in terms of the delay,

laches as also the principles of estoppel, waiver and abandonments, the petitioners were not entitled to the relief sought for.

8. The learned Writ Court after relying upon the judgment of the Hon'ble Supreme Court in ***Tukaram Kana Joshi and others*** *vs.* ***Maharashtra Industrial Development Corporation and others (2013) 1 SCC 353*** and a recent judgment of the Hon'ble Supreme Court in ***Vidya Devi*** *vs.* ***State of H.P. and others (2020) 2 SCC 569*** held that the plea of any implied or verbal consent of the landowners was not available to the State and further there was no question of petition in such cases being barred by delay and laches and allowed the petition after placing reliance on the aforesaid judgments.

9. Aggrieved by the judgment passed by the learned Writ Court, the State has filed the instant appeal questioning the judgment rendered by the learned Writ Court again on the grounds of delay, laches, estoppel and waiver.

10. However, we find no merit in this contention in view of the judgments as relied upon by the leaned Writ Court and further in view of a very recent judgment of the Hon'ble Supreme Court in ***Sukh Dutt Ratra and another*** *vs.* ***State of Himachal Pradesh and others (2022) 7 SCC 508*** wherein all the questions as raised by the petitioners have been considered in detail and it is thereafter that the Hon'ble Supreme Court while allowing the SLP observed as under:-

> **"Analysis and conclusion**
>
> 13. While the right to property is no longer a fundamental right ["Constitution (Forty-fourth Amendment) Act, 1978"], it is pertinent to note that at the time of dispossession of the subject land, this right was still included in Part III of the Constitution. The right against deprivation of property unless in accordance with procedure established by law, continues to be a constitutional right under Article 300-A.
>
> 14. It is the cardinal principle of the rule of law, that nobody can be deprived of liberty or property without due process, or

authorization of law. The recognition of this dates back to the 1700s to the decision of the King's Bench in Entick v. Carrington 1765 EWHC (KB) J98: 95 ER 807 and by this court in Wazir Chand v. The State of Himachal Pradesh (1955) 1 SCR 408. Further, in several judgments, this court has repeatedly held that rather than enjoying a wider bandwidth of lenience, the State often has a higher responsibility in demonstrating that it has acted within the confines of legality, and therefore, not tarnished the basic principle of the rule of law.

15. When it comes to the subject of private property, this court has upheld the high threshold of legality that must be met, to dispossess an individual of their property, and even more so when done by the State. In Bishandas v. State of Punjab (1962) 2 SCR 69 this court rejected the contention that the petitioners in the case were trespassers and could be removed by an executive order, and instead concluded that the executive action taken by the State and its officers, was destructive of the basic principle of the rule of law. This court, in another case - State of Uttar Pradesh and Ors. v. Dharmander Prasad Singh and Ors. (1989) 2 SCC 505, held: (SCC p.516 para 30)

> **"30. A lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression 're-entry' in the lease-deed does not authorise extra- judicial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited; a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a 'legal pedigree'".**

16. Given the important protection extended to an individual vis-a-vis their private property (embodied earlier in Article 31, and now as a constitutional right in Article 300-A), and the high threshold the State must meet while acquiring land, the question remains – can the State, merely on the ground of delay and

laches, evade its legal responsibility towards those from whom private property has been expropriated? In these facts and circumstances, we find this conclusion to be unacceptable, and warranting intervention on the grounds of equity and fairness.

17. When seen holistically, it is apparent that the State's actions, or lack thereof, have in fact compounded the injustice meted out to the appellants and compelled them to approach this court, albeit belatedly. The initiation of acquisition proceedings initially in the 1990s occurred only at the behest of the High Court. Even after such judicial intervention, the State continued to only extend the benefit of the court's directions to those who specifically approached the courts. The State's lackadaisical conduct is discernible from this action of initiating acquisition proceedings selectively, only in respect to the lands of those writ petitioners who had approached the court in earlier proceedings, and not other land owners, pursuant to the orders dated 23.04.2007 (in CWP No. 1192/2004) and 20.12.2013 (in CWP No. 1356/2010) respectively. In this manner, at every stage, the State sought to shirk its responsibility of acquiring land required for public use in the manner prescribed by law.

18. There is a welter of precedents on delay and laches which conclude either way – as contended by both sides in the present dispute – however, the specific factual matrix compels this court to weigh in favour of the appellant-land owners. The State cannot shield itself behind the ground of delay and laches in such a situation; there cannot be a 'limitation' to doing justice. This court in a much earlier case - Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service (1969) 1 SCR 808, held: (AIR pp. 335-36, para 11)

> "**11……Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material.**
>
> **But in every case, if an argument against relief, which otherwise would be just, is founded upon**

> **mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."**

19. The facts of the present case reveal that the State has, in a clandestine and arbitrary manner, actively tried to limit disbursal of compensation as required by law, only to those for which it was specifically prodded by the courts, rather than to all those who are entitled. This arbitrary action, which is also violative of the appellants' prevailing Article 31 right (at the time of cause of action), undoubtedly warranted consideration, and intervention by the High Court, under its Article 226 jurisdiction. This court, in State of U.P. v. Manohar (2005) 2 SCC 126 - a similar case where the name of the aggrieved had been deleted from revenue records leading to his dispossession from the land without payment of compensation held: (SCC pp. 128-29, paras 6-8)

> **"6.Having heard the learned counsel for the appellants, we are satisfied that the case projected before the court by the appellants is utterly untenable and not worthy of emanating from any State which professes the least regard to being a welfare State. When we pointed out to the learned counsel that, at this stage at least, the State should be gracious enough to accept its mistake and promptly pay the compensation to the respondent, the State has taken an intractable attitude and persisted in opposing what appears to be a just and reasonable claim of the respondent.**
>
> **7. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the Forty-fourth Amendment to the Constitution, Article 300-A has been placed in the Constitution, which reads as follows:**

> **"300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law."**
>
> **8.This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities. In our view, this case was an eminently fit one for exercising the writ jurisdiction of the High Court under Article 226 of the Constitution."**

20. Again, in Tukaram Kana Joshi v. Maharashtra Industrial Development Corpn. (MIDC) (2013) 1 SCC 353 while dealing with a similar fact situation, this court held as follows: (SCC p. 359, para 11)

> **"11.There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. The functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode."**

21. Having considered the pleadings filed, this court finds that the contentions raised by the State, do not inspire confidence and deserve to be rejected. The State has merely averred to the appellants' alleged verbal consent or the lack of objection, but has not placed any material on record to substantiate this plea. Further, the State was unable to produce any evidence indicating that the land of the appellants had been taken over or acquired in

the manner known to law, or that they had ever paid any compensation. It is pertinent to note that this was the State's position, and subsequent findings of the High Court in 2007 as well, in the other writ proceedings.

22. This court is also not moved by the State's contention that since the property is not adjoining to that of the appellants, it disentitles them from claiming benefit on the ground of parity. Despite it not being adjoining (which is admitted in the rejoinder affidavit filed by the appellants), it is clear that the subject land was acquired for the same reason – construction of the Narag Fagla Road, in 1972-73, and much like the claimants before the reference court, these appellants too were illegally dispossessed without following due process of law, thus resulting in violation of Article 31 and warranting the High Court's intervention under Article 226 jurisdiction. In the absence of written consent to voluntarily give up their land, the appellants were entitled to compensation in terms of law. The need for written consent in matters of land acquisition proceedings, has been noted in fact, by the full court decision of the High Court in Shankar Dass (supra) itself, which is relied upon in the impugned judgment.

23. This court, in Vidya Devi v. State of H.P. (2020) 2 SCC 569 facing an almost identical set of facts and circumstances – rejected the contention of 'oral' consent to be baseless and outlined the responsibility of the State: (SCC p. 574, para 12)

> **"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 (2013) 1 SCC 353 : (2013) 1 SCC (Civ) 491 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.**
>
> **12.10. This Court in State of Haryana v. Mukesh Kumar (2011) 10 SCC 404 : (2012) 3 SCC (Civ) 769 held that the right to property is now considered to be not only a constitutional or statutory right, but also a human right. Human rights have been considered in the realm of individual rights such as right to shelter,**

> **livelihood, health, employment, etc. Human rights have gained a multi-faceted dimension."**

24. And with regards to the contention of delay and laches, this court went on to hold: (Vidya Devi case (supra), SCC pp. 574-75, para 12)

> **"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.**
>
> **12.13. In a case where the demand for justice is so compelling, a constitutional court would exercise its jurisdiction with a view to promote justice, and not defeat it. [P.S. Sadasivaswamy v. State of T.N., (1975) 1 SCC 152 : 1975 SCC (L&S) 22]"**

25. Concluding that the forcible dispossession of a person of their private property without following due process of law, was violative 22 of both their human right, and constitutional right under Article 300-A, this court allowed the appeal. We find that the approach taken by this court in Vidya Devi (supra) is squarely applicable to the nearly identical facts before us in the present case.

26. In view of the above discussion, in view of this court's extraordinary jurisdiction under Article 136 and 142 of the Constitution, the State is hereby directed to treat the subject lands as a deemed acquisition and appropriately disburse compensation to the appellants in the same terms as the order of the reference court dated 04.10.2005 in Land Ref. Petition No. 10-LAC/4 of 2004 (and consolidated matters). The Respondent-State

> is directed, consequently to ensure that the appropriate Land Acquisition Collector computes the compensation, and disburses it to the appellants, within four months from today. The appellants would also be entitled to consequential benefits of solatium, and interest on all sums payable under law w.e.f 16.10.2001 (i.e. date of issuance of notification under Section 4 of the Act), till the date of the impugned judgment, i.e. 12.09.2013."

11. Now that all the questions that have been raised in the instant appeal have been dealt with threadbare and meticulously by the Hon'ble Supreme Court, the instant appeal on behalf of the State clearly sans merit and is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Prem Chand ...Appellant

Versus

Yoginder Kumar & another ...Respondents

For the appellant : Mr. J. L. Bhardwaj & Mr. Sanjay Bhardwaj, Advocates.

For the respondents : Mr. J. N. Kanwar, Advocate, vice counsel for respondent No.1.

Mr. Lalit K. Sharma, Advocate, for respondent No.2.

FAO No. 150 of 2014
Reserved on:10.11.2022
Date of decision:22.11.2022

Motor Vehicles Act, 1988- Section 173- Appellant has sought enhancement in the amount of compensation awarded- **Held**- The right arm of appellant had to be amputated- Appellant had suffered disablement to the extent of 75% as per medical opinion- Settled law that victim of accident having suffered permanent disablement is entitled for consideration of loss of future prospects for compensation- Functional disability would be to the extent of 100%- with one arm, not able to drive the vehicle- It cannot be presumed that a person at the age of 45 years would not be earning even a single penny- he was a professional driver so his source of income gone- Appellant had suffered 100% loss of his income- Since, permanently disabled, there was no requirement to make any further deduction out of income towards personal and living expenses- Award modified- Appeal allowed. (Para 12)

Cases referred:

Chandra alias Chandraram & another vs. Mukesh Kumar Yadav & another 2022 (1) SCC 198;
Laxmibai vs Bhagwantbuva 2013 (4) SCC 97;
Pappu Deo Yadav Vs Naresh Kumar AIR 2020 SC 4424;
Raj Kumar vs. Ajay Kumar & another 2011 (1) SCC 343;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant appeal, the appellant has sought enhancement in the amount of compensation awarded in his favour by learned Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. (for short "the Tribunal") vide award dated 3.1.2014, in MAC Petition No. 49-S/2 of 2007.

2. The appellant was victim of accident involving motor vehicle bearing Registration No. HP-14-7703. The accident had occurred on 23.11.2005 near Old Panchkula, Haryana. The offending vehicle was owned by respondent No.1 and was being driven by one Sh. Sunil Kumar at the time of accident, who had died as a result of injuries suffered by him in the same accident. The right arm of appellant had to be amputated. As per medical opinion, the appellant had suffered disablement to the extent of 75% towards whole body.

3. The appellant preferred claim petition for compensation under Section 163A of the Motor Vehicles Act (for short "the Act"). He pleaded his monthly income to be Rs. 4000/- per month from all sources. As per appellant, he was employed as a driver before accident by Sh. Manmohan Singh, resident of Village Bashal, Tehsil and District Solan, H.P. Appellant alleged that on account of permanent disability suffered by him, he was not able to drive the vehicle and was also unable to indulge in agriculture pursuits, which he had been doing on the land belonging to his father before accident.

4. The owner of the vehicle filed reply to the claim petition and submitted that the accident had taken place due to rash and negligent driving of the driver of Truck No. CH-01E-7577. It was also been submitted that FIR No. 537 dated 24.11.2005 was registered under Sections 279, 337 and 304 of IPC at Police Station Panchkula. The occupation of the vehicle by the

appellant at the time of accident was not denied. It was submitted that the appellant was traveling in the vehicle as owner of the goods.

5. Respondent No.2 insurer in its reply has submitted that the vehicle No. HP-14-7703 was being plied at the time of accident in violation of the terms of the policy. It was also submitted that the accident had taken place on account rash and negligent driving of the driver of Truck No. CH-01E-7577.

6. Learned Tribunal framed the following issues: -

i) Whether the petitioner was injured in accident and entitled for compensation? OPP.

ii) Whether respondent No.2 is liable to make payment of compensation amount as indemnifier? OPP.

iii) Whether the petition is not maintainable? OPR.

iv) Whether the petition is bad for non-joinder of necessary party? OPR.

v) Whether the vehicle in question was driven in breach of terms and conditions of the policy? OPR.

vi) Relief.

Issues No. 1 and 2 were decided in affirmative and rest of the issues were decided in negative. The petition was allowed and the appellant was held entitled for compensation to the tune of Rs. 1,61,250/- with interest at the rate of 9% per annum from the date of institution of the petition. A sum of Rs. 1,46,250/- was awarded by learned Tribunal on account of loss of income, Rs. 5000/- were awarded as compensation on account of pain and sufferings and Rs. 10,000/- were awarded as charges incurred by the appellant on medical expenses.

7. The learned Tribunal found that appellant had not been able to prove his income and, on such assumption, held the appellant entitled to Rs.

15000/- per annum being his notional income, as provided in 2nd Schedule to the Act. Learned Tribunal held the age of the appellant on the date of accident about 45 years. Multiplier of 13 was applied as prescribed under the aforesaid schedule. The notional income of claimant at the rate of 15000/- per annum was multiplied by 13 and the sum of Rs. 1,95,000/- so derived was reduced by 25% as the disability of appellant was assessed at 75%.

8. Respondents have accepted the award and have not assailed the same.

9. Aggrieved against inadequacy of award, appellant has approached this Court by way of the instant appeal.

10. I have heard learned counsel for the parties and have also gone through the record carefully.

11. At the outset, learned counsel for the appellant made a submission that the claim petition filed by the appellant under Section 163A be treated as one under Section 166 of the Act. He contended that the rights of appellant have been seriously prejudiced by not filing the petition under Section 166 of the Act. The submission so made deserves to be rejected for the simple reason that the appellant, during the pendency of proceedings of claim petition before learned Tribunal, had moved an application under Order 6 Rule 17 of the Code of Civil Procedure with a prayer to convert the claim petition under Section 166 of the Act and to amend the pleadings accordingly. However, the prayer made in the said application was given up by the appellant on 14.6.2012 before the learned Tribunal. Once such prayer was given up by the appellant voluntarily, he cannot be allowed to make the same prayer again before this Court.

12. Learned Tribunal found that appellant had failed to prove his income that he used to earn before accident. Such findings need interference by this Court for the reason that learned Tribunal had failed to notice the unrebutted versions of claimant regarding his occupation and income. The

claimant had appeared as his own witness and submitted his examination-in-chief by way of affidavit Ext. PW-1/A. In para-1 of the said affidavit, appellant had categorically mentioned that he was working as a driver with one Sh. Manmohan Singh, S/o Sh. Netar Singh on his vehicle No. HP-14-7703 and used to be paid total Rs. 4000/- per month i.e. salary of Rs. 3000/- besides daily allowance. An income of Rs. 1000/- per month was additionally claimed from agriculture pursuits. This part of the statement of appellant had remained unrebutted. He had not been cross-examined in this respect at all. It was only suggested to him that his income was not Rs. 4000/- per month, which he had denied. In light of unrebutted statement of claimant and there being no other evidence to the contrary, the assessment drawn by learned Tribunal, as regards monthly income of claimant, cannot be said to be justified or legal. Learned Tribunal could have applied the notional income in the case of appellant in case he was not able to earn anything before accident. As noticed above, there was evidence on record in the shape of unrebutted statement of the appellant by way of an affidavit, which was sufficient to infer that the appellant was having an income of Rs. 4000/- per month before accident. To support such view reliance can be placed on following extract from the judgment passed by Hon'ble Supreme Court in ***Laxmibai vs Bhagwantbuva*** reported in ***2013 (4) SCC 97***

> *"40. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to*

test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See Khem Chand v. State of H.P. [1994 Supp (1) SCC 7 : 1994 SCC (Cri) 212 : AIR 1994 SC 226] , State of U.P. v. Nahar Singh [(1998) 3 SCC 561 : 1998 SCC (Cri) 850 : AIR 1998 SC 1328] , Rajinder Parshad v. Darshana Devi [(2001) 7 SCC 69 : AIR 2001 SC 3207] and Sunil Kumar v. State of Rajasthan [(2005) 9 SCC 283 : 2005 SCC (Cri) 1230 : AIR 2005 SC 1096] .)"

14. Even otherwise the findings returned by learned Tribunal in this regard were unreasonable as it cannot be presumed that a person at the age of 45 years would not be earning even a single penny. In ***Chandra alias Chandraram & another*** vs. ***Mukesh Kumar Yadav & another*** **reported in 2022 (1) SCC 198**, the Hon'ble Supreme Court has held that in absence of any documentary proof regarding the income, some amount of guess work is permissible and is required to be done.

15. Thus, there was evidence on record which suggested that appellant had income of atleast 4000/- per month before he met with the accident.

16. Since the appellant had claimed compensation under Section 163A of the Act and his permanent disability was proved, he was entitled for compensation as per Clauses 4 and 5 of IInd Schedule appended to the Act which read as under: -

4. **General damages in case of injuries and disabilities:**

(i) Pain and Sufferings

(a) Grievous injuries — Rs. 5000/-

(b)Non-grievous injuries	Rs. 1000/-
(ii) Medical Expenses-actual expenses incurred supported by bills/vouchers but not exceeding as one time payment	Rs. 15,000/-

5. **Disability in non-fatal accidents:**

The following compensation shall be payable in case of disability to the victim arising on account of non-fatal accidents:

Los of income, if any, for actual period of disablement not exceeding fifty-two weeks **PLUS** either of the following: -

(a) In case of permanent total disablement, the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent total disablement/Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule 1 under workmen's compensation Act, 1923

17. Clause-5, as noticed above, of the IInd Schedule speaks about calculation of payable compensation on the basis of "loss of income". As held above appellant had monthly income of Rs. 4000/-. Though the disablement

of appellant was assessed at 75% but his functional disability would be to the extent of 100%. With one arm, he will not be able to drive the vehicle. He was a professional driver and on account of aforesaid disablement, his source of income was snatched. Thus, the appellant had suffered 100% loss of his income.

18. It is now a settled proposition that a victim of Motor Vehicles Accident, having suffered permanent disablement, is entitled for consideration of loss of future prospects while assessing compensation under the Act. At this stage, following excerpts from judgment passed by Hon'ble Supreme Court in ***Pappu Deo Yadav Vs Naresh Kumar*** reported in ***AIR 2020 SC 4424*** can be gainfully noticed:-

> *"3. While assessing loss of earning capacity, the Tribunal took the appellant's income to be Rs. 8000 per month, and added 50% towards future prospects. At the time of the accident, the appellant was only 20 years of age. Therefore, a multiplier of 18 was applied. The physical disability was assessed to be 45%, by the Tribunal. The High Court, to which the claimant appealed (and the insurer cross appealed), revised this head of compensation by doing away with the addition of 50% towards future prospects, and reassessed the compensation for loss of earning capacity as Rs. 7,77,600 (Rs.8000 x 12 x 45% x 18). The total compensation was reassessed by the High Court to be Rs.14,36,600, after enhancing the compensation for disfigurement, diet, attendant and conveyance, loss of amenities and enjoyment of life, and pain and suffering. Further, an interest of 9% per annum was imposed. In reducing the amount awarded for loss of future prospects, the High Court noticed this court's judgments in National Insurance Company Ltd. v. Pranay Sethi & Ors. and Jagdish v. Mohan & Ors both by three-judge benches of this court.*
>
> *4. The appellant argues that the impugned judgment is in material error, in misreading this court's judgments in Pranay Sethi & Ors which was later clarified in Jagdish (2018) 4 SCC 571 by a three judge Bench, which had ruled that the benefit of future prospects should not be confined only to those who have a permanent job and would extend to self-employed individuals, and in case of self- employed persons an addition of 40% of established income should be made where the age of the victim at*

the time of the accident was below 40 years. It was urged that the decision in Anant s/o of Sidheshwar Dukre v. Pratap s/o Zhamnnappa Lamzane & Anr. relied on by the High Court, did not assess future prospects. However, that per se did not preclude claims by persons incurring permanent disablement as a consequence of motor accidents, from seeking such heads of compensation. It is urged that the High Court misread and created a distinct category of cases where addition in income towards "future prospects" can only be given in case of death, and not for injury, which cannot be the intention of this court as no such observation is made. It was argued that the High Court should have reassessed and not reduced 'the loss of future earning capacity' of the appellant from Rs. 11,66,400/- (determined by the tribunal) to Rs. 7,77,600/- on the wrongly depressed income of Rs. 8000/-. Learned counsel submitted that the assessment of monthly income should have been Rs.12,000/- and not Rs.8,000/. It was submitted that the courts below ignored the fact that in 2012, persons earning Rs.12, 000/- per month did not have to file income tax returns or pay tax. The High Court further erred in assessment of physical permanent disability of injured as 45%, even though it was 100%.

7. Two questions arise for consideration: one, whether in cases of permanent disablement incurred as a result of a motor accident, the claimant can seek, apart from compensation for future loss of income, amounts for future prospects too; and two, the extent of disability. On the first question, the High Court no doubt, is technically correct in holding that Pranay Sethi involved assessment of compensation in a case where the victim died. However, it went wrong in saying that later, the three-judge bench decision in Jagdish was not binding, but rather that the subsequent decision in Anant to the extent that it did not award compensation for future prospects, was binding. This court is of the opinion that there was no justification for the High Court to have read the previous rulings of this court, to exclude the possibility of compensation for future prospects in accident cases involving serious injuries resulting in permanent disablement. Such a narrow reading of Pranay Sethi is illogical, because it denies altogether the possibility of the living victim progressing further in life in accident cases - and admits such possibility of future prospects, in case of the victim's death.

10. The recent decision in Parminder Singh v. New India Assurance Co. Ltd, involved an accident victim who underwent surgery for hemiplegia. According to the treating medic, he could

not work as a labourer or perform any agricultural work, or work as a driver (as he was wont to); the assessment of his disability was at 75%, and of a permanent nature. The court held that:

> *"5.2. On the basis of the affidavit filed by the employer of the appellant, we accept that the income of the appellant was Rs 10,000 p.m. at the time of the accident, for the purpose of computing the compensation payable to him.*
>
> *5.1. The appellant has however, produced an affidavit by his employer in this Court. As per the said affidavit, the appellant was earning Rs 10,000 p.m. at the time of the accident.*
>
> *5.3. Taking the income of the appellant as Rs 10,000 p.m., with future prospects @ 50% as awarded by the High Court, the total income of the appellant would come to Rs 15,000 p.m. 5.4. The appellant was 23 years old at the time when the accident occurred. Applying the multiplier of 18, the loss of future earnings suffered by the appellant would work out to Rs 15,000 × 12 × 18 = Rs 32,40,000*
>
> *5.7. In K. Suresh v. New India Assurance Co. Ltd (2012) 12 SCC 274, this Court held that:*
>
> > *"10. It is noteworthy to state that an adjudicating authority, while determining the quantum of compensation, has to keep in view the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have 15 (2019) 7 SCC 217 16 Weakness of one half of the body on the left side; in this case, caused by an accident. 17 at page 279, para 10 11 earned. Hence, while computing compensation the approach of the Tribunal or a court has to be broadbased. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion of "just compensation" should be inhered."*
> >
> > *5.9. In the present case, it is an admitted position that it is not possible for the appellant to get employed as a driver, or do any kind of manual labour, or engage in any agricultural operations whatsoever, for his sustenance. In such*

circumstances, the High Court has rightly assessed the appellant's functional disability at 100% insofar as his loss of earning capacity is concerned. The appellant is, therefore, awarded Rs 32,40,000 towards loss of earning capacity."

11. Yet later and more recently in an accident case, which tragically left in its wake a young girl in a life-long state of paraplegia, this court, in Kajal v. Jagdish Chand, 18 reiterated that in addition to loss of earnings, compensation for future prospects too could be factored in, and observed that:

"14. In Concord of India Insurance Co. Ltd. v. Nirmala Devi [Concord of India Insurance Co. Ltd. v. Nirmala Devi, (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : 1980 ACJ 55] , this Court held : (SCC p. 366, para 2)

"2. … the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales."

15. In R.D. Hattangadi v. Pest Control (India) (P) Ltd. [R.D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551 : 1995 SCC (Cri) 250] , dealing with the different heads of compensation in injury cases this Court held thus : (SCC p. 556, para 9)

"9. Broadly speaking while fixing the amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas nonpecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in the future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss

of expectation of life i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

16. In Raj Kumar v. Ajay Kumar [Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343 : (2011) 1 SCC (Civ) 164 : (2011) 1 SCC (Cri) 1161] , this Court laid down the heads under which compensation is to be awarded for personal injuries : (SCC p. 348, para 6)

"6. The heads under which compensation is awarded in personal injury cases are the following:
Pecuniary damages (Special damages)
(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure. (ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.
(iii) Future medical expenses.
Non-pecuniary damages (General damages)
(iv) Damages for pain, suffering and trauma as a consequence of the injuries. (v) Loss of amenities (and/or loss of prospects of marriage).
(vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. In K. Suresh v. New India Assurance Co. Ltd. [K. Suresh v. New India Assurance Co. Ltd., (2012) 12 SCC 274 : (2013) 2 SCC (Civ) 279 : (2013) 4 SCC

(Cri) 638] , this Court held as follows : (SCC p. 276, para 2)

"2. … There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity "the Act") stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance." Loss of earnings

20. Both the courts below have held that since the girl was a young child of 12 years only notional income of Rs 15,000 p.a. can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs 15,000 p.a. Each case has to be decided on its own evidence but taking notional income to be Rs 15,000 p.a. is not at all justified. The appellant has placed before us material to show that the minimum wages payable 14 to a skilled workman is Rs 4846 per month. In our opinion, this would be the minimum amount which she would have earned on becoming a major. Adding 40% for the future prospects, it works to be Rs 6784.40 per month i.e. 81,412.80 p.a. Applying the multiplier of 18, it works out to Rs 14,65,430.40, which is rounded off to Rs 14,66,000."

12. In view of the above decisive rulings of this court, the High Court clearly erred in holding that compensation for loss of future prospects could not be awarded. In addition to loss of future earnings (based on a determination of the income at the time of accident), the appellant is also entitled to compensation for loss of future prospects, @ 40% (following the Pranay Sethi principle)."

19. As noticed above the method for calculation of compensation under clause 5 of IInd Schedule appended to the Act relates multiplication of "loss of income" with applicable multiplier meaning thereby that particular

number of future years of claimant are taken into consideration. Thus, while considering future prospects while assessing loss of income, a claim petition under Section 163A cannot be an exception. By applying the above principle as laid down in Jagdish Vs Mohan (2018)4 SCC 571, a sum of Rs. 1000/- per month as 25% of the income was liable to be added to the loss of income of appellant.

20. Thus, the income of the appellant was assessable at Rs. 5000/- per month and his annual income would be assessed at Rs. 60,000/-. However, under clause 5 of IInd Schedule to the Act, injuries deemed to result in Permanent total disablement/Permanent Partial Disablement and percentage of loss of earning capacity are to be reckoned as per Schedule 1 under workmen's compensation Act, 1923.

21. By applying the parameters provided in Schedule 1 under workmen's compensation Act, 1923, the case of the appellant fell under part II of the said Schedule and will be considered as 'Permanent Partial Disablement' with 80% loss of earning capacity as the appellant had suffered amputation from elbow. Thus his annual income would have been considered at 80% i.e. Rs. 48,000/- instead of Rs. 60,000/- and the appellant was entitled to following amounts as compensation:

i) Rs. 4000/- per month for 52 weeks (13 months) = 4000 x 13= Rs. 52,000/-

ii) Rs. 4000 x12 x13 = Rs. 6,24,000/-.

22. Since the appellant has suffered permanent disability, there was no requirement to make any further deduction out of income towards personal and living expenses. Reference in this regard can be made to ***2011 (1) SCC 343,*** titled as ***Raj Kumar vs. Ajay Kumar & another***, which reads as under: -

> *"In the case of an injured claimant with a disability, what is calculated is the future loss of earning of the claimant, payable to the claimant, (as contrasted from loss of dependency calculated in a fatal accident, where the dependent family members of the deceased are the claimants). Therefore, there is no need to deduct one-third or any other percentage from out of the income, towards the personal and living expenses."*

23. Keeping in view the above discussions, the award passed by the learned Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. vide Award dated 3.1.2014, in MAC Petition No. 49-S/2 of 2007 needs modification to the extent as noticed above. The amount of Rs. 5000/- towards pain and suffering and Rs. 10,000/- towards medical expenses awarded by learned Tribunal needs no interference.

24. In result, the appellant is held entitled to the compensation as under: -

Rs.52,000+Rs 6,24,000+10,000+5000= Rs. 6,91,000/-

25. In addition, the appellant shall also be entitled to interest at the rate of 9% per annum from the date of filing of petition till realization of the amount. All pending miscellaneous application(s), if any, also stand disposed of.

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

1. **FAO No. 414 of 2014**

Pushpinder Singh @ Monu ...Appellant

Versus

Rajesh Mehta & others ...Respondents

2. **FAO No. 420 of 2014**

Oriental Insurance Company Ltd. ...Appellant

Versus

Pushpinder Singh @ Monu & others ...Respondents

For the petitioner : Mr. J. L. Bhardwaj, Advocate, for the appellant in FAO No. 414 of 2014 and for respondent No.1 in FAO No. 420 of 2014.

For the respondent : Mr. Ashwani K. Sharma, Sr. Advocate for the appellant in FAO No. 420 of 2014 and for respondent No.3 in FAO No. 414 of 2014.

FAO Nos. 414 & 420 of 2014
Reserved on:3.11.2022
Date of decision:18.11.2022

Motor Vehicles Act, 1988- Section 173- appeal no. 414 by claimant for enhancement of award amount and appeal no. 420 by insurer assailing the quantum- **Held**- neither insurer challenged version of salary nor any evidence was led in rebuttal- assessment of monthly income cannot be said to be illegal or unjustified- fact of claimant getting incentive is not rebutted- Cannot be disentitled from benefit of monthly payment for assessment of compensation- Education has no direct nexus with earning capacity- Assessment of loss of future prospects at rate the of 5% is unjustified, as less education does not mean no potential to earn- entitled for 40%- Claim for amount paid to an attendant cannot be termed to be unjustified- Modified both appeals- Compensation amount increased. (Paras 15,18)

Cases referred:
Laxmibai vs Bhagwantbuva reported in 2013 (4) SCC 97;
Pappu Deo Yadav Vs Naresh Kumar AIR 2020 SC 4424;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

Both these appeals are being decided by a common judgment as these arise from same Award dated 20.4.2014, passed by learned Motor Accident Claims Tribunal, Shimla, H.P. in MACC No. 1-S/2 of 2012 and also involve identical questions of law and facts.

2. FAO No. 414 of 2014 has been filed by the claimant for enhancing of Award amount, whereas FAO No. 420 of 2014 has been filed by insurer, assailing the quantum of compensation to be on higher side.

3. Brief facts necessary for adjudication of these appeals are that claimant Pushpinder Singh alias Monu on 30.6.2006, while riding motorcycle was hit by a Car bearing Registration No. CH-03Y-7187, and suffered grievous injuries resulting in 50% disability. The offending car was owned by respondent No.1(for short, 'the owner') and driven by respondent No.2 (for short, 'the driver') in FAO No. 414 of 2014.

4. Claimant preferred claim petition under Section 166 of Motor Vehicles Act (for short, 'the Act') before learned Motor Accident Claims Tribunal, Shimla (for short, 'the Tribunal') with the allegation that claimant had suffered grievous injuries and consequent disability due to rash and negligent driving by the driver. It was alleged that claimant at the time of accident was working at a salary of Rs. 9000/- per month as sales executive with "Smooth Waves" and was also being paid Rs. 1200/- per month as incentive. It was further alleged that due to the disability suffered by the claimant, he was not in a position to work anymore.

5. Learned Tribunal allowed the claim petition of claimant and awarded a sum of Rs. 19,86,016/- along with interest at the rate of 9% per annum from the date of filing of the petition till realization of the awarded amount. Insurer was burdened with liability to pay the compensation. Learned Tribunal awarded the compensation to claimant under various heads as under: -

"Pecuniary damages (Special Damages)"

(i)	Expenses relating to treatment hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.	Rs. 6,16,016/-
(ii)	Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of treatment (b) Loss of future earnings on account of permanent disability.	 Rs. Nil. Rs. 10,20,000/-
(iii)	**"Non-pecuniary damages (General damages)"**	
(iv)	Damages for pain, suffering and trauma as a consequence of the injuries.	Rs. 1,00,000/-
(v)	Loss of amenities (and/or loss of prospects of marriage).	Rs. 1,00,000/-
(vi)	Loss of expectation of life (shortening of normal longevity).	Rs. 50,000/-
(vii)	Loss of matrimonial prospects	Rs. 1,00,000/-

6. The claimant has assailed the aforesaid award on the grounds that the same is on lesser side, whereas, insurer has assailed the same being excessive.

7. I have heard learned counsel for the parties and have also gone through the record carefully.

8. Learned Tribunal assessed the income of claimant at Rs. 9000/- per month. Considering the 50% disability of claimant, loss of income was assessed at Rs. 4500/- per month. Learned Tribunal added Rs. 500/- per month on account of future prospects and thus assessing loss of income at the rate of Rs. 5000/- per month and by applying a multiplier of 17, a sum of Rs. 10,20,000/- was awarded to the claimant as loss of future earnings.

9. It has been contended on behalf of the insurer that the assessment of income of claimant at the rate of Rs. 9000/- per month by learned Tribunal is without any legal basis. It is submitted that there was no cogent and reliable evidence to prove the income of claimant on such a higher side. Challenge has been made to document Ext. PW-5/A, the salary certificate of claimant, on the ground that it was not proved in accordance with law. As per insurer, PW-5 was not a person, who had issued the certificate Ext. PW-5/A and said witness was also not authorized to depose on behalf of the organization, which allegedly had employed the claimant.

10. On the other hand, learned counsel for the claimant has contended that the claimant in his statement on oath before Court had categorically submitted his income to be Rs. 9000/- per month from the salary received from his employer and no challenge had been made on behalf of the insurer or insured to such part of the statement, as such, the version so rendered by the claimant was deemed to have been admitted and now the insurer cannot turn around to assail the quantum of income of the claimant. Reliance has been placed on following extract from the judgment passed by

Hon'ble Supreme Court in ***Laxmibai vs Bhagwantbuva*** **reported in** ***2013 (4) SCC 97***

> ***40.*** *Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See Khem Chand v. State of H.P. [1994 Supp (1) SCC 7 : 1994 SCC (Cri) 212 : AIR 1994 SC 226] , State of U.P. v. Nahar Singh [(1998) 3 SCC 561 : 1998 SCC (Cri) 850 : AIR 1998 SC 1328] , Rajinder Parshad v. Darshana Devi [(2001) 7 SCC 69 : AIR 2001 SC 3207] and Sunil Kumar v. State of Rajasthan [(2005) 9 SCC 283 : 2005 SCC (Cri) 1230 : AIR 2005 SC 1096] .)*

11. Record reveals that the claimant had deposed that he was being paid Rs. 9000/- per month as salary and his such version has remained totally unrebutted. Neither the insurer had laid any challenge to such version of claimant during his cross-examination nor any evidence was lead in rebuttal. Further, there is nothing on record to suggest that a person working as sales executive in 2006 could not earn salary of Rs. 9000/- per month. In the light of the unrebutted statement of claimant and there being no other

evidence to the contrary, even if document Ext. PW-5/A is ignored, the assessment drawn by learned Tribunal as regards monthly income of claimant cannot be said to be unjustified or illegal. Learned Tribunal has taken a view which is possible and does not require any interference in absence of any evidence to the contrary.

12. It has been asserted on behalf of the claimant that learned Tribunal has erred in not adding component of incentive to monthly income of the claimant. Reliance has been placed on judgments passed by this Court and reported in ***2012 (2) HLR 969 and 2016 (1) Shimla Law Cases 64***. Such contention of claimant has been resisted by insurer by alleging that the judgments relied upon by claimant were not applicable in the facts of the instant case as this Court had considered the addition of daily allowance to an employee paid by employer, whereas in the instant case, the claimant claimed benefit of addition of incentive to his income.

13. Again, referring to the statement of PW-1 claimant, the version given by him with respect to receipt of incentive at the rate of Rs. 1200/- per month has remained unrebutted and cannot be disbelieved. Thus, the fact remains that claimant was getting incentive of Rs. 1200/- in addition to his salary. It being so, no reason can be found to disentitle the claimant from benefit of such monthly payment for the purpose of assessment of loss of income by drawing distinction between payment made to an employee as daily allowance and incentive. Both are pecuniary benefits. Claimant has been denied the benefit of receipt of incentive on account of his inability to work as a result of disability suffered by him. In considered view of this Court, learned Tribunal erred in not adding the component of incentive to monthly income of claimant.

14. It has also been contended on behalf of the claimant that the assessment of Rs. 500/- per month as income on account of future prospects is totally unreasonable. Claimant was only twenty years of age and his

potential was evident from the monthly income, he was able to generate at such young age and his future prospects could not be restricted to just about 5% of the income.

15. There is sufficient force in the arguments raised on behalf of claimant. Merely because claimant was less educated does not mean that he had no potential to earn. Education has no direct nexus with earning capacity of a person. There are many avocations where a person can earn a lot without even being educated. Applying this principle, the assessment of loss of future prospects at the rate of 5% by learned Tribunal is highly unjustified. In ***Pappu Deo Yadav Vs Naresh Kumar*** reported in ***AIR 2020 SC 4424*** the Hon'ble Supreme Court has observed as under:-

> *"3. While assessing loss of earning capacity, the Tribunal took the appellant's income to be Rs. 8000 per month, and added 50% towards future prospects. At the time of the accident, the appellant was only 20 years of age. Therefore, a multiplier of 18 was applied. The physical disability was assessed to be 45%, by the Tribunal. The High Court, to which the claimant appealed (and the insurer cross appealed), revised this head of compensation by doing away with the addition of 50% towards future prospects, and reassessed the compensation for loss of earning capacity as Rs. 7,77,600 (Rs.8000 x 12 x 45% x 18). The total compensation was reassessed by the High Court to be Rs.14,36,600, after enhancing the compensation for disfigurement, diet, attendant and conveyance, loss of amenities and enjoyment of life, and pain and suffering. Further, an interest of 9% per annum was imposed. In reducing the amount awarded for loss of future prospects, the High Court noticed this court's judgments in National Insurance Company Ltd. v. Pranay Sethi & Ors. and Jagdish v. Mohan & Ors both by three-judge benches of this court.*
>
> *4. The appellant argues that the impugned judgment is in material error, in misreading this court's judgments in Pranay Sethi & Ors which was later Jagdish by a three judge Bench, which had ruled that the benefit of future prospects should not be confined only to those who have a permanent job and would extend to self-employed individuals, and in case of self- employed persons an addition of 40% of established income should be made where the age of the victim at the time of the accident was below*

40 years. It was urged that the decision in Anant s/o of Sidheshwar Dukre v. Pratap s/o Zhamnnappa Lamzane & Anr. relied on by the High Court, did not assess future prospects. However, that per se did not preclude claims by persons incurring permanent disablement as a consequence of motor accidents, from seeking such heads of compensation. It is urged that the High Court misread and created a distinct category of cases where addition in income towards "future prospects" can only be given in case of death, and not for injury, which cannot be the intention of this court as no such observation is made. It was argued that the High Court should have reassessed and not reduced 'the loss of future earning capacity' of the appellant from Rs. 11,66,400/- (determined by the tribunal) to Rs. 7,77,600/- on the wrongly depressed income of Rs. 8000/-. Learned counsel submitted that the assessment of monthly income should have been Rs.12,000/- and not Rs.8,000/. It was submitted that the courts below ignored the fact that in 2012, persons earning Rs.12, 000/- per month did not have to file income tax returns or pay tax. The High Court further erred in assessment of physical permanent disability of injured as 45%, even though it was 100%.

7. Two questions arise for consideration: one, whether in cases of permanent disablement incurred as a result of a motor accident, the claimant can seek, apart from compensation for future loss of income, amounts for future prospects too; and two, the extent of disability. On the first question, the High Court no doubt, is technically correct in holding that Pranay Sethi involved assessment of compensation in a case where the victim died. However, it went wrong in saying that later, the three-judge bench decision in Jagdish was not binding, but rather that the subsequent decision in Anant to the extent that it did not award compensation for future prospects, was binding. This court is of the opinion that there was no justification for the High Court to have read the previous rulings of this court, to exclude the possibility of compensation for future prospects in accident cases involving serious injuries resulting in permanent disablement. Such a narrow reading of Pranay Sethi is illogical, because it denies altogether the possibility of the living victim progressing further in life in accident cases - and admits such possibility of future prospects, in case of the victim's death.

10. The recent decision in Parminder Singh v. New India Assurance Co. Ltd, involved an accident victim who underwent surgery for hemiplegia. According to the treating medic, he could not work as a labourer or perform any agricultural work, or work

as a driver (as he was wont to); the assessment of his disability was at 75%, and of a permanent nature. The court held that:

> *"5.2. On the basis of the affidavit filed by the employer of the appellant, we accept that the income of the appellant was Rs 10,000 p.m. at the time of the accident, for the purpose of computing the compensation payable to him.*
>
> *5.1. The appellant has however, produced an affidavit by his employer in this Court. As per the said affidavit, the appellant was earning Rs 10,000 p.m. at the time of the accident.*
>
> *5.3. Taking the income of the appellant as Rs 10,000 p.m., with future prospects @ 50% as awarded by the High Court, the total income of the appellant would come to Rs 15,000 p.m. 5.4. The appellant was 23 years old at the time when the accident occurred. Applying the multiplier of 18, the loss of future earnings suffered by the appellant would work out to Rs 15,000 × 12 × 18 = Rs 32,40,000*
>
> *5.7. In K. Suresh v. New India Assurance Co. Ltd (2012) 12 SCC 274, this Court held that:*
>
> > *"10. It is noteworthy to state that an adjudicating authority, while determining the quantum of compensation, has to keep in view the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have 15 (2019) 7 SCC 217 16 Weakness of one half of the body on the left side; in this case, caused by an accident. 17 at page 279, para 10 11 earned. Hence, while computing compensation the approach of the Tribunal or a court has to be broadbased. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion of "just compensation" should be inhered."*
> >
> > *5.9. In the present case, it is an admitted position that it is not possible for the appellant to get employed as a driver, or do any kind of manual labour, or engage in any agricultural operations whatsoever, for his sustenance. In such circumstances, the High Court has rightly assessed*

the appellant's functional disability at 100% insofar as his loss of earning capacity is concerned. The appellant is, therefore, awarded Rs 32,40,000 towards loss of earning capacity."

11. Yet later and more recently in an accident case, which tragically left in its wake a young girl in a life-long state of paraplegia, this court, in Kajal v. Jagdish Chand, 18 reiterated that in addition to loss of earnings, compensation for future prospects too could be factored in, and observed that:

"14. In Concord of India Insurance Co. Ltd. v. Nirmala Devi [Concord of India Insurance Co. Ltd. v. Nirmala Devi, (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : 1980 ACJ 55] , this Court held : (SCC p. 366, para 2)

"2. … the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales."

15. In R.D. Hattangadi v. Pest Control (India) (P) Ltd. [R.D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551 : 1995 SCC (Cri) 250] , dealing with the different heads of compensation in injury cases this Court held thus : (SCC p. 556, para 9)

"9. Broadly speaking while fixing the amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas nonpecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in the future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss of expectation of life i.e. on account of injury the

normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

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"6. The heads under which compensation is awarded in personal injury cases are the following:
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(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.
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Non-pecuniary damages (General damages)
(iv) Damages for pain, suffering and trauma as a consequence of the injuries. (v) Loss of amenities (and/or loss of prospects of marriage).
(vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

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> *"2. … There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity "the Act") stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance." Loss of earnings*
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> *20. Both the courts below have held that since the girl was a young child of 12 years only notional income of Rs 15,000 p.a. can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs 15,000 p.a. Each case has to be decided on its own evidence but taking notional income to be Rs 15,000 p.a. is not at all justified. The appellant has placed before us material to show that the minimum wages payable 14 to a skilled workman is Rs 4846 per month. In our opinion, this would be the minimum amount which she would have earned on becoming a major. Adding 40% for the future prospects, it works to be Rs 6784.40 per month i.e. 81,412.80 p.a. Applying the multiplier of 18, it works out to Rs 14,65,430.40, which is rounded off to Rs 14,66,000."*
>
> *12. In view of the above decisive rulings of this court, the High Court clearly erred in holding that compensation for loss of future prospects could not be awarded. In addition to loss of future earnings (based on a determination of the income at the time of accident), the appellant is also entitled to compensation for loss of future prospects, @ 40% (following the Pranay Sethi principle)."*

16. Keeping in view the aforesaid exposition in mind, the claimant in instant case is also held entitled to loss of future prospects to the tune of 40% of his income keeping in view his age and potential to earn.

17. The insurer has contended that as per medical evidence on record, claimant had suffered partial paralysis and as such, the assessment of disability to the tune of 50% on whole body is unreasonable. On the other hand, the contention on behalf of the claimant is that the functional disability of claimant was much more than 50% as he was not able to work.

18. Considering the rival contentions of the insurer and the claimant and the material on record, the findings recorded by learned Tribunal cannot be faulted. The disability of claimant was proved by PW-4 Dr. Manoj to be 50% of whole body and his statement in that regard has remained unchallenged. As regards functional disability, the contention raised on behalf of the claimant deserves rejection as no specific evidence has been brought on record in that regard. PW-4 has not stated anything regarding functional disability of claimant. Merely, on the statement of claimant in this behalf, no hypothesis can be drawn.

19. In light of what has been held above, the claimant is held entitled to loss of income as under:

i) Monthly income 9000+1200= 10,200-50% (as the disability of claimant is assessed at 50% towards whole body)=5,100/-.

ii) 40% of 5,100/- towards loss of future prospects= 2040/-. Total loss of income per month Rs. 7140/-

20. Learned Tribunal applied the multiplier of 17 while assessing the loss of future income, which as per mandate of Sarla Verma vs DTC reported in (2009) 6 SCC 721 should have been of 18. Thus, the petitioner was entitled to compensation under the head loss of future income as under:

Rs. 7140 X 12 X 18 = Rs. 15,42,240/-

21. Learned counsel for the insurer raised another objection that learned Tribunal had erred in awarding a sum of Rs. 72,000/- to the claimant

on account of attendant charges. He contended that there was no evidence to this effect. The attendant who allegedly attended upon the claimant was not examined. Such contention of insurer deserves to be rejected for the reason that the Tribunal was not precluded from making some amount of guess work while awarding the compensation under beneficial legislation like Motor Vehicles Act. With the nature of injury and disability suffered by the claimant his claim for amount paid to an attendant cannot be termed to be unjustified.

21. Additionally, the non-pecuniary damages awarded to claimant have been assailed by both the parties. As per claimant, they are on lower side, whereas as per insurer they are on higher side. Learned counsel for the claimant has placed reliance on a judgment passed by Hon'ble Supreme Court in ***Civil appeal Nos. 2811-2812 of 2020*** titled ***Erudhya Priya*** vs. ***State Express transport Corporation Ltd*** reported in 2020 SCC Online SC 601 in which, the damages on account of loss of marriage prospects were awarded at Rs. 5,00,000/-. Claimant, as noticed above, was only twenty years of age and was unmarried. He has suffered partial paralysis. There is no evidence that he had recovered or his disability was cured. Keeping in view the nature of disability suffered by claimant, it can easily be presumed that his marriage prospects could even be marred completely. There is no evidence that the claimant had married. In view of these observations, the amount of Rs. 1,00,000/- awarded to the claimant towards loss of marriage prospects is definitely at lower side and needs to be enhanced to Rs. 5,00,000/- keeping in view the exposition of law in Erudhaya Priya (supra). The award of non-pecuniary damages under other heads needs no interference.

22. Learned counsel for the insurer also drew attention of the Court towards miscalculation made by learned Tribunal while assessing the expenses of treatment. He by unfolding the contents of document Ext. PW-1/E1 to Ext. PW-1/E3 revealed that these do not pertain to different

transactions but were part of the same treatment received by claimant in the hospital and the total expenses were Rs. 1,30,170/-. The contention so raised on behalf of the insurer deserves to be upheld. Learned Tribunal has erred in calculating the amount as Rs. 5,34,016/- whereas it was only a sum of Rs. 1,30,170/-. These, however, were the charges paid to the hospital. Petitioner must have remained on medication during the post hospitalization period and by taking such fact into consideration the expenses on it can be conservatively estimated at Rs. 50,000/-. Thus, the claimant is held entitled to Rs. 1,80,170/- as treatment charges.

23. The insurer and claimant have also made diverse arguments with regard to award on interest. Claimant has supported the interest at the rate of 9% awarded by learned Tribunal, whereas the insurer has prayed for reducing the same to 6.5% by placing reliance on judgment passed by Hon'ble Supreme Court in ***2020 (4) SCC 143***. To the contrary, learned counsel for the claimant has placed reliance on the judgment passed by Hon'ble Supreme Court in ***2018 (3) SCC 18*** and ***Civil Appeal No. 6194 of 2022***. The award of interest depends on fact situation of each case. The Motor Vehicles Act only provides for award of interest and not its rate. The learned Tribunal has awarded interest at the rate of 9% which appears to be reasonable keeping in view the long life which the claimant has to spend with the disability. The compensation cannot always bring an end to the agony of disabled victim. The scar left on his soul remains uncompensated. The beneficial legislation like Motor Vehicles Act is to be interpreted in a manner so as to achieve maximum toward its object.

24. In light of above discussion, both the Appeals are disposed of by modifying the award dated 20.4.2014, passed by learned Motor Accident Claims Tribunal, Shimla, H.P. in MACC No. 1-S/2 of 2012. The claimant is held entitled to following amount to be paid by insurer:-

Pecuniary damages:

(i)	Expenses relating to treatment hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.	Rs. 1,80,170/- + Rs. 72,000/- (attendant charges) = 2,52,170/-
(ii)	Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (c) Loss of earning during the period of treatment (d) Loss of future earnings on account of permanent disability.	 Rs. Nil. Rs. 15,42,240/-
(iii)	**"Non-pecuniary damages (General damages)"**	
(iv)	Damages for pain, suffering and trauma as a consequence of the injuries.	Rs. 1,00,000/-
(v)	Loss of amenities (and/or loss of prospects of marriage).	Rs. 5,00,000/-
(vi)	Loss of expectation of life (shortening of normal longevity).	Rs. 50,000/-
(vii)	Loss of matrimonial prospects	Rs. 1,00,000/-
	TOTAL	**Rs.25,44,410/-**

In addition, claimant will also be entitled to interest @ 9% per annum on the abovesaid amount from the date of filing of petition till actual payment or deposit, whichever is earlier.

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

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

Between:-

SMT. KAUSHALYA DEVI, WIFE OF SHRI KHUSHAL CHAND, RESIDENT OF VILLAGE BASHONA, PO PIPLAAGE, TEHSIL BHUNTAR, DISTT. KULLU, HP, AT PRESENT RESIDING IN HER PARENTAL HOUSE AT VILLAGE TREHAN, PO PIPLAAGE, TEHSIL BHUNTAR, DISTT KULLU, HP AGED 54 YEARS.

.....PETITIONER

(BY MR. B.L. SONI, ADVOCATE)

AND

SHRI KHUSHAL CHAND SON OF SHRI KHEKH RAM, RESIDENT OF VILLAGE BASHONA PO PIPLAAGE, TEHSIL BHUNTAR, DISTT KULLU HP.

.....RESPONDENT

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

CRIMINAL REVISION
No. 157 OF 2022
Decided on: 07.11.2022

Code of Criminal Procedure, 1973- Sections 397, 401- **Family Courts Act, 1984**- Section 19(4)- petitioner challenged order whereby petition for grant of monthly maintenance was dismissed- **Held**- Marriage affidavit is an admission by respondent that he has solemnised marriage with petitioner- Plea that fraud had been played upon respondent as he never used to sign in english- plea falsified as he has stated in court that he appends signature both in hindi and english- Respondent cannot be allowed to claim no marriage between them- Marriage affidavit may not be a substantive evidence of first and only marriage- Order set aside- Matter remanded for fresh adjudication. (Paras 7,8)

Cases referred:

Badshah vs. Urmila Badshah Godse and another, (2014) 1, SCC 188;

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

O R D E R

By way of this revision petition, the petitioner has challenged the order passed by the Court of learned Principal Judge, Family Court, Kullu, District Kullu, H.P. in terms whereof, an application filed under Section 125 of the Code of Criminal Procedure by the present petitioner for the grant of monthly maintenance stands dismissed.

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

The petitioner herein filed an application under Section 125 of the Code of Criminal Procedure for the grant of monthly maintenance of Rs. 5,000/- against the respondent *inter alia* on the ground that she was the legally wedded wife of the respondent. According to the petitioner, marriage was solemnized between her and the respondent as per Hindu customs and rites in the year 2004. Out of this wedlock, no issue was born. The petitioner and respondent lived together as husband and wife in her matrimonial house. Though initially, respondent kept the petitioner well but thereafter his behaviour towards her changed and he started torturing and harassing her. According to the petitioner, under the influence of liquor, respondent used to physically assault her. She was denied even basic necessities like food and clothes etc. by the respondent. Despite all these atrocities, the petitioner continued to perform all her matrimonial obligations faithfully but as the cruelty of the respondent continued, the petitioner filed application against the respondent under Sections 494 and 495 of the Indian Penal Code in the Court of learned Chief Judicial Magistrate, Kullu. These proceedings were compromised and it was decided that parties would reside separately and will not interfere in their day to day life. According to the petitioner even after the

compromise, the respondent resided with her even at her parental house and thereafter he again started interfering in her day to day life. On 15.10.2016, respondent telephonically informed the petitioner that she should not participate in the *Nati* of Dussehra festival with other ladies of Anganbari Kendra and thereafter, respondent visited the parental house of the petitioner and there he manhandled her and threatened her with dire consequences if she did not pay heed to his advice. According to the petitioner, she was not having any source of income and she was barred by the respondent from working anywhere, therefore, she submitted that the respondent be directed to pay to her an amount of Rs.5,000/- per month as maintenance, as respondent was hale and hearty person and was having sufficient property at his disposal to take care of the petitioner.

3. The petition was resisted by the respondent *inter alia* on the ground that the petitioner was not his wife at all and he was indeed married to Smt. Jabana Devi and was also having two children. The averments made in the complaint were denied in totality. It was denied that there was relationship of wife and husband between the petitioner and the respondent.

4. The petition of the petitioner has been dismissed by the learned Principal Judge, Family Court, Kullu, in terms of the impugned order. While dismissing the petition, learned Court has held that it is settled law that it is only a legally wedded wife, who is entitled to maintenance under Section 125 of the Code of Criminal Procedure and as the petitioner failed to place on record any evidence suggesting that she was legally wedded wife of the respondent, strictly in terms of the provisions of Section 125 of the Code of Criminal Procedure, therefore, she was not entitled for any maintenance. Learned Court also held that the factum of the respondent having another wife and children was admitted by the petitioner and further the respondent had stated that petitioner was not his legally wedded wife. Learned Court also held that the affidavit of marriage executed by the respondent, relied upon by

the petitioner which was attested by the Notary Public, was of no consequence as the marriage between the petitioner and the respondent allegedly having taken place as per the Hindu customs and rites, was not proved on record. Learned Court also held that the affidavit attested by the Notary Public was not a valid proof of marriage and further Hon'ble Supreme Court in *Somabhai Bhatiya* vs. *State of Gujrat and others*, *2005(2) Civil Court Cases 133*, had held that the plea of the wife that she was not informed about the earlier marriage of her husband was of no avail and the principle of estoppel could not be pressed into service to circumvent the provisions of Section 125 of the Code of Criminal Procedure. Learned Court also held that a woman, who had married without knowing about the previous marriage of the husband, does not acquires legal status of a wife and was not entitled to claim maintenance and from the documentary evidence on record, it was crystal clear that the petitioner was not the legally wedded wife of the respondent. By returning these findings, the petition was dismissed.

5. I have heard learned Counsel for the parties and also carefully gone through the record which was summoned by the Court.

6. The respective contentions, as were pleaded by the parties before the Court below, have been referred to by me in the above part of the order. There is on record Ext. P-18, which is a marriage affidavit signed by the respondent dated 20th December, 2004, which contains that the deponent therein, i.e. the respondent herein, at that time was about 37 years of age and he has not been previously married nor betrothed with anybody and that on 20th day of December, 2004, he had contracted marriage with the petitioner, namely, Kaushalya Devi, daughter of Sh. Dane Ram, resident of village Tarain, Post Office Piplage, Tehsil and District Kullu. It is further mentioned in this affidavit that the deponent had entered into above marriage with his free consent, without any pressure or undue influence and he was not in prohibitory relationship at the time of marriage with the petitioner and he

would discharge his marital obligations and duties towards his wife (petitioner). This Court is of the considered view that the reasoning which has been given by the learned Court below to hold that the petitioner cannot be said to be the wife and more so the legally wedded wife of the respondent for the purposes of maintenance under Section 125 of the Code of Criminal Procedure, is not sustainable in law. In fact, a careful perusal of what has been held by the learned Court below in para-19 of the order demonstrates that the factum of the petitioner and the respondent having entered into the relationship of marriage has not been rejected *per se* by the learned Court below but what has weighed with the learned Court is that this is not the first marriage solemnized between the petitioner and the respondent, therefore, the petitioner could not be said to be legally wedded wife of the respondent so as to enable her to be entitled for maintenance under the provisions of Section 125 of the Code of Criminal Procedure against the respondent. In the light of law, as has been laid down by Hon'ble Supreme Court in **Badshah** vs. **Urmila Badshah Godse and another**, (2014) 1, SCC 188, the findings so returned by the learned Court below are not sustainable. Hon'ble Supreme Court in *Badshah vs. Urmila Badshah* (supra), after referring to the questions which were referred to Larger Bench of the Hon'ble Supreme Court in *Chanmuniya vs. Virendra Kumar Singh Kushwaha*, (*2011) 1 SCC 141*, was pleased to hold that when marriage between respondent No. 1 therein and the petitioner was solemnized and a false representation which was given to respondent No. 1 that he was single and was competent to enter into marital tie with respondent No. 1, could not be used by the man to his advantage as a person cannot be permitted to take advantage of his own wrong and turn around to say that the respondent was not entitled to maintenance by filing petition under Section 125 Cr.P.C. as respondent No. 1 was not the "legally wedded wife" of the petitioner. To be more precise, the

relevant findings, which have been returned by Hon'ble Supreme Court, are quoted herein below:-

> *"13. On this basis, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the courts below is perfectly justified. We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.*
>
> *13.1. Firstly, in Chanmuniya case, the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125,Cr.P.C. by interpreting the term "wife" widely. The Court has impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125,Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No.1 had been married each other.*
>
> *13.2. Secondly, as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into martial tie with respondent No.1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125,Cr.P.C. as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125 Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above. For this*

> *reason, we are of the opinion that the judgments of this Court in Adhav and Savitaben cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marriages second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized.*
>
> *13.3. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society."*

7. Coming to the facts of the present case, Ext. P-18 is self speaking that there is an admission on the part of the respondent that he has solemnized marriage with the petitioner. The argument of learned Counsel for the respondent that this is a false affidavit as respondent never used to sign in English is falsified from what has been stated by the respondent while deposing before the learned Court below wherein he has stated that he appends his signatures both in Hindi and English. Otherwise also, the respondent cannot be allowed to claim that he was not married to the petitioner in the teeth of Ext. P-18, though Ext. P-18 may not be a substantive evidence of the marriage being the first and the only marriage.

8. In the backdrop of what has been discussed hereinabove, as this Court is satisfied that the findings returned by the learned Court below to the effect that the petitioner was not entitled to claim maintenance by way of proceedings under Section 125 of the Cr.P.C. , are not sustainable in the eyes of law, the impugned order is set aside and the matter is remanded back to the learned Court below for adjudication afresh on merit. It is made clear that in the course of adjudication of the petition under Section 125 Cr.P.C. the ground of the petitioner living in adultery, alongwith all other grounds, are open to be taken by the respondents.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. Record be returned to the learned Court below forthwith. Parties through their respective Counsel are directed to appear before learned Court below on 12.12.2022.

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

Between:-

MR. JALMU RAM SON OF SMT. SAMAJO, RESIDENT OF VILLAGE ALOTI,POST OFFICE DHARECH, TEHSIL THEOG, DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS ANIMAL ATTENDANT IN MONKEY STERLIZATION CENTRE,TUTIKANDI, TEHSIL AND DISTRICT SHIMLA, H.P.

…….PETITIONER

(BY MR. BALWANT SINGH THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (FORESTS) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
2. THE PRINCIPAL CHIEF CONSERVATOR OFFORESTS (WILDLIFE), TALLAND, SHIMLA-171001.
3. THE CHIEF CONSERVATOR OF FOREST(WILDLIFE), SHIMLA, TEHSIL AND DISTRICT SHIMLA, H.P.
4. THE CHIEF EXECUTIVE OFFICER, H.P. ZOOS CONSERVATION AND BREEDING SOCIETY, SHIMLA-CUM-DIVISIONAL FOREST OFFICER, ZO AND RESCUE DIVISION SHIMLA (FOREST OFFICE COMPLEX KHALINI), TEHSIL AND DISTRICT SHIMLA, H.P.

…….RESPONDENTS

(BY MR. SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL AGS WITH MR. AMIT KUMAR DHUMAL, DEPUTY AG FOR THE RESPONDENTS

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 31 OF 2019
Decided on: 12.10.2022

Constitution of India, 1950 - Article 226- Writ petition for direction to respondents to consider applicant for regularisation and to pay arrears of salary and further to pay equal pay for equal work- respondents did not regularise services of petitioner as animal attendant because the instructions

issued by the Government regarding regularisation of contract appointees in the Government Departments are applicable only to the contract appointees in such Departments whereas the petitioner is not an appointee of a Government Department but is an appointee of the Society- **Held**- Chief Executive Officer of the said Society is the Divisional Forest Officer who is a Government Officer- Society is registered with Registrar Cooperative Societies, H.P.- inference can be made that it is registered under Himachal Pradesh Societies Registration Act, 2006- Society is itself owned and controlled by the Government which makes it 'State'- work done by society is the work to be done by State- It was the decision of State Government to engage employees on contract basis- benefit of regularisation cannot be denied on the ground that petitioner is employee of the society and not of Government department- Act of denying regularisation is arbitrary and discriminatory- Acceptance of terms and conditions by the petitioner cannot be a reason to deny regularisation as he lacks bargaining power equal to his employer - Petition allowed. (Paras 13,14,15)

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

J U D G E M E N T

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

> *"(i) That the respondents may kindly be directed to consider the case of the applicant for regularization immediate after the completion of five years services on contractual basis as per the policy dated 07.05.2015, Annexure A-10, with all consequential benefits, with interest @ 18% per annum.*
> *(ii) That the respondents may kindly be directed to pay the arrears of salary to the applicant from 31.03.2015 till the regularization of his services by the respondents.*
> *(iii) That the respondents may further be directed to pay equal pay for equal work to the applicant with effect from due date.*
> *(iv) That the respondents may kindly be directed to decide the representation, Annexure A-7, submitted by the applicant, within time bound manner."*

2. The petitioner is serving as an Animal Attendant with the H.P. Zoos Conservation and Breeding Society, Shimla, after his appointment as such, on contract basis, vide Annexure A-3, dated 21st February, 2009, since 27th February, 2009. The case of the petitioner is that vide communication dated 13th March, 2008 Annexure A-1, the Additional Chief Secretary (Forests) to the Government of Himachal Pradesh, called upon the Principal Chief Conservator of Forests, Himachal Pradesh, informing the Principal Chief Conservator of Forests that the government had approved the arrangement proposed by the Additional Principal Chief Conservator of Forests, in terms of his letter dated 13.11.2007, on the subject "*Monkey Sterilization at Rescue and Rehabilitation Centre-Issues regarding*" and that as far as the staff to be engaged by the Society was concerned, the same was to be engaged on contract basis for one year, to begin with at the rates as were applicable to the contract appointees in the government departments. The Principal Chief Conservator of Forests was directed to follow proper selection process in this regard. Thereafter, the name of the petitioner was sponsored by the Employment Exchange, Theog, for the post of Animal Attendant in Monkey Sterilization Centre Tutikandi/ongoing Monkey Project in Himachal Pradesh to be filled in by HP Zoos Conservation and Breeding Society Shimla on fixed payment of Rs. 3000/- per month on contract basis for a period of one year at the first instance which was likely to be extended till completion of ongoing Monkey Project or which was earlier. This was done vide Annexure A-2, dated 20.01.2009. Thereafter, vide Annexure A-3, dated 21.02.2009, the petitioner was offered appointment against the post of Animal Attendant, on the basis of interview held for recruiting persons against the said post on 04.02.2009. The engagement of the petitioner was on contract basis for one year with effect from the date of joining extendable further depending upon the availability of work, funds as also performance of the petitioner, on a consolidated amount of Rs.3,000/- per month. As already mentioned hereinabove, the petitioner

thereafter joined the services against the post of Animal Attendant in the society concerned w.e.f. 27th February, 2009 and is stated to be continuing till date as such on contract basis though monthly emoluments which were being paid to him by the Society as of now are stated to be Rs.12,000/-. The grievance of the petitioner is that despite the fact that the Government of Himachal Pradesh, has, from time to time, issued policies of regularization of contract appointees of the Government Departments, as is evident from Annexure A-10, Instructions dated 07.05.2015 on the subject '*Regularization of contract appointees in the Government Departments-Instructions thereof*', yet the services of the petitioner are not being regularized despite the fact that he is fulfilling the criteria as is laid down in the said instructions by the Government pertaining to the regularization of the contract appointees. To be brief, it is in this background that the petition stands filed seeking the reliefs, already enumerated hereinabove.

3. Mr. Balwant Thakur, learned Counsel for the petitioner has argued that the act of the respondent of not regularizing the services of the petitioner, in terms of the instructions issued by the Government of Himachal Pradesh from time to time qua regularization of contract appointees, is arbitrary and discriminatory as the services of the petitioner cannot be continued on contract basis till infinity, more so, in the light of the fact that though his initial engagement was only for one year but with the condition that the same was likely to continue subject to availability of work, funds and his conduct yet the services of the petitioner have been continued for the last 13 years, which demonstrates that work is available, funds are also available and work of the petitioner is also satisfactory. Learned Counsel further argued that otherwise also the only reason which is coming forth from the response filed by the respondents as to why the services of the petitioner are not being regularized is that he is an employee of the Society whereas the instructions pertaining to regularization take into its ambit the government departments

only. According to learned Counsel for the petitioner, this distinction which has been created by the Government between the contractual incumbents in the Government Departments and contractual incumbents working in the Societies owned and controlled by the Government, is arbitrary and against the provisions of Articles 14 of the Constitution of India. Accordingly, he has prayed that the present petition be allowed and the services of the petitioner be ordered to be regularized in terms of Annexure A-1 as after completion of 5 years service on contract basis as on 31.03.2015.

4. The petition has been opposed by the respondents *inter alia* on the ground that the replying State has yet not formulated any policy for regularization of daily wagers and contractual appointees appointed under HP Zoos Conservation and Breeding Society, Shimla, and moreover, the Society engages the persons on the basis of need of work. It is further the stand of the respondents that at the time when the petitioner was recruited, it was made clear that the appointment was being offered to him purely on contract basis in a Society and that the candidate will not claim continuance in service after completion of the contract or the project. The appointment letter itself was explicit that the appointment would not confer any right of regularization upon the incumbent. It is further the stand of the respondents that the petitioner accepted the post of Animal Attendant in terms of the agreement, which was executed between him and the Society and this was done by him voluntarily and once he accepted the conditions of the contract, now he is estopped from raising the claim as is being raised by him by way of this petition. Learned Additional Advocate General on the strength of the stand which has been taken by the respondents in the reply has submitted that there are large number of contractual employees engaged in various societies in the State of Himachal Pradesh and as far as the contractual employees of the HP Zoos and Conservation Breeding Society, Shimla, are concerned, the governing body of this Society has already taken a decision in its meeting held on 09.06.2015,

copy whereof is appended with the petition as Annexure R-3, that whatever decision will be taken by the Government with regard to regularization of the employees engaged on contract basis in Societies would be followed by it. Learned Additional Advocate General thus submits that because till date no decision has been taken by the government to the effect that the instructions which have been issued by the Government with regard to regularization of services of the contractual appointees in the various government departments, would also be applicable to the employees engaged on contract basis in the respondent-Society, therefore, the services of the petitioner cannot be ordered to be regularized at this stage and till the time a policy decision is taken by the Government of Himachal Pradesh in this regard, the petitioner will have to wait. Learned Additional Advocate General has also drawn the attention of the Court to the documents which have been filed alongwith the affidavit filed by the Chief Conservator of Forests, Wildlife (South), Shimla, dated 10.03.2022, and by referring to Annexure R-II appended therewith, which are Recruitment and Promotion Rules for the post of Multipurpose Animal Attendant/Sweeper/Cleaner in the respondent-Society, he has submitted that as now the Recruitment and Promotion Rules have been formulated, and they also stand published in the official Gazette, therefore also, the post has to be filled in as per the Recruitment and Promotion Rules, which clearly envisage that employment will be on contract basis only and in this background the petitioner has no right to claim regularization. Accordingly, he has submitted that the present petition is devoid of any merit and the same be dismissed.

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

6. During the Course of hearing of this case, when the matter was listed on 15.12.2021, the Court passed the following order:-

> *"Heard for some time. Learned counsel for the petitioner has submitted that the services of the petitioner who is serving*

as an Animal Attendant on contract basis with the respondent-society since the year 2009, has till date not been regularized, though it is the admitted stand of the respondent-society that for the purpose of regularization of the services of employees like the petitioner, the society shall be governed by the policy of the Government. He has further submitted that as Recruitment and Promotion Rules have been framed for recruiting Animal Attendants, then the act of the respondent-society of paying only contractual emoluments to the petitioner rather than paying the pay scale of the post to the petitioner is also not sustainable in law and the same is arbitrary and discriminatory.

Learned Additional Advocate General submits that before the matter is heard any further, the hearing thereof be deferred by 10 days to enable him to have appropriate instructions in this regard. Ordered accordingly.

List on 29.12.2021, as prayed for.

7. In response thereto, an affidavit was filed on behalf of respondents No. 1 to 4 by Chief Conservator Forest Wildlife (South), Circle Shimla, the relevant part whereof is being reproduced herein below:-

"7. That in the year 2008-09, the said Society deployed staff under certain terms and conditions on contract basis till completion of project i.e. for five years. Such staff was to be kept for one year at first instance and to be continued for further four years for operationalization of Monkey sterilization Centers at Tutikandi Shimla.

8 That all the multipurpose animal attendant / sweeper/ cleaner including petitioner were well conversant with the terms and conditions of the contract service at the time of their appointment on contract basis. As per offer letter No.3224 dated 21.2.2009. Annexure R-I, it was clearly mentioned in condition No. 2 (h) that working on contract shall not confer any rights to incumbent for the regularization. The last line of the offer letter clearly specify that the candidate engaged on contract basis shall have no right to claim regularization / permanent absorption as multipurpose Animal Attendant and Sweepers/cleaner in HPZCBS in any case. . Further incumbents as per offer were to be paid consolidated amount of Rs.3000/- per month. Petitioner duly accepted the same and was accordingly engaged as animal attendant on contractual basis in year 2009. Further contact, of all such contractual

employees of HPZCBS are renewed annually subject to fulfilment of terms and conditions.

9. That petitioner is governed by the Recruitment and Promotion Rules of the said Society and is being paid as per Rules approved for the same from Governing Board of the Society which were framed in 2018.

10. That the petitioner is being paid emoluments as per the R&P Rules framed for the Multipurpose Animal Attendant/Sweeper/Cleaner as being engaged on contract basis and further consolidated fixed contractual amount of Rs. 4900-10 1300GP-6200/- per month as prescribed in para 4 in the HP.Z and Conservation Breeding Society (HPZCBS), Multipurpose Animal Attendant/Sweepers/Cleaner Class-IV (Non Gazetted Recruitment and Promotion Rules, 2018 Annexure R-II is paid to such employees alongwith admissible dearness allowance decided by Governing Board of the Society alongwith annual increments.

11. That the petitioner is getting emoluments as per RAF Rules of society for Multipurpose Animal Attendant. There is no provision for providing regular status in the society being temporary set up. Further it is submitted that as per R&P Rules of HPZCBS Society for Multipurpose Animal Attendant (Annexure R-II) contractual emoluments of such employees is Rs.6200 per month which is equal to minimum of pay band plus grade pay Dearness allowance in term of percentage of the DA admissible to regular HP Govt. Employees is to be decided by Governing Board of HPZCBS Society from time to time. Further there shall be annual increase of 3% minimum of pay band plus grade pay of the post in contractual enhancement to such employees of HPZCBS Society as per R&P Rules (Annexure R-11). However it is clear under such rules that all depends up on financial health of society. There is no provision of regular pay scale or regularization in such R&P Rules which was very much clear as per the letter No.3224 dated 21.2.2009 i.e. offer to petitioner (Annexure R-1 which clearly specified that working on contract shall not confer any rights to incumbent for any regularization. Last line of offer clearly specify that the candidate engaged on contract basis shall have no right to claim regularization /permanent absorption as attendant in HPZCBS. Further contracts of all such contractual employees of HPZCBS including petitioner are renewed annually subject to

fulfilment of terms and conditions. Also incumbents were to be paid consolidated amount Rs.3000/- per month.

12. That petitioner is being paid contractual emoluments as per R&P Rules for post of Multipurpose Animal Attendant (Annexure R-II) and petitioner is having no merit in his case. The Governing Board of the Society enhanced the contractual amount of the petitioner alongwith their eligible incumbents during year 2014 from consolidated amount of Rs.3000/- as per Annexure R-III. The petitioner has been given pay including percentage of dearness allowances as agreed by Governing Board in its 13th meeting on dated 04.08.2018 and after finalization of the R & P Rules of Multipurpose Animal Attendant / Sweepers / Cleaner Class-IV (Non Gazetted), in 2018 petitioner has been given increased contractual emoluments from back date that is on the completion of 7 years of services of the petitioners w.e.f 01.08.2016 as per decision of Governing Board of the Society in its 13"meeting at point No. 5 as per Annexure R-IV. It is further clarified that there is no provision of regularization in such R&P Rules infact contractual emoluments includes pay band plus grade pay alongwith percentage of dearness allowance as decided in Governing Board of Society. However, 3% annual increase of grade pay plus band shall be allowed if contract is extended. That as per 13" meeting (Annexure R-IV) it is clarified that contractual employment of such contractual employees including petitioner of HPZCBS Society was increased on basis of increase in percentage of dearness allowance w.e.f. 01.04.2016 as per Annexure R-V. where contractual enhancement including dearness allowance as per page No.6, column No.iv of Annexure-R-IV has been paid to the petitioner alongwith admissible arrear w.e.f. 1.4.2016 alongwith admissible increments. Further annual increment as per R&P Rules as admissible are also being paid to the petitioner. Further there is no provision of regularization in HPZCBS society as per R&P Rules of animal attendant / cleaner/ sweeper & all employee of Society being engaged on contract which is extended yearly subject to satisfying terms and conditions of HPZCBS.

13. That there is no provision of any regularization in HPZCBS Society as per R&P Rules. Employees appointed in HPZCBS get contractual emoluments as per admissibility and as per Rules of HPZCBS Society.

> *14. That since petitioner alongwith the other workers being contractual employees of HPZCBS are governed by the R&P Rules for Animal Attendants, Cleaner /Sweepers, etc. of the Society. Further it is submitted that such contractual employees of the Society shall be covered under the policy of HPZCBS as being engaged by said Society on contract basis and not being Government employees said and are governed under R&P Rules of HPZCBS subject to the terms and conditions of such contract given in the R&P Rules of the Society."*

8. The reason as to why the contents of the affidavit have been referred to in the judgment in extensio is that what is contained in the above referred paras 7 to 14 of the affidavit, is depicting the stand of the respondent State as to why the petitioner is not entitled for regularization. The primary reason being assigned by the respondents as to why the petitioner, who is serving on contract basis as of now is not entitled for regularization in terms of the instructions which have been issued by the Government of Himachal Pradesh regarding regularization of contract appointees in the Government Departments is that the instructions are applicable only to the contract appointees in the Government Departments whereas the petitioner is not an appointee of a Government Department but is an appointee of the Society.

9. Society in issue is HP Zoos Conservation and Breeding Society. Incidentally, the Chief Executive Officer of the said Society happens to be the Divisional Forest Officer, Zoos and Rescue Division, Shimla, meaning thereby that the Society is being headed by a Government Officer, who heads the same by virtue of the office, which he is holding. The Society, as is evident from Annexure P-12 appended with the petition at page 177 of the paper book, is a Society registered with Registrar, Cooperative Societies, H.P. Shimla, from which it could be safely inferred that it is a Society registered under the provisions of the Himachal Pradesh Societies Registration Act, 2006.

10. Annexure P-12, are the minutes of the proceedings of 10th Meeting of HP Zoos & Conservation Breeding Society (HPZCBS), held on 09.06.2015. The document in which the proceedings of the meeting stand recorded starts with the heading "Himachal Pradesh Forest Department Wildlife Wing", in terms whereof, the meeting was attended by 19 participants and except the participants whose names are at Sr. No. 17 and 19, all are State Government Functionaries. Though, the parties have not placed on record the aim and objectives as to why this Society was constituted but the nomenclature of the Society itself is self speaking that the Society has been formed for the purpose of conservation and breeding in Himachal Pradesh Wildlife Zoos.

11. Be that as it may, all that the Court intends to emphasize from what has been stated hereinabove, is that may be the nomenclature of the employer of the petitioner is that of a Society but the Society itself is owned and controlled by the Government of Himachal Pradesh in general and the Forest Department of the Government of Himachal Pradesh in particular, which makes the Society 'State', within the meaning of Article 12 of the Constitution of India.

12. Further the very fact that the Recruitment and Promotion Rules, which have been framed in the year 2018, which have been published in the Hiamchal Pradesh Official Gazette is also a clear indicator that the Society is a government owned Society.

13. At this stage, it is pertinent to mention that the nomenclature of the post, which is being held by the petitioner, is now the Multipurpose Animal Attendant. Before proceeding further, one more fact of which this Court is taking judicial notice is this that though the instructions/policy for regularization of contract employees, as have been issued by the State Government, refers only to "regularization of contract appointees in the Government Departments" but fact of the matter is that on the strength of

these instructions, contract employees, who have been engaged in various Boards and Corporations, owned and controlled by the Government of Hiamchal Pradesh, have also been regularized.

14. In the backdrop of what has been discussed herein above, this Court is of the considered view that the act of denying regularization to the petitioner on the basis of instructions, which have been issued by the State Government pertaining to the regularization of contract appointees, simply on the ground that the petitioner does not happens to be an employee of a Government Department, is arbitrary and discriminatory. The work which is being done by the Society otherwise is the work which has to be carried out by the State Government and State Government in its wisdom rather than executing said work from the department, decided to constitute a Society to undertake various activities and it was thereafter that the services of the petitioner and may be other incumbents similarly situated like the petitioner, were taken on contract basis.

15. The decision to constitute the Society was that of the Government. The decision to engage employees in the Society on contract basis was that of the government. Therefore, in these circumstances, the benefit of the instructions which have been issued from time to time by the government pertaining to regularization of contract employees cannot be denied to the petitioner simply on the ground that he happens to an employee of the society and not of a government department.

16. As far as the stand of the respondents, as is also urged by learned Additional Advocate General, is concerned that the petitioner has accepted the terms and conditions of the appointment offered to him on contract basis without any condition, this Court holds that bargaining power of a person who is being offered appointment on contract basis cannot be compared to the employer. This Court is of the view that in such like circumstances, the persons like the petitioner, have no option but to accept

the engagement on whatever terms, the same is offered to them and they per force sign the terms and conditions on dotted lines.

17. At this stage, the Court would like to dwell upon the factum of the Recruitment and Promotion Rules as have been framed for the purpose of Multipurpose Animal Attendant by the respondent-State in the year 2018. At the time when the petitioner was engaged as Animal Attendant in the respondent-Society, there were no Recruitment and Promotion Rules governing the recruitment process to any post, be it on daily wage basis, on contract basis or regular basis, yet, the recruitment of the petitioner cannot be said to be a back door entry for the reason that his name was duly sponsored by the Employment Exchange and he was recruited on contract basis by the respondent-Society by following the procedure which the society resorted to at the relevant time to recruit the incumbents. However, thereafter the Society has formulated the Recruitment and Promotion Rules which are on record and in terms thereof, the post of Multipurpose Animal Attendant, has to be filled in, if on contract basis, then *inter alia* from amongst those candidates who fulfill the minimum educational and other qualification criteria and Multipurpose Animal Attendants who already stand engaged in the respondent-Society and are having 7 years of service as daily wagers with minimum 240 days in each calendar year.

18. The petitioner is serving the respondent-Society since 27th February, 2009 and though he is not appointed on daily wage basis and is appointed on contract basis but it is not in dispute that he has been serving as such continuously and has put in more than 240 days in each calendar year. Meaning thereby that in terms of the Recruitment and Promotion Rules as on the date when the R&P Rules came into force, the petitioner had a right to be appointed against the post of Multipurpose Animal Attendant, may be on contract basis, in terms of the said Recruitment and Promotion Rules, in view of the fact he was a serving incumbent in the respondent-Society who had

completed 7 years of service and was also possessing the minimum educational and other qualifications. This the Court is observing for the reason that it is not in dispute that the petitioner is 8th pass and he also has experience of performing various zoos related works as he has been serving the respondent-Society itself since 27th February, 2009.

19. Therefore, from the date said Recruitment and Promotion Rules came into force, the minimum that was expected from the State Government was that the services of the petitioner ought to have been brought on contract basis by invoking the provisions of said Rules. Though in the affidavit which has been referred to by me hereinabove, it stands mentioned in para-10 thereof that the petitioner is being paid emoluments as per the R&P Rules framed for the Multipurpose Animal Attendant/ Sweeper/Cleaners as being engaged on contract basis but this affidavit is conspicuously silent as to whether after these Rules came into force, the services of the petitioner were converted to contract basis in terms of these Recruitment and Promotion Rules by subsuming one post against the name of the petitioner. That not being clear from the Recruitment and Promotion Rules and though it is not a prayer made in the writ petition and rightly so for the reason that Recruitment and Promotion Rules came into force in the year 2018 and the present petition has been filed before the learned Tribunal in the 2015, this Court is of the considered view that a mandamus is required to be issued to the respondents to first convert the services of the petitioner on contract basis in terms of Recruitment and Promotion Rules as from the date when the Recruitment and Promotion Rules came into force, provided the petitioner was fulfilling the eligibility criteria which is not much in dispute and thereafter, a further direction is required to be issued to the respondents to regularize the services of the petitioner after completion of such number of years of service as is contained in the policy of regularization which governs the field as of today as this Court has already held hereinabove that the act of the respondent-

department of denying regularization to the petitioner in terms of the instructions issued by the Government of Himachal Pradesh qua regularization of contract appointees on the ground that the petitioner happens to be an incumbent serving in a Society is not sustainable in the eyes of law. Ordered accordingly.

20. At this stage, it is relevant to refer to the judgment passed by Hon'ble Coordinate Bench of this Court in CWP No. 1102 of 2011, titled as Sanjay and others Vs. State of H.P. and others, decided on 28.05.2014 and other connected matter. By way of this judgment, Hon'ble Coordinate Bench has been pleased to order the regularization of the services of the petitioners therein, who were serving in the Rogi Kalyan Samiti, in terms of the policy of regularization issued by the State Government. The Court has been informed that this judgment has attained finality and stands implemented. That being the case, as the petitioners in the abovementioned writ petition were also being denied regularization on the ground that they were not the employees of the State Government but that of a Society, the judgment passed by the Hon'ble Coordinate Bench squarely applies to the facts of the present case and therefore also, the petitioner cannot be denied regularization by the respondents on the ground that he happens to be an employee of the Society.

21. Accordingly, this petition is allowed with the direction that the respondents are directed to convert the services of the petitioner on contract basis by deeming him to have been appointed as such under the 2018 Recruitment and Promotion Rules issued by respondent No. 2 and thereafter, his services be regularized in terms of the policy of the respondent-State after completion of requisite number of years of service on contract basis by taking the date of his appointment on contract basis to be the date on which 2018 Rules came into force. The regularization of the petitioner shall be with all consequential benefits but the monetary benefits shall be given to him on notional basis only, till the date of the decision of this judgment and

thereafter, actual benefits be given to him, however, benefit of seniority shall entail from the date of regularization.

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

BEFORE HON'BLE MR. JUSTICE AMJAD AHTESHAM SAYED, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

State of H.P. and others

.....Appellants

Versus

Pooja and another

.....Respondents

For the appellants: Mr. R.P. Singh, Deputy Advocate General.

For the respondents: Mr. K.D. Shreedhar, Senior Advocate with Ms. Sneh Bhimta, Advocate, for respondent No.1.

LPA No.195 of 2015
Reserved on:17.11. 2022
Decided on: 25.11.2022

Delhi High Court Act, 1966- Section 10- Petitioner was lecturer in college and her services were not taken over when the college and services of teachers and non teaching staff was taken over by State Govt – **Held** - R&P Rules 2004 for the post of Lecturer (College Cadre) prescribed the eligibility criteria of possessing Post-Graduation Degree with minimum 55% marks along with NET/SET qualification- As per UGC notification dated 14.06.2006, candidates having M.Phil degree are exempted from possessing NET for undergraduate level teaching- petitioner satisfied the criteria for taking over of her services as Lecturer (College Cadre) under R&P Rules read with UGC guidelines- Not in dispute that by now the writ petitioner has qualified NET/SET and has also completed her Ph.D.- Appeal dismissed as meritless. (Para 4)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Writ petitioner was a left out Lecturer (College Cadre) in a private college, whose service was not taken over by the State. The State contended that the writ petitioner did not satisfy educational criteria required for taking over her services. Learned Single Bench allowed the writ petition and directed the State to take over petitioner's services from due date (09.11.2005) alongwith seniority, but without back wages. The judgment was not interfered by the Division Bench in the appeal filed by the State. However, review petition filed by the State was allowed on the ground that whether the writ petitioner possessed requisite educational qualification or not was an aspect to be determined by the Appellate Court. The appeal, restored to its original number, has been taken up for hearing.

2. Facts:-

2(i). Writ petitioner was appointed as Lecturer (Commerce) (College Cadre) in Maharaja Sansar Chand Memorial (MSCM) College Thural, District Kangra. Vide notification issued on 09.11.2005, the college was taken over by the State Government. Services of its teaching and non-teaching staff were also taken over under a separate notification issued on 18.10.2006. Writ petitioner's services were not taken over.

2(ii). Aggrieved against non-taking over of her services, the writ petitioner filed Original Application No.149/2007 in the erstwhile H.P. Administrative Tribunal. This original application was disposed of on 21.05.2010 as CWP(T) No.14639 of 2008 with a direction to the respondents to decide petitioner's representation in light of certain notifications/office communications, whereby similarly situated persons were given relaxation in educational qualifications while taking over their services as Lecturer (College Cadre).

2(iii). The State Government vide order dated 31.07.2010, rejected writ petitioner's case. Feeling aggrieved, the writ petitioner filed CWP No.7951 of 2010, praying for quashing of order dated 31.07.2010 and for directing the

respondents to take over her services as Lecturer (College Cadre) from the due date.

2(iv). Learned Single Judge allowed the writ petition on 23.07.2014. The respondents were directed to take over writ petitioner's services w.e.f. 09.11.2005, i.e. the date of taking over of the college in accordance with law alongwith continuity of service and seniority, but without any back wages.

2(v). The judgment passed by the learned Single Judge on 23.07.2014 was challenged by the State Government in LPA No.195 of 2015. This letters patent appeal was initially disposed of by a Division Bench of this Court on 30.10.2018 alongwith eleven other connected appeals. The findings of the learned Single Judge were upheld with some modifications regarding payment of arrears to the writ petitioners in some of the connected appeals. It is an admitted position that the judgment dated 30.10.2018 has attained finality vis-à-vis eight connected letters patent appeals involving similar questions and stands implemented qua the writ petitioners therein. Regarding the present writ petitioner, the State filed Review Petition No.99 of 2019 on the ground that the writ petitioner lacked qualifications required for the post of Lecturer (School Cadre). The review petition was allowed on 20.08.2021. It was observed that whether the writ petitioner was qualified or not is a matter to be decided by the Appellate Court. The appeal was accordingly restored to its original number.

3. Contentions:-

3(i). Learned Deputy Advocate General contended that the writ petitioner did not possess the qualifications required for the post of Lecturer (College Cadre). The writ petitioner had not qualified NET/SET examinations. The writ petitioner also did not possess minimum 55% marks in her Post Graduation/M.Phil degree. It was submitted that the writ petitioner was required to satisfy the above two conditions in terms of the Recruitment & Promotion Rules, 2004 for the post of Lecturer (College Cadre). Appointment

of writ petitioner was also not approved by the H.P. University. The prayer was accordingly made for allowing the appeal and dismissing the writ petition.

3(ii). Learned Senior Counsel for the writ petitioner submitted that the writ petitioner had obtained M.Phil degree in Commerce in the year 2004. Drawing attention to Annexure P-1/D, it was highlighted that the writ petitioner had secured 187/300 marks in the M.Phil examination, which are much more than the required 55% marks in the said examination. Further, it was submitted that as per the University Grants Commission (UGC) notification of 14.06.2006, the writ petitioner was exempted from qualifying NET examination for Undergraduate level teaching. It was also submitted that in several cases, the State Government had taken over the services of Lecturers working in the private colleges, who did not satisfy the qualifications required under the Recruitment & Promotion Rules. Two such notifications issued by the State for taking over services of Lecturers in National College Amb, District Una, Pt. Amarnath Samarak Mahavidalaya, Jogindernagar, District Mandi and DAV College Sujanpur Tihra, District Hamirpur were highlighted. Reference was also made to a decision of Division Bench of this Court in *LPA No.686 of 2011 (State of HP and another Versus Balbir Singh Kalsaik)*, wherein services of a similarly situated Lecturer (College Cadre) working in a Private College, i.e. G.G.D.S.D. College Nerwa, who according to the State, did not possess the requisite qualifications under the R&P Rules, were directed to be taken over. It was submitted that the writ petitioner satisfied the educational criteria and her appointment was also approved in accordance with law.

4. Observations:-

Having heard learned counsel on both sides, we are of the considered view that for the reasons stated hereinafter, the appeal deserves to be dismissed:-

4(i). Recruitment & Promotion Rules 2004 for the post of Lecturer (College Cadre) prescribe following essential educational qualifications (translation of page 101 of the writ record):-

> *(i) Post Graduation with minimum 55% marks with good academic record or equivalent to 55% from any University recognized by the Govt. of India or Post Graduation from any Foreign University where grading system is followed.*
> *(ii) For Lecturer in Fine Arts which include Commerce, Arts, Visual Arts & Sculpture, minimum 55% marks in post-graduation with good academic record or where grading system is followed.*
> *(iii) to (v) xxx xxx xxx*
> *(vi) Candidates in addition to above qualifications must have passed eligibility test for Lecturer (NET) as conducted by the UGC, CSIR or State Public Service Commission.*
> *(vii) NET will be an essential qualification for appointment as Lecturer even for Ph.D. candidates, but candidates who have obtained their M.Phil degree or have submitted their Ph.D. thesis upto 31.12.1993 will be exempted from NET Examination.*

According to the respondents, "as per R&P Rules the essential educational qualification for the appointment of Lecturer College is Post Graduation with 55% marks with NET/SET..... Petitioner acquired M.Phil degree from H.P. University under Roll No.2503 in the year 2004 securing marks 150/300, i.e. 50%, which is less than minimum requirement of 55% marks as per R&P Rules." Hence, she does not meet the criteria of Recruitment & Promotion Rules.

4(ii). Writ petitioner obtained M.Phil Degree on 05.05.2004. She secured 187/300 marks and not 150/300 marks as is contended by the State in her M.Phil Degree. It is thus evident that the petitioner secured 62.33% marks, which is more than the minimum required 55% marks. This position was admitted by the appellant during hearing of the case.

4(iii). UGC issued a notification on 14.06.2006 exempting the candidates having M.Phil Degree from possessing NET qualification for

Undergraduate level teaching. It will be appropriate to extract the relevant portion of the notification:-

> *"NET shall remain compulsory requirement for appointment as Lecturer for those with Postgraduate Degree. However, the candidates having Ph.D. Degree in the concerned subject are exempted from NET for Post Graduation Level and Under Graduate Level teaching. The candidates having M. Phil Degree in the concerned subject are exempted from NET for Under Graduate level teaching only."*

4(iv). Many private colleges were taken over by the State in terms of the notification dated 25.08.1994. Pursuant to this notification, the college in question was taken over w.e.f. 09.11.2005. Services of its teaching and non-teaching staff were taken over vide a separate notification issued on 18.10.2006. This taking over was 'as per UGC guidelines, Recruitment & Promotion Rules and terms and conditions of taking over of staff of private Colleges notified vide Notification dated 25.08.1994' (Annexure P-4). The UGC notification dated 14.06.2006 issued prior to taking over of services of staff of the college in question, was applicable to the case of the writ petitioner. In terms of the UGC notification, the writ petitioner having M.Phil Degree with the requisite percentage of marks, was exempted from qualifying NET examination. It is not in dispute that by now the writ petitioner has qualified NET/SET and has also completed her Ph.D.

4(v). It is not in dispute that services of 'left out' teaching and non-teaching staff appointed in privately managed National College Amb, District Una and Pt. Amarnath Samarak Mahavidalaya, Jogindernagar, District Mandi, were taken over by the State in relaxation of the required educational qualifications and also in relaxation of the terms & conditions of the notification dated 25.08.1994. Notification in this regard was issued on 30.03.1999. Similarly, the services of teaching and non-teaching staff employed in DAV College Sujanpur Tihra, District Hamirpur, were taken over

by the State vide notification dated 28.08.2001. One of the terms & conditions for taking over their services was that such lecturers would be required to acquire NET qualification as prescribed under the Rules within a period of three years, failing which their increments were to be withheld. The condition is extracted hereinafter:-

> *"2. The Lecturers, whose services have been taken over as Lecturer (College Cadre) (as per Annexure-"A") will be required to clear N.E.T. Examination as prescribed in Recruitment & Promotion Rules within a period of three years failing which, their increments will be withheld."*

Once the State Government takes over the services of Lecturers employed in various private colleges, who did not possess the requisite qualifications in terms of the R&P Rules, then, similar treatment is to be meted out to the writ petitioner as well. The writ petitioner cannot be discriminated vis-à-vis other lecturers, who did not satisfy the required qualifications in terms of the R&P Rules, yet their services were taken over. Services of such lecturers, who did not possess the requisite qualifications in National College Amb, District Una and Pt. Amarnath Samarak Mahavidalaya, Jogindernagar, District Mandi, were taken over in relaxation of requirement of possessing requisite educational qualifications. Similarly, services of lecturers not possessing the required qualifications prescribed in the R&P Rules were taken over in DAV College Sujanpur Tihra, District Hamirpur. They were granted a period of three years for upgrading their educational qualifications in terms of the rules, failing which the increments were to be withheld.

4(vi). In *LPA No.686 of 2011*, titled *State of HP and another Versus Balbir Singh Kalsaik*, decided on 26th June, 2012, the Court was considering a case where the services of the petitioner (therein), a Lecturer (College Cadre) employed in a private college, i.e. G.G.D.S.D. College Nerwa, were not taken over on the ground of his being unqualified for the post. The Court passed the following order in the appeal on 11.04.2012:-

> *"There will be a direction to the Director of Higher Education to file an affidavit as to whether the Lecturers in College cadre have been appointed as such while taking over of the college by the Government with the condition that they should pass NET/SET examination within three years. It shall also be clarified in the affidavit as to what is the consequential action taken in the case of those teachers who have not passed NET/SET examination within the stipulated period of three years. It will also be open to the respondent to point out such instances before the Director of Higher Education within 10 days from today so as to enable him to have proper verification. The affidavit, as above, shall be filed by the Director of Higher Education within three weeks from today. Post on 3.5.2012.*
>
> *Authenticated copy."*

In the affidavit filed pursuant to the above order, the State admitted that 22 unqualified lecturers were appointed as Lecturer (College Cadre), out of which 20 were appointed in DAV College, Sujanpur Tihra and 2 in National College Amb. It was also stated that out of 22 lecturers, 5 had not qualified NET, however, they had done Ph.D/M.Phil and on that basis, their cases were recommended for exemption. The affidavit also stated that as per the notification issued in the year 2007, the candidates having M.Phil in the concerned subject are exempted from NET for Undergraduate level teaching. The gist of affidavit filed by the State in LPA No.686 of 2011 pursuant to the above extracted direction of the Court has been taken note of by the Division Bench in its judgment dated 26.06.2012 *(State of H.P. Versus Balbir Singh Kalsaik)* as under:-

> *"3. In the affidavit filed pursuant to our order dated 11th April, 2012, it is admitted that 22 unqualified lecturers have been appointed as Lecturer (College Cadre), 20 in D.A.V College, Sujanpur Tihra and 2 lecturers in National College, Amb. Out of these 22, five Lecturers have not qualified the NET, however, they have done Ph.d/M.Phil and on the basis thereof their cases have been recommended for exemption. As per Notification issued in 1994 and as per subsequent Notification in 2007, the candidates having Ph.D. degree in the concerned*

subject are exempted from NET for PG level. The candidates having M.Phil. in the concerned subject are exempted from NET for UG level teaching. It is the condition in the Regulation that in the case of those candidates who do not possess NET within the stipulated period, they will not get any increment, after that period."

On the basis of above affidavit, the Letters Patent Appeal (LPA No.686 of 2011) was disposed of with a direction that the writ petitioner (therein) shall be deemed to have been appointed as Lecturer (College Cadre) alongwith other incumbents from the date of taking over of the College. Since the writ petitioner therein had not qualified NET/SET and had also not qualified Ph.D or M.Phil, he was held not entitled to any increment on the post after three increments. The operative part of the judgment dated 26.06.2012 passed in *Balbir Singh Kalsaik's* case is as follows:-

"4. We find in the judgment that learned Single Judge had issued a direction to consider taking over the services of the writ petitioner as Lecturer (College Cadre) with effect from the date of taking over of the college and continue him as such with the regular increments on condition that he would pass the NET latest by December, 2013. We do not find any justification in granting the time to the writ petitioner up to 2013, since nothing prevented the writ petitioner from acquiring the qualification otherwise within the stipulated period of three years. Therefore, the judgment under appeal is modified to the extent that the writ petitioner shall be deemed to have been appointed as Lecturer (College Cadre) along with other incumbents, as pointed out in the affidavit with effect from the date of taking over of the college. He shall be continued as such with increments for a period of three years. Since admittedly he has not qualified NET or SET or has not qualified the Ph.D or M.Phil, he shall not be entitled to any increment on the post after three increments. Appropriate orders in that regard shall be passed within three months from the date of production of a copy of this judgment by the writ petitioner before the 1st respondent. The consequential benefits shall be worked out and disbursed within another one month."

Special Leave to Appeal against the judgment dated 26.06.2012 was dismissed by the Apex Court on 08.07.2013.

4(vii). The **upshot of above discussion** is that the college in question was taken over by the State on 09.11.2005. Services of its teaching & non-teaching staff were taken over on 18.10.2006 as per UGC guidelines, R&P Rules and terms & conditions of taking over of staff of private colleges notified on 25.08.1994. The R&P Rules 2004 for the post of Lecturer (College Cadre) prescribed the eligibility criteria of possessing Post-Graduation Degree with minimum 55% marks alongwith NET/SET qualification. The writ petitioner had obtained M.Phil Degree in the year 2004 with 62.33% marks. In terms of the UGC notification dated 14.06.2006, she being in possession of M.Phil degree, was exempted from possessing NET for Undergraduate level teaching. The writ petitioner, therefore, satisfied the criteria for taking over of her services as Lecturer (College Cadre). Even otherwise, the State had granted relaxation from possessing the required educational qualifications while taking over the services of unqualified lecturers employed in National College Amb, District Una and Pt. Amarnath Samarak Mahavidalaya, Jogindernagar, District Mandi. The services of unqualified lecturers working in DAV College Sujanpur Tihra, District Hamirpur, were taken over by the State on the condition that they will have to acquire NET qualification as prescribed in the R&P Rules within a period of three years, failing which their increments were to be withheld. We have already held that the writ petitioner was qualified in terms of the applicable R&P Rules read with UGC guidelines. Even otherwise, writ petitioner cannot be discriminated vis-à-vis unqualified lecturers of National College Amb, District Una, Pt. Amarnath Samarak Mahavidalaya, Jogindernagar, District Mandi, DAV College Sujanpur Tihra, District Hamirpur and G.G.D.S.D. College Nerwa, whose services were taken over in relaxation of required educational qualifications or who after taking over of services, were granted time to meet the educational qualification criteria. The

documents placed on record of the writ petition, more specifically alongwith rejoinder, are pointer to the fact that appointment of the writ petitioner in the college was approved. There is no rebuttal to the rejoinder. The appellant has not demonstrated that appointment of writ petitioner was not approved.

5. For all the aforesaid reasons, we do not find any infirmity in the impugned judgment dated 23.07.2014 passed by the learned Single Judge. The present appeal, being devoid of any merit, is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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

Basu Dev & Ors. .....Appellants

Versus

Narad ....Respondent

For the appellants: Mr. Naresh Kumar Sood, Sr. Advocate with Mr. Aman Sood, Advocate.

For respondent: Mr. R.K. Gautam, Sr. Advocate with Mr. Jai Ram Sharma, Advocate.

RSA No. 375 of 2009
Reserved on:18.11.2022
Decided on: 25.11.2022

Code of Civil Procedure, 1908- Section 100- Second appeal- Decree of permanent prohibitory & mandatory injunction granted in favour of the plaintiff by Ld. Trial Court and affirmed by Ld. First Appellate Court with modified relief- Defendants aggrieved by decree of mandatory injunction and not permanent prohibitory injunction- Defendant contended that without demarcation, demolition order could not have been passed- **Held**- Defendants failed to take specific plea of not having raised construction, therefore, cannot be allowed to take such plea in second appeal- Defendant wa proceeded exparte and plaintiff did not have very heavy burden- Site plan and photographs established construction raised by defendants- evidence led by plaintiff was sufficient in law to prove case- Defendant in suit and legal heirs of defendant in appeal did not deny the fact of construction by their predecessor in suit- Appellate court ordered demarcation before any demolishment- Appeal dismissed. (Para 5)

Cases referred:

Gaiv Dinshaw Irani and ors. Vs Tehmtan Irani and Ors., (2014) 8 SCC 294;
Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & Ors. (1997) 5 SCC 438;
Maya Devi Vs. Lalta Prasad (2015) 5 SCC 588;

Ramesh Chand Ardawatiya Vs. Anil Panjwani (2003) 7 SCC 350;
Samir Narain Bhojwani Vs. Aurora Properties and Investments and another (2018) 17 SCC 203;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J

Decree of permanent prohibitory & mandatory injunction granted in favour of the plaintiff by the learned Trial Court was affirmed by the learned First Appellate Court with slight modification in the relief clause. Aggrieved, the legal heirs of original defendant have filed this second appeal.

2. Facts.

2(i). Civil Suit was instituted by One Narad Ram. He prayed for decree of permanent prohibitory injunction against the defendant Budhu Ram. The suit land was Khasra Nos.54 and 52 situated in Mohal and Mouja Bundla, Tehsil Palampur, District Kangra, H.P. The case of the plaintiff was that:-

2(i)(a) Khasra No.54 land measuring 0-03-37 hectares is entered in ownership of State of Himachal Pradesh and in the possession of *'Aab Pash Kunindgan'*. Plaintiff is a *'Bartandaran'* of Mohal and Mouja Bundla. Khasra No. 54 is *'Gair Mumkin Kuhl'* (water channel). The plaintiff has got right to irrigate his land from the water of said *'Kuhl'*. The defendant is also *'Bartandaran'* of the Mohal and Mouja Bundla. He has also got right of irrigation through the suit land but he has no right to raise construction on the suit land or to block the *'Kuhl'* by raising structure thereupon.

2(i)(b) Khasra No.52 measures 1-14-08 hectares. The said khasra is recorded as *'Charagah Bila Darakhtan'*. Being *'Bartandaran'* of Mohal and Mouja Bundla, the plaintiff has got grazing right in this land. The defendant in the capacity as *'Bartandaran'* has also got right of grazing but he has no right to raise construction over the suit land.

2(i)(c) The defendant constructed a path over the suit land comprised in Khasra No.52 and a room on Khasra No.54 measuring 10 feet in length and 8 feet in breadth. These constructions were raised by the defendant during the pendency of the suit and after the service of stay order upon him. The matter was reported to the Pradhan Gram Panchayat Bundla. Police protection was also obtained from the learned Trial Court for enforcing the interim stay order granted by it, yet the suit land was encroached by the defendant.

2(ii) The defendant was served in the civil suit. Though he put in appearance in the Court through his counsel but he allowed himself to be proceeded ex-parte on 5.6.2000. Plaintiff led oral as well as documentary evidence in support of his pleadings.

2(iii) After appreciating the pleadings and the evidence led by the plaintiff, learned Trial Court on 1.12.2003 passed a decree of permanent prohibitory injunction in favour of plaintiff restraining the defendant from changing the nature of suit land by raising any construction thereon. The decree of mandatory injunction was also passed in plaintiff's favour, compelling the defendant to demolish the portion constructed by him in Khasra Nos.52 and 54 as shown in the site-plan (Ext. P-5). The site-plan Ext.P-5 was made part of the decree.

2(iv) Legal heirs of defendant-Budhu Ram preferred First Appeal under Section 96 of the Code of Civil Procedure (CPC) against the judgment and decree passed by the learned Trial Court.

2(iv)(a) The legal heirs of original defendant *inter alia* pleaded in their first appeal that Budhu Ram their predecessor-in-interest had died on 7.2.2001. The judgment and decree passed by the learned Trial Court dated 1.12.2003 being against a dead person was nullity. Learned First Appellate Court did not find force in this contention. On facts, it was observed that original defendant Budhu Ram's death had been brought to the notice of the

learned Trial Court on 27.2.2001. Plaintiff's counsel had prayed for exemption from filing the application to bring on record the legal heirs of the deceased-Budhu Ram. Since he was already proceeded ex-parte vide order passed on 5.6.2000, learned Trial Court had allowed this prayer by observing that the original defendant-Budhu Ram was proceeded ex-parte, hence, in light of Order 22 Rule 4(4) CPC, there was no need to bring on record his legal heirs. While rejecting the contention of legal heirs of Budhu Ram, learned First Appellate Court also took note of the fact that there was no recital in the orders passed by the learned Trial Court that counsel representing the original defendant ever pleaded no instructions. That on 5.6.2000, when the case was called, neither the defendant nor his advocate appeared, hence, the defendant was proceeded ex-parte in accordance with law. Defendant had neither filed any written statement nor contested the suit. Thus, the exemption granted by the learned Trial Court to the plaintiff from bringing on record the legal heirs of deceased-defendant Budhu Ram was held to be in order. This finding of learned First Appellate Court has now attained finality.

2(iv)(b) The next contention advanced on behalf of legal heirs of original defendant-Budhu Ram before the learned First Appellate Court was that all rights, title and interests over the suit land stood vested in the State of Himachal Pradesh free from all encumbrances. No right of any kind was available with the plaintiff, which would entitle him to institute the civil suit. This submission was also turned-down by the learned First Appellate Court on the basis of documentary evidence on record. It was held that Khasra No.54 was in the ownership of the State of Himachal Pradesh but in possession of *'Aab Pash Kunindgan'*. The nature of land in the revenue document is recorded as *'Gair Mumkin Kuhl'* (water channel). No one could be allowed to block the water channel for his personal interest. Similarly in respect of Khasra No.52, the observation was that the State of Himachal Pradesh is though owner of this khasra number but in the cultivation column

'Bartandaran' reserve pool (right holders) have been recorded. The nature of this land depicted in the revenue document is *'Charagah'* (pasture). The learned First Appellate Court held that no one could be allowed to change the nature of pasture or disturb the reserve pool land in any manner. The contention advanced on behalf of legal heirs of original defendant-Budhu Ram that the oral & documentary evidence produced by the plaintiff was not appreciated properly by the learned First Appellate Court Court was also rejected.

2(iv)(c) The appeal preferred by the legal heirs of original defendant-Budhu Ram was dismissed on 02.05.2009 by the learned First Appellate Court. The judgment and decree dated 01.12.2003 passed by the learned Trial Court was affirmed. However, it was ordered that before executing the order of demolition of super-structure, the Executing Court will get the suit land demarcated from a Revenue Officer not below the rank of Tehsildar with further direction that if the defendant was found to have encroached upon any portion of Khasra Nos.52 and 54 by way of blocking the water channel or any construction thereupon, the same should be demolished only after receipt of demarcation report of Tehsildar.

3. Having suffered two concurrent judgments and decrees passed by the learned Courts below, the defendants, legal heirs of original defendant Budhu Ram have preferred this regular second appeal under Section 100 of the Code of Civil Procedure. This appeal was admitted on 16.03.2010 on the following substantial questions of law:-

> *"1. Whether impugned decree for demolition of structure is vitiated as the court below has failed to conclusively determine the factum and extent of alleged encroachment on suit land and thereby ordering the ascertainment of encroachment, if any, to be determined by way of demarcation at the execution stage?*
> *2. Whether documents Exhibit P-5 (self serving site plan), reports exhibit P-10 and P-11 (prepared by PW 2 on visual inspection of the spot) in the absence of proper demarcation report*

and Plan of Encroachment (Naksha Tafawat) can not be said to be a sufficient, cogent and lawful proof of allegations of encroachment as laid in the present suit?

3. Whether the findings of the courts below are vitiated for misreading and misconstruing the legal effect of documents Exhibit P-5 (Site Plan) , Exhibits P-6 and P-7 (Photographs) and Exhibits P-10 and P-11 (Reports of the Pradhan Gram Panchayat PW2)?"

4. I have heard learned counsel for the parties on the above substantial questions of law and with their assistance gone through the record.

5. Substantial Question of Law No.1 (moulding of reliefs)

5(i) Contentions

Learned Senior Counsel for the appellants/defendants submitted that the decree passed by the learned Trial Court is not executable. That Khasra Nos.54 and 52 are large parcels of land. Without identifying the exact extent of encroachment over these two khasra numbers, the decree for mandatory injunction could not have been passed by the learned Trial Court. Such decree is un-executable. It was contended that the learned First Appellate Court erred in moulding the reliefs.

Learned Senior Counsel for the respondent-plaintiff defended the moulding of reliefs by the learned First Appellate Court. It was argued that power to mould the reliefs lay with the Court and had been justly exercised in the facts of the case. The concern of the defendants have already been taken care of by the learned First Appellate Court in moulding the reliefs.

5(ii) Observations

5(ii)(a) The plaintiff had prayed for permanent prohibitory and mandatory injunction over the suit land. Learned Trial Court granted permanent prohibitory injunction and restrained the defendants from interfering over the

suit land. Mandatory injunction was also granted by the learned Trial Court directing the defendants to demolish the construction raised by them over the suit land. Learned First Appellate Court has affirmed the judgment and decree passed by the learned Trial Court. However, insofar as the mandatory injunction is concerned, the relief was slightly moulded. The modification was that before ordering demolition of super-structure over the suit land, it would be demarcated by the Revenue Officer not below the rank of Tehsildar and in case the defendant was found to have encroached upon any portion of Khasra Nos.52 and 54, then the same would be demolished on receipt of demarcation report. Moulding of relief can be resorted to at the time of consideration of final relief in the main suit. Reference in this regard can be made to (2018) 17 SCC 203 titled ***Samir Narain Bhojwani Vs. Aurora Properties and Investments and another***. Relevant paragraphs thereof reads as under:-

> *"24. That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in applying the principle of moulding of relief which could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The nature of order passed against the appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted. This Court in Dorab Cawasji Warden Versus Coomi Sorab Warden and Others, has had occasion to consider the circumstances warranting grant of interlocutory mandatory injunction. In paragraphs 16 & 17, after analysing the legal precedents on the point as noticed in paragraphs 11-15, the Court went on to observe as follows:*
>
> > *"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But*

since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

25 to 27……..

28. Reverting to the decision in Gaiv Dinshaw Irani, (supra), relied upon by the High Court, the Court moulded the relief in favour of the party to the proceedings to do substantial justice whilst finally disposing of the proceedings and did not do so at an interlocutory stage. In other words, reliance placed on the principle of moulding of relief is inapposite to the fact situation of the present case."

It is well settled that to meet exigencies of situations, the Court can always mould the reliefs. Reference in this regard can be made to (2014) 8 SCC 294 titled ***Gaiv Dinshaw Irani and ors. Vs Tehmtan Irani and Ors.,*** wherein it was observed that the Court may mould the relief in accordance with changed circumstances for shortening the litigation or to do complete justice. Following paragraphs relevant to the context will be appropriate to be extracted:-

"50. This was further followed in Lekh Raj vs. Muni Lal & Ors. This Court in Sheshambal (dead) through LRs vs. Chelur

Corporation Chelur Building & Ors. while discussing the issue of taking cognizance of subsequent events held that:

> ***"****19. To the same effect is the decision of this Court in Om Prakash Gupta case where the Court declared that although the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit yet the court has power to mould the relief in case the following three conditions are satisfied:*
>
> *"11. … (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;*
>
> *(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and*
>
> *(iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise.'*

51. This Court in Rajesh D. Darbar V. Narasingrao Krishnaji Kuklarni, a matter regarding the elections in a registered society, held that the courts can mould relief accordingly taking note of subsequent events. Furthermore, in Beg Raj Singh vs. State of Uttar Pradesh & Ors. while deciding on the issue of renewal of a mining lease held that:

> ***"7....****A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment."*

*52. Even this Court while exercising its powers under Article 136 can take note of subsequent events (See: Bihar State Financial Corporation & Ors. vs. Chemicot India (P) Ltd. & Ors. **Parents Association of Students vs. M.A. Khan** State of Uttar Pradesh & Ors. vs. Mahindra & Mahindra Ltd*

53. Thus, when the relief otherwise awardable on the date of commencement of the suit would become inappropriate in view of

the changed circumstances, the courts may mould the relief in accordance with the changed circumstances for shortening the litigation or to do complete justice.

54. The appellants during the pendency of the Civil Suits sought interim orders from the High Court and on the basis of order dated April 20, 1988 constructed the structure on the condition that rights of five flats were to be retained and they were subject to the outcome of the suit. In another order dated October 16, 1991 the appellants were once again restrained from the creation of third party rights with respect to the five demarcated flats. The appellants being well aware of the risks and consequences, carried on with the construction. During the pendency of the First Appeal, it has been pointed out that the appellants had given two of the five flats on leave and licence and continued to enjoy benefits from the same since 1997. The appellants are occupying two of the other nine flats and benefits from the remainder are being enjoyed by them.

55. In wake of the above, we are of the opinion that the High Court taking note of the subsequent events has correctly moulded the relief and allotted five flats to the respondent Nos. 1 to 5 as per their share."

5(ii)(b) The relief moulded by the learned First Appellate Court in fact takes care of any misgiving, which appellants-defendants may have. The defendants have not made any grievance about the decree of permanent prohibitory injunction granted against them. Their grievance is only confined to the mandatory injunction issued in favour of the plaintiff. Apprehensions expressed on behalf of the defendants have been taken care of by the learned First Appellate Court while moulding the reliefs .

5(ii)(c) Before the learned First Appellate Court, the defendants had not specifically taken the plea of having not raised any construction over Khasra Nos. 54 and 52. In ***(1997) 5 SCC 438,*** titled ***Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & Ors.*** the High Court had entertained a new plea as a legal plea and consequently allowed the second appeal. Observing that neither any specific plea was taken nor specific issues were framed in that regard, the Hon'ble Apex Court held that the High Court failed to bear in mind that it is not every question of law that could be permitted to be raised in

second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be *"satisfied"* that the case involves a "*substantial question of law*" and not a mere "*question of law*".

The observation made above was reiterated by the Hon'ble Apex Court while deciding ***Civil Appeal No. 6857/2022 on 22.9.2022*** titled ***Chandrabhan (Deceased) through legal heirs & Ors. Vs Saraswati & Ors***. Thus, the defendants cannot even be allowed to take new plea at the stage of second appeal, which is otherwise purely factual. In their appeal, the defendants had only pleaded that the decree passed by the learned Trial Court was nullity having been passed against a dead person and that plaintiff had no right to seek the relief on account of State being owner of the suit land. Under the circumstances, moulding of reliefs as done by the learned First Appellate Court was in order.

Accordingly substantial question of law is answered against the appellants-defendants and in favour of the respondent-plaintiff.

6. Substantial Question of Law Nos.2 and 3.

Being interconnected and involving overlapping discussions, these two questions are being considered together hereinafter:-

6(i) Contentions

Learned Senior Counsel for the appellants (defendants) submitted that the site-plan (Ext.P-5) prepared by the clerk of plaintiff's counsel shows encroachment allegedly made by the defendants over Khasra Nos.54 and 52. It is only a self serving document neither made to the scale nor supported by any other valid legal evidence. It was further contended that the photographs Ext. P-6, P-7 and P-13 adduced by the plaintiff for proving encroachment on the suit land are not sufficient to prove that any specific portion of Khasra Nos.52 and 54 was encroached, obstructed or built upon by the defendants. Khasra Nos.52 and 54 are big chunk of land parcels

measuring 0-03-37 hectares and 1-14-08 hectares respectively. Mere production of photographs of certain constructions cannot establish that these constructions were actually raised over the suit land. It was next submitted that reports of Pradhan Gram Panchayat Bundla (Ext.P-10 and P-11) would also not advance plaintiff's case that the construction alleged to have been raised by the defendants were over the suit land. The gist of arguments advanced by learned Senior Counsel for the appellants/defendants was that the evidence led by the plaintiff was not sufficient in law to prove and establish his case. The rule of best evidence was not followed in the case.

Defending the impugned judgments and decrees concurrently passed in favour of the plaintiff, learned Senior Counsel appearing for the respondent submitted that the original defendant was proceeded ex-parte. He had not filed any written statement. By leading oral as well documentary evidence, the plaintiff had proved his case of interference over the suit land by the defendant. The plaintiff had established that the defendant was not entitled to interfere over the suit land. The plaintiff had also established the factum of defendant's having raised construction over the suit land. Learned Senior Counsel also submitted that the plaintiff had adduced best evidence in the facts and circumstances of the case. The evidence was properly appreciated by both the learned Courts below.

6(ii) Observations

6(ii)(a) Admittedly despite having been served, the defendant (Budhu Ram) chose not to file any written statement. Neither the counsel engaged by the defendant nor he himself appeared in the suit and as such vide order dated 05.06.2000, he was proceeded ex-parte by the learned Trial Court. The order has now attained finality.

6(ii)(b) ***(2003) 7 SCC 350*** titled ***Ramesh Chand Ardawatiya Vs. Anil Panjwani*** holds that even if the suit proceeds ex-parte and in the absence of a written statement, unless the applicability of Order 8 Rule 10 of the CPC is

attracted and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A *prima facie* proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex-parte the Court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the Trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'point for determination' and proceed to construct the ex-parte judgment dealing with the points at issue one by one. Merely because the defendant is absent, the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

In **(2015) 5 SCC 588 titled Maya Devi Vs. Lalta Prasad,** it was held that the absence of the defendant does not absolve the Trial Court from fully satisfying itself of the factual and legal veracity of the Plaintiff's claiming, this feature of the litigation casts a greater responsibility and onerous obligation on the Trial Court as well as the Executing Court to be fully satisfied that the claim has been proved and substantiated to the hilt by the plaintiff. The failure to file a Written Statement, thereby bringing Order 8 Rule 10 of the CPC into operation, or the factum of Defendant having been set ex parte, does not invite a punishment in the form of an automatic decree. Both under Order 8 Rule 10 CPC and on the invocation of Order 9 of the CPC, the Court is nevertheless duty- bound to diligently ensure that the plaint stands proved and the prayers therein are worthy of being granted.

6(ii)(c) The plaintiff in support of his pleadings adduced documentary evidence i.e. Ext.P-1, jamabandi for the year 1997-98, reflecting Khasra No.54 to be in the ownership of State of Himachal Pradesh and in possession of *'Aab Pash*

Kunindgan'. The nature of this land is recorded as '*Gair Mumkin Kuhl'* (water channel). Ext.P-2 is also a jamabandi for the year 1997-98 depicting Khasra No.52 to be in the ownership of State of Himachal Pradesh and in possession of '*Bartandaran*' (reserve pool). The nature of this land is recorded as '*Charagah'* (pasture).

6(ii)(d) Both khasra numbers constituting the suit land are therefore, though owned by State of Himachal Pradesh but right holders of the village are entitled to exercise their rights of getting their land irrigated through *Kuhl* existing on the suit land and also to use the suit land as pasture land without any obstruction. Ext.P-4 is a field map (*Tatima*) placed on record by the plaintiff showing the suit land alongwith adjoining Khasra Nos. 56 and 58. Ext.P-5 is the site-plan prepared by one Sh. Kartar Chand Clerk to the counsel of the plaintiff. The site-plan shows that a path has been constructed over Khasra No.52 connecting Khasra No.54 to a main road through khasra No.52. The site-plan also reflects that a 10 feet long and 8 feet wide room has been constructed over Khasra No.54. In support of site plan, photographs of construction in form of path (stairs) and a room have been proved in evidence as Ext.P-6, Ext.P-7 and Ext.P-13. Ext.P-6 and Ext. P-13 are the photographs showing the construction of room, whereas Ext. P-7 is a photograph of a path on the face of pleadings & evidence on record.

6(ii)(e) It cannot be said that the plaintiff had not adduced the best evidence possible. Defendant had chosen not to contest the suit. Plaintiff had placed on record a site-plan depicting encroachment with the measurement of the construction raised over the suit land. The defendant had not disputed that he had not raised the construction. The site-plan (Ext. P-5) and the photographs (Ext. P-6, P-7 and P-13) establish plaintiff's pleaded case of construction having been raised by the defendant over Khasra Nos. 54 and 52. Ext.P-10 is a verification report prepared by the Pradhan Gram Panchayat Bundla. The report states that in-violation of stay order granted by the

learned Trial Court, the defendant-Budhu Ram had raised construction over the suit land. To the same effect is the certificate issued by the Pradhan Gram Panchayat Bundla at Ext.P-11. Ext.P-12 is the report of the Police Official to the effect that the defendant had violated the stay order granted by the learned Trial Court by raising construction over the suit land. All these documents lead credence to the case of plaintiff's that the defendant had constructed over the suit land i.e. Khasra Nos.54 and 52 by raising a room and a path respectively. Apart from the documentary evidence, the plaintiff had also produced three witnesses in support of his case. While appearing as PW-1, plaintiff narrated his pleaded case and stated that his right over the suit land had been interfered by the defendant by raising construction over it. Consequently he has been deprived of his right to irrigate his land through *Kuhl* existing over Khasra No.54 and also deprived to use Khasra No.52 as pasture land. Pradhan of Gram Panchayat Bundla stepped in the witness box. As PW-2, he testified the nature of suit land as *Kuhl* (water channel) and pasture land. He also proved the reports prepared by him (Ext.P10 & P-11) and stated that the defendant had constructed the suit land. To similar effect is the deposition of PW-2 a member of the concerned panchayat.

The oral and documentary evidence led by the plaintiff proves that the defendant had encroached over Khasra Nos. 54 and 52. The defendant had no right to raise any construction over these two khasra numbers and to cause interference over exercise of plaintiff's rights thereupon. The site-plan Ext.P-5 might have been prepared by the clerk of the counsel, however, the length and width of the room constructed by the defendant over Khasra No.54 had been described therein. Even otherwise, the defendant had not denied raising of construction over the suit land. The legal heirs of defendant-Budhu Ram in their appeal filed before the learned First Appellate Court did not specifically deny raising of construction by their

predecessor over the suit land. It was established on record that the Pradhan Gram Panchayat as well as the Police Officials had reported raising of construction by the defendant over the suit land. In fact, learned Trial Court had provided police assistance vide order dated 6.6.2000, for enforcing its injunction order. The very fact, that defendants have come up in appeal not against the permanent prohibitory injunction granted against them but against the mandatory injunction goes on to show that their predecessor had raised construction over the suit land. In any event, learned First Appellate Court by moulding the reliefs has taken care of apprehension of the defendants for getting the suit land demarcated before ordering demolition of encroachment.

The substantial questions of law No.1 and 2 are answered against the appellants/defendants and in favour of the respondent/plaintiff.

7. In view of the above discussion, the impugned judgments and decrees concurrently passed by the learned Courts below cannot be said to be suffering from any infirmity. There is no merit in this second appeal. The same is accordingly dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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

Smt. Madhavi Mehra alias Urmila .....Appellant.

Versus

Smt. Kamla Devi and Ors. .....Respondents.

For the appellant : Mr. K.D. Sood, Sr. Advocate, with Mr. Rahul Gathania, Advocate.

For respondent No.1 : Mr. Bunesh Pal, Advocate.

For respondent No.2 : Ms. Anjali Soni, Advocate.

RSA No.: 358 of 2017
Reserved on:18.11.2022
Decided on :25.11.2022

Code of Civil Procedure, 1908- Section 100- Second appeal- Suit dismissed by ld. Senior civil judge and affirmed by first appellate court- Plaintiff filed suit alleging encroachment by defendant by wrongfully manipulating records- **Held**- No corroboration of allegations except self serving statements of plaintiff and her husband- Plaintiff never applied for demarcation of her land but defendant got the demarcation done- Husband of plaintiff was present at the time of demarcation and consented to it being correct- He cannot be permitted to resile from such admission- Findings of courts below not perverse or illegal as based on due appreciation of evidence- No substantial question of law- Appeal dismissed. (Para 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

Heard.

2. By way of Regular Second Appeal, judgment and decree dated 28.02.2017, passed by learned District Judge, Kangra at Dharamshala, H.P.

in Civil Appeal No. 35-D/XIII/2013, titled as Smt. Madhavi Mehra Vs. Smt. Kamla Devi and ors., affirming judgment and decree dated 24.04.2013, passed by learned Civil Judge (Senior Division), Kangra at Dharamshala in Civil Suit No. 13 of 2006, has been sought to be assailed.

3. Parties hereinafter shall be referred to by the same status as they held before learned Trial Court. Appellant herein was plaintiff and respondents herein were defendants in the same sequence as impleaded in the instant appeal.

4. Brief facts necessary to be noticed for adjudication of the appeal are that plaintiff is co-owner of land, with Shri Kumud Handa and defendant, comprised in Khasra Nos.1746 and 1747, measuring 1249-56 sq. mtrs., situated in Up-Mohal Gamroo, Mouza and Tehsil Dharamshala, District Kangra, H.P., which had come in their ownership by way of transfer from defendant No.3. Defendants No. 1 and 2 are owners of Khasra Nos. 1745/1 and 1745/7, which abutts the abovesaid land of plaintiff, comprised in Khasra Nos. 1746 and 1747. Defendants No. 1 and 2 were also transferees of their respective pieces of land as mentioned above from defendant No.3.

5. Plaintiff filed the suit on the premise that while getting the plots carved out in the land comprised in Khasra No. 1745, defendant No. 3 in collusion with revenue staff, had manipulated the records in such a manner that the area of Khasra No. 1745 was increased and land comprised in Khasra Nos. 1746 and 1747 was reduced. On such allegations, it was averred in the plaint that the defendants, under the garb of wrong revenue entries were trying to encroach upon the land comprised in Khasra Nos. 1746 and 1747. It was further submitted in the plaint that during demarcation proceedings conducted by Revenue Officer on the request of defendants, though her husband was present and had signed the proceedings, but he had not appended signatures voluntarily as he was not feeling well.

6. Defendants contested the allegations levelled by the plaintiff. Defendants No. 1 and 2 came up with clear defence that they were in possession of their respective plots of land sold to them by defendant No.3. There was no enhancement in the area of Khasra No. 1745 nor was there any reduction in the area of land comprised in Khasra Nos. 1746 and 1747. Defendant No.1 had got the land demarcated and boundaries of the respective land of the plaintiff and defendants, were un-breached.

7. On the pleadings of the parties, learned Trial Court has framed the following issues:-

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP.

2. Whether the defendants interfered in the ownership and possession of the plaintiff over the suit land by way of raising construction, encroaching and chopping the trees, as alleged ? OPP.

3. In case the defendants succeed in raising construction over the suit land, whether the plaintiff is entitled for a decree of mandatory injunction mandating the defendants to restore the suit land to the original position, as alleged ? OPP.

4. Whether the suit is not legally and factually maintainable in the present form, as alleged? OPD.

5. Whether the plaintiff has no cause of action and locus-standi to file the present suit? OPD.

6. Whether the plaintiff has not approached the court with clean hands? OPD.

7. Whether the suit is vague and based upon frivolous averments? OPD.

8. Whether the suit is time barred, as alleged? OPD.

9. Whether the suit is bad for multifariousness and mis-joinder of cause of action? OPD.

10. Whether the act and conduct of the plaintiff is bar to file the present suit? OPD.

11. Whether the suit of the plaintiff is bad for non-joinder of necessary parties? OPD.

12. Whether the plaintiff has no enforceable cause of action? OPD.

13. Whether the suit of the plaintiff is not properly valued for the purposes of court fee and jurisdiction? OPD.

14. Relief.

8. Issues No. 1 and 5 were partly decided in affirmative. Issues No. 2, 7 and 12 were also decided in affirmative, whereas rest of the issues were negated and as a result, the suit was dismissed. The appeal filed by the plaintiff under Section 96 of the Code of Civil Procedure was also dismissed by learned District Judge, Kangra at Dharamshala, H.P. on 28.02.2017, hence, the present appeal.

9. Learned Trial Court on appreciation of evidence held that plaintiff had failed to prove the allegations made in the plaint. She had not been able to substantiate that there was any manipulation in the revenue records or the area of lands proved in Khasra Nos. 1746 and 1747, was reduced. Learned Trial Court also held that plaintiff never applied for demarcation of land and without ascertaining the limits of boundaries of respective land of the parties, her apprehension was unfounded. Learned Trial Court also rejected allegation regarding defendant No. 3 having sold more area than his shares in Khasra No. 1745.

10. Learned Lower Appellate Court also affirmed the findings returned by learned Trial Court on re-appreciation of evidence. It has been additionally found that the husband of the plaintiff was present at the time of

demarcation of land conducted at the instance of defendant No.1. He had consented to such demarcation being correct and hence, he cannot be allowed to resile from such admission without any justifiable reason.

11. Plaintiff examined herself as PW-1. Her husband also appeared as a witness as PW-4. In addition, one Sh. Gurdial Singh and Sh. Sahib Ram, were also examined. Whereas, Sh. Gurdial Singh tried to support the case of the plaintiff by stating that defendants had trespassed into the land of the plaintiff by carrying out excavation, PW-3, Sh. Sahib Ram proved *tatima* Ext. PW3/A, which he had prepared on the basis of '*Latha*'. From the evidence lead by plaintiff, it is clear that except the self serving statements of the plaintiff and her husband, there was no corroboration to their allegations. Statement of Sh. Gurdial Singh was in general terms. He was not owner of any adjoining land as stated by him in cross-examination. He was also not aware about the respective area of land owned by the parties. He did not know in which khasra number fencing of plaintiff was disturbed. Similarly, *tatima* Ext. PW3/A was stated to have been prepared by PW-3 Sh. Sahib Ram on 24.09.2002. He had prepared *tatima* on the basis of '*Latha*'. The suit was filed in the year 2006. Defendant No. 1 had purchased the land comprised in Khasra No. 1741 on 13.12.2005 and defendant No. 2 had purchased his plot of land almost during the same period. The '*Latha*' gets amended with the change in the size of holding. It is not disputed that the area of land comprised in Khasra No. 1745 was sub-divided into different khasra numbers after carving out of plots therefrom. Thus, *tatima* Ext. PW3/A was of no help to the case of the plaintiff.

12. Noticeably, plaintiff never applied for demarcation or got her land demarcated. On the other hand, defendant No. 1 got the land demarcated and husband of the plaintiff had admitted such demarcation to be correct.

13. Both the Courts below have based their conclusions on the basis of findings arrived at after due appreciation of evidence. Such findings are borne from the records and cannot be said to be illegal or perverse.

14. In view of above discussion, no question of law much less substantial question of law arises in the instant appeal. In result, the same fails. Judgment and decree dated 28.02.2017, passed by learned District Judge, Kangra at Dharamshala, H.P. in Civil Appeal No.35-D/XIII/2013, titled as Smt. Madhavi Mehra Vs. Smt. Kamla Devi and ors., affirming judgment and decree dated 24.04.2013, passed by learned Civil Judge (Senior Division), Kangra at Dharamshala in Civil Suit No. 13 of 2006, is affirmed.

15. The appeal is, accordingly, disposed of, so also the pending miscellaneous application, if any.

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

Between:-

RAJINDER KUMAR DUTTA S/O SH. OM PRAKASH DUTTA, R/O WARD NO. 3, CHOGAN BAZAR, NURPUR, TEHSIL NURPUR, DISTT. KANGRA, (H.P.).

…….APPELLANT

(BY MR. NARESH KAUL, ADVOCATE)
AND

1. SMT. GIAN DEVI W/O SH. BISHAN DASS,

2. AARTI, DAUGHTER,

3. ANKUSH, SON,

4. SHIKHA, DUAGHTER OF SHRI JOGINDER KUAMR SON OF BISHAN DASS,

   ALL RESIDENTS OF WARD NO. 2, DUNGA BAZAR, NURPUR, TEHSIL NURPUR, DISTT. KANGRA, (H.P.).

   ……..CLAIMANTS/PETITIONERS

5. SUMIT MAHAJAN S/O SH. TARA CHAND, R/O WARD NO. 3, CHOGAN, NURPUR, TEHSIL NURPUR, DISTT. KANGRA, (H.P.)

   …..PROFORMA RESPONDENT

6. THE UNITED INDIA INSURANCE COMPANY LIMITD NEAR SHAAN HOTEL, DALHOUSIE ROAD, PATHANKOT (PUNJAB) THROUGH THE BRANCH MANAGER, DHARAMSHALA, DISTRICT KANGRA, (H.P.)

   …..RESPONDENT

(MR. AJAY SHARMA, SENIOR ADVOCATE WITH MS. KAVITA, FOR R-2 TO 4.
MR. JAGDISH THAKUR, ADVOCATE FOR R-6)

FIRST APPEAL FROM ORDER

No. 173 OF 2022
Decided on: 18.10.2022

Motor Vehicles Act, 1988- Section 173- Appeal against award by MACT granting compensation of Rs. 6,24,000 on ground that income of deceased assessed on higher side- **Held**- Criteria assessing the income of deceased adopted by MACT is a prudent criteria- No assessment on higher side- Vehicle was being driven by minor who could not have possessed driving licence on date of accident-Violation of insurance policy- Owner of offending vehicle to compensate- Appeal dismissed. (Paras 14,16)

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

J U D G E M E N T

When this appeal was taken up on 30th August, 2022, with the consent of learned Counsel for the parties, the matter was ordered to be listed for final consideration for today. Accordingly, today the case is heard and is being disposed of.

2. Heard.

3. The appellant herein is aggrieved by the award passed by the learned Motor Accidents Claim Tribunal-II, Kangra at Dharamshala, District Kangra, H.P. in MACP No. 107-N/II/13/2011, titled as Smt. Gian Devi and others vs. Sumit Mahajan and others, dated 04.01.2018, in terms whereof a claim petition preferred by the respondents No. 1 to 4 herein was decided by learned Tribunal in the following terms:-

> *"17. In view of my findings on issues above, the petition is allowed with costs and the petitioners are awarded compensation to the tune of Rs. 6,24,000/- along with interest at the rate of 8% per annum from the date of filing of the petition till realization of the whole amount. The deceased being a third party, is covered in terms of the insurance contract. Thus, the aforesaid amount of compensation is firstly to be satisfied by the insurer, the respondent No. 3 and thereafter insurer has a right to recover the same from the insured, the respondent No. 2. Compensation amount shall be shared by the*

petitioners equally. Memo of costs be prepared accordingly. File after its due completion be consigned to record room."

4. Brief facts necessary for the adjudication of the present appeal are that the respondents/claimants (hereinafter to be referred as the claimants) filed a claim petition before the learned Tribunal *inter alia* on the ground that on 21.07.2009, one Joginder Kumar was walking on a road on his side near Municipal Council office, Nurpur, when respondent Sumit Mahajan, who was riding Activa Scooty bearing registration No. HP-38B-3021, hit him, as a result whereof, Joginder Kumar fell down and sustained injuries. Karan Dutta, son of respondent No. 2, i.e. present appellant, was the pillion rider. Joginder Kumar was provided initial medical assistance at Civil Hospital, Nurpur, from where he was shifted to Dr. Rajender Prasad Government Medical College, Tanda. From there also, the injured was shifted to DMC Ludhiana, where he remained admitted till 31.07.2009 but he passed away while in Coma on 10.01.2010. The matter was reported to the police, which led to registration of an FIR also. According to the claimants, the deceased was 54 years of age at the time when he died and he was running a Sweet shop in main bazaar, Nurpur, from where his monthly earnings were Rs. 20,000/-. According to the respondent, the deceased was sole bread earner of the family, and on these grounds, the claim petition was filed seeking compensation to the tune of Rs. 15.00 Lac with interest.

5. The petition was resisted by respondents No. 1 and 2 before the learned Tribunal, which includes the present appellant on the ground that the deceased was a patient of High Blood Sugar and he himself fell down and respondent No. 2 with the help of respondent No. 1 took him to the hospital and as deceased died a natural death after a lapse of six months, therefore, the claimants were not entitled for compensation as was being prayed for. As per said respondents, there was no connection between the alleged accident

and the death of the deceased. According to them, the petition stood filed just to extract money from the respondents. Respondent No. 3-Insurance Company opposed the petition *inter alia* taking the objection that driver of the Scooty was not having valid and effective licence and the vehicle was being plied in violation of the provisions of the insurance policy. The factum of age and income of the deceased was objected to by respondent-Insurance Company.

6. On the basis of the pleadings of the parties, learned Tribunal framed the following issues:-

> *"1. Whether deceased Jginder Kumar died in road side accident o 21.7.2009 at about 11.00 A.M. near HPSEB, Nurpur due to rash and negligent driving of respondent No. 1, as alleged? OPP*
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, to what extent and from whom? OPP*
> *3. Whether the driver of the vehicle in dispute (Scooty) was not holding valid and effective driving licence at the time of accident, as allegd? OPR-3*
> *4. Whether the vehicle in dispute (Scooty) was being plied in violations to the terms and conditions of the insurance policy, as alleged? OPR-3.*
> *5. Relief."*

7. On the basis of pleadings and evidence led by the parties in support of their respective claims, the issues so framed were answered by learned Tribunal as under:-

> *Issue No. 1: Yes.*
> *Issue No. 2: Decided accordingly.*
> *Issue No. 3: No.*
> *Issue No. 4: No.*
> *Relief: The petition is allowed as per operative part of the award.*

8. The claim petition was thus decided by learned Tribunal in favour of the claimants and award to the tune of Rs. 6,24,000/- alongwith interest at the rate of 8% per annum from the date of filing of the petition till realization of the whole amount was awarded.

9. The claimants have not assailed the award and the same has been assailed by respondent No. 2 (before the learned Court below) only.

10. Mr. Naresh Kaul, learned Counsel for the appellant has challenged the award *inter alia* on the ground that the findings which have been returned by learned Tribunal that the Scooty was being driven by Sumit Mahajan in violation of the insurance policy are perverse findings because as the Scooty in issue was duly insured with the Insurance Company at the time when the accident took place, therefore, the liability to compensate the claimants was that of the Insurance Company, which has been wrongly fastened upon the present appellant. Learned Counsel has further submitted that otherwise also the income, which has been assessed, of the deceased is on the higher side without there being any evidence on record to prove the same, and therefore also, the award under challenge is liable to be set aside. No other point was urged.

11. On the other hand, Mr. Ajay Sharma, learned Senior Counsel appearing for respondents No. 2 to 4/claimants has resisted the present appeal *inter alia* on the ground that there is no infirmity in the award passed by the learned Tribunal for the reasons that it was a matter of record that the appellant and also Sumit Mahajan, failed to produce on record driving licence of Sumit Mahajan, authorizing him to drive the vehicle in issue. Learned Senior Counsel also argued that the amount of compensation which was assessed at by the learned Tribunal was arrived at by taking the income of the deceased Rs.6,000/- per month only, by construing the daily earnings of the deceased to be that of a labourer at the rate of Rs.200/-, from which also, ¼ was deducted as personal expenses of the deceased, and therefore, by no stretch of imagination, it could be said that the compensation awarded by learned Tribunal was on the higher side.

12. Similarly, Mr. Jagdish Thakur, learned Counsel for the Insurance Company has submitted that it is a matter of record that as on the

date when the accident took place, the offending vehicle was duly insured but as the offending vehicle was being driven in violation of the insurance policy, therefore, learned Tribunal has rightly ordered that the liability to compensate the claimants was that of the owner of the vehicle.

13. I have heard learned Counsel for the parties and also gone through the award passed by learned Tribunal as well as record of the case.

14. As far as the contention of the learned Counsel for the appellant that the income of the deceased has been assessed by the learned Tribunal on the higher side is concerned, this Court is of the considered view that the said contention has no merit. A perusal of para-14 of the judgment passed by the learned Tribunal demonstrates that after taking into consideration the fact that there was no satisfactory evidence adduced by the claimants with regard to the income of the deceased, learned Tribunal assessed the income of the deceased to be Rs. 200/- per day, by relying upon the evidence in terms whereof the deceased admittedly was stated to be running a Sweet shop. From this, ¼ amount was deducted as personal expenses of the deceased, and thereafter by calculating the monthly dependency of the deceased to Rs.4500/-, the annual dependency was arrived at Rs. 54,000/-. By applying to multiplier of 12 (4500x12=54000/-), the compensation was arrived at by the learned Tribunal. The criteria, which was adopted by the learned Tribunal while assessing the income of the deceased is a prudent criteria and therefore, it cannot be said, as has been argued by learned Counsel for the appellant, that the income of the deceased was assessed by the learned Tribunal on the higher side. Similarly, the contention of learned Senior Counsel for the respondents-claimants that the income of the deceased was assessed on the lower side by the learned Tribunal is also rejected for the reason that in the absence of any evidence that the deceased was earning Rs. 20,000/- per month, as claimed, the claimants cannot be awarded compensation on conjectures and surmises.

15. Now coming to the second issue as to whether the award passed by the learned Tribunal is not sustainable on the ground that learned Tribunal erred in not holding that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy, this Court is of the considered view that the findings so returned by learned Tribunal call for no interference. The reasoning which has been given by the learned Tribunal while fastening the liability to compensate the claimants upon the present appellant is that the vehicle was being driven by Sumit Mahajan without possessing a valid and effective driving licence to drive the same. A perusal of the record of the case demonstrates that there is on record one driving licence, i.e. Ext. RW4/C. A perusal of this exhibit demonstrates that this was the driving licence of Rajinder Kumar Dutta, i.e. the present appellant and not of Sumit Mahajan. Now the foundation of the case of the claimants before the learned Tribunal was that the offending vehicle was being driven by Sumit Mahajan, which led to the death of Joginder Kumar. A perusal of the FIR Ext. PW1/A demonstrates that therein also the allegation is that the offending vehicle was being driven by Sumit Mahajan. Not only this, a perusal of the statement of Sumit Mahajan, i.e. RW1, demonstrates that he admitted in the course of his cross examination that on 21st July, 2009, i.e. the date when the accident took place, he was a minor and that he was not having a driving licence which he could produce in the Court.

At this stage, it is relevant to refer to Sections 3 and 4 of the Motor Vehicles Act, which provide as under:-

> "***3. Necessity for driving licence.—***
> *(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.—(1) No person shall drive a*

motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do."

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.

4. Age limit in connection with driving of motor vehicles.—

(1) No person under the age of eighteen years shall drive a motor vehicle in any public place: Provided that 1[a motor cycle with engine capacity not exceeding 50cc] may be driven in a public place by a person after attaining the age of sixteen years.

(2) Subject to the provisions of section 18, no person under the age of twenty years shall drive a transport vehicle in any public place.

(3) No learner's licence or driving licence shall be issued to any person to drive a vehicle of the class to which he has made an application unless he is eligible to drive that class of vehicle under this section."

16. The facts as narrated hereinabove and the statutory provisions of the Motor Vehicles Act, 1988, which have been reproduced hereinabove, leave no room for any doubt that as the Scooty was being driven by Sumit Mahajan, who was a minor on the relevant date, who but obvious could not have possessed the driving licence as on the date when the accident took place, learned Tribunal correctly returned the findings that as there was violation of the provisions of the insurance policy, therefore, the liability to compensate the claimants was that of the owner of the offending vehicle. These findings are clearly borne out from the record of the case and the same do not call for any interference.

Accordingly, in view of the observations made hereinabove, as this Court does not finds any merit in the present appeal, the same is

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

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

Mansa Ram .....Petitioner

Versus

Prakash Chand and another .....Respondents

For the Petitioner : Mr. K.D. Sood, Senior Advocate, with
Ms. Ranjana Chauhan, Advocate.

For the Respondents : Mr. J.L.Bhardwaj, Advocate, for respondent No.1.
Mr. Mukesh Sharma, Advocate, for respondent No.2

CMPMO No. 482 of 2022
Reserved on: 18.11.2022
Decided on: 25 .11.2022

Code of Civil Procedure, 1908- Order 1 Rule 10- **Constitution of India, 1950**- Article 227- The application was allowed- It was held that the petitioner is a necessary party to the appeal as in the event of the Appellate Authority deciding the appeal in favour of respondent No.1, the claim of the petitioner being transferee of membership and token from respondent No.1, will remain unheard. It is further seen that Rule 10 of Order 1 of the CPC, vests the Court with power to add party at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just. The relevant considerations for exercise of such power is either the party sought to be impleaded ought to have been joined as a plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. This Court in exercise of jurisdiction under Article 227 of the Constitution of India will not sit as a Court of appeal and will also not substitute its own opinion or view having regard to the restrictive jurisdiction.(Para 18)

Cases referred:

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

Sadhana Lodh vs. National Insurance Company Ltd. And another, (2003) 3 SCC 524;

Sudhamayee Pattnaik and others vs. Bibhu Prasad Sahoo and others 2022 Live Law (SC) 773;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, petitioner has challenged order dated 14.02.2022, Annexure P-11, passed by the Assistant Registrar, Cooperative Societies, Solan, District Solan, H.P. whereby the application of the petitioner herein under Order 1 Rule 10 of the Code of Civil Procedure (for short, 'CPC') has been dismissed.

2. Brief facts necessary for adjudication of the petition are that respondent No.2 is a Society registered under the Himachal Pradesh Co-operative Societies Act, (for short, "The Society") having its own Rules and Bye-laws. The primary objective of the Society is to carry out all types of transport business for transporting goods which includes plying of trucks, tippers, trailers and any other type of public vehicle. Besides this, the Society has been constituted to provide business only for land-loosers of the Panchayats within whose jurisdiction the lands were utilized for the Gujarat Ambuja Cement Project. Land-loosers includes hereditary permanent residents of the area under operation of the Society.

3. Respondent No.1 was a member of the Society. He was assigned token No. B-812 and his vehicle No. HP-51B-0557 was being operated under the aegis of the Society. Respondent No.1 had purchased the aforesaid vehicle by taking financial assistance from the Finance Company. He defaulted in payments of instalments, as a consequence of which, the Finance Company re-possessed the vehicle on 04.07.2011 and subsequently auctioned the same to realize its due amount. Thus, the petitioner was unable to ply any vehicle under the token of membership allotted to him by the Society.

4. On 08.01.2014, respondent No.1 had agreed to transfer the membership of the Society in favour of the petitioner. The Managing Committee of the Society passed a resolution on 08.02.2014 whereby the membership of respondent No.1 was cancelled for his inability to ply any

vehicle against said membership despite repeated reminders. The resolution was approved by the General House on 27.04.2014.

5. Respondent No.1 claims that he had submitted an application to the Society praying for grant of permission to ply one multi axle truck and one six tyre truck. He received a communication dated 16.03.2021 from the Society informing him that his membership stood cancelled, as aforesaid and his request could not be allowed.

6. Aggrieved against the communication dated 16.03.2021 and his termination/expulsion from the Society, respondent No.1 has preferred an appeal under Section 93 of the Himachal Pradesh Cooperative Societies Act (for short, 'the Act'), before the Assistant Registrar Cooperative Societies, Solan, District Solan, H.P. During the pendency of the appeal of respondent No.1, an application was filed by the petitioner under Order 1 Rule 10 of CPC for impleading him as party to the appeal. The application was preferred on the premise that the petitioner was a necessary party to the appeal as respondent No.1 had transferred his membership alongwith token in favour of the petitioner on 08.01.2014, whereafter respondent No.1 had ceased to be the member of the Society and, therefore, the question of termination of membership of respondent No.1 by the Society did not arise. It was further averred that respondent No.1 was claiming himself to be the member of the Society by concealing true facts regarding transfer of membership in favour of petitioner and had willfully omitted to implead the petitioner as party in the appeal.

7. The application of petitioner was contested by respondent No.1 on the grounds that the application was not maintainable as respondent No.1 had not prayed any relief against the petitioner. It was further averred that the Society had not rejected the prayer of respondent No.1 for permission to ply the vehicles on the ground that his membership and token stood

transferred to the petitioner, rather such rejection was on the ground that the membership of respondent No.1 had been cancelled for his inability to ply the vehicle since long. As per respondent No.1, the petitioner was neither a necessary nor a proper party to the proceedings. The petitioner was also accused of having filed the application merely to delay the proceedings of the case. Respondent No.1 also raised a specific plea that the affidavit executed by him evidencing the factum of transfer of his membership in favour of the petitioner on 08.01.2014, had not matured and thus the affidavit could not be acted upon. The petitioner had not initiated any legal process on the basis of said affidavit knowing fully well that the transaction had not matured and the affidavit was a waste paper.

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

9. The application dated 15.03.2021 submitted by respondent No.1 to the Administrator of the Society reveals that request was made for granting permission to purchase/replace new vehicles in place of vehicle No./token No. HP-51B-0557/B-812. Respondent No.1 had made such prayer on the premise that his vehicle No. HP-51B-0557 was registered in the name of his wife Smt. Lata Devi and was financed by Shriram Transport Finance Company. Due to his financial conditions, respondent No.1 could not pay the monthly instalments and consequently the vehicle was repossessed by the Financer and was auctioned subsequently.

10. In his appeal preferred to the Assistant Registrar, Cooperative Societies, Solan against the communication dated 16.03.2021, respondent No.1 has specifically averred that the said respondent on earlier occasions had also made request for purchasing another vehicle by replacement of vehicle No. HP-51B-0557, during the years 2016-17, but his request was put off on one or the other pretext by the Society. It has also been averred in the

appeal by respondent No.1 that the bye-laws of the Society permitted the plying of three single axle vehicles or one multi axle vehicle with one single axle vehicle at a time. Thus, respondent No.1 had put-forth his case for permission to purchase new vehicles. Noticeably, the prayer clause of the appeal filed by respondent No.1 reads as under:

> (i) That the impugned action of the respondent-society to terminate/expel the appellant from the membership of the respondent-society may kindly be quashed and set-aside and the membership of the appellant be ordered to be restored to its original number.
>
> (ii) That the respondent-society may kindly be directed to grant the permission to the appellant to purchase one multi axle vehicle and one single axle vehicle, since as per the bye-laws of the respondent-society, one member can ply three single axle vehicles or one multi axle and one single axle vehicle with the respondent-society at a time and justice be done."

11. No doubt, the prayer No.(ii) made by respondent No.1 in his appeal will depend on the decision on prayer No. (i). In case, prayer No. (i) of respondent No.1 is granted, his entitlement for purchase of new vehicles will become relevant. In such view of the matter, the prayer of petitioner to implead him as a party in the appeal does not appear to be unjustified. Rather, the petitioner is a necessary party to the appeal as in the event of the Appellate Authority deciding the appeal in favour of respondent No.1, the claim of the petitioner being transferee of membership and token from respondent No.1, will remain unheard. Before delving further on the subject, it will be apt to deal with another submission of learned counsel for respondent No.1 that this Court in exercise of jurisdiction under Article 227 of the Constitution of India will not sit as a Court of appeal and will also not substitute its own opinion or view having regard to the restrictive jurisdiction.

Reliance has been placed on para-7 of the judgment passed by the Hon'ble Supreme Court in **Sadhana Lodh vs. National Insurance Company Ltd. And another, (2003) 3 SCC 524**, which reads as under:

> *"**7**. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision."*

12. Similarly, para-15 of the judgment passed by the Hon'ble Supreme Court in **Garment Craft vs. Prakash Chand Goel (2022) 4 SCC 181**, has been pressed into service, which reads as under:

> *"**15**. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of the first appeal to reappreciate, reweigh the evidence or fact upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has*

come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice."

13. There cannot be any dispute as to proposition of law canvassed on behalf of respondent No.1. In **Garment Craft** (supra), it has been held that the power under Article 227 of the Constitution is to be exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It has further been held "it is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice". Thus, it becomes the duty of this Court to intervene in case the facts before it reveal the possibility of miscarriage of justice.

14. Reverting to the facts of the case, the petitioner has registered his claim with the authorities on the membership and token earlier held by respondent No.1. The possibility of success of such claim could not be an issue of consideration at the stage of deciding the prayer for impleadment as party. What was to be seen was the possible effect of the final verdict in the appeal on the projected claim of the petitioner.

15. As noticed above, in case of grant of prayer made by respondent No.1 in his appeal, the projected claim of petitioner will be impliedly defeated. Petitioner has based his claim on the basis of transaction dated 08.01.2014. Respondent No.1 was allegedly terminated/expelled from the membership of the Society by a subsequent decision dated 08.02.2014. Though, the decision of the Society to cancel the membership of respondent No.1 was not based on the factum of transfer of membership in favour of petitioner, yet it cannot be said that the projected claim of petitioner is completely alien to the controversy before the Appellate Authority. The refusal of prayer of petitioner to implead him as a party in appeal, therefore, will cause miscarriage of justice and having held so, this Court is within its power to exercise jurisdiction under Article 227 of the Constitution.

16. Another contention that has been raised on behalf of respondent No.1 is that he was *dominus litus* in the appeal and no one can be permitted to be impleaded as respondent against his wish. In support of such contention, reliance has been placed on the judgment passed by the Hon'ble Supreme Court in **Sudhamayee Pattnaik and others vs. Bibhu Prasad Sahoo and others 2022 Live Law (SC) 773** while dealing with the proposition under Order 1 Rule 10 of CPC, the Hon'ble Supreme Court has observed that though the wish of plaintiff becomes relevant as regards the prayer for impleadment of third party as defendant as he is the dominus litus, but such an action is always at the risk of the plaintiff. On the basis of such observations, in para-7 of the judgment, it has been held as under:-

> ***"7****. However, at the same time, considering the fact that defendants have also filed counter-claim for declaration of their right, title and interest over the suit property and permanent injunction and in case the counter-claim is allowed, as the plaintiffs are opposing to implead the subsequent purchasers as party defendants, thereafter it will not be open for the plaintiffs to contend that no decree in the counter-claim be passed in absence of the subsequent purchasers. Therefore, non-impleading the subsequent purchasers as defendants on the objection raised by the plaintiffs shall be at the risk of the plaintiffs."*

17. It is not the case of respondent No.1 that he will not object to the projected claim of petitioner or will not derive any benefit, which may accrue to him as a result of non-impleadment of petitioner as a party in the appeal.

18. It is further seen that Rule 10 of Order 1 of the CPC, vests the Court with power to add party at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just. The relevant considerations for exercise of such power is either the party sought to be impleaded ought to have been joined as a plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and

settle all the questions involved in the suit. The Appellate Authority while deciding the application under Order 1 Rule 10 of the CPC of the petitioner, has erred in not taking aforesaid relevant factors in consideration. As held above, the projected right of petitioner will be impliedly effected by grant of prayers made by respondent No.1 in the appeal.

19. In light of above discussion, the petition is allowed. Order dated 14.02.2022, Annexure P-11, passed by the Assistant Registrar, Cooperative Societies, Solan, District Solan, H.P., is set-aside. The petitioner is ordered to be impleaded as party-respondent in the appeal filed by respondent No.1 and pending before the Assistant Registrar, Cooperative Societies, Solan, District Solan, H.P.

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

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

Between:-

PAWAN KUMAR, S/O SH. KARAM CHAND, R/O MOHALLA BANGOTU, CHAMBA TOWN, DEVELOPMENT BLOCK, TEHSIL AND DISTT. CHAMBA HP.

....PETITIONER

(SH. NIMISH GUPTA, ADVOCATE)

AND

SMT. YOGMAYA W/O SH. PAWAN KUMAR, R/O MOHALLA BANGOTU, DEVELOPMENT BLOCK, TEHSIL AND DISTT. CHAMBA, AT PRESENT R/O VILLAGE JANNA, POST OFFICE AND GRAM PANCHAYAT THAKRI MATTI, TEHSIL SALOONI, DISTT. CHAMBA, H.P. CONTACT NO. 78072-90599.

....RESPONDENT

(MS. ANJALI SONI VERMA, ADVOCATE AS LEGAL AID COUNSEL).

CRIMINAL REVISION
NO. 315 OF 2022
Reserved on: 7.11.2022
Decided on: 14.11.2022

Protection of Women from Domestic Violence Act, 2005- Section 29- Powers and jurisdiction of Appellate Court- Section 29 of the Act vests the Court of Sessions to hear and decide the appeal against the order made by the Magistrate under the Act. There is no embargo on appellate power of Court of Sessions. The jurisdiction to hear and decide the appeal is vested in Court of Sessions, thus, will include all the powers to set right the illegality or irregularity made out in the order impugned before such Appellate Court. The Appellate Court has jurisdiction to look into the legality and propriety of the order impugned before it and the same can be done, if noticed, even without raising of an issue by the appellant or the other side. The learned Appellate Court cannot shut its eyes to the glaring illegality and impropriety found in the order being scrutinized by it in exercise of its appellate jurisdiction under the Act.(Paras 12 & 13)

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

O R D E R

By way of instant petition, petitioner has taken exception to judgment dated 6.4.2022, passed by learned Sessions Judge, Chamba in Cr. Appeal No. 4 of 2022, whereby the appeal of respondent/complainant filed under Section 29 of Protection of Women from Domestic Violence Act, 2005 (for short the Act) has been allowed and the matter has been remanded to learned trial Court for deciding afresh after affording opportunities to the parties to lead evidence for proving/disproving the birth certificate and after calling the domestic incident report.

2. The parties hereafter shall be referred by the same status, which they held before learned trial Court.

3. An application under Section 12 of the Act was filed by petitioner before learned Judicial Magistrate 1st Class, Chamba against respondent, seeking protection order under Section 18, residence/accommodation allowance under Section 19, maintenance allowance under Section 20 and compensation order under Section 22 of the Act. For the purpose of adjudication of instant petition, it will suffice to notice only the relevant facts. One of the allegations leveled by petitioner against respondent was that respondent had denied the paternity of the son born out of his wedlock with petitioner, which caused mental and emotional harassment and torture to the petitioner and resultantly, petitioner suffered agony and deterioration in health. Petitioner also alleged that such conduct of the respondent lowered the reputation of petitioner in the eyes of general public. On such premise, compensation was sought from respondent.

4. Respondent denied the above noted allegations. He specifically denied that any son was born to him out of his wedlock with petitioner. Respondent categorically denied himself to be the biological father of such son.

5. During the pendency of the complaint, petitioner filed an application under Section 311 Cr.P.C., seeking leave to produce in evidence the birth certificate of her son, issued by Registrar of Birth and Death with further prayer to summon original record regarding registration of birth of said son from the office of Registrar Birth and Death, Municipal Council Chamba. Learned trial Court rejected the application of petitioner under Section 311 Cr.P.C. vide order dated 20.9.2021. The petitioner did not assail the said order of rejection separately.

6. The complaint of the petitioner was also dismissed finally by learned trial Court vide judgment dated 30.11.2021. Petitioner assailed the said judgment dated 30.11.2021 before learned Sessions Judge, Chamba under Section 29 of the Act. Learned Sessions Judge, Chamba vide impugned judgment has allowed the appeal of the petitioner and has remanded the case for decision afresh to learned trial Court, as noticed above. Learned Sessions Judge, Chamba has held the rejection of application of petitioner under Section 311 Cr.P.C. to be wrong and illegal and in such view of the matter, directions have been issued to learned trial Court to afford opportunities to the parties to lead evidence for proving/disproving the birth certificate of the son of petitioner.

7. I have heard the learned counsel for the parties and have also gone through the record carefully.

8. Mr. Nimish Gupta, learned counsel for the petitioner has contended that the impugned order is bad for two reasons, firstly that the order dated 20.9.2021, passed by learned trial Court rejecting the application of petitioner under Section 311 Cr.P.C. had attained finality and secondly, the petitioner had not raised any ground in her appeal laying challenge to aforesaid order. It has further been contended that in absence of any challenge to order dated 20.9.2021 before the learned Appellate Courtthe

setting aside of such order by learned Appellate Court amounts to exceeding of jurisdiction vested in such Court.

9. On the other hand, Ms. Anjali Soni Verma, learned Legal Aid Counsel for the respondent supported the order having been passed in lawful exercise of jurisdiction by learned Appellate Court.

10. Petitioner had alleged domestic violence at the hands of respondent. One of the modes of alleged domestic violence was emotional abuse. The verbal emotional abuse has been explained vide explanation 1 (iii) to Section 3 of the Act as under:-

> *"verbal and emotional abuse includes-*
> *(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and*
> *(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested."*

11. Noticeably, the complaint contained averments and allegations with respect to emotional abuse of petitioner by respondent. The denial of paternity of petitioner's son by respondent was stated to be a cause of such abuse. It was alleged that due to such conduct of respondent, petitioner was insulted, ridiculed and humiliated. Respondent had specifically denied the paternity of master Abhinav by taking a stand to that effect in his reply also. It was in this background that the petitioner had sought leave of the Court to prove the birth certificate of her son in evidence by summoning the record of Registrar Birth and Death. Obviously, the prayer was made by invoking Section 311 Cr.P.C., as the parties had already closed their evidence. While passing the final judgment dated 30.11.2021 in complaint filed by petitioner, learned trial Court did not either delve upon the issue of alleged emotional abuse of petitioner nor returned any finding thereon. Aggrieved against such judgment, petitioner filed appeal under Section 29 of the Act.

12. Section 29 of the Act vests the Court of Sessions to hear and decide the appeal against the order made by the Magistrate under the Act.

There is no embargo on appellate power of Court of Sessions. The jurisdiction to hear and decide the appeal is vested in Court of Sessions, thus, will include all the powers to set right the illegality or irregularity made out in the order impugned before such Appellate Court.

13. Adverting to the facts of the case, as noticed above, learned trial Court had failed to address the issue of emotional abuse alleged by petitioner. The matter was assailed before learned Appellate Court. The jurisdiction to hear appeal would also include power to rectify the defects in order impugned in appeal. Merely because the order dated 20.9.2021, passed by learned trial Court on application under Section 311 Cr.P.C. was not separately assailed would not preclude the aggrieved person from challenging the same while filing the appeal against final order, provided the legality of such order becomes necessary to be looked into for rectifying the defect in final judgment. Learned Appellate Court has clearly noted in impugned judgment that an argument to this effect was specifically raised on behalf of the petitioner while making submissions in appeal and was duly refuted by the other side. Thus, it cannot be said that the learned Sessions Judge has decided the issue without being raised on behalf of the petitioner. To say that without raising a specific plea in the grounds of appeal, the petitioner could not raise the argument before learned Appellate court would be making the very purpose of provision of appeal otiose. The learned Appellate Court has jurisdiction to look into the legality and propriety of the order impugned before it and the same can be done, if noticed, even without raising of an issue by the appellant or the other side. The learned Appellate Court cannot shut its eyes to the glaring illegality and impropriety found in the order being scrutinized by it in exercise of its appellate jurisdiction under the Act.

14. Coming to the legality of order dated 20.9.2021, passed by learned trial Court on application under Section 311 of Cr.P.C., it can be said without any hesitation that the same could not have been sustained on

scrutiny at touch stone of settled legal principles. Section 311 Cr.P.C. vests the criminal Court with jurisdiction to allow evidence to be produced on record at any stage of the proceedings provided such evidence is found necessary for adjudication of the matter in issue. Perusal of order dated 20.9.2021, passed by learned trial Court reveals that such consideration was totally missing therefrom. Learned trial Court had dismissed the application of the petitioner for additional evidence merely on the ground that it was delayed and the son of the petitioner was not a party to the litigation. Learned trial Court has completely ignored that it had to decide the issue of alleged emotional abuse of petitioner and thus the evidence sought to be produced on behalf of the petitioner was necessary for imparting complete justice to the parties.

15. In light of above discussions, there is no merit in the instant petition and the same is dismissed. The judgment dated 6.4.2022, passed by learned Sessions Judge, Chamba in Cr. Appeal No. 4 of 2022 is affirmed. Pending applications, if any, also stand disposed of.

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

Nain Singh ...Petitioner.

Versus

State of H.P. ...Respondent.

For the petitioner : Mr. Karan Singh Kanwar, Advocate.

For the respondent : Mr. Desh Raj Thakur, Addl. A.G.
with Mr. Narender Thakur, Asstt. A.G.

Cr. Revision No. 261 of 2012
Reserved on :17.11.2022
Date of decision: 25.11.2022

Code of Criminal Procedure, 1973 – Section 374, Testimony of police witness- Only because the independent witness associated in the investigation had not supported the prosecution case, the testimonies of police witnesses cannot be brushed aside. The witness turning hostile, in our judicial system, is a common phenomenon and reasons are various and obvious.(Para 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant petition, petitioner has assailed judgment dated 29.11.2012, passed by learned Sessions Judge, Sirmour, District at Nahan in Criminal Appeal No. 56-Cr.A/10 of 2011, whereby the judgment and sentence order 25.5.2011/30.5.2011, passed by learned Judicial Magistrate, 1st Class, Court No.1, Paonta Sahib, District Sirmour, H.P. has been affirmed.

2. The case of prosecution in nut-shell was that on 5.1.2007, HC Bahadur Singh (PW-5) and Constable Kailash Kant (PW-4) were on routine patrol duty. They met Sh. Telu Ram (PW-1), who was on his way to Village Tikkar. All of them proceeded together in the direction of Village Tikkar. On the way, they noticed smoke emanating from the side of "Nallah" (Stream).

They proceeded towards the direction from where the smoke was emanating and found that petitioner was operating illicit liquor "Bhatti". About 150 liters of "*Lahan"* was found in the drum and six bottles of distilled illicit liquor were found contained in a container. Samples of "*Lahan"* and illicit liquor were drawn and were sealed. The equipment used for preparation of illicit liquor was taken into possession. "Rukka" was sent to Police Station and on the basis of which, FIR Ext. PW-4/A was registered. The samples were sent for chemical examination to CTL, Kandaghat. Those were confirmed to be of "*Lahan"* and illicit liquor vide report Ext. PW-6/A. A prima-facie case under Section 61 (1) (c) of Punjab Excise Act, as applicable to the State of Himachal Pradesh (for short "the Act"), was found against the petitioner.

3. Prosecution examined 7 witnesses and also proved the documents prepared during investigation. Petitioner was examined under Section 313 Cr.P.C. He did not lead any defence evidence.

4. Learned trial Court convicted the petitioner for commission of offence under Section 61 (1) (c) of the Act vide judgment dated 25.5.2011 and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs. 5000/-. In default of payment of fine, the petitioner was further ordered to undergo simple imprisonment for one month vide sentence order dated 30.5.2011.

5. Petitioner has assailed his conviction and sentence before learned Sessions Judge, Sirmour at Nahan by filing appeal under Section 374 of the Code of Criminal Procedure (for short "the Code"). Learned Appellate Court affirmed the conviction and sentence of petitioner vide judgment dated 29.11.2012.

6. Petitioner has laid challenge to the judgment passed by learned Appellate Court affirming the judgment and sentence passed/imposed by learned trial Court on the grounds that both the courts below have committed

patent illegality in convicting the petitioner whereas, prosecution evidence was clearly deficient and was full of doubts.

7. I have heard the learned counsel for the parties and have also gone through the record carefully.

8. Prosecution examined PW-1, Telu Ram, PW-4, Constable Kailash Kant and PW-5, HC Bahadur Singh as spot witnesses. PW-1, Telu Ram did not support the prosecution case. He was cross-examined by learned Prosecutor. This witness admitted having signed the document Ext. PW-2/A i.e. the recovery memo. The other two spot witnesses supported the prosecution case. Placing reliance upon their testimonies, both the courts below have convicted the petitioner, as noticed above.

9. Learned counsel for the petitioner has contended that the entire case of prosecution was falsified from the statement of PW-5 made by him during his cross-examination, whereby he admitted that the drum Ext. PW-3 was in broken condition and nothing could be stored in such drum. He laid stress on the arguments that as per prosecution case, 150 liters of "*Lahan*" was found in drum Ext. P-3, which was not possible, keeping in view the condition of the drum. It was further submitted on behalf of the petitioner that both the courts below have erred by ignoring such a material piece of evidence.

10. The argument so raised needs rejection for the reasons firstly that the drum Ext. P-3 was taken into possession by police in January, 2007. Statement of PW-5 was recorded in January, 2011, after four years. The possibility of damage caused to the drum Ext. P-3 during such a long gap could not be ruled out, as the case properties remain in "Malkhana". It is not necessary that the case properties are kept with due care and secondly, rather more importantly, the witness (PW-5) was not cross examined about the condition of the drum at the time it was taken into possession by the police. In absence of such exploration, there was nothing to suggest that the drum

Ext. P-3 was taken into possession by police in the same state, as was found at the time of examination of PW-5 after four years.

11. It was next contended on behalf of the petitioner that reliance placed on the testimonies of police witnesses was not safe as they were the interested witnesses. Since the independent witness had turned hostile, the benefit of doubt was liable to be given to the petitioner. Learned Appellate Court has rightly held that conviction can be based on the testimonies of police witnesses, provided they are scrutinized with caution and thereafter found to be trustworthy. In the instant case after going through the statements of PW-4 and PW-5, no fault can be found with the findings of fact recorded by both the courts below. Such findings are borne from the statements of said witnesses. It also cannot be ignored that even PW-1 had identified his signatures on the recovery memo Ext. PW-2/A. He did not allege that his signatures were obtained under any threat or coercion. Only because the independent witness associated in the investigation had not supported the prosecution case, the testimonies of police witnesses cannot be brushed aside. The witness turning hostile, in our judicial system, is a common phenomenon and reasons are various and obvious. The fact that PW-1 had signed Ext. PW-2/A lends credence to the prosecution version about recovery made from the petitioner of "*Lahan*" and illicit liquor from the spot. PW-1 has failed to explain as to under what circumstances, he had signed Ext. PW-2/A.

12. Learned counsel for the petitioner has also submitted that the spot of recovery was near Village Tikkar and the police could easily procure witnesses from the said village. As noticed above, it was a chance recovery and the police was already in company of a resident of the area, whom they had associated in the investigation.

13. The learned courts below have rightly appreciated the evidence and the findings recorded by them cannot be said to be illegal or perverse.

Further, the petitioner has not been able to show from the records that there was any defect or illegality in the process of sampling. It has also not been shown that there was any tampering of case property at any point of time.

14. In light of above discussions, there is no merit in the instant petition and the same is dismissed. The conviction and sentence as recorded by learned trial court vide judgment and sentence order 25.5.2011/30.5.2011 and affirmed by learned Sessions Judge, Sirmour, District at Nahan in Criminal Appeal No. 56-Cr.A/10 of 2011 is further affirmed. Bail bonds, if any, furnished by the petitioner are cancelled. Petitioner is directed to surrender before learned trial Court to receive the sentence. Pending applications, if any, also stand disposed of. Records be sent back forthwith.

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

Sukh Dev and others ....Petitioners

Versus

Union of India and others ...Respondents

For the petitioners: Mr. Anuj Nag, Advocate.

For the respondents: Mr. Janesh Gupta, Advocate, for respondents No. 1, 2 and 4.

Mr. Yudhvir Singh Thakur, Deputy Advocate General, for respondent No.3.

CWP No.6660 of 2021
Decided on:25.11 2022

Land Acquisition Act, 2013- Reconveyance of land is not permitted by the Government- Once the land is acquired and it vests in the State, free from all encumbrances, it is not the concern of the land owner, whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes persona non-grata once the land vests in the State. He has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. The State neither has the requisite power to reconvey the land to the person- interested, nor can such person claim any right of restitution on any ground, whatsoever, unless there is some statutory amendment to this effect. (Para 5)

Cases referred:

Indore Development Authority Vs. Manohar Lal and others (2020) 8 SCC 129;
V. Chandershekaran and another Vs. Administrative Officer and others (2012) 12 SCC 133;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Petitioners' land stand acquired by the respondents under the provisions of the National Highways Act, 1956. Award to that regard has been passed in their favour. However, compensation amount has not been paid to them. Hence, they seek compensation in terms of the award dated 15.03.2021 passed by the respondents for acquisition of their lands.

2. Petitioners' **simple case** is that: -

2(i) The respondents required the land for building (widening/four laning etc.), maintenance, management and operation of NH-154 on the stretch of land from Km 42.000 to Km 51.000 (Pathankot-Mandi section). The respondents declared their intention to acquire the land within this stretch of road. Notification under Section 3(A) of the National Highways Act, 1956 (the Act hereinafter), was issued on 09.02.2018, expressing the intention to acquire the land measuring 10-92-98 Hectares on the stretch in question. Petitioners' lands were also intended to be acquired under the said Notification.

2(ii) No Notification for declaration of acquisition as was required under Sections 3(D) of the Act was issued within a period of one year from the date of publication of Notification under Section 3A. Inspite of this, an award of compensation under Section 3(G) and 3(H) of the Act was passed on 31.12.2020. The award included petitioners' land as well.

2(iii) Realizing that no Notification under Section 3(D) within the period permissible under the Act, was issued, therefore, fresh exercise for acquiring the land was undertaken by the respondents. The Notification under Section 3(A) was re-issued on 20.10.2020 in accordance with law. Notification under Section 3(D) was issued on 11.12.2020. In terms of Section 3(G) (3), notice inviting claims from the land owners/persons interested therein by or before 07.03.2021 was also issued by the respondents in February, 2021. Final award of compensation under Sections 3(G) and 3(H) of the Act, in respect of acquisition of lands in question, was passed on 15.03.2021.

2(iv) Petitioners' lands form part of the land acquired by the respondents and were also part of the award dated 15.03.2021.

3. The above facts have not been disputed by the contesting respondents No. 2 and 4 (National Highway Authority of India) (NHAI in short) in the short affidavit filed by them to the writ petition. The respondents No. 1 and 4 have not filed reply to the writ petition.

4. The controversy

The limited grievance of the petitioners is that even after passing of the award dated 15.03.2021 (Annexure P-2), the respondents have not released the compensation amount due and admissible to them. The only defence taken by the contesting respondent-NHAI in its reply is that:-

"the petitioners' lands are situated over the tunnel falling beyond 60 mts, as such, the land in question is not required for creating any tunnel related infrastructure or for the construction of the project highway.....in the aforesaid circumstances, deponent most humbly submits that since the land in question is not required for construction, the same may please be utilized by the landowners and NHAI may please be divested from such land so as to have no right whatsoever in the land in question on account of various notifications issued under National Highways Act, 1956. The land owner may please use the land in question as may be permissible under the law. Furthermore, in case such land is required any time in future, same will be acquired as per the prescribed procedure as may be permissible at the relevant time."

5. Observations

The gist of the stand taken by the respondent-NHAI is that it had though acquired petitioners' lands in question, however, the aforesaid lands are now surplus and not required by it. The NHAI has prayed that it should be divested from the acquired land of the petitioners and landowners can utilize the land in the manner they deem proper. The stand taken by the respondent-NHAI is completely *dehors* the settled legal position. Regarding

vesting and divesting of acquired land, in ***(2020) 8 SCC 129***, ***[Indore Development Authority Vs. Manohar Lal and others]*** it was held that once title vests in the State under Section 17 of the Land Acquisition Act, 1894, divesting of title is not a possibility at all..... Once vesting takes place and is with possession after which a person who remains in possession is only a trespasser, not in rightful possession and vesting contemplates absolute title, possession in the State..... Section 24 of the Right to Fair Compensation Act, 2013, does not intend to take away vested rights. This is because there is no specific provision taking away or divesting title to the land, which had originally vested with the State, or divesting the title or interest of beneficiaries or third-party transferees of such land which they had lawfully acquired, through sales or transfers. There is neither a specific provision made for divesting, nor does the Act of 2013 by necessary intendment, imply such a drastic consequence. Divesting cannot be said to have been intended. (***2012) 12 SCC 133*** titled ***V. Chandershekaran and another Vs. Administrative Officer and others***, holds that once the land is vested in the State free from all encumbrances it cannot be divested and proceedings under the Land Acquisition Act, 1894, would not lapse even if an award is not made within the statutory stipulated period. Land, once acquired, cannot be restored to the tenure holders/persons-interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either. Some of the relevant paras from this judgment are as under: -

> *"25 . It is a settled legal proposition, that once the land is vested in the State, free from all encumbrances, it cannot be divested and proceedings under the Act would not lapse, even if an award is not made within the statutorily stipulated period.*
>
> *26. The said land, once acquired, cannot be restored to the tenure holders/persons-interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either. The proceedings cannot be withdrawn/abandoned under the provisions of Section 48 of the Act, or under Section 21 of the General Clauses Act, once the possession of the land*

has been taken and the land vests in the State, free from all encumbrances.

27. *The meaning of the word 'vesting', has been considered by this Court time and again. In Fruit and Vegetable Merchants Union v. Delhi Improvement Trust, AIR 1957 SC 344, this Court held that the meaning of word 'vesting' varies as per the context of the Statute, under which the property vests. So far as the vesting under Sections 16 and 17 of the Act is concerned, the Court held as under.-*

> *"In the cases contemplated by Sections 16 and 17, the property acquired becomes the property of Government without any condition or ; limitations either as to title or possession. The legislature has made it clear that vesting of the property is not for any limited purpose or limited duration."*

28 ……..

29 ……..

30. *In Govt. of A.P. V. v. Syed Akbar , this Court considered this very issue and held that, once the land has vested in the State, it can neither be divested, by virtue of Section 48 of the Act, nor can it be reconveyed to the persons- interested/tenure holders, and that therefore, the question of restitution of possession to the tenure holder, does not arise."*

The Hon'ble Court summarized the law that once the land is acquired and it vests in the State, free from all encumbrances, it is not the concern of the land owner, whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes persona non-grata once the land vests in the State. He has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. The State neither has the requisite power to reconvey the land to the person- interested, nor can such person claim any right of restitution on any ground, whatsoever, unless there is some statutory amendment to this effect.

Petitioners' lands have been acquired under the National Highways Act, 1956 read with provisions of the Right to Fair Compensation and Transparency in Land Acquisition Act, 2013. Notification under Section 3A of the National Highways Act was issued on 20.10.2020. Declaration of acquisition under Section 3D(1) was made vide notification issued on 11.12.2020. Section 3D(2) states that on publication of declaration under Section 3D(1), the land shall vest absolutely in Central Government free from all encumbrances. Petitioners' lands in question, thus, vested in the respondents on 11.12.2020. Notwithstanding this vestment under Section 3D of the National Highways Act even the award under the provisions of Section 3(G) & (H) of the Act was passed on 15.03.2021. The award presupposes taking over of possession of lands in question by the respondents in terms of Section 3(E) of the Act. Viewing from any angle, there is no escape from the conclusion that lands of petitioners stood completely vested in the respondents. There is no provision which permit divesting of land as is requested by the respondents in their reply.

For the foregoing reasons, the writ petition is allowed. The respondents are directed to release the compensation amount to the petitioners in terms of the award dated 15.03.2021 (Annexure P-2) within a period of four weeks from today.

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

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

Sagar Chawla .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr.Kashmir Singh Thakur, Advocate.

For the respondent: Mr. Desh Raj Thakur, Addl. A.G., with Mr. Manoj Bagga, Asstt. A.G.

Cr. M.P.(M) No. 2038 of 2022
Reserved on: 22.11.2022
Decided on: 25.11.2022

Code of Criminal Procedure, 1973- Section 438- Pre-trial incarceration is not the rule. The custodial interrogation cannot be used as a method to extract confession. The investigation cannot be converted into money recovery proceedings- The Investigating Agency already had more than sufficient time to lay its hands on the evidence, if any, against the petitioner. The non-payment of amount allegedly due to fruit growers can also not be a ground for rejection of prayer for pre-arrest bail. The pre-arrest bail cannot be denied to the petitioner only on the ground that he is not disclosing the facts as required by the police or is not making the payments to the complainant. As far as joining of investigation is concerned, petitioner has already complied with the orders of this Court and can be further bound down to do so. The only concern of the Court, at this stage, is to facilitate the fair and expeditious investigation and trial. Pre-trial incarceration is not the rule. No fruitful purpose shall be served by allowing the petitioner to be kept in custody till indeterminate period. Even otherwise, no justification is made out for custodial interrogation of the petitioner.(Paras 8, 9, 10 and 12)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

The petitioner has prayed for grant of pre-arrest bail in case FIR No. 07 of 2021, dated 15.07.2021, under Sections 406, 420 and 120-B of the IPC, registered at Police Station, CID Bharari, District Shimla, H.P. He was admitted to interim bail on 09.09.2022, whereafter he has joined the investigation.

2. On 07.06.2021, the complainant Sh. Manjeet Verma made a written complaint alleging inter-alia that since 2019 the petitioner is operating a whole-sale business of fruit merchant with his father Sh. Mohan Chawla at Panchkulla under the name and style of "M/s New Guru Nanak Vegetable Company". The two local agents namely Sh. Hukam Chand Mehta and Sh. Kapil Chauhan were deployed by the petitioner in the area to which complainant belonged. On the request of petitioner, many fruit growers sold their apple crop to M/s New Guru Nanak Vegetable Company, but they did not receive the sale proceeds. When the petitioner was contacted telephonically, he abused the fruit growers and threatened them of life. It was alleged that in this manner the petitioner had duped a number of fruit growers and had not paid them sale proceeds worth about Rs.1,71,26,246/-. On such complaint, the case was registered on 15.07.2021 at Police Station, CID Bharari, Shimla.

3. The status report filed on behalf of the respondent reveals that after investigation, it has been found that the petitioner had purchased apple crop worth Rs.1,61,31,718/- from 49 apple growers in the year 2019 and a sum of Rs.1,30,93,825/- was still due and payable to them.

4. On the other hand, petitioner has submitted that approximately Rs.3.00 Crores have been paid by M/s New Guru Nanak Vegetable Company to various fruit growers. As per petitioner, he has no concern with the proprietary firm M/s New Guru Nanak Vegetable Company. Petitioner is stated to be carrying his business from SCF No. 16, Sabzi Mandi, Sector 26, Chandigarh as

Manager of the firm M/s New Jalandhar Fruit Company owned by his grand-mother Smt. Usha Chawla. The involvement of petitioner in the instant FIR is stated to be without any reason. Petitioner has claimed himself to be innocent. It is submitted on behalf of the petitioner that he has permanent abode in Chandigarh and has roots in the society. Petitioner has undertaken not to flee from course of justice. He has further undertaken to abide by all the terms and conditions.

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

6. At the time of hearing, the prayer for grant of bail has been opposed by the respondent on the ground that huge amount is due to be recovered from him. His custodial interrogation has been sought for the said purpose.

7. As evident from the facts coming forth from investigation record, the allegation against petitioner is that he has failed to pay back the price of apple crop to the fruit growers. The allegation is denied by the petitioner. Petitioner has also claimed that he has nothing to do with M/s New Guru Nanak Vegetable Company. The allegations are subject to proof.

8. The custodial interrogation cannot be used as a method to extract confession. The FIR was registered on 15.07.2021 and more than a year has elapsed since initiation of investigation. The Investigating Agency already had more than sufficient time to lay its hands on the evidence, if any, against the petitioner.

9. The non-payment of amount allegedly due to fruit growers can also not be a ground for rejection of prayer for pre-arrest bail. The investigation cannot be converted into money recovery proceedings. In ***Udho Thakur and Anr. Etc***. vs. ***The State of Jharkhand & Anr., Criminal Appeal Nos. 1703-1704 of 2022, decided on 29th September, 2022***, the Hon'ble Supreme Court has held as under:

"At the outset, learned counsel for the State has frankly referred to the order dated 24.08.2022 passed by a co-ordinate Bench, disapproving the propositions adopted in several orders by the High Court, imposing the terms of payment for the purpose of granting the relief of pre-arrest bail and remitting the matter for re-consideration with several observations.

Having regard to the circumstances of the case, we felt inclined to pass similar order in the present matter too, where the High Court has proceeded to grant the concession of pre-arrest bail to the appellants on the condition of their furnishing a bond in the sum of Rs.25,000/- and also depositing a demand draft in the sum of Rs.7,50,000/-as an ad-interim victim compensation. However, learned counsel for respondent No.2 has submitted that the expression "victim compensation" as used in the impugned order may not be apt for the reason that it was not a case of recovery of victim compensation but, otherwise, the condition cannot be said to be unjustified or onerous because receiving of the said sum of Rs. 7,50,000/- by the appellants at the time of marriage has not been a fact in dispute.

Even if we take the submissions of the learned counsel for the contesting respondent on its face value, we are clearly of the view that in essence, the petitions seeking relief of pre-arrest bail are not money recovery proceedings and, ordinarily, there isno justification for adopting such a course that for the purpose of being given the concession of pre-arrest bail, the person concerned apprehending arrest has to make payment.

While issuing notice in this matter on 16.04.2009, this Court has provided that the appellants shall not be arrested in connection with Complaint Case No. 1484 of 2017. Obviously, the said condition of depositing Rs.7,50,000/- stood arrested because of the stay order of this Court. This position has hitherto continued.

> *Having regard to the circumstances, in our view, the said condition of depositing a sum of Rs.7,50,000/- for the purpose of granting the relief of pre-arrest bail cannot be approved and else, the order granting bail deserves to be maintained. Hence, we are of the view that no useful purpose would be served by sending the matter for reconsideration to the High Court and the order impugned deserves to be modified appropriately in these appeals only."*

10. Except as above, respondent has not been able to justify its opposition to the bail plea of the petitioner. The pre-arrest bail cannot be denied to the petitioneronly on the ground that he is not disclosing the facts as required by the police or is not making the payments to the complainant. As far as joining of investigation is concerned, petitioner has already complied with the orders of this Court and can be further bound down to do so. The only concern of the Court, at this stage, is to facilitate the fair and expeditious investigation and trial.

11. Respondent has not raised any real apprehension that in case of grant of pre-arrest bail to the petitioner, his presence cannot be procured for the purpose of investigation or trial. No criminal antecedents have been attributed to the petitioner. It is not the case of respondent that petitioner has no permanent abode.

12. Pre-trial incarceration is not the rule. No fruitful purpose shall be served by allowing the petitioner to be kept in custody till indeterminate period. Evenotherwise, no justification is made out for custodial interrogation of the petitioner. The other co-accused Mohan Chawla has already been released on bail.

13. In peculiar facts of the case, the petition is allowed and in case of arrest of petitioner in case FIR No. 07 of 2021, dated 15.07.2021, under Sections 406, 420 and 120-B of the IPC, registered at Police Station CID

Bharari, District Shimla, H.P., he shall be released on bail subject to his furnishing personal bond in a sum of Rs.1,00,000/with one surety in the like amount, who necessarily should have immovable assets in the State of Himachal Pradesh, to the satisfaction of Arresting Officer/Investigating Officer, further subject to following conditions:

(i) That the petitioner shall join investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Investigating Officer or to the Court.

(iii) That the petitioner shall not leave the country without the express permission of the trial Court.

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

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

Between:

1. HARI KRISHAN SHANDIL S/O SH. SALIG RAM Shandil
   R/O VILLAGE GUSAN P.O.MEHLI, TEHSIL
   & DISTRICT SHIMLA-171013, H.P.

2. SURENDER KUMAR S/O SH. RAM SINGH,
   R/O VILLAGE DART BAGLA, P.O.
   JALPEHAR, TEHSIL JOGINDERNAGER,
   DISTRICT MANDI-175015, H.P.

3. VIKRANT SHARMA S/O SH. VINOD SHARMA R/O
   PRABHUMAN BUILDING GREEN VALLEY DHANDA, P.O.
   TOTU, TEHSIL & DISTRICT SHIMLA-171011, H.P.

4. JITENDER KUMAR S/O SH. TULA RAM,
   R/O VILLAGE BAAG P.O. DEOLA, TEHSIL SUNNI,
   DISTRICT SHIMLA-171007, H.P.

5. ANIL ZINTA S/O SH. HARDEV SINGH ZINTA
   R/O V.P.O. JHIKNIPOOL, TEHSIL NERWA, DISTRICT
   SHIMLA, H.P.

6. PRADEEP SINGH S/O SH. RAM BHAJ,
   R/O VILLAGE BINDLA, P.O. MILLAH,
   TEHSIL SHILLAI, DISTRICT
   SIRMOUR-173029, H.P.

7. RAJENDER S/O SH. BHAGAT RAM,
   R/O VILLAGE BADHAL, P.O. JEORI,
   TEHSIL RAMPUR BUSHEHR,
   DISTRICT SHIMLA-172101, H.P.

8. SAHI RAM S/O LATE SH. RATTI RAM,

R/O VILLAGE CHANDNI, P.O. DEHA
(BALSON), TEHSIL THEOG,
DISTRICT SHIMLA-171220, H. P.

9. AMAN S/O SH. TRILOK CHAND,
R/O VILLAGE BARI, P.O. BAUNGTA,
TEHSIL DEHRA, DISTRICT KANGRA,
H.P.

10. SANJAY KUMAR S/O SH. SHAM LAL,
R/O V.P.O. DARUG, TEHSIL BAIJNATH,
DISTRICT KANGRA-176071, H.P.

....PETITIONERS

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

AND

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

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

3. THE DEPARTMENT OF ADVOCATE
GENERAL, STATE OF HIMACHAL
PRADESH, SHIMLA-01

....RESPONDENTS

(MR. NARENDER GULERIA,
ADDITIONAL ADVOCATE GENERAL,

WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO. 1497 OF 2021
Decided on: 18.10.2022

Constitution of India, 1950- Articles 39(d), 14 and 16-**Recruitment & Promotion Rules in the State of Himachal Pradesh, the Himachal Pradesh Civil Services (Revised Pay) Rules** - Disparity in pay scale between Clerks and Restorers in the office of Advocate General- Stand taken by the respondent to reject the claim of the petitioners' category is not sustainable in the eye of law because this Court can take judicial note of the fact that repeatedly, respondent-State keeps on changing its stand with regard to application of pay-scale prevalent in the Punjab Government. In some cases, respondent-state takes the stand that they are not bound to give pay-scale as per Punjab Government pattern, but in some other cases, they take the stand that pay-scales as prevalent in the state of Punjab are payable to the Himachal Pradesh because Punjab Pay pattern is generally followed by the State of Himachal Pradesh. True, it is that repeatedly, it has been held by the Hon'ble Apex Court as well as this court that State is not bound to follow each and every revision, if any, made by the Punjab Government but in the instant case, where the category of restorer is at par with the category of clerk, especially in the office of respondent No.3 for all intents and purposes as has been discussed herein above in detail, ground raised in communication dated 10.2.2021 Annexure R-1 for rejecting the claim of the petitioners is not tenable in the eye of law. Though the categories of clerk and restorers working in the office of respondent No.3 are being governed by the different set of Recruitment & Promotion Rules, but if Recruitment & Promotion Rules governing the service conditions of Punjab Government are perused juxtaposing each other, they are para-materia same with regard to qualification and pay scales. Since Restorers working in the office of respondent No.3 are performing similar duties as are being performed by the clerks in the office of respondent No.3, benefit of pay revision as is being sought by the category of the petitioners cannot be denied on the ground that pay of the category of clerks has been revised on the basis of pay revision made by the Punjab government. Though there is no material with regard to decision, if any, taken by the Punjab government with regard to revision of pay

of category of restorers working in the office of Advocate General, but since it has been repeatedly claimed by respondent-State that they are not bound to follow each and every revision of the pay-scale ordered by the State of Punjab, respondents having taken note of the fact that category of restorer and clerk working in the respondent No.3 are performing similar duties, ought to have granted the similar benefit of pay revision to the petitioners/restorers, who being working/performing the similar duties in the same department are otherwise entitled to the similar pay scale on the principle of "equal pay for equal work".(Paras 12 and 13)

Cases referred:

Haryana State Minor Irrigation Tubewells Corporation and Ors v. G.S. Uppal and Ors (along with connected matters), (2008) 7 SCC 375;

K.T. Veerappa and Ors v. State of Karnataka and Ors, (2006) 9 SCC 40;

Punjab State Power Corporation Ltd v. Rajesh Kumar Jindal, (2019) 3 SCC 547;

Union of India v. Dineshan K.K. (2008) 1 SCC 586;

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

O R D E R

Petitioners herein, who are working as Restorers in the Office of Advocate General/respondent No.3, have approached this Court by way of instant petition filed under Article 226 of the Constitution of India, praying therein for following substantive reliefs:

> "(i) That appropriate writ order or direction may very kindly be issued directing the respondents to grant pay band of Rs. 10,300-34,800 +3200 Grade Pay after two years of regular service of the petitioners alongwith arrears and interest @9% per annum from the respective dates it became due to the petitioners, in the interest of law and justice.
>
> (ii) That appropriate writ order or direction may very kindly be issued directing the respondents to protect the basic pay drawn during the contractual period on regularization in

order to save the petitioners from financial loss, as the petitioners had already reached at a basic pay of around Rs.9,000/-, but on regularization were again given a restart from Rs.5910/- by paying the arrears after granting the protection by calculating the difference, in the interest of law and justice.

(iii) That appropriate writ order or direction may very kindly be issued to the respondents to grant Grade Pay of Rs. 2400/- instead of Rs.1900/- for the period the petitioners were working on contractual basis by calculating the difference of salary and paying the arrears to the petitioners, in the interest of law and justice."

2. Briefly stated facts, which may be relevant for adjudication of the case at hand are that petitioners No.1 to 9 are working as Restorers in the Office of Advocate General i.e. respondent No.3, on regular basis, whereas, petitioner No.10, is still continuing on contract basis. Issue raised in the instant petition is with regard to anomaly in the pay scales of Restorers and Clerks working in the office of Advocate General/respondent No.3. Since 1996, Restorers in respondent-3/Department are being equated to that of Clerks in respect of pay scales as well as for the purpose of promotion avenues. Clerks and Restorers in the respondent-3/Department had been drawing the same pay scales and both the categories after their having 10 years (now 7 years) of regular service are eligible and entitled to be promoted to the post of Senior Assistant. Prior to framing of common Recruitment & Promotion Rules in the State of Himachal Pradesh for the post of Clerk as well as Senior Assistant, respondent-3/Department had its own Recruitment & Promotion Rules and as per these Rues, post of Restorer was in the pay scale of Rs. 950-1800 and the minimum educational qualification and other qualification prescribed for the direct recruitment to the post of Restorer was as under:-

"Essential Qualification:-

(i) Should have passed Matriculation with 2nd Division or 10+2 Examination or equivalent from a recognized Board/University."

3. On the other hand, State Government had notified the Recruitment & Promotion Rules for the post of Clerk, Class-III (Non-Gazetted) in the pay scale of Rs.950-1800 and the minimum educational and other qualification prescribed for direct recruitment to the post of Clerk, is/was same for the post of Restorer, as has been taken note hereinabove. It is not in dispute that both the posts of Restorers and Clerks were having same pay scales of Rs.950-1800, however vide notification dated 27.9.2012, clerks were made entitled to the higher pay scale of Rs. 10300-34800/- after completion of 2 years of regular service. It is not in dispute that prior to framing of common Recruitment & Promotion, Rules in the State of Himachal Pradesh for the post of Clerk as well as Senior Assistant, Restorers and Clerks were eligible to be promoted to the post of Senior Assistant after completion of 10 years of service, which has been reduced to 7 years. State Government notified the Himachal Pradesh Civil Services (Revised Pay) rules on 20.01.1998, which was further amended on 01.09.1998, whereby pay scale of Restorers and Clerks was revised from Rs.950-1800 to Rs.3120-5160 w.e.f. 01.01.1996. However, pay scale further came to be revised w.e.f. 01.01.2006, whereby pay scale of both the the post of Restorers and Clerks was revised from Rs.3120-5160 to Rs. 5910-20,200+1900 Grade Pay w.e.f. 01.01.2006.

4. On 24.09.2012, State Government notified Himachal Pradesh Civil Services (Category/Post-wise Revised Pay) Rules and thereafter, issued schedule to these Rules as per Notification dated 27.09.2012, whereby pay scale of Restorer was revised from Rs. 5910-20,200+ 1900 Grade Pay to Rs.

5910-20,200+ 2400 Grade Pay w.e.f. 01.10.2012, whereas, the category of Clerks, who were drawing the same pay scale of Rs. 5910-20,200+ 1900 Grade Pay, were given higher pay-band and higher Grade pay of Rs.10,300-34,800+3200 Grade Pay w.e.f. 01.10.2012 with the condition attached to it that this higher pay band and higher Grade Pay would be given after 2 years of regular service. On account of the aforesaid decision taken by the Government, two categories in respondent No.-3/Department, i.e. Restorer and Clerk, who were performing similar duties and were at par with respect to promotional avenues, started getting different pay scales.

5. Subsequent to issuance of Notification dated 27.09.2012, respondent-State promulgated common draft Recruitment & Promotion Rules for the post of Senior Assistant, whereby class of Restorers was removed from the feeder category to the post of Senior Assistant and only Clerks were kept in the feeder category to the post of Senior Assistant. Though, Draft Rules, 2012, to the post of Senior Assistant were never finalized, but, State Government notified Himachal Pradesh, Department of Personnel, Senior Assistant, Class-III (Non-Gazetted), Ministerial Services) common Recruitment and Promotion Rules, vide Notification dated 8th June 2016 by amending 2011 Rules, (Annexure P-2). Bare perusal of aforesaid Rules clearly reveals that posts of Senior Assistant were to be filed up by promotion from amongst the incumbents of the common Clerical cadre of Clerks/Junior Assistant of the concerned Department or Restorers (*only incumbents of such establishments where the category of Restorer was a feeder category for promotion to the post of Senior Assistant in the prevailing Recruitment and Promotion Rules prior to the Notification of common Recruitment & Promotion Rules for the post of Senior Assistant*). With the issuance of aforesaid Notification dated 08.06.2016, category of Restorer in respondent No.3/Department continued to be a feeder category to the post of Senior Assistant with similar qualification and similar length of service with only one proviso that they are required to qualify typing

test as prescribed for Clerks. However, 2016 Rules were again amended vide a Notification dated 28.05.2020, wherein category of Restorer in the Department of Advocate General continued to be in the feeder category to the post of Senior Assistant, (Annexure P-3).

6. Precise grouse of the petitioners as has been highlighted in the petition and has been further canvassed by Mr. Sanjeev Bhushan, learned Senior Advocate, representing the petitioners is that once for all intent and purposes, category of petitioners i.e. restorer are at par with Clerks, working in the office of respondent No.3/Department, action of the respondent in denying higher pay band and higher pay-scale of Rs. 10,300-34,800+3200 Grade Pay vide Notification dated 19.09.2012 w.e.f. 01.10.2012, is not sustainable in the eye of law and as such, such action needs to be corrected in accordance with law. As per petitioners, they are also entitled to aforesaid higher pay band and higher Grade Pay of Rs. 10300-34800 + 3200 Grade Pay w.e.f. 01.10.2012 after completion of two years regular service. Record reveals that though petitioners repeatedly, represented to the respondent for rectification of aforesaid anomaly, but in vain. Representation dated 26.11.2019, submitted through proper channel (Annexure P-4) was favourably recommended by respondent No.3 with a request to respondent No.1, to take up the matter with respondent No.2 vide communication dated 30.12.2019, Annexure P-5. Pursuant to aforesaid recommendation made by office of respondent No.3, certain queries came to be raised by the office of respondent No.1, which were duly answered. First query was that how many posts of Restorers are there in the Department of respondent No.3 and further what is the job profile of Restorer. Office of respondent No.3, gave detailed answer to aforesaid queries vide communication dated 27.05.2020, which is reproduced herein below:-

“ No.1-55/2018-Loose- 86 34
Department of the Advocate General
State of Himachal Pradesh, Shimla-1.

To

The Additional Chief Secretary (Home) to the,
Government of Himachal Pradesh, Shimla-1.
Dated: 27-5-2020

Subject: Regarding of Pay anomaly and request for granting the higher pay band and Higher Grade Pay of Rs.10300-34800+3200GP after two years regular service to Restorers as given to Clerks in the office of Advocate General, Himachal Pradesh.

Sir,

I am to refer to your office letter No. Home-B(B)7-3/2019 dated 14th May, 2020 on the subject cited above and to submit the point wise information as under:-

Pt. No.1.	How Many posts of Restorer are there?
	It is submitted that total sanctioned posts of Restorer are=12
Pt.2	What is the job profile of Restorer?
	It is informed that the detail information qua this point has already been provided to Government vide letter No.1-13/2012-26902 dated 31st July, 2013 and letter No.1- 13/94-42002 dated 15th November, 2013, on subject matter of Recruitment and Promotion Rules for the post of Senior Assistant, Class-III, (Non-Gazetted), ministerial Services.). Now the Government has finalized the common recruitment and promotion rules for the post of Senior Assistant vide letter No. Per(AP)-C-A(3)-7/2010-1 dated 8th June, 2016 and the category of Restorer is feeder category for promotion to the post of Senior Assistant in this office. (Photocopies of common R&P rules for the

	post of Senior Assistant and letters dated 31st July, 2013 and dated 15th November, 2013 are enclosed herewith for ready reference please.) However, it is submitted that the Restorers are performing multifarious jobs in this Department. At times, they are attached with Law Officer of this Department for assisting the concerned Law Officer and as well for court duty purpose. It is the responsibility of the attached Restorer that the files of all cases mentioned in the daily, weekly and monthly cause lists are made available to the Law Officer well in advance. While in Court, their duty is to provide requisite Law Books from office Library and apply for the copies of orders/judgments pronounced by the Hon'ble Court. Besides Court work the Restorers are deputed in different Sections of the office for dealing work branches/section. Restorers are performing the same duties as is being performed by a Clerk in this Department.

In view of the above mentioned facts and circumstances, it is once again requested that the matter may kindly be considered at Government level at the earliest possible please."

7. Bare perusal of aforesaid communication clearly reveals that Restorers working in the establishment of respondent No.3 are performing the same duties as are being performed by the Clerks in the same Department, but respondents despite having received the aforesaid clarification from respondent No.3, kept mum and after filing of the petition at hand, issued letter dated 10.02.2021 to the office of Advocate General Annexure R-1, which reads as under:

" Home-B(B)7-3/2019
Department of Home
Government of Himachal Pradesh

From

The Additional Chief Secretary (Home) to the
Government of Himachal Pradesh

To

The Advocate General,
Himachal Pradesh,
Shimla-1
Dated: Shimla-2, the 10th February, 2021

Subject: Regarding of pay anomaly and request for granting the higher pay band and Higher Grade Pay of 10300-34800+3200 GP after two years of regular service to Restores as given to Clerks in the office of Advocate General, Himachal Pradesh, Shimla.

Sir,

I am directed to refer your letter No.1-55/2018-Loose-20329 dated 29.8.2020 on the subject cited above and to say that the matter was taken up with the Finance Department who has observed that the pay scale in the Pay Band of 10300-34800+3200 GP has been granted to the Clerk on the basis of the Pay scales prevalent in Punjab Government and no such pay scale has been revised in respect of Restorer. Therefore, Finance Department has conveyed its inability to agree to the proposal.

Yours faithfully,

(Rakesh Sharma)

Special Secretary (Home) to the
Government of Himachal Pradesh.
Phone 0177-2626212"

8. Vide aforesaid communication, Special Secretary Govt. to the Himachal Pradesh, apprised respondent No.3 that matter was taken with the

finance department, which has observed that pay-scale in the Pay Band of Rs. 10,300-34,800 +3200 Grade Pay has been granted to the Clerk on the basis of pay scales prevalent in the Punjab Government and no such pay scale has been revised in the respect of Restorer.

9. Mr. Sanjeev Bhushan, learned Senior counsel appearing for the petitioners while referring to the aforesaid communication Annexure R-1 vehemently argued that since it is not in dispute that all the petitioners were working as restorer in the office of Advocate General and they were discharging similar duties as were being discharged by the Clerks in the office of respondent No.3 coupled with the fact that both the categories were kept in the pay scale of Rs. 950-1800 as per Recruitment & Promotion Rules for the post of Restorer class-III, action of the respondents in denying the similar revised pay scale as is being given to the category of clerk working in the office of respondent No.3 is fully unjust and unreasonable. He further submitted that if Recruitment & Promotion Rules for both the posts of Clerk and Restorer in the respondent No.3 department are read juxtaposing each other, it clearly reveals that qualification for being appointed against both the categories is same and their pay-scales were also same. He further submitted that pay scale of both the categories remained the same with the revision of pay scale w.e.f. 1.1.1996 and 1.1.2006 and it is only after issuance of the notification dated 27.9.2012, by the state of Himachal Pradesh, discrimination was made as far as the category of the petitioners is concerned, whereby after two years, clerks were given pay-scale of Rs. 10,300-34,800 +3200 Grade Pay, but such benefit was denied to the Restorers.

10. Having heard learned counsel for the parties and perused material available on record this Court finds merit in the petition of the petitioners that they are entitled to similar pay scale as is being given to the category of clerks in the respondent No.3-department. As has been taken note herein above, though categories of clerk and restorer working in the office of

respondent No.3 are/were being governed by separate Recruitment & Promotion Rules, but minimum qualification for appointment against such posts is same and till the issuance of notification dated 27.9.2012 issued by the Government of Himachal Pradesh in exercise of power conferred in Rule 9 of HP Civil Services Rules, both the aforesaid categories were drawing similar pay scale.

11. Leaving everything aside, both the categories were in the feeder category to the post of Senior Assistant in the office of respondent No.3 i.e. Advocate General. Even today, both the categories working in the office of respondent No.3 continue to be feeder category for the post of Senior Assistant but with the issuance of notification dated 27.9.2012, pay scale of both the categories have been changed. One category of clerk has been given pay-scale of Rs. 10,300-34,800 +3200 Grade Pay, but for no plausible reason, same benefit has been denied to the category of the restorers, which otherwise is performing similar duties as are being performed by the category of clerk in the office of respondent No.3.

12. Careful perusal of communication dated 27.5.2020 (reproduced supra), clearly reveals that office of Advocate General-respondent No.3 while answering the query raised by the department of Home Govt. of Himachal Pradesh with regard to job profile of the restorer categorically observed in the aforesaid communication that restorers are performing the multifarious jobs in the department. At times, they are attached with Law Officers and for the court duty purpose. Respondent No.3 has categorically mentioned in the aforesaid communication that Restorers are performing the same duties as are being performed by the clerks in the department. Most importantly, in the aforesaid communication, it has been stated that category of the Restorer continues to be the feeder category for the post of Senior Assistant in the office alongwith category of clerks in terms of common Recruitment & Promotion Rules for the post of Senior Assistant notified vide communication

dated 8.6.2016. Interestingly, respondent-State vide communication dated 10.2.2021, refused to accede to the prayer made by the petitioners, who are restorers in the office of respondent No.3 on very flimsy grounds that the pay scale in the pay band of Rs. 10,300-34,800 +3200 Grade Pay has been granted to the clerk on the basis of the Pay scales prevalent in Punjab Government and no such pay scale has been revised in respect of Restorer. Aforesaid stand taken by the respondent to reject the claim of the petitioners' category is not sustainable in the eye of law because this Court can take judicial note of the fact that repeatedly, respondent-State keeps on changing its stand with regard to application of pay-scale prevalent in the Punjab Government. In some cases, respondent-state takes the stand that they are not bound to give pay-scale as per Punjab Government pattern, but in some other cases, they take stand that pay-scales as prevalent in the state of Punjab are payable to the Himachal Pradesh because Punjab Pay pattern is generally followed by the State of Himachal Pradesh. True, it is that repeatedly, it has been held by the Hon'ble Apex Court as well as this court that State is not bound to follow each and every revision, if any, made by the Punjab Government but in the instant case, where the category of restorer is at par with the category of clerk, especially in the office of respondent No.3 for all intents and purposes as has been discussed herein above in detail, ground raised in communication dated 10.2.2021 Annexure R-1 for rejecting the claim of the petitioners is not tenable in the eye of law. Though the categories of clerk and restorers working in the office of respondent No.3 are being governed by the different set of Recruitment & Promotion Rules, but if Recruitment & Promotion Rules governing the service conditions of Punjab Government are perused juxtaposing each other, they are para-materia same with regard to qualification and pay scales. Probably, having regard to the aforesaid similarity in the Recruitment & Promotion Rules, Government had been granting the pay-scales of both the categories on the same and similar footing

till 2006. Abruptly, on 27.9.2012 State Government notified the Himachal Pradesh Civil Service Rules, whereby the pay scale of Restorer came to be revised from 5910-to 20200+1900 Grade Pay w.e.f. 1.10.2012, whereas category of clerk working in the office of respondent No.3, which were initially drawing the same pay-scale of R4. 510-20200 +1900 grade pay were given higher pay band and higher Grade pay of Rs. 10,300-34,800 +3200 Grade Pay grade pay w.e.f. 1.10.2012, which action on the part of the respondent is not only discriminatory vis-à-vis the category of restorers/ petitioners but also unsustainable in the eye of law being totally discriminatory and arbitrary in nature, especially in view of the fact that as of today, both the categories of clerk and restorer continue to be feeder category for the next promotional post i.e. Senior Assistant.

13. Leaving everything aside, at this stage, it is pertinent to take note of the fact that Restorer working in the office of respondent No.3 cannot be equated with the Restorers working in the other departments of the State on account of their duties and responsibilities. As has been clarified by respondent No.3 vide communication dated 27.5.2020 Restorers working in the office of respondent No.3 are performing multifarious duties in the department. At times they are attached with law officer of this department for assisting the concerned Law Officer and as well for the court duty purposes. It is responsibility of the attached restorer that the files of all cases mentioned in the daily, weekly and monthly cause lists are made available to the law officer well in advance. While in court, their duty is to provide requisite law books from the office library and apply for the copies of orders/ judgments pronounced by the court. Besides above, restorers are deputed in the different sections of the office for dealing work in branches/section and as such, they are performing the same duties as are being performed by the clerk in the department. Since Restorers working in the office of respondent No.3 are performing similar duties as are being performed by the clerks in the office of

respondent No.3, benefit of pay revision as is being sought by the category of the petitioners cannot be denied on the ground that pay of the category of clerks has been revised on the basis of pay revision made by the Punjab government. Though there is no material with regard to decision, if any, taken by the Punjab government with regard to revision of pay of category of restorers working in the office of Advocate General, but since it has been repeatedly claimed by respondent-State that they are not bound to follow each and every revision of the pay-scale ordered by the State of Punjab, respondents having taken note of the fact that category of restorer and clerk working in the respondent No.3 are performing similar duties, ought to have granted the similar benefit of pay revision to the petitioners/restorers, who being working/performing the similar duties in the same department are otherwise entitled to the similar pay scale on the principle of "equal pay for equal work".

14. In this regard reliance is placed upon the judgment rendered by the Hon'ble Apex Court in ***K.T. Veerappa and Ors v. State of Karnataka and Ors, (2006) 9 SCC 406***, which reads as under:

> "He next contended that fixation of pay and parity in duties is the function of the Executive and financial capacity of the Government and the priority given to different types of posts under the prevailing policies of the Government are also relevant factors. In support of this contention, he has placed reliance in the case of State of Haryana and Anr. v. Haryana Civil Secretariat Personal Staff Association (2002) 6 SCC 72 and Union of India and Anr. v. S.B. Vohra and Ors. (2004) 2 SCC 150. There is no dispute nor can there be any to the principle as settled in the case of State of Haryana & Anr. v. Haryana Civil Secretariat Personal Staff Association (supra) that fixation of pay and determination of parity in duties is the function of the Executive and the scope of judicial review of administrative decision in this regard is very limited. However, it is also equally well-settled that the courts should interfere with administrative decisions

> pertaining to pay fixation and pay parity when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors."

15. In the aforesaid judgment, though Hon'ble Apex Court has held that courts should interfere with the administrative decisions pertaining to pay fixation and pay parity when they find such a decision to be unreasonable, unjust and prejudicial to a section of the employees and taken in ignorance of material and relevant factors.

16. Reliance is placed upon ***Haryana State Minor Irrigation Tubewells Corporation and Ors v. G.S. Uppal and Ors (along with connected matters), (2008) 7 SCC 375***, wherein Hon'ble Apex Court has held that in matters of fixation of pay and determination of parity though scope of judicial review is very limited, but court would be justified in interfering with the pay fixation if it finds such decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors. Apart from above, in the aforesaid judgment, Hon'ble Apex Court has held that financial difficulties/constraints cannot be a ground to deny the higher pay-scale. Paras 21 to 33 of the aforesaid judgment read as under:

> " 21. There is no dispute nor can there be any to the principle as settled in the above-cited decisions of this Court that fixation of pay and determination of parity in duties is the function of the Executive and the scope of judicial review of administrative decision in this regard is very limited. However, it is also equally well-settled that the courts should interfere with the administrative decisions pertaining to pay fixation and pay parity when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors. [see K.T. Veerappa & Ors. v. State of Karnataka & Ors. (2006) 9 SCC 406].

22. Mr. M.N. Krishnamani, learned senior counsel assisted by Shri Raj Kumar Gupta and Shri A.N.Bardiyar appearing for respondents in C.A. Nos. 9244/03 and 9248/03; Mr. Rishi Malhotra, Advocate appearing for respondents in C.A. 9239/2003, in support of the judgment of the Division Bench, contended that no exceptions can be taken to the well- reasoned judgment recorded by the Division Bench of the High Court. They submitted that the Division Bench has analysed in great detail the factual situation and legal proposition covering the field of controversy, therefore, there is apparently no infirmity or perversity in the judgment impugned in these appeals inviting interference by this Court.

23. In order to appreciate the rival contentions of the learned counsel for the parties, we have scrutinized the judgment of the Division Bench of the High Court in the backdrop of the factual situation of the case as well as in the light of the principle enunciated in the above-cited decisions.

24. It is well-settled that the State can make reasonable classification if it has a nexus with the object sought to be achieved. It is admitted position in the present case that posts of SDOs/SDEs/AEs can be filled up by the Corporation by any one of the three known methods, namely, direct recruitment, on promotion or by transfer/deputation. Once a person is appointed to a post in a particular cadre, the source of his recruitment or the method of his appointment becomes irrelevant. The Corporation has framed its Service Bye-Laws and by virtue of Rule 5.1 of Part-V of the Service Bye-Laws, each post in the Corporation will carry a time scale of pay; the present pay scale being indicated in Appendix-II and further that the pay scale is subject to revision by the Board, which will, however, generally follow the pattern adopted by the Government of Haryana from time to time.

25. The employees of the Corporation, since its inception in 1970, had been getting the same pay scales as that of the employees of the Haryana Government and the Board of Directors having already equated the pay scales of the Engineers of the Corporation commensurate to the pay scales of the Government employees, but the State Government has not concurred with the decision of the Board of Directors.

26. By virtue of Clause 81(v) of the Memorandum of Association of the Corporation, the Directors of the Corporation in their discretion have powers to appoint, remove or suspend such Managers, Secretaries, Officers, Clerks, Agents and Servants of permanent, temporary or special services, as they may from time to time think fit, and to determine their powers and duties and fix their salaries or emoluments and to require security of such amount as they think fit in such instances. The power to fix the salaries or emoluments of the employees of the Corporation, thus, specifically rests with the Directors of the Corporation and by virtue of Rule 5.1 of Part-V of the Service Bye-Laws, as mentioned in the earlier part of the judgment, the Corporation had favourably considered the claim of the respondents by recommending the same scales for them, as were being given to their counterparts in the service of the Government Departments.

27. The proposal of the Board of Directors of the Corporation for revision of pay scales to its employees came up before the Standing Committee in its meeting held on 28.05.1992 and the Standing Committee approved the pay scales in a selective manner. The revision in pay scales of the Superintending Engineers, Accounts Officers, Circle Head Draftsmen, Divisional Head Draftsmen, etc. were approved, whereas the revision of pay scales of the respondents, who are AEs/SDOs/SDEs, was postponed and it was decided that the matter would be examined separately by the Finance Department.

28. The State of Haryana in its written statement filed before the High Court admitted that although the technical qualifications of incumbents on the posts of AEs/SDOs/SDEs in various Government Departments, Boards and Corporations are identical, yet the nature of duties and responsibilities, quantum of workload and level of technical expertise involved do vary from organization to organization depending upon the nature of activities undertaken by the respective organizations. It is further contended that the salary and allowances of the deputationists of the Corporation are governed by the terms and conditions of their deputation as decided by the Government from time to time. Therefore, the respondents cannot be treated and equated at par with the similar categories of employees of the State Government.

29. The learned Single Judge of the High Court as also the learned Judges of the Division Bench have considered the

controversy in detail in their judgments holding the respondents entitled for the revision of pay scales at par with their counter-parts working in the State of Haryana.

30. It is not in dispute that a deputationist holds the post in a particular cadre office for the duration he remains on deputation and is a part of that cadre. No material has been placed on record by the appellants to show that the deputationists are appointed against only certain particular posts or that they cannot be posted or transferred to the posts held by the respondents. In fact, it is an admitted position that the posts are mutually inter-changeable. In this situation, it is reasonable to infer that a deputationist performs the same duties as those performed by other persons working in the cadre. It is also an admitted position that the qualifications laid down for recruitment in the Corporation are identical to those prescribed in the Departments of the Government. It is further clear that the respondents have continued to work in the pay scale of Rs.2000-3500 w.e.f. 01.01.1986. As against this, their counter-parts in the Government and also the persons, who are posted in the Corporation by way of deputation, would get the scale of Rs.3000-4500 on completion of five years of service and are placed in the scale of Rs.4100-5300 (to the extent of 20% of the posts) on completion of 20 years of service. The respondents were obviously placed at a disadvantageous position. The decision of the Government in rejecting the proposal of the Board of Directors suffers from the vice of invidious discrimination and cannot be sustained because the very same decision of the Board with regard to all other employees has since been accepted and approved by the State Government. On the scrutiny of the material on record, it is clear that the appellants did not produce any evidence on record to establish that the working conditions, responsibilities and nature of duties, etc. of the respondents are different to their counter-parts working in the same categories in the State Government, Boards and other Corporations, etc. and also the persons who are working with the Corporation on deputation.

31. A careful examination shows that the issue was not really about grant of pay scales to Corporation Engineers on par with PWD Engineers. When the pay revision took place, the revised pay scales that were given to the Engineers of the State Government were also given to the engineers of the Corporation

with effect from 1.1.1986 thereby maintaining the parity. What was not extended to the Corporation employees, which is the subject matter of the grievance, is the further revision by way of 'removal of anomaly in pay scales' given to AEE/AE/SDO/SDE of the State Government with effect from 1.5.1989 vide circular dated 2.6.1989 of the Finance Commissioner. The real question would be whether what is given by way of anomaly removal in the case of Engineers of State Government, should automatically be extended to the corresponding categories of engineers of the Corporation.

32. When, after a pay revision, an anomaly is found in the pay scale given to a class of Government servants and such anomaly is rectified, it is not a new pay revision but a correction of the original pay revision, or an amendment to the pay scale that has already been granted. Therefore, where the pay revision extended to the government servants has already been extended to the employees of the Corporation also, it follows that any correction of anomaly in the revised pay scale given to the government servants should also be made in the case of those who were earlier given parity by extending the pay scale which is the subject matter of the correction. It should be borne in mind that the question whether Corporation engineers were on par with PWD Engineers and should be given parity in pay scales was already decided when the pay scale revision granted to Government (PWD) engineers was extended to the corporation Engineers also with effect from 1.1.1986. That question did not again arise when the anomaly in the pay revision was rectified with reference to the Government engineers. When the anomaly in the pay scale of Government engineers was rectified, the rectification should apply to Corporation engineers also to maintain the parity.

33. The plea of the appellants that the Corporation is running under losses and it cannot meet the financial burden on account of revision of scales of pay has been rejected by the High Court and, in our view, rightly so. Whatever may be the factual position, there appears to be no basis for the action of the appellants in denying the claim of revision of pay scales to the respondents. If the Government feels that the Corporation is running into losses, measures of economy, avoidance of frequent writing off of dues, reduction of posts or repatriating deputationists may provide the possible solution to the problem.

> Be that as it may, such a contention may not be available to the appellants in the light of the principle enunciated by this Court in M.M.R. Khan v. Union of India [1990 Supp. SCC 191] and Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union [(2000) 4 SCC 245]. However, so long as the posts do exist and are manned, there appears to be no justification for granting the respondents a scale of pay lower than that sanctioned for those employees who are brought on deputation. In fact, the sequence of events, discussed above, clearly shows that the employees of the Corporation have been treated at par with those in Government at the time of revision of scales of pay on every occasion."

17. In ***Union of India v. Dineshan K.K. (2008) 1 SCC 586***, Hon'ble Apex Court has held that principle of "equal work pay for equal work" has been assumed to be the status of a fundamental right. Though it is the task of expert body like pay commission to determine pay structures, yet judicial review is not altogether excluded. Hon'ble Apex Court has further held that when there is no dispute with regard to the qualifications, duties and responsibilities of the persons holding identical posts or ranks but they are treated differently merely because they belong to different departments or the basis for classification of posts is ex-facie irrational, arbitrary or unjust, it is open to the Court to intervene and order parity. Aforesaid judgment reads as under:

> " 12. The principle of "equal pay for equal work" has been considered, explained and applied in a catena of decisions of this Court. The doctrine of "equal pay for equal work" was originally propounded as part of the Directive Principles of the State Policy in Article 39(d) of the Constitution. In Randhir Singh Vs. Union of India & Ors. , a bench of three learned Judges of this Court had observed that principle of equal pay for equal work is not a mere demagogic slogan but a constitutional goal, capable of being attained through constitutional remedies and held that this principle had to be read under Article 14 and 16 of the Constitution. This decision was affirmed by a Constitution Bench of this Court in D.S. Nakara & Ors. Vs. Union of India . Thus, having regard to the constitutional mandate of equality and

> inhibition against discrimination in Article 14 and 16, in service jurisprudence, the doctrine of "equal pay for equal work" has assumed status of a fundamental right.
>
> 13. Initially, particularly in the early eighties, the said principle was being applied as an absolute rule but realizing its cascading effect on other cadres, in subsequent decisions of this Court, a note of caution was sounded that the principle of equal pay for equal work had no mathematical application in every case of similar work. It has been observed that equation of posts and equation of pay structure being complex matters are generally left to the Executive and expert bodies like the Pay Commission etc. It has been emphasized that a carefully evolved pay structure ought not to be ordinarily disturbed by the Court as it may upset the balance and cause avoidable ripples in other cadres as well. (Vide: Secretary, Finance Department & Ors. Vs. West Bengal Registration Service Association & Ors. and State of Haryana & Anr. Vs. Haryana Civil Secretariat Personal Staff Association. Nevertheless, it will not be correct to lay down as an absolute rule that merely because determination and granting of pay scales is the prerogative of the Executive, the Court has no jurisdiction to examine any pay structure and an aggrieved employee has no remedy if he is unjustly treated by arbitrary State action or inaction, except to go on knocking at the doors of the Executive or the Legislature, as is sought to be canvassed on behalf of the appellants. Undoubtedly, when there is no dispute with regard to the qualifications, duties and responsibilities of the persons holding identical posts or ranks but they are treated differently merely because they belong to different departments or the basis for classification of posts is ex-facie irrational, arbitrary or unjust, it is open to the Court to intervene."

18. It is not in dispute that for considering the equation of posts and the issue of equivalence of posts, some factors had been held to be determinative i.e. (i) The nature and duties of a post; (ii) The responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged; (iii) The minimum qualifications, if any, prescribed for recruitment to the post; and (iv) The salary of the post. The burden of proof in establishing parity in pay scales and the nature of duties and responsibilities is on the person claiming such right. In

case, the person claiming parity succeeds in establishing the he is similarly situate to the person, who has been granted higher pay scale, by placing on record material before the court to prove the nature of duties and functions are similar and that they are entitled to parity of pay scales, court would be justified in considering the claim of an employee on the basis of principle of "equal pay for equal work". Reliance in this regard is placed upon judgment passed by the Hon'ble Apex Court in ***Punjab State Power Corporation Ltd v. Rajesh Kumar Jindal***, ***(2019) 3 SCC 547***, wherein it has been held that it is the duty of an employee seeking parity of pay under Article 39(d) of the Constitution of India to prove and establish that he had been discriminated as the question of parity has to be decided on consideration of various factors as well as statutory rules etc. i.e. (i) method of recruitment; (ii) level at which recruitment is made; (iii) the hierarchy of service in a given cadre; (iv) minimum educational/technical qualifications required; (v) avenues of promotion; (vi) the nature of duties and responsibilities; and (vii) employer's capacity to pay, etc. Relevant paras of the aforesaid judgment reads as under:

> "14. Ordinarily, the courts will not enter upon the task of job evaluation which is generally left to expert bodies like the Pay Commission etc. The aggrieved employees claiming parity must establish that they are unjustly treated by arbitrary action or discriminated. In Kshetriya Kisan Gramin Bank v. D.B. Sharma and Others (2001) 1 SCC 353, this Court held as under:-
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> > "7. The next question that arises for consideration is, as to what extent the High Court would be justified in exercise of its extraordinary jurisdiction under Article 226 to interfere with the findings of an expert body like the Equation Committee. In State of U.P. and Others v. J.P. Chaurasia and Others (1989) 1 SCC 121, this Court unequivocally held that in the matter of equation of posts or equation of pay, the same should be left to the Executive Government, who can get it determined by expert bodies like the Pay Commission, and such expert body would be the best judge

to evaluate the nature of duties and responsibilities of the posts and when such determination by a commission or committee is made, the court should normally accept it and should not try to tinker with such equivalence unless it is shown that it was made with extraneous consideration...."

15. In S.C. Chandra and Others v. State of Jharkhand and Others (2007) 8 SCC 279, this Court held as under:-

"33. It may be mentioned that granting pay scales is a purely executive function and hence the court should not interfere with the same. It may have a cascading effect creating all kinds of problems for the Government and authorities. Hence, the court should exercise judicial restraint and not interfere in such executive function vide Indian Drugs & Pharmaceuticals Ltd. v. Workmen, Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC 408.

.....

35. In our opinion fixing pay scales by courts by applying the principle of equal pay for equal work upsets the high constitutional principle of separation of powers between the three organs of the State. Realising this, this Court has in recent years avoided applying the principle of equal pay for equal work, unless there is complete and wholesale identity between the two groups (and there too the matter should be sent for examination by an Expert Committee appointed by the Government instead of the court itself granting higher pay).

36. It is well settled by the Supreme Court that only because the nature of work is the same, irrespective of educational qualification, mode of appointment, experience and other relevant factors, the principle of equal pay for equal work cannot apply vide Govt. of W.B. v. Tarun K. Roy and Others (2004) 1 SCC 347."

The same view was reiterated in Union Territory Administration, Chandigarh and Others v. Manju Mathur and Another (2011) 2 SCC 452; State of Haryana and Others v. Charanjit Singh and Others (2006) 9 SCC 321 and in Hukum Chand Gupta v.

Director General, Indian Council of Agricultural Research and Others (2012) 12 SCC 666.

16. Observing that granting parity in pay scales depends upon the comparative evaluation of job and equation of posts, in Steel Authority of India Limited and Others v. Dibyendu Bhattacharya (2011) 11 SCC 122, this Court held as under:-

> "30. ..... the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the posts concerned. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties."
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> .....
> .....
> .....

20. Burden of proof on the person claiming parity of pay scale:-

Ordinarily, the scale of pay is fixed keeping in view the several factors i.e.

(i) method of recruitment;
(ii) level at which recruitment is made;
(iii) the hierarchy of service in a given cadre;
(iv) minimum educational/technical qualifications required;
(v) avenues of promotion;
(vi) the nature of duties and responsibilities; and

(vii) employer's capacity to pay, etc.

21. It is well settled that for considering the equation of posts and the issue of equivalence of posts, the following factors had been held to be determinative:-

(i) The nature and duties of a post;
(ii) The responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged;
(iii) The minimum qualifications, if any, prescribed for recruitment to the post; and
(iv) The salary of the post (vide Union of India and Another v. P.K. Roy and Others AIR 1968 SC 850).

22. After referring to P.K. Roy's case, this Court, in SAIL, held as under:-

"25. In State of Maharashtra and Another v. Chandrakant Anant Kulkarni and Others (1981) 4 SCC 130 and Vice-Chancellor, L.N.Mithila University v. Dayanand Jha (1986) 3 SCC 7, a similar view has been reiterated observing that equal status and nature and responsibilities of the duties attached to the two posts have to be taken into consideration for equivalence of the post. Similar view has been reiterated in E.P. Royappa v. State of T.N. and Another (1974) 4 SCC 3 and Sub-Inspector Rooplal and Another v. Lt. Governor Through Chief Secretary, Delhi and Others (2000) 1 SCC 644, wherein this Court following the earlier judgment in P.K. Roy AIR 1968 SC 850 held that the salary of the post alone may not be a determining factor, the other three criterion should also be fulfilled."

23. The burden of proof in establishing parity in pay scales and the nature of duties and responsibilities is on the person claiming such right. The person claiming parity must produce material before the court to prove that the nature of duties and functions are similar and that they are entitled to parity of pay scales. After referring to number of judgments and observing that it is the duty of an employee seeking parity of pay to prove and establish that he had been discriminated against, this Court, in SAIL, held as under:-

> "22. It is the duty of an employee seeking parity of pay under Article 39(d) of the Constitution of India to prove and establish that he had been discriminated against, as the question of parity has to be decided on consideration of various facts and statutory rules, etc. The doctrine of "equal pay for equal work" as enshrined under Article 39(d) of the Constitution read with Article 14 thereof, cannot be applied in a vacuum. The constitutional scheme postulates equal pay for equal work for those who are equally placed in all respects. The court must consider the factors like the source and mode of recruitment/appointment, the qualifications, the nature of work, the value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. In other words, the equality clause can be invoked in the matter of pay scales only when there is wholesome/wholesale identity between the holders of two posts. The burden of establishing right and parity in employment is only on the person claiming such right. (Vide U.P. State Sugar Corpn. Ltd.
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> and Another v. Sant Raj Singh and Others (2006) 9 SCC 82, Union of India and Another v. Mahajabeen Akhtar (2008) 1 SCC 368, Union of India v. Dineshan K.K (2008) 1 SCC 586, Union of India and Others v. Hiranmoy Sen and Others (2008) 1 SCC 630, Official Liquidator v. Dayanand and Others (2008) 10 SCC 1, U.P. SEB and Another v. Aziz Ahmad (2009) 2 SCC 606 and State of M.P. and Others v. Ramesh Chandra Bajpai (2009) 13 SCC 635)".

19. In the case at hand, as has been taken note herein above, though service conditions of both the categories i.e. restorer and clerk working in the respondent No.3 are being regulated by different set of Recruitment & Promotion Rules, but their qualification, duties and responsibilities are same and till one point of time, both the categories were drawing similar pay-scales and even as of today, both the aforesaid categories continue to be feeder category for the next post of promotion i.e. Senior Assistant. Since it is not in dispute rather stands clarified by respondent No.3 that category of restorer

working in the office of respondent No.3 are performing the duties of clerk, there is no justification to deny the benefit of revised pay scales i.e. Rs. 10,300-34,800 +3200 Grade Pay to the category of restorers working in the respondent No.3 after completion of two years regular service as has been given in the category of clerks working in the respondent-department.

20. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this court finds merit in the present petition and accordingly same is allowed and communication dated 10.2.2021, whereby claim of the petitioners came to be rejected, is quashed and set-aside. Respondents are directed to grant the similar pay-scale to the category of the Restorers as has been granted to the Clerks working in the respondent No.3-department vide notification dated 27.9.2012 from the date same has been granted to the category of clerks alongwith consequential benefits, within a period of two months from today. In the aforesaid terms, present petition is disposed of alongwith Pending application(s), if any.

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

Between

SUBA SINGH @ SUBA RAM SON OF SHRI SHOBHANU RAM RESIDENT OF VILLAGE KADROH, PO KHERIAN, TEHSIL NURPUR, DISTRICT KANGRA H.P. 176200

.....PETITIONER

(BY SH. VIVEK SINGH THAKUR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY EDUCATION, GOVT OF H.P. AT SHIMLA

2. DEPUTY DIRECTOR ELEMENTARY EUDCATION, DHARAMSHALA, DISTRICT KANGRA H.P.

3. DIRECTOR SAINIK WELFARE, HAMIRPUR AT HAMIRPUR HP

4. SUB REGIONAL EMPLOYMENT OFFICER EX-SERVICEMAN EMPLOYMENT CELL, DIRECTOR OF SAINIK WELFARE H.P. AT HAMIRPUR

5. DINESH KUMAR SON OF SH.HIMAL CHAND, R/O VILLAGE JADRANGAL /PATOLA, PO KARDYANU, TEHSIL DHARAMSHALA, DISTT. KANGRA HP

....RESPONDENTS

(BY SHRI HEMANT VAID, ADDITIONAL ADVOCATE GENERAL FOR RESPONDENTS NO. 1 TO 4

NONE FOR RESPONDENT NO.5.
SHRI GURDEV NEGI, ADVOCATE VICE MR.RAJIV RAI, ADVOCATE, FOR APPLICANT IN CMP-T NO. 2127 OF 2020)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.5984 OF 2019
Decided on: 27.10.2022

Civil Writ Petition- National Council for Teachers Education (NCTE) Regulation 2001- Appointment to the post of PET for subsequent vacancy(ies)- For batch-wise appointment, entitlement has to be considered on the basis of date of acquiring minimum prescribed eligibility and the batch of candidate is to be determined on the basis of date of acquisition of such qualification and therefore, a batch of candidate for the purpose of batch-wise recruitment to the post shall be of the year in which he acquires such qualification but not before that.(Para 9)

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

O R D E R

By way of instant petition, petitioner has approached the Court seeking direction to respondents authority/department to nominate and appoint him to the post of Physical Education Teacher (PET) reserved for Ex-serviceman quota in Scheduled Tribe (ST) category along with all consequential benefits from the date since when his juniors has been appointed to the said post.

2 Petitioner, being an Ex-serviceman, registered his name in Employment Exchange on 18.12.2000 with qualification of matric and PTI. He also enrolled himself as a ST candidate with Employment Cell of Directorate of Sainik Welfare Himachal Pradesh at Hamirpur.

3 It is an admitted fact that at the time of interview of petitioner on 24.9.2003 education qualification for the post of PET was matriculation.

Requisite educational qualification to the post of PET was amended from matriculation to 10+2 w.e.f. 10th January, 2011 in furtherance to National Council for Teachers Education (NCTE) Regulation 2001 and provision of Right of Children to Free and Compulsory Education Act, 2009 as well as notification dated 23.8.2010, issued by NCTE, prescribing minimum educational qualification, for various posts of teachers. For non-availability of any post of PET (ST Ex-serviceman), petitioner was not appointed as PET prior to amendment.

4 Petitioner acquired 10+2 qualification in October 2014 and registered the said qualification in the Employment Exchange on 16.1.2015.

5 As per reply filed on behalf of respondents No. 1 and 2/Education Department, it has been submitted that Employment Exchange Nurpur had also sponsored his name under General Ex-serviceman Category to the post of PET and consequently, he had attended the interview on 28.9.2012 but for want of minimum educational qualification of 10+2 he was not found entitled for appointment to the post of PET and further that his name was not received from respondents No. 3 and 4 against the post reserved for ST Ex-serviceman Category.

6 As per reply of respondents No. 3 and 4/Directorate of Sainik Welfare Himachal Pradesh, in furtherance to his enrollment and registration in Employment Exchange/Employment Cell, petitioner was interviewed for the post of Physical Education Teacher on

24.9.2003 and was empanelled as selected as such, but his nomination was withheld for want of correction in his name and he was advised to produce a certificate with correction of his name duly authenticated by the appropriate authority during his interview. However, petitioner failed to produce the same within stipulated period. Petitioner was empanelled in the year 2003 finding him eligible to the post of Physical Education Teacher (ST category) at that time being matriculate. Further that though petitioner was empanelled for

appointment to the said post in the year 2003, but no post was available after his empanellment till amendment of requisite qualification to the post of PET and thus his name could not be sponsored for want of availability of post.

7. It is further case of respondents that educational qualification for the post of PET was amended to 10+2 w.e.f. January 2011 and petitioner acquired the 10+2 qualification in October 2014 and correspondent entry to that effect in Employment Exchange was made on 16.1.2015 and further that respondent No.5 Dinesh was enrolled in Employment Exchange on 24.05.2013 with minimum prescribed educational qualification of 10+2 to the post of PET acquired on 17.01.2013 whereas petitioner acquired such qualification subsequent to him in the year 2014 on 10.12.2014 and entry with respect to which was made in the year 2015 on 16.01.2015. Therefore, Dinesh Kumar was found eligible since his enrollment in the year 2013 whereas petitioner was found eligible only after December 2014, entry with respect to which was made on record of Employment Exchange on 16.1.2015 and therefore, Dinesh Kumar was declared selected vide notification dated 17.9.2016.

8 Learned counsel for petitioner, referring the information received through RTI dated 6.7.2015 which has been placed on record as Annexure A-7, has contended that for batch-wise appointment to the post of PET against the category of ST, the appointment of batch of 2002 was being made in June 2015, whereas petitioner was registered in Employment Exchange in the year 2000 and therefore, he was senior to respondent No.5 who registered him in the year 2013 and ignoring the seniority of petitioner in batch, respondent No.5 Dinesh Kumar junior to the petitioner has been appointed and therefore, petitioner is entitled not only for appointment and consequential benefits but also for compensation for the period to which he has not been appointed despite being eligible for such post at least since 16.01.2015 i.e. the date of

entry of acquiring the minimum educational qualification prescribed to the post of PET.

9 For batch-wise appointment, entitlement has to be considered on the basis of date of acquiring minimum prescribed eligibility and the batch of candidate is to be determined on the basis of date of acquisition of such qualification and therefore, a batch of candidate for the purpose of batch-wise recruitment to the post shall be of the year in which he acquires such qualification but not before that. Therefore, till 10.01.2011 petitioner was entitled for batch-wise appointment by considering him a candidate having been registered in the year 2000 with requisite qualification of matric prescribed for the post of PET and accordingly, in the year 2003 on the basis of matriculation qualification, he was considered. But after 2011 he was not eligible for want of prescribed qualification and he again became eligible after acquiring 10+2 qualification in the year 2014 which was registered on 16.1.2015. Therefore, after 2011, batch for appointment for considering the petitioner for batch-wise appointment to the post of PET is to be determined on the basis of date of acquiring the 10+2 qualification by him. The batch of respondent No.5 has also to be considered accordingly. Therefore, for acquiring +2 qualification before the petitioner, respondent No.5, for considering to the post of PET, has to be considered senior to him for appointment to the post of PET and therefore, I find no merit in petition.

10 Needless to say that for general vacancies for which petitioner was eligible to be appointed at the time of registration in Employment Exchange and is also eligible till date, he has to be considered to be senior in batch to those who acquired qualification/registered name, as the case may be, after the petitioner. Further that, in case petitioner is/was otherwise eligible for appointment to the post of PET for subsequent vacancy(ies) available with the respondents, he was and is entitled to be considered for that on its own merit without any impact of filing of present petition, as claim of

the petitioner for his appointment in the year 2015-16 has been rejected in this petition for availability of person(s) senior in batch with acquisition of essential qualification but not his entitlement for consideration and appointment on his turn subject to eligibility at relevant time.

11 During pendency of petition, one Surender Kumar has filed an application CMP-T No. 2127 of 2020 under Order 1 Rule 10 CPC for arraying him as party/respondent claiming that he has acquired qualification of +2 w.e.f. 4.9.2013 i.e. prior to petitioner and OA No. 3225 of 2019 filed by him has been decided on 24th July, 2019 directing the respondents to consider his case but he has not been considered because of pendency of present petition and therefore, he seeks permission to array him as party/respondent.

12 For the findings returned in petition and also for reason that applicant Surender Kumar has no role and is not necessary party for adjudication of claim and counter claim of petitioner as well as respondents authorities, I do not find it appropriate to array him as a respondent in present petition and hence his application is rejected.

With aforesaid observations, petition is dismissed being devoid of any merit.

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

Between:

1. RAM PARKASH SHARMA AGE 51 YEARS SON OF LATE SHRI SANT RAM, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2.

2. SAT PAL SINGH SON OF LATE SHRI SUMRA SINGH, PRESENTLY WORKING AS SUPERINTENT GRADE-II, H.P. SECRETARIAT SHIMLA-2.

3. BABU RAM SON OF SHRI LAXMI DHAR, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2.

4. RAMESH KUMAR SON OF SHRI AMAR SINGH RAWAT, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

5. RAMA NAND SON OF SHRI MAHANT RAM, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

6. SHEETAL WIFE OF KASMAL PARKASH, PRESENTLY WORKING AS ASSISTANT/ SENIOR ASSISTANT, H.P. SECRETARIAT SHIMLA-2

7. TALBIR SINGH SON OF SHRI DURGA SINGH, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

8. JEET RAM SON OF LATE SHRI GOVERDHAN DASS, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

9. BRIJ PAL SINGH SON OF SHRI BHABUTI LAL, PRESENTLY WORKING AS ASSISTANT/ SENIOR ASSISTANT H.P. SECRETARIAT SHIMLA-2

10. LEKH RAM SON OF SHRI NATHU RAM, PRESENTLY WORKING AS ASSISTANT/ SENIOR ASSISTANT H.P. SECRETARIAT SHIMLA-2
11. BAL KRISHAN SON OF SHRI RAM, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

12. LEKH RAM SON OF SHRI TARSEM LAL, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

13. GOVERDHAN SINGH SON OF SHRI MURAT SINGH, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

14. RAMESH CHAND SON OF LATE SHIR DHANI RAM, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

15. KAHAN SINGH SON OF SHRI SUDERSHAN SINGH PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

16. KRISHAN CHAND SON OF SHRI DAULAT RAM, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

17. VIJAY SINGH SON OF SHRI CHET RAM R/O KOTHI JAMOGI, PO BATHALAG, TEHSIL ARKI DISTRICT SOLAN, H.P.

18. NIRMALA WIFE OF SHRI LEKH RAJ, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

19. LEELA DHAR SON OF LATE SHRI KESHAVE DASS, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

20. TARA CHAND SON OF SHRI MANDI RAM NEGI, PRESENTLY WORKING AS SUPERINTENDENT GRADE-II, H.P. SECRETARIAT SHIMLA-2

21 NARINDER SINGH SON OF SHRI KHIALI RAM, PRESENTLY WORKING AS ASSISTANT/ SENIOR ASSISTANT H.P. SECRETARIAT SHIMLA-2

....PETITIONERS

(BY MR. KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS CHIEF SECRETARY TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA, H.P.

2. SECRETARY (SA) TO THE GOVERNMENT OF HIMACHAL PRADESH

3. SECRETARY (PERSONNEL) TO THE GOVERNMENT OF HIMACHAL PRADESH

....RESPONDENTS

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL WITH MR. VINOD THAKUR, ADDITIONAL ADVOCATE GENERAL AND MR. RAJAT CHAUHAN, LAW OFFICER, FOR THE RESPONDENT-STATE)

EXECUTION PETITION
NO. 151 OF 2019
Reserved on:31.10.2022
Decided on:14.11.2022

Recruitment & Promotion Rules- Relaxation in the educational qualifications prescribed in the Recruitment & Promotion Rules of the Senior Assistants for promotion- Vacancies arose prior to the amendment of the rules shall be fulfilled only in accordance with the un-amended rules. Court has reason to presume and believe that respondents are purposely and willfully not implementing the judgment with a view to defeat the genuine claim of the petitioners, which has accrued to them pursuant to directions issued by the Division Bench of this Court. The respondents are directed to comply with/release all financial benefits to the petitioners pursuant to their promotion to the post of Senior Assistants from the due date. (Para 15)

Cases referred:

A. Manoharan and Ors v. Union of India and Ors, (2008) 3 SCC 641;

This petition coming on for orders before order this day, Hon'ble ***Mr. Sandeep Sharma,*** *passed the following:*

O R D E R

By way of instant execution petition, prayer has been made by the petitioners to issue direction to the respondents to execute the judgment dated 22.6.2008 passed by this Court in CWP(T) No. 8902 of 2008 titled ***Nand Lal v. State of Himachal Pradesh and Ors.***

2. Precisely the facts of the case as emerge from the record are that by way of CWP(T) No. 8902 of 2008, petitioners herein prayed for following relief:

> "(i) That the action of the respondents to fill in the vacancies of the years 1999 to 2002 in accordance with the rules may be held void-ib-initio and the respondents may be directed to review DPC which has resulted in passing of the orders Annexure-A5 to A8 may be reviewed and the respondents may be directed to convene DFPC for the posts of Senior Assistants by calculating the year wise vacancies and in accordance with the rules which were in vogue at the time of occurrence of vacancies and thereafter to promote the applicants to the posts of Senior Assistants from the due dates with all consequential benefits."

3. Coordinate Bench of this Court having taken note of the judgment passed by the Hon'ble Apex Court in case titled **A. Manoharan and Ors v. Union of India and Ors, reported in (2008) 3 SCC 641,** whereby it came to be held that vacancies which arose prior to the amendment of the Rules should be filled up only in accordance with the un-amended Rules,

disposed of the petition reserving liberty to the respondents/State to review any promotion granted to any ineligible or unqualified person.

4. After passing of the aforesaid judgment, petitioners filed representations for considering their cases for the post of Senior Assistants keeping in view the fact that persons junior to them were promoted, but respondents-State vide order dated 10.12.2010, rejected the representations, as a result of which, petitioners were compelled to approach this Court again by way of CWP No. 6116 of 2011-G. Learned Single Bench of this court vide judgment dated 21.6.2012 (Annexure E-2), set-aside order dated 10.12.2010 and directed the respondents to consider the case of the petitioners for promotion to the post of Senior Assistant in accordance with law from the date their juniors were considered and promoted. While passing aforesaid order, learned Single Judge categorically ordered that all consequential benefits, if any, other than seniority be also accorded to the petitioners.

5. Being aggrieved and dissatisfied with aforesaid direction issued by the learned Single Judge, respondents/State preferred LPA No. 468 of 2012, which came to be disposed of on 10.11.2014, whereby the coordinate Bench of this Court, observed that observation made in paras-8 to 10 of the judgment shall not come in the way of the appellants (respondent-State), in considering the case of the petitioners.

6. Since despite passing of the aforesaid judgment dated 10.11.2014 in the aforesaid LPA, no action was taken by the respondents, petitioners approached this Court by way of COPC No 809 of 2015, praying therein for initiation of contempt proceedings against the respondents for their having willfully and intentionally disobeyed the directions contained in the judgment alleged to have been violated. Coordinate Bench of this Court while directing the respondents to pass fresh consideration order categorically observed that respondents have not gone through the judgment dated 27.5.2010 rendered by the coordinate Bench of this Court in CWP(T) No. 8902

of 2008, wherein court having taken note of the submissions made by the then learned Senior Additional Advocate General reserved liberty to the State to review any promotion granted to any ineligible or unqualified person. Court further observed in the order that respondents were to consider the case of the petitioners in terms of the said judgment and pass consideration order. Vide aforesaid order, court directed the respondent to consider case of the petitioner in light of the judgment dated 27.5.2010, passed by coordinate Bench of this Court in CWP(T) No. 8902 of 2008, titled *Nand Lal and Ors v. State of H.P. and Ors*. however fact remains that aforesaid order was again not complied with and as such, petitioners again approached this court by way of contempt petition bearing COPC No. 21 of 2017, wherein pursuant to directions issued by this Court, the then Chief Secretary, Mr. Vineet Chaudhary and Mr. Sunil Chaudhary, Secretary (GAD & SAD) to the Government of Himachal Pradesh, came present in the Court. Coordinate Bench of this Court vide order dated 21.3.2018, disposed of the contempt petition having taken note of the undertaking given by the learned Advocate General under instructions from the aforesaid officers that judgment in question shall be positively implemented within two weeks. While passing aforesaid order, coordinate Bench again reiterated that cases of the original petitioners for promotion were to be considered on the basis of criteria prevalent as on the date when the posts fell vacant subject to the relaxation being granted in the terms of the Rules with respect of the educational qualification. Coordinate Bench of this Court observed in the order that *" abundantly, we clarify that in view of paras 8 and 9 of the judgment rendered in Nand Lal (Supra) would mean that relaxation has to be with regard to the educational qualification."*

7. Since undertaking given in the aforesaid contempt petition was not honoured by the respondents, petitioners herein filed application for revival of the contempt proceedings, which otherwise stood decided on

24.12.2018. Perusal of order dated 24.12.2018, reveals that learned Advocate General on the basis of instructions received from the Secretary (SA) to the Government of Himachal Pradesh vide letter dated 21.9.2018 informed this court that matter was placed before the Council of Ministers in their meeting held on 11.12.2018, wherein cabinet has approved the relaxation in the educational qualifications prescribed in the Recruitment & Promotion Rules of the Senior Assistants for promotion of the petitioners. Learned Advocate General further apprised this Court that benefit of relaxation shall be extended to the petitioners by convening a Review DPC and by re-framing the seniority of the incumbents. On the basis of aforesaid instructions placed on record by the learned Advocate General, application for revival having been filed by the petitioners was disposed of.

8. Though pursuant to aforesaid undertaking, review DPC vide order dated 15.2.2019 (Annexure E-7) promoted the petitioners to the post of Senior Assistants, but on notional basis in the pay-scales from the date shown against their names till the date of their actual joining/working on the post. Since petitioners were not given actual benefits on account of their promotions to the post of Senior Assistants from the due date, they have approached this court in the instant proceedings by way of execution petition, seeking therein direction to the respondents to implement/execute the directions contained in judgment dated 22.6.2008 passed by coordinate Bench of this Court in CWP(T) No. 8902 of 2008, which has attained finality.

9. Pursuant to directions issued vide order dated 7.1.2020 in the instant proceedings, respondents-State has filed compliance affidavit stating therein that judgment sought to be executed in the instant proceedings stands duly complied with and nothing remains to be adjudicated in the instant proceedings. It has been averred in the compliance affidavit that after approval of the cabinet qua relaxation in the educational qualification, matter was placed before DPC for promotion of the petitioners from the dates their

juniors were promoted. The DPC in view of the approval of the Cabinet qua the relaxation in educational qualification recommended the names of the petitioners for promotion to the post of Senior Assistants from the date their junior eligible incumbents were promoted in the year 2004. Respondents claimed that petitioners were promoted as Senior Assistants w.e.f. 22.1.2004 vide office order dated 15.2.2019 by creating the requisite number of supernumerary posts of Senior Assistants and thereafter, their pay was fixed from the retrospective dates vide office memorandum dated 16.2.2019 (Annexure R/II). Respondents hereinafter claimed that after assigning the seniority, the petitioners were promoted as Superintendent Grade-II from the dates their juniors were promoted i.e. w.e.f. 4.4.2015 vide office order dated 21.2.2019, by creating requisite number of supernumerary posts and their pay was fixed and seniority was assigned vide office memorandum dated 23.3.2019. In nutshell, respondents have claimed that petitioners have been extended all the consequential benefits as admissible i.e. seniority, promotion and pay etc. As regards claim of the petitioners regarding payment of arrears is concerned, promotion from the retrospective dates was granted to the petitioners by creating supernumerary posts and since petitioners never worked against the promotional post, they have been not given arrears.

10. Vide order dated 11.3.2020, time was granted to the petitioners to file counter affidavit to the compliance affidavit and opportunity was granted to the respondents to implement the judgment sought to be executed in its letter and spirit. Again, vide communication dated 11.7.2022 addressed to the learned Advocate General from the office of the Principal Secretary (SA), to the Government of Himachal Pradesh, respondents have reiterated that the petitioners had already been released all consequential benefits qua promotion with retrospective dates in relaxation of the Recruitment & Promotion Rules i.e. benefit of seniority, pay fixation from back date and counting of service and the claim of the petitioners regarding payment of arrears is not tenable

because they have been promoted against the supernumerary post created for accommodating them in compliance to judgment sought to be executed and as such, no extra financial commitment is involved in creating of such posts in the shape of increased pay and allowances, pensionary benefits etc. Rather, as per FR-17 an official shall draw pay and allowances attached to his tenure post with effect from the date when the benefit of pay fixation was given on national basis, till the day he/she actually assumed his/her duty.

11. Having heard learned counsel for the parties and perused material available on record, this Court finds that despite repeated assurances and undertaking given to this court, respondents have failed to comply with judgment sought to be executed in its letter and spirit, whereby it was categorically reiterated that vacancies arose prior to the amendment of the rules shall be fulfilled only in accordance with the un-amended rules. Since the respondents ignoring the mandate given by the Hon'ble Apex Court in **A. Manoharan's** case (supra), wherein it was held that only those vacancies which existed prior to the amendment of the Rules should be filled up in accordance with the Rules prevalent at the relevant time and only those vacancies which arose after the amendment alone can be filled up in terms of the amended Rules, Coordinate Bench of this Court while passing judgment sought to be executed specifically directed the State to review any promotion granted to any ineligible or unqualified person and thereafter, fill up vacancies which arose prior to the amendment of the rules in accordance with the unamended rules. Since despite there being aforesaid clear direction issued by the coordinate Bench of this Court, representation filed by the petitioners was rejected, learned Single Judge again vide judgment dated 21.6.2012, passed in CWP No. 6116 of 2011 set aside the order dated 10.12.2010, passed by the respondents on the representations of the petitioners and again directed to consider the cases of the petitioners for promotion to the post of Senior Assistance in accordance with the law from the date their juniors were

considered and promoted. While passing aforesaid judgment, learned Single Judge categorically ordered that all consequential benefits, if any, other than seniority be also accorded to the petitioners, however fact remains that aforesaid judgment though was taken in appeal by way of LPA No. 468 of 2012, but same was not interfered with save and except one observation that *"observation made in paras 8 to 10 shall not come in the way of the appellant in considering the cases of the petitioners."* Subsequently, in COPC No. 809 of 2015, coordinate Bench of this Court while passing order dated 9.11.2016, clarified that respondents were required to consider the case of the petitioners in terms of the judgment dated 27.5.2010 rendered by Division Bench in CWP(T) No. 8902 of 2008, which was though laid challenge, but not interfered with.

12. Leaving everything aside, the then Chief Secretary and the then Secretary (GAD) Government of Himachal Pradesh, to the Government of Himachal Pradesh, came present in the Court on 21.3.2018 in COPC No. 21 of 2017 and on the basis of their instructions, learned Advocate General undertook before this court to implement the judgment in question in its letter and spirit within two weeks. Division Bench while passing aforesaid order in contempt petition clarified that in view of the paras-8 and 9 of the judgment rendered in **Nand Lal** case (supra), relaxation has to be with regard to the educational qualification.

13. Though respondents specifically undertook before the Division Bench at the time of the passing of the order dated 21.3.2018 in COPC No. 21 of 2017 to implement the judgment within two weeks, but failed to honour their commitment and as such, application for revival of the contempt proceedings came to be filed, wherein learned Advocate General apprised this Court that Cabinet has approved relaxation in the educational qualification prescribed under the Recruitment & Promotion Rules of the Senior Assistant for the promotion of the petitioners, as a consequence of which, petitioners

came to be entitled for promotion in relaxation of educational qualification prescribed under the Recruitment & Promotion Rules. Review DPC though ordered for their promotions to the post of Senior Assistants and thereafter to Superintendent Grade-II, but on notional basis. Since though repeatedly, it came to be clarified from this Court that vacancies existing prior to the amendment of Recruitment & Promotion Rules should be filled upon only on the basis of unamended rules and according to such Rules, petitioners herein were entitled to be promoted, but yet respondents promoted the persons junior to them on the basis of amended rules and as such, learned Single Judge while setting aside order dated 10.12.2010 in CWP No. 6116 of 2011, categorically observed that all the consequential benefits, if any, other than the seniority be also accorded to the petitioners, meaning thereby, petitioners were held entitled to all the consequential benefits consequent upon their promotion to the posts of Senior Assistant and thereafter Superintendent Grade-II.

14. In the case at hand, though petitioners have been promoted to the post of Senior Assistants and thereafter, to the post of Superintendent Grade-II, from the date their juniors were promoted against the post in question, but they have been denied actual financial benefits on the ground that they have been promoted against the supernumerary post created for the purpose of promoting them and they have not worked against such posts and as such, they are not entitled to financial benefits. However, this court finds force in the submission of Mr. Karan Singh Parmar, learned counsel representing the petitioners that since this Court having taken note of illegality committed by the respondents in promoting the persons junior to the petitioners to the post of Senior Assistants existing prior to the amendment of Recruitment & Promotion Rules, specifically clarified in para 10 of the judgment dated 21.6.2012 passed in CWP No. 6116 of 2011 that the petitioners shall be held entitled to all the consequential benefits, respondents

had no option but to grant all the consequential benefits including the arrears while promoting them to the posts of Senior Assistants and thereafter Superintendent Grade-II. Though in the case at hand, respondents have tried to carve out a case that since with a view to comply with judgment sought to be executed, Government after relaxing the educational qualification in Recruitment & Promotion Rules, created supernumerary post and thereafter petitioners were promoted against the supernumerary post of Senior Assistant and Superintendent, they cannot be held entitled for consequential benefits especially arrears but such plea may not be available to the respondents for the reason that this Court having taken note of the fact that respondents wrongly promoted the persons junior against the post of Senior Assistant on the basis of amended Recruitment & Promotion Rules, reserved liberty to the respondents to review any promotion granted to the ineligible and unqualified person. Since posts existing prior to the amendment of Recruitment & Promotion Rules are /were to be filled as per the unamended rules as has been held by the Hon'ble Apex Court in the case of **A. Manoharan** (supra), Mr. R.K. Sharma, the then learned Senior Additional Advocate General, himself submitted before the court at the time of passing of order dated 27.5.2010, State may be given liberty to review any promotion granted to any ineligible or unqualified person in terms of the aforesaid judgment, which was though laid challenge repeatedly, but same was not interfered with.

15. Having scanned the entire material available on record as well as taken note of the factum with regard to repeated opportunities granted to the respondents to comply with/execute the judgment, this Court has reason to presume and believe that respondents are purposely and willfully not implementing the judgment with a view to defeat the genuine claim of the petitioners, which has accrued to them pursuant to directions issued by the Division Bench of this Court in judgment dated 27.5.2010, however, before passing any harsh order, we direct the respondents to comply with/release all

financial benefits to the petitioners pursuant to their promotion to the post of Senior Assistants from the due date within four weeks, from the date of receipt of this order, failing which petitioners would be at liberty to file application, furnishing therein details of property of the department concerned as well as names of the erring officials/officers, enabling this court to pass order of attachment of property and salary of the officials towards execution and implementation of the judgment. All pending application shall also stand disposed of accordingly.

List for compliance in the ***1st week of January, 2023***.

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

Harinder Singh

.....Petitioner.

Versus

State of Himachal Pradesh and Ors.

.....Respondents

For the Petitioner: Mr. Ashwani Gupta, Advocate.

For the respondents: Mr. Sudhir Bhatnagar, Additional Advocate General, for the State.
Ms. Shashi Kiran, Advocate, for R-3.

Civil Writ Petition (Original Application)
No. 3430 of 2020
Date of Decision: 17.11.2022

General Provident Fund Rules - Rule 4- Work charge service rendered prior to regularization- Service rendered on work charge basis followed by the regular appointment is to be counted towards qualifying service for the purpose of pension and other retiral benefits. Since on account of work charge service rendered prior to regularization, petitioner became entitled to pension under the old Scheme, he automatically becomes entitled to be governed by the Old Pension Scheme and as such, petitioner is entitled to make contribution towards the GPF, for which he has already been allotted GPF number.(Paras 3 and 5)

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Petitioner herein was appointed as Chainman on daily wage basis in the year, 1992 and was granted work charge status in the year, 2002. Petitioner after being regularized against the aforesaid post in the year, 2007,

applied for allotment of GPF Account Number on the prescribed application form. In the said form, petitioner expressed his willingness to deduct an amount of Rs. 4000/- per month from his salary to be remitted in his GPF No. HLR-7822 (Annexure A-1). Since despite there being allotment of GPF number, respondents failed to get the amount from the salary of the petitioner deducted to GPF number, petitioner made several requests but in vain and as such, he approached the erstwhile HP State Administrative Tribunal by way of Original Application No.2736 of 2018, which now on account of abolishment of the Tribunal, has been transferred to his court for adjudication, praying therein for following main relief:

> "i) That the respondent may kindly be directed to deduct the GPF from the salary of the applicant every month and remit the same to his GPF Account No. HLR-7822 alloted by the respondent No.3."

Having heard learned counsel for the parties and perused the material available on record, especially reply filed by the respondents, this Court finds that there is no dispute that though petitioner was initially appointed as Chainman on daily wage basis, but his services were regularized in the year, 2007 after being conferred work charge status in the year, 2002 and vide order dated 26.3.2013, GPF Number was allotted in his favour. It is also not in dispute that at the time of allotment of the GPF Number, petitioner had put in more than six years of service as Chainman on regular basis with the respondent department.

Reply filed by respondents No. 1 and 2 reveals that GPF deduction was not started because Under Secretary (Revenue) to the Government of Himachal Pradesh intimated vide letter No.Rev-A(E) 3-159/2011 dated 2.3.2013 that issue regarding deduction of either GPF or CPF from the salary of Chainmen from the dates of granting them work charge status, was taken up with the Finance Department for opinion, who after due deliberation has

observed that since Central Civil Services (Pension) Rules, 1972 are applicable only to regular employees appointed before 14.5.2003 in terms of Rule 2 of these Rules, all government employees appointed on or after 15.5.2003, on regular basis are covered under the Contributory Pension Scheme (also called New Pension Scheme) and they are governed by New Contributory Pension Rules, 2006.

Mr. A.K. Gupta, Senior Advocate, appearing on behalf of the petitioner, argued that erstwhile HP State Administrative Tribunal vide order dated 31.7.2017, passed in OA No. 6681 of 2016, *Matwar Singh v. State of Himachal Pradesh and Ors*, which has been further upheld by the Division Bench of this Court vide judgment dated 18.12.2018, in CWP No. 2384 of 2018, titled *State of Himachal Pradesh and Ors v. Matwar Singh*, has held that work charge service followed by the regular appointment is to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. If it is so, petitioner is entitled to be governed by the Old Pension Scheme. He submitted that since petitioner was conferred work charge status prior to promulgation of New Pension Scheme, he was rightly allotted GPF number by the office of Accountant General. He also invited attention of this court to Rule 4 of General Provident Fund Rules, perusal whereof reveals that all temporary government servants after a continuous service of one year are eligible to contribute/subscribe to the old Pension Scheme. Rule 4 of the aforesaid rules reads as under:

> " Rule-4: CONDITIONS OF ELIGIBILITY
> 4. Conditions of eligibility - All temporary Government servants after a continuous service of one year, all re-employed pensioners (other than those eligible for admission to the Contributory Provident Fund) and all permanent Government servants shall subscribe to the Fund:
> Provided that no such servant as has been required or permitted to subscribe to a Contributory Provident Fund shall be eligible to join or continue as a subscriber to the Fund, while he retains his right to subscribe to such a Fund:

> Provided further that a temporary Government servant, who is borne on an establishment or factory to which the provisions of Employees' Provident Funds Scheme, 1952, framed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), would apply or would have applied but for the exemption granted under Section 17 of the said Act, shall subscribe to the General Provident Fund if he has completed six months' continuous service or has actually worked for not less than 120 days during a period of six months or less in such establishment or factory or in any other establishment or factory to which the said Act applies, under the same employer or partly in one and partly in the other.
>
> 1[Provided also that nothing contained in these rules shall apply to Government servant appointed on or after the 1 st day of January, 2004.]
>
> EXPLANATION. - For the purposes of this rule "continuous service" shall have the same meaning assigned to it in the Employees' Provident Funds Scheme, 1952, and the period of work for 120 days shall be computed in the manner specified in the said scheme and shall be certified by the employer."

Mr. Sudhir Bhatnagar, learned Additional Advocate General, while refuting the aforesaid submission made by the learned counsel for the petitioner argued that since services of the petitioner were regularized in the year, 2007, he could not have been allotted GPF number, which in case of the petitioner was inadvertently issued. However, learned Additional Advocate General was unable to dispute that on account of judgment rendered by the Division Bench of this Court in CWP No. 2384 of 2018, *State of Himachal Pradesh and Ors v. Matwar Singh and Anr*, service rendered on work charge basis followed by the regular appointment is to be counted towards qualifying service for the purpose of pension and other retiral benefits. If it is so, petitioner otherwise is eligible to contribute the GPF towards Old Pension Scheme. Admittedly, if service rendered on work charge basis by the petitioner is taken into consideration, that would commence from the year, 2002 i.e. much prior to promulgation of New Pension Scheme, whereby all government employees appointed on or after 15.5.2003 on regular basis came

to be held entitled to subscribe to Contributory Pension Scheme. Since on account of work charge service rendered prior to regularization, petitioner became entitled to pension under the old Scheme, he automatically becomes entitled to be governed by the Old Pension Scheme and as such, petitioner is entitled to make contribution towards the GPF, for which he has already been allotted GPF number.

At this stage, it would be apt to take note of the judgment dated 18.12.2018 passed in CWP No.2384 of 2018 (supra), relevant portion whereof reads as under:

> 2. The facts are not in dispute. The private respondent joined the petitioners' Department as daily waged worker in the year 1992 at Saraswati Nagar Range under the jurisdiction of the Divisional Forest Officer, Forest Division, Rohru, Distt. Shimla. He was subsequently conferred status of work charge employee w.e.f. 01.05.2002. His services were later on regularized as Forest Worker w.e.f. 06.09.2007 as per the policy of the State Government. It appears that the respondent's claim for grant of pension was declined on the ground that he did not possess the requisite qualifying service. It is in this backdrop that the respondent approached the Tribunal and his claim has been accepted.
>
> 3. It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/struck down, in the light of view taken by this Court in CWP No.6167 of 2017, titled Sukru Ram vs. State of H.P. & others, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in Keshar Chand vs. State of Punjab through the Secretary P.W.D. B & R Chandigarh and others, (1988) 94(2) PLR 223, also dealt with an identical issue where Rule 3.17(ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the

> purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court.
> 4. For the afore-stated reasons, we do not find any error in the impugned order passed by the Tribunal. Accordingly, the writ petition is dismissed alongwith pending application(s), if any."

Consequently, in view of the above, this Court finds merit in the present petition and accordingly, same is allowed and respondents are directed to forthwith deduct the GPF from the salary of the petitioner every month and remit the same to his GPF Account No. HLR-7822, which has been already allotted to him by respondent No.3. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Between:-

SH. RAJIV CHANDEL S/O SH. LAIQ RAM,
RESIDEN OF VILLAGE TALWARD,
P.O. CHANDPUR, TEHSIL SADAR,
DISTRICT BILASPUR, H.P.

...PETITIONER

(BY MS. ARCHANA DUTT, ADVOCATE)

AND

2. STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (INDUSTRIES)
TO THE GOVERNMENT OF H.P.,
SHIMLA-2.

2. THE DIRECTOR OF INDUSTRIES,
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-1.

3. THE PRODUCTION OFFICER,
SILK SEED DIVISION,
GHUMAWIN, DISTRICT BILASPUR, H.P.

. RESPONDENTS.

(SH.DESH RAJ THAKUR, ADDL. ADVOCATE GENERAL WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 7697OF 2013
RESERVED ON: 20.10.2022
DECIDED ON: 31.10.2022

Constitution of India, 1950- Article 226- Affirmed the Order passed by Presiding Judge, Labour Court-cum-Industrial Tribunal- It is more than settled that while exercising the jurisdiction under Article 226 of the Constitution, this Court is not to sit as Court of appeal over the decisions of Tribunals constituted under special laws. It is only in the case where the

award passed by the Labour Court-cum-Industrial Tribunal suffers from absolute illegality or perversity that interference may be required.(Para 11)

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

O R D E R

By way of instant petition, petitioner has assailed award dated 01.07.2013 passed by learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. (for short,"the Tribunal") in Reference No. 210/2012.

2. Petitioner raised an industrial dispute and a reference was made to learned Tribunal by the appropriate Government in following terms:

> *"Whether termination of the services of Shri Rajiv Chandel S/o Sh. Laiq Ram, R/o Village Talward, P.O. Chandpur, Tehsil Sadar, District Bilaspur, H.P. by the (1) The Director of Industries, Shimla-1 (2) The Production Officer, Silk Seed Division, Ghumarwin, District Bilaspur, H.P. w.e.f. 28.8.2008 without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, past service benefits, seniority and amount of compensation the above worker is entitled to from the above employer?"*

3. Petitioner claimed before the learned Tribunal that he had worked as daily wage Beldar from 3.4.2002 till 28.8.2008 continuously in Silk Centre, KothiMajher. He was transferred as daily wage worker to the Government Seri Culture Centre, Kandrour in March, 2003. Petitioner thus laid challenge to the termination of his services being in violation of Sections 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947.

4. Respondents, by way of reply filed before the Tribunal, admitted that the petitioner was engaged as daily wager w.e.f. 3.4.2002. The respondents further submitted that the engagement of petitioner was in a

project named as 'Gold Mines'. According to respondents, petitioner had worked in the aforesaid project on daily wages till 30.6.2004 whereafter his services were disengaged for paucity of work. Later, petitioner worked purely on contract basis as Chowkidar at Government Seri Culture Centre, Kandrour from 1.5.2005 till 28.8.2008. The said engagement of petitioner was stated to be result of an offer made by him to work purely on contract basis at the rate of Rs.1800/- per month. The sanction for the post of Chowkidar, against which petitioner had worked, was withdrawn on closure of CDV project.

5. Learned Tribunal held that the petitioner worked from 26.3.2002 to 30.6.2004 on daily wage basis in Gold Mine Project. Reliance was placed on the mandays chart,Ext. RW-1/B, pertaining to petitioner. It was also held that as per seniority list, petitioner was the junior most and three other persons senior to him were also disengaged even prior to the disengagement of the petitioner in the project. Further, it was held that on 2.5.2005 vide letter Ext.RW-1/E the Incharge, Government Silk Centre, Kandrour sought permission to engage services of a Chowkidar on contract basis. The requisite sanction/permission was accorded on 11.7.2005 vide Ext. RW-1/F to engage services of Store Chowkidar purely on contractual basis after inviting the quotations. Three persons including petitioner submitted their respective quotations and the rate quoted by petitioner being lowest, he was engaged as a Chowkidar purely on contract at Rs.1800/- per month. The services of petitioner as Chowkidar were dispensed with after 28.08.2008 as the store articles were disbursed/ distributed and there was no further requirement of such job.

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

7. It is on record that the petitioner worked on daily wage basis in Gold Mine Project w.e.f. 03.04.2002 till 30.06.2004. There is nothing to suggest that the petitioner continued to work in the same project thereafter.

Rather, the record reveals that petitioner remained disengaged from 30.06.2004 till 01.05.2005, whereafter the engagement of petitioner was as contract Chowkidar on specific terms. The engagement of petitioner as Chowkidar was in pursuance to specific time bound requirement to manage the stores and such requirement was placed by the Incharge Government Silk Centre, Kandrour vide letter Ext. RW-1/E on 02.05.2005. The proposal was accepted by respondent No.2 vide Annexure RW-1/F dated 11.07.2005. Resultantly, the quotations were invited for the grant of work as Chowkidar from interested candidates. The petitioner was one of the three candidates, who submitted their quotations and the rate of petitioner was found lowest. Petitioner accordingly was engaged as Chowkidar by the Incharge, Government Silk Centre, Kandrour on payment of fixed monthly amount of Rs.1800/-.

8. Thus, the earlier engagement of petitioner in Gold Mine Project till 30.06.2004 cannot be said to have continued w.e.f. 01.05.2005, which definitely was a distinct and separate engagement as Chowkidar on different terms. Petitioner did not challenge his disengagement from Gold Mine Project and the decision of respondents in that respect attained finality. The engagement of petitioner as Chowkidar was purely contractual and after the work came to an end, the disengagement of petitioner cannot be said to be violative of his rights under the Industrial Disputes Act or otherwise.

9. Learned Tribunal has passed the award after taking into consideration the material placed on record by the parties. I have not found any illegality or perversity in the impugned award. The findings recorded by learned Tribunal are borne from the material on record.

10. Learned counsel for the petitioner has tried to take benefit from the cross-examination of RW-1 by asserting that the said witness had admitted the continuous employment of petitioner from 26.03.2002 till 27.08.2008. The contentions so raised, however, cannot be countenanced for

the reason that the witness (RW-1) had also clarified that the petitioner had worked in the Gold Mine Project till 30.06.2004 and thereafter he worked from 01.05.2005 to 27.08.2008 as Chowkidar on contract. Hence, there is no continuity in the service. Petitioner having been disengaged from his daily wage job in Gold Mine Project had remained silent and had thereafter accepted the new assignment as Chowkidar on contract basis without any reservation.

11. It is more than settled that while exercising the jurisdiction under Article 226 of the Constitution, this Court is not to sit as Court of appeal over the decisions of Tribunals constituted under special laws. It is only in the case where the award passed by the Labour Court-cum-Industrial Tribunal suffers from absolute illegality or perversity that interference may be required. In the given facts of the case, no interference is warranted in exercise of writ jurisdiction. Accordingly, the petition is dismissed. Pending application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE A.A. SAYED, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

GANPATI ROPEWAYS PVT. LTD. WITH ITS REGISTERED AND HEAD OFFICE AT (NANDI COMMERCIAL) SUITE-4B, 4TH FLOOR, 14-B, CAMAC STREET, KOLKATA-700017, THROUGH SH. RAVI SETHI, ITS CHIEF EXECUTIVE OFFICER.

……PETITIONER

(BY SH. ARJUN LALL, ADVOCATE)

AND

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

2. THE DIRECTOR, DEPARTMENT OF TOURISM AND CIVIL AVIATION, HIMACHAL PRADESH, SDA COMPLEX, KASUMPTI, SHIMLA-171009

……RESPONDENTS

(BY MR. VIKAS RATHORE, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO.7475 OF 2010
Reserved on: 13.10.2022
Decided on: 03.11.2022

Rules for Grant of Incentives to Tourism Industry in H.P., 1993, Doctrine of legitimate expectation and promissory estoppel- The 1993 Rules shall be deemed to have been continued and in force for grant of incentives to the petitioner even after issuance of 2001 notification. The explanation accorded by the State in denying incentives to the petitioner under the 1993 Rules on

the ground that the petitioner was not entitled to the benefits under the said Rules after coming into force of 30.04.2001 notification cannot be accepted. There is no such embargo in the notification issued on 30.04.2001. Not inclined to interfere on the ground of delay alone when the judgment is based on legally sustainable principles. The delay of the respondent in filing a writ petition by itself should not defeat the claim unless the position of the State has been so altered that it cannot be retracted on account of a lapse of time or the inaction of the writ petitioner.(Paras 4(v) and 4(vi).

Cases referred:

The State of Jharkhand and Ors. Vs. Brahmputra Matallics Ltd, Ranchi and Anr. 2020 (13) Scale 500;

This petition coming on for hearing this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

Simply put the petitioner's grievance is that it had acted upon the promise extended by the respondents State Government under the Rules in force at the time and changed its position. The respondents though performed some of the obligations, but later on refused to honour their commitments under the Rules giving cause of action to the petitioner to file this petition, seeking implementation of the Rules vis-a-vis benefits to be given to the petitioner under them.

2. Facts:-

2(i) Tourism was declared an industry in Himachal Pradesh on 05.12.1984. Three sets of rules providing incentives to tourism industry in H.P. came into play viz:- (i) H.P. Grant of Incentives to the Tourism Industry Rules, 1984;(ii) H.P. Grant of Incentives to Paying Guest House Scheme, 1988 and (iii) H.P. Grant of Incentives to Dhaba Scheme, 1988. On 26.07.1993 in supersession of above Rules, the respondents notified new Rules for Grant of Incentives to Tourism Industry in H.P. (in short the 1993 Rules).

2(ii) The 1993 Rules came into force w.e.f. 01.08.1993. All new approved tourism units as defined under the rules, which had commenced operations within a period of ten years from the appointed day i.e. from 01.08.1993 up to 01.08.2003 were eligible for grant of incentives mentioned therein. The eligibility clause of the Rules runs as under: -

"*1.2 Eligibility:*

(a) All the approved tourism units as defined under these Rules shall be eligible for grant of incentives.

(d) These incentives will be available only to those New Tourism Units which commence operations within the period from the appointed day up to 01.03.2003 (i.e. for 10 years) provided that this condition will not be applicable for incentives under Rules 17 and 22.

2.1 Under these rules unless the context otherwise requires: -

2.1(w) "Tourism Unit" means commercial establishment in Himachal Pradesh providing facilities/services to the tourists and will include the following:
1 to 7. ……..
(8) Ropeways."

Rule 1.2(a) was not to be made applicable for incentives available under Rules 17 to 22. Rule 17 with the Heading "Publicity Assistance" aims to encourage participation of tourism units, tour operators & travel agents in publicity of State and for that purpose grants subsidies. Rule 18 provides incentives for tiny tourism units. Tiny tourism unit, as per Rule 2.1 (t) means a small scale tourism unit having fixed capital investment of Rs.10,00,000/- or less. Ropeways is included in the list of tourism units under definition clause 2.1(w)(8). Several incentives have been made available to the tourism units in form of subsidies, concessions and exemptions under the 1993 Rules.

2(iii) It is the case of the petitioner that in view of the incentives granted by the State under the 1993 Rules, it established a ropeway unit, in the name of 'Ganpati Ropeways' at Sh.Naina Devi Ji, District Bilaspur, H.P.. For the purpose of grant of incentives, this area fell under Category 'A' of the Rules. 'Ropeways' has been included in list of 'Priority Tourism Projects' in Annexure-II of the Rules and as such is entitled to incentives under Rule 16 of the Rules. Petitioner's ropeways unit became operational in August, 1997.

2(iv) Petitioner claimed and was granted several incentives under the Rules by the respondent-Department, however, after sometime, the grant of incentives/payments become irregular and later on stopped altogether. It is in this context, the petitioner filed this writ petition in the year 2010 for grant of following substantive reliefs: -

> *"(a) Quash Annexure P-L i.e Communication bearing No.7-31/93-TS-II-8462, dated 11.11.2009, issued by Respondent No.2 to the Petitioner with consequential relief in favour of the Petitioner Company.*
>
> *(b) Direct the respondents No.1 and 2 to release the arears of Interest Subsidy, Electricity Duty Paid Subsidy, Advertisement and publicity Expenses Subsidy, Reimbursement/ Subsidy qua the Diesel Generating Set Purchased and Installed by the Petitioner and the Subsidy/ Reimbursement of Charges in respect of amount paid for Feasibility Report, alongwith the interest on the above, totaling in the sum of Rs.26,10,068.68 paise, which amount is due and payable to the Petitioner Company as per and in accordance with the provisions of the 'Rules for grant of Incentives to Tourism Industry in Himachal Pradesh, 1993."*

3. Contentions

Petitioner's case

3(i)(a) Sh.Arjun Lall, Learned counsel for the petitioner contended that taking into consideration the incentives permissible to the ropeways unit

under the 1993 Rules, the petitioner started constructing its ropeway project at Sh.Naina Devi Ji in District Bilaspur, H.P. The commercial operations of this ropeways unit commenced in the year 1997. In accordance with the Incentive Rules 1993 the petitioner had been forwarding its claims to the respondents from time to time. The claims forwarded by the petitioner have been made part of the petition. In response thereto, the petitioner kept on receiving the incentives/payments from the government from time to time. Learned counsel also drew attention to one such sanction order dated 28.02.2001 (page 132 of the petition), whereby the respondents sanctioned and later released an amount of Rs.16,56,401/- for 3% interest subsidy against loan taken by the petitioner. Learned counsel stated that the last such incentive in form of bank draft dated 06.07.2005 for Rs.1,26,949/- was received by the petitioner on 12.07.2005 on account of interest subsidy. Thereafter, no payment was made to the petitioner. The petitioner had repeatedly requested in writing to the respondents to release the unpaid incentives to it under the 1993 Rules. In response to the petitioner's last communications dated 28.08.2009 and 26.10.2009, the respondents vide impugned office letter dated 11.11.2009 (Annexure P-L) declined to grant further incentives giving following reason: -

"*No.7-31/93-TSM-II8462*
Department of Tourism and Civil Aviation,
Himachal Pradesh, Shimla-171009

To

M/s Ganpati Ropeways (P) Ltd.
Nandi Commercial Suite-4B, 4th Floor,
14-B, Camac Street, Kolkata-700071.

Dated: Shimla-171009, the 11/11/2009

"Subject: Claim of Incentives.
Sir,

Please refer to your letter dated 28.08.2009 and 26.10.2009 on the above mentioned subject.

In this regard, it is stated that the H.P. Govt. "Scheme of Incentives to Tourism Industry, 1993" have been re-appealed and there is no provision to provide subsidy. In addition, there is no budget provision available with the Department, therefore it is not possible to release the subsidy.

Yours faithfully,
(Director)
Tourism and Civil Aviation
Himachal Pradesh, Shimla-9"

3(i)(b) Learned counsel for the petitioner further submitted that in all the respondents had paid Rs.23,32,841/- to the petitioner under the1993 Rules. Whereas, incentives amounting to Rs.26,10,068/- as detailed in para-7 of the petitioner, still remain to be paid to it. Para-7 of the petition runs as under: -

"7. That the Petitioner Company is owed the following amounts from the respondents under various heads by way of incentives and subsidies etc. etc. as detailed herein below:

(a) *<u>Amount owed by way of Interest Subsidy Incentive</u>:*

A sum of Rs.6,67,159/- is owed by the respondents, to the Petitioner Company, by way of Principal Amount, on account of incentives due to it from the respondents, under this Head, which has not been paid till date. On the aforementioned amount, the Petitioner Company is also entitled to interest @12%, which comes to a sum of Rs.7.05,902.60 paise. Hence the Petitioner is entitled to a total sum of Rs. 13,73,061.60 paise from the Respondents in this account. Calculations in this respect are annexed hereto as Annexure PD.

(b) *<u>Amount owed on account of Electricity Duty Subsidy</u>:*

A sum of Rs.1,51,021/- is owed by the respondents, to the Petitioner Company on account of the Principal Amount of Subsidy due to it on account of reimbursement of Electricity Duty paid by the Petitioner Company to the HP State Electricity Board, which has not been paid till date. Copy of the calculations is annexed hereto as Annexure PE. On the aforementioned amount, the Petitioner Company is also entitled to interest @12%, which comes to a sum of Rs.1,51,356/-. Calculations in this respect are annexed hereto as Annexure PF. Hence the Petitioner is entitled to a total sum of Rs.3,02,377/- from the Respondents in this account.

(c) *Amount owed on account of Advertisement and Publicity subsidy:-*

A sum of Rs.3.50,000/- (relating to advertisement subsidy) as well as a sum of Rs.11,68,180/- (relating to publicity subsidy) is owed by the respondents, to the Petitioner Company, as per calculations annexed hereto as Annexure PG. On the aforementioned amount, the Petitioner Company is also entitled to interest @12%, which comes to a sum of Rs.3,72,000/-, as per Annexure PH. Hence the Petitioner is entitled to a total sum of Rs.7,22,000/-, from the Respondents in this account.

(d) *Amount owed on account of Reimbursement/ Subsidy qua the Diesel Generating Set Purchased and Installed by the Petitioner at its Unit:*

A sum of Rs.1,97,630/- is owed by the respondents, to the Petitioner Company on account of subsidy/ reimbursement qua the Diesel

Generating Set, paid by the Petitioner and which is due from the respondents, which has not been paid till date.

(e) Amount owed on account of Reimbursement of Charges paid for Feasibility Report:

A sum of Rs.15,000/- is owed by the respondents, to the Petitioner Company on account of subsidy/ reimbursement relating to the Feasibility Report, paid by the Petitioner and which is due from the respondents, which has not been paid till date.

Hence the total amount that the Petitioner Company is entitled to receive by way of subsidies and the interest thereupon, as per the aforementioned Incentive Rules of the State of Himachal Pradesh, comes to Rs.26,10,068/-, which the respondents are withholding without any reason whatsoever, from the Petitioner Company, in a highly arbitrary and discriminatory manner. Other Tourism Units have received the subsidies due to them and to which they were entitled, under the aforementioned Incentive Rules, from the Respondent State and the Respondent Authorities, but for reasons best known to them, the same are being illegally withheld in so far as the Petitioner Company is concerned. The correspondence addressed to the Respondents, alongwith the supporting documents, which were duly received by the Respondent No.2's office, in this regard, is annexed hereto as Annexure PJ (Colly)."

3(i)(c) The gist of petitioner's arguments is that it had displaced itself to its disadvantage by investing heavily in the 'Tourism Ropeways Project' in the respondent State on the promises held out by the respondents State in its

1993 Incentives Rules. The action of the respondents in refusing payments of amounts due to the petitioner Company under the 1993 Rules is arbitrary. The respondents are estopped by their acts, deeds and conduct from declining to make the payments in question to the petitioner Company.

3(ii) Stand of respondents

3(ii)(a) The respondents-State has not disputed the facts projected by the petitioner. It has not denied that petitioner was entitled to incentives, exemptions and concessions under the 1993 Rules. It has also not denied that some incentives, exemptions, concessions etc. were made available to the petitioner under the 1993 Rules. The facts and figures given by the petitioner in the petition have not been specifically denied. However, in response to para-7 of the petition extracted earlier, following averments have been made by the respondents in their reply: -

> *"Para-7: That the contents of this para which pertains to record do not call for any reply, however, contrary submissions are wrong and hence denied vehemently. The amount is based on presumption and assumption and has no sanctity or liability of the replying respondents. The alleged communications have duly been replied by the replying respondents. No amount as alleged has illegally been withhold by the replying respondents. The petitioner is not entitled for any incentives or subsidies as alleged due to repealing of the which stake the claim of the petitioner and the same is based on hypothesis and conjectures."*

3(ii)(b) The essence of stand of the respondents-State is that the 1993 Rules were repealed by a notification dated 30.04.2001. In view of repeal of the 1993 Rules, incentives in terms of the 1993 Rules, could not be continued to be paid to the petitioner. Apart from the ground of repeal of the 1993 Rules, additional premise of petition being barred by delay and latches has also been taken.

4. Observations

Before analyzing the factual scenario of the case, it would be appropriate to first make a reference to a judgment passed by the Hon'ble Apex Court on 01.12.2020 in **2020 (13) Scale 500**, **The State of Jharkhand and Ors. Versus Brahmputra Matallics Ltd, Ranchi and Anr.** The respondent in that case put forward its entitlement to a rebate/deduction from electricity duty in terms of the representation held out by the State in its industrial policy 2012. It was contended that denial of exemption by the State government during the years 2011-2014 was contrary to the doctrine of promissory estoppel. The Hon'ble Apex Court traced out the origin and evolution of doctrine of promissory estoppel in several judicial precedents. The Court also traversed from doctrine of promissory estoppel to the doctrine of legitimate expectation and referred to various Judgments on the issue in the timeline. It was observed that the State had held out a solemn representation founded on its stated desire to encourage industrialization in the State. Having made a solemn representation, it was manifestly unfair and arbitrary to deprive industrial units within the State of their legitimate entitlement. The Court further held that it is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy 2012. The state must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. The State is bound to act fairly, in a transparent manner in its action. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts. The relevant paras of the judgment are extracted hereinafter: -

"H.6 Expectations breached by the State of Jharkhand

43. Applying the abovementioned principles in the present case, we are unable to perceive any substance in the submission of the State which was urged in defense before the High Court. Not only did the State in the present case hold out a solemn representation, this representation was founded on its stated desire to encourage industrialization in the State. The policy document spelt out:

(i) The nature of the incentives;

(ii) The period during which the incentives would be available; and

(iii) The time limit within which follow-up action would be taken by the State government through its departments for implementing the Industrial Policy 2012.

44. The State having held out a solemn representation in the above terms, it would be manifestly unfair and arbitrary to deprive industrial units within the State of their legitimate entitlement. The State government did as a matter of fact, issue a statutory notification under Section 9 but by doing so prospectively with effect from 8 January 2015 it negated the nature of the representation which was held out in the Industrial Policy 2012. Absolutely no justification bearing on reasons of policy or public interest has been offered before the High Court or before this Court for the delay in issuing a notification. The pleadings are completely silent on the reasons for the delay on the part of the government and offer no justification for making the exemption prospective, contrary to the terms of the representation held out in the Industrial Policy 2012.

45. It is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy 2012. Both the accountability of the State and the solemn obligation which it undertook in terms of the policy document militate against accepting such a notion of state power. The state must discard

the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest. This conception of state power has been recognized by this Court in a consistent line of decisions. As an illustration, we would like to extract this Court's observations in National Buildings Construction Corporation (supra):

> *"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."*

46. Therefore, it is clear that the State had made a representation to the respondent and similarly situated industrial units under the Industrial Policy 2012. This representation gave rise to a legitimate expectation on their behalf, that they would be offered a 50 per cent rebate/deduction in electricity duty for the next five years. However, due to the failure to issue a notification within the stipulated time and by the grant of the exemption only prospectively, the expectation and trust in the State stood violated. Since the State has offered no justification for the delay in issuance of the notification, or provided reasons for it being in public interest, we hold that such a course of action by the State is arbitrary and is violative of Article 14."

4(i) It is admitted position in the instant case that on 26.07.1993, the State had notified Rules for grant of incentives to tourism industry in H.P. and 'Ropeways' was one of the industry covered by 'tourism units' defined

under Rule 2.1 (w)(8). Under the 1993 Rules, the approved industrial unit is entitled to incentives, exemptions and concessions as detailed therein.

4(ii) It is also an admitted position that the petitioner set-up its ropeways unit at Sh.Naina Devi Ji in District Bilaspur, H.P.. This tourism unit became functional in August 1997. It has not been denied that under the 1993 Rules, the unit was entitled to several incentives for a period of ten years.

4**(iii)** This is also not denied that an amount of Rs.23,32,841/- was paid to the petitioner in form of several incentives/exemptions/concessions etc. under the incentive Rules 1993. Last payment of Rs.1,26,949/- towards the incentives under the 1993 Rules was paid to the petitioner on 12.07.2005.

4(iv) The reason put forth by the State in denying the petitioner the remaining incentives under the 1993 Rules is that Rules framed under 1993 notification were repealed by notification dated 30.04.20001, hence, the benefits under the repealed notification could not be continued to be given to the petitioner. It will be appropriate to extract hereinafter the stand of the State from different paras of its reply: -

> *"Preliminary Objections*
>
> *2. That the petitioner has no locus standi to file and maintain the present petition in view of the fact that it is the prerogative of the replying respondents to provide subsidies or not in as much as the H.P. Government "Scheme of Incentives to Tourism Industry, 1993" have been repealed and there is no provision to provide subsidy. Furthermore, there is no budget provision available with the replying respondents therefore; it is not possible and feasible to release the subsidy as alleged in the petition. Hence, the petition deserves outright dismissal and be dismissed with exemplary costs.*
>
> *On Merits*
>
> *4……..However, it is submitted that the H.P. Government "Scheme of Incentives to Tourism Industry, 1993" have been*

re-appealed and there is no provision to provide subsidy. Furthermore, there is no budget provision available with the replying respondents, therefore; it is not possible and feasible to release the subsidy as alleged in the petition.

5……. The petitioner has already been informed about the closure of the Scheme.

6. That the contents of this para which pertains to record do not call for any reply, however, contrary submission are wrong and hence denied vehemently. As submitted supra, it is the prerogative of the replying respondents and after repealing the scheme, the petitioner is not entitled for any amount as alleged in the petition.

7……The petitioner is not entitled for any incentives or subsidies as alleged due to repealing of the scheme/Rules. There is nothing on record which stake the claim of the petitioner and the same is based on hypothesis and conjectures.

8……..It is the prerogative of the replying respondents to continue with the scheme or it has been repealed and the replying respondents has not acted at the instance of the petitioner….after repealing of the scheme, the petitioner has no claim whatsoever as prayed in the petition……"

4(v) Reading of the notification dated 30.04.2001 makes it apparent that reasons offered by the State to deny the remaining concessions, exemptions and incentives to the petitioner in terms of the 1993 Rules, is fallacious. First of all, the notification dated 30.04.2001 itself saves the action in terms of the previous notification dated 26.07.1993. The 'repeal and saving clause' of notification dated 30.04.20001 provides that all incentives already sanctioned under Rules/Schemes so repealed, shall continue and such sanctions for the purpose of said Rules/Schemes shall always be deemed to have been continued and in force. For denying the incentives due to the petitioner under the 1993 Rules, notified on 26.07.1993, the respondent State has taken shelter of 2001 notification. 1993 incentive Rules were repealed by

notification issued on 30.04.2001. It will be appropriate to extract hereinafter some relevant provisions from 30.04.2001 notification: -

" Notification

In supersession to this department's notification or even no. dated 26-7-93, the Governor of Himachal Pradesh is pleased to make the following Rules for providing Incentives to the Tourism Industry namely: -

RULES FOR GRANT OF INCENTIVES TO TOURISM INDUSTRY FOR SC & ST CATEGORIES IN HIMACHAL PRADESH, 2000.

8. Repeal and Saving

8.1 The Himachal Pradesh Grant of Incentives to Tourism Industry Rules, 1984. The Himachal Pradesh Grant of Incentives to Dhaba Scheme, 1988, The Himachal Pradesh Grant of Incentives to paying Guest House Scheme, 1988 and the Himachal Pradesh grant of Incentives to Tourism Industry Rules, 1993 are hereby repealed.

8.2 Notwithstanding such repeal, anything done or action taken under the schemes or the rules repealed shall be deemed to have been done or taken under corresponding provisions of these rules.

Provided that nothing contained herein shall affect the incentives already sanctioned under the rules/schemes so repealed and such sanctions shall continued and for the purposes the said Rules/Schemes shall always be deemed to have been continued and in force."

Grant of incentives to the petitioner under the Incentive Rules 1993 was saved in the notification dated 30.04.2001. In the facts and circumstances of the case, the 1993 Rules shall be deemed to have been continued and in force for grant of incentives to the petitioner even after issuance of 2001 notification. Thus, the explanation accorded by the State in

denying incentives to the petitioner under the 1993 Rules on the ground that the petitioner was not entitled to the benefits under the said Rules after coming into force of 30.04.2001 notification cannot be accepted. There is no such embargo in the notification issued on 30.04.2001.

The fact that notification dated 30.04.2001 made no adverse impact upon petitioner's entitlement to continue to receive the incentives under the 1993 Rules, is also apparent from the fact that the respondents State Government itself continued to make payments of various incentives etc. to the petitioner under the 1993 Rules even after the issuance of notification dated 30.04.2001. The last payment was admittedly made to the petitioner on 12.07.2005. Obviously, the respondents-State understood and interpreted the 'Repeal and Saving clause" of notification dated 30.04.2001 in the manner it should have been and kept on releasing the incentives due to the petitioner under the 1993 Rules even after repeal of these Rules by notification dated 30.04.2001. This was because the entitlement of the petitioner to continue to receive the benefits under repealed the 1993 Rules was not affected in any manner after coming into force of the new incentive Rules vide notification dated 30.04.2001. The law laid down by the Hon'ble Apex Court in *Brahamputra Metallics (supra)* also supports the claim of the petitioner to continue to receive the remaining benefits due to it under the 1993 Rules. We hold accordingly.

4(vi) **The question of delay and latches** in petitioner's filing instant petition, raised by the respondents-State also does not arise in the facts and circumstances of the case. The petitioner had been presenting its claim to the respondents in terms of the1993 Rules from time to time. Respondents had also been releasing the payment in favour of the petitioner. The last payment of Rs.1,26,949/- was made by the respondents to the petitioner under a Bank draft dated 06.07.2005 sent on 12.07.2005. The petitioner has placed on record the claims made by it subsequently in terms of the 1993 Rules. The

respondent State, vide its communication dated 25/26.05.2006 expressed its inability to release interest subsidy admissible to the petitioner due to non-availability of budget in 'current financial year'. Petitioner kept on making further claims of incentives in the succeeding years with request for timely release of the same. It was only on 11.11.2009 (impugned Annexure PL) that the respondents declined to grant incentives to the petitioner on the ground that the scheme of incentives to the tourism industry under the 1993 Rules had been repealed and there was no provision in the new Rules notified on 30.04.2001 to provide subsidy to the petitioner. This denial by the respondents in the year 2009 provided cause of action to the petitioner. The writ was filed thereafter in the year 2010. In the facts and circumstances of the case, the petition claiming grant of remaining incentives from the State in terms of the 1993 Rules, cannot be said to be suffering from delay and latches. The question of delay and latches was also raised in case of *Brahamputra Metallics (supra).* The plea was not accepted. It was held that the State cannot contend that delay had led it to after its position to its detriment. The parties were also not affected as a consequence of delay. Relevant paras of the judgment regarding this are as under: -

(ii) The argument of delay

48 An earnest effort has been made on behalf of the appellant to submit that the writ petitions before the High Court ought not to have been entertained since they were instituted in 2019. However, Mr. Devashish Bharuka, learned Counsel on behalf of the respondents has, in the course of his submissions, correctly urged that the issue of delay has never been raised in the course of the proceedings before the High Court or raised as a ground in the Special Leave Petition before this Court. In High Court of Judicature of Patna vs

Madan Mohan Prasad 36, a two judge Bench of this Court, speaking through Justice J M Panchal, held thus:

"19. The contention advanced on behalf of the appellant that the writ petition was filed by Respondent 1 on 10-11-1990 i.e. seven years after he had superannuated from service, and therefore, the writ petition should have been dismissed on the ground of delay and laches, cannot be accepted. The impugned judgment nowhere shows that such a point was argued by the appellant before the High Court. No grievance is made in the memorandum of SLP that point regarding delay and laches was argued before the High Court but the same was not dealt with by the High Court when impugned judgment was delivered."

Further, Mr Bharuka has submitted that once the High Court has held the respondent's writ petition to be legally sustainable on merits, this Court should not interfere on grounds on delays and laches alone. This finds support in the judgment of this Court in Dayal Singh vs Union of India 37, where a three judge Bench, speaking through Justice S B Sinha, held thus:

"41. It was submitted that the respondents having filed a writ petition after a period of eight years, the same ought not to have been entertained. Primarily a question of delay and laches is a matter which is required to be considered by the writ court. Once the writ court has exercised its jurisdiction despite delay and laches on the part of the respondents, it is not for us at this stage to set aside the order of the High Court on that ground alone particularly when we find that the impugned judgment is legally sustainable."

Mr Bharuka is also correct in submitting that the State cannot possibly contend that the result of the delay has led to it altering its position to its detriment. Nor is it a case where third parties may be affected as a consequence of a delay in instituting writ proceedings. This submission finds support in Hindustan Petroleum Corporation Ltd. vs Dolly Das 38, where a two judge Bench, speaking through Justice S Rajendra Babu, noted thus:

> *"8. So far as the contention regarding laches of the respondent in filing the writ petition is concerned, delay, by itself, may not defeat the claim for relief unless the position of the appellant had been so altered which cannot be retracted on account of lapse of time or inaction of the other party. This aspect being dependent upon the examination of the facts of the case and such a contention not having been raised before the High Court, it would not be appropriate to allow the appellants to raise such a contention for the first time before us. Besides, we may notice that the period for which the option of renewal has been exercised has not come to an end. During the subsistence of such a period certainly the respondent could make a complaint that such exercise of option was not available to the appellants and, therefore, the jurisdiction of the High Court could be invoked even at a later stage. Further, the appellants are not put to undue hardship in any manner by reason of this delay in approaching the High Court for a relief."*

In this view of the matter, we are not inclined to interfere with the judgment of the High Court on the ground of delay alone when the judgment is based on legally sustainable principles. The delay of the respondent in filing a writ petition by itself should not defeat the claim unless the position of the State

has been so altered that it cannot be retracted on account of a lapse of time or the inaction of the writ petitioner. The State has not in the present case either pleaded or argued any hardship if the respondent were to be granted relief. Finally, the decisions in Bhailal Bhai (supra) and Suganmal (supra) related to a petitioner seeking a refund of an illegally collected tax. In the present case, we are not concerned with such a situation. Rather, the petitioner has come before this Court due to arbitrariness in State action which led to the non-fulfillment of their legitimate expectations.

5. Conclusion

The upshot of above discussions is that the petitioner established its Ropeways Project in the respondents State in light of the HP Grant of Incentives to Tourism Industry Rules 1993 notified on 26.07.1993. Petitioner's unit was covered under Rules and entitled to several incentives, exemptions and subsidies mentioned therein for a period of ten years from the date it commenced commercial operations in the year 1997. Petitioner kept on claiming these benefits and was being released the admissible incentives by the respondents-State from time to time. Last payment towards incentives under the 1993 Rules was made to the petitioner on 12.07.2005. In the year 2006, the respondents-State did not release the incentives for want of budget. Petitioner's subsequent claims of incentives in terms of the 1993 Rules were declined by the State on 11.11.2009 on the ground that the 1993 Rules were repealed by the State by issuing notification on 30.04.2001. The reasons given by the State for not releasing the incentives due to the petitioner under the 1993 Rules are not palatable. Promise was extended by the State in form of grant of specific incentives under the 1993 Rules for encouraging its tourism

industry. Petitioner acted upon the promises held out by the State in the 1993 Rules and changed its position. It established a Ropeways Project in the State. In the facts and circumstances of the case, after releasing some incentives, it is not open to the State to deny release of remaining incentives only on the ground that the 1993 Rules were repealed by 2001 notification. Doctrine of legitimate expectation and promissory estoppel as explained in *Brahamputra Metallics (supra)* come into play in favour of the petitioner. Even otherwise, release of incentives to the petitioner under the 1993 Rules is not prohibited under the 2001 notification rather continuation of benefits under and in terms of the 1993 Rules has been provided by the repeal and saving clause of 2001 notification. The State had itself been releasing the benefits to the petitioner even after 2001 notification. The respondents State declined to grant further incentives to the petitioner under the 1993 Rules only on 11.11.2009, hence this petition filed in the year 2010, seeking remaining incentives under the 1993 Rules cannot be said to be suffering from any delay or latches. We therefore, find merit in the writ petition. The same is accordingly allowed. The petitioner is held entitled to the benefits due to it in terms of the 1993 Rules notified on 27.07.1993. The respondents are directed to examine the case of the petitioner for grant of benefits/ concessions/ incentives/ exemptions etc. due to it and which still remain to be paid under the 1993 Rules within a period of four weeks from today. The benefits/concession/ incentives/ exemption etc. so worked out be released to the petitioner within six weeks from today.

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

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

Between:-
RAM RAKHA SON OF SH. SIMRU,
CASTE HARIJAN, RESIDENT OF
VILLAGE KALRUHI, TEHSIL AMB,
DISTRICT UNA, H.P.

...PETITIONER

(BY SH. DHEERAJ K. VASHISHT, ADVOCATE).

AND

1. HARBHAJAN RAI S/O SH. KALIDU
2. SHADI LAL S/O SH. HARBHAJAN RAI
BOTH RESIDENTS OF VILLAGE KALRUHI,
TEHSIL AMB, DISTRICT UNA, H.P.

....RESPONDENTS.

(BY SH. AMIT SINGH CHANDEL, ADVOCATE, LEGAL AID COUNSEL, FOR THE RESPONDENTS)

CIVIL MISC. PETITION (MAIN) (CMPMO)
NO. 153 OF 2019
Reserved on: 31.10.2022
Decided on: 04.11.2022

Code of Civil Procedure, 1908- Order 6 Rule 17- Amendment sought should be necessary for the purpose of determining the real questions in controversy between the parties- By way of amendment the plaintiff intended to plead certain acts of defendants whereby they had allegedly made complaint regarding stoppage of passage. It cannot be said that the amendment as sought by the plaintiff is necessary for the purpose of determining the real questions in controversy between the parties. The conduct of defendants in filing complaints before the authorities or filing of a suit may be relevant as piece of evidence, but they cannot be said to be facts which required necessarily to be pleaded by the plaintiff. Even without pleading such facts, the plaintiff cannot be said to be barred from cross-examining the defendants or his witnesses on the facts sought to be pleaded in plaint.(Paras 10 and 12)

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

O R D E R

By way of instant petition, petitioner has taken exception to the order dated 07.03.2019 passed by learned Senior Civil Judge, Court No.1 Amb, District Una, H.P. in case No. 298-I-2010, titled as Ram Rakha vs. Harbhajan Rai and another whereby theapplication of petitioner under Order 6 Rule 17 of the Code of Civil Procedure (for short, "CPC") for amendment of plaint has been dismissed.

2. Petitioner is the plaintiff before the learned trial Court and has filed a suit for permanent prohibitory and mandatory injunction seeking the following reliefs:

> *(a) Land measuring 0-04-66 hectares bearing Khewat No.379, Khatauni No.590, Khasra No.1534, as entered in NakalJamabandi for the year 2008-09.*
>
> *(b) Land measuring 0-04-79 hectares bearing Khewat No.380 min, Khatauni No.591 min, Khasra No.1439 as entered in NakalJamabandi for year 2008-09.*
>
> *(c) Land measuring 0-01-95 hectares bearing Khewat No.381, Khatauni No.592, KhasraNo. 1531 as entered in NakalJamabandi for the year 2008-09, situated in village Kalruhi, Teh.Amb, Distt. Una (H.P.) and in the alternative suit for mandatory injunction directing the defendants to restore the suit land in its original position if the defendants succeeded in changing the nature and taking forcible possession during the pendency of the suit may kindly be passed in favour of the plaintiff and against the defendants with costs in the best interest of justice."*

3. The case of the plaintiff is that he is co-owner with others in respect of the land described in Clauses (a) and (b) of relief, whereas, the plaintiff is co-owner with other co-sharers including defendant No.1 in land described in Clause (c) of the relief. As per the plaintiff, the settlement authorities had made changes in revenue entries, which had been sought to

be corrected by the plaintiff by moving appropriate application, which was pending before the competent revenue authority. He alleged that despite pendency of the revenue proceedings, defendants were trying to interfere in the suit land by disturbing the possession of the plaintiff and were threatening to raise construction thereon.

4. The defendants are contesting the suit on the premise that the land described in Clause (a) of relief is a common passage leading to Abadi of the defendants as also of other inhabitants of the village. Except for the passage through Khasra No. 1534, there was no other passage to their Abadi, which was in user of defendants and other residents of the village unobstructively for the last more than 20 years. The defendants further specifically denied any intent to raise any construction on the suit land.

5. During the pendency of the suit and particularly when the case was fixed for evidence of defendants, plaintiff moved an application under Order 6 Rule 17 of CPC for amendment of the plaint. The plaintiff sought to add para 5(A) in the plaint as under:

> *"5-A. That during the pendency of this suit the defendant No.1, who is very clever, head strong and politically influential person, connived with the mischievous persons, to create the evidence, firstly filed the false and frivolous complaint regarding the stoppage of construction of passage of HarijanBasti before the Pradhan Gram Panchayat, Kalruhi on 7.5.2013 against the plaintiff which is still pending before the Panchayat. Thereafter, defendant No.1 again filed the false complaint regarding the same passage before the Sub Divisional Magistrate, Amb on 14.06.2013 and the Sub Divisional Magistrate, Amb forwarded the complaint to the Prahan, Gram Panchayat, Kalruhi. The Pradhan Gram Panchayat, Kalruhi constitute the Committee and the members of the Committee visited at the spot on 19.06.2013 and found that there is no passage and at the spot Bagichi and cultivated crops over the suit land. Thereafter the defendant No.1 filed the false and frivolous suit for permanent injunction of Khasra No. 1534 which is the part*

of this present suit against the plaintiff and his brother, which is still pending before the learned Civil Judge, Jr. Divn. Court No.III, Amb. The certified copies of all documents are attached herewith."

6. The defendants resisted and contested the application.

7. The learned trial Court dismissed the application vide impugned order dated 07.03.2019, hence this petition.

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

9. The matter in issue in suit is with respect to the respective rights of the parties over the suit land. The questions for determination are whether the plaintiff can exert his exclusive rights on the suit land and whether there existedthe passage for user of defendants and other share-holders through Khasra No. 1534 of the suit land?

10. By way of amendment the plaintiff intended to plead certain acts of defendants whereby they had allegedly made complaint regarding stoppage of passage of HarijanBasti before the Gram Panchayat, Kalruhi and also before the Sub Divisional Magistrate, Amb. The factum of filing of a separate suit by defendant No.1 in respect of Khasra No. 1534 was also sought to be pleaded.

11. The question arises whether the facts sought to be included in the plaint are required to be part of pleadings? The answer is in negative for the reason that the conduct of defendants in filing complaints before the authorities or filing of a suit in respect of Khasra No.1534 may be relevant as piece of evidence, but they cannot be said to be facts which required necessarily to be pleaded by the plaintiff. Even without pleading such facts, the plaintiff cannot be said to be barred from cross-examining the defendants or his witnesses on the facts sought to be pleaded in plaint.

12. Even otherwise it cannot be said that the amendment as sought by the plaintiff is necessary for the purpose of determining the real questions in controversy between the parties.

13. In result, the petition fails and the same is dismissed. The impugned order dated 07.03.2019 passed by learned Senior Civil Judge, Court No.1, Amb is upheld. Petition is accordingly disposed of, so also the pending application(s), if any.

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

Sat Pal .....Appellant

Versus

Jatinder Kumar and others .....Respondents

For the Appellant:- Mr. Surender Sharma, Advocate.
For the Respondents: Mr. Divya Raj Singh, Advocate, for respondent No.2.

F.A.O.(MVA) No. 118 of 2013
Judgment reserved on:17.11.2022
Decided on:22 .11.2022

Motor Vehicles Act, 1988- Section 166- Compensation on account of injury/disability suffered as a result of motor vehicle accident- Assessment of the loss of future earning- The claimant had not adduced any independent corroboration to his stand of having become incapable to do physical work. There is no medical opinion regarding the functional disability, hence there is no merit in the appeal.(Para 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Heard.

2. By way of instant appeal, the award dated 30.11.2012 passed by the learned Motor Accident Claims Tribunal, (for short, 'Tribunal') Una, H.P. in MAC Case No. 58 of 2011 has been challenged by the appellant/claimant on the grounds that he has not been awarded just and adequate compensation.

3. Brief facts necessary for adjudication of appeal are that the claimant/appellant preferred petition under Section 166 of the Motor Vehicles Act (for short, the 'Act') seeking compensation on account of injury/disability suffered by him as a result of motor vehicle accident involving motorcycle No.

HP-20D-0842. It was alleged that the claimant on 10.09.2010 at about 8.30 P.M. alighted from his car after parking the same on left side of the road and in the meantime, respondent No.1 came driving motorcycle No. HP-20D-0842, in a rash and negligent manner, in a wrong direction and hit the appellant by his speeding motorcycle. The claimant/appellant suffered multiple injuries. He underwent surgical intervention qua his both legs.

4. Respondents No. 1 and 2 jointly contested the petition. The factum of accident as alleged by the claimant/appellant was denied. It was submitted that the claimant/appellant slipped on the road and struck against the motorcycle.

5. Respondent No.3 filed separate reply. As per said respondent, motorcycleCH-04H-3265 was owned by him, but he had transferred the ownership to respondent No.2 on 17.01.2010 and the Licensing and Registration Authority, Chandigarh had already issued NOC for such transfer on 01.02.2010. It was alleged that after such sale, the possession of the motorcycle in question was with respondent No.2.

6. The insurer/respondent No.4 also contested the petition and claimed to be absolved from liability on the grounds of breach of terms of policy. Respondent No.4 specifically contended that the factum of transfer of vehicle by respondent No.3 in favour of respondent No.2, was not reported to the insurer and such breach was in violation of Section 157 of the Act.

7. The learned Tribunal framed the following issues:-

1. Whether petitioner Sat Pal sustained injuries as a result of rash and negligent driving of vehicle No. HP-20-D 0842 by respondent No.1? OPP

2. If issue No.1 is proved, to what amount of compensation the petitioner is entitled toand from whom? OPP

3. Whether the petition is not maintainable? OPRs 1 to 4.

4. Whether petitioner hasno locus-standi to file the present petition against respondent No.3? OPR3 (corrected).

5. Whether respondent No1 was to holding valid and effective driving license to drive motorcycle No. HP-20D-0842 at the time of accident? OPR4

6. Whether motorcycle No. HP-20D -0842 was being driven without valid registration certificate and fitness certificate? OPR4

7. Whether motorcycle No. HP-20D-0842 was being driven in violation of terms and conditions of insurance policy and Motor Vehicle Act? OPR4

8. Relief.

8. Issues No. 1, 2 and 7 were decided in affirmative, remaining issues were decided in negative. The claim petition was allowed and a sum of Rs.82,800/- was adjudged payable to the claimant/appellant on account of compensation alongwith interest @ 8% per annum from the date of filing of petition. Learned Tribunal found the breach of Section157 of the Act, however, the insurer was directed to satisfy the award in the first instance and liberty was reserved with insurer to recover the same from the insured or the transferee, as the case may be.

9. The appellant by way of instant appeal, has alleged that he has not been awarded adequate compensation.

10. As per evidence on record, appellant had suffered disability to the extent of 5% in relation to bilateral lower limbs. The disability certificate Ex.PW-5/A stood proved by PW-5 Dr. D.K. Sharma. The disability was adjudged to be permanent in nature.

11. Appellant claimed compensation with the allegations that due to injury/disability suffered by him, he was not able to drive, milch cattle and perform agricultural work. The learned Tribunal, however, found that the claimant/appellant had not adduced any independent corroboration to his

stand of having become incapable to do physical work. The statement of PW-5 did not suggest any such inference. The claimant/appellant had examined PW-5 in support of his case, but strangely no opinion was sought from him regarding functional disability, if any, suffered by the claimant/appellant. The disability certificate clearly reveals the disability was assessed at 5% in relation to both lower limbs. Though in cross-examination, the disability is stated to be qua whole of the body to the extent of 50%, but the percentage so mentioned, on the face of it, appears to be a bonafide error in writing.

12. The learned Tribunal assessed the loss of future earning to the tune of Rs.4800/- per annum. The age of the claimant/appellant was 53 years and a multiplier of 11 was applied. Additionally, a sum of Rs. 15,000/- was allowed in favour of the claimant/appellant for medicine and treatment charges, Rs. 5,000/- under the head 'Attendant Charges' and Rs. 10,000/- for pain and sufferings. Thus, a total amount of Rs. 82,800/- was awarded.

13. The claimant/appellant examined himself as PW-6 and claimed Rs.10,000/- as monthly income without disclosing the source of such income. He further submitted that he is not able to drive vehicle to run to indulge in agricultural pursuits and to milch the cattle etc. and he had become dependent for such purpose on others. He had kept a helper for such purpose on the payment of Rs.5000/- per month, however, there was no corroboration to the statement of the appellant/claimant. Noticeably, there is no medical opinion regarding the functional disability of appellant as noticed above. Thus, in light of evidence on record, the findings recorded by learned Tribunal cannot be faulted with. Nothing has been shown to this Court that the assessment of annual income of the claimant/appellant was wrongly assessed at Rs.4800/- per annum by adjudging the functional disability 10%, as some amount of guess work is permissible. The multiplier has also rightly been applied as the age of the claimant/appellant was 53 years at the time of accident.

14. In light of above, there is no merit in the appeal and the same is accordingly dismissed, so also the pending application(s), if any.

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

Parul Thakur .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr. Rakesh Kumar Chaudhary, Advocate.

For the respondent: Mr. Desh Raj Thakur, Addl. A.G., with Mr. Narender Thakur, Deputy Advocate General.

Cr. MP(M) No. 2419 of 2022
Reserved on: 16.11.2022
Decided on: 22.11.2022

Indian Penal Code, 1860- Grant of bail under Sections 302, 201, 297 and 34 **-** Pre-trial incarceration is not the rule- The accused is of young age and his prolonged incarceration will be an impediment in his career prospects. He has undertaken to abide by all the terms and conditions imposed against him. The cause of death of the deceased has been opined excessive intake of drug "amphetamine". The conduct of the petitioner in disposing of the body of deceased without disclosing the facts to his parents or to the authorities, casts doubt, but the allegations are to be proved during trial. It is also not in dispute that both were friends and were addict to using drugs. There is no direct evidence that the dose of drug was forcibly given to the deceased against his wish. Keeping in view the facts and circumstances of the case especially the age of the petitioner, no fruitful purpose shall be served by prolonging his incarceration till the conclusion of trial. The investigation is complete and challan has been presented. It is not apprehended by the respondent that the petitioner has potential to tamper with the prosecution evidence. Even otherwise pre-trial incarceration is not the rule. Appropriate conditions can be

imposed to secure the free and expeditious trial. There is no apprehension of petitioner fleeing from the course of justice, hence bail granted subject to just conditions.(Paras 5, 8 and 9)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

The petitioner is an accused in case FIR No. 48 of 2022 dated 13.5.2022 under Sections 302, 201, 297 and 34 of the Indian Penal Code, registered at Police Station, Dharampur, District Mandi, H.P.

2. The brief facts necessary for adjudication of the petition are that since 26.4.2022, a boy namely Dheeraj Thakur was missing and to that effect, a missing report was recorded by the police on 30.4.2022 at the instance of mother of said Dheeraj Thakur. It was reported in the missing report that the son of the informant was an addict and she had come to know that accused Parul Thakur was also habitual of using 'Chitta'. The police was also informed that on the night of 26.4.2022, Dhreeraj Thakur had stayed in the house of Parul Thakur.

3. Later, it was found that Dheeraj Thakur had died in the house of Parul Thakur on the intervening night of 26/27.4.2022, after consuming the drug 'Chitta'. The case was registered and investigation carried. As per investigation report, after death of Dheeraj Thakur during intervening night of 26/27.4.2022, accused Parul Thakur with the help and aid of another accused Vikrant Guleria disposed the body of Dheeraj Thakur in 'Vakkar Khad'.

4. It is alleged against the petitioner that deceased Dheeraj Thakur had died in the house of petitioner during the intervening night of 26/27.04.2022. Petitioner without informing the parents of deceased or the

police, had disposed of the body with the help and aid of another co-accused named Vikrant Guleria.

5. Petitioner has sought bail on the ground that he has been falsely implicated. The death of deceased Dheeraj Thakur had taken place on account of excess dose of drug "amphetamine". As per petitioner, from the postmortem conducted on the body of deceased, no other cause of death has been found. It is further submitted that petitioner is permanent resident of Village Jhadiyar, P.O. Kango Ka Gehra, Tehsil Dharampur, District Mandi, H.P. He is of young age and his prolonged incarceration will be an impediment in his career prospects. He has undertaken to abide by all the terms and conditions imposed against him.

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

7. From the status report filed by the respondent, it is evident that the cause of death of deceased Dheeraj Thakur has been opined the excessive intake of drug "amphetamine". It is also inferable from the status report that the deceased and petitioner had visited Hoshiarpur in Punjab to bring heroin for their use. On 26.4.2022, it was after their return from Hoshiarpur that the deceased had stayed with the petitioner. It is also not in dispute that both were friends and were addict to using drugs. The above observations have been made only to assess the seriousness and gravity of the allegations against the petitioner.

8. The conduct of the petitioner in disposing of the body of deceased without disclosing the facts to his parents or to the authorities, casts doubt, but the allegations are to be proved during trial. There is no direct evidence that the dose of drug was forcibly given to the deceased against his wish.

9. Keeping in view the facts and circumstances of the case especially the age of the petitioner, no fruitful purpose shall be served by prolonging his incarceration till the conclusion of trial. The investigation is

complete and challan has been presented. It is not apprehended by the respondent that the petitioner has potential to tamper with the prosecution evidence. Even otherwise pre-trial incarceration is not the rule.

10. Petitioner is permanent resident of Village Jhadiyar, P.O. Kango-K-Gehra, Tehsil Dharampur, District Mandi, H.P. Appropriate conditions can be imposed to secure the free and expeditious trial. There is no apprehension of petitioner fleeing from the course of justice.

11. In view of peculiar facts and circumstances of the case, petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 48 of 2022 dated 13.5.2022 under Sections 302, 201, 297 and 34 of IPC, registered at Police Station, Dharampur, District Mandi, H.P. on his furnishing personal bond in the sum of Rs.1,00,000/- (Rupees One lac) with one surety in the like amount to the satisfaction of the learned trial Court. This order, however, shall be subject to following conditions: -

(i) That the petitioner shall make himself available during the entire trial of the case.

(ii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police.

(iii) That the petitioner shall not leave India without the prior permission of the Court.

12. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above