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And

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conferred the work charge status w.e.f. 26.12.1993- he was not allowed to join the duty and was wrongly retrenched- retrenchment was set aside- therefore, he is entitled to be conferred the work charge status with all consequential benefit including promotion from the date- his juniors were promoted to the higher post.

Title: Dharam Dass Vs. HPSEB Ltd. & anr. Page-1

Constitution of India, 1950- Article 226- Petitioner was engaged as daily wage Beldar- he worked as Assistant fitter and thereafter as daily wage beldar- his services were regularized as beldar- respondent stated that the private respondent had joined subsequently but they had forfeited their seniority for the period when they worked as beldar and were appointed as fitter on the completion of 8 years of services on the said post - held, that respondent is model employer and is under an obligation to conduct itself with high probity-it should not take advantage of the employees- respondent had exploited the petitioner as well as private respondents- when a person had rendered service in two or three capacities-an option was required to be obtained from him - petition allowed and the respondent directed to take appropriate action in accordance with law.

Title: Mohan Lal Vs. State of H.P. & ors. Page-110

Constitution of India, 1950- Article 226- Petitioner was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College Chaura Maidan Shimla- subsequently he was appointed as part time contingent paid Sweeper- petitioner had served for more than 21 years but was not conferred the status of whole time contingent paid worker – respondent pleaded that the petitioner was appointed purely on temporary basis as stop gap arrangement- petitioner was placed at seniority No. 584 and at present posts of part time employees up to seniority No. 466 had been converted to the post of whole time contingent paid employees- case of the petitioner would be considered for the next higher post as per his seniority on the availability of the posts- held, that the petitioner was appointed on temporary basis as stop gap arrangement- it was specifically stated that the services of the petitioner would stand terminated on joining of regular employee- petitioner had accepted the terms of the appointment order and he cannot be allowed to approbate and reprobate the conditional appointment order- further, employee cannot be appointed on public post contrary to Rules framed by Union or State as per Article 309 of Constitution of India- there was no evidence to prove that the vacancy of the contingent worker was available in the department or that his claim was recommended by the Competent Authority for appointment.

Title: Sita Ram son of Shri Bihari Lal Vs. State of H.P. & Anr. Page-67

Constitution of India, 1950- Article 226- Petitioner was posted in Shimla and was transferred to Reckong Peo, a tribal area- he completed his tenure but was not transferred- respondents directed to consider the

case of the petitioner for transfer within one week and to take disciplinary action against the transferred employee who have failed to join the duty within stipulated period.

Title: Karam Singh Vs. Managing Director & another Page-154

Constitution of India, 1950- Article 226- petitioner was transferred from Pangi, a tribal area to GHS Tippar fro where he was transferred to GMS Jhaniker and again to tribal area- transfer policy framed by the Government provides that employee who served in Tribal/ Hard/Difficult Areas as well as in Remote/Rural Areas are not to be transferred to the same area again- hence, respondents directed to examine the case of the petitioner afresh and to pass appropriate order.

Title: Suresh Kumar Vs. State of H.P. & others Page-163

Constitution of India, 1950- Article 226- Petitioners were appointed as Assistant Surgeon and Assistant Professor in the department of Health and Medical Education, Jammu and Kashmir – they had applied through proper channel for the post of Lecturer/ Assistant Professor at IGMC, Shimla- they made representation for counting the services rendered by them in Jammu and Kashmir for the purpose of pensionary benefits- Govt. refused to do so on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir- held, that as per CCS (Pension) Rules, 1972 and decision No. 5(2)(b) of Rule 14liability is to be borne in full by the Central/ State department and no recovery is to be made from Central/State Government under whom employee had served, therefore, it was not open for the State Government to decline the claim of the petitioners on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir.

Title: State of H.P. & ors. Vs. Dr.(Mrs.) Man Mohini Sharma & anr. Page-157

Constitution of India, 1950- Article 226- PCCF (Wildlife)-cum-Chief Wildlife Warden, H.P., Shimla had written a letter to Additional Director General(Wildlife), Government of India, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi, to deal with the monkey menace - Authority of Union of India was also directed to take decision but no decision was taken- therefore, Union of India directed to file compliance report as well as report regarding the steps taken in terms of letter.

Title**:** People for Animals Kasauli and another Vs. Union of India & others Page-155

Constitution of India, 1950- Article 226- Respondent issued prospectus for the year 2014 for filling-up PG seats in IGMC, Shimla and DRPGMC, Tanda in service General Duty Medical Officers) and HPHS Contract Service Medical Officer Group and Direct Group for the different categories- petitioner contended that the respondent had not disclosed to

two Post Graduate seats in Preventive and Social Medicine and Pathology- they were told that only seats in Microbiology and Bio-chemistry were available which were accepted by the petitioners- the seats were subsequently allotted to the private respondents- respondents admitted that two seats were filled up after due publishing and were filled up by contacting the candidates in the waiting list over their mobile phones- held, that admissions have to be made in a fair and transparent manner and no admissions can be made without disclosing the available vacancies and by publishing the same in the newspaper- respondents failed to observe this requirement and had engaged the merit- however, keeping in view that the upsetting the admission would start a chance reaction and many candidates would come forward to occupy the seats, therefore, the matter was left and rest- directions issued to the respondent to grant admission strictly in accordance with prospects.

Title: Dr. Disha Sharma Vs. State of Himachal Pradesh & others

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Constitution of India, 1950- Article 226- Respondent No. 2 issued a notice inviting tenders on or before 18.6.2014- subsequently, the entire process was recalled and another advertisement was issued calling for tender on or before 12.8.2014- entire process was again recalled and fresh advertisement was issued calling for tender on or before 15.9.2014- petitioner submitted the tender document but the respondent No. 2 refused to accept them- respondent filed a reply stating that technical bid of the petitioner was rejected by the Competent Authority- held, that issuance of tender notice, opening of financial bids, technical bids and contracts cannot be subjected to judicial review unless it is malafide, illegal, unconstitutional and against the public interest.

Title: M/s Kausal Air Products Vs. State of H.P. & others Page-85

Constitution of India, 1950- Article 226- Road Users and Pedestrians (Public Safety and Convenience) Act, 2007- respondents were directed to furnish the list of permit holders but the list was not furnished in accordance with the direction- respondent directed to file a fresh list along with name of the officers who had issued the permits in violation of the provisions of the Act –respondent further directed to cancel permits which were issued in breach of the Act- respondents also directed to furnish the list of the names of the police officers and to mention the action taken by police officials for violation of the Act- further, direction issued to indicate the mechanism in place for managing the parking of vehicles.

Title: Dharam Pal Thakur Vs. State of Himachal Pradesh & others

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Constitution of India, 1950- Article 363- jurisdiction of the Civil Court is barred for determining disputes arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument

which were entered into or executed before the commencement of Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any predecessor Governments was a party - this article will not cover the grants made by the Rulers in favour of individuals.

Title: Kuldip Singh and others Vs. State of H.P. and others Page-46

H.P. Land Revenue Act, 1954 - Section 17- Section 17 can be pressed into service only when any case is pending and the matter was determined by the Revenue Court, Appellate Court and by the Civil Courts.

Title: Devinder Singh Jaswal Vs. Nagender Singh & others Page-81

H.P. Land Revenue Act, 1954- Section 38- B was owner of the suit land and S was recorded as a tenant- revenue entries were repeated in the subsequent jamabandies- R was recorded as a tenant for the first time in the jamabandi for the year 1973-74- held, that there was no record to show as to how R was recorded as a tenant- Patwari is required to notify in writing to the person or persons likely to be adversely affected by such a change of the entries and retain on record proof of the notifications - entries are required to be verified by the '*Lumberdar*' or '*Panch* and any entry made in violations of these instructions are void.

Title: Ram Lok Vs. Nand Ram & others Page-126

H.P. Land Revenue Act, 1954- Section 107- Demarcation- demarcation was conducted on the basis of Aks Shazra- held, that demarcation should be conducted on the basis of Aks Musabi and the demarcation conducted on the basis of Aks Shazra is not permissible.

Rattan Chand son of Lachho Ram Vs. Pushpa Devi widow of Shri Balwant Singh and others Page-169

H.P. Urban Rent Control Act, 1987 - Section 14- Landlord filed an eviction petition seeking eviction on the ground that premises was required bonafide for reconstruction and rebuilding on old lines, which could not be carried out without vacating the same- building was in dilapidated condition and had outlived its life span – building had become unsafe and unfit for human habitation and the tenants were in arrears of rent- tenant pleaded that building is situated in core area where construction activities is banned by the government – building had not become unfit and unsafe for human habitation- the petitioner was not an actual landlord and was not entitled to get rent- held, that the version of the petitioner that the building was more than 100 years old, in dilapidated condition and had become unfit and unsafe for human habitation was duly proved by evidence of the plaintiff- landlord had deposed that he had sufficient funds and had got the map approved from M.C. Shimla- building cannot be reconstructed without being vacated- further, tenants were in arrears of rent- learned Appellate Court had

wrongly held that executing Court will not execute the order of eviction unless duly sanctioned plan is produced by the petitioner- this modification by Appellate Court was contrary to the Law- petition allowed.

Title: Janmejai Sood Vs. Ram Gopal Sood & ors. Page-42

H.P. Village Common Lands Vesting and Utilization Scheme, 1975 - Clause 13 (1) to (4) Sub clause (4) of the scheme vests jurisdiction and authority in the commissioner to cancel the grant suo moto on an application made to him when the allottee was not entitled to or ineligible for allotment- however, cancellation had to be made after proper inquiry.

Title: Madho Ram & Anr. Vs. Makholi Ram Page-99

Indian Penal Code, 1860- Sections 363, 366, 120-B and 506- Accused had taken the prosecutrix from her house on motorcycle with an intention to marry her with co-accused 'M' by telling her that her friend had called her - they served cold drink and 'Laddu' to her after which she started feeling giddiness -she was brought to the temple- there was no evidence to prove that some intoxicated substance was mixed in the cold drink and Laddu provided to the prosecutrix- there was no evidence that any arrangement was made for performing marriage ceremony in the temple and that the priest was engaged to perform the marriage ceremony – no complaint was made by the prosecutrix to PW-4 or pw-7- On the other hand prosecutrix specifically told the Investigating Officer that she had voluntarily come for strolling- held, that in these circumstances prosecution version was not proved and the acquittal of the accused was justified.

Title: State of H.P. Vs. Ravinder Kumar s/o Sh Raghbir Dass Page-72

Indian Penal Code, 1860- Sections 498-A and 306 readwith Section 34 of IPC- Deceased had committed suicide by consuming poison- father of the deceased filed a complaint that deceased was not being treated properly in her matrimonial home- he made inquiry on which accused apologized-subsequently, deceased committed suicide- father of the deceased admitted in his cross-examination that no dowry was demanded by the accused at the time of marriage- PW-3 told that deceased was fed up due to her illness- accused had never harassed the deceased-PW-5 also admitted in cross-examination that no dowry was demanded at the time of marriage- PW-9 admitted that she had not told about the non-fulfillment of the demand of dowry to anyone and was deposing about this fact for the first time- held, that the testimonies of the eye-witnesses suffer from minor improvements- there has to be a series of facts/events to cause harassment - there was no demand of dowry and no evidence that deceased was forced to commit suicide or that accused had insisted or provoked the deceased to commit suicide.

Title: State of Himachal Pradesh Vs. Sunil Kumar and another Page- 17

N.D.P.S. Act- Section 20- Accused was found in possession of 6.250 k.gs of charas- police made efforts to search for independent witnesses but could not find any independent witness - PW-3 and PW-4 were declared hostile but they admitted their signature on the seizure memo- FSL report showed that the contraband was found to be charas on analyses- held, that accused was rightly convicted.

Title: Prakash Chand Vs. State of Himachal Pradesh Page- 62

Practice and Procedure- Court should be conscious in entertaining the writ petitions which are aimed to prevent the eligible candidate to reap the fruits of selection.

Title: Sunil Kumar Vs. Indian Oil Corporation Ltd. (IOC) & others Page-119

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they are permanent lessees of the grass land known as "Ghas Godam Mundkhar" and the land was allotted to their father by ruler of Bilaspur State- State Government decided to put the forest grass grown on the land to auction- notice was issued by the plaintiff on which Law Department given an opinion that lease was perpetual and heritable- one of the plaintiffs filed an application before Collector for recording the factum of lease in the revenue record which was allowed- an appeal was preferred before the Commissioner who directed that matter be settled before the Civil Court- defendants pleaded that document was not a lease, but it was a concession granted by the Ruler to the father of the plaintiffs and no rent was paid by the plaintiffs- suit was initially decreed- appeal preferred before Additional District Judge, Bilaspur and High Court were dismissed- matter was taken before the Hon'ble Supreme Court of India and the case was remanded with the liberty granted to the parties to adduce fresh evidence- however, no evidence was led and application filed to lead additional evidence was dismissed- suit was ultimately dismissed- appeal preferred before the Appellate Court was also dismissed- held that documents show that grant was made by Raja Bilaspur- there was no time frame rather the same was granted in perpetuity subject to the payment of Rs. 5/- as rent- Raja of Bilaspur was a sovereign enjoying the full powers of the State- there was no restriction or obstruction on his power- further, Conservator of Forest, Bilaspur had also acknowledged the right of the plaintiff- in these circumstances, decree passed by the Trial Court as affirmed by the Appellate Court is not sustainable- appeal allowed.

Title: Kuldip Singh and others Vs. State of H.P. and others Page-46

TABLE OF CASES CITED

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'V'

Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

Dharam Dass .....Petitioner.
Versus
HPSEB Ltd. & anr. .....Respondents.

CWP No. 5639 of 2014.
Reserved on: 30.10.2014
Decided on: 3.11.2014.

Constitution of India, 1950- Article 226- petitioner was appointed as a Beldar- he was retrenched in the year 1998- he filed an application before Administrative Tribunal which was allowed- petitioner was re-engaged and was conferred the status of work charge employee- he was again retrenched on 13.5.2005- he referred the matter to Industrial Tribunal Shimla, which held that retrenchment was in violation of the Industrial Disputes Act – writ petition was filed by the respondent was dismissed and the petitioner was engaged on 12.11.2010 as a T-mate- petitioner claimed that he should have been conferred with work charge status with all the consequential benefits- held, that petitioner was conferred the work charge status w.e.f. 26.12.1993- he was not allowed to join the duty and was wrongly retrenched- retrenchment was set aside- therefore, he is entitled to be conferred the work charge status with all consequential benefit including promotion from the date- his juniors were promoted to the higher post. (Para- 4 and 5)

For the petitioner: Mr. Hamender Singh Chandel, Advocate.
For the respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was engaged as Beldar on 26.12.1993. He was retrenched in the year 1998. He approached the erstwhile H.P. State Administrative Tribunal, by filing OA No. 1587 of 1998. The erstwhile H.P. State Administrative Tribunal ordered the re-engagement of the petitioner vide order dated 6.11.1998. The petitioner was re-engaged as per the orders of the erstwhile H.P. State Administrative Tribunal. He was conferred with work charge status, as per Annexure P-2 dated 6.11.2002 at Sr. No. 42. However, the fact of the matter is that the petitioner was not allowed to join his duties as work charge employee.

2. The petitioner was again retrenched on 13.5.2005. The petitioner raised the industrial dispute. The matter was referred to the Industrial Tribunal-cum-Labour Court, Shimla, vide reference No. 59 of

2007. The learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Shimla, held the retrenchment of the petitioner in violation to provisions of Sections 25F,25G &H of the Industrial Disputes Act, 1947. The petitioner was ordered to be re-instated with seniority and continuity of service, but without back wages.

3. The respondents-Board, feeling aggrieved by the order dated 1.6.2010, filed CWP No. 6089 of 2010 before this Court. The same was dismissed by this Court with analogous writ petitions on 28.9.2010. The petitioner was re-engaged as Beldar on 12.11.2010 vide Annexure P-6. He was appointed as T/Mate vide order dated 5.11.2011 (Annexure P-7).

4. The case of the petitioner, in a nut shell, is that on the basis of Annexure P-2, order dated 6.11.2002, he should have been conferred work charge status with all consequential benefits. Mrs. Sharmila Patial, Advocate, appearing for the Board has vehemently argued that since there is break in service, the petitioner could not be conferred with work charge status w.e.f. 6.11.2002, as he was re-engaged pursuant to the award dated 1.6.2010, as Beldar on 12.11.2010.

5. It is evident from Annexure P-2, letter dated 6.11.2002 that taking into consideration the seniority of the petitioner w.e.f. 26.12.1993, he was conferred with work charge status. He was not permitted to join his duties as work charge employee for the reasons best known to the respondents. The subsequent retrenchment of the petitioner dated 13.5.2005 was set aside by the learned Industrial Tribunal-cum-Labour Court, Shimla, vide order dated 1.6.2010. The learned Tribunal has awarded re-instatement of the petitioner with continuity in service but without back wages. The writ petition preferred against the award dated 1.6.2010 has been dismissed by this Court on 28.9.2010. The action of the respondents to re-engage the petitioner merely as Beldar on 12.11.2010 was wholly illegal, though he has been made T/Mate on 5.11.2011. However, the fact of the matter is that the petitioner should have been granted the work charge status w.e.f. 6.11.2002, vide letter Annexure P-2, with all consequential benefits by counting his previous seniority.

6. Accordingly, the Writ Petition is allowed. The petitioner would be deemed to have been appointed on work charge basis w.e.f. 6.11.2002 with all consequential benefits including promotion etc. from the date the persons junior to him have been promoted to the higher post. The consequential benefits be released to the petitioner by treating him work charge employee w.e.f. 6.11.2002, within a period of six weeks from today.

7. Pending applications, if any, shall stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Ram Krishan Khagta ..... Petitioner
Vs.
The Kangra Central Cooperative
Bank Ltd. & ors. ..... Respondents

CWP No. 3874 of 2014.
Date of decision: 3.11.2014.

Constitution of India, 1950- Article 226- *P*etitioner had filed a writ petition against the Co-operative society registered under H.P. Cooperative Societies Act, 1968- held, that writ petition against the co-operative society is not maintainable, even the Court cannot relegate the petitioner to pursue the remedy under section 72 of H.P. Cooperative Societies Act. (Para- 3 to 6)

Cases referred:
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243
S.S.Rana vs. Registrar, Co-operative Societies and another (2006) 11 SCC 634
Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)

For the petitioner : Mrs. Jyotsna Rewal Dua and Ms. Shalini Thakur, Advocates.

For the respondents Mr. Umesh Kanwar, Advocate, for respondents No. 1 and 2.
Mr. Virender Kumar Verma and Ms. Meenakshi Sharma, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondent No. 3.
Mrs. Ranjana Parmar, Advocate, for respondents No. 4, 6 and 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has approached this court for grant of following substantive reliefs:-

(i) For directing the respondents to hold review DPC within a time bound schedule by ensuring that no Grade 1 officer is superseded in his promotion to the post of Assistant

General Manager by another officer where the difference of length of promotion between the two officers in feeder category is more than 2 years.

(ii) For holding that supercession by respondents No. 4-6 over the petitioner for promotion to the post of Assistant General Manager is bad in eyes of law considering the difference between their length of promotion in feeder category of Grade 1 is more than 2 years vis-à-vis the petitioner.

(iii) For directing the respondents to promote the petitioner to the post of Assistant General Manager w.e.f. the date his juniors have been promoted i.e. 7.2.2014 along with all consequential including monetary benefits.

(iv) For directing the respondents to read the over all entry of ACR of the petitioner for the year 2008-09 & 2011-12 as 'Very Good' or alternatively the entries in these ACRs be directed to be communicated to the petitioner and thereafter action in accordance with law may be directed to be taken on the un-communicated ACRs.

(v) For issuing a writ of Certiorari or any other appropriate writ for quashing the proceedings of DPC as convened on 31.1.2014 vide annexure P-4 and all consequential actions thereupon vis-à-vis parties to the litigation.

2. From the perusal of the reliefs sought for by the petitioner, it is clear that the relief has been sought primarily against respondent No.1, which is a Cooperative Society registered under the H.P. Cooperative Societies Act, 1968 (for short, the Act).

3. The parties are not at variance that in view of decisions of learned Division Bench of this court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243, Sanjeev Kumar & ors.** Vs. **State of H.P. and ors. CWP No. 6709 of 2013-A dated 4.8.2014, LPA No. 236 of 2011 titled Laxmi Narain & ors.** Vs. **Kuldeep Singh & ors alongwith connected matters decided on 17.9.2014,** the decision of Hon'ble Supreme Court in **S.S.Rana** vs. **Registrar, Co-operative Societies and another (2006) 11 SCC 634** and the decision of Hon'ble Full Bench of this court in **Vikram Chauhan** vs. **The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB),** the writ petition itself is not maintainable.

4. However, the learned counsel for the petitioner has made a request for relegating the petitioner to the Registrar so as to enable him to file a petition under section 72 of the Act. The petitioner has made this request taking cue from para-9 of preliminary objection raised by respondents No. 1 and 2 to the following effect:-

> "*The petitioner has an effective alternative remedy under Section 72 of the H.P. Cooperative Societies Act, 1968. Being a matter touching the business of the society, the grievance, if any,*

has got to be vindicated by having recourse to the said provisions only."

5. I am afraid that this court cannot relegate the petitioner to pursue the remedy under section 72 of the Act, which is in fact not available to him under the law. This aspect of the matter has been succinctly dealt with by the learned Division Bench of this court in **Sanjeev Kumar's** case (supra), wherein it was held as follows:-

"9. "Faced with such situation, the petitioners would then contend that the orders passed by the Registrar and thereafter by the State government were statutory and therefore, a writ against an order passed by the statutory authority was maintainable.

10. There would have been no dispute in case the orders impugned herein could be termed to have been passed by the statutory authority in exercise of powers conferred upon it by the Act and Rules, because in that event undisputedly the writ petition would be maintainable before this court. However, the moot question again herein is as to whether the orders passed by the respondents i.e. Registrar and the State Government can be termed to be statutory orders.

11. Admittedly, the dispute raised by the petitioners pertained to a service matter and therefore, even if this court had relegated the petitioners to the Registrar/ State government, could the orders be termed to be in exercise of the statutory powers? The obvious answer is no, for more than one reasons. Firstly, the dispute of an employee and employer relationship is not a dispute, which touches the constitution, management or business of the cooperative societies and therefore, is not amenable to the jurisdiction of the Registrar under section 72 of the Act [Re: ***Morinda Coop. Sugar Mills Ltd.*** *Vs.* ***Morinda Coop.Sugar Mills Workers' Union (2006) 6 SCC 80****]. Secondly even if this court had relegated the petitioners before the Registrar/ State government, the orders passed by them would not clothe the orders so passed with statutory colour, as the same are not in exercise of statutory powers conferred upon them under the provisions of the Act and Rules as held in* ***Chandresh Kumar Malhotra*** *(supra). "*

6. In view of the aforesaid exposition of law, even this prayer of the petitioner cannot be acceded to. Consequently, there is no merit in this petition and the same is dismissed. All interim orders are vacated. Pending application, if any also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

State of Himachal Pradesh ...Appellant.
Versus
Sunil Kumar and another ...Respondents.

Cr.A.No. 344 of 2008
Reserved on : 31.10.2014
Decided on: 3.11.2014

For the Appellant: Mr. Ramesh Thakur, Asstt. A.G.
For the Respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 29.2.2008 rendered by the Additional Sessions Judge, Ghumarwin, District Bilaspur in Sessions Trial No. 58/7 of 2004, whereby the respondents-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under sections 498-A and 306 read with section 34 of the Indian Penal Code, have been acquitted.

2. Case of the prosecution, in a nutshell, is that a telephonic message was received at Police Station, Ghumarwin on 25.2.2004 at 5.45 P.M. from Dr. Anil at Civil Hospital, Ghumarwin that a case of poisoning has come which needs action. Rapat No.20 dated 25.2.2004 Ex.PW-4/A was recorded. S.I. Balwant Singh proceeded to Civil Hospital, Ghumarwin. The Medical Officer on duty informed that a lady named Asha Devi was not fit to make statement. He came back to Police Station and got recorded rapat No.26 dated 25.2.2004 vide Ex.PW-4/B. On 26.2.2004 at 10.10 A.M. Rattan Singh from P.G.I. Chandigarh informed telephonically Police Station, Ghumarwin that in the poisoning case of Jol Palakhi village which was referred to P.G.I. from Ghumarwin, the lady has died at PG.I. Chandigarh. Head Constable Chotta Ram alongwith Constable Balbir were sent to P.G.I. Chandigarh vide rapat No. 6 dated 26.2.2004 Ext. PW-4/C. Chotta Ram came back from P.G.I. Chandigarh to Police Station Ghumarwin on 27.2.2004 and rapat No.22 dated 27.2.2004 Ext. PW-4/D was incorporated. The post- mortem of the deceased was got conducted at Chandigarh and the dead body was handed over to deceased's father in law, Rattan Lal. It came during the course of investigation by Head Constable Chotta Ram that on 25.2.2004 at 5.15 P.M., Asha Devi had gone to bring grass from the fields. She felt giddy and accused Ram Dass and Krishni Devi brought her home. However, she started vomiting. She was taken to Civil Hospital, Ghumarwin from where she was referred to Bilaspur. From Bilaspur she

was further referred to P.G.I. Chandigarh on 25.2.2004 at 4.00 A.M. Asha Devi died at P.G.I. Chandigarh on 26.2.2004 at 5.00 P.M. Statement of the mother of the deceased Brahmi Devi was recorded by H.C. Chotta Ram vide Ext. DW-2/A. PW-1 Chandu Ram on 28.2.2004 made statement under Section 154 of the Criminal Procedure Code vide Ext. PA. According to him, he was resident of Dosarka, Police Station, District Hamirpur. He has retired as Captain from the Army. His elder brother has expired 7 years back, who was having 8 daughters. He was looking after the daughters. He married Asha Devi on 8.7.2003 with accused Sunil Kumar, resident of village Jol Palakhi. Whenever Asha Devi used to visit her house, she used to say that she was not comfortable at her in-laws house. Her husband, mother-in-law, grandfather-in-law and Sister-in-law used to taunt her. He went to Asha Devi's house and asked accused as to why they were harassing Asha Devi. They apologized. On 25.2.2004, Sunil Kumar informed him telephonically at 8.30 P.M. that Asha Devi has consumed poison. She was brought to Ghumarwin hospital. Thereafter, he and his wife Santosh went to Ghumarwin hospital. They found that Asha Devi was taken to Bilaspur. They proceeded to Bilaspur. They were told that Asha Devi has been taken to P.G.I. Chandigarh. He got telephonic information about Asha Devi having expired at P.G.I. Chandigarh. Accused were subjecting Asha Devi to ill-treatment, which led her to consume poison. The matter was investigated. An empty tube of Aluminum Phosphide Sulphas was recovered. It was seized vide seizure memo Ext. PW-11/A in presence of Lekh Ram and Joginder Singh witnesses. PW-11 Chint Ram recorded statements of the witnesses. Post-mortem of the dead body was got conducted vide Mark 'C'. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 12 witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. According to them, they have not harassed or tortured Asha Devi and no dowry was demanded. She was kept nicely. Learned trial Court acquitted the accused. Hence the present appeal.

4. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. T.S. Chauhan has supported the judgment passed by the trial Court.

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

7. PW-1 Chandu Ram has deposed that he has performed marriage of Asha Devi in the month of July 2003 with accused Sunil Kumar resident of Jol Palakhi. Asha Devi visited his house only once after the marriage. She told them that her mother-in-law, grandfather-in-law, husband and sister-in-law were harassing her on account of dowry. He visited the house of accused and advised them to stop

harassing Asha Devi. On 25.2.2004, at 8.30 P.M. he received telephonic message from accused Sunil Kumar that Asha Devi has consumed something. She was admitted to hospital at Ghumarwin. He and his wife Santosh Kumar went to Ghumarwin. After reaching Ghumarwin, he was told that Asha Devi was sent to Bilaspur Hospital. They rushed to Bilaspur Hospital. When they reached Bilaspur they were told that Asha Devi has already been sent to P.G.I. Chandigarh. They stayed in hospital at Bilaspur and next morning they went back to their home at Hamirpur. They were informed that Asha Devi has expired in P.G.I. Chandigarh. In his cross- examination, he has categorically admitted that at the time of marriage, no dowry was demanded by the accused. However, according to him, they had given dowry according to their status. Accused never demanded dowry from him. He has also admitted that accused knew that Brahmi Devi was a poor lady. Asha Devi had told him about her harassment for dowry in the month of September –October, 2003 when she visited his house at Dosarka. He told this fact to his neighbourer Dalip Singh, retired Subedar. Except that he has not told this fact to anyone. He told this fact for the first time in the Court. He has informed the Police that accused were demanding dowry from Asha Devi (whereas it is not so recorded in Ext.PA.). He has also stated to the police that thereafter he visited the house of accused and told them to stop harassing Asha Devi due to fulfillment of demand of dowry (whereas the words 'her harassment due to demand of dowry' is not written in Ext. PA)

8. PW-2 Dr. Anil Kumar has examined Asha Devi. He has issued MLC to this effect.

9. PW-3 Asha Devi has deposed that on 25.2.2004, at about 4.30 PM, she was going to bring grass. When she reached near Bowali, Asha Devi (deceased) consumed something from a tube. She threw away the tube and told her that she was fed up and thereafter she went away. She also told her that she was fed up due to her illness as she was operated upon for her illness. She was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned defence counsel she has testified that accused never harassed deceased Asha Devi nor deceased Asha Devi told her about alleged harassment by the accused persons.

10. Statement of PW-4 Bharat Bhushan is formal in nature.

11. PW-5 Brahmi Devi is the mother of deceased. She has deposed that deceased Asha Devi told her that she was harassed by accused Sunil Kumar. Asha Devi used to tell her that her husband used to come late night. He was demanding a motor cycle from them. Asha Devi also used to tell her that whenever she used to watch T.V., her sister-in-law Nishu used to tell her that she should bring T.V. from her parents. In her cross-examination she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha Devi from Ghumarwin upto Chandigarh and Sunil and his Taya were also with them upto Chandigarh.

12. PW-6 Naresh Kumar has partly investigated the case. He has recorded statements of witnesses Santosh Kumari, Brahmi Devi, Madhu Bala, Chandu Ram, Anjana Devi and Vinod Kumar. In his cross-examination, he has deposed that Brahmi Devi has also made statement earlier to the police at Chandigarh.

13. PW-7 Chotta Ram has got the post mortem conducted at P.G.I. Chandigarh. He obtained post mortem report Mark 'C'. In his cross-examination, he has deposed that Brahmi Devi made statement to him at Chandigarh that her daughter Asha Devi was not being harassed by accused. Brahmi Devi has also made statement that Asha Devi has not made any complaint about her harassment by the accused.

14. PW-8 Shiv Chaudhary has recorded statement of PW-1 Chandu Ram under Section 154 of the Criminal Procedure Code.

15. PW-9 Anjana Kumari has deposed deceased Asha Devi was daughter of her Taya (uncle). She was her friend. Whenever Asha Devi used to visit her mother's house, she used to tell her that she was being harassed and tortured by her in-laws. She also used to tell that her husband used to come late during night and he also used to beat her. Her husband demanded dowry and asked to bring money from her parents. In her cross-examination, she has admitted that she has not told the fact of torturing to anyone. About harassment of Asha Devi and demand of dowry, she was telling for the first time in the Court.

16. PW-10 Madhuwala is the sister of deceased. She has deposed that deceased used to meet her and also used to talk to her on telephone. She used to tell her that she was being harassed by her in-laws for dowry and her husband used to come home at late during night. Asha Devi died by consuming poison. In her cross-examination, she has deposed that she has told about demand of motor-cycle and T.V. to police (whereas it was not so recorded in mark 'X'. She has made statement to police that she used to meet her after marriage (whereas it was not so recorded in mark 'X').

17. PW-11 Chint Ram has partly investigated the matter. He has taken into possession empty tube with mark Sulphase vide memo Ex.PW-11/A. He recorded the statements of witnesses under section 161 of the Code of Criminal Procedure.

18. What emerges from the facts enumerated hereinabove is that marriage of deceased was solemnized with accused Sunil Kumar in the month of July, 2003. It was performed by PW-1 Chandu Ram. Statement of PW-1 Chandu Ram was recorded vide Ex.PA on the basis of which FIR was registered. According to PW-1 Chandu Ram, deceased has told them that her mother-in-law, grand father-in-law, husband and sister-in-law were harassing her on account of dowry. In his cross-examination, he has admitted that at the time of marriage, no dowry was demanded by the accused. He has not stated in Ex.PA about the demand of dowry raised by the accused. PW-3 Asha Devi has deposed that she was going to bring grass on 25.2.2004 at about 4.30 P.M. Asha

Devi consumed something from tube. She threw away that tube and told that she was fed up due to her illness. She was operated for her illness. In her cross-examination, she has specifically deposed that accused never harassed deceased Asha Devi nor Asha Devi ever told her about harassment by the accused. PW-5 Brahmi Devi, mother of deceased has deposed that deceased was harassed by Sunil Kumar as he was demanding a motorcycle from them and also threatening to kill in case motorcycle is not given to him. In her cross-examination, she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha from Ghumarwin to P.G.I. Chandigarh. Accused Sunil and his Taya also went with them upto Chandigarh. Statement of PW-5 Brahmi Devi was also recorded vide Ex.DW-2/A. We have also gone through Ex.DW-2/A. There is no reference about the demand of dowry being raised by the accused. Statement of PW-5 Brahmi Devi was recorded by PW-7 Chotta Ram at P.G.I. Chandigarh. PW-6 Head Constable Naresh Kumar has also deposed in his cross-examination that no witness has stated about the demand of dowry before him. PW-7 ASI Chotta Ram has admitted that Brahmi Devi has made statement before him at Chandigarh vide Ex.DW-2/A. In case the dowry has ever been demanded by the accused, it should have been mentioned in Ex.DW-2/A. PW-1 Chandu Ram, PW-5 Brahmi Devi and PW-6 Naresh Kumar have categorically deposed that there was no demand of dowry. In view of these statements, statement of PW-9 Anjana Kumari and PW-10 Madhuwala cannot be believed. Moreover, PW-9 Anjana Kumari has specifically admitted that she has not told the non-fulfillment of demand of dowry to anyone. She has stated about the harassment of Asha Devi and demand of dowry in the Court for the first time.

19. Now, as far as statement of PW-10 Madhuwala is concerned, she has also not told about harassment of Asha Devi and demand of dowry to anyone. She has narrated these facts to police after the death of deceased Asha Devi. According to her, she has told about the demand of motorcycle and T.V. to police. However, it is not so recorded in mark 'X'. It is true that deceased has died by consuming poison. She has also been operated for breast cancer. She could be in depression due to her serious ailment. She was operated upon for her ailment. It has also come on record that accused are well off. They have never demanded any dowry from the deceased. PW-5 Brahmi Devi has made major improvements in her statement vis-à-vis Ex.DW-2/A. There has to be series of facts/events to cause harassment. There was no demand of dowry. The evidence produced by the prosecution does not prove the case against the accused for offence under section 498-A of the Indian Penal Code. There is no evidence brought on record to establish that deceased was forced to commit suicide. There is no evidence also whatsoever to establish that accused have incited or provoked the deceased to commit suicide.

20. So far as presumption under section 113 of the Indian Evidence is concerned, it could be raised, if it was proved that deceased was subjected to cruelty. No cruelty was ever meted out to the deceased.

Thus, section 113 of the Indian Evidence is not applicable in the present case.

21. The prosecution has failed to prove that accused ever demanded dowry from the deceased or compelled the deceased to commit suicide. We need not interfere with the well reasoned judgment rendered by the trial court.

22. Accordingly, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case against the accused beyond reasonable doubt for offence under sections 498-A and 306 read with section 34 of the Indian Penal Code.

20. Consequently, the appeal is dismissed.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

Dharam Dass .....Petitioner.

Versus

HPSEB Ltd. & anr. .....Respondents.

CWP No. 5639 of 2014.
Reserved on: 30.10.2014
Decided on: 3.11.2014.

Constitution of India, 1950- Article 226- petitioner was appointed as a Beldar- he was retrenched in the year 1998- he filed an application before Administrative Tribunal which was allowed- petitioner was re-engaged and was conferred the status of work charge employee- he was again retrenched on 13.5.2005- he referred the matter to Industrial Tribunal Shimla, which held that retrenchment was in violation of the Industrial Disputes Act – writ petition was filed by the respondent was dismissed and the petitioner was engaged on 12.11.2010 as a T-mate- petitioner claimed that he should have been conferred with work charge status with all the consequential benefits- held, that petitioner was conferred the work charge status w.e.f. 26.12.1993- he was not allowed to join the duty and was wrongly retrenched- retrenchment was set aside- therefore, he is entitled to be conferred the work charge status with all consequential benefit including promotion from the date- his juniors were promoted to the higher post. (Para- 4 and 5)

For the petitioner: Mr. Hamender Singh Chandel, Advocate.
For the respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was engaged as Beldar on 26.12.1993. He was retrenched in the year 1998. He approached the erstwhile H.P. State Administrative Tribunal, by filing OA No. 1587 of 1998. The erstwhile H.P. State Administrative Tribunal ordered the re-engagement of the petitioner vide order dated 6.11.1998. The petitioner was re-engaged as per the orders of the erstwhile H.P. State Administrative Tribunal. He was conferred with work charge status, as per Annexure P-2 dated 6.11.2002 at Sr. No. 42. However, the fact of the matter is that the petitioner was not allowed to join his duties as work charge employee.

2. The petitioner was again retrenched on 13.5.2005. The petitioner raised the industrial dispute. The matter was referred to the Industrial Tribunal-cum-Labour Court, Shimla, vide reference No. 59 of 2007. The learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Shimla, held the retrenchment of the petitioner in violation to provisions of Sections 25F,25G &H of the Industrial Disputes Act, 1947. The petitioner was ordered to be re-instated with seniority and continuity of service, but without back wages.

3. The respondents-Board, feeling aggrieved by the order dated 1.6.2010, filed CWP No. 6089 of 2010 before this Court. The same was dismissed by this Court with analogous writ petitions on 28.9.2010. The petitioner was re-engaged as Beldar on 12.11.2010 vide Annexure P-6. He was appointed as T/Mate vide order dated 5.11.2011 (Annexure P-7).

4. The case of the petitioner, in a nut shell, is that on the basis of Annexure P-2, order dated 6.11.2002, he should have been conferred work charge status with all consequential benefits. Mrs. Sharmila Patial, Advocate, appearing for the Board has vehemently argued that since there is break in service, the petitioner could not be conferred with work charge status w.e.f. 6.11.2002, as he was re-engaged pursuant to the award dated 1.6.2010, as Beldar on 12.11.2010.

5. It is evident from Annexure P-2, letter dated 6.11.2002 that taking into consideration the seniority of the petitioner w.e.f. 26.12.1993, he was conferred with work charge status. He was not permitted to join his duties as work charge employee for the reasons best known to the respondents. The subsequent retrenchment of the petitioner dated 13.5.2005 was set aside by the learned Industrial Tribunal-cum-Labour Court, Shimla, vide order dated 1.6.2010. The learned Tribunal has awarded re-instatement of the petitioner with continuity in service but without back wages. The writ petition preferred against the award dated 1.6.2010 has been dismissed by this Court on 28.9.2010. The action of the respondents to re-engage the petitioner merely as Beldar on 12.11.2010 was wholly illegal, though he has been made T/Mate on 5.11.2011. However, the fact of the matter is that the petitioner should

have been granted the work charge status w.e.f. 6.11.2002, vide letter Annexure P-2, with all consequential benefits by counting his previous seniority.

6. Accordingly, the Writ Petition is allowed. The petitioner would be deemed to have been appointed on work charge basis w.e.f. 6.11.2002 with all consequential benefits including promotion etc. from the date the persons junior to him have been promoted to the higher post. The consequential benefits be released to the petitioner by treating him work charge employee w.e.f. 6.11.2002, within a period of six weeks from today.

7. Pending applications, if any, shall stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Ram Krishan Khagta ..... Petitioner
Vs.
The Kangra Central Cooperative
Bank Ltd. & ors. ..... Respondents

CWP No. 3874 of 2014.
Date of decision: 3.11.2014.

Constitution of India, 1950- Article 226- *P*etitioner had filed a writ petition against the Co-operative society registered under H.P. Cooperative Societies Act, 1968- held, that writ petition against the co-operative society is not maintainable, even the Court cannot relegate the petitioner to pursue the remedy under section 72 of H.P. Cooperative Societies Act. (Para- 3 to 6)

Cases referred:
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243
S.S.Rana vs. Registrar, Co-operative Societies and another (2006) 11 SCC 634
Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)

For the petitioner : Mrs. Jyotsna Rewal Dua and Ms. Shalini Thakur, Advocates.

For the respondents Mr. Umesh Kanwar, Advocate, for respondents No. 1 and 2.
Mr. Virender Kumar Verma and Ms. Meenakshi Sharma, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondent No. 3.
Mrs. Ranjana Parmar, Advocate, for respondents No. 4, 6 and 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has approached this court for grant of following substantive reliefs:-

(i) For directing the respondents to hold review DPC within a time bound schedule by ensuring that no Grade 1 officer is superseded in his promotion to the post of Assistant

General Manager by another officer where the difference of length of promotion between the two officers in feeder category is more than 2 years.

(ii) For holding that supercession by respondents No. 4-6 over the petitioner for promotion to the post of Assistant General Manager is bad in eyes of law considering the difference between their length of promotion in feeder category of Grade 1 is more than 2 years vis-à-vis the petitioner.

(vi) For directing the respondents to promote the petitioner to the post of Assistant General Manager w.e.f. the date his juniors have been promoted i.e. 7.2.2014 along with all consequential including monetary benefits.

(vii) For directing the respondents to read the over all entry of ACR of the petitioner for the year 2008-09 & 2011-12 as 'Very Good' or alternatively the entries in these ACRs be directed to be communicated to the petitioner and thereafter action in accordance with law may be directed to be taken on the un-communicated ACRs.

(viii) For issuing a writ of Certiorari or any other appropriate writ for quashing the proceedings of DPC as convened on 31.1.2014 vide annexure P-4 and all consequential actions thereupon vis-à-vis parties to the litigation.

7. From the perusal of the reliefs sought for by the petitioner, it is clear that the relief has been sought primarily against respondent No.1, which is a Cooperative Society registered under the H.P. Cooperative Societies Act, 1968 (for short, the Act).

8. The parties are not at variance that in view of decisions of learned Division Bench of this court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243, Sanjeev Kumar & ors.** Vs. **State of H.P. and ors. CWP No. 6709 of 2013-A dated 4.8.2014, LPA No. 236 of 2011 titled Laxmi Narain & ors.** Vs. **Kuldeep Singh & ors alongwith connected matters decided on 17.9.2014,** the decision of Hon'ble Supreme Court in **S.S.Rana** vs. **Registrar, Co-operative Societies and another (2006) 11 SCC 634** and the decision of Hon'ble Full Bench of this court in **Vikram Chauhan** vs. **The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB),** the writ petition itself is not maintainable.

9. However, the learned counsel for the petitioner has made a request for relegating the petitioner to the Registrar so as to enable him to file a petition under section 72 of the Act. The petitioner has made this request taking cue from para-9 of preliminary objection raised by respondents No. 1 and 2 to the following effect:-

> "*The petitioner has an effective alternative remedy under Section 72 of the H.P. Cooperative Societies Act, 1968. Being a matter touching the business of the society, the grievance, if any,*

has got to be vindicated by having recourse to the said provisions only."

10. I am afraid that this court cannot relegate the petitioner to pursue the remedy under section 72 of the Act, which is in fact not available to him under the law. This aspect of the matter has been succinctly dealt with by the learned Division Bench of this court in **Sanjeev Kumar's** case (supra), wherein it was held as follows:-

"9. "Faced with such situation, the petitioners would then contend that the orders passed by the Registrar and thereafter by the State government were statutory and therefore, a writ against an order passed by the statutory authority was maintainable.

10. There would have been no dispute in case the orders impugned herein could be termed to have been passed by the statutory authority in exercise of powers conferred upon it by the Act and Rules, because in that event undisputedly the writ petition would be maintainable before this court. However, the moot question again herein is as to whether the orders passed by the respondents i.e. Registrar and the State Government can be termed to be statutory orders.

11. Admittedly, the dispute raised by the petitioners pertained to a service matter and therefore, even if this court had relegated the petitioners to the Registrar/ State government, could the orders be termed to be in exercise of the statutory powers? The obvious answer is no, for more than one reasons. Firstly, the dispute of an employee and employer relationship is not a dispute, which touches the constitution, management or business of the cooperative societies and therefore, is not amenable to the jurisdiction of the Registrar under section 72 of the Act [Re: ***Morinda Coop. Sugar Mills Ltd.*** *Vs.* ***Morinda Coop.Sugar Mills Workers' Union (2006) 6 SCC 80****]. Secondly even if this court had relegated the petitioners before the Registrar/ State government, the orders passed by them would not clothe the orders so passed with statutory colour, as the same are not in exercise of statutory powers conferred upon them under the provisions of the Act and Rules as held in* ***Chandresh Kumar Malhotra*** *(supra). "*

11. In view of the aforesaid exposition of law, even this prayer of the petitioner cannot be acceded to. Consequently, there is no merit in this petition and the same is dismissed. All interim orders are vacated. Pending application, if any also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

State of Himachal Pradesh ...Appellant.
Versus
Sunil Kumar and another ...Respondents.

Cr.A.No. 344 of 2008
Reserved on : 31.10.2014
Decided on: 3.11.2014

Indian Penal Code, 1860- Sections 498-A and 306 readwith Section 34 of IPC- Deceased had committed suicide by consuming poison- father of the deceased filed a complaint that deceased was not being treated properly in her matrimonial home- he made inquiry on which accused apologized-subsequently, deceased committed suicide- father of the deceased admitted in his cross-examination that no dowry was demanded by the accused at the time of marriage- PW-3 told that deceased was fed up due to her illness- accused had never harassed the deceased-PW-5 also admitted in cross-examination that no dowry was demanded at the time of marriage- PW-9 admitted that she had not told about the non-fulfillment of the demand of dowry to anyone and was deposing about this fact for the first time- held, that the testimonies of the eye-witnesses suffer from minor improvements- there has to be a series of facts/events to cause harassment - there was no demand of dowry and no evidence that deceased was forced to commit suicide or that accused had insisted or provoked the deceased to commit suicide.
(Para-19)

For the Appellant: Mr. Ramesh Thakur, Asstt. A.G.
For the Respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 29.2.2008 rendered by the Additional Sessions Judge, Ghumarwin, District Bilaspur in Sessions Trial No. 58/7 of 2004, whereby the respondents-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under sections 498-A and 306 read with section 34 of the Indian Penal Code, have been acquitted.

2. Case of the prosecution, in a nutshell, is that a telephonic message was received at Police Station, Ghumarwin on 25.2.2004 at 5.45 P.M. from Dr. Anil at Civil Hospital, Ghumarwin that a case of poisoning has come which needs action. Rapat No.20 dated 25.2.2004 Ex.PW-4/A

was recorded. S.I. Balwant Singh proceeded to Civil Hospital, Ghumarwin. The Medical Officer on duty informed that a lady named Asha Devi was not fit to make statement. He came back to Police Station and got recorded rapat No.26 dated 25.2.2004 vide Ex.PW-4/B. On 26.2.2004 at 10.10 A.M. Rattan Singh from P.G.I. Chandigarh informed telephonically Police Station, Ghumarwin that in the poisoning case of Jol Palakhi village which was referred to P.G.I. from Ghumarwin, the lady has died at PG.I. Chandigarh. Head Constable Chotta Ram alongwith Constable Balbir were sent to P.G.I. Chandigarh vide rapat No. 6 dated 26.2.2004 Ext. PW-4/C. Chotta Ram came back from P.G.I. Chandigarh to Police Station Ghumarwin on 27.2.2004 and rapat No.22 dated 27.2.2004 Ext. PW-4/D was incorporated. The post- mortem of the deceased was got conducted at Chandigarh and the dead body was handed over to deceased's father in law, Rattan Lal. It came during the course of investigation by Head Constable Chotta Ram that on 25.2.2004 at 5.15 P.M., Asha Devi had gone to bring grass from the fields. She felt giddy and accused Ram Dass and Krishni Devi brought her home. However, she started vomiting. She was taken to Civil Hospital, Ghumarwin from where she was referred to Bilaspur. From Bilaspur she was further referred to P.G.I. Chandigarh on 25.2.2004 at 4.00 A.M. Asha Devi died at P.G.I. Chandigarh on 26.2.2004 at 5.00 P.M. Statement of the mother of the deceased Brahmi Devi was recorded by H.C. Chotta Ram vide Ext. DW-2/A. PW-1 Chandu Ram on 28.2.2004 made statement under Section 154 of the Criminal Procedure Code vide Ext. PA. According to him, he was resident of Dosarka, Police Station, District Hamirpur. He has retired as Captain from the Army. His elder brother has expired 7 years back, who was having 8 daughters. He was looking after the daughters. He married Asha Devi on 8.7.2003 with accused Sunil Kumar, resident of village Jol Palakhi. Whenever Asha Devi used to visit her house, she used to say that she was not comfortable at her in-laws house. Her husband, mother-in-law, grandfather-in-law and Sister-in-law used to taunt her. He went to Asha Devi's house and asked accused as to why they were harassing Asha Devi. They apologized. On 25.2.2004, Sunil Kumar informed him telephonically at 8.30 P.M. that Asha Devi has consumed poison. She was brought to Ghumarwin hospital. Thereafter, he and his wife Santosh went to Ghumarwin hospital. They found that Asha Devi was taken to Bilaspur. They proceeded to Bilaspur. They were told that Asha Devi has been taken to P.G.I. Chandigarh. He got telephonic information about Asha Devi having expired at P.G.I. Chandigarh. Accused were subjecting Asha Devi to ill-treatment, which led her to consume poison. The matter was investigated. An empty tube of Aluminum Phosphide Sulphas was recovered. It was seized vide seizure memo Ext. PW-11/A in presence of Lekh Ram and Joginder Singh witnesses. PW-11 Chint Ram recorded statements of the witnesses. Post-mortem of the dead body was got conducted vide Mark 'C'. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 12 witnesses in all to prove its case against the accused. Statements of accused under Section

313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. According to them, they have not harassed or tortured Asha Devi and no dowry was demanded. She was kept nicely. Learned trial Court acquitted the accused. Hence the present appeal.

4. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. T.S. Chauhan has supported the judgment passed by the trial Court.

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

7. PW-1 Chandu Ram has deposed that he has performed marriage of Asha Devi in the month of July 2003 with accused Sunil Kumar resident of Jol Palakhi. Asha Devi visited his house only once after the marriage. She told them that her mother-in-law, grandfather-in-law, husband and sister-in-law were harassing her on account of dowry. He visited the house of accused and advised them to stop harassing Asha Devi. On 25.2.2004, at 8.30 P.M. he received telephonic message from accused Sunil Kumar that Asha Devi has consumed something. She was admitted to hospital at Ghumarwin. He and his wife Santosh Kumar went to Ghumarwin. After reaching Ghumarwin, he was told that Asha Devi was sent to Bilaspur Hospital. They rushed to Bilaspur Hospital. When they reached Bilaspur they were told that Asha Devi has already been sent to P.G.I. Chandigarh. They stayed in hospital at Bilaspur and next morning they went back to their home at Hamirpur. They were informed that Asha Devi has expired in P.G.I. Chandigarh. In his cross- examination, he has categorically admitted that at the time of marriage, no dowry was demanded by the accused. However, according to him, they had given dowry according to their status. Accused never demanded dowry from him. He has also admitted that accused knew that Brahmi Devi was a poor lady. Asha Devi had told him about her harassment for dowry in the month of September –October, 2003 when she visited his house at Dosarka. He told this fact to his neighbourer Dalip Singh, retired Subedar. Except that he has not told this fact to anyone. He told this fact for the first time in the Court. He has informed the Police that accused were demanding dowry from Asha Devi (whereas it is not so recorded in Ext.PA.). He has also stated to the police that thereafter he visited the house of accused and told them to stop harassing Asha Devi due to fulfillment of demand of dowry (whereas the words 'her harassment due to demand of dowry' is not written in Ext. PA)

8. PW-2 Dr. Anil Kumar has examined Asha Devi. He has issued MLC to this effect.

9. PW-3 Asha Devi has deposed that on 25.2.2004, at about 4.30 PM, she was going to bring grass. When she reached near Bowali, Asha Devi (deceased) consumed something from a tube. She threw away the tube and told her that she was fed up and thereafter she went away.

She also told her that she was fed up due to her illness as she was operated upon for her illness. She was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned defence counsel she has testified that accused never harassed deceased Asha Devi nor deceased Asha Devi told her about alleged harassment by the accused persons.

10. Statement of PW-4 Bharat Bhushan is formal in nature.

11. PW-5 Brahmi Devi is the mother of deceased. She has deposed that deceased Asha Devi told her that she was harassed by accused Sunil Kumar. Asha Devi used to tell her that her husband used to come late night. He was demanding a motor cycle from them. Asha Devi also used to tell her that whenever she used to watch T.V., her sister-in-law Nishu used to tell her that she should bring T.V. from her parents. In her cross-examination she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha Devi from Ghumarwin upto Chandigarh and Sunil and his Taya were also with them upto Chandigarh.

12. PW-6 Naresh Kumar has partly investigated the case. He has recorded statements of witnesses Santosh Kumari, Brahmi Devi, Madhu Bala, Chandu Ram, Anjana Devi and Vinod Kumar. In his cross-examination, he has deposed that Brahmi Devi has also made statement earlier to the police at Chandigarh.

13. PW-7 Chotta Ram has got the post mortem conducted at P.G.I. Chandigarh. He obtained post mortem report Mark 'C'. In his cross-examination, he has deposed that Brahmi Devi made statement to him at Chandigarh that her daughter Asha Devi was not being harassed by accused. Brahmi Devi has also made statement that Asha Devi has not made any complaint about her harassment by the accused.

14. PW-8 Shiv Chaudhary has recorded statement of PW-1 Chandu Ram under Section 154 of the Criminal Procedure Code.

15. PW-9 Anjana Kumari has deposed deceased Asha Devi was daughter of her Taya (uncle). She was her friend. Whenever Asha Devi used to visit her mother's house, she used to tell her that she was being harassed and tortured by her in-laws. She also used to tell that her husband used to come late during night and he also used to beat her. Her husband demanded dowry and asked to bring money from her parents. In her cross-examination, she has admitted that she has not told the fact of torturing to anyone. About harassment of Asha Devi and demand of dowry, she was telling for the first time in the Court.

16. PW-10 Madhuwala is the sister of deceased. She has deposed that deceased used to meet her and also used to talk to her on telephone. She used to tell her that she was being harassed by her in-laws for dowry and her husband used to come home at late during night. Asha Devi died by consuming poison. In her cross-examination, she has deposed that she has told about demand of motor-cycle and T.V. to police (whereas it was not so recorded in mark 'X'. She has made

statement to police that she used to meet her after marriage (whereas it was not so recorded in mark 'X').

17. PW-11 Chint Ram has partly investigated the matter. He has taken into possession empty tube with mark Sulphase vide memo Ex.PW-11/A. He recorded the statements of witnesses under section 161 of the Code of Criminal Procedure.

18. What emerges from the facts enumerated hereinabove is that marriage of deceased was solemnized with accused Sunil Kumar in the month of July, 2003. It was performed by PW-1 Chandu Ram. Statement of PW-1 Chandu Ram was recorded vide Ex.PA on the basis of which FIR was registered. According to PW-1 Chandu Ram, deceased has told them that her mother-in-law, grand father-in-law, husband and sister-in-law were harassing her on account of dowry. In his cross-examination, he has admitted that at the time of marriage, no dowry was demanded by the accused. He has not stated in Ex.PA about the demand of dowry raised by the accused. PW-3 Asha Devi has deposed that she was going to bring grass on 25.2.2004 at about 4.30 P.M. Asha Devi consumed something from tube. She threw away that tube and told that she was fed up due to her illness. She was operated for her illness. In her cross-examination, she has specifically deposed that accused never harassed deceased Asha Devi nor Asha Devi ever told her about harassment by the accused. PW-5 Brahmi Devi, mother of deceased has deposed that deceased was harassed by Sunil Kumar as he was demanding a motorcycle from them and also threatening to kill in case motorcycle is not given to him. In her cross-examination, she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha from Ghumarwin to P.G.I. Chandigarh. Accused Sunil and his Taya also went with them upto Chandigarh. Statement of PW-5 Brahmi Devi was also recorded vide Ex.DW-2/A. We have also gone through Ex.DW-2/A. There is no reference about the demand of dowry being raised by the accused. Statement of PW-5 Brahmi Devi was recorded by PW-7 Chotta Ram at P.G.I. Chandigarh. PW-6 Head Constable Naresh Kumar has also deposed in his cross-examination that no witness has stated about the demand of dowry before him. PW-7 ASI Chotta Ram has admitted that Brahmi Devi has made statement before him at Chandigarh vide Ex.DW-2/A. In case the dowry has ever been demanded by the accused, it should have been mentioned in Ex.DW-2/A. PW-1 Chandu Ram, PW-5 Brahmi Devi and PW-6 Naresh Kumar have categorically deposed that there was no demand of dowry. In view of these statements, statement of PW-9 Anjana Kumari and PW-10 Madhuwala cannot be believed. Moreover, PW-9 Anjana Kumari has specifically admitted that she has not told the non-fulfillment of demand of dowry to anyone. She has stated about the harassment of Asha Devi and demand of dowry in the Court for the first time.

19. Now, as far as statement of PW-10 Madhuwala is concerned, she has also not told about harassment of Asha Devi and demand of dowry to anyone. She has narrated these facts to police after

the death of deceased Asha Devi. According to her, she has told about the demand of motorcycle and T.V. to police. However, it is not so recorded in mark 'X'. It is true that deceased has died by consuming poison. She has also been operated for breast cancer. She could be in depression due to her serious ailment. She was operated upon for her ailment. It has also come on record that accused are well off. They have never demanded any dowry from the deceased. PW-5 Brahmi Devi has made major improvements in her statement vis-à-vis Ex.DW-2/A. There has to be series of facts/events to cause harassment. There was no demand of dowry. The evidence produced by the prosecution does not prove the case against the accused for offence under section 498-A of the Indian Penal Code. There is no evidence brought on record to establish that deceased was forced to commit suicide. There is no evidence also whatsoever to establish that accused have incited or provoked the deceased to commit suicide.

20. So far as presumption under section 113 of the Indian Evidence is concerned, it could be raised, if it was proved that deceased was subjected to cruelty. No cruelty was ever meted out to the deceased. Thus, section 113 of the Indian Evidence is not applicable in the present case.

21. The prosecution has failed to prove that accused ever demanded dowry from the deceased or compelled the deceased to commit suicide. We need not interfere with the well reasoned judgment rendered by the trial court.

22. Accordingly, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case against the accused beyond reasonable doubt for offence under sections 498-A and 306 read with section 34 of the Indian Penal Code.

20. Consequently, the appeal is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No.5419 of 2014 alongwith
CWP No.4872 of 2014.
Judgment reserved on : 14.10.2014.
Date of decision: 4th November, 2014.

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1. CWP No.5419 of 2014.

Dr. Disha Sharma .....Petitioner.

Versus

State of Himachal Pradesh & others .....Respondents.

For the Petitioner : Mr. Ashwani Sharma, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma and Mr. V.S.Chauhan, Additional Advocate Generals, Mr.J.K.Verma, Deputy Advocate General, for respondents No.1 to 4.
Nemo for respondent No.5.
Ms.Anjali Soni Verma, Advocate, for respondent No.6.

2. CWP No.4872 of 2014.

Dr.Pankaj Katoch .....Petitioner.
Versus
State of Himachal Pradesh & others .....Respondents.

For the Petitioner :Mr. Ashwani Sharma, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma and Mr. V.S.Chauhan, Additional Advocate Generals, Mr.J.K.Verma, Deputy Advocate General, for respondents No.1 to 5.
Respondent No.6 ex parte.
Respondent No.7 deleted.

Constitution of India, 1950- Article 226- Respondent issued prospectus for the year 2014 for filling-up PG seats in IGMC, Shimla and DRPGMC, Tanda in service General Duty Medical Officers) and HPHS Contract Service Medical Officer Group and Direct Group for the different categories- petitioner contended that the respondent had not disclosed to two Post Graduate seats in Preventive and Social Medicine and Pathology- they were told that only seats in Microbiology and Bio-chemistry were available which were accepted by the petitioners- the seats were subsequently allotted to the private respondents- respondents admitted that two seats were filled up after due publishing and were filled up by contacting the candidates in the waiting list over their mobile phones- held, that admissions have to be made in a fair and transparent manner and no admissions can be made without disclosing the available vacancies and by publishing the same in the newspaper- respondents failed to observe this requirement and had engaged the merit- however, keeping in view that the upsetting the admission would start a chance reaction and many candidates would come forward to occupy the seats, therefore, the matter was left and rest- directions issued to the respondent to grant admission strictly in accordance with prospects.

(Para-14, 15 and 33)

Cases referred:

Priya Gupta versus State of Chhattisgarh and others (2012) 7 SCC 433

Asha versus Pt. B.D.Sharma University of Health Sciences and others (2012) 7 SCC 389

Punjab Engineer College, Chandigarh through its Principal versus Sanjay Gulati and others (1983) 3 SCC 517

State of Punjab and others versus Renuka Singla and others (1994) 1 SCC 175

Rajiv Mittal versus Maharshi Dayanand University and others (1998) 2 SCC 402

Aneesh D.Lawande and others versus State of Goa and others 2013 AIR SCW 6217,

Chandigarh Administration & Another versus Jasmine Kaur and others JT 2014 (10) SC 319

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and facts arise for determination, therefore, both these petitions are taken up together for decision.

2. The petitioner(s) by way of these writ petitions have approached this Court making grievance therein that the respondents had not disclosed two seats of PSM (Preventive and Social Medicine) and Pathology in the open counselling held on 08.07.2014 for GDO in service candidates and had further illegally ted these seats to respondents No. 6 and 7, who were lower in merit to the petitioner(s).

3. The respondents in February, 2014, issued prospectus for the year 2014 for filling-up PG seats in IGMC, Shimla and DRPGMC, Tanda from amongst the candidates from HPHS (in service General Duty Medical Officers) and HPHS Contract Service Medical Officer Group and Direct Group. The seats for Post Graduate (MD and MS) Degree Course have been categorized under Group-A (All India Quota Seats), Group-B (State Quota Seats). Under Group-B, the seats are further sub-classified as HPHS (in service General Duty Medical Officers) and HPHS Contract Service Medical Officer Group under HPHS (in service GDO). The petitioner (s) and the private respondents applied for PG seats under HPHS (in service General Duty Medical Officers) after qualifying All India NEET PG Competitive Entrance Examination. The petitioner(s) were ranked 63 and 79 respectively while the private respondents were ranked 91 and 93 respectively in the merit list.

4. The grievance of the petitioner (s) is that when they were called for second counselling on 08.07.2014 for filling-up the vacant PG seats, the respondents concealed and did not disclose two Post Graduate seats in Preventive and Social Medicine (in short hereinafter referred to 'PSM') and Pathology and were informed that only seats in Microbiology and Biochemistry were vacant and were asked to give their options qua these two seats. Left with no other option, the petitioner(s) accepted these

seats by depositing the fees. The petitioner(s) were shocked and surprised when they came to know that the official respondents had infact offered the aforesaid two Post Graduate seats in 'PSM' and Pathology to the respondents No.6 and 7 on 10.07.2014 without offering these seats first to the petitioner(s), who had a preferential right qua the same on account of their being better placed in merit.

5. The officials respondents initially filed short reply and there appeared to be some contradictions in Paras 3 and 7 thereof and accordingly this Court vide order dated 22.09.2014 directed the official respondents to file supplementary affidavit. In compliance to the aforesaid orders, the respondents filed supplementary affidavit wherein they categorically stated that in the 3rd round of counselling held on 08.07.2014, the following PG (MD/MS) seats were offered to the petitioner(s):-

1 PG seat of MD Community Medicine (Preventive and Social Medicine),

1 PG seat of Microbiology and

1 PG seat of Bio-chemistry for GDO (General) group and category.

6. It is further alleged that contrary to the claim set up by the petitioner(s), none of them opted for PG seats in 'PSM' and infact exercised their options and accepted the seats of Microbiology and Bio-chemistry, respectively. Insofar as the allegation of the petitioner(s) that two seats of 'PSM' and Pathology had been filled-up on 10.07.2014 in a surreptitious manner by offering the same to respondents No.6 and 7 without first offering the same to the petitioner(s), who were higher in merit, the respondents have repelled this claim in the following manner:-

"10. That it is submitted that after completion of 3rd round of Counselling, while compilation/finalization of the record on 10.7.2014, it was found that two seats remained vacant (One seat of MD Community Medicine GDO General (regular) and one seat of MD Pathology GDO (contract).

It is worthwhile to submit here that the MD Pathology GDO General (Contract) seat which was allotted to one Dr.Puneet Singh during 2nd round of Counselling held on 29.4.2014 remained vacant due to the non-submission of fees by the candidate as verified from the records, which did not come in the notice of Counselling Committee on 8.7.2014 and the same was brought to the knowledge of authorities by the concerned Dealing Assistant on 9.7.2014. The Principal, Indira Gandhi Medical College, Shimla called for the emergency meeting of Counselling Committee on 10.7.2014 in the chamber of Director Medical Education and Research, Himachal Pradesh. Copy of relevant Noting Sheet is annexed and marked herewith as Annexure R-4 for the kind perusal of this Hon'ble Court.

It is pertinent to submit here that no written information has been submitted by the candidate i.e. Dr.Puneet Singh regarding

surrendering of MD Pathology seat, ***it is a known fact that surrendering of seats is total responsibility of candidate for which Director, Medical Education has also published a Notice in leading News Paper on 4.7.2014****, inspite of this, we have not received any written information from the concerned Doctor for non-joining/ surrendering of seats i.e. MD Pathology,*

Further, during the emergent meeting held on 10.7.2014, after detailed deliberation on this issue, it was unanimously decided by the Committee that in order to avoid the sheer wastage of precious Post Graduate Degree seats and in compliance to the direction passed by the Hon'ble Apex Court in Writ Petition (C) No.433/2013 titled as Dr.Fraz Naseem V/S Union of India and others to fill the vacant seats arisen ***out of any reason may be filled up out of waiting list*** *of 3rd round of Counselling . Accordingly, the candidates ranked at 91 and 93 were offered these seats* ***in order of merit from the waiting list of 3rd round of Counselling .*** *Xerox copies are annexed and marked as Annexure R-5 for the kind perusal of this Hon'ble Court."*

7. Thus, what appears from the defence of the State is that the admissions in question have been made by offering the same only to the waiting list candidates in compliance to the directions passed by the Hon'ble Supreme Court in ***Dr.Fraz Naseem & others*** *versus* ***Union of India & others, Writ Petition (Civil) No. 433 of 2013***.

8. Now, in case the order passed by the Hon'ble Supreme Court on 14.03.2014 is perused, it would be clear that the Hon'ble Supreme Court infact did not pass any effective order, but infact fixed the following schedule for the admissions to the Post Graduate Courses for the academic session 2014-15:-

"Upon hearing counsel the Court made the following

O R D E R

We have heard learned counsel for the parties. For the timer being we fix the following schedule for the admissions to the Post Graduate Medical Courses for the academic session 2014-2015:-

SCHEDULE FOR ADMISSION POST GRADUATE COURSES

[BROAD SPECIALITY]

STATE QUOTA

ALL INDIA QUOTA

1st round of Counselling	*To be over by 30th March*	*Between 4th April and 16th April*
Last date for joining the allotted College and course	*7th April*	*26th April*

2nd round of Counselling for allotment of seats from waiting list	*27th April to 3rd May*	*9th May to 13th May*
Last date for joining for candidates allotted seats in 2nd round of counselling	*10th May*	*24th May*
3rd round of counselling (Round for filling up seats reverted from AIQ/ other vacant State Quota Seats)	*20th June to 25th June*	*25th May to 9th June*
Last date for joining for candidates Allotted seats in 3rd round of Counselling	*30th June*	*19th June*
Commencement of academic Session	*30th June*	*30th June*
Last date up to which students can be admitted against vacancies arising due to any reason from the waiting list	*10th July*	*Not applicable.*

The Medical Council of India will notify the aforesaid schedule. List the matters in the month of April, 2014.

This order has been passed in modification of order dated 28th February, 2014."

9. In this background, the only question required to be determined in these petitions is as to whether the vacant seats of PG Courses were first required to be filled-up purely on merit from amongst the candidates desiring change of course/specialty or the same were required to be filled-up only out of the waiting list.

10. From the material placed on record and what has been stated above, it is clear that the respondents had not denied the fact that two seats of 'PSM' and Pathology filled-up on 10.07.2014 had not been filled-up after due publicity and had been filled-up by contacting the candidates in the waiting list over their mobile telephones and after seeking their options, these seats were offered to respondents No.6 and 7.

11. True import of the terms "cut off date" and "rule of merit" came up for consideration in ***Priya Gupta*** *versus* ***State of Chhattisgarh and others (2012) 7 SCC 433*** wherein after deprecating the practice of Universities not complying with the prescribed schedule and procedure, the Hon'ble Supreme Court held as follows:-

"45. The maxim Boni judicis est causas litium dirimere places an obligation upon the Court to ensure that it resolves the causes of litigation in the country. Thus, the need of the hour is that binding dicta be prescribed and statutory regulations be enforced, so that all concerned are mandatorily required to implement the time schedule in its true spirit and substance. It is difficult and not even advisable to keep some windows open to meet a particular situation of exception, as it may pose impediments to the smooth implementation of laws and defeat the very object of the scheme. These schedules have been prescribed upon serious consideration by all concerned. They are to be applied stricto sensu and cannot be moulded to suit the convenience of some economic or other interest of any institution, especially, in a manner that is bound to result in compromise of the above- stated principles.

46. Keeping in view the contemptuous conduct of the relevant stakeholders, their cannonade on the rule of merit compels us to state, with precision and esemplastically, the action that is necessary to ameliorate the process of selection. Thus, we issue the following directions in rem for their strict compliance, without demur and default, by all concerned:

46.6. All admissions through any of the stated selection processes have to be effected only after due publicity and in consonance with the directions issued by this Court. We vehemently deprecate the practice of giving admissions on 30th September of the academic year. In fact, that is the date by which, in exceptional circumstances, a candidate duly selected as per the prescribed selection process is to join the academic course of MBBS/BDS. Under the directions of this Court, second Counselling should be the final Counselling, as this Court has already held in the case of Ms. Neelu Arora & Anr. v. UOI & Ors. (2003) 3 SCC 366 and third Counselling is not contemplated or permitted under the entire process of selection/grant of admission to these professional courses.

46.7. If any seats remain vacant or are surrendered from All India Quota, they should positively be allotted and admission granted strictly as per the merit by 15th September of the relevant year and not by holding an extended Counselling. The remaining time will be limited to the filling up of the vacant seats resulting from exceptional circumstances or surrender of seats. All candidates should join the academic courses by 30th September of the academic year.

46.8. No college may grant admissions without duly advertising the vacancies available and by publicizing the same through the internet, newspaper, on the notice board of the respective feeder schools and colleges, etc. Every effort has to be made by all concerned to ensure that the admissions are given on merit and after due publicity and not in a manner which is ex-facie arbitrary and casts the shadow of favouritism.

46.9. The admissions to all government colleges have to be on merit obtained in the entrance examination conducted by the nominated authority, while in the case of private colleges, the colleges should choose their option by 30th April of the relevant year, as to whether they wish to grant admission on the basis of the merit obtained in the test conducted by the nominated State authority or they wish to follow the merit list/rank obtained by the candidates in the competitive examination collectively held by the nominated agency for the private colleges. The option exercised by 30th April shall not be subject to change. This choice should also be given by the colleges which are anticipating grant of recognition, in compliance with the date specified in these directions."

12. ***Priya Gupta's*** case (supra) subsequently came up for consideration before the Hon'ble Supreme in ***Asha*** *versus* ***Pt. B.D.Sharma University of Health Sciences and others (2012) 7 SCC 389*** wherein it was observed as follows:-

"23. Adherence to the schedule is the obligation of the authorities and the students both. The prescribed schedule is to be maintained stricto sensu by all the stakeholders because if one party adheres to the schedule and others do not or there is some kind of lack of communication or omission to make proper announcements and maintain proper records for such counselling, disastrous results can follow, of which the present case is an apt example.

24. The Court cannot ignore the fact that these admissions relate to professional courses and the entire life of a student depends upon his admission to a particular course. Every candidate of higher merit would always aspire admission to the course which is more promising. Undoubtedly, any candidate would prefer course of MBBS over BDS given the high-competitiveness in the present times, where on a fraction of a mark, the admission to course could vary. Higher the competition, greater is the duty on the part of the concerned authorities to act with utmost caution to ensure transparency and fairness. It is one of their primary obligations to see that a candidate of higher merit is not denied seat to the appropriate course and college, as per his preference. We are not oblivious of the fact that the process of admissions is a cumbersome task for the authorities but that per se cannot be a ground for compromising merit. The concerned authorities are expected to perform certain functions, which must be performed in a fair and proper manner i.e. strictly in consonance with the relevant rules and regulations."

"40.2. The essence of all the judgments dealing with this issue is to nurture discipline, fairness and transparency in the selection and admission process and avoid prejudice to any of the stake-holders. Thus, while we expect the authorities to be perfect, fair and transparent in the discharge of their duties, we make it clear that the students who adopt malpractices in collusion with the authorities or otherwise for seeking admissions and if their

admissions are found to be irregular or faulty in law by the courts, they shall normally be held responsible for paying compensation to such other candidates who have been denied admission as a result of admission of the wrong candidates.

40.3. The law requires adherence to a settled protocol in the process of selection and grant of admission. None should be able to circumvent or trounce this process, with or without an ulterior motive. The courts are duty bound to ensure that litigation relating to academic courses, particularly, professional courses should not be generated for want of will on the part of the stake holders to follow the process of selection and admission fairly, transparently and without exploitation."

13. Undoubtedly, the judgments of the Hon'ble Supreme Court referred hereinabove in ***Priya Gupta's*** case (supra) and ***Asha's*** case (supra) relate to MBBS and BDS Courses, however, nonetheless the broader guidelines and principles laid down therein can be applied to the facts of the present case as has been held by a co-ordinate Bench of this Court in ***CWP No.5587 of 2012, Richa Kaushik versus State of Himachal Pradesh and others.***

14. The aforesaid exposition of law by the Hon'ble Supreme Court makes it absolutely clear that admissions have to be made in a fair and transparent manner and, therefore, no admissions can be made without disclosing the vacancies available and by publishing the same through the newspaper and displaying the same on the notice board. Every effort has to be made by all concerned to ensure that the admissions are made on merit after due publicity and in no manner which is *ex-facie* arbitrary and casts the shadow of favouritism. The admissions have to be made on merit and merit alone. Infact, merit, fairness and transparency are the ethos of the process of admissions to such courses and it will be a travesty of justice if the rule of justice is defeated by inefficient or improper methods of admissions.

15. From the facts of this case, it is evident that "merit" has been a casualty because the respondents have failed to observe and oversee that the procedure adopted is fair and transparent which has been the consistent view of the Hon'ble Supreme Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but it is also an abuse of process of Court.

16. At this stage, we may now refer to the prospectus issued by the respondents themselves setting out in detail the mode and manner of filling-up the seats in question. Clause-4 of the prospectus deals with the procedure to be followed for counsellling which reads thus:-

"4.1 The Counselling will be held on dates mentioned in the prospectus as per the time schedule fixed by MCI/GOI based on the judgment of Hon'ble Supreme Court of India. The allotment of available seats to the eligible candidates will be made in order of merit on the basis of State merit drawn (group-wise as well as category-wise) by the ***Principal Indira Gandhi Medical***

College, Shimla-cum-Member Secretary Counselling Committee *on the basis of score of Himachal Pradesh State AIPGMEE-2014 result supplied by the Assistant Director (Medical), NBE (Ministry of Health & Family Welfare Govt. of India) New Delhi vide letter No. NBE/AIPGMEE (2014)/ Result/ 14038 dated 4.2.2014 of those candidates who have applied on the prescribed application form within stipulated date as mentioned in the prospectus for admission to PG(MD/MS) degree course in Indira Gandhi Medical College & Hospital Shimla and Dr.Rajindera Prasad Govt. Medical College & Hospital Tanda against 50% State quota seats for the academic session 2014-17 on the day of Counselling. All the eligible candidates or their authorized representatives will have to bring their original documents alongwith required documents at the time of Counselling. NO SEPARATE COMMUNICATION WILL BE ISSUED TO THE CANDIDATES FOR ATTENDING THE COUNSELLING. The candidate not reporting for Counselling as per schedule will forfeit their claim for admission without any further notice. No further opportunity will be given.* ***Hence, appearance in the 1st round of Counselling is mandatory for consideration of candidature for further Counselling.*** *Joining time is as per schedule prescribed in the prospectus. The selected candidates will be required to join latest by* ***26.5.2014*** *failing which their candidature will be cancelled. The academic session will start from* ***31.5.2014****. In case of any vacancy arising on or after* ***26.5.2014*** *for any reason, the vacancy position will be displayed on the college notice board and uploaded on the College website on* ***30.5.2013*** *(afternoon). The available vacancies will be filled-up purely on merit from amongst the candidates desiring the change of course/speciality and thereafter from the waiting list. The interested candidates will report to the Principal Indira Gandhi Govt. Medical College, Shimla on 10.00 AM on* ***31.5.2014*** *along with original documents and requisite fees. No admission will be made after* ***31.5.2014*** *(including change of course) and seats still remaining vacant will not be filled-up in compliance of directions of MCI/GOI as per the Judgment of the Hon'ble Supreme Court of India.*

Note: *The candidate who brings incomplete certificates/documents including service certificate-cum-No objection certificate (NOC) as per provisions of the Prospectus will be rejected without any notice there and then by the Counselling Committee."*

(Underlining supplied by us)

A perusal of the underlined portion makes it abundantly clear that the available vacancies in all subsequent counselling after the first counselling are required to be filled-up purely on merit from amongst the candidates desiring change of course/specialty and only thereafter the same can be offered to the candidates from the waiting list.

17. The terms and conditions of the prospectus are binding even on those who have issued it. (***See: Punjab Engineer College,***

Chandigarh through its Principal versus Sanjay Gulati and others (1983) 3 SCC 517). A prospectus issued with regard to admissions to educational courses is a declaration to the candidates that a field for development of educational technicalities is available for exploration and that there could be a chance of success. It is a piece of information. The rules and norms contained in the prospectus are binding on the Selection Committee and the authorities and, therefore, have to be strictly followed. The binding nature of the prospectus both on the Selection Committee and the candidates applying for admission is on the basis that it is a piece of information containing the summary essence of norms and rules that guide both the Selection Committee and the candidates. After setting out the various conditions and methods of selection, if anyone of the parties is permitted to travel beyond the prescribed procedure, that would adversely affect the right of the other party. Therefore, it is necessary that the Selection Committee is to follow the procedure enumerated in various clauses of the prospectus and cannot be permitted or allowed to introduce any new element or procedure for admission to those as are contained in the prospectus.

18. Now, in case the arguments of the learned Advocate General are taken to its logical end whereby it has been canvassed that the seats had to be offered to the waiting list candidates in preference to the meritorious candidates, who wanted to change their options/courses, it would essentially mean that what the respondents are virtually seeking is a direction to violate their own statutory rules and regulations in respect of admissions which admittedly will be contrary to what has been envisaged and provided under Clause-4 of the prospectus. We are afraid that no such direction can be issued by this Court in the teeth of the observations of the Hon'ble Supreme Court in ***State of Punjab and others*** *versus* ***Renuka Singla and others (1994) 1 SCC 175*** wherein it was held that the High Court and the Supreme Court cannot be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students.

19. Further, in case the order passed by the Hon'ble Supreme Court in ***Dr.Fraz Naseem's*** case (supra) is minutely analyzed, it would be seen that the word "waiting list" has not been used in its literal sense. Even at the stage of second round of counselling, it has been provided as under:-

> *"2nd round of counselling for allotment of seats from waiting list , STATE QUOTA, 27th April to 3rd May."*

In case the term "waiting list" is interpreted in the manner as suggested by the learned Advocate General, then it would essentially mean that a candidate, who has exercised his option in the first counselling held on 7th of April, is debarred for all times to come to change his option of course irrespective of subsequent counselling held thereafter at three stages and the course of choice being available. This clearly is not the intent of the order passed by the Hon'ble Supreme

Court. We, therefore, have no manner of doubt that the respondents have failed to carry out counselling in terms of Clause-4 of the prospectus and have completely misconstrued and misinterpreted the order passed by the Hon'ble Supreme Court in ***Dr.Fraz Naseem's*** case (supra).

20. The present lis relates to admissions to the post of Graduate Medical Degree Courses which is a technical/academic course of super-specialty, where emphases are always on merit. In ***Dr.Dinesh Kumar and others*** *versus* ***Moti Lal Nehru Medical College, Allahabad and others (1986) 3 SCC 727****,* it was observed that if we want to introduce doctors, who are MD/MS particularly Surgeon, who were going to operate, on human beings, it is of utmost importance that the selection should be made on merits.

21. Indisputably, "counselling" has been prescribed in the prospectus as the medium on the basis of which admissions are required to be made. The system of Counselling for the purpose of granting admissions is now regarded as the most equitable one where options are given of various seats to the students in accordance with their overall merit position in the combined competitive examination. If as a result of first counselling, all the seats which are available are filled, then no further counselling takes place. Where, however, some seats become available, then the need for holding second, third or fourth counselling may arise. This was so held by the Hon'ble Supreme Court in ***Rajiv Mittal*** *versus* ***Maharshi Dayanand University and others (1998) 2 SCC 402*** in the following terms:-

> *"10…….The system of counselling for the purpose of granting admission to the various medical colleges in the State is now regarded as most equitable one where options are given of various seats to the students in accordance with their overall merit position in the combined entrance examination, which examination is competitive in nature.*
>
> *11. If as a result of first counselling, all the seats, which are available, are filled then no further counselling takes place. Where however some seats become available, then it appears that second, third or if the need arise, fourth counselling does take place but in such a manner that normally there should be no delay in the commencement of the course of study. Further more unless and until counselling takes place, no candidate who has been granted admission on the basis of the counselling, is allowed to change his college merely because a seat in another college has fallen vacant. The seats, if any, which fall vacant, can only be filled if and when counselling takes place where the candidates who have already been selected may have an option of shifting to another college. An appropriate analogy of this system is that of a booking chart for a dramatic performance which has to take place in the future. The people standing in the queue reserve or book their seats out of those which are available according to their preference. Once the chart fills up the booking closes. Only sometimes, if tickets are returned they*

may be reissued. But once the dramatic performance starts no one is allowed to enter. Just as counselling for seats to medical colleges must stop once the courses of study commence."

The centralized and integrated procedure for competitive examination and counselling optimizes chances of not only the students in securing the course available for admission on the one hand but it also maximizes educational institution chances of filling-up its seats. Once, therefore, the Hon'ble Supreme Court itself has held the counselling system to be one of the most equitable methods of filling-up of seats of different disciplines and further when a clear-cut provision was set out in Clause-4 of the prospectus prescribing therein the mode and manner in which the seats would be filled-in, it was imperative and mandatory for the respondents to have adhered to the provisions of the prospectus.

22. The allegations of the respondents that they only came to know about the seats of MD Pathology GDO General (Contract) only on 09.07.2014 when the same was brought to the notice of the authorities by the concerned dealing hand is more than what meets the eye. We say so because the second round of counselling was held wayback on 29.04.2014 and the seat admittedly had become vacant on the said date itself since the selected candidate Dr.Puneet Singh had not deposited the fees. The third round of counselling was held after a gap of more than two months on 08.07.2014 and yet the respondents would have this Court believe that the dealing hand had not informed the authorities regarding this vacancy. After-all, the purpose of counselling is to offer to the eligible candidates the option and choice of seats which are available in the Institution. The respondents cannot be permitted to give admissions to the students in an arbitrary and nepotistic manner. The methodology adopted by the respondents and the manner in which the admissions were given to the private respondents, leaves no doubt in the mind of this Court that this process was neither fair nor transparent. It was incumbent upon the official respondents to have ensured that arbitrariness and discrimination do not creep into the process of admissions and the same are carried out in a just and fair manner.

23. Earlier also, while making admissions for the academic sessions 2012-13, the matter had reached this Court in ***Richa Kaushik's*** case (supra) wherein this Court in its majority decision after placing reliance on ***Priya Gupta's*** and ***Asha's*** cases (supra) had directed the seat in Periodontics to be offered to the candidate in the merit list after quashing the action of the respondents whereby they had offered this seat to the waiting list candidate.

24. More than three decades back, a three Judges Bench of the Hon'ble Supreme Court in ***Sanjay Gulati's*** case (supra) had expressed their anguish regarding the insensitivity of the educational authorities while granting admissions in the following terms:-

"4. Cases like these in which admissions granted to students in educational institutions are quashed raise a sensitive human issue. It is unquestionably true that the authorities who are charged with

the duty of admitting students to educational institutions must act fairly and objectively. If admissions to these institutions are made on extraneous considerations and the authorities violate the norms set down by the rules and regulations, a sense of resentment and frustration is bound to be generated in the minds of those unfortunate young students who are wrongly or purposefully left out. Indiscipline in educational institutions is not wholly unconnected with a lack of sense of moral values on the part of the administrators and teachers alike. But, the problem which the courts are faced with in these cases is, that it is not until a period of six months or a year elapses after the admissions are made that the intervention of the court comes into play. Writ petitions involving a challenge to such admissions are generally taken up by the High Court as promptly as possible but even then, students who are wrongly admitted finish one or two semesters of the course by the time the decision of the High Court is pronounced. A further appeal to this Court consumes still more time, which creates further difficulties in adjusting equities between students who are wrongly admitted and those who are unjustly excluded. Inevitably, the Court has to rest content with and academic pronouncement of the true legal position. Students who are wrongly admitted do not suffer the consequences of the manipulations, if any, made on their behalf by interested persons. This has virtually come to mean that one must get into an educational institution by means, fair or foul: Once you are in, no one will put you out. Law's delays work their wonders in such diverse fashions.

5. We find that this situation has emboldened the erring authorities of educational institutions of various States to indulge in violating the norms of admission with impunity. They seem to feel that the Courts will leave the admissions intact, even if the admissions are granted contrary to the rules and regulations. This is a most unsatisfactory state of affairs. Laws are meant to be obeyed, not flouted. Some day, not distant, if admissions are quashed for the reason that they were made wrongly, it will have to be directed that the names of students who are wrongly admitted should be removed from the rolls of the institution. We might have been justified in adopting this course in this case itself, but we thought that we may utter a clear warning before taking that precipitate step. We have decided, regretfully, to allow the aforesaid sixteen students to continue their studies, despite the careful and weighty finding of the High Court that at least eight of them, namely, the seven wards of employees and Ashok Kumar Kaushik, were admitted to the Engineering Course in violation of the relevant rules and regulations.

6. It is strange that in all such cases, the authorities who make admissions by ignoring the rules of admissions contend that the seats cannot correspondingly be increased, since the State Government cannot meet the additional expenditure which will be caused, by increasing the number of seats or that the institution will

not be able to cope up with the additional influx of students. An additional plea available in regard to Medical Colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission. Those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admissions made."

25. Three decades later, the Hon'ble Supreme Court in ***Aneesh D.Lawande and others*** *versus* ***State of Goa and others 2013 AIR SCW 6217***, expressed its despair in the following terms:-

" The present litigation exposits a sad sad scenario. It is sad because a chaos has crept in the lives of some students and it is further sad as the State of Goa and its functionaries have allowed ingress of systemic anarchy throwing propriety to the winds possibly harbouring the attitude of utter indifference and nurturing an incurable propensity to pave the path of deviancy. The context is admission to Post Graduate courses in a single Government medical college at Goa. The insensitivity of the authorities administering medical college admissions was seriously decried by a three-Judge Bench in Convenor, MBBS/BDS Selection Board and others v. Chandan Mishra and others 1995 Supp (3) SCC 77 and further echoed in Medical Council of India v. Madhu Singh and others (2002) 7 SCC 258. The Court in Chandan Mishra (supra) had approvingly reproduced a sentence from the decision of the High Court that proclaimed in sheer anguish: "Shakespeare in Othello has written "Chaos is come again".

2. The saga of anguish continues with constant consistency. In Asha v. Pt. B.D. Sharma University of Health Sciences and others (2012) 7 SCC 389 a two-Judge Bench commenced the judgment thus: -

"Admission to the medical courses (MBBS and BDS) has consistently been a subject of judicial scrutiny and review for more than three decades. While this Court has enunciated the law and put to rest the controversy arising in relation to one facet of the admission and selection process to the medical courses, because of the ingenuity of the authorities involved in this process, even more complex and sophisticated sets of questions have come up for consideration of the Court with the passage of time. One can hardly find any infirmities, inaccuracies or impracticalities in the prescribed scheme and notifications in regard to the process of selection and grant of admission. It is the arbitrary and colourable use of power and manipulation in implementation of the schedule as well as the apparently perverse handling of the process by the persons concerned or the authorities involved, in collusion with the students or otherwise, that have rendered the entire admission process

faulty and questionable before the courts. It is the admissions granted arbitrarily, discriminately or in a manner repugnant to the regulations dealing with the subject that have invited judicial catechism. With the passage of time, the quantum of this litigation has increased manifold."

3. We have begun with such a prefatory note and referred to the aforesaid pronouncements as the facts, as have been uncurtained, would shock one's conscience. A deliberate labyrinth which not only assaults the majesty, sanctity and purity of law, but also simultaneously creates a complex situation requiring this Court to intervene in a different manner to redeem the situation as far as possible so that there is some sanguine cathartic effect."

26. The respondents would then contend that it will not only be difficult but an impossible task to contact all the candidates as per the merit list. This plea is equally fallacious and cannot be countenanced because the seats in question relate to in service candidates, meaning thereby candidates, who are already in the service of respondents, therefore, contacting them would not at all be difficult.

27. This is an age of communication and if waiting list candidates could be contacted, so could the candidates in order of merit be contacted. This is not a case of individual hardship because what we are examining is the generality of the situation and such matters have been repeatedly coming up before this Court. More meritorious candidates cannot be compelled to be pinned down to their choice given under compulsion in view of the limited seats available at the earlier counselling by refusing them a course of their choice which may have subsequently fallen vacant. This is not only contrary to the provisions of the prospectus issued by the respondents themselves but also in conflict with the very concept of "counselling".

28. The upshot of the aforesaid discussion is that the action of the respondents is, undoubtedly, illegal and arbitrary when they have filled-up vacant seats from the waiting list candidates instead of filling-up the same purely on the basis of merit from amongst the candidates desiring change of course/specialty and thereafter filling-up the same from the waiting list candidates. But, then there would be many other candidates, who would be even more meritorious than the petitioner(s), who may also want to opt for the same seats. In case the seats at this stage are offered merit wise, this will start a chain reaction and the effect of putting the seat back for counselling for all candidates would, therefore, be to upset the entire counselling which has taken place. Therefore, there is no alternative apart from leaving this aspect of the matter to rest.

29. There is yet another reason why the petitioner(s) cannot be granted any relief at this stage. Undisputedly, the Hon'ble Supreme Court in ***Dr.Fraz Naseem's*** case (supra) has fixed the schedule for admission to the Post Graduate Courses for the academic sessions 2014-15 which

time schedule as held by the Hon'ble Supreme Court in ***Asha's*** case (supra) has to be strictly adhered to:-

> *"25. Strict adherence to the time schedule has again been a matter of controversy before the courts. The courts have consistently taken the view that the schedule is sacrosanct like the rule of merit and all the stakeholders including the authorities concerned should adhere to it and should in no circumstances permit its violation. This, in our opinion, gives rise to dual problem. Firstly, it jeopardizes the interest and future of the students. Secondly, which is more serious, is that such action would be ex facie in violation of the orders of the court, and therefore, invite wrath of the courts under the provisions of the Contempt of Courts Act, 1971. In this regard, we may appropriately refer to the judgments of this Court in Priya Gupta v. State of Chhattisgarh (2012) 7 SCC 433, State of Bihar v. Sanjay Kumar Sinha (1990) 4 SCC 624, Medical Council of India v. Madhu Singh (2002) 7 SCC 258, GSF Medical and Paramedical Assn. v. Assn. of Self Financing Technical Institutes (2003) 12 SCC 414 and Christian Medical College v. State of Punjab (2010) 12 SCC 167."*

30. Adherence to the time schedule in professional courses was recently a subject-matter before the Hon'ble Supreme Court in ***Chandigarh Administration & Another*** *versus* ***Jasmine Kaur and others JT 2014 (10) SC 319*** and after taking into consideration the relevant principles contained in its previous decisions, the following principles were culled out:-

> *"30. Having noted the various decisions relied upon by the Appellant in SLP (C) No.18099 of 2014 and the contesting Respondent, we are able to discern the following principles:*
>
> *(1) The schedule relating to admissions to the professional colleges should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the courts or the Board and midstream admission should not be permitted.*
>
> *(2) Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate i.e., the candidate has pursued his or her legal right expeditiously without any delay and that there is fault only on the part of the authorities or there is an apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right to equality and equal treatment to the competing candidates and the relief of admission can be directed within the time schedule prescribed, it would be completely just and fair to provide exceptional reliefs to the candidate under such circumstance alone.*
>
> *(3) If a candidate is not selected during a particular academic year due to the fault of the Institutions/Authorities*

and in this process if the seats are filled up and the scope for granting admission is lost due to eclipse of time schedule, then under such circumstances, the candidate should not be victimised for no fault of his/her and the Court may consider grant of appropriate compensation to offset the loss caused, if any.

(4) When a candidate does not exercise or pursue his/her rights or legal remedies against his/her non-selection expeditiously and promptly, then the Courts cannot grant any relief to the candidate in the form of securing an admission.

(5) If the candidate takes a calculated risk/chance by subjecting himself/herself to the selection process and after knowing his/her non- selection, he/she cannot subsequently turn around and contend that the process of selection was unfair.

(6) If it is found that the candidate acquiesces or waives his/her right to claim relief before the Court promptly, then in such cases, the legal maxim vigilantibus non dormientibus aequitas subvenit , which means that equity aids only the vigilant and not the ones who sleep over their rights, will be highly appropriate.

(7) No relief can be granted even though the prospectus is declared illegal or invalid if the same is not challenged promptly. Once the candidate is aware that he/she does not fulfil the criteria of the prospectus he/she cannot be heard to state that, he/she chose to challenge the same only after preferring the application and after the same is refused on the ground of eligibility.

(8) There cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year i.e., carry forward of seats cannot be permitted how much ever meritorious a candidate is and deserved admission. In such circumstances, the Courts cannot grant any relief to the candidate but it is up to the candidate to re-apply next academic year.

(9) There cannot be at any point of time a direction given either by the Court or the Board to increase the number of seats which is exclusively in the realm of the Medical Council of India.

(10) Each of these above mentioned principles should be applied based on the unique and distinguishable facts and circumstances of each case and no two cases can be held to be identical."

As observed earlier, there would be more meritorious candidates than the petitioner(s) herein, therefore, the case of the petitioner(s) do not fall in any of the exceptions specified hereinabove.

31. Moreover, the time gap between 10th July, 2014 till date is certainly a long period and in similar situation, the Hon'ble Supreme Court in ***Jasmine Kaur's*** case (supra) held as follows:-

> *"36. The time gap between April, 2013 and July, 2013 nearly three months is certainly a long period as the process of admission to professional courses are regulated by the Selection Authorities such as the Medical Council of India, All India Council for Technical Education, National Council for Teacher Education, State Government Authorities as well as the concerned affiliated universities each one of whom have got to play their corresponding roles in regulating the admissions and also monitoring the subsequent course of study for the purpose of ultimately granting the degrees of successful candidates after the completion of the course. As the process being a continuous one, any delay in working out the remedies promptly will have to be viewed very seriously or otherwise the same would impinge upon the rights of other candidates apart from causing unnecessary administrative hardship to the regulatory bodies. When the said factors are kept in mind while analyzing the case on hand, it will have to be stated that even though the contesting Respondent was successful in her challenge to the concerned provision relating to the NRI quota in the prospectus of 2013-14, on that sole ground it cannot be held that every other factor should be kept aside and her claim for admission to M.B.B.S. course should be ensured by issuing directions unmindful of the infringement of rights of other candidates and the other statutory bodies. We are, therefore, of the view that the conduct of the contesting Respondent in having fixed her own time limit in making the challenge, namely, after three months of the issuance of the prospectus and thereafter, in filing the Letters Patent Appeal which process resulted in the Division Bench in deciding the appeal only in the month of January, 2014 by which time the substantial part of the academic year had been crossed, the question remained as to whether the Division Bench was justified in directing the admission of the contesting Respondent to the M.B.B.S. course in the academic year 2014-15 by merely stating that she was already undergoing the B.D.S. course and that the course content of the first six months of B.D.S and M.B.B.S. are more or less identical. Beyond that we do not find any other good grounds which weighed with the Division Bench in issuing the direction for creating an additional seat."*

> *"38. As time and again such instances of claiming admission into such professional courses are brought before the Court, and on every such occasion, reliance is placed upon the various decisions of this Court for issuing necessary directions for accommodating the students to various courses claiming parity, we feel it appropriate to state that unless such claims of exceptional nature are brought before the Court within the time schedule fixed by this Court, Court or Board should not pass orders for granting admission into any particular course out of time. In this context, it will have to be stated*

that in whatever earlier decisions of this Court such out of time admissions were granted, the same cannot be quoted as a precedent in any other case, as such directions were issued after due consideration of the peculiar facts involved in those cases. No two cases can be held to be similar in all respects. Therefore, in such of those cases where the Court or Board is not in a position to grant the relief within the time schedule due to the fault attributable to the candidate concerned, like the case on hand, there should be no hesitation to deny the relief as was done by the learned Single Judge. If for any reason, such grant of relief is not possible within the time schedule, due to reasons attributable to other parties, and such reasons are found to be deliberate or mala fide the Court should only consider any other relief other than direction for admission, such as compensation, etc. In such situations, the Court should ensure that those who were at fault are appropriately proceeded against and punished in order to ensure that such deliberate or malicious acts do not recur."

32. Though no relief can be granted to the petitioner(s) for the reasons stated above, yet this Court cannot ignore the lapses on the part of the official respondents, who have acted in the most callous and negligent manner in carrying out the admissions little realizing that the career of more meritorious students has been jeopardized without adhereing to the rule of merit that too in violation of its own sacred prospectus. It was on account of the corrective measures and adherence to rule being thwarted by motivated action on the part of the authorities concerned which had led to manifold increase in arbitrary admissions whereby the repeated defaults had resulted in generating more and more litigation with the passage of time and the desire to curb these incidents of disobedience that the Hon'ble Supreme Court while dealing with cases relating to admissions had issued directions *in rem* for their strict compliance without demur and default by all concerned in ***Priya Gupta's*** case (supra). Therefore, the respondent No.1 is directed to hold an inquiry and fix responsibility against the erring official(s) and submit its report to this Court by 31st December, 2014.

33. Taking into account all these facts and circumstances, it has become imperative for this Court to issue directions that henceforth respondents shall make admissions to PG (MD/MS) Courses strictly in consonance with the procedure as prescribed in the prospectus, more particularly Clause-4, after adhering to the schedule as prescribed in ***Dr.Fraz Naseem's*** case (supra) by the Hon'ble Supreme Court. The schedule for admissions shall be religiously followed and vacant seats falling to the respective courses and quotas shall be notified at least a week earlier to the next counselling by displaying and publishing the same on the College notice board, uploading the same on the college website. Apart therefrom, the desirability of informing the eligible candidates through e-mail and text message over the mobile phones can also be considered. In short, the respondents would ensure that the

admissions are carried out on the basis of merit and merit alone in a fair and transparent manner and in no event would merit be compromised.

34. Ex-consequenti, the writ petitions are disposed of in the aforesaid terms accordingly, so also the pending application (s), if any. A copy of this judgment be placed on the connected file.

35. List the case on **1st January, 2015** for consideration of the report to be submitted by the respondent No.1.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE.

Janmejai Sood .....Petitioner.
Versus
Ram Gopal Sood & ors. .....Respondents.

Civil Revision No. 62 of 2013.
Decided on: 4.11.2014.

H.P. Urban Rent Control Act, 1987 - Section 14- Landlord filed an eviction petition seeking eviction on the ground that premises was required bonafide for reconstruction and rebuilding on old lines, which could not be carried out without vacating the same- building was in dilapidated condition and had outlived its life span – building had become unsafe and unfit for human habitation and the tenants were in arrears of rent- tenant pleaded that building is situated in core area where construction activities is banned by the government – building had not become unfit and unsafe for human habitation- the petitioner was not an actual landlord and was not entitled to get rent- held, that the version of the petitioner that the building was more than 100 years old, in dilapidated condition and had become unfit and unsafe for human habitation was duly proved by evidence of the plaintiff- landlord had deposed that he had sufficient funds and had got the map approved from M.C. Shimla- building cannot be reconstructed without being vacated- further, tenants were in arrears of rent- learned Appellate Court had wrongly held that executing Court will not execute the order of eviction unless duly sanctioned plan is produced by the petitioner- this modification by Appellate Court was contrary to the Law- petition allowed. (Para- 8 to 14)

Cases referred:

Hari Dass Sharma vrs. Vikas Sood and others, reported in (2013) 5 SCC 243

Syed Jameel Abbas and others Vs. Mohd. Yamin alias Kallu Khan, reported in (2004) 4 SCC 781

For the petitioner: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashista, Advocate.

For the respondents: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Ajit Jaswal, Advocate for respondents No. 1 to 6.
None for respondents No. 7 to 13.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

This revision petition is instituted against the judgment rendered by the learned Appellate Authority (II), Shimla in Civil Appeal No. 19-S/13 (b) of 2007, dated 26.11.2012.

2. Key facts necessary for the adjudication of this revision petition are that the respondents (hereinafter referred to as the landlords) have filed a rent application No. 1-2 of 2002 in the Court of learned Rent Controller (5), Shimla under Section 14 of the H.P. Urban Rent Control Act, against the petitioner and proforma respondents (hereinafter referred to as the tenants). The premises were previously owned and possessed by one Sh. Shanti Swaroop son of Sh. Wadhwa Mal. From the original owner the demised premises was purchased vide registered sale deed dated 14.8.1989 by late Sh. Rama Nand and Sh. Ram Gopal Sood, sons of late Sh. Jai Karan Dass; and their respective sons namely, Chander Harsh, Vijay Kumar and Sanjay Karol (sons of Rama Nand) and Sh. Rakesh Sood, Raman Sood and Ashwani Sood (sons of Ram Gopal Sood). The premises fell exclusively to the share of the landlords in the family settlement vide arbitration award dated 1.10.2001 registered on 2.10.2001. The eviction petition was filed on the following grounds:

A) That the premises were bonafide required by the landlords for re-construction and rebuilding on old lines, which could not be carried out, unless the tenants vacates the same.

B) The building in question is more than 100 years old. It is in dilapidated condition. It has outlived its life span. The entire building stood constructed in old stone work i.e. "*surkhi*" and *lim masonry*. They have carried out addition and alteration resulting in putting additional load on entire load bearing structure and walls of the building. The walls are out of plumb and have bulged out due to weight. Damage has been caused to the building. The stone walls had started crumbling down.

C) The building has become unsafe and unfit for human habitation. The condition of the building was dangerous to the life and property of the occupants and other residents of the locality.

D) The rent has not been paid w.e.f. 1.3.1985 till 30.11.2001.

3. The tenants contested the petition. According to them, the building was situated in core area wherein any construction activity has been banned by the government. There was no bonafide requirement. No additions and alterations have been undertaken. The building has not become unsafe and unfit for human habitation. The tenants were

not liable to pay rent to the landlord as they were not the landlords of the demised premises.

4. Rejoinder was filed. The Rent Controller framed issues on 26.10.2002. He ordered the eviction of the tenants vide order dated 1.10.2007 on the ground of bonafide requirement of the landlord for the purpose of rebuilding/reconstruction that the demise premises has become unfit and unsafe for human habitation and that the respondent is in arrears of rent to the tune of Rs. 6305/-. The tenants were directed to hand over the vacant possession of the demise premises to the applicants within a period of 60 days from the date of the order.

5. The tenants feeling aggrieved by order dated 1.10.2007

preferred appeal before the learned Appellate Authority. The learned Appellate Authority, partly set aside and modified the order on 26.11.2012, hence this petition.

6. Mr. Ajay Kumar, Sr. Advocate, has vehemently argued that the premises in question were not bonafide required by the landlord for the purpose of re-building and reconstruction. He also contended that the building has not become unsafe and unfit for human habitation. The tenants were not bound to pay the rent to the landlords. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the order and judgment dated 1.10.2007.

7. I have heard the learned Advocates and gone through the pleadings and record very carefully.

8. The copy of the sale deed Ext. PW-3/A has been duly proved on record by registration Clerk. The arbitration award Ext. PW-9/A was duly proved. It was a duly registered document. On the basis of the sale deed Ext. PW-3/A, arbitration award Ext. PW-9/A and from the revenue record Ext. PW-1/A, it has rightly been held by the Courts' below that Sh. Ram Gopal Sood, Sudesh Sood, Rakesh Sood, Raman Karol, Ashwani Sood and Manu Karol have become landlords of the demise premises.

9. One of the landlords has appeared as PW-11. According to him, the premises were 100 years old. These were in dilapidated condition and have outlived its life. The building has been damaged by the tenants. The load bearing walls have bulged out. The foundation of the building has also settled down. The portion of the wall had fallen. The M.C. Shimla has issued notice vide letter Ext. PW-11/C wherein the building in question was declared unsafe. The photographs of the building have been produced by Sh. Harinder Singh vide Ext. PW-10/A to Ext. PW-10/C and its negatives Ext. PW-10/D to Ext. PW-10/F. Sh. Vivek Karol has appeared as PW-6. He is a graduate in Civil Engineering. He has inspected the building on 6.12.2001. He prepared report Ext. PW-6/A. According to his inspection report, the building was in bad condition. Its walls have bulged out. The stone work was falling. The building was more than 100 years old.

10. The tenants have examined one expert witness H.S.Bist. He appeared as RW-2 and stated that he is a retired Ex. Engineer from the department of HP PWD. He inspected the demise premises on two occasions i.e. firstly in December, 2001 and thereafter in June, 2002. He prepared his report Ext. RW-2/A and copy of map Ext. RW-2/B. According to him the building was in good condition and is very much habitable. RW-1 Kulbhushan Sood, RW-3 Sanjeev Kuthiala and RW-4 Ashutosh Aggarwal deposed that the building was in good condition. On the basis of the statement of the landlord read in conjunction with the statement of PW-6 Vivek Karol, the Courts below have rightly concluded that the building was 100 years old. It was in dilapidated condition. It has become unsafe and unfit for human habitation.

11. Now, as far as the issue of construction of the building on old lines is concerned, one of the landlord has appeared as PW-1. It is evident from Ext. PW-7/A, PW-7/A-1 to Ext. PW-7/A-8 that the landlords possesses sufficient funds. They have also got their plan sanctioned in this regard from the M.C. Shimla vide Ext. PW-2/A and the map as Ext. PW-11/A. Sh. Vivek Karol has deposed that if the landlords wanted to re-construct the building the same could not be carried out without the same being vacated by the tenants. Though, RW-2 has deposed that the building can be re-constructed/rebuild without being vacated, however, in view of the overwhelming evidence led by the landlords, it can be safely concluded that the building can not be built or re-built without the same being vacated by the tenants. The tenants are found to be in arrears of rent w.e.f. 1.3.1985 up to February, 2007.

12. The learned Appellate Authority has wrongly set aside and modified partly the order passed by the learned Rent Controller by observing that the executing Court would not execute the order of eviction on the ground of rebuilding and reconstruction unless duly sanctioned plan is produced by the petitioner therein. This issue is no more *res integra* in view of the decision of the Hon'ble Supreme Court in the case of ***Hari Dass Sharma vrs. Vikas Sood and others,*** reported in (***2013) 5 SCC 243.***

13. Now, it is not the requirement of the law that for the purpose of re-building the landlord should obtain building permission from the Municipal Authorities. Accordingly, the operative portion of the judgment whereby the appeal has been partly allowed and the order has been modified is set aside.

14. Accordingly, the Civil Revision is disposed of as under:

> "The tenant is directed to hand over the vacant possession of the premises to the landlords within a period of three months. Thereafter the landlords shall commence the construction within a period of six months and complete the same within a further period of one year. The tenants should be re-inducted in the same place, location and area should be equivalent to the area which was in occupation of the tenants before the orders passed by the learned Rent Controller. The rate of rent after the induction of the

tenants by the landlords would be determined as per the law laid down by their lordships of the Hon'ble Supreme Court in the case of ***Syed Jameel Abbas and others*** *Vs.* ***Mohd. Yamin alias Kallu Khan***, reported in ***(2004) 4 SCC 781.***"

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Kuldip Singh and others ...Appellants/Plaintiffs
Versus
State of H.P. and others ..Respondents/Defendants

R.S.A. No. 53 of 2012
Judgment reserved on: 16.10.2014.
Date of decision: 04.11.2014

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they are permanent lessees of the grass land known as "Ghas Godam Mundkhar" and the land was allotted to their father by ruler of Bilaspur State- State Government decided to put the forest grass grown on the land to auction- notice was issued by the plaintiff on which Law Department given an opinion that lease was perpetual and heritable- one of the plaintiffs filed an application before Collector for recording the factum of lease in the revenue record which was allowed- an appeal was preferred before the Commissioner who directed that matter be settled before the Civil Court- defendants pleaded that document was not a lease, but it was a concession granted by the Ruler to the father of the plaintiffs and no rent was paid by the plaintiffs- suit was initially decreed- appeal preferred before Additional District Judge, Bilaspur and High Court were dismissed- matter was taken before the Hon'ble Supreme Court of India and the case was remanded with the liberty granted to the parties to adduce fresh evidence- however, no evidence was led and application filed to lead additional evidence was dismissed- suit was ultimately dismissed- appeal preferred before the Appellate Court was also dismissed- held that documents show that grant was made by Raja Bilaspur- there was no time frame rather the same was granted in perpetuity subject to the payment of Rs. 5/- as rent- Raja of Bilaspur was a sovereign enjoying the full powers of the State- there was no restriction or obstruction on his power- further, Conservator of Forest, Bilaspur had also acknowledged the right of the plaintiff- in these circumstances, decree passed by the Trial Court as affirmed by the Appellate Court is not sustainable- appeal allowed. (Para- 25 to 30)

Code of Civil Procedure, 1908- Order 6- pleading- plaintiffs claimed to be a lease-holders of the land - defendants claimed that the document set up by the plaintiffs was not lease but was only a concession – court

recorded a finding that the plaintiffs were licensee- held, that Court could not have given findings that plaintiffs were licensee. (Para-19)

Constitution of India, 1950- Article 363- jurisdiction of the Civil Court is barred for determining disputes arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which were entered into or executed before the commencement of Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any predecessor Governments was a party - this article will not cover the grants made by the Rulers in favour of individuals. (Para-12)

Cases referred:

Union of India vs. E.I.D. Parry (India) Ltd. AIR 2000 SC 831

Pradeep Oil Corporation vs. Municipal Corporation of Delhi and another (2011) 5 SCC 270

For the Appellants :	Mr. B.P.Sharma, Senior Advocate with Mr. Arun Kumar and Mr. G.K.Nadda, Advocates.
For the Respondents :	Mr. P.M.Negi and Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants/plaintiffs filed a suit for declaration and consequential relief of injunction to the effect that they are permanent lessees of the grass land known as "Ghas Godam Mundkhar" comprised in Khasra Nos. 3 and 4 of the revenue estate No. 252/1, Jangal Jhanjiar Tehsil Ghumarwin and that the defendants be restrained from interfering with the possession of the plaintiffs over the said land and from auctioning the grass of the said land.

2. The case of the plaintiffs is that their father late Mian Lekh Ram was granted the aforesaid land by the then ruler of Bilaspur State, Sir Raja Vijay Chand Sahib Bahadur. The grant was made on 19 Sawan 1977 BK and a document known as "Satha" was issued on 23 Sawan, 1977 BK. This "Satha" was duly signed by the then ruler Sh. Vijay Chand. It was conveyed through the said "Satha" that Sh. Lekh Ram aforesaid would be entitled to the grass of the aforesaid forest against an annual rent of Rs.5/-. Mian Lekh Ram continued enjoying the aforesaid right of cutting the grass till his death in the year 1953 and thereafter the plaintiffs are enjoying the said right and are in possession of the land, in question. Mian Lekh Ram had been paying rent of Rs. 5/- per annum regularly to the State Government. Similarly, the plaintiffs continued paying the said rent after the death of their father. However,

subsequently, the said rent was enhanced from Rs. 5/- to Rs. 7/- per annum. It is further mentioned that the land is about 100 acres. Previously, this land used to be a demarcated forest under the ownership and possession of late Ruler of Bilaspur, but, subsequently when it was allotted to the father of the plaintiffs, it was taken out of the list of the demarcated forest and was declared as Ghas Godam. Thereafter, Khasra Nos. 3 and 4 was allotted to Mian Lekh Ram and thereafter the plaintiffs continued enjoying the right aforesaid till 1970. It was in 1970 that the State Government decided to put the forest into auction in respect of the grass which is grown in the said land. Having come to know the intention of the Government, the plaintiffs served a notice upon the State Government under Section 80 CPC. Consequently, the auction was stayed and the Government referred the matter for legal opinion of the Law Department. The main question for interpretation and opinion was the "Satha" aforesaid. The Law Department opined that "Satha" in question, was a perpetual and heritable lease and that the plaintiffs had right over the land in dispute. Subsequently, Kuldip Singh Patyal one of the plaintiffs preferred an application on 13.11.1973 to the Collector Ghumarwin for recording the factum of aforesaid lease in the revenue record. The said Collector passed an order on 26.3.1974 and ordered that an entry be made in the revenue record in respect of the said right of the plaintiffs. However, the defendants preferred an appeal against the said order of the Collector. The Commissioner directed the plaintiffs to get the matter settled through the Civil Court. The plaintiffs brought the present suit and also availed of the opportunity of filing an appeal against the order of the Divisional Commissioner. The appeal was pending before the Financial Commissioner, who had granted stay order against the defendants thereby restraining the defendants from interfering with the possession of the plaintiffs over the suit land. Thereafter, the defendants have been fixing various dates for putting the grass of the forest, in question, to auctioned. The defendant No.4,Shiv Ram Arya, DFO, Bilaspur had fixed the auction of the said land for 4.8.1976 and 28.8.1976 despite the stay order of the Financial Commissioner and it was with the intervention of the Collector concerned that the said auction was not held. It is stated that the defendants have admitted the right of the plaintiffs over the suit land and the defendants are estopped from disputing the right of the plaintiffs over the suit land. As such, a declaratory decree has been sought thereby declaring the plaintiffs as perpetual lease holders of the land, in question, and also prayed that the defendants be restrained permanently from auctioning the grass land or interfering with the possession of the plaintiffs over the suit land.

3. The defendants contested the claim of the plaintiffs and they have denied that the plaintiffs are permanent lease holders of the land in dispute. It has been pleaded that "Satha" in question, was not a lease, but it was a concession granted by the then Ruler to Sh. Lekh Ram, father of the plaintiffs. It is further stated that father of the plaintiffs and plaintiffs have never been in possession of the land in dispute and that no rent was paid by them to the Government. It has

also been mentioned that Khasra Nos. 3 and 4 still continue to be demarcated protected forest and are recorded as such in the revenue record. It has emphatically been denied that the Government had admitted "Satha" to be the perpetual and heritable one. It has also been averred that the Divisional Commissioner had rejected the claim of the plaintiffs in respect of making of the entries regarding the factum of lease. As regards the admission made by the defendants, it is stated that the same is not binding on the Government and the defendants are not estopped from raising the objections aforesaid. It has further been stated that the auctions were fixed by the defendants because the Financial Commissioner had vacated the stay on 26.8.1976. Apart from this, certain preliminary objections like maintainability of the suit etc. have been raised. However, these averments were denied by the plaintiffs in their replication which they were allowed to file.

4. On the pleadings of the parties, the following issues were framed by the learned trial Court:

1. *Whether the plaintiffs are permanent lease holders of the land known as Ghas Godam Mundkhar Khasra Nos. 3 and 4 of Village Jangal Jhanjiar, Tehsil Ghumarwin, District Bilaspur, H.P. under the Government? OPP*

1-A. *Whether the suit land is comprised in Khasra No. 4 only as alleged? OPD*

2. *Whether the defendants are estopped from denying the rights of the plaintiffs in the land in dispute by their conduct and admission as alleged? OPP*

3. *Whether the defendants are interfering with the rights of the plaintiffs in the land in dispute as alleged? OPP*

4. *Whether the plaintiffs are entitled to the relief of injunction and declaration as prayed for? OPP*

5. *Whether the suit is not legally maintainable? OPD*

5-A. *Whether the plaintiffs have no locus standi to file the present suit? OPD*

6. *Whether the suit is without limitation? OPD*

7. *Whether this court has no jurisdiction to try the suit? OPD*

8. *Whether no valid and legal notice U/s 80 CPC has been served upon the defendants? OPD*

9. *Whether the suit has been properly valued for the purpose of court fee and jurisdiction? OPP*

10. *Whether the plaintiffs are in continuous possession of the land in dispute for more than 30 years as alleged in the alternative, if so, its effect? OPP*

10-A. *Whether the plaintiffs are in adverse possession of the land in dispute for more than 30 years as alleged, if so, its effect? OPP*

11. Whether the Satha in dispute is not at all a lease and had terminated at the death of the father of the plaintiffs? OPD

12. Whether the land in dispute falls in demarcated forest and the plaintiffs are not permanent lease holders of the land in dispute known as Ghas Godam Mundkhar? OPD

12-A. Whether the suit land ceased to be a demarcated forest after its grant to the father of the plaintiffs, as alleged, if so, its effect? OPP

13. Relief.

5. The suit was initially decreed by the learned Senior Sub Judge, Bilaspur vide judgment and decree dated 7.12.1981 in case No. 141/1 of 1976. The State preferred an appeal which was dismissed by the learned Additional District Judge, Bilaspur and the second appeal preferred before this Court was also dismissed.

6. The respondents then filed an appeal before the Hon'ble Supreme Court of India and the same was remanded to the learned trial Court in the following terms:

"Learned counsel appearing for the appellant urged that the courts below have committed a serious error in holding that what was given to the plaintiff-respondents was lease and not licence and moreover such a right stood extinguished once the area for which licence was given vested and became part of the protected and demarcated forest. Learned counsel has relied upon relevant notifications, survey map and judgment of this Court in support of his argument. After we heard the matter we find many documents which are sought to be relied upon were not filed in the Courts below. Learned counsel for the parties are agreed that the case may be remanded to the trial court with liberty to file documents.

In view of above, we set aside the judgment of the Courts below and send the case back to the trial Court to decide the matter afresh. It will be open to the parties to adduce fresh evidence.

The appeal is allowed. There shall be no order as to costs.

Sd/-

(V.N.Khare)

New Delhi,
February 01, 2001.

(K.G.Balakrishan)"

7. Learned trial Court after receipt of the file, fixed the case on 20.3.2010 a date for final arguments. However, when the case was listed on the said date, the parties sought time for arguments and the case was thereafter fixed for final arguments on 17.4.2010. On 17.4.2010, the respondents filed an application under Section 151 CPC for filing the documents i.e. Survey Map etc. However, this application was dismissed

on the ground that the case had been remanded by the Hon'ble Supreme Court by affording opportunities to the State to place on record the documents relating to the property but it had failed to exercise its right. The matter was then heard in part and fixed for arguments on 30.4.2010 on which date the suit of the plaintiffs came to be dismissed.

8. The plaintiffs preferred an appeal before the learned lower Appellate Court which also came to be dismissed and yet aggrieved, the plaintiffs/appellants have approached this Court by way of filing the present appeal.

9. When the appeal came up for consideration on 17.2.2012 this Court admitted the same on the following substantial questions of law:

1. *Whether Sanad Ex.PW-2/A is beyond the jurisdiction of the Civil Courts and cannot be set aside in any civil proceedings?*
2. *Whether Article 363 of the Constitution of India ousts the jurisdiction on the Civil Courts to adjudicate, set aside the grant in the Sanad Ex. PW-2/A or to pass any other order annulling the grant so made?*
3. *Whether the Sanad Ex.PW-2/A is not subject to the limitation imposed by other laws including the laws relating to forest settlement?*
4. *Whether the Courts below have ignored/glossed over/ misinterpreted the evidence of Raja Anand Chand son of Raja Bijai Chand, Ex Ruler of Bilaspur, who granted the Sanad Ex.PW-2/A?*
5. *Whether the Courts below have erred in interpreting the terms of the grant of the Sanad Ex.PW-2/A?*
6. *Whether the Courts below were in grave error in ignoring Ex.PZ, letter dated 18.06.1973, issued by the respondent-State acknowledging the possession of the plaintiff-appellant, if so its effect?*
7. *Whether the Courts below have misread and misinterpreted the evidence and pleadings of the parties on record?*
8. *Whether the judgment of the Courts below is against law and facts on record?*

10. Thereafter, vide order dated 15.7.2014 in CMP No. 9274 of 2014, the following additional substantial question of law was framed:

> *Whether the respondents have played fraud on the Hon'ble Supreme Court by filing and persuading the Hon'ble Supreme Court to remand the case on false plea and on wrong translation of Urdu word 'Doam' and if so, the judgment passed by the then Ld. Trial Court and both the Ld. Appellate Courts are to be revived by this Hon'ble Court*

by a judgment as per law laid down by the Hon'ble Apex Court.

Substantial questions of law Nos. 1 and 2:

Since both these questions of law are interconnected and interrelated, therefore, these are taken up together for consideration.

11. Article 363 of the Constitution of India reads thus:

> *"363.* ***Bar to interference by Courts in disputes arising out of certain treaties, agreements, etc.****- (1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.*
> *(2) In this article –*
> *(a) "Indian State" means any territory recognized before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and*
> *(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."*

12. Till the Indian Independence Act, 1947, the Indian States were not subject to the administration of the Government of British India. The Indian States were under the suzerainty of the British Crown and were subject to control of the suzerain in certain matters. This suzerainty elapsed with the coming into force of the Indian Independence Act, 1947. With the passing of the Constitution, India became sovereign republic and Article 363(1) has barred the jurisdiction of the Civil Court arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party. To my mind, the provisions of this Article are not at all attracted to this case because sine qua non with respect to the documents like treaty, agreement etc. for coming within the ambit of Article 363 of the Constitution of India is that the same must have been entered into or executed before the commencement of the Constitution by any Ruler of an Indian State and thereafter importantly the Government of the Dominion of India or any of its predecessor Governments must be a party thereto. Resultantly, this

would not cover the grants made like in the present case by the erstwhile Rulers in favour of individuals to which the Government of the Dominion of India or any of its predecessor is not a party thereto. Accordingly, it is held that Article 363 of the Constitution is not applicable to the facts of the present case and the Civil Court had jurisdiction to entertain the suit. These substantial questions of law are answered accordingly.

Substantial questions of law Nos. 3, 4, 5, 6, 7, 8 & 9:

Since these questions of law are somewhat inter-connected and inter-related, therefore, these are collectively taken up together for consideration.

13. At the outset, it may be pointed out that granting of "Satha" Ex.PW-2/A has not been disputed by the respondents. The claim of the appellants is that the "Satha" was a perpetual lease while on the other hand, the claim of the respondents is that it was simply a concession granted on the application of Lekh Ram, which had terminated automatically on the death of Lekh Ram, father of the plaintiffs. The translation of "Satha" has been placed on record by the appellants, which reads as under:

"Before Captain Sir Raja Vijay Chand Sahib Bahadur K.C.I.C.C.S. Bilaspur State (Kehloor)

No. of case Corresponding Date Register file.
133 23 Savan 1977 Sambad Sd/-
(Vijay Chand)
Signature in English.

Addressed Mian Lekh Ram S/o Malagar Singh by Caste Rajput, resident of Village Mundkhar, Pargana Sunhani.

Whereas according to your petition for the contract (THEKA) of Grass Godown (Grass area) in Village Mundkhar, Pargana Sunhani on payment of `5/- per year is granted on perpetual basis on 19th Savan 1977 Sambat. This will be deemed effective from the 1977 Sambat. The contract amount shall be deposited with the Forest Department every year. This contract is thus granted by way of Sanad (certificate) and you are directed to retain it with you.

Sd/- inder Singh Sd/- Hari Singh Sd/- Shiv Singh
(Signature in English) Nazirn Forest Forester Forest
(Signature in English) (Signature in Urdu)."

14. The respondents on the other hand have placed on record the translation of "Satha" which reads as under:

"Before Captain Sir Raja Vijay Chand Sahib Bahadur K.C.I.E.C.S. Riyasat, Bilaspur.

Case No. Date of Registration
133 23 Savan Sambat 1977 B.K.
Sd/-

Raja Vijay Chand (in English).
Versus Mian Lekh Raj, son of Malagar Singh, Caste Rajput, R/o Mundkhar, Pargana Sunhani.

As per your written request, the contract of the grass godown Mundkhar, Pargana Sunhani on payment of Rs. 5/- yearly, has been accepted in public hearing, by order of the Raja dated 19 Savan 1977 and is granted to you, which shall be operative from 1977. The agreed contract amount shall be deposited every year with Forest Department. Hence, this Sanad is granted which be kept with you. Promulgated 23rd Savan, Sambat 1977.

Scribe Shiv Singh, Forester, Forest Department.
Sd/- Hari Singh Nazirn of Forest Department.
Sd/-
Inder Singh.
The Hindi translation of the above document has been transcribed by the trial Court in its judgment dated 7.12.1981 in English alphabets. Copy of the above judgment is endorsed as Annexure A-1. The admissions if any, made by the official of the Government are not binding on the State being against the official record."

15. It is argued by learned counsel for the appellants that the respondents have played mischief and have even misled the Hon'ble Supreme Court to remand the case on account of wrong translation of the Urdu word "doam" by terming it to be "public hearing", which in fact otherwise means "perpetual". The appellants in support of his contention with regard to meaning of "doam" has placed on record an extract of Advance Urdu-Hindi-English Dictionary by V.V.Sahani wherein the "doam" means perpetual, continual, eternal. The respondents on the other hand have not been able to show that "doam" in fact means "public hearing". The translation submitted by the respondents in fact changes the entire complexion of the case and, therefore, it is established that the translation of "Satha" made by the respondents is incorrect while the translation made by the appellants is correct. However, this does not mean that only on account of the wrong translation, the judgments passed previously by the learned trial Court and learned Appellate Court would automatically revive.

16. Undisputedly, Raja Vijay Chand was the Ruler of erstwhile State of Bilaspur and had granted the "Satha" in favour of late Sh. Lekh Ram. PW-2 Anand Chand Sahib, who is the son of Raja Vijai Chand while deposing in this case, has stated that he was Ex-Ruler of Bilaspur and "Satha" Ex.PW-2/A bore the signatures of his father. It was also signed by administering the same. He identified the signatures of both the aforesaid persons. It cannot be disputed that being a complete sovereign, he had made the "Satha" and the only question which arises for consideration as to whether the "Satha" was a perpetual lease granted

in favour of the plaintiffs or was it only a concession granted in favour of the predecessors in interest of the plaintiffs.

17. The learned courts below while rejecting the claim of the plaintiff/appellants have held that the plaintiffs were only licensee whose predecessor-in-interest had been given concession of licence merely to cut the grass from the suit land. While the claim of the plaintiffs/appellants was that they were permanent lessee of the suit land. At this stage, this Court is required to see as to what were the precise pleadings of the respective parties.

18. The plaintiffs in paras No. 1 and 2 of the plaint had alleged as under:

> *"1. That the plaintiffs are permanent lease holders of the land in dispute known as Ghas Godam Mundkhar comprising of Khasra No. 3 and 4 of Village Jangal Jhanjiar Hadbast No. 252/1, Tehsil Ghumarwin, District Bilaspur, H.P. measuring about 100 acres (489-11-0 bighas) since it was granted to their worthy father.*
> *2. That the land in dispute was granted to their worthy father of the plaintiffs late Mian Lekh Ram, Jagirdar by the then Ruler of Bilaspur State Siri Raja Bijai Chand Sahib Bahadur K.e.i.C.s. vide his order dated 19 Sawan 1977 BK and Satha dated 23 Sawan 1977 BK, signed by the then Ruler of the State Siri Bijai Chand, his minister late Shri Inder Singh, Forest Nazam Late Shri Hari Singh and Forester late Sh. Shiv Singh, as perpetual lease in lieu of rupees five annual rent to deposited with the forest department. The attested copy of the original Satha is enclosed herewith.""*

While corresponding paras 1 and 2 of the written statement reads as under:

> *"1. That the contents of para No.1 are wrong, hence not admitted. The plaintiffs are not permanent lease holders of the land in dispute known as grass Godam Mundkhar, comprised in Kh. No. 4 and not in Khasra No.3 of Village Jangale Jhanjiar hadbast No. 258/1, Jhanjiar Forest hadbast No. 258/1 has been notified as demarcated protected Forest, under Chapter IV of Indian Forest Act.*
> *2. That the contents of para No.2 of the plaint are wrong and hence denied. The so called Satha which the plaintiffs claim as permanent lease, is not at all lease and was simply a concession granted on the application of late Sh. Lekh Ram, which had terminated automatically on the death of Shri Lekh Ram, the father of plaintiffs."*

19. Thus, what would be seen from the pleadings is that the plaintiffs had claimed themselves to be a lease-holders of the land comprised in Khasra Nos. 3 and 4, while the defendants on the other hand had alleged that the plaintiffs were not permanent lessee but only a simple concession had been granted on the application of late Sh. Lekh Ram, which had terminated with his death. The defendants did not even set up a plea that the predecessor-in-interest of the plaintiffs was only a licensee. I wonder from where and how the learned Courts below

assumed the status of the predecessor-in-interest of the plaintiffs to be that of a licensee when this was not even the plea set up by the defendants. The learned Courts below could not have carved out an entirely a new case in favour of the defendants to dis-lodge the claim of the plaintiffs. There were no pleadings on behalf of the defendants that the plaintiffs were licensees. In absence of pleadings to this effect, the trial Court did not frame any issue on that question. However, still the learned Courts below have concluded that the plaintiffs were mere licensees. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not have been decided. Reliance can conveniently be placed upon the judgment of the Hon'ble Supreme Court in ***Union of India vs. E.I.D. Parry (India) Ltd. AIR 2000 SC 831*** wherein it was held as follows:

> *"The suit was filed for the recovery of excess demurrage allegedly charged by the appellant from the respondent. The claim depended upon Goods Tariff Rules, specially the Rule quoted above, which authorizes the respondent to claim damages in respect of the entire block of wagons supplied to a party who does not empty those wagons at the siding within the time permitted for that purpose. There was no pleading that the Rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the trial Court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the Rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not be decided by the Court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the Rule struck down by the High Court. The High Court, therefore, travelled beyond the pleadings in declaring the Rule to be ultra vires. The judgment of the High Court, therefore, on this question cannot be sustained."*

20. What is a lease, licence and what is the difference between the two, has been succinctly summed up by the Hon'ble Supreme Court in ***Pradeep Oil Corporation vs. Municipal Corporation of Delhi and another (2011) 5 SCC 270,*** which reads as follows:

> *"12. It would be useful to examine at this stage the definition of "lease" and "licence" as envisaged under Section 105 of the Transfer of Property Act, 1882 and section 52 of the Indian Easements Act, 1882 respectively. Section 105 of the Transfer of Property Act, 1882 reads: -*

> *"105. **Lease defined**.--A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."*

On the other hand, Section 52 of the Indian Easements Act, 1882 reads as:

> *"52**. 'Licence' defined**.--Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called, a licence."*

13. A licence may be created on deal or parole and it would be revocable. However, when it is accompanied with grant it becomes irrevocable. A mere licence does not create interest in the property to which it relates. License may be personal or contractual. A licensee without the grant creates a right in the licensor to enter into a land and enjoy it.

14. In Halsbury's Laws of England, 4th Edition, Vol. 27 at page 21 it is stated: -

> *"12. **Licence coupled with grant of interest.** - A license coupled with a grant of an interest in property is not revocable. Such a license is capable of assignment, and covenants may be made to run with it. A right to enter on land and enjoy a profit a prendre or other incorporeal hereditament is a license coupled with an interest and is irrevocable. Formerly it was necessary that the grant of the interest should be valid; thus, if the interest was an incorporeal hereditament, such as a right to make and use a watercourse, the grant was not valid unless tinder seal, and the license, unless so made, was therefore a mere license and was revocable but since 1873 the Court has been bound to give effect to equitable doctrines and it will restrain the revocation of a license coupled with a grant which should be, but is not, under seal."*

A lease on the other hand, would amount to transfer of property.

15. In Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262, the following well established proposition were laid down by a Constitution Bench for ascertaining whether a transaction amounts to a lease or a licence: (AIR p. 1269, para 27)

> *"27. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy*

such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The Lesser parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the Lessor. Whereas Section 52 of the Indian Easement Act defines a licence thus:

* * *

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license. The legal possession, thereforee, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission his occupation would be unlawful. It does not create in his favor any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is dear through sometimes it becomes very thin or even blurred. Alone time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial option is reflected in Errington v. Errington 1952 (1) All ER 149, wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion thus at p. 155:

> *"The result of all these cases is that, although a person who is let into exclusive possession is, prima facie to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."*

16. It is quite clear that the distinction between lease and license is marked by the last clause of Section 52 of the Easement Act as by reason of a license, no estate or interest in the property is created.

17. In the case of Qudrat Ullah v. Municipal Board, Bareilly, (1974) 1 SCC 202 it was observed at p. 398 thus: -

> *"... If an interest in immovable property, entitling the transferors to enjoyment is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a license is the legal result."*
>
> *(emphasis underlined)*

18. A licence, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) it is revocable and (d) it is determined when the grantor makes subsequent

assignment. The rights and obligations of the lessor as contained in the Transfer of Property Act, 1882 are also subject to the contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement."

21. On the touch-stone of the aforesaid exposition of law, I proceed to examine the oral and documentary evidence available on record. "Satha" Ex.PW-2/A in itself does not mention specifically the total area and khasra numbers which is only ascertainable from the entries made during the Bandobast of the Mundkhar forest wherein this area was denoted in Khasra Nos. 3 and 4. There is no contrary evidence on record so as to suggest that any other area save and except the aforesaid khasra numbers were also known as "Mundkhar". The area shown under Khasra No. 3 is 344-12 bighas while under Khasra No. 4, it is 141-19 bighas and in this manner the total area works out to be 486-11 bighas.

22. Now, in case the wording of the document Ex.PW-2/A is seen, the same reads as under:

"Before Captain Sir Raja Vijay Chand Sahib Bahadur
K.C.I.C.C.S. Bilaspur State (Kehloor)
No. of case Corresponding Date Register file.
133 23 Savan 1977 Sambad Sd/-
(Vijay Chand)
Signature in English.

Addressed Mian Lekh Ram S/o Malagar Singh by Caste Rajput, resident of Village Mundkhar, Pargana Sunhani.

Whereas according to your petition for the contract (THEKA) of Grass Godown (Grass area) in Village Mundkhar, Pargana Sunhani on payment of Rs.5/- per year is granted on perpetual basis on 19th Savan 1977 Sambat. This will be deemed effective from the 1977 Sambat. The contract amount shall be deposited with the Forest Department every year. This contract is thus granted by way of Sanad (certificate) and you are directed to retain it with you.

Sd/- inder Singh Sd/- Hari Singh Sd/- Shiv Singh
(Signature in English) Nazirn Forest Forester Forest
(Signature in English) (Signature in Urdu)."

23. There is specific reference of a grant having been made by Raja of Bilaspur and the same is not restricted and there is no time frame rather the same has been granted in perpetuity subject to the payment of Rs. 5/- as rent (later increased to Rs. 7/-). It is not disputed that at the time of making the grant, the Raja of Bilaspur was a sovereign enjoying the full powers of the State and his Will was the law with no restriction or obstruction on his power and he in exercise of his prerogative right had made the grant.

24. I wonder how the learned Courts below have assumed that this land was given for cutting grass alone. The purpose of lease is no where mentioned in the "Satha". The mere mentioning of grass Godam (Grass area) in itself may only suggest that it had something to do with grass but it cannot inferred that this was the right for which it was given. The Courts cannot of its own introduce those words which otherwise have not been mentioned in the document.

25. At this stage, it would be relevant to make note of copy of memorandum dated 18.6.1973 issued by the Conservator of Forest, Bilaspur, which has been duly proved on record and reads as under:-

"No. 4081
Himachal Pradesh Forest Department.
Dated Bilaspur, the 18.6.73
From: C.F. Bilaspur.
Subject: Lease of Mundkhar Grass Godown in Bilaspur Forest Division.
Memorandum,

There is an area named Mundkhar Grass Godown, included in Palasla DPF of Bilaspur Forest Division, which was with lease for grass cutting with late Mian Lekh Ram of village Mundkhar for an annual payment of Rs. 5/- as lease money. This area was granted for grass cutting by His Highness Raja Sir Vijai Chand, the then ruler of Bilaspur State on 19th Savan 1977 vide 'Satha' dated 23rd Sawan, 1977 (attested copy enclosed). After the death of Mian Lekh Ram, his heirs have asserted their claim that the lease of grass cutting originally entered into with Mian Lekh Ram may be continued in their name as well. In support of their assertion they have stated that the lease was granted in perpetuity in the name of original grassee, therefore, the lease is to be continued to the succeeding generations as well. Since the transfer of lease to the heirs involves legal interpretation of the contents of 'Satha', therefore, the case is referred to you for kindly getting necessary clarification from the law department as to whether the lease can be transferred to the heirs of Mian Lekh Ram or not. It may however, be mentioned that the grass godown is at present under the possession of the heirs of Mian Lekh Ram and they are prepared to pay the arrears of lease amount of the grass godown which has not been accepted by the Department for the last few years. An early clarification in the matter is requested as the heirs of the original lease holder are keen to get the matter decided at the earliest.
2. The copy of 'Satha' enclosed with this letter may kindly be returned after it is no longer required in your office.

Sd/-
C.F. Bilaspur."

In the aforesaid memorandum, the Conservator of Forest had not only acknowledged the appellants to be in possession, but had also acknowledged the receipt of rent.

26. The learned Advocate General would contend that the appellants at best can agitate their claim over Khasra No.4 and not over Khasra No.3 since this khasra number had been notified as demarcated

protected forest under Chapter IV of the Indian Forest Act. There is a fallacy in this argument because the demarcated protected forest was declared only in the year 1952 while the grant in this case admittedly had been made in the year 1977 BK corresponding to the English Calendar 1920. Any unilateral act of the defendants that too subsequent to the grant of "Satha", would not be binding upon the plaintiffs.

27. The learned Advocate General would thereafter argue that the revenue records do not record and recognize right as claimed by the plaintiffs. I am afraid that even this contention does not appeal to this Court. It is settled law that no presumption of truth is attached to the revenue entries, particularly jamabandi, the entries whereof are primarily for fiscal purpose and moreover, the rights of the parties would be governed by the "Satha" and this Court need not fall back or rather look at any other document.

28. The learned Courts below have not only gone astray but these findings are perverse when they place reliance on the entries of revenue records in the teeth of this "Satha" Ex.PW-2/A. Equally misplaced is the reliance placed by the learned Courts below to the forest settlement report compiled by Mian Durga Singh under the authority of H.H. Raja Bije Chand Sahib as it does not even make a reference to the land in question. The further reliance placed by the learned Courts below upon the judgments of the Rajasthan High Court and Orrisa High Court, respectively, to hold that the plaintiff was only a licencee and not lessee to say least are misplaced for the simple reason that the "Satha" did not reflect the usage of the land mentioned therein much less the same being granted only for the purpose of cutting grass. Even the word "Doam" has been totally misconstrued by the learned Courts below as the word 'Doam" was with respect to the grant being made in perpetuity, how the learned Courts below have held the "Satha" to be a grant and how it amounts to Theka or contract year after year is neither discernable or forthcoming. A bare perusal of the "Satha" would clearly show that the grant had been made in perpetuity on the payment fixed therein and in no manner was a licensee as held by the learned Courts below.

29. Thus, in view of the aforesaid discussion, it can be safely concluded that while granting the "Satha" no subordinate tenure or an interest was created in anybody else and the same was a proprietary sovereign grant, granting all kinds of rights on these lands while making no reservation whatsoever in that connection. A perusal of the Sanad in indubitably and unequivocally indicates that the intention of the Ruler was to grant a right in perpetuity to the predecessor-in-interest of the plaintiffs. No doubt, ordinarily the rule is that the grant made by the sovereignty are to be construed most favourably for the sovereign but if the intention is obvious a fair and liberal interpretation may be given to the grant to enable it to take effect; and the operative part if plainly express may take effect notwithstanding qualifications, if any, in the recitals.

30. Lastly, it may be observed that the Hon'ble Supreme Court had remanded the case so as to enable the respondents to file documents so that the matter could be decided afresh, which is clear from the following observations of the order:

> ***"Learned counsel appearing for the appellant urged that the courts below have committed a serious error in holding that what was given to the plaintiff-respondents was lease and not licence and moreover such a right stood extinguished once the area for which licence was given vested and became part of the protected and demarcated forest. Learned counsel has relied upon relevant notifications, survey map and judgment of this Court in support of his argument. After we heard the matter we find many documents which are sought to be relied upon were not filed in the Courts below. Learned counsel for the parties are agreed that the case may be remanded to the trial court with liberty to file documents....."***

Admittedly no additional documents were filed by either of the parties, more particularly by the respondents. This being the factual position then whether the learned trial or even the appellate Court could have given findings different and contrary to ones rendered earlier by them once the pleadings and evidence available on the record remained same. The substantial questions of law are answered accordingly.

31. In view of the above, there is merit in this appeal and accordingly, the judgment and decree dated 19.11.2011 passed by learned Additional District Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur) in Civil Appeal No. 26/13 of 2011/10 are set-aside and the suit of the plaintiffs is decreed as prayed for. Pending application(s), if any, stands disposed of.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

Prakash Chand .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 119 of 2011.
Reserved on: November 3, 2014.
Decided on: November 4, 2014.

N.D.P.S. Act- Section 20- Accused was found in possession of 6.250 k.gs of charas- police made efforts to search for independent witnesses but could not find any independent witness - PW-3 and PW-4 were declared hostile but they admitted their signature on the seizure memo- FSL

report showed that the contraband was found to be charas on analyses- held, that accused was rightly convicted. (Para- 18 to 21)

For the appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG with Mr. Anup Rattan Addl. AG and Mr. Vivek Singh Attri, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.3.2011, rendered by the learned Special Judge(II), Kinnaur at Rampur, H.P. in RBT No. 20-AR/3 of 2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine to undergo simple imprisonment for two years. Tara Chand was acquitted, hence this appeal.

2. The case of the prosecution, in a nut shell, is that on 13.12.2008, S.I Gurbachan Singh, P.S.Anni alongwith ASI Ludar Singh, Constable Hari Singh and Constable Bhoop Singh left Police Station Anni in connection with investigation of case FIR No. 119/08 dated 12.12.2008 and also for detection of cases under Excise Act, NDPS Act and Forest Act and for checking of traffic towards Swad, Kanda Aran side. At about 2 pm accused Prakash Chand came from Swad side holding a bag on his back. He stopped at a distance of 25 meters. He turned back and tried to escape. He was apprehended. S.I. Gurbachan Singh informed the accused that he intended to conduct his search and also apprised him of his right of being searched in the presence of the Magistrate or a gazetted officer. The accused opted to be searched by the police on the spot. S.I. Gurbachan Singh alongwith ASI Ludar Singh and Constable Bhoop singh were joined by him as witnesses. They gave their personal search to the accused. The bag was checked. It contained 6 kgs 250 gms charas. The sampling and seizure procedure was completed and NCB forms in triplicate were filled in. The 'rukka' was sent to PS Anni through Constable Hari Singh on the basis of which FIR No. 121/2008 was registered. The accused was arrested the case property was deposited in the *malkhana*. The case was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 13 witnesses to prove its case. The accused persons were also examined under Section 313 Cr.P.C to which they pleaded not guilty. Accused also examined two witnesses in defence. The learned Trial Court convicted accused Prakash Chand, as stated hereinabove.

4. Mr. Manoj Pathak, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. According to him, no independent witness was associated by the prosecution, though available. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment dated 26.3.2011, of the learned trial Court.

5. We have heard learned counsel for the parties and gone through the records of the case meticulously.

6. PW-1, ASI Luder Singh, deposed that on 13.12.2008, he accompanied S.I. Gurbachan Singh along with Constable Hari Singh and Bhoop Singh to Nagan. One person was apprehended who was carrying one Pithu and coming from Swad side towards Nagan. The accused was given option to be searched either before Magistrate or gazetted officer. Accused opted to be searched by the police vide memorandum Ext. PW-1/A. Constable Hari Singh was deputed to procure some independent witnesses but Constable Hari Singh came after some time as no independent witness was found to be associated. S.I. Gurbachan Singh after associating the official witnesses offered his search to accused Prakash Chand vide memorandum Ext. PW-1/B. The search of *Pithu* was carried out. It contained 6 kg 250 gms charas. Out of this contraband, two samples of 25 gms each were drawn separately and the remaining charas was put into the same polythene packet and *pithu* bag which was put into a separate sealed packet as P1 duly sealed with seal 'C' in the separate packet. NCB forms were filled in. The sample charas and remaining charas was taken into possession vide seizure memo Ext. PW-1/C. Constable Bhoop Singh and accused Prakash Chand also signed the same. In his cross-examination, he deposed that the distance from Police Station to Kanda Aran is about 20 kms., approximately. They remained there for about 2 hours. He did not remember the house or shop owner adjoining to the Nagan bridge. The electronic scale was used to weigh the contraband. All the proceedings including preparation of papers were completed on the spot.

7. PW-2 Chunni Devi is the wife of the accused. She did not know what had happened to her husband. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she deposed that her husband returned at about 4:30 PM after converting the timber. She denied the suggestion that her husband returned and he received a telephonic call from co-accused Tara Chand.

8. PW-3 Rajinder Kumar and PW-4 Amar Chand have deposed that nothing has taken place in their presence. They were also declared hostile. However, they have admitted their signatures on the memorandum Mark 'X'.

9. PW-5 M.L.Sharma, deposed that he has supplied the call details of Mobile No. 98171 49093 vide Ext. PW-5/A.

10. PW-6 Devinder Verma, has supplied the call details of Mobile No. 91166 43520 vide Ext. PW-6/A.

11. PW-7 HC Anup Kumar deposed that on 13.12.2008, Constable Hari Singh brought the *'rukka'* on the basis of which, he registered FIR Ext. PW-7/A. Thereafter, the file was handed over to Constable Hari Singh. On 13.12.2008, S.I. Gurbachan Singh deposited case property 3 sealed parcel, NCB forms in triplicate alongwith specimen impression of seal in the *malkhana* and entry was incorporated in the register vide PW-7/E. On 14.12.2008, vide RC No. 92/2008 he handed over to HHC Roshan Lal one sealed parcel sample alongwith the specimen impression of seal and NCB forms to be delivered at State Forensic Science Laboratory who brought the receipt over the RC itself after depositing the same. The copy of RC was Ext. PW-7/F.

12. PW-8 ASI Sohan Lal has deposed that on 14.12.2008, Dy. SP. Bhajan Singh Negi handed over to him special report, the copy of which was Ext. PW-8/A.

13. PW-9 HC Pushp Dev deposed that on 6.3.2010, he was working as MHC, Police Station Anni. He handed over two sealed parcels containing charas and sample of charas duly sealed alongwith the NCB form and specimen impression of seal vide RC No. 124/09-10 to HHC Roshan Lal to be delivered at SFSL who brought the receipt over the RC itself, the copy of which is Ext. PW-9/A.

14. PW-10 HHC Roshan Lal, deposed that firstly on 14.12.2008, MHC Anup Ram handed over to him one sealed parcel duly sealed with seal 'C' alongwith specimen impression of seal and NCB form vide RC No. 92/2008 and after depositing the same he brought the receipt over the RC itself and handed over the same to MHC. The copy of RC is Ext. PW-7/F. Thereafter on 6.3.2010 MHC Pushp Dev handed over to him two sealed parcels duly sealed alongwith the specimen impression of seal and NCB form vide RC No. 124/00, the copy of which is Ext. PW-9/A to be deposited in SFSL and after depositing the same, he brought the receipt over the RC itself and handed over to the MHC. No interference was caused to the samples.

15. PW-11 Hem Bharti is a formal witness.

16. PW-12 Constable Hari Singh deposed the manner in which the accused was apprehended and seizure and sampling process was completed on the spot. S.I. Gurbachan Singh scribed 'rukka' Ext. PW-12/A and handed over to him. He delivered the same to MHC Anup Kumar in the Police Station Anni, on the basis of which FIR Ext. PW-7/A was registered. In his cross-examination, he has specifically deposed that the I.O. had sent him to procure independent witnesses but no independent witness was available. He had gone towards Swad side as well as towards Nagan chowk to look for independent witnesses. He had gone towards Nagan side first and thereafter he had gone towards Swad side. He denied the suggestion that at that time a large number of people were present at the Nagan chowk. He denied that there was a tea stall at Nagan chowk and residential houses were also situated besides the shop. He made search for the independent witnesses for about 20/25 minutes on both sides.

17. PW-13 S.I. Gurbachan Singh also deposed the manner in which the accused was apprehended and the search and seizure process was completed and '*rukka'* was handed over to PW-12 Hari Singh, to be deposited at the Police Station, Anni. He deposited the case property with MHC with specimen seal and NCB forms. In his cross-examination, he deposed that they had visited Kanda in connection with investigation of a case FIR No. 119/08. He made an attempt to join independent witnesses by sending Constable Hari Singh to look for independent witnesses but he could not find any independent witness.

18. It has come in the statement of PW-1 ASI Ludar Singh that Constable Hari Singh (PW-12) was deputed to bring independent witnesses by S.I. Gurbachan Singh. PW-12 Constable Hari Singh came back as no independent witness was found. PW-12 Constable Hari Singh has deposed in his cross examination that I.O. had sent him to procure independent witnesses; however, no independent witness was available. He had gone towards Swad side as well as towards Nagan chowk side to look for independent witnesses. He had gone towards Nagan side first and thereafter he had gone towards Swad side. He made search for the independent witnesses for about 20/25 minutes on both sides. PW-13 SI Gurbachan Singh has also deposed that he had deputed Constable PW-12 Hari Singh to find out independent witnesses, however, no independent witness was available on the spot. PW-13 SI Gurbachan Singh has tried to associate independent witnesses by sending PW-12 Constable Hari Singh but no independent witness was available. The statement of official witnesses PW-1 ASI Ludar Singh, PW-12 Constable Hari Singh and PW-13 SI Gurbachan Singh inspire confidence. The statement of these official witnesses have rightly been relied upon by the learned trial Court.

19. Mr. Manoj Pathak, Advocate, for the accused has vehemently argued that PW-13 S.I. Gurbachan Singh was not carrying the file of case No. 119 of 2008 when the accused was apprehended. Merely that PW-13 S.I. Gurbachan Singh was not carrying the file of FIR No. 119 of 2008 has not caused any prejudice to the accused.

20 Now, as far as statements of PW-3 Rajinder Kumar and PW-4 Amar Chand are concerned, they were declared hostile but they have categorically admitted their signatures on the memorandum 'X'. The chain of circumstances is complete.

21. The prosecution has sent the samples as well as the bulk through special messenger. The FSL reports are Ext. PW-9/B and Ext. PW-13/J. The contraband was found to be charas. The case property was not tampered with during its transition from the *malkhana* to the State Forensic Science Laboratory. The seals were found intact as per Ext. PW-9/B and Ext. PW-13/J. The prosecution has fully proved the case against the accused. The charas was recovered from the exclusive and conscious possession of the accused. The statements of DW-1 Beli Ram and DW-2 Parmod Kumar do not inspire any confidence. Since the charas was recovered from the bag of the accused, neither Section 42 nor Section 50 is applicable in this case. It was a case of chance recovery.

The police had no prior information that the accused was carrying charas. Since the charas was recovered from the bag, Section 50 of the Act was not required to be followed. The contradictions pointed out by the learned counsel for the accused are only minor in nature.

22. Accordingly, there is no merit in this appeal, the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sita Ram son of Shri Bihari Lal ....Petitioner
Versus
State of H.P. and another ....Respondents

CWP No. 2872 of 2012
Order Reserved on 30th October,2014
Date of Order 4th November,2014

Constitution of India, 1950- Article 226- Petitioner was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College Chaura Maidan Shimla- subsequently he was appointed as part time contingent paid Sweeper- petitioner had served for more than 21 years but was not conferred the status of whole time contingent paid worker – respondent pleaded that the petitioner was appointed purely on temporary basis as stop gap arrangement- petitioner was placed at seniority No. 584 and at present posts of part time employees up to seniority No. 466 had been converted to the post of whole time contingent paid employees- case of the petitioner would be considered for the next higher post as per his seniority on the availability of the posts- held, that the petitioner was appointed on temporary basis as stop gap arrangement- it was specifically stated that the services of the petitioner would stand terminated on joining of regular employee- petitioner had accepted the terms of the appointment order and he cannot be allowed to approbate and reprobate the conditional appointment order- further, employee cannot be appointed on public post contrary to Rules framed by Union or State as per Article 309 of Constitution of India- there was no evidence to prove that the vacancy of the contingent worker was available in the department or that his claim was recommended by the Competent Authority for appointment. (Para-6)

Cases referred:

Haribans Misra and others vs. Railway Board and others AIR 1989 SC 696

Director Institute of Management Development UP vs. Smt. Pushpa Srivastava AIR 1992 SC 2070

For the Petitioner: Mr. P.D. Nanda, Advocate.

For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, and Mr. Pushpinder Singh Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that petitioner was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College Chaura Maidan Shimla on daily wages basis vide order dated 21.7.1997 out of the Amalgamated Fund. It is pleaded that copy of appointment order dated 21.7.1997 is Annexure P1 and subsequently petitioner was appointed as a part time contingent paid Sweeper through Employment Exchange vide order dated 29.9.1997 vide Annexure P-2. It is further pleaded that for the purpose of conferment of whole time contingent paid status and subsequently regular status all part time Water Carriers and Sweepers are considered jointly based on their date of initial appointments in either of the categories. It is further pleaded that petitioner has rendered more than 21 years of service but he has not been conferred the status of whole time contingent paid worker. It is pleaded that case of the petitioner is not considered for the conferment of whole time contingent worker. It is pleaded that service rendered by the petitioner on daily wage basis w.e.f. 21.7.1997 to 29.9.1997 is ignored on the plea that petitioner was paid out of the Amalgamated Fund of the College. It is further pleaded that action of respondents is highly illegal and arbitrary in view of judgments of the Hon'ble High Court of H.P. announced in CWP No. 859 of 2010 titled Rishi Pal vs. State of H.P. and others decided on dated 24.5.2010 and CWP No. 5444 of 2010 titled Jeet Ram vs. State of H.P. and others decided on dated 28.9.2011. It is further pleaded that copy of judgments are Annexures P3 and P4. It is also pleaded that petitioner be conferred the status of whole time contingent paid worker and thereafter he should be regularized. Prayer for acceptance of civil writ petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that category of part time Water Carrier/part time sweeper is covered on the basis of combined seniority in the District Cadre for the purpose of granting whole time contingent paid status and thereafter regularized as Class IV employee. It is pleaded that grant of such status is dependant upon availability of posts. It is also pleaded that conferment of whole time contingent paid worker is not automatic in nature. It is pleaded that Government has framed a committee consisting of President of part time Water Carrier association, President NGO federation and representative of Law, Finance, Personal departments both Directors Higher and Elementary Education and further pleaded that committee would submit the recommendation. It is pleaded that petitioner was appointed purely on temporary basis as stop gap arrangement against leave vacancy on dated 21.7.1997 with the condition that services of the

petitioner will stand terminated on the joining of regular employee. It is further pleaded that thereafter through interview held on dated 21.9.1997 petitioner was appointed as part time Sweeper by the Principal RGGCC Shimla on dated 29.9.1997 for two and a half hours daily pursuant to the recruitment scheme notified on dated 6.7.1996 and copy of appointment order is Annexure R1. It is further pleaded that petitioner could be considered for further promotion/regularization benefits w.e.f. 29.9.1997 instead on 21.7.1997. It is further pleaded that w.e.f. 21.7.1997 to 29.9.1997 petitioner could not be treated for consequential benefits as during this period petitioner was engaged purely on temporary basis as a stop gap arrangement out of amalgamated fund for smooth functioning of the college on the demand of the students. It is also pleaded that petitioner was placed at seniority No. 584 and at present part time employees up to seniority No. 466 have been converted to the post of whole time contingent paid employees. It is pleaded that petitioner will also be considered for the next higher post as per his seniority on the availability of vacancies. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

4. Following points arise for determination in this civil writ petition:-

1. Whether conditional services of petitioner as water carrier on daily wages w.e.f. 21.7.1997 to 29.9.1997 would be considered for appointment as whole time contingent paid worker and thereafter for seniority and regularization as alleged?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that service of the petitioner as water carrier on daily wages w.e.f. 21.7.1997 to 29.9.1997 be considered for the purpose of seniority and whole time contingent paid worker in view of rulings of Hon'ble High Court of H.P. announced in CWP No. 859 of 2010 titled Rishi Pal vs. State of H.P. and others decided on dated 24.5.2010 and in view of CWP No. 5444 of 2010 titled Jeet Ram vs. State of H.P. and others decided on dated 28.9.2011 is rejected being devoid of any force for the reasons mentioned hereinafter. Court has carefully perused the above said orders passed by Hon'ble High Court of H.P. in aforesaid CWPs carefully. In both CWPs, Hon'ble High Court of H.P. did not announce that if a person is appointed on daily wages purely on temporary basis as stop gap arrangement against the leave vacancy even then benefit of stop gap arrangement service would be given to the employee for the purpose of seniority and regularization. Court has carefully perused the office order passed by the Principal Government Collage Chaura Maidan Shimla dated 21.7.1997 wherein the petitioner was appointed on daily wages purely on temporary basis as stop gap arrangement. There is recital in

office order that service of petitioner would stand terminated on joining of regular employee who had proceeded on long leave due to her illness. Office order dated 21.7.1997 is quoted in toto:-

"No. EDN-GCCM-Funds (AF)/97-98-314
Govt. College Chauramaidan
Shimla-171004

Dated Shimla-171004 the 21st July 1997.

O F F I C E O R D E R

The following candidates are hereby appointed on daily wages purely on temporary basis (Stop-gap arrangement) with immediate effect against vacancy/Leave vacancy and their services will stand terminated on joining of regular hand/joining of duties by a regular Sweeper who has been proceeded on long leave due to her illness taking into consideration the demands of the students and will be paid out of College Amalgamated Fund according to approved rates of the H.P. Government:-

1. Shri Shavi Pal — Sweeper
   Purana Raj Bhawan,
   Shimla-171004

2. Sh. Sita Ram — Water Carrier
   Village Bagrath,
   P.O. and Teh. Suni,
   Distt.Shimla (HP)

2. In case above terms and conditions are acceptable to them they will report for duty forthwith failing which the offer will be treated as cancelled.

Sd/-
(J.S.Chauhan)
Principal
Govt. College Chaura Maidan
Shimla-171004

Endst.No.Edn.GCCM-Fund(AF)/97-98- Dt.Shimla-4the

Copy of above for information and necessary action.

1. Pursar, G.C. Chauramaidan, Shimla-171004
2. Individual concerned.

Sd/-
Principal
Govt. College Chaura Maidan
Shimla-171004"

6. It is proved on record that appointment of the petitioner as water carrier was (1) Purely on temporary basis. (2) The appointment of

petitioner was as stop gap arrangement. There is recital in office order that service of the petitioner would stand terminated automatically on joining of regular employee. There is further recital in office order that amount would be paid to the petitioner from the College Amalgamated Fund according to rates approved by H.P. Government. Copy of office order was supplied to the petitioner. After receiving the office order the petitioner has himself voluntarily accepted the condition of office order dated 21.7.1997. Petitioner has voluntarily accepted that he would work (1) Purely on temporary basis as stop gap arrangement. (2) Petitioner has admitted that his service would be terminated automatically on joining of regular employee. Court is of the opinion that petitioner has voluntarily accepted the terms and conditions of the conditional appointment order. It is held that petitioner cannot be allowed to approbate and reprobate the conditional appointment order dated 21.7.1997. Petitioner has himself admitted that he would work purely on temporary basis as stop gap arrangement and petitioner has himself admitted that his service would automatically terminate after joining the regular employee who was proceeded on leave. It was held in case reported in ***AIR 1989 SC 696 titled Haribans Misra and others vs. Railway Board and others*** that person appointed on ad-hoc basis cannot claim lien on post to which he was so appointed. It was hled in case reported in ***AIR 1992 SC 2070 titled Director Institute of Management Development UP vs. Smt. Pushpa Srivastava*** that appointment on contractual basis is only for a limited period and after expiry of period of contract post comes to an end automatically. It is well settled law that when there is conflict between judgments of Hon'ble Apex Court of India and Hon'ble High Court then judgment announced by Hon'ble Apex Court of India always prevails as per Constitution of India. It is well settled law that employee is appointed in particular cadre of post only upon the availability of vacancy and after recommendation of Selection Committee constituted by competent authority in accordance with law. As per Article 309 of Constitution of India recruitment and conditions of public service of Union or State are governed by Rules framed by competent authority of law and Rules so framed shall have effect subject to the provision of any Act. It is also well settled law that employee cannot be appointed on public post contrary to Rules framed by Union or State as per Article 309 of Constitution of India. It is well settled law that Constitution of India is supreme and all public authorities are under legal obligation to strictly comply the provision of Constitution of India. Petitioner did not place on record any evidence in order to prove that as of today vacancy of whole time contingent worker is available in the department. Petitioner also did not place on record any evidence on record in order to prove that his name has been recommended by competent authority of law for appointment as whole time contingent worker. In view of above facts point No. 1 is answered in negative.

Final Order

7. In view of above said findings (1) It is held that conditional service of petitioner upon leave vacancy w.e.f. 21.7.1997 to 29.9.1997 will not be considered for whole time contingent worker because as per

Anenxure P-1 the petitioner was appointed purely on temporary basis as stop gap arrangement from College Amalgamated Fund with condition that service of petitioner would stand terminated automatically after joining of regular employee and petitioner has voluntarily accepted terms and conditions of service of Water Carrier. Petitioner is not permitted to approbate and reprobate. (2) It is held that status of whole time contingent worker will be given to the petitioner strictly as per his seniority and strictly as per recommendation of Selection Committee subject to availability of post. Civil writ petition stands disposed of. Parties are left to bear their own costs. Pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR.JUSTICE P.S.RANA, J.

State of H.P. ...Appellant.

Vs.

Ravinder Kumar son of Sh Raghbir Dass and others. .....Respondents.

Cr. Appeal No. 307 of 2008.
Judgment reserved on:19.8.2014
Date of Decision: November 4, 2014.

Indian Penal Code, 1860- Sections 363, 366, 120-B and 506- Accused had taken the prosecutrix from her house on motorcycle with an intention to marry her with co-accused 'M' by telling her that her friend had called her - they served cold drink and 'Laddu' to her after which she started feeling giddiness -she was brought to the temple- there was no evidence to prove that some intoxicated substance was mixed in the cold drink and Laddu provided to the prosecutrix- there was no evidence that any arrangement was made for performing marriage ceremony in the temple and that the priest was engaged to perform the marriage ceremony – no complaint was made by the prosecutrix to PW-4 or pw-7- On the other hand prosecutrix specifically told the Investigating Officer that she had voluntarily come for strolling- held, that in these circumstances prosecution version was not proved and the acquittal of the accused was justified. (Para-10 to 17)

For the appellant: Mr.Ashok Chaudhary, Addl. Advocate General with Mr.Vikram Thakur and Mr.Puneet Rajta Dy. Advocate General.

For respondents: Mr. Anuj Nag, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment of acquittal passed by learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala in Sessions Trial No. 27-M/VII/2007 titled State of HP Vs. Ravinder Kumar and others decided on 31.12.2007.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 31.5.2005 at about 5.00 PM accused persons in furtherence of common object to marry prosecutrix with co-accused Manoj Kumar @ Palu against her will as well as against the will of her natural guardian and managed to take prosecutrix from her house on motor cycle by way of telling prosecutrix that her friend Ms Rita resident of village Jaunta had called her. It is further alleged by prosecution that accused persons took prosecutrix upon a motor cycle with the intention to marry her with co-accused Manoj Kumar @ Palu. It is further alleged by prosecution that since mother of prosecutrix came in search of her daughter accused persons could not succeed in performing the marriage of prosecutrix. It is further alleged by prosecution that prosecutrix daughter of Sh Bishan Dass was studying in 10th class in the year 2005 and was under the custody and care of her parents at village Kotla. It is further alleged by prosecution that accused persons served cold drink and 'Laddu' (Sweets) to prosecutrix and on consumption of cold drink and 'Laddu' (Sweets) prosecutrix started feeling giddiness. It is further alleged by prosecution that prosecutrix was brought to temple for marriage purpose. It is further alleged by prosecution that father of prosecutrix reported the matter to District Magistrate Ext PW1/A and thereafter FIR Ext PW9/A was registered. It is further alleged by prosecution that car and its documents were took into possession vide seizure memo Ext PW8/A. It is further alleged by prosecution that motor cycle was also took into possession vide seizure memo Ext PW12/B and site plan Ext PW12/C was prepared. It is further alleged by prosecution that certificate Ext PW5/A was collected by the Investigating Officer from Secretary Gram Panchayat Mehella District Chamba. Charge was framed against accused persons under Sections 363, 366, 120-B and 506 of the Indian Penal Code. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as eleven witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Sh Bishan Dass
PW2	Ms Shikha

PW3	Smt. Tara Devi
PW4	Sh Kanshi Ram
PW5	Sh Hem lal
PW6	Ms Rita
PW7	Sh Rajinder Kumar
PW8	Sh Dev Raj
PW9	ASI Kailash Chand
PW10	SHO Mohinder Singh
PW11	SI Hans Raj

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description:*
Ext PW1/A	*Complaint*
Ext PW5A	*Certificate*
Ext PW8/A	*Memo*
Ext. PW9/A	*FIR*
Ext PW9/B	*Endorsement*
Ext PW12/A	*Endorsement*
Ext PW12/B	*Seizure memo*
Ext PW12/C	*Site plan*
Ext PW12/D	*Statement of Rajinder Kumar*
Ext PW12/E	*Statement of Kanshi Ram*
Ext PW12/F	*Statement of Kanshi Ram*
Ext DA-1	*Statement of prosecutrix*
Ext DA	*Extract of family register*
Ext.DB	*Copy of order dated 16.7.2005*

5. Statements of accused persons were also recorded under Section 313 Cr.P.C. Accused persons did not examine any defence witness. Learned trial Court acquitted the accused.

6. Feeling aggrieved against the judgment passed by learned trial Court State of HP filed the present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of accused persons and also gone through the entire record carefully.

8. Question that arises for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 Bishan Dass has stated that his family consists of his wife Tara Devi, two daughters and son. He has stated that his wife was posted as Senior Assistant in Senior Secondary School Bhadawar. He has stated that on dated 31.5.2005 he received a telephone call from his wife at his place of posting at village Mhow in Madhya Pradesh informing him that prosecutrix had been kidnapped by accused persons with intent to marry her. He has stated that prosecutrix was traced at about 8.30 PM in the same day. He has stated that he sent a complaint through Army authorities to District Magistrate Kangra with a copy to soldier board Kangra. He has stated that complaint Ext PW1/A bears his signature. He has stated that his daughter and wife both have telephoned him. He has sated that on the basis of conversation with both of them he had filed a complaint. He has denied suggestion that he was provided wrong information.

9.1 PW2 prosecutrix has stated that in the year 2005 she was studying in 10th class in Senior Secondary School Kotla. She has stated that on dated 31.5.2005 her mother was working as Senior Assistant in Senior Secondary School Bhadawar. She has stated that at about 11.00 AM when she was ready to go to school to take admission in plus one class, mother of the prosecutrix refused to take admission on that day and informed prosecutrix that admission would be taken after 2/3 days. She has stated that she was in school dress. She has stated that Mohit came to her house and told prosecutrix that her girl friend Reeta was calling her. She has stated that Mohit took her on his motor cycle to his house at village Jaunta and accused persons Subhash, Ravinder, Sarita, Manoj Kumar @ Palu and Remeshwari were present there. She has stated that Madhu served cold drink and 'Laddu' (Sweets) etc. to her. She has stated that on consumption cold drink and 'Laddu' (Sweets) she started feeling giddiness. She has stated that accused persons told her that she would be married with Manoj Kumar @ Palu and thereafter she started weeping. She has stated that thereafter accused persons took her to Kakaro temple. She has stated that she told Mohit and co-accused

Manoj Kumar @ Palu to allow her to contact her parents on telephone but they did not permit her to do so. She has stated that she was sent with one Kaka on his scooter by Kanshi Ram up to village Jaunta. She has stated that thereafter co-accused Subhash Chand and his wife came in a car and after stopping the scooter of Kaka took her in the car and left to their house. She has stated that she was instructed by one Geeta Devi that she would not reveal anything to anyone. She has stated that she informed her father telephonically. She has denied suggestion that she had intimacy with co-accused Manoj Kumar @ Palu. She denied suggestion that in order to save the honour of her family she levelled false allegation against accused persons.

9.2 PW3 Tara Devi has stated that prosecutrix was born on 10th December 1990. She has stated that on dated 31.5.2005 her daughter asked her to get her admission in plus one class but she told her daughter that she would be admitted in school after two days and thereafter she left for duty. She has stated that she returned at home at about 5.30 PM. She has stated that she was told by her another daughter that prosecutrix was not at home. She has stated that her another daughter told her that Mohit came at about 5 PM and handed over keys of house. She has stated that thereafter she inquired about prosecutrix from Madhu telephonically and thereafter she went to the house of co-accused Ravinder and inquired about prosecutrix. She has stated that she along with her nephew Pankaj went in search of prosecutrix and in the meantime she was told by Madhu telephonically that prosecutrix would come and she should not be worried. She has stated that thereafter she along with Pankaj proceeded to the house of Madhu at village Jaunta but nobody was found there. She has stated that thereafter she proceeded towards old village Jaunta where some marriage was going on but her prosecutrix was not there. She has stated that she again proceeded to the house of Madhu at village Jaunta where she was informed that prosecutrix was sent to village Kotla. She has stated that co-accused Subhash Chand requested her that she should not report the matter to police. She has stated that police officials already recorded the statement of prosecutrix. She has stated that thereafter she returned to village Kotla and found prosecutrix at home. She has stated that thereafter she intimated the matter to her husband telephonically. She has stated that prosecutrix told her that she was took by accused persons under criminal conspiracy.

9.3. PW4 Kanshi Ram has stated that he is agriculturist and running a shop at village Kakroh. He has stated that he along with his wife was sitting in the shop. He has stated that Sawarna Devi told him that a boy and girl who were strangers were sitting in the temple. He has stated that in the meanwhile girl and boy came on motor cycle to his shop. He has stated that he stopped the motor cycle and on inquiry rider of the motor cycle told him that he is resident of village Indora and girl told that she is resident of village Shahpur. The witness was declared hostile. Witness was cross examined at length but no incriminating statement came against accused persons.

9.4 PW5 Hem Lal has stated that since January 2007 he was posted as Secretary in gram panchayat Mehla and brought family register. He has stated that he supplied copy of family register Ext PW5/A to the investigating agency. He has stated that the date of birth of the prosecutrix is 10.12.1990.

9.5 PW6 Ritta has stated that prosecutrix is her friend and was her class fellow in 10th class in the year 2005. She has stated that she did not call prosecutrix to her house. She has stated that she does not know Mohit.

9.6 PW7 Ravinder Kumar has stated that he had a scooter bearing No HP-38A-6127 in the year 2005. He has stated that marriage of his cousin was fixed for 31.5.2005 at village Kuppar adjoining to village Jaunta and there was also wrestling fair. He has stated that he had gone there to participate in the wrestling on dated 31.5.2005. He has stated that on his return his scooter was stopped by Pandit Kanshi Ram and he asked him as to why he knew prosecutrix who was standing there. He has stated that he knows prosecutrix and thereafter he took prosecutrix on his scooter up to village Jaunta. The witness was declared hostile. Witness was cross examined but no incriminating statement came against accused persons.

9.7 PW8 Dev Raj has stated that on dated 28.7.2005 police took into possession car and its documents and driving license of co-accused Subhash Chand and memo Ext PW8/A was prepared.

9.8 PW9 Kailash Chand has stated that in the year 2005 he was posted as Investigating Officer in police station Shahpur. He has stated that on receipt of Ext PW1/A FIR Ext PW9/A was registered which bears his signature. He has stated that he made endorsement Ext PW1/B on the receipt Ext PW1/A. He has stated that thereafter FIR was sent to Investigating Officer through HHG Jagdish Chand.

9.9 PW10 Mohinder Singh has stated that in the year 2005 he was posted as Station House Officer in Police Station Shahpur and he prepared challan and presented the same in Court.

9.10 PW11 Hans Raj has stated that in the year 2005 he was posted as Incharge Police Post Kotla. He has stated that on dated 2.7.2005 complaint Ext PW1/A was received in police station. He has stated that he was directed by Superintendent of Police to investigate the matter. He has stated that he visited at village Kotla and Jaunta and thereafter he submitted a report to Superintendent of Police. He has stated that Superintendent of Police directed him to register a criminal case and thereafter FIR Ext PW9/A was registered. He has stated that statements of prosecutrix witness were recorded as per their versions. He has stated that he also visited the temple at village Sakroh. He has stated that prosecutrix and co-accused Manoj Kumar @ Palu and one Mohit who is facing trial in Juvenile Board at Una were found sitting in the complex of the temple. He has stated that he recorded their statements according to their versions. He has stated that a car bearing No. HP-38-A

3583 and motor cycle LML were took into possession along with documents vide seizure memo Ext PW12/B and Ext PW8/A in the presence of witness. He has stated that motor cycle was identified by prosecutrix. He has stated that site plan Ext PW12/C was prepared. He has stated he also obtained Middle Standard Certificate and birth certificate of prosecutrix. He has stated that as per his investigation prosecutrix was deceitfully carried by accused persons. He has stated that on conclusion of the investigation case file was handed over to Station House Officer who prepared challan. He has admitted that on inquiry prosecutrix and co-accused Manoj Kumar @ Palu told him that they came for strolling. He has denied suggestion that he has recorded the statement of the prosecutrix Ext DA at his own. He has denied suggestion that false case was planted against accused persons.

(A) Testimony of PW1 Bishan Dass is not helpful to the prosecution in the present case.

10. In the present case testimony of PW1 Bishan Dass is not helpful to the prosecution case because PW1 is not eye witness of the incident because at the time of alleged incident he was posted in Army at Madhya Pradesh and testimony of PW1 is only hearsay evidence and it is well settled law that under Indian Evidence Act hearsay evidence is not admissible.

(B) Testimony of prosecutrix is also fatal to the prosecution case.

11. In the present case testimony of prosecutrix is also fatal to the prosecution case. Prosecutrix has specifically stated when she appeared in witness box that some cold drink and sweets were given to her and on consumption of cold drink and sweets she started feeling giddiness. There is no medical evidence on record in order to prove that some intoxicate cold drinks and 'Laddu' (Sweets) were given to the prosecutrix in order to convert the prosecutrix into the stage of intoxication. There is no positive, cogent and reliable evidence on record in order to prove that some intoxicated substance was mixed in the cold drink and 'Laddu' (Sweets) provided to the prosecutrix. No arrangement of marriage ceremony in the temple proved on record in the present case. There is no evidence on record to prove that priest was engaged to perform the marriage ceremony by the accused persons. There is no evidence on record in order to prove that articles of marriage ceremony were brought by the accused persons in temple. Hence it is held that testimony of prosecutrix is not sufficient to convict accused persons.

(C) Testimony of PW3 Smt Tara Devi is also fatal to the prosecution case in the present case.

12. PW3 Tara Devi mother of the prosecutrix is not eye witness of the incident. PW3 has specifically stated in positive manner that she was told by co-accused Sarita Devi that they would come with prosecutrix and PW3 Tara Devi should not worry about it. PW3 has stated that when she reached at home she found prosecutrix was already present there.

(D) Testimony of PW4 Kanshi Ram is also fatal to the prosecution case.

13. PW4 Sh Kanshi Ram has specifically stated when he appeared in witness box that prosecutrix told him that rider of the vehicle was her maternal uncle. Prosecutrix did not complaint against the accused persons when she met PW 4 Kanshi Ram. No reason has been assigned as to why the prosecutrix did not complaint against the accused persons when she met PW4 Kanshi Ram.

(E) Testimonies of PW5 Hem Lal and PW6 Ms Ritta Devi are not helpful to the prosecution case.

14. PW5 Hem Lal is not eye witness of the incident and he has simply proved the date of birth certificate of the prosecutrix. Even testimony of PW6 Ritta Devi is not helpful to the prosecution because PW6 has simply stated that prosecutrix is her friend and class fellow. PW6 has stated that she does not know about accused persons.

(F) Testimony of PW7 Rajinder Kumar is also not helpful to the prosecution.

15. PW7 Rajinder Kumar has specifically stated that he provided lift to the prosecutrix and when he provided lift to the prosecutrix she did not complaint against accused persons. No reason has been assigned by the prosecution as to why the prosecutrix did not complaint against the accused persons when she was given lift in the vehicle by PW7 Rajinder Kumar.

(G) Testimonies of PW8 Dev Raj, PW9 ASI Kailash Chand and PW10 SHO Mohinder Singh are also not helpful to the prosecution in the present case.

16. PW8 Dev Raj is only a corroborative witness and he has stated that only car key, RC, insurance and driving license of co-accused Subhash Chand were took into possession vide memo Ext PW8/A. PW9 ASI Kailash Chand has simply stated that he registered FIR after receipt of rukka. Even testimony of PW10 Mohinder Singh is not helpful to the prosecution because testimony of PW10 is only corroborative in nature and he has simply stated that he has prepared challan in the present case.

(H) Testimony of PW11 Hans Raj is also fatal to the prosecution case.

17. PW11 Hans Raj Investigating Officer has specifically stated that on inquiry from prosecutrix and co-accused Manoj Kumar @ Palu they informed to investigating officer that they voluntarily came for strolling. Prosecutrix had voluntarily stated before investigating officer that she voluntarily came for strolling. It was held in case reported in AIR 1965 SC 942 titled S Veradarajan Vs. State of Madras that where the girl left her father protection knowing and having capacity to know the full import of what she was doing and voluntarily joins the accused person the offence of kidnapping could not be said to have been proved. Similarly in the present case it is proved beyond reasonable doubt that girl had left her parental house voluntarily with co-accused Manoj Kumar

@ Palu. It was held in case reported in AIR 1997 SC 3483 titled Bilal Ahmed Kaloo Vs. State of Andhra Pradesh that mensrea is a necessary condition for the proof of criminal offence. It was held in case reported in (2010) 14 SCC 129 titled Johan Pandian Vs. State of Tamil Nadu that in order to punish the accused under criminal conspiracy there should be meeting of minds between the conspirators for the intended object of committing an illegal act. It was held in case reported in AIR 1999 SC 782 titled Sanjiv Kumar Vs. State of Himachal Pradesh that simply association is not sufficient to establish criminal conspiracy under Section 120 B of the Indian Penal Code. In the present case although it is proved on record that prosecutrix had accompanied one of the co-accused Manoj Kumar @ Palu upto temple but no over-act has been established on the part of accused persons. In the present case prosecutrix met several persons but she did not complaint to any of the persons to whom she met against the accused persons. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration in admissible evidence. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S.Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P, See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh). It was held in case reported in 1998 (2) SLJ 1408 Shashi Pal and others Vs. State of HP that if two versions appear in prosecution evidence then version beneficial to the accused should be adopted. Also see 1993(1) SLJ 405 titled State of HP Vs. Sudarshan Singh, See 1995 (3) SLJ 1819 titled State of Himachal Pradesh Vs. Inder Jeet and others, See 1995 (4) SLJ 2728 titled State of HP Vs. Diwana and others. Also see 2005 (5) JT 553 titled State of UP Vs. Gambhir Singh and others. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it

cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh**.** Also See*:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR 1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that even where the circumstances raise a serious suspicion against the accused it cannot take the place of legal proof. See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. There are following stages for commission of criminal offence i.e. (1) Criminal intention (2) Criminal preparation for commission of criminal offence (3) Criminal over-act for commission of criminal offence (4) Completion of criminal offence finally. It is well settled law that courts are under legal obligation to take grain from chaff and courts should not take chaff from gain.

18. In view of the above stated facts and case law cited supra it is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record and it is held that learned trial Court has rightly given benefit of doubt to the accused persons in the present case. Judgment passed by learned trial Court is affirmed and appeal filed by appellant-State is dismissed. All pending application(s) if any are also disposed of. Record of learned trial Court along with certify copy of judgment be transmitted forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. & HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Shri Devinder Singh Jaswal ...Appellant.

Versus

Shri Nagender Singh & others ...Respondents.

LPA No. 713 of 2011
Reserved on: 28.10.2014
Decided on: 05.11.2014

Constitution of India, 1950- Article 226- Land was allotted to father of the writ petitioner- mutations were attested, which were questioned by the appellant by filing appeal- appeal was dismissed- appellant filed civil suit which was decreed- appeal preferred by the father of the petitioner was dismissed by the Appellate Court - RSA was filed which was allowed and the decree passed by the Civil Court and Appellate Court were set aside – SLP was filed which was dismissed by Hon'ble Supreme Court of India- Revision Petition was filed before the Financial Commissioner who allowed the same - writ petition was filed, which was allowed on the ground that Financial Commissioner had set aside the order made by the

revenue authority and civil Court- held, that the appellant had lost the litigation before the revenue Court and the Civil Court- he had filed a revision petition which was barred by limitation and was meant to abuse the process of law- no reason was given for condonation of delay- revision power must be exercised within a reasonable time.

(Para, 3 to 7, 9 and 11)

H.P. Land Revenue Act, 1954 - Section 17- Section 17 can be pressed into service only when any case is pending and the matter was determined by the Revenue Court, Appellate Court and by the Civil Courts. (Para-9)

Case referred:
State of Gujarat versus P. Raghav, AIR 1969 SC 1297

For the appellant:	Mr. Neeraj Gupta, Advocate.
For the respondents:	Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondent No. 1. Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 2 to 4. Respondent No. 5 stands deleted. Mr. Pawan Gautam, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This Letters Patent Appeal is directed against the judgment and order, dated 6th July, 2010, made by the learned Single Judge in CWP No. 472 of 2007, titled as Nagender Singh versus The Financial Commissioner (Appeals), H.P. Shimla and others, whereby writ petition filed by the writ petitioner-respondent No. 1 herein came to be allowed and the order passed by the Financial Commissioner (Appeals), Shimla, H.P., dated 23rd January, 2007 (Annexure P-11 to the writ petition) came to be quashed (hereinafter referred to as "the impugned judgment").

2. This case has a chequered history and depicts how the appellant has invoked the jurisdiction of the Revenue Courts, Civil Courts and again the Revenue Courts in order to deprive the writ petitioner-respondent No. 1 herein to enjoy/reap the fruits of the entire litigation, which he has completed with success.

3. It appears that the Collector had made an order on 9th September, 1975 (Annexure P-2 to the writ petition), whereby land was to

be allotted to Shri Chain Singh, father of the writ petitioner-respondent No. 1 herein, and the said order was given effect to by the Revenue Authority by effecting mutation Nos. 4437, 4438, 4439, 4440 and 4441, dated 21st September, 1987. The appellant had questioned those mutations by the medium of appeal, which was dismissed by the Appellate Authority on 29th August, 1995 (Annexure P-4 to the writ petition). The said order of the Appellate Authority was not questioned and had attained finality. However, the appellant had filed a Civil Suit before Senior Sub Judge, Una, which was decreed on 26th December, 1984. The appeal was filed by the father of the writ petitioner, i.e. Shri Chain Singh, which was dismissed on 1st September, 1988; was questioned by the writ petitioner and his father, Shri Chain Singh, by the medium of RSA No. 351 of 1988; was allowed vide judgment and order, dated 30th December, 1999 (Annexure P-5 to the writ petition), whereby the judgments made by the Civil Court and the Appellate Court were set aside and it was held that the suit was not maintainable. The appellant had questioned the same by the medium of SLP, which was dismissed by the Apex Court vide judgment and order, dated 9th February, 2001 (Annexure P-6 to the writ petition). Thus, the orders made by the Revenue Authorities in terms of order, dated 9th September, 1975, made by the Collector and the orders passed by the Civil Courts dismissing the suit of the plaintiff-appellant herein had attained finality.

4. Thereafter, the appellant filed a revision petition before the Financial Commissioner (Appeals), Himachal Pradesh, on 16th July, 2005, which was diarized as Revision Petition No. 120/05 and was allowed on 23rd January, 2007 (Annexure P-11), whereby the Authorities were directed to exercise the review powers and virtually has set aside the mutations.

5. Feeling aggrieved, the writ petitioner, i.e. son of Shri Chain Singh, filed writ petition questioning the said order, Annexure P-11, and also arrayed his brother and mother as proforma respondents No. 6 and 7, respectively. The Writ Court allowed the writ petition in terms of the impugned judgment and quashed the said order on the ground that the revisional Court has virtually set aside the orders made by the Revenue Authorities and the Civil Courts by passing this order, which is unknown to law and also held that after lapse of twenty one years, the revisional jurisdiction was invoked, which is patently barred.

6. Being dissatisfied by the impugned judgment, the appellant-respondent No. 1 in the writ petition has questioned the same.

7. It is undisputed that the appellant has lost the entire litigation before the Revenue Courts as well as before the Civil Court. Despite that, invoked the jurisdiction under Section 17 of the Himachal Pradesh Land Revenue Act (hereinafter referred to as “the Act”) by the medium of revision petition, which, on the face of it, was time barred and abuse of process of law.

8. It is also a moot question- whether the remedy provided in terms of Section 17 of the Act was available to the appellant?

9. Section 17 of the Act can be pressed into service only when any case is pending before any Revenue Court or disposed of. Admittedly, no case was pending and the matter was determined by the Revenue Courts, including the Appellate Courts and by all the Civil Courts.

10. The revisional Court has not taken into consideration the aspect that the revision petition was time barred and has not spelled out any reasons for condoning the delay. It has also not recorded the reasons for exercising the revisional power.

11. The Apex Court in a case titled as **State of Gujarat versus P. Raghav,** reported in **AIR 1969 SC 1297,** held that the revisional powers must be exercised in a reasonable time. It is apt to reproduce para 11 of the judgment herein:

> *"11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised."*

12. The order of revisional Court is without jurisdiction, power and competence. The said order is abuse of process of law.

13. The Writ Court has marshalled and thrashed out all the facts and has made the conclusions rightly.

14. The revisional Court cannot exercise power in a revision petition, that too, belatedly, to prevent the successful party from its legitimate rights and reaping the fruits of the litigation. Such power is to be exercised only in the interest of justice, that too, promptly and within reasonable time. The said power cannot be exercised in order to take away the settings of law.

15. Having said so, the Writ Court has passed a well reasoned judgment, needs no interference. Accordingly, the appeal merits to be dismissed and the impugned judgment merits to be upheld. The appeal is dismissed and the impugned judgment is upheld. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Kausal Air Products ...Petitioner.

Versus

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

CWP No. 6953 of 2014-F
Reserved on: 28.10.2014
Decided on: 05.11.2014

Constitution of India, 1950- Article 226- Respondent No. 2 issued a notice inviting tenders on or before 18.6.2014- subsequently, the entire process was recalled and another advertisement was issued calling for tender on or before 12.8.2014- entire process was again recalled and fresh advertisement was issued calling for tender on or before 15.9.2014- petitioner submitted the tender document but the respondent No. 2 refused to accept them- respondent filed a reply stating that technical bid of the petitioner was rejected by the Competent Authority- held, that issuance of tender notice, opening of financial bids, technical bids and contracts cannot be subjected to judicial review unless it is malafide, illegal, unconstitutional and against the public interest. (Para-7)

Cases referred:

Tata Cellular versus Union of India, reported in (1994) 6 Supreme Court Cases 651

Association of Registration Plates versus Union of India and others, reported in (2005) 1 Supreme Court cases 679

Michigan Rubber (India) Limited versus State of Karnataka and others, reported in (2012) 8 Supreme Court Cases 216

Tejas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another, reported in (2012) 6 Supreme Court Cases 464

Aruna Rodrigues & Ors. versus Union of India & Ors., reported in 2012 AIR SCW 3340

Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others, reported in (2014) 4 Supreme Court Cases 156

M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors., reported in 2014 AIR SCW 1249

For the petitioner: Mr. Sanjeev Bhushan, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 and 2.

Nemo for respondents No. 3 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Petitioner has sought writ of mandamus commanding respondent No. 2 to open the technical bid of the petitioner and also to allow the petitioner to participate in the financial bid on the grounds taken in the writ petition, which can be aptly and precisely enumerated as under:

2. Respondent No. 2 issued notice inviting tenders, which was published in various newspapers and all the eligible contractors/persons had to submit tenders by or before 18th June, 2014 upto 2.00 p.m. Many persons applied, but the entire process was recalled, fresh advertisement notice was issued and the last date for submission of tender documents was fixed as 12th August, 2014. The entire process was again recalled and fresh advertisement notice was issued, in terms of which the tender documents were to be submitted by or before 15th September, 2014. Tenders were submitted. The petitioner also submitted the tender documents, but respondent No. 2 refused to accept the same, constraining the writ petitioner to make a correspondence with respondent No. 1 and the Hon'ble Minister concerned through e-mail on 16th September, 2014. Respondents have not opened the tender documents of the writ petitioner, constraining him to file the writ petition. It is averred in the writ petition that respondent No. 2 is bent upon to oust the writ petitioner from participation for extraneous reasons.

3. The writ petitioner had not arrayed respondents No. 4 and 5 in the array of respondents, were arrayed, on the application filed by the writ petitioner, as respondents No. 4 and 5 in the array of respondents.

4. Respondents No. 1 and 2 have filed reply. It has specifically been averred by respondents No. 1 and 2 that the technical bid of the writ petitioner was rejected by the Competent Authority as per the terms and conditions of the tender. Respondents No. 1 and 2 have also specifically stated what were the reasons for issuing tenders thrice. It is apt to reproduce paras 1 and 2 of the preliminary submissions herein:

> *"1. That the petitioner i.e. representative of M/s Kaushal Air Product, who was present on 15-09-2014 in the Directorate of Animal Husbandry, did not drop his tender in the sealed tender box despite verbal insistence by the committee members. The petitioner rather went on saying that he will drop the tender in sealed tender box only, if the department assures him to approve his tender for the supply of liquid nitrogen gas. Since, the petitioner deliberately did not drop the tender document before the prescribed time in sealed tender box and rather started creating nuisance.*

Hence, his tender was taken at 2.30 PM to start the proceeding in a cordial way and is still lying in sealed cover with the Department. It is pertinent to mention here that as per terms & condition of tender and also as per notice inviting tender, it was clearly mentioned that tender should be dropped in tender box up to 2.00 PM on 15-09-2014 and thereafter tender box will be sealed. Keeping in view this condition the tender of M/s Kaushal Air Product Una was rejected by the competent authority as per the terms & condition of the tender.

2. That Liquid Nitrogen is very essential item for preservation, transportation of Deep-frozen Semen Straws and Artificial Insemination of cattle & Buffaloes at the door step of the farmers. In the absence of supply of Liquid Nitrogen semen straws are likely to be destroyed thus may bring breeding programme in the entire State to stand still. Since the Notice Inviting Tender (NIT) has been called for third time so that the process has to be finalized before 30th October, 2014 i.e. before the expiry of extended validity of previous tender, so that farmers are not put to inconvenience and loss. It is pertinent to mention here that as per the report received from Director, Animal Husbandry Punjab M/s Kaushal Air Product, Una also participated in their tender for Liquid Nitrogen Gas which was opened on 05-08-2014 and was declared as L-1 but the said firm has failed to deposit the security money and sign the agreement with Punjab Livestock Development Board till date despite repeated reminders, instead he tried to impose new condition which were not in the notice inviting tender. It has been further intimated that because of this the said firm has put Punjab Livestock Development Board in lot of in-convenience wastage of time and energy and his record has been reported to be extremely poor and un-satisfactory."

5. Learned counsel for the writ petitioner was asked to show whether the writ petition is maintainable in view of the rejection of his technical bid, as averred in the reply filed by respondents No. 1 and 2.

6. It is also apt to record herein that respondents No. 1 and 2 have filed reply on 24th September, 2014 and copy was furnished to the learned counsel for the petitioner on the same day, has not taken any steps to seek appropriate relief.

7. The writ petition is also not maintainable for the reason that it is beaten law of land that issuance of tender notice, opening of financial bids, technical bids and contracts made cannot be subjected to

judicial review unless it is mala fide, illegal, unconstitutional and against the public interest.

8. This Court in **CWP No. 9337 of 2013-D,** titled as **Shri Ashok Thakur versus State of Himachal Pradesh & others,** decided on **6th May, 2014,** held that tenders cannot be questioned unless case for judicial review is carved out. It is apt to reproduce para 8 of the judgment herein:

> *"8. At the outset, it may be stated that this Court would interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India."*

9. The Apex Court in the first case reported in **Tata Cellular versus Union of India,** reported in **(1994) 6 Supreme Court Cases 651,** has held that in tender matters, the judicial review is not permissible unless there is arbitrariness or mala fide writ large on the face of it and has also laid down guidelines. It is apt to reproduce para 94 of the judgment herein:

> *"94. The principles deducible from the above are:*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,*

such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administrative and lead to increased and unbudgeted expenditures.
……"

10. The Apex Court in a series of cases from the year 1994 till 2005 has also discussed the ambit of the powers of the writ Court, the writ jurisdiction and in which circumstances the tender documents, tender process and the decision-making process can be questioned. It is apt to reproduce paras 38 to 40, 43 and 44 of the judgment rendered by the Apex Court in **Association of Registration Plates versus Union of India and others,** reported in **(2005) 1 Supreme Court cases 679,** herein:

"38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there

were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

41. .....

42. .....

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same

time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners.

What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entreprenneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

11. The Apex Court in **Michigan Rubber (India) Limited versus State of Karnataka and others,** reported in **(2012) 8 Supreme Court Cases 216,** has laid down some principles and has held that it is the prerogative of the department to fix any criterion and that cannot be made subject matter of a writ petition unless it is arbitrary or mala fide, which too appears on the face of it. It is apt to reproduce paras 23 and 35 of the judgment herein:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. .....

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35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or

> *unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."*

12. In this judgment, the Apex Court, in paras 11 to 15, has also discussed and made reference to all the judgments of the Apex Court on the issue. In these judgments, the same ratio has been laid down and after taking note of all these judgments, the Apex Court has culled out the principles, reference of which has been made in para 23 (supra).

13. The Apex Court, in another case titled as **Tejas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another,** reported in **(2012) 6 Supreme Court Cases 464,** has discussed what is judicial review, how it is to be exercised in economic cases and other cases related to business. It is apt to reproduce paras 27 and 31 of the judgment herein:

> *"27. That leaves us with the second ground on which the appellant questioned the eligibility of Respondent 2 to offer a bid, namely, the non-execution by Respondent 2 of a single integrated water supply scheme for the requisite value. The appellant's case, in this connection, is twofold. Firstly, it is contended that the works executed by Respondent 2 for Vyare and Songadh were distinct and different works which did not constitute a single integrated water supply scheme hence could not be pressed into service to show satisfaction of the*

> *condition of eligibility stipulated under the tender notice. The alternative submission made by the learned counsel appearing for the appellant in connection with this ground is that the work executed by Respondent 2 for Upleta also did not satisfy the requirement of the tender notice inasmuch as the said work did not involve the construction of intake wells, which was an essential item of work for any integrated water supply scheme.*
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> *28. .....*
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> *29. .....*
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> *30. .....*
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> *31. It is also noteworthy that in the matter of evaluation of the bids and determination of the eligibility of the bidders the Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of Respondent 2."*

14. Applying these tests to the instant case, as discussed hereinabove, we are of the considered view that it is the prerogative and domain of the official respondents to determine the eligibility.

15. The Courts have no expertise to determine the issue whether the conditions imposed are relevant or otherwise and cannot interfere unless the petitioner carves out a case for interference, as discussed hereinabove.

16. The Apex Court in **Aruna Rodrigues & Ors. versus Union of India & Ors.,** reported in **2012 AIR SCW 3340,** has laid down the same principle. It is apt to reproduce para 2 of the judgment herein:

> *"2. This Court, vide its order dated 1st May, 2006, directed that till further orders, field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (for short 'GEAC'). I.A. No.4 was filed, in which the prayer was for issuance of directions to stop all field trials for all genetically modified products anywhere and everywhere. The Court, however, declined to direct stoppage of field trials and instead, vide order dated 22nd September, 2009 directed the GEAC to withhold approvals till further directions are issued by this Court, after hearing all parties. Except permitting field trials in certain specific cases, the orders dated 1st May, 2006 and 22nd*

September, 2009 were not substantially modified by the Court. As of 2007, nearly 91 varieties of plants, i.e., GMOs, were being subjected to open field tests, though in terms of the orders of this Court, no further open field tests were permitted nor had the GEAC granted any such approval except with the authorization of this Court. This has given rise to serious controversies before this Court as to whether or not the field tests of GMOs should be banned, wholly or partially, in the entire country. It is obvious that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences.

(Emphasis added)"

17. The Apex Court in a latest judgment in the case titled as **Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others,** reported in **(2014) 4 Supreme Court Cases 156,** has also laid down the principles. It is apt to reproduce paras 11 and 14 of the judgment herein:

" 11. We have extensively referred to these principles in Arun Kumar Agrawal case, (2013) 7 SCC 1, where we have held as follows: (SCC p. 17, para 41)

"41. .....This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."

12. .....

13. .....

14. We are of the view that these are purely policy decisions taken by the State Government and, while so, it has examined the benefits the project would bring into the State and to the people of the State. It is well settled that non-floating of tenders or absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise of power. The courts have always held that it is open to the State and the authorities to take economic and management decisions depending upon the exigencies of a situation guided by appropriate financial policy notified in public interest. We are of the view that is what has been done in the instant case and the High Court has rightly held so. We, therefore, find no reason to entertain this special leave petition and the same is dismissed."

18. The Apex Court in **M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors.,** reported in **2014 AIR SCW 1249,** has taken note of all the judgments right from the year 1949 and has culled out the principles. It is apt to reproduce paras 17, 18 and 22 of the judgment herein:

"17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 SCC 489 : (AIR 1979 SC 1628) which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in Tata Cellular's case (AIR 1996 SC 11) (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope

of judicial review, observed this Court, was confined to the following three distinct aspects:

> *(i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;*
>
> *(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and*
>
> *(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.*

18. The principles governing judicial review were then formulated in the following words:

> *(i) The modern trend points to judicial restraint in administrative action.*
>
> *(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but*

must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19. .....

20. .....

21. .....

22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest"

19. This Court in **CWP No. 9337 of 2013-D (supra), CWP No. 765 of 2014,** titled as **Namit Gupta versus State of H.P. and others,** decided on 27th March, 2014, **CWP No. 4112 of 2014,** titled as **Minil Laboratories Pvt. Ltd. versus State of Himachal Pradesh and another,** decided on 15th July, 2014, and **CWP No. 4897 of 2014,** titled as **Mahalakshmi Oxyplants Pvt. Ltd. versus State of Himachal Pradesh and another,** decided on 10th September, 2014, has laid down the same principle.

20. The writ petition has been filed in order to delay the supply of Liquid Nitrogen Gas which is very essential for preservation, transportation of Deep-frozen Semen Straws and Artificial Insemination of cattle and Buffaloes at the door steps of the farmers and is to frustrate the scheme/breeding programme launched by the Government in the entire State, which is against the public interest.

21. While applying the test to the instant case, the writ petition is not maintainable.

22. The writ petitioner has also not arrayed respondent No. 2 in personal capacity and no specific allegation of mala fide is made.

23. The writ petitioner has not questioned the act of the official respondents whereby the technical bid stands rejected.

24. Having said so, the writ petition merits to be dismissed and is dismissed accordingly alongwith all pending applications. Interim directions, if any, shall stand vacated.

****

BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, JUDGE.

RSA No. 454 of 2003 with
RSA No.510 of 2003.
Reserved on: 29.10.2014
Decided on: 05/11/2014.

1. RSA No. 454 of 2003:

Madho Ram & Anr. ...Appellants.

VERSUS

Makholi Ram (since deceased) through LRs. ...Respondents.

2. RSA No. 510 of 2003:

State of H.P. ...Appellant.

VERSUS

Makholi Ram (since deceased) through LRs. ...Respondents.

H.P. Village Common Lands Vesting and Utilization Scheme, 1975 - Clause 13 (1) to (4) Sub clause (4) of the scheme vests jurisdiction and authority in the commissioner to cancel the grant suo moto on an application made to him when the allottee was not entitled to or ineligible for allotment- however, cancellation had to be made after proper inquiry.

(Para- 11 to 12)

Appearing Counsel:

In RSA No. 454 of 2003:

For the Appellants: Mr.Sanjeev Kuthiala, Advocate.

For the Respondents: Mr.Ajay Sharma, Advocate, for respondents No. 1(a) and 1(b).
Mr.Vivek Singh Attri, Dy. A.G. for respondent No.2.

In RSA No.510 of 2003:

For the Appellants: Mr.Vivek Singh Attry, Dy. A.G.

For the respondents: Mr.Ajay Sharma, Advocate, for respondents No. 1 (a) to 1(f).
Mr.Sanjeev Kuthiala, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Both the above noted appeals are directed against the judgment and decree, rendered on 1st September, 2003, in Civil appeals No.19-D/XIII-02 and 20-D/XIII-02, by the learned District Judge, Kangra at Dharamshala, whereby the learned First Appellate Court dismissed

the appeals, preferred by the appellants/defendants and affirmed the judgment, rendered on 29.12.2001 by the learned Sub Judge 1st Class(II), Dharamshala, District Kangra, H.P. These appeals are being disposed of by a single judgment as they arise out of a common judgment.

2. Brief facts of the case are that the plaintiff had instituted a suit for declaration to the effect that the plaintiff is owner in possession of suit land comprising Khewat No.88, Khatauni No.125 and Khasra No.764/362, measuring 0-10-11 Hectares of Jamabandi 1994-95 of Mohal Thamba, Mauza Ghiana Kalan, Tehsil Dharamshala and the defendants have no right, title or interest to interfere in the suit land in any manner whatsoever in the ownership and possession of plaintiff with consequential relief of permanent injunction.

3. The plaintiff has alleged that the suit land is owned and possessed by the plaintiff as per Jamabandi for the years 1994-95. The plaintiff is in cultivating possession of the suit land and the defendant No.1 has initiated some proceedings against the plaintiff and threatening to dispossess the plaintiff from the suit land. The proceedings have been initiated at the instance of defendants No.2 to 4 who are very influential persons. It is also stated that the plaintiff has applied for the allotment of the suit land to defendant No.3 and after due inquiries by the official of the defendant No.1 the plaintiff was finally allotted the suit land measuring 0-10-11 Hectares comprising Khasra No.362/2 by defendant No.1 on 14.11.1981 and a certificate of allotment was issued on 14.11.1981. The plaintiff deposited the amount of Rs.24/- qua the allotment on 1.12.1981. The plaintiff occupied the suit land on 14.11.1981 as the possession was given to the plaintiff by defendant No.1 without any interference from anybody. It has come in the notice of the plaintiff that vide order dated 26.5.1997, the Additional District Magistrate,Kangra, at Dharamshala, exercising the powers of Commissioner under the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 has cancelled the allotment of the suit land. The said order is illegal, without authority, null and void and is liable to be set aside. It is stated that there are no 'Kuhals' in the suit land and there is no play ground of the school in the suit land and the local people of the area also did not use the suit land. The mango fruit trees were planted by the plaintiff in the year 1981. There are no 'Sare-Am-Rasta' in the suit land and there is no drinking water/spring in the suit land. The plaintiff was never summoned by the Commissioner under the aforesaid act. The plaintiff falls within the definition of landless person. Hence, the order passed by the Additional District Magistrate, Kangra at Dharamshala on 26.5.1997 for cancellation of the land is illegal, null and void. Hence, the suit.

4. The State, defendant No.1 therein, filed the written statement taking preliminary objections of locus-standi, estoppel, maintainability, suit is time barred, no cause of action, suit is bad for non-joinder of necessary parties, suit is not properly valued, suit is bad for issuance of legal notice under Section 80 CPC and the Court has no

jurisdiction under Section 10 of the H.P. Village Common Lands Act, 1974. On merits, it is pleaded that the plaintiff was allotted land from Khata No.114, Khatauni No.164, Khasra No.352/2 measuring 0-10-11 Hectares situated in Mohal Thamba Mauza Khaniara under the H.P. Village Common Lands Vesting and Utilization Act, 1974 on 14.11.1981. However, the plaintiff got the land mutated in his name vide mutation No.175 of 23.10.1994 after the gap of 15 years in the year 1995. He started cultivating the land and on 17.6.1995, the residents of the village came to know about the alleged allotment and they by way of representation to the Deputy Commissioner objected to the alleged allotment as the land is used as a path and other common passages. Secondly, three 'Kuhals' pass through the said suit land which irrigates the agricultural land of the Mohal and the land is also used by the children of the Primary School, Thamba, Barnala, Kaned as a play ground. On such representation, a detailed inquiry was got conducted by the Tehsildar Dharamshala who found the objection of the residents are well founded and submitted her report to Deputy Commission on 14.7.1995. Thereafter, proceedings were initiated against the plaintiff by the Commissioner and after hearing the plaintiff and objectors, allotment of the suit land was cancelled with direction to allot some other suitable land to the plaintiff. Objections qua jurisdiction, cause of action, limitation, non-joinder of necessary parties, valuation and maintainability were also raised.

5. Defendants No.2 to 4 by way of separate written statement claimed existence of two Kuhals, three paths, passing through the suit land and that school is located adjoining the suit land. It is being used as a play ground by school children and plaintiff obtained wrong allotment of the suit land in his favour in papers only. After such allotment, he never took possession of the land. When they came to know of allotment, approached Deputy Commissioner for cancellation and consequently Tehsildar Dharamshala visited the spot and recommended cancellation. Cancellation order is claimed to be legal and valid.

6. The plaintiff filed replication to the written statement of the defendants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments made in the plaint.

7. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP
2. Whether the plaintiff is entitled for the consequential relief of injunction? OPP
3. Whether the suit of the plaintiff is within time? OPP
4. Whether the suit of the plaintiff is not maintainable? OPD
5. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD

6. Whether this Court has no jurisdiction to try the present suit? OPD
7. Whether the suit of the plaintiff is bad for non-issuance of notice under Section 80 CPC? OPD
8. Relief.

8. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff. In appeal, preferred before the learned first Appellate Court, against the judgment and decree of the learned trial Court, the learned first Appellate Court affirmed the findings, recorded by the learned trial Court and consequently, it affirmed the judgment and decree passed in favour of the plaintiff by the learned trial Court.

9. Now the defendants have instituted the instant Regular Second Appeals before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeals came up for admission on 24.3.2006, this Court, admitted both the appeals instituted by the defendants against the judgment and decree rendered by the learned first Appellate Court, on, the hereinafter extracted common substantial question of law:-

1. Whether in view of the provisions of Section 10 of the H.P.Village Common Lands Vesting and Utilization Act, the civil Court did not have the jurisdiction to try and decide the suit?

Substantial Questions of Law No.1:

10. Mr.Sanjeev Kuthiala, Advocate, appearing for appellants/defendants No.2 to 4 and Mr.Vivek Singh Attri, learned Deputy Advocate General, appearing for the State have conjointly submitted before this Court that the findings rendered by the learned Courts below on issues No. 3, 4 and 6 necessitate interference by this Court. They succinctly submit that the suit land was allotted in favour of the plaintiff-respondent in the year 1981. The order of cancellation of grant of the suit land in favour of the plaintiff/respondent, rendered by the learned Additional District Magistrate-cum-Commissioner under the Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974, comprised in Ext.D-16. Ext.D-16 is anvilled upon the power vested in the Commissioner under Clause 13 of the H.P. Village Common Lands Vesting and Utilization Scheme, 1975, which relevant clause is extracted hereinafter:-

> "13. (1) Any person aggrieved by an order, of Collector or any other authority competent to make such order, may within thirty days from the date of such order, or such longer period as the Commissioner may allow for reasons to be recorded in writing prefer an appeal in write the Commissioner.

> Explanation:- In completing the period of thirty days, the time taken in obtaining the copy of the order appealed against shall excluded.
>
> (2) An such appeal being preferred, the Commissioner may order stay of further proceedings in the matter pending decision on the appeal.
>
> (3) The commissioner shall decide the appeal after giving the parties an opportunity of being heard and if necessary, after sending further record of the case from the Collector and after making such inquiry as he thinks fit either personally or through the Collector.
>
> (4) if at any time, it comes to the notice of the Commissioner either through an application made by any person or otherwise, that the allotment of any land under this Scheme was made to a person who was not entitled or eligible for such allotment or the allotment was wrong on any other grounds, he may call for the record of the case and after making such enquiries as he thinks proper either in person or through a Revenue Officer subordinate to him and after giving an opportunity to the parties concerned, he may cancel the grant of land and make such other orders in connection therewith as he deems necessary in this circumstances of the case."

11. Sub clause (4) thereof vests jurisdiction and authority in the Commissioner to "at any time" cancel the grant of suit land on an application made to him by any person manifesting therein the fact that the allottee was not entitled to or ineligible for allotment or that the allotment was wrong on any other grounds. However, such cancellation of grant is to be preceded by an inquiry and the affording of an opportunity of being heard to all affected.

12. In view of the fact that the allotment of the suit land was made in favour of the plaintiff-respondent in the year 1981 and the said allotment came to be rescinded in the year 1994 that hence it is contended by the learned counsel for the plaintiff that the import and purport of the phraseology "if at any time" occurring in Sub clause(4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 cannot be inordinately stretched to facilitate the Commissioner exercising the powers to cancel any allotment of land made by the competent authority to proceed to cancel it in the year 1994, especially when the grant/allotment of the suit land was made in favour of the plaintiff respondent in the year 1981. True it is that the power vested in Sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 authorizing or empowering the Commissioner to rescind the grant or allotment of land made in favour of the plaintiff-respondent was exerciseable 'at any time'. So also it is true that the import and purport of the phraseology 'at any time' cannot be given the connotation of it having an untrammeled or

unrestricted limit qua time, besides the said power obviously is to be exercised within a reasonable time. However, the reasonableness of time within which the power of rescission or cancellation of allotment of land made by the competent authority in favour of the allottee, who is the plaintiff-respondent, is exercisable, is also to be adjudged from the stand point of the time when knowledge of the grant was acquired by the persons affected by the grant. If the persons affected by the grant, hence, proceeded to seek revocation or cancellation of grant within a reasonable time from the date of theirs having acquired knowledge of the grant in favour of the allotee, then the power of cancellation exercised by the authority vested with such a power acquires the colour of validity, inasmuch, as it having been exercised within a reasonable time. The acquisition of knowledge by the defendants-appellants qua the factum of allotment or grant of the suit land having been made in favour of the plaintiff-respondent was acquired or was gained by them on attestation of mutation of allotment of the suit land in the year 1994. As such when the affected persons or persons aggrieved by the grant who are the residents of Mohal Ghiana Kalan, Tehsil Dharamshala, having immediately on acquisition of knowledge qua the grant or allotment of the suit land in favour of the plaintiff-respondent, which acquisition of knowledge arose on the attestation of mutation of allotment of the suit land recorded in favour of the plaintiff-respondent in the year 1994 and theirs in quick spontaneity on 14th July, 1995 instituted before the competent authority a representation/complaint for cancellation of the grant of the suit land, which complaint sequelled the elicitation of a report from the Tehsildar existing at page 263 of the Paper Book on which report of the Tehsildar, the order rescinding the allotment of the suit land in favour of the plaintiff-respondent comprised in Ext.D-16 was rendered, all cumulatively constitute facts which portray that neither there was any indolence or inertia on the part of the villagers of Mohal Ghiana Kalan, Tehsil Dharamshala District Kangra, to, on acquisition of knowledge qua the allotment of the suit land in favour of the plaintiff-respondent come to agitate their grievances before the competent authority nor also it can be concluded that when though the import of the phrase 'if at any time' existing in sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 does not ipso facto communicate that it contemplates an untrammeled or unrestricted period of time for the authority concerned to cancel the grant, that the exercise of power of rescission is not within a reasonable time. Rather, given the fact that the exercise of power to cancel grant 'at any time' is to be read in context with and in entwinement with the proven fact of promptitude or quick spontaneity within which the affected persons proclaim their grievances qua allotment reckonable from the date of acquisition of knowledge by them of the purported untenable grant of the suit land made in favour of the plaintiff-respondent. Consequently, given the fact that the connotation borne by the phraseology 'at any time' existing in sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 inherently bespeaks of the power of cancellation of grant of the suit land being exercisable by the competent authority within a reasonable time to

be adjudged from the date of acquisition of knowledge by the persons affected by the grant, as such, when from the date of acquisition of knowledge by the affected persons of the grant of the suit land in favour of the plaintiff-respondent which arose on the date of attestation of mutation of allotment of the suit land in favour of the plaintiff-respondent in October, 1994 theirs having in the year 1995 proclaimed their grievances, cannot, either render their act to be procrastinated or elongated so as to interdict them to seek its rescission nor also the amplitude of the plenary powers vested in the authority concerned envisaged in sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 can be said to be either circumscribed or curtailed it having proceeded to exercise the power of rescission even when the affected persons despite having knowledge qua its grants even prior to attestation of mutation of allotment of the suit land in favour of the plaintiff-respondent in the year 1994 having then not moved the authority concerned for its rescission or cancellation. Even otherwise, there is no material on record to portray that the persons affected by the grant had prior to the attestation of mutation of allotment of the suit land in favour of plaintiff respondent had acquired knowledge qua its grant in favour of the plaintiff-respondent. For lack of said evidence, it is to be aptly concluded that they acquired knowledge of the allotment of the suit land in favour of the plaintiff-respondent only in the year 1994. Furthermore, the communication by the Tehsildar in his report submitted to the Deputy Commissioner, Kangra on an application moved by the villagers of Mohal Ghiana Kalan for cancellation of grant communicates/records certain pertinent facts sequelled by an inspection of the suit land by him in the presence of the aggrieved as well as the plaintiff-respondent devolving upon the factum of the plaintiff-respondent having not prior to 1994 committed any overt act upon the suit land so as to then equip the defendants/appellants with the requisite knowledge qua the allotment of the suit land in his favour and theirs despite having acquired knowledge earlier, omitted to seek cancellation of the suit land. The preponderant fact, as recorded in the report, furnished by the Tehsildar existing at Page 263 of the Paper Book, is rather of the plaintiff-respondent only after attestation of mutation of allotment of the suit land recorded in his favour in the year 1994 having then commenced to proceed till or cultivate the suit land. The aforesaid fact, constrains this Court to record an inference that when the plaintiff-respondent commenced to cultivate or till the suit land only after attestation of mutation recorded in the year 1994 he had not cultivated it earlier. The inference gains fortification in the face of the fact of it having been founded upon the presence of both the aggrieved and the allottee who is the plaintiff-respondent during the course when the Tehsildar carried out an inspection of the suit land. As a corollary, when the fact, aforesaid, as elucidated in it, are founded upon the factum of it being recorded or it being unraveled in the presence of the persons aggrieved as well as in the presence of the allottee of the suit land, as a sequel then when no evidence cogent and weighty has been adduced by the plaintiff-respondent that the manifestation, aforesaid, in the report of the Tehsildar is unworthy of credence. Consequently, the factum, as

divulged in the report of the Tehsildar of the plaintiff-respondent having not commenced cultivation of the suit land prior to the year 1994, attains conclusiveness and forestalls as well as estops the plaintiff to claim that prior to year 1994 he has commenced cultivation of the suit land. The further concomitant is that it estops the plaintiff-respondent to now contend that prior to 1994, he had tilled or cultivated the suit land. With the formation of the above deduction, the ensuing corollary is that the plaintiff-respondent omitted to utilize the land earlier so as to proclaim to the affected persons the factum of his having allotted the suit land. Naturally then, the concomitant inference is that the persons affected by the grant remained unaware of the grant or hence did not acquire knowledge of its grant, as such, were dis-empowered to at a stage earlier than 1995, seek its cancellation by moving the authority concerned. Even though the plaintiff-respondent has in his deposition proclaimed that he has utilized the suit land earlier and his acts of utilization bestowed knowledge or conferred knowledge upon the affected persons of its allotment in his favour and theirs having omitted to assail the grant earlier before the authority concerned estops them now at an inordinate stage to seek its rescission. However, the above deposition is benumbed by the report of the Tehsildar as also it stands benumbed by the fact of omission on the part of the plaintiff-respondent to adduce the best evidence comprised in the Khasra Girdawaris qua the suit land prior to year 1995 and their enunciating the factum of plaintiff-respondent having utilized the land earlier. For their non adduction, the clinching conclusion, hence is that the plaintiff-respondent had not utilized the land earlier than 1994 rather had utilized the suit land only after attestation of mutation of allotment of the suit land in his favour. Therefore, the acquisition of knowledge by the affected persons by the allotment as portrayed by them to have been acquired only on the recording of the attestation of mutation of allotment in favour of the plaintiff-respondent and its subsequent cultivation by the allottee in the year 1994 acquires an aura of truth and remains un-prevaricated.

13. It is hence held with aplomb that the rescission of the allotment recorded in Ext.D-16 is not out side the period of limitation rather when the power of rescission or cancellation of allotment of the suit land in favour of the plaintiff-respondent has been mandated to be exercisable “at any time” by the authority concerned, exercise whereof is to be done within a reasonable time, to be viewed from the date of acquisition of knowledge by the persons affected by the grant/allotment of the suit land in favour of the plaintiff-respondent. Consequently, when given the clinching fact of the persons affected by the grant having acquired knowledge of its grant/allotment only in the year 1994, theirs having ventilated their grievance qua its grant in the year 1995, which sequelled the rendition of the report of the Tehsildar in the year 1995 and ultimately consummated in the order of rescission comprised in Ext.D-16, is within limitation. The findings recorded by the learned Courts below on the issue relating to limitation hence is liable to be reversed and set-aside.

14. Furthermore, the learned counsel for the plaintiff-respondent contends that the statutory bar envisaged in Section 10 of the H.P.Village Common Lands Vesting and Utilization Act, 1974 ousts the jurisdiction of Civil Courts to adjudicate upon any order rendered by the Collector or State Government or any Officer authorized by it under the provisions of the Act. However, true it is that the provisions of Section 10 of the Act, which are extracted herein-after, exclude the jurisdiction of the Civil Courts to adjudicate upon any order rendered by the authorities concerned relating to allotment of land/grant of land made in favour of any beneficiary under the provisions of the Act, which reads as under:-

> "10. Bar of Jurisdiction:- Save as otherwise expressly provided in this Act, no order made by the Collector or the State Government or any officer authorized by it, as the case may be, shall called in question by any Court or before any officer or authority."

15. However, it is also settled law that the statutory prohibition engrafted in Section 10 of the Act against the Civil Courts exercising the jurisdiction qua subjects explicitly enunciated in Section 10 does not omnibously usurp the jurisdiction of Civil Courts to test the legality of orders rendered by the officer concerned while exercising powers vested in H.P.Village Common Lands Vesting and Utilization Scheme, 1975. Rather, it is settled law that the civil Courts would continue to retain jurisdiction or would be vested with jurisdiction to test the legality of or adjudicate upon any order rendered by any authority concerned exercising powers under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975. In the event when such orders, as rendered by any authority concerned under the aforesaid Act, are permeated with the vice of infraction of principles of natural justice or are also beyond jurisdiction. Therefore, it was incumbent upon the learned counsel for the plaintiff/respondent to establish that the orders comprised in Ext.D-16 are vitiated with an infirmity inasmuch as they have been rendered in transgression of the principles of natural justice inasmuch as preceding its rendition, the plaintiff-respondent had neither been summoned nor participated, hence, was condemned unheard. However, with an explicit communication Ext.D-16, of the plaintiff-respondent having been summoned and his having been afforded an opportunity of being heard prior to the rendition of Ext.D-16, as such, in face thereof and when for displacement of the explicit enunciation aforesaid in Ext.D-16, no evidence to the contrary has been adduced by the plaintiff-respondent. Consequently, an invincible conclusion which fosters is that there is no force or weight in the submission of the learned counsel for the plaintiff-respondent that preceding to the rendition of Ext.D-16, the plaintiff-respondent had neither been served nor had participated in the proceedings preceding the rendition of Ext.D-16. Nor also he can contend that it is vitiated while it having been rendered behind his back or his having come to be condemned unheard. In sequel, Ext.D-16 remains un-vitiated. Consequently, when this Court has formed the conclusion that the order comprised in Ext.D-16 is not vitiated for

transgression of principles of natural justice at the instance of the authority who has rendered it. The sequel thereof is that it foments an inference that hence the saving or excepting principle to the statutory bar against the exercise of jurisdiction by the Civil Courts qua the subject matters explicitly enshrined in Section 10 of the H.P.Village Common Lands Vesting and Utilization Act, 1974 remains unattracted. Consequently, the Civil Courts had no jurisdiction to test the legality or adjudicate upon the vires of pronouncement rendered by the competent authority in Ext.D-16. As a sequel, the findings rendered by the learned trial Court qua the maintainability of the civil suit before the civil Court and its having jurisdiction are set aside. Furthermore, the learned counsel for the plaintiff-respondent has also contended that the order comprised in Ext.D-16 has been rendered by an Officer not vested with the jurisdiction to render it, inasmuch, as, it has not been rendered by a "Commissioner" who is the authority vested with the jurisdiction under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 to exercise the powers vested under Sub-Clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, for rescinding or canceling a grant made in favour of an allottee. However, the said submission, too, is rudderless in face of the statutory meaning attributed to the term 'Commissioner' in Section 2bb of the Act, which is extracted herein-after:-

> "Commissioner" means the Commissioner, Himachal Pradesh and includes an officer appointed as such by the State Government."

16. The signification which is apparent on a reading of the phraseology "Commissioner" who is the competent authority to rescind or cancel a grant, is of the designation, aforesaid comprising the Commissioner, Himachal Pradesh and its also including an officer appointed as such by the State Government. When the plaintiff-respondent had omitted to adduce, cogent, potent and best evidence comprised in adduction of a notification apposite, to rendering a determination that the proclamation by the officer who rendered Ext.D-16 of his having rendered Ext.D-16, while his exercising the powers of Commissioner under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, is legally unwarranted and fictitious. Its non adduction sequels the inference that the reflection in Ext.D-16 by the officer who rendered Ext.D-16 of his having rendered it while exercising the powers of Commissioner under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 is a true portrayal of his being, as a matter of fact, an officer appointed as Commissioner within the signification borne by the word 'Commissioner' as defined in Section 2bb of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975. Consequently, even if he was Additional Deputy Commissioner and not a 'Commissioner', yet when hence he is to be construed to be an officer who has been empowered as a Commissioner to exercise the powers vested in a "Commissioner" under sub-clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, the orders of cancellation or revocation of grant comprised in Ext.D-16

cannot be construed to be without jurisdiction having been rendered by an officer not empowered to render it.

17. Lastly, the learned counsel for the plaintiff-respondent has contended that since it is un-controverted that he was both entitled to as well as eligible for the grant, besides when the further ground contemplated in sub-clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 for revocation of the grant by the Commissioner, inasmuch as of it being revocable on "any other grounds" was un-available inasmuch as when the land allotted to the plaintiff-respondent stood or existed in the allotable pool, its de-allotment was unwarranted. However, a deep and incisive perusal of the report of the Tehsildar, existing at page 263 of the file of the trial Court reflects that the persons aggrieved by the grant had proclaimed their grievances against its allotment in favour of the plaintiff-respondent on the strength of it being used by them for the purposes as divulged in it as well as in the order comprised in Ext.D-16 which purposes constitute public purpose. In sequel, when the ambit of the phraseology 'any other ground' on which anchorage the Commissioner was competent to rescind it is extendable to encompass dehors eligibility or entitlement of the plaintiff-respondent for the grant or the allotment of the suit land, also the implicit and inherent rights/interests of the larger village body in the suit land when proven to be liable to be prejudiced, jeopardized as well as affected in case the allotment of the grant of the suit land remains un-rescinded. Consequently, when the communications in the report of the Tehsildar on which Ext.D-16 is founded, unravels the fact of the land being available for use for advancing larger public interest, which unfoldment therein remain un-controverted, as a sequel, it has to be concluded that the suit land was meant for being used by the village community, hence, they have entrenched interests in its being preserved for the protection of their inherent community rights in it which rights would get eroded in case the allotment is not decided. Therefore, cancellation or rescission of the allotment of the suit land in favour of the plaintiff-respondent on the score that if not rescinded, public interest would be jeopardized, does comprise a sufficient "any other grounds" envisaged in sub-clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, for hence vesting in the authority concerned on its implicit proof, as exists in Ext.D-16, the power to cancel it. Therefore, even if the suit land was in the allotable pool, yet for saving and preserving it for public interest, its de-allotment or rescission was tenably done.

18. For the foregoing reasons, both the appeals are allowed and the judgments/decrees, rendered by the learned Courts below, are set aside. The suit of the plaintiff is dismissed. The substantial question of law is answered accordingly. No order as to costs.

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

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

Mohan Lal ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 10625 of 2011.
Date of decision: 5.11.2014.

Constitution of India, 1950- Article 226- Petitioner was engaged as daily wage Beldar- he worked as Assistant fitter and thereafter as daily wage beldar- his services were regularized as beldar- respondent stated that the private respondent had joined subsequently but they had forefeited their seniority for the period when they worked as beldar and were appointed as fitter on the completion of 8 years of services on the said post - held, that respondent is model employer and is under an obligation to conduct itself with high probity-it should not take advantage of the employees- respondent had exploited the petitioner as well as private respondents- when a person had rendered service in two or three capacities-an option was required to be obtained from him - petition allowed and the respondent directed to take appropriate action in accordance with law. (Para- 4 to 9)

Case referred:
Gauri Dutt & ors. Vs. State of H.P Latest HLJ 2008(HP) 366

For the petitioner : Mr. B.N. Sharma, Advocate.
For the respondents : Ms. Meenakshi Sharma, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 to 3.
Mr. Shashi Shirshoo, Advocate for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has approached this court for grant of following substantive relief:-

a) That a writ in the nature of mandamus may kindly be issued directing the respondents to regularize the services of the petitioner as Fitter instead of helper on which post the petitioner has been working since 1983 and granted work charge status in the year 1996 and further they may kindly be directed to pay the arrears with interest on the revised pay scales of Fitter from 1996 onwards with all consequential benefits.

2. The uncontroverted facts are that petitioner was engaged as a daily waged Beldar on 1.6.1983 and worked as such up to 30.4.1985. Thereafter he worked as an Assistant Fitter w.e.f. 1.5.1985 to 24.7.1987 and thereafter he worked as daily-waged Fitter w.e.f. 25.7.1987 up to 18.1.1995. Now the grievance of the petitioner is that when it got down to regularization of his services, instead of being regularized as a Fitter, the respondents regularized his services as Beldar, that too from the years 2004, while the private respondents who had been appointed much after the petitioner in the year 1990, had been regularized prior to the petitioner.

3. The respondents have not denied these averments and contended that private respondents had in fact been appointed subsequently, but they had forfeited their seniority of the period when they worked as Beldar and were thereafter appointed as Fitters on their completion of eight years of service on the said post.

4. The stand of the respondents to say the least is absolutely unfair not only qua the petitioner but even as against the private respondents themselves. The respondent is a model employer and what has been expected from model employer has been succinctly dealt with by this court in **LPA No. 386 of 2012 titled H.P. State Industrial Corporation Ltd.** vs. **Shri Rajesh Kumar Kashyap, decided on 7.4.2014,** wherein it has been held as follows:-

> *"17. The Central Government, State Governments and likewise all Public Sector Undertakings are expected to function like model employers . A model employer is under an obligation to conduct itself with high probity and expected candour. An employer who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit the employees and take advantage of their helplessness and misery."*

5. The official respondents have exploited not only the petitioner, but even the private respondents. The petitioner was granted work-charge status for the first time in the year 1996 and was regularized only in the year 2006, that too, on the post of Beldar. While in the case of private respondents, they were made to forfeit their seniority for the period they worked as Beldar and it is only thereafter that on completion of eight years of service as daily-waged Fitters, their services came to be regularized. It is also absolutely clear that official respondents have not conducted themselves with high probity and expected candour. They have not treated their employees in an appropriate manner and have rather exploited them taking advantage of their helplessness and misery. The conduct of the official respondents is reprehensible and falls short of expectation of a model employer.

6. The petitioner, even as per reply of the respondents had worked as a Fitter from 25.7.1987 to 18.1.1995, while on the other hand the private respondent No. 4 Fakerjeet had been engaged as a

daily-waged Beldar on 19.2.1988 and had worked as such till 31.7.1995 and it is only thereafter that he had worked as a Fitter from 1.8.1995 to 19.3.2004. While on the other hand the respondent No. 5 had been engaged as Beldar on 25.8.1991 and had worked as such up to 30.11.1994 and it is thereafter that he worked as a Fitter w.e.f. 1.12.1994 to 19.3.2004. The comparative particulars of the petitioner and private respondents clearly demonstrate that petitioner had been engaged much prior to the private respondents not only as a Beldar, but had been assigned the duties of Fitter prior to the private respondents.

7. It cannot be disputed that in such like cases where a person has rendered service in two or three capacities, an option was required to be obtained from him in terms of learned Division Bench judgement in case titled **Gauri Dutt & ors.** Vs. **State of H.P Latest HLJ 2008(HP) 366,** wherein this court held as follows:-

> *"18. The last question raises some interesting points. There have been instances where some employee has worked as beldar for some time and thereafter he has been engaged in a higher scale as mate or supervisor etc. The Tribunal in most of these cases has directed that the employee should be granted work charge status in the higher post of completion of 10 years of service after combining the service rendered in the lower scale and the higher scale. The State is aggrieved by these directions. According to the learned Advocate General the State has offered work charge status to these employees on completion of 10 years of combined service in the lower of the two scales and the State cannot be directed to grant work charge status in the higher scale. On the other hand, it is contended on behalf of the employees that since the employees are already working in the higher scale, it would not be fair and equitable to grant them work charge status in the lower scale.*
>
> *19. We have considered the arguments from all angles. We are of the view that the employee cannot be given the benefit of combining service rendered in both the scales and be granted work charge status in the higher scale. We do, however, feel that at times it may be inequitable to grant the employee work charge status in the lower scale without giving him an option in this regard. We are giving two examples to illustrate two extreme positions. In example (i) we will deal an employee (A) who joined service on 1.1.1990. He works in the lower scale of Beldar from 1.1.1991 to 31.12.1999. He is thereafter posted as Supervisor in the higher scale. Should he be granted work charge status as beldar or as Supervisor w.e.f. 1.1.2001? The clear other example is converse. Supporting employee (B) has worked as beldar w.e.f. 1.1.1991 to 31.12.1991 and from 1.1.1992 he was worked as Supervisor. From which date should we grant him work charge status and in what scale? It is obvious that in the first case the employee would not mind being granted work charge status even in the lower scale after 10 years w.e.f. 1.1.2000 since granted of work charge status would mean that he would get regular scale of pay. But should the employee be*

granted work charge status in the higher scale? We cannot agree with the preposition.

20. After considering all the pros and cons and keeping in view the fact that various anomalous situations may arise we are of the considered view that when an employee completes 10 years of continuous service combined in two scales, an option should be given to the employee to either accept work charge status in the lower scale or he may continue to work on daily rated basis in the higher scale and claim work charge status in the higher scale of completion of 10 years of continuous service in the said scale. In the examples given above employee (A) may prefer to accept work charge status w.e.f. 1.1.2001 even in the lower scale of beldar because otherwise he may have to wait for 9 years before he is granted work charge status. On the other hand, employee (B) in the second example may prefer to delay of 3 grant of work charge status by one year so that he can get work charge status in the higher scale. We feel that in each case the choice should be left to the employee. However, if the employee on being given a change to exercise his option does not convey his option within 30 days, he shall be granted work charge status in the lower scale by combining the service rendered in both the scales. This answers the fourth question."

8. The case of the petitioner is squarely covered by the aforesaid judgement and consequently directions issued in **Gauri Dutt's case** (supra) shall mutatis mutandis apply to the present case also.

9. Resultantly, the petition succeeds and the respondents are directed to take appropriate action in accordance with law laid down by this court in **Gauri Dutt's case** (supra) within a period of three months from the date of receipt of certified copy of this judgement, failing which the petitioner shall be entitled to interest at the rate of 9% per annum. Needless to add that petitioner shall be granted all consequential benefits including and not restricted to pay, arrears, seniority etc. from the due date. Costs easy.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, JUDGE.

Smt.Sudesh Sood wife of
Sh Chandu Lal Sood and another. ...Petitioners.

Versus:

State of HP and others. ....Respondents.

CWP No. 6600 of 2011.
Order reserved on:22.10.2014.
Date of Order: November 5 ,2014.

Constitution of India, 1950- Article 226- Central Civil Services (Leave) Rules 1972 - son of petitioners and husband of respondent No.5 and father of respondents No.6 and 7 who was serving as medical officer died in harness- Leave encashment amount was not paid by the State- held, that the Leave encashment amount after the death of employee who died during service is payable by State under Rule 39-C - Father and Mother falls in class (v) and (vi) while Widow falls in class (i) - First category will be preferred over class (v) and (vi)- therefore, the petitioners are not entitled for the payment of Leave encashment amount - leave rules will supersede the general law containing in Hindu Succession Act. (Para-5 and 6)

Constitution of India, 1950- Article 226- Died in harness- Petitioners claimed death-cum-retirement gratuity amount - held, that as per Central Civil Services (Leave) Rules 1972 widows has preferential right of payment of death-cum-retirement gratuity amount- therefore, the petitioners being father and mother are not entitled to death-cum-retirement gratuity amount. (Para-7)

For the petitioners: Mr.Ashwani Sharma, Advocate.
For Respondents-1 to 4. Mr. M.L.Chauhan, Addl. Advocate General.
For Respondent-5 Mr.S.K.Sood, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that on dated 28.8.2007 Dr. Naveen Sood son of petitioners and husband of respondent No.5 and father of respondents No.6 and 7 who was serving as medical officer died in harness. It is further pleaded that on dated 22.9.2009 final payment of General Provident Fund in respect of deceased Dr. Naveen Sood was paid by respondent No. 4 in terms of clarification issued by respondent No.3 vide letter dated 13.7.2009 Annexure P1 to respondents No. 5 to 7 and petitioners in five equal shares since they were covered under the term 'Family'. It is further pleaded that dispute inter se the parties is regarding disbursement of claims relating to (1) Leave encashment amount (2) Death-cum-Retirement Gratuity amount (3) Group Insurance Scheme amount. It is further pleaded that on dated 8.4.2011 it was informed that amount of death-cum-retirement gratuity was Rs.5,85,000/- (Five lac eighty five thousand) and amount of leave encashment was Rs. 2,28,600/- (Two lac twenty eight thousand six hundred). It is further pleaded that the shares of the petitioners in leave encashment amount, death-cum-retirement gratuity amount and group insurance scheme amount should be ordered to be refunded from respondent No. 5 Smt Anuradha Sood who had received entire amount after the death of her husband. Prayer for acceptance of writ petition sought.

2. Per contra reply and counter claim filed on behalf of respondent No.5 Smt Anuradha Sood pleaded therein that civil writ petition is not maintainable. It is further pleaded that deceased Dr. Naveen Sood has filed his nomination on dated 13.9.1992. It is further pleaded that certified copy of nomination is Annexure R1. It is further pleaded that 2/5th share in the General Provident Fund given to petitioners is wrong and against the rules. It is admitted that Dr. Naveen Sood died on dated 28.8.2007 while working as medical officer at Health Centre, Takipur Tehsil and District Kangra HP. It is denied that deceased Dr Naveen Sood did not file any nomination papers in the name of respondent No.5 Smt. Anuradha Sood during his life time for the payment of his dues in the service record. It is further pleaded that deceased Dr Naveen Sood has filed his nomination on dated 13.9.1992 with the department and nomination was duly witnessed by Dr. Raj Kumar the then Medical Officer Incharge Civil Hospital Garli where he was working at that time. It is further pleaded that nomination was also witnessed by Sh Dhani Ram Kondal who was working as a Senior Clerk in the hospital at that time. It is further pleaded that replying respondents have also sent a copy of the aforesaid nomination to Accountant General HP vide registered AD No RLAD A 2226 dated 10.12.2007 vide Annexure R/2. It is denied that deceased Dr. Naveen Sood has not filed any nomination during his life time. It is further pleaded that deceased had left behind his widow and two daughters and they are legally entitled for leave encashment amount, death-cum-retirement gratuity and group insurance scheme amount. It is further pleaded that petitioners were not dependent upon the deceased. It is further pleaded that petitioners have independent ration cards of their own. It is further pleaded that petitioners are running a shop for the last 50 years in their own village at Pragpur and they are getting regular income from the shop. It is further pleaded that petitioners have landed property at Pragpur, Dhaliara, Theog and Shimla from which they are getting substantial income. It is further pleaded that petitioners have also acquired policies from the post office, insurance companies and mutual funds from which they are earning lot of money every month. It is further pleaded that petitioners are paying income tax every year. It is further pleaded that petitioners are also claiming medical reimbursement through their eldest son who is employed in the National Insurance Company at Jawalamukhi. It is further pleaded that replying respondents are living in a rented house. It is further pleaded that petitioners have intentionally made false statement that they were dependent upon the deceased at the time of his death. It is further pleaded that leave encashment amount, death-cum-retirement gratuity amount and group insurance scheme amount were paid to respondent No.5 strictly as per rules. Prayer for dismissal of writ petition sought. Respondent No.5 also filed counter claim for refund of amount of General Provident Fund paid to petitioners. Petitioners also filed rejoinder and reasserted the allegation pleaded in the writ petition.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Additional Advocate General appearing on behalf

of respondents No. 1 to 4 and Mr. S.K.Sood, learned Advocate appearing on behalf of respondents No.5 to 7 and also perused entire records carefully.

4. Following points arise for determination in the present writ petition:

(1) Whether petitioners are legally entitled for payment of (1) Leave encashment amount (2) Death-cum-retirement gratuity amount (3) Group insurance scheme amount as alleged in the civil writ petition.

(2) Whether respondents No. 5 to 7 are legally entitled for refund of General Provident Fund amount as pleaded in counter claim.

(3) Final Order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioners that petitioners are father and mother of deceased Dr Naveen Sood who died on dated 28.8.2007 and they are legally entitled for (1) Leave encashment amount (2) Death-cum-retirement gratuity amount (3) Group insurance amount which was payable to deceased Dr Naveen Sood is decided accordingly for the reason hereinafter mentioned. It is well settled law that amount of leave encashment payment of employee who died during service is governed by Central Civil Services (Leave) Rules 1972 and these Rules came into operation on 1.6.1972. Rule 39-C deals with payment of leave encashment amount. As per rule 39-C of Central Civil Services Leave Rules 1972 leave encashment amount after the death of employee is payable to different classes of relations mentioned in rule 39-C. There are 1 to 11 classes mentioned in Rule 39-C. Widow falls in class (i) of rule 39-C and Father and Mother falls in class (v) and (vi). First category will be preferred to other categories. All leave encashment payment is governed under Central Civil Services (Leave) Rules 1972. It is well settled law that under Article 309 of the Constitution of India any rules so made have effect of act. In view of fact that special Central Civil Service (Leave) Rules 1972 came into effect on 1.6.1972. It is held that payment of amount of leave encashment will be governed by rule 39-C of Central Civil Service (Leave) Rules 1972. It is held that petitioners are not legally entitled for payment of leave encashment amount of deceased Dr Naveen Sood in view of rule 39-C of Central Civil Service (Leave) Rules 1972

6. Submission of learned Advocate appearing on behalf of petitioners that payment of leave encashment amount will be governed by Hindu Succession Act and as per Hindu Succession Act mother falls as class-I heir and she is legally entitled for payment of leave encashment amount of deceased Dr Naveen Sood who died on dated on 28.8.2007 is rejected being devoid of any force for the reason hereinafter mentioned. It is held that Central Civil Services (Leave) Rules 1972 came into operation on 1.6.1972 for governing payment of leave encashment

amount. It is well settled law that when there is a conflict between general law and special law then special law always prevails over the general law. Part 14 of the Constitution of India deals with service matter under the Union and the State. As per Article 309 of the Constitution of India any rules so framed shall have the effect of act. Hence it is held that rules framed under Central Civil Services (Leave) Rules 1972 which came into operation on 1.6.1972 will prevail upon Hindu Succession Act 1956 qua payment of leave encashment amount of deceased employee. Hence it is held that payment of entire leave encashment amount to the widow of deceased has been paid by respondents No. 1 to 4 strictly as per rule 39-C(i) of Central Civil Service (Leave) Rules 1972 and there is no illegality in the payment of leave encashment amount to the widow of deceased who falls in the first category. Even petitioners did not fall within the definition of family because respondent No.5 has specifically stated by way of affidavit that petitioners are residing separately from respondents No.5 to 7 and petitioners have separate ration card. It is well settled law that after the preparation of separate ration card family did not remain joint family.

7. Another submission of learned Advocate appearing on behalf of the petitioners that petitioners are also entitled for death-cum-retirement gratuity amount is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that payment of gratuity amount of deceased employee is governed under Central Civil Services (Pension) Rules 1972. It is well settled law that Central Civil Services (Pension) Rules 1972 came into operation on 1.6.1972. As per Rule 51 of Central Civil Services (Pension) Rules 1972 the gratuity is payable by means of a nomination under Rule 53 and if there is no nomination then gratuity of employee should be paid as per rule 50 of sub-rule (6) of Central Civil Services (Pension) Rules 1972. As per rule 50 of sub-rule (6) eleven categories have been specified and widow has been shown in first category and father and mother have been shown in 6th and 7th category. It is well settled law that first category have a preferential right of payment than that to other category. In the present case no nomination document placed on record qua the payment of gratuity amount and only Annexure R1 has been placed on record which is related to General Provident Fund. It is well settled law that concept of Provident Fund and gratuity amount are two different concept. In the absence of any nomination qua gratuity amount the present case will be governed under rule 50 of sub-rule (6) of Central Civil Services (Pension) Rules 1972. In the present case widow of the deceased is still alive and she falls in first category and she has the preferential right of payment of death-cum-retirement gratuity amount. It is held that petitioners are not entitled for payments of death-cum-retirement amount of deceased Dr Naveen Sood in view of Central Civil Service Pension Rules 1972.

8. Another submission of learned Advocate appearing on behalf of the petitioners that petitioners are legally entitled for the amount of group insurance scheme is accepted for the reason hereinafter mentioned. Himachal Pradesh Government Employees Group Insurance Scheme 1984 came into force on 1st April, 1985. HP Government

Employees Group Insurance Scheme 1984 is relating to the amount deposited in Group Insurance Scheme and as per the Scheme the amount of Group Insurance Scheme should be paid to the person mentioned in the nomination form and in the absence of nomination the amount of insurance scheme should be paid to the member of the family of deceased as defined in General Provident Fund (Central Services) Rules 1960. No nomination paper qua payment of amount of Group Insurance Scheme placed on record. As per Rule 2 of sub-rule (C) of General Provident Fund (Central Services) Rules, 1960 family has been defined as wife, parents, children, minor brothers, unmarried sisters, deceased son's widow and children in the first category. Hence it is held that petitioners are entitled for payment of Group Insurance Scheme amount as per their shares. Point No.1 is decided accordingly.

Finding upon Point No.2.

9. Submission of learned Advocate appearing on behalf of respondent No.5 Smt Anuradha Sood that as per Annexure R2 placed on record she has been mentioned as nominee qua provident fund amount and respondents No. 1 to 4 have illegally paid the amount of provident fund in favour of the petitioners and the same be got refunded from the petitioners is decided accordingly for the reasons hereinafter mentioned. It is well settled law that amount of provident fund as per General Provident Fund (Central Services) Rules 1960 should be paid to nominee. It is held that as per rule 33 of General Provident Fund (Central Services) Rules 1960 the amount of General Provident Fund (GPF) should be paid to nominee and in the absence of nominee the same should be paid to the member of the family of deceased as defined under Section 2(c) of General Provident Fund (Central Services) Rules, 1960. It is well settled law that General Provident Fund (Central Services) Rules, 1960 came into operation on 1st April, 1960. As per Section 2(c) of General Provident Fund (Central Services) Rules 1960 wife, children and parents have been mentioned in first category. Admittedly petitioners fall within first category as defined in word 'family'. As the amount of General Provident Fund (GPF) already stood paid to the petitioners respondents No.5 to 7 are directed to file Civil Suit for refund of General Provident Fund amount paid to petitioners in view of the nomination Annexure R1 placed on record qua payment of General Provident Fund because nomination Annexure R1 qua payment of General Provident Fund is in dispute inter se parties. Point No.2 is decided accordingly.

Final Order

10. In view of the above stated finding it is held (1) That petitioners are not entitled for payment of leave encashment amount. (2) It is held that petitioners are also not entitled for payment of death-cum-retirement gratuity amount. (3) It is held that petitioners are entitled for payment of Group Insurance Scheme amount qua their shares only in the absence of nomination qua payment of Group Insurance Scheme. (4) It is held that respondents No.5 to 7 will be legally entitled to recover the amount from petitioners qua General Provident Fund on the basis of

nomination mentioned in Annexure R1 by filing civil suit in competent Civil Court. Respondent No.5 will refund the amount of Group Insurance Scheme to the petitioners as per their share(s) within one month. Writ petition is accordingly disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

LPA No. 62 of 2013
a/w LPA No. 149 of 2013
Reserved on: 28.10.2014
Decided on: 05.11.2014

LPA No. 62 of 2013

Mr. Sunil Kumar ...Appellant.

Versus

Indian Oil Corporation Ltd. (IOC) & others ...Respondents.

.....

LPA No. 149 of 2013

Ms. Promila Kumari Sandil ...Appellant.

Versus

The General Manager (LPG) & others ...Respondents.

Constitution of India, 1950- Article 226- Petitioner had applied for allotment in which he was awarded 10 marks- his grievance was that he was entitled to 10 marks as per criterion fixed by the respondent since he is owner of the land and has absolute title- held, that the revenue record produced by the petitioner shows that he is co-sharer and his mother and brother are also recorded as owners- brother does not fall within the definition of the family prescribed by the respondent, therefore, respondent had rightly awarded 10 marks. (Para- 6 and 9)

Practice and Procedure- Court should be conscious in entertaining the writ petitions which are aimed to prevent the eligible candidate to reap the fruits of selection. (Para- 15)

Case referred:

Sanjay Kumar Shukla versus M/s. Bharat Petroleum Corporation Ltd. & Ors., 2014 AIR SCW 4945

LPA No. 62 of 2013

For the appellant: Mr. Digvijay Singh, Advocate.

For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondents No. 1 and 2.
Mr. Navlesh Verma, Advocate, for respondent No. 3.

.....

LPA No. 149 of 2013

For the appellant: Mr. Dushyant Dadwal, Advocate.
For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondents No. 1 to 3.
Mr. Navlesh Verma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Judgment and order, dated 12th December, 2012, made by the learned Single Judge in a bunch of writ petitions, lead case of which is CWP No. 6399 of 2010, titled as Pardeep Kumar versus General Manager and another (hereinafter referred to as "the impugned judgment"), has given birth to both these appeals. Thus, we deem it proper to determine both these appeals by this common judgment.

2. Appellant in LPA No. 62 of 2013 has questioned the impugned judgment so far it relates to CWP No. 920 of 2012, titled as Sunil Kumar versus Indian Oil Corporation and others and the appellant in LPA No. 149 of 2013 has questioned the impugned judgment so far it relates to CWP No. 7350 of 2010, titled as Ms. Promila Kumari Sandil versus the General Manager (LPG) and others.

3. The writ petitioners in CWPs No. 6399 and 6549 of 2010 have not questioned the impugned judgment on any count, has attained finality so far it relates to them.

4. The impugned judgment is to be tested only so far it relates to CWPs No. 920 of 2012 and 7350 of 2010 on the touchstone of Rules occupying the field read with the pleadings of the parties.

LPA No. 62 of 2013:

5. Appellant, i.e. the writ petitioner in CWP No. 920 of 2012, has specifically pleaded in the appeal as well as the writ petition that he was entitled to 25 marks instead of 10 marks awarded as per the criterion fixed by the respondents, details of which have been given in para 24 of the impugned judgment.

6. According to the writ petitioner, he is owner of land and is having absolute title because that land belongs to the family to which the writ petitioner belongs, but only ten marks were awarded, which is not according to the Rules, Regulations and the policy.

7. Admittedly, the extracts of revenue record produced by the writ petitioner before the respondents do disclose that he is a co-sharer; his mother and brother are also recorded as owners. Brother do not fall within the definition of family.

8. As per the definition, 'family' includes applicant, applicant's spouse, unmarried son(s)/daughter(s) and also the parents. It does not include married son(s), married daughter(s) or brother. Thus, the writ petitioner was not absolute owner of the said land and was not having the absolute title. The Writ Court has rightly recorded the findings in paras 24 and 25 of the impugned judgment, which are reproduced herein:

> *"24. The word 'owned' according to the policy, means having clear ownership title in the name of the applicant/family member of the 'family unit'. 'Family unit' of a married applicant consists of self, applicant's spouse and unmarried son(s)/ daughter(s) and also his parents, but the petitioner had attached the documents with the application of the land which was offered by him, it was an ancestral property and consent of the family members have not been furnished. Further, in the said land apart from the petitioner Tarsem Kumar, his married brother and mother are reflected as co-sharers to the extent of 3/14th share in the revenue record, who otherwise do not fall within the definition of 'family unit'. The selection guidelines provide marking under the heading "Capability to provide infrastructure and Facilities" and the same have been divided into three heads as below:*
>
> ***a. Owns mean having clear title/registered sales deed of the suitable land/godown-based on documents -- 25 marks,***
>
> ***b. Firm Offer having agreement to purchase suitable land/godown- based on documents***
>
> ***– 18 marks; and***
>
> ***c. Can arrange-Based on documents***
>
> ***– 10 marks.***
>
> *25. In the revenue papers aforesaid produced by the petitioner he was not having clear title of the plot/land offered, thus he was rightly awarded 10 marks under the sub-head (iii), i.e., 'can-arrange'. The land offered for construction of godown in the application form at Clause 12(a) is ancestral and undivided property. The value of the property is Rs. 2,03,49,000/- and the share of the petitioner comes out to Rs.43,60,500/- and in case the applicant is having property worth more than Rs.20 lacs then full 5 marks are to be awarded which was done, but in my opinion, the evaluation was rightly reviewed by the Committee after investigating his complaint, but despite*

that he failed to get merit. Thus, I do not find any force in the present petition, which also deserves to be dismissed."

9. Having said so, the Writ Court has not committed any illegality and the appeal, i.e. LPA No. 62 of 2013, merits to be dismissed.

LPA No. 149 of 2013:

10. The appellant, i.e. writ petitioner in CWP No. 7350 of 2010, was supposed to produce the original copies of all the documents annexed with the form. She had applied in terms of the advertisement notice and has annexed photocopies of the documents, but had neither annexed the original nor had produced some of the originals at the relevant point of time before the respondents.

11. Learned counsel for the appellant admitted that she had annexed some documents in addition to the documents required and had not produced originals of all the annexed documents at the time of scrutiny, but, stated that she had shown the same to one Shri Sunil Thakur, an employee of the respondent-Oil Corporation, but he has not allowed her to enter inside the room, where the interviews were being held and has not even looked into the documents which she was having.

12. The appellant-writ petitioner has also alleged that said Shri Sunil Thakur had some grudge against her as there was some dispute between their families, has not been arrayed as a party in the writ petition, thus, anything said in the writ petition against him cannot be looked into and examined.

13. Learned counsel for the appellant stated that it is a fact that the appellant-writ petitioner had not produced the original of the revenue documents, which she was not supposed to annex or produce in terms of the advertisement notice.

14. We have examined the impugned judgment and the documents alongwith the policy and are of the considered view that the Writ Court has rightly dismissed the writ petition in terms of the findings given in paras 16 and 17 of the impugned judgment.

15. We also deem it proper to record herein that the Apex Court in a recent judgment in the case titled as **Sanjay Kumar Shukla versus M/s. Bharat Petroleum Corporation Ltd. & Ors.,** reported in **2014 AIR SCW 4945,** has commanded that the Courts should be cautious in entertaining the writ petitions which are aimed at to prevent the eligible candidate to reap the fruits of selection. It is apt to reproduce para 15 of the judgment herein:

"15. In the present case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at Areraj, East Champaran District in the State of Bihar is not required as on date. It

can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. We have already indicated that the present litigation initiated by Respondent No. 7 does not constitute a very bona fide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the appellant or the Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. The above highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, we are of the view that it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid by the Corporation itself."

16. Having glance of the above discussions, this appeal also deserves to be dismissed.

17. Viewed thus, both the appeals are dismissed and the impugned judgment is upheld. Pending applications, if any, are also disposed of.

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Before Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice and Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Dharam Pal Thakur ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWPIL No. 10 of 2014
Date of Order: 10.11.2014

Constitution of India, 1950- Article 226- Road Users and Pedestrians (Public Safety and Convenience) Act, 2007- respondents were directed to furnish the list of permit holders but the list was not furnished in accordance with the direction- respondent directed to file a fresh list along with name of the officers who had issued the permits in violation of the provisions of the Act –respondent further directed to cancel permits which were issued in breach of the Act- respondents also directed to furnish the list of the names of the police officers and to mention the action taken by police officials for violation of the Act- further, direction

issued to indicate the mechanism in place for managing the parking of vehicles. (Para- 2 to 14)

Present: Mr. Ajay Mohan Goel, Advocate, for the petitioner.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 to 5.

Mr. Hamender Chandel, Advocate, for respondent No. 6.

Mr. Dushyant Dadwal, Advocate, for respondent No. 7.

Mr. G.S. Rathore, Advocate, for respondent No. 8.

Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No. 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Keeping in view the fact that the vehicles of Union of India are also being plied on the sealed/restricted roads, Union of India through Secretary (Home) to the Government of India is arrayed as party-respondents and shall figure as respondent No. 9 in the array of respondents.

2. Issue notice to newly added respondent No.9. Mr. Ashok Sharma, learned Assistant Solicitor General of India, waives notice. Respondent No. 9 is directed to file status report indicating how the Army vehicles are being plied on Mall Road and whether the requisite permits have been issued in terms of the directions issued by this Court in CWPs No. 1916 of 2009 and 7784 of 2010. The particulars of all the permits be also disclosed.

3. Respondents No. 1 to 8 had to file compliance reports in terms of the directions contained in orders, dated 22nd July, 2014, and 22nd September, 2014, though have filed status reports, are evasive and not in accordance with the mandate of the said directions.

4. In the given circumstances, we deem it proper to direct respondents No. 1 to 8 to file fresh status reports indicating the steps taken by them to comply with the directions (supra) in letter and spirit and also to spell out what steps they have taken to implement the mandate of the Shimla Road Users and Pedestrians (Public Safety and Convenience) Act, 2007 (hereinafter referred to as "the Act").

5. The respondents have furnished the list of permit holders, which, on the face of it, appears not in tune with the mandate of the Act read with direction (b) contained in order, dated 22nd July, 2014, and para 22 of order, dated 22nd September, 2014. In addition to filing the compliance reports, they are directed to pin point who is/are the officer(s) who had issued the permits in violation of the provisions of the

Act and are also directed to cancel all those permits, which have been issued in breach of the mandate of the Act.

6. The affidavits filed do disclose that CCTV cameras have not been installed and it has also not been disclosed as to what is the mechanism in place. The concerned authorities to do the needful and report compliance by or before the next date of hearing.

7. The respondents, in addition to the compliance reports, shall also furnish the details of the police/traffic officers/officials, who are manning the entry points and what actions they have drawn if they have noticed any violation.

8. The affidavits filed by the respondents do not disclose how many parking places are in place and how many unauthorized parkings are being used. In addition to the compliance reports, they are directed also to indicate what action they have drawn to ban the said parking places. The list of the parkings, which have been misused or which are being misused, be also furnished.

9. Respondent No. 8, in addition to the compliance report, is also directed to indicate what is the mechanism in place for managing the parking of vehicles in terms of the said orders.

10. It appears that the respondents have complied with direction (f), but have not complied with other directions relating to the subject contained in para 16 of order, dated 22nd September, 2014.

11. Respondent No. 8 has filed affidavit in response to the directions, is an eye wash, is directed to file affidavit and also to place on record the policy read with the action drawn by it in terms of paras 18 to 20 contained in order, dated 22nd September, 2014.

12. Respondents No. 4 and 5 have virtually admitted that no long term vision plan is in place. Respondents No. 1 to 4 and 6 are directed to utilize the services of an Expert before submitting the compliance report in terms of para 5 of order, dated 22nd July, 2014.

13. Respondent No. 7 has filed affidavit and has given details that the permits have been issued in favour of the MLAs and also in favour of some officers/officials, is directed to file affidavit how permits were issued in favour of the officers/officials other than MLAs.

14. The authorities, which are empowered to issue permits, must ensure that the vehicle belongs to the person in whose name permit has been granted or is to be granted and whether the permit(s) is/are being misused.

15. Respondents No. 1 to 8 are directed to remain present in Court on next date of hearing. List on **24th November, 2014.**

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, JUDGE.

Ram Lok ……Appellant.
Vs.
Nand Ram & others ……..Respondents.

RSA No.287 of 2004
Reserved on 29.10.2014.
Decided on: 10.11.2014.

Code of Civil Procedure, 1908- Order 22 Rule 4- proforma defendants No.3 to 5 were proceeded exparte- no written statement was filed by them- suit was filed for the benefit of proforma defendants No.3 to 5- held, that death of proforma defendant No.3 would not result in the abatement of the suit or appeal. (Para-10)

H.P. Land Revenue Act, 1954- Section 38- B was owner of the suit land and S was recorded as a tenant- revenue entries were repeated in the subsequent jamabandies- R was recorded as a tenant for the first time in the jamabandi for the year 1973-74- held, that there was no record to show as to how R was recorded as a tenant- Patwari is required to notify in writing to the person or persons likely to be adversely affected by such a change of the entries and retain on record proof of the notifications - entries are required to be verified by the '*Lumberdar'* or '*Panch and any* entry made in violations of these instructions are void. (Para-18 and 19)

Cases referred:

Sushil K. Chakravarty vrs. Tej Properties Private Ltd., reported in (2013(9) SCC 642

Mata Prasad Mathur versus Jwala Prasad Mathur and others, reported in (2013) 14 SCC 722

Bhagirath Mal vrs. Bhagwan Dutt, reported in AIR 1996 Rajasthan 27

Ram Sarup vrs. Chandra Bhan and ors. reported in 1992 PLJ 179

For the appellant: Mr. Rajnish K. Lall, Advocate.
For the respondents: Mr.N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharoll, Advocate, for respondents No. 1 to 3 & 6.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Una, dated 5.5.2004 passed in Civil Appeal No. 68 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), filed a suit for declaration to the effect that the plaintiffs alongwith proforma defendants are owner-in-possession to the extent of 34749 shares and tenant in possession to the extent of 3395 shares under defendant No. 2 over the land measuring 0-80-15 hectares, comprised in Khewat No. 238, Khatauni No. 401, Khasra Nos. 644 and 645 as per *Misal Haquiat* Settlement for the year 1986-87 and the change of the revenue entries in the name of defendant No. 1 as non-occupancy tenant and subsequent order dated 10.6.1985 of Assistant Collector, IInd Grade, Amb sanctioning mutation No. 971 of proprietary rights in the name of defendant No. 1, were absolutely wrong, false, baseless, illegal and without jurisdiction and contrary to the provisions of H.P. Tenancy and Land Reforms Act and Rules with a consequential relief of permanent injunction restraining the defendant No. 1 from interfering in any manner or raising any sort of construction and cutting trees from the suit land.

3. The suit land was coming in possession of the plaintiff and proforma defendant Nos. 3 to 5 since the time of ancestors as non-occupancy tenants under Shri Bhagat Singh etc. owners on payment of rent and after coming into force of H.P. Tenancy and Land Reforms Act, the plaintiff had become owner to the extent of 34749 shares and tenant in respect of 3395 shares under the defendant No. 2 who is widow. Earlier the old Khasra No. of the suit land was 284 which was converted into new Khasra No. 293 during consolidation and thereafter the suit land was denoted by Khasra No. 644 and 645 during settlement operation. The defendant No. 1 with the connivance of the revenue staff got changed the entries of the suit land in his name as non-occupancy tenant and also got sanctioned mutation No. 971 of proprietary rights from Assistant Collector, IInd Grade, Amb. On 10.6.1985.

4. The suit was contested by defendant No. 1, namely Ram Lok. He filed the written statement. According to him, the suit land was coming in his possession as non-occupancy tenant on payment of rent to the owners since June, 1970 and now under the provisions of H.P. Tenancy and Land Reforms Act, the defendant has become owner vide mutation No. 971 dated 10.6.1985. The defendant Nos. 2 to 5 despite service did not appear and they were proceeded ex-parte in the trial Court.

5. The plaintiffs filed replication to the written statement filed by the defendant. The issues were framed by the learned Sub Judge (Ist Class), Amb. The learned Sub Judge (Ist Class), Amb, decreed the suit on 27.6.2002. The defendant Ram Lok filed an appeal against the judgment and decree dated 27.6.2002 before the learned District Judge, Una. The learned District Judge, Una, dismissed the same on 5.5.2004. Hence, this regular second appeal .

6. The regular second appeal was admitted by this Court on 16.3.2005 on the following substantial questions of law:

> "1. Whether the Civil Court had jurisdiction to try the suit as framed for correction of entries and setting aside the order confirming the ownership rights on the appellant under the provisions of H.P. Tenancy and Land Reforms Act?
>
> 2. Whether on a proper construction of H.P. Tenancy and Land Reforms Act, the onus to disprove the tenancy of the appellant which lay on the plaintiff was discharged and the court below mis-directed in directing the appellant to establish his tenancy?
>
> 3. Whether the judgment of the Court below is vitiated as the suit had abated because of the death of defendant No. 3 Prabhu and which question of abatement could only be decided by the trial Court where abatement had occurred?"

7. Mr. Rajnish K. Lall, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the Civil Court had no jurisdiction to try the suit. He then contended that the plaintiffs have not become owners. The suit had abated because of the death of defendant No. 3 Sh. Prabhu and this question could only be tried by the trial Court where the abatement had occurred. On the other hand, Mr. Naresh Thakur, Sr. Advocate, has supported the judgments and decrees passed by both the Courts' below. In addition thereto, he has referred to the order passed by the learned District Judge on 13.6.2003 in CMA No. 52 of 2003.

8. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

9. Since all the questions of law are inter-related, hence in order to avoid repetition of evidence, these were taken up together for discussion.

10. Now, as far as the question of abatement is concerned, defendant No. 3 Sh. Prabhu has died on 9.12.1999. At the time of death of Prabhu, the suit was pending before the trial Court. The application for bringing on record the legal representatives of Prabhu was filed under Order 22 Rule 4 CPC on 7.3.2003. The application was contested. Sh. Prabhu was admittedly arrayed as proforma defendant No. 3 by the plaintiffs in the suit. Defendant No. 3 refused to accept the summons. Defendants No. 3 to 5 were proceeded ex parte vide order dated 29.4.1993. No written statement was filed by proforma defendants No. 3 to 5. According to the plaint, the plaintiffs have filed suit for declaration to the effect that the plaintiffs alongwith the proforma defendants No. 3 to 5 were owner-in-possession to the extent of 34749 shares in the suit land. The suit was filed for the benefit of proforma defendants No. 3 to 5. No relief was sought against the proforma defendant No. 3. Defendants No. 3 to 5 have not filed any written statement. In view of this, death of proforma defendant No. 3 would not

result in abatement of the suit even if no application had been filed nor permission as required under Order 22 Rule 4 (4) CPC was obtained. Thus, the death of Prabhu i.e. proforma defendant No. 3 would not result in abatement of the suit or appeal, as argued by Mr. Rajnish K. Lall, Advocate.

11. In the case of ***Sushil K. Chakravarty vrs. Tej Properties Private Ltd.,*** reported in ***(2013(9) SCC 642,*** their lordships of the Hon'ble Supreme Court have held that when the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of 'S', it was done on the Court's satisfaction, that it was a fit case to exempt the plaintiff 'T' from the necessity of impleading the legal representatives of the sole defendant 'S'. Their lordships have held as under:

> "31.3. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. In this behalf all that needs to be noticed is, that the defendant Sushil K.C. having entered appearance in CS (OS) no. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex- parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. to participate in the proceedings of CS(OS) no.2501 of 1997, till his death on 3.6.2003.
>
> 31.4. It is apparent, that the trial court was mindful of the factual position noticed above, and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant Sushil K.C. (the appellant herein). This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the Code of Civil Procedure, stood complied. The fact that the aforesaid satisfaction was justified, has already been affirmatively concluded by us, hereinabove.
>
> 31.5. We are therefore of the considered view, that the learned Single Judge committed no error whatsoever in proceeding with the matter in CS (OS) no.2501 of 1997 ex-parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. We therefore, hereby, uphold the determination of the learned Single Judge, with reference to Order XXII Rule 4(4) of the Code of Civil Procedure."

12. Similarly in the case of ***Mata Prasad Mathur versus Jwala Prasad Mathur and others,*** reported in ***(2013) 14 SCC 722,*** their lordships of the Hon'ble Supreme Court have held that in order to expedite process of law, courts may exempt plaintiff from substituting LRs of a defendant who failed to appear or contest the suit. Their lordships have held as under:

> "3. Having heard learned counsel for the parties, we are inclined to agree with the order of the First Appellate Court that the suit had not abated no matter for a reason different from the one that prevailed with that Court. It is common ground that Virendra Kumar-defendant was proceeded ex parte as he had not appeared to contest the suit or file a written statement. Substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial Court in view of the provisions of Order XXII Rule 4 Sub-Rule 4, which is as under:
>
> "4. Procedure in case of death of one of several defendants or of sole defendant.-
>
> (1) xxxxx
>
> (2) xxxxx
>
> (3) xxxxx
>
> (4). The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."
>
> 4. The High Court has, in our view, rightly noticed this aspect in its order albeit the manner in which the High Court dealt with the same is not all that satisfactory. Be that as it may, so long as the power of exemption was available to the trial Court, the same could and ought to have been exercised by the First Appellate Court while hearing an appeal assailing the dismissal of the suit as abated.
>
> .....
>
> 9. It would appear from the above that the Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant-Virendra Kumar. We have no manner of doubt that the view taken by the First

Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4 (4) of the CPC."

13. The learned Single Judge in the case of ***Bhagirath Mal vrs. Bhagwan Dutt,*** reported in ***AIR 1996 Rajasthan 27,*** held that the decree against a dead person is not nullity when deceased-defendant had not filed written statement and had not made legal appearance during pendency of trial and in fact the trial has proceeded against him ex parte. It has been held as follows:

"3. I have heard the learned counsel for the parties. During the course of arguments it has not been disputed by the learned counsel for the non-applicant that no legal appearance had been made by the deceased during the pendency of the trial and that the learned counsel for the applicant-defendant had put in appearance on behalf of the deceased also without filing any Vakalatnama and that during the pendency of the suit statement was made by the learned counsel representing the applicant in the learned trial Court that the written statement filed by the applicant-defendant should be treated as the written statement of the deceased-defendant as well, but the learned trial Court had refused to treat the same as the written statement of the deceased-defendant. The suit in question had been filed by the non-applicant for specific performance of the agreement to sell said to have been executed by the deceased in his favour in respect of the property in dispute which is said to have been sold by the deceased to the applicant in violation of the terms of the agreement and the defendant-applicant had been put in possession of the property. It is also the common case of the parties that the property in dispute is situated in District Jhunjhunu within the State of Rajasthan and the deceased was resident of the State of Bihar and that the sale deed in favour of the applicant had been executed by a person who had been given a Power of Attorney by the deceased. The deceased-defendant not having made appearance and the appearance having been made on his behalf without any authority from him on the basis of a memorandum of appearance and the counsel on the basis of the said memorandum having not been accepted as a duly appointed Advocate and because of that fact the written statement filed by the applicant was not taken as the written statement of the deceased shows that, although, no specific order in this regard was passed, proceedings against him were ex parte, and in these circumstances, it cannot be said that it was within the knowledge of either the plaintiff non-applicant or the defendant-applicant that deceased had died during the pendency of the suit and in these circumstances this fact was not brought to the notice of the learned trial Court who passed the impugned decree. Even otherwise, in view of sub-rule (4) of Rule 4 of Order 22 of the Code

of Civil Procedure it was not obligatory, in the circumstances, for the plaintiff to have brought on record the legal representatives of the deceased during the pendency of the suit and as such the appeal having been filed by the applicant impleading the deceased as respondent No. 1 and the report having been received that he had died, there was no question of impleading his LRs as he had died before the suit was decided and not during the pendency of the appeal. In view of these facts, I am of the view that it cannot be said that the appeal can be said to have abated or that the decree passed by the learned trial Court was nullity as no legal representative had been brought on record. Consequently, I am of the view that the order dated 5-11-1993 dismissing the appeal as having abated should be recalled and appeal should be heard on merits.

4. Consequently, while holding that neither the appeal had abated nor the decree was nullity, the application dated 25-4-1994 filed for recalling the order is allowed. The order dated 5-11-1993 passed by me is recalled and the appeal is restored with a direction that it should be registered at its original number and be placed before the regular Bench hearing first appeals."

14. In ***Ram Sarup vrs. Chandra Bhan and ors.*** reported in ***1992 PLJ 179,*** the learned Single Judge has held that when no relief was sought against the defendant who died, suit would not abate and it is not necessary that all those who succeed to estate must be made a party. It has been held as under:

"3. Mr. Sharma, learned counsel for the appellant forcefully contended that the learned Courts below have not at all applied their mind to the facts of the case and inasmuch as Chandni was not a necessary party to the litigation nor any relief was claimed against her, her death could not entail dismissal of the suit as having abated.

.....

5. After hearing the learned counsel for the parties, I find sufficient force in the contention of Mr. Sharma, learned counsel for the appellant. Plaintiff had challenged the Will said to have been executed by Nand Lal in favour of respondents No. 1 to 6. If the suit was to be decreed, the benefit of the said judgment would have been available to all those who are entitled to succeed in the estate of Nand Lal. Even one of the successors without impleading others could successfully maintain the suit. Although, it is true that on declaration that the Will was a forged document or that Nand Lal had not executed the Will, the plaintiff alone would not succeed to the entire estate but it cannot, as a necessary corollary, be held that all those, who were to succeed to the estate must have been made a party. As has been mentioned above, no relief was claimed against Smt. Chandni and for that

reason as well, her death could not result into abatement of the suit."

15. Now, the Court would advert to the substantial question of law whether the plaintiffs and proforma defendants No. 3 to 5 have become owners to the extent of 34749 shares and tenant in possession to the extent of 3395 shares under defendant No. 2 and also whether the change of revenue entry in favour of defendant No. 2 was wrong including the order passed by the A.C. IInd Grade, Amb, dated 10.6.1985 sanctioning mutation No. 971 of proprietary rights in favour of defendant No. 1. It is admitted fact that Bhagat Singh was the owner of the suit land and initially Santu son of Mangu alongwith Sikh son of Bardu i.e. plaintiff was recorded as a tenant over old Khasra No. 284 measuring 20 kanals 18 marlas on payment of rent as per *jmabandi* for the year 1945-46, Ext. P11. These revenue entries were also repeated in the subsequent *jamabandis* 1954-55, Ext. P-12, 1963-64 Ext. P-13 and 1968-69 Ext. P-14. The change in entry had taken place for the first time in the *jamabandi* for the year 1973-74, Ext. P-1. Ram Lok was recorded as tenant in respect of 10 kanals 9 marlas over Kh. No. 284 min. Initially, as per the remarks column of *jamabandi* Ext. P-1, mutation regarding conferment of the proprietary rights was ordered to be sanctioned in view of notification in favour of the plaintiff and proforma defendants on 21.5.1976. The proprietary rights were to be given to the plaintiffs only in respect of 17 kanals out of the land and share of widow co-owner was to remain intact during her life time. In *jamabandi* for the year 1984-85 Ext. P-2, Ram Lok during the course of consolidation was shown to be tenant over old khasra No. 284, new khasra No. 293 measuring 20 Kanals 18 marlas under the ownership of Bhagat Singh. The name of the plaintiff was deleted as tenant in *jamabandi* Ext. P-2 for the year 1984-85. The *jamabandi* for the year 1986-87 Ext. P-3 prepared during the course of settlement, suit land comprised in old Kh. No. 293 min was denoted by new khasra Nos. 644 and 645 kita 2 measuring 0-80-15 wherein defendant No. 1 Ram Lok was shown to be *'gair marusi tenant'* except the share of Sita Devi widow.

16. PW-1 Ajit Kumar Patwari, has testified that the suit land falls in his Patwar Circle. He has brought the record pertaining to '*khasra girdawari*' of the suit land from the year 1972 to 1979. According to him, the change of entry was reflected in favour of defendant No. 1 firstly in *rabi* 1976, but there was no order of any revenue officer regarding the change of entry nor there was any mutation or *rapat* to this effect in the revenue record.

17. PW-2 Kewal Krishan, Patwari has produced '*register karvai*' pertaining to the suit land alongwith '*rapat roznamachas'*. PW-3 Naresh Kumar, Patwari has deposed that there was no order of any revenue officer regarding the change of entry as tenant in favour of defendant No. 1. Sh. Nandu Ram has examined himself as PW-4. He has supported the averments made in the plaint. According to him also, no order was passed by the competent authority for effecting change of

entry in the suit land in the presence of the recorded tenants i.e. plaintiffs. PW-5 Prem Chand has supported the version of the plaintiffs.

18. According to DW-1 Ram Lok, Bhagat Singh was the owner of the suit land. The suit land was given by the owners in the year 1970 to him for the purpose of cultivation as tenant. He was regularly paying rent to the owners since 1970. The plaintiff Nandu was present on the spot when proprietary rights were conferred upon him but no-objection was raised by him. He admitted categorically that the suit land was partitioned and after consolidation only khasra number of the suit land changed. He has not filed any application regarding the correction of the entries. The defendant has also examined Bhagat Singh co-owner of the suit land. According to him, the defendant No. 1 was cultivating the suit land as tenant since 1970.

19. There is no order of the Revenue Officer how the change was effected showing defendant No. 1 Ram Lok as tenant in the *jamabandi* for the year 1973-74 and also in *jamabandi* for the year 1984-85, Ext. P-1 and P-2, respectively. The revenue entries before 1973-74 were in favour of the plaintiffs. According to the instructions issued by the Financial Commissioner, it is the duty of the Patwari before making any change in the existing entry at the time of harvest inspection, to notify in writing to the person or persons likely to be adversely affected by such a change of the entries and retain on record proof of the notifications. The entries are required to be attested by the '*Lumberdar*' or '*Panch*' of the village concerned. The entries made in violations of these instructions are null and void. The first entry was made in favour of the plaintiffs and proforma defendants in *jamabandi* for the year 1945-46, Ext. P-11. The defendant has failed to prove how the entries were changed in his favour without any order from the competent authority. The plaintiff alongwith the proforma defendants were recorded as tenants since 1945-46. These entries, as noticed above, were changed abruptly in the *jamabandi* for the year 1973-74. The plaintiffs have conclusive proof that they are owners in possession of the suit property and the entries made in favour of the defendant were wrong.

20. The dispute primarily is between the previously recorded tenants i.e. plaintiff and proforma defendants on the one hand and defendant No. 1 on the other, who was abruptly recorded as tenant for the first time in the *jamabandi* for the year 1973-74. The entries have been changed without hearing the plaintiffs. The mutation was attested in their absence. The revenue authorities have not followed the prescribed procedure for making changes in the revenue entries. Thus, the civil Court has the jurisdiction to adjudicate the matter regarding validity of the tenancy. The Assistant Collector, IInd Grade, Amb was not competent to make correction of tenancy entry or conferring proprietary rights in favour of defendant no. 1. The final order dated 10.6.1985 has been passed by the Assistant Collector, IInd Grade, Amb, behind the back of the plaintiff- Sikh Ram. It was in violation of the principles of natural justice. In these circumstances, the conferment of proprietary rights in favour of defendant No. 1 was null and void. The plaintiffs were

recorded as tenant on payment of rent. The defendant No. 1 has failed to prove how the entries were changed abruptly in his favour. The substantial questions of law are answered accordingly.

21. Consequently, the appeal is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Arvind Bhardwaj ..... Appellant.

Vs.

Himachal Pradesh Subordinate Services Selection Board and others .... Respondents.

LPA No. 25 of 2013
Reserved on: 29.10.2014
Date of decision: November 12, 2014

Constitution of India, 1950- Article 226- Petitioner appeared for the post of Junior Engineer (Electrical) in the sports quota- he was held ineligible on the ground that he had not participated three times in national championship and one time in senior national championship- held, that the mere fact that petitioner had appeared in screening test and had qualified the same would not entitle him for the appointment – he was required to fulfill the criteria and mere possession of merit certificate is not sufficient- petition dismissed. (para- 7 and 8)

For the Appellant : Mr. Tara Singh Chauhan, Advocate.

For the Respondents Ms. Archana Dutt, Advocate, for respondent No.1.
Ms. Richa Sharma, Advocate, for respondent No.2.
Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Addl. Advocate General, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellant, who was respondent No.3 before the writ Court, is aggrieved by the judgment passed by the learned writ Court whereby both the writ petitioner and the appellant herein, were held to be ineligible to be considered for appointment in general (sportsman) quota.

2. The facts in brief, may be noticed. Advertisement No. 11/2007 was got issued by respondent No.1 on 6.7.2007 inviting applications for filling up the posts of Junior Engineer (Electrical) and last date for receipt of the application was 14.8.2007. The respondents conducted a written screening test. The claim of the writ petitioner was rejected by the learned Single Judge and the findings have attained finality. Insofar as the appellant is concerned, he initially was not a party to the writ petition and vide CMP No.5723 of 2009 he had sought his impleadment on the ground that he was already selected and the learned writ Court vide its order dated 4.4.2012 impleaded the appellant by passing the following order:

> ***"CMP No. 5723 of 2009***
>
> *Heard.*
>
> *Since the applicant is a selected candidate, he is permitted to be arrayed as respondent No.3. Registry is directed to carry out the necessary corrections in the memo of parties. The application stands disposed of."*

Now what appears from the perusal of the aforesaid order is that the precise case of the appellant was that he had been selected and therefore, ought to be appointed.

3. When the matter came up before the learned Single Judge on 18.4.2012, then on the request of the writ petitioner, the Director (Youth & Sports) was added as a party respondent No.4 and was directed to file supplementary affidavit as to whether the petitioner and respondent No.3 (appellant herein) were eligible for being considered under the category of sportsman, as per criteria adopted by respondent No.1.

4. In compliance to the directions issued by the learned writ Court, the Director (Youth & Sports) i.e. respondent No.4 filed supplementary affidavit, the relevant portion whereof reads as follows:

> *"1. It is submitted that the State Government has provided 3% reservation to the distinguished sportspersons in various services under the Government vide Notification No. 2-11/72-DP (A-II) dated 28th May, 1999, No. PER (AP)-C-F(I)-3/2011 dated 22nd January, 2002, No. PER (AP)-C-F(I)-3/2001 dated 2.8.2008, No. YSS-C(15)3/2008 dated 24.7.2009 and No. YSS-A(4)1/2008-Loose dated 10th February, 2011. The names of distinguished sportspersons are registered in the Sports Cell and on receiving of requisition from any of the recruiting Department names were sponsored from amongst the eligible sportspersons, fulfill the required educational and essential professional education prescribed under the R & P Rules for any of the post. Under the 3% reservation scheme, criteria for selection of outstanding sportspersons who will be eligible for employment in Govt. Department/Boards/Corporations and Universities is as under:*

The various sports competitions will be classified as follow:

Category No. I	*I.*	*Medal winners of Olympic Games/Winter Olympics.*
	II	*Commonwealth Games*
	III	*Medal winners of Asian Games/Winter Asiad.*
Category No.II	*I.*	*Participation in Olympic Games.*
	II.	*Participation in Commonwealth Games.*
	III.	*Participation in Asian Games.*
Category No.III	*I.*	*Medal winners in South Asian Federation (SAF) Games.*
	II.	*Medal winners in National Games.*
	III.	*Medal winners in recognized Senior National Championship.*
Category No.IV	*I.*	*Medal winners in All India Inter Versity Sports Tournaments.*
	II.	*Medal winners in All India National School Games, All India Rural Sports Tournaments and National Sports Festival for Women organized under the PYKKA competitions.*
	III.	*Medal winners in recognized Jr. National Sports Championships.*
	IV.	*Participation in South Asian Federation (SAF) Games.*
	V.	*At least three times participation in National Championship and Senior National Championship.*

: *(Copy annexed vide Annexure R-I).*

2. The sports achievements of the petitioner and respondent No.3 as per record provided and those are recognized events are as under:

1. Rajinder Singh (Petitioner)

1. 1st place in 10th H.P. State Athletics championship held at Sundernagar on 23-24/12/1998.

2.1st place in 15th H.P. State Athletics meet held at Sundernagar on 1/1994.

3. 2nd place in H.P. State Sub-Junior Boxing championship held at Shimla on 28-30/8/1992.

2. Arvind Bhardwaj (respondent No.3).

1. Participated in 51st Sr. National Ball Badminton championship held at Quilan (Kerla) on 8-11th February, 2006.

2.1st place in State Handball championship held at Una on 7-9/2/1997.

3.State Level Cricket tournament held at Chamba in 1998-99.

4. State Level Cricket tournament held at Nahan in 1999-2000.

3. Therefore, as per criteria fixed for eligibility of sportspersons under 3% reservation policy, these both candidates do not falls under distinguished sportspersons category and are not eligible for appointment under the scheme. The minimum eligibility for sportspersons is atleast 3 times participation in National championship and Sr. National championship in one game. It is also submitted for the information of the Hon'ble Court that during 2009 respondent No.3 Sh. Arvind Bhardwaj attended this office for getting his name sponsored for the post of J.E. (Electrical) to Chief Engineer (Operation) North, HPSEB, Dharamshala under 3% sports quota. He has been informed vide this office letter No. 6-1/2006-YSS-1870 dated 2.4.2009 (copy annexed vide Annexure R-II) and letter No. 6-1/2006-YSS-2902 dated 29.6.2009 (copy annexed vide Annexure R-III) that his claim for appointment under sports quota can not be considered since, he do not fulfill the required criteria prescribed under the 3% reservation policy. A copy of the scheme has also been provided to him by this office on his demand."

Further in para-5 of the supplementary affidavit, it has been averred:

"It is, therefore, most respectfully prayed that as stated in present Supplementary Affidavit to this case, it is humbly stated that this Department sponsor the names of eligible sportspersons for all requisitioned post on the basis of their sports achievements and suitability for any of the post. The names of the petitioner and respondent No.3 are not registered with the cell since they do not fulfill the criteria specified under 3% reservation policy…"

Based upon the aforesaid contents of the supplementary affidavit, the learned writ Court dismissed the writ petition.

5. The learned counsel for the appellant has vehemently argued that the learned writ Court has not taken into consideration the fact that there are two modes of recruitment for the post of Junior Engineer (Electrical) out of which one is on batch-wise basis wherein the quota and posts are reserved for sports person and secondly through the competitive examination in which the posts are reserved for sportsman and filled up by way of examination held by the Himachal Pradesh Subordinate Services Selection Board. The appellant falls in the latter class and had appeared in the competitive examination and despite having secured highest marks he had not been offered appointment. According to appellant, the learned writ Court has wrongly applied the procedure applicable to candidates, who were to be appointed on batch-wise basis to the case of the appellant and thereby reached a wrong conclusion. He would further contend that the appellant was meritorious sports person and was required to be appointed since he had participated in the games recognized and notified by the respondents themselves.

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

7. There is inherent fallacy in the argument of the appellant that he had been selected and, therefore, ought to have been appointed. No doubt, the petitioner appeared in the screening test and qualified that, but that in itself would not entitle him for appointment. In order to be selected, he was further required to fulfill the eligibility criteria in terms of the notifications referred to by respondent No.4 in the supplementary affidavit (supra). This criteria of selection was applicable to the categories not only of the batch-wise selection but even to the case of candidates, who appeared in the competitive examination and passed the same. The merit of the appellant was not to be judged solely on the basis of screening test as this was only for the purpose of judging the basic eligibility of the candidates, thereafter the selection under a specified category i.e. sports was to be carried out in accordance with the criteria laid down for the same.

8. The other contention of the appellant that he possessed certain merit certificates wherein he had excelled in sports and, therefore, ought to have been appointed is again without any force. The mere fact that the appellant possessed certain certificates would not ipso facto entitle him to be appointed under the sports quota because unless and until the petitioner did not fulfill the criteria of selection under this category as had been laid down by the respondents, he could not have been selected. The respondent No.4 after taking into consideration all the certificates produced by the appellant has not found the appellant to be fulfilling the required criteria prescribed under 3% reservation policy as he did not fall in distinguished sportspersons category.

9. For the detailed reasons stated above, we find no merit in the appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR .JUSTICE P.S.RANA, JUDGE.

Jai Parkash son of Sh. Krishan Chand. ...Applicant.

Versus

State of Himachal Pradesh. ...Non-applicant.

Cr.MP(M) No.1150 of 2014.
Order reserved on: 20.10.2014.
Date of Order : November 12 , 2014.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 467, 468, 471 and 120B of IPC- held that Court has to see nature and seriousness of offence , the character of the evidence, circumstances which are peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable

apprehension of witnesses being tampered with and the larger interests of the public or the State- allegations against the petitioner were regarding the embezzlement of Rs. 19,70,000/-- investigation was undergoing and specimen signatures were to be taken- since the investigation was not complete, therefore, bail rejected.

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration, AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Sidharam Satlingappa Mhetre Vs. State of Maharashtra and others, AIR 2011 SC 312

State of Kerala Vs. Raneef, AIR 2011 SC 340

For the applicant: Ms. Anjali Soni Verma, Advocate.
For the respondent: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 138 of 2014 dated 18.6.2014 registered under Sections 420, 467, 468, 471 and 120B of Indian Penal Code at Police Station Kangra Himachal Pradesh.

2. It is pleaded that FIR has been registered on false and frivolous ground just to harass the applicant. It is further pleaded that complainant Bank i.e. Branch Manager Canara Bank Branch Office opposite Old Bus Stand Kangra District Kangra HP filed complaint alleging that Canara Bank advanced loan to one Sh Rakesh Verma for purchase of tractor to the tune of Rs.4,70,000/- (Four lac seventy thousand) and one JCB to the tune of Rs.15,00,000/- (Fifteen lac) on dated 30.8.2013 and 17.10.2013 respectively. It is further pleaded that payments were credited in the account of dealer of the said vehicles i.e. M/s Sood Enterprises to whom the applicant is working as Manager. It is further pleaded that when the payment was made in the account of M/s Sood Enterprises then the amount was to be utilized by M/s Sood Enterprises only. It is further pleaded that all records pertaining to the transaction stood seized by the investigating agency and nothing is to be recovered from the applicant. It is further pleaded that applicant is working as Manager with M/s Sood Enterprises and undertaking to abide any terms and conditions imposed by the Court. It is further pleaded that applicant is not required for investigation purpose. Prayer for acceptance of anticipatory bail application filed under Section 438 of the Code of Criminal Procedure sought.

3. Per contra police report filed pleaded therein that FIR No. 138 of 2014 dated 18.6.2014 was registered under Sections 420, 467, 468, 471 and 120B IPC at Police Station Kangra HP. There is recital in police report that applicant Jai Parkash Sood while exercising the powers of Manager in M/s Sood Enterprises issued advance payment receipts. There is further recital in police report that applicant Jai Parkash has also signed the papers on behalf of Sh Samir Sood. There is further recital in police report that sample of signature would be sent to RFSL for comparison with admitted hand writing. There is further recital in police report that applicant Jai Parkash, Samir Sood, Rakesh Verma loanee and Manager Gopal Krishan are all involved in the embezzlement of amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand). There is further recital in police report that applicant will induce the prosecution witness and prayer for rejection of anticipatory bail sought.

4. Following points arise for determination in the present bail application:

(1) Whether application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final order.

5. Court heard learned Advocate appearing on behalf of applicant and learned Additional Advocate General appearing on behalf of State and also perused entire records carefully.

Finding upon Point No.1

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. The fact whether applicant is innocent or not cannot be decided at this stage. The same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that recovery already stood effected by the investigating agency and nothing is to be recovered and applicant will not influence or temper the prosecution witness and shall join investigation as and when directed by the investigating agency and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are considered (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** **Also see** ***AIR 1962 SC***

253 titled The State Vs. Captain Jagjit Singh. In the present case the allegation against the applicant are very grave and heinous in nature qua embezzlement of public money to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand). Specimen of hand writings are still to be obtained from the applicant in order to compare with the signature of receipts of advance payment issued by applicant Jai Parkash. It is held that custodial investigation is essential in the present case in order to ascertain the truth qua embezzlement of amount to the tune of Rs. 19,70,000/- (Nineteen lac seventeen thousand). It is held that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely effected qua embezzlement of amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand). In the present case public exchequer to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand) is involved. It is well settled law that if there is conflict between the public interest and individual interest then public interest always prevails over the individual interest in the ends of justice. It is well settled law that grant or refusal of anticipatory bail depends upon the facts and circumstances of each case. In anticipatory bail application Court has to keep balance keeping in view the fact that no prejudice should be caused to free fair and full investigation. The facts and case law cited by learned Advocate appearing on behalf of the applicant reported in **AIR 2011 SC 312 titled Sidharam Satlingappa Mhetre Vs. State of Maharashtra and others** and in case reported in **AIR 2011 SC 340 titled State of Kerala Vs. Raneef** are entirely different. Hence the facts of the case law cited supra are not applicable in the present case because in the present case there is allegation of embezzlement of public amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand) against the applicant from public exchequer. It is held that in order to conduct fair investigation and in order to ascertain the truth qua embezzlement of amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand) custodial investigation is essential in the present case. Hence point No.1 is answered in negative against the applicant.

Final order.

8. In view of the above stated facts present anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is rejected. Observation made hereinabove is strictly for the purpose of deciding the present anticipatory bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J

K. P. Singh ...Petitioner

Versus

High Court of H.P. and others ...Respondents.

Civil Review No. 2 of 2012
Judgment reserved on: 28.10.2014
Date of Decision : November 12, 2014.

Code of Civil Procedure, 1908- Section 114 Order 14- Review petition was preferred on the ground that additional evidence taken by Inquiry Officer was in violation of Rule 14 (15) of CCS (CCA) Rules- Inquiry Officer was biased and there was violation of Rule 17 – held, that the points raised by the petitioner were raised before the single judge and thereafter before division bench which had decided the matter- there was no error apparent on the face of record- therefore, it is not permissible to set aside the decision- an erroneous decision can be corrected by higher forum and not in exercise of the judicial review. (Para-10 and 12)

For the Petitioner : Mr. Jiya Lal Bhardwaj, Advocate.
For the respondents :Ms. Jyotsna Rewal Dua, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Mr. V.S. Chauhan, Addl. A.Gs, Mr. J.K.Verma and Mr. Kush Sharma, Dy. A.Gs. for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This review petition under Section 114 read with Order 47 of the Code of Civil Procedure has been preferred by the petitioner for reviewing the judgment dated 21.4.2011 passed by this Court in LPA No. 163 of 2009 whereby the judgment passed by the learned Single Judge has been affirmed and consequently the writ petition preferred by the petitioner seeking quashing of the order dated 5.6.2004 whereby the petitioner has been ordered to be removed from service has been dismissed.

2. At the outset, it may be observed that against the judgme

> *"Learned counsel appearing for the petitioner seeks permission to withdraw this petition to enable the petitioner to file a review petition. Permission is granted. The special leave petition is disposed of as withdrawn."*

3. According to the petitioner, there is error apparent on the face of the record inasmuch as this Court while delivering its judgment on 21.4.2011 has not taken into consideration:

(i) That the additional evidence taken on record by the Inquiry Officer was in violation of Rule 14 (15) of CCS (CCA) Rules

(for short 'Rules') and non-compliance thereof had caused material prejudice to the petitioner;

(ii) The Inquiry Officer was biased and this Court had held that since the petitioner had not approached the reviewing authority for change of the Inquiry Officer, his plea was turned down, while as a matter of fact, the petitioner had approached the reviewing authority vide Annexure P-7 for change of Inquiry Officer; and

(iii) There was violation of Rule 17 of the Rules which mandated the Disciplinary Authority to supply to the petitioner, the copy of the findings/statement of findings on each article of charge after considering the representation submitted by him which was not supplied to him.

4. Before we proceed any further, we may take note of a decision rendered by this Bench in Civil Review Petition No. 4084 of 2013 titled M/s Harvel Agua India Private Ltd. vs. State of H.P. and others, decided on 9.7.2014 wherein after reviewing the entire case law on the subject, this Court held as follows:

> ***"10. Thus what appears to be more than settled law is that an error contemplated under the rule must be such, which is apparent on the face of the record and not an error which has to be fished out and searched. It must essentially be an error of inadvertence and definitely something more than a mere error and must be one which must be manifest on the face of the record. If the error is so apparent that without further investigation or inquiry only one conclusion can be drawn in favour of the applicant, in such circumstances, the review will lie. However, under the guise of review, the parties are not entitled to re-hearing of the same issue but the issue can be decided just by a perusal of the record and if it is manifest can be set right by reviewing the order. It must be remembered that in exercise of the powers of review this court cannot sit in appeal over its own order. Re-hearing of the matter is impermissible in law, since the power of review is an exception to the general rule that once the judgement is signed or pronounced, it should not be altered. It has to be remembered that power of review can be exercised for correction of a mistake but not to substitute a view. The review cannot be treated like an appeal in disguise.***
>
> ***11. The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous***

decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgement is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality.

12. Having observed so, it would be seen that the petitioner is seeking the present review on the ground that points raised in the petition have not been dealt in correct perspective, though the same have admittedly been dealt with. We are afraid that such questions cannot be gone into and determined by this court in exercise of its review jurisdiction, particularly when a detailed judgment running into 35 pages has been delivered by this court, wherein not only the factual but even the legal aspects of the case have been dealt with in detail."

5. Undisputedly, all the points as have been raised herein have been dealt with in detail not only by the learned Single Judge but even by this Court while deciding LPA No. 163 of 2009. The learned Single Judge while deciding the case had culled out the following points for determination:

"27. On the basis of submissions made by the learned counsel for the petitioner, the following points emerge for determination:-

(1) The Inquiring Authority was authorized by disciplinary authority to conduct the inquiry, the impugned order dated 5.6.2004 was passed by the State Government. Therefore, in the present case the disciplinary authority was the Inquiring Authority.

(2) The Inquiring Authority has taken on record various documents of presenting side in violation of Rule 14(15) of the Rules.

(3) The Rule 15(2) and Rule 15(2A) of the rules have been violated.

(4) The impugned order/ notification is not a speaking order. The Rule 17 has been violated. The proceedings of the Full Court meeting dated 7.4.2004 were not supplied to the petitioner, which has caused prejudice to the petitioner.

(5) The statements of most of the witnesses of the presenting side were not supplied at the proper time to the petitioner. The Inquiring Authority did not provide appropriate opportunity to the petitioner to lead defence evidence. The Inquiring Authority was biased. The Inquiring Authority has only considered the case of the presenting side and the evidence led by the petitioner has not been considered. There is no legal evidence in the inquiry in support of various charges. The written arguments submitted to the Inquiring Authority were not considered.

(6) The Disciplinary Authority did not give personal hearing at the stage of considering reply to chargesheet and also at the final stage when the comments of the petitioner to the inquiry report were sought."

It was after giving detailed findings on each of the points that the writ petition was dismissed.

6. Likewise, when the matter came up before this Court, the petitioner raised the following contentions:

"3. Before us, the main contentions are:

i) The inquiry is conducted in violation of the provisions of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, in particular Rule 14(15);

ii) The report is based on no evidence;

iii) The inquiry officer was biased in the sense also that his version of the absence was not taken into consideration;

iv) The disciplinary authority, namely the High Court has not considered the comments offered by the delinquent officer to the inquiry report and recorded its findings and that such findings have not been communicated to the petitioner whereby the whole proceedings are vitiated; and

v) There is violation of the principles of natural justice in not granting an opportunity for personal hearing."

This Court dealt with all the aforesaid five contentions in detail and dismissed the appeal preferred by the petitioner-appellant.

7. While dealing with the first contention as now again raised by the petitioner in this petition, this Court held:

"4. The main allegation is that after closing the evidence, new evidence has been permitted to be adduced. Whether it is permissible is the question. Rule 14 of the Central Civil

Services (Classification, Control and Appeal) Rules, 1965, provides for procedure for imposing major penalties. Sub Rule 15 of Rule 14 reads as follows:

> ***"(15) If it shall appear necessary before the close of the case on behalf of the Disciplinary Authority, the Inquiring Authority may, in its discretion, allow the Presenting Officer to produce evidence not included in the list given to the Government servant or may itself call for new evidence or recall and re-examine any witness and in such case the Government servant shall be entitled to have, if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the day of adjournment and the day to which the inquiry is adjourned. The Inquiring Authority shall give the Government servant an opportunity of inspecting such documents before they are taken on the record. The Inquiring Authority may also allow the Government servant to produce new evidence, if it is of the opinion that the production of such evidence is necessary in the interests of justice.***
>
> ***Note.-- New evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called for only when there is an inherent lacuna or defect in the evidence which has been produced originally."***

5. A perusal of the Rule would clearly show that there is no absolute bar under the Rules in production of new evidence at the stage of closing the case on behalf of the disciplinary authority. It is permissible at the discretion of the Inquiry Officer. It is the duty of the Inquiring Authority to make every possible and permissible attempt to find out the truth and that is why it is sometimes termed as fact finding enquiry. In the event of the Inquiry Officer allowing the production of such new evidence, the delinquent government servant shall be entitled to have, if he deems, a copy of the list of further evidence proposed to be produced and an adjournment by clear three days before the production of such new evidence. The delinquent shall also be entitled to inspect such documents and he may also seek for an opportunity to produce new evidence on his part. The note under Sub Rule 15 bars the production of new evidence to fill up any gap in the evidence; however, such evidence is permitted when there is an inherent lacuna or defect in the evidence which has been produced originally. The documents Exhibits P-2A, P-4A to P-7A, P-11A to P-13A, P-42 to P-48, P-49 and P-50, are the documents which according to the petitioner have been permitted to be produced after closure

of evidence by both the sides. Exhibit P-2A is the certified copy of the passenger manifest of Flight No. TG 316 on 10.12.2002, Delhi to Bangkok and that of Flight No. TG 315 from Bangkok to Delhi on 22.12.2002. Exhibit P-2 originally produced was the computer print out. Likewise, Exhibit P-4A to P-7A are the details of embarkation of the delinquent officer and Smt. Deepa Singh. In the place of those certified copies, computer print outs had already been produced. Exhibit P-11A to P-13A are again the certified copies of the embarkation and dis-embarkation cards, the computer print outs of which had already been produced. Exhibit P-42 to P-48 are the applications of the delinquent officer for visa on arrival, his clear photograph, embarkation form, embarkation form of Ms. Deepa Singh, application for duplicate Passport of delinquent officer, visa application form, the flight manifest of the return flight from Bangkok to Delhi and letter of Royal Thai Embassy, New Delhi, regarding the travel of delinquent officer. Going through the proceedings of inquiry, we find that these documents have been produced with clear three days notice to the delinquent officer and on 27.12.2003, the appellant has acknowledged the receipt of the documents. On 3.1.2004, the statement of the delinquent officer as counter signed by him reads as follows:

> ***"I do not want to lead any evidence in rebuttal to rebut the documents, Exhibits P-2A, P-4A, P-5A, P-6A, P-7A, P-11A, P-12A, P-12A, P-13A, P-41, P-42, P-43, P-44, P-45, P-46, P-47 and P-48, which have been introduced by the presenting side after closure of their evidence. I shall only argue orally with regard to admissibility of these documents and production at a late stage."***
>
> ***(emphasis supplied)***

6. As we have already discussed above, Rule 14(15) does not in any way bar the recalling of any witness or production of new evidence. If such a process is adopted, certain safeguards are prescribed under the Rule so as not to cause any prejudice to the delinquent officer. He is to be given the list of documents, he is to be granted three clear days time, he is to be granted an opportunity to inspect the documents and he is also to be given an opportunity to lead fresh evidence if it is required in the interest of justice. The only restriction is that the evidence thus led shall not be to fill the gaps in the evidence already tendered. But such evidence is permissible to fill up any inherent lacuna or defect in the evidence which has already been tendered. Filling up any gap in the evidence and filling up an inherent lacuna or defect in the evidence are provided in the Rule in contradistinction to each other. The very purpose of inquiry is to find out the facts on the best available evidence. But, in

the process the course of justice shall not be deflected. Sharpening the evidence is different and distinct from filling up any gap or in-consistency in the evidence. Curing any defect in the evidence already tendered so as to make it legally perfect is different from filling up the gap in evidence. What has been done in the instant case is only production of the certified copies of the travel documents on which evidence had already been tendered by producing the un-certified computer print outs. With the leave of the Inquiry Officer, certain documents which have been obtained belatedly from the Thai Embassy also were produced. On an application for producing Exhibits P-49 and P-50 filed on 3.1.2004 by the presenting officer, the delinquent officer stated that:

> ***" I do not want to file any reply to the application produced by the presenting side today. However, I orally oppose the tendering of the documents in evidence at this stage because the evidence of the presenting side has already been closed and the documents cannot be now tendered to fill in a lacuna in the evidence of the presenting side."***

7. In this context, we may also extract the statement of the delinquent officer with regard to Exhibits P-49 and P-50 on 3.1.2004.

> ***" I do not want to lead any evidence to rebut the documents Exhibit P-49 and P-50, which have been produced by the presenting side in the evidence today. I shall, however, rebut these documents in the course of my arguments with regard to their admissibility and late production etc."***

Thus, the only objection of the delinquent officer is with regard to admissibility of the documents and not on the contents of the documents. Exhibit P-49 is a letter from the Royal Thai Embassy, New Delhi addressed to the Registrar of the High Court of Himachal Pradesh. The letter reads as follows:

> ***"The Royal Thai Embassy presents its compliments to the High Court of Himachal Pradesh, Shimla and would like to refer to the latter's letter No. HHC/VIG/PS/2003-3585 dated 26th December 2003 requesting the Embassy to certify the copies of documents of Shri Kiran Pal Singh.***
>
> ***In this connection, the Embassy has the honour to inform the High Court that it has attested a copy of Shri Kiran Pal Singh's visa application form as herewith enclosed. In addition the Embassy has the honour to further inform the latter that the Shri Kiran***

Pal Singh has obtained the visa No. 17908 issued on December 10, 2002 by the immigration office at Chiangmai International Airport, Thailand.

The Royal Thai Embassy avails itself of this opportunity to renew to the High Court of Himachal Pradesh, Shimla the assurances of its highest consideration."

8. Exhibit P-50 is the application for visa on arrival at Bangkok. There is no dispute with regard to the Passport and the details with regard to the address of the applicant and the date on which the application has been filed at Thailand. Having stated before the inquiry officer that the delinquent employee does not have anything to rebut on the evidence thus produced, it is absolutely futile to contend that the documents have been admitted in evidence in violation of the procedure under Rule 14(15). The production being legally permissible, it cannot be said that the inquiry has been conducted in violation of the Rules.

9. PW-1, Shri Promod Sood, Manager, Liaison and Customer Services of Thai Airways International, PCL, New Delhi, has clearly stated before the Inquiry Officer that ……."as per the passengers manifest, which I have brought today (Ext. P-2), a person named Singh K.P. had travelled by our flight No. TG 316, dated 10th December, 2002 from Indira Gandhi International Airport, Delhi to Bangkok. …… As per the passengers manifest, Singh Deepa has also travelled by this flight from New Delhi to Bangkok. As per the passengers manifest, Singh Deepa Ms and Singh K.P. Mr. returned from Bangkok to New Delhi by Flight No. TG 315 on 22nd December, 2002."……

10. PW-2 Shri Sandeep Goel, I.P.S., Foreigners Regional Registration Officer, Delhi, referring to the passenger name recorded as retrieved from the computer system and passenger manifest, Exhibits P-3 to P-7 stated that ……. " Sh. Kiran Pal Singh holder of Passport No. R-489789 and Deepa Singh holder of Passport No. E-3033381 have departed from Indira Gandhi International Airport Delhi on 10.12.2002 by flight No. TG 316 of Thai Airways. Both of these passengers have returned to India at I.G.I.A. Delhi on 22.12.2002 by flight No. TG 315 of the airways."……

11. The delinquent appellant does not have, even according to his own statement, any evidence to lead in rebuttal to the documentary evidence referred to above. Thus, it is not a case of evidence adduced in violation of the Rules or it is not a case of no evidence. It is a fact and it has been also established that the delinquent was in Thailand between 10th December, 2002 to 22nd December, 2002, for which period he later submitted an application for earned

leave on medical grounds. As far as the illicit relationship of Advocate Deepa Singh with the delinquent officer is concerned, the husband of Smt. Deepa Singh and also the son of Smt. Deepa Singh have stated in detail before the inquiry authority. Though it was not necessary for us to extensively refer to facts as above, in view of the vehement contention advanced by the petitioner that it is a report on no evidence and that it is a report on evidence otherwise impermissible and that the version of the delinquent has not been taken into consideration, we have referred to the same. It is settled law that the High Court is not a Court of appeal under Article 226 of the Constitution of India on the decision of the authorities holding departmental inquiry. The Court is concerned to determine whether the inquiry held by a competent authority is done in accordance with the procedure prescribed in that behalf, whether principles of natural justice have been applied, whether there is some evidence for the inquiry officer to reasonably support the conclusion that the delinquent officer is guilty of charge and whether there is overall fairness in the procedure. The Court may also examine whether the conclusion ex-facie is wholly arbitrary or capacious that no reasonable person could ever have arrived at that conclusion."

The detailed findings quoted above, leaving no manner of doubt that this Court had dealt with all the contentions raised by the petitioner minutely and there is nothing on record to suggest even remotely that there is any error much less error apparent on the face of such findings, which may call for interference.

8. Insofar as second contention regarding bias is concerned, the same have been dealt with in the following manner:

"15. As far as the allegation of bias is concerned, admittedly, the petitioner has not approached the reviewing authority for change of inquiry officer or with any such allegation, though made an attempt before the inquiry authority. The inquiry authority having turned down the application on merits, rules permitted him to approach the reviewing authority namely the High Court. Such a step having not taken by the delinquent officer, it cannot be said that there is any basis on the allegation of bias. Therefore, the report of inquiry cannot be assailed as invalid on that count."

9. No doubt, the petitioner had approached the reviewing authority for change of Inquiry Officer on the allegation of bias, but the question is as to whether the Inquiry Officer was in fact biased. This issue has been dealt with in detail by the learned Single Judge in the following manner:

"The Inquiry Officer has the power to take on record additional evidence under sub-rule (15) of Rule 14. The application dated 31.12.2003 indicates that petitioner had raised some grievance for taking on record documents during inquiry from 22.12.2003 to 26.12.2003. There is no allegation in the application that the Inquiring Authority intentionally and with ulterior motive allowed the presenting side to place on record certain documents. In the application dated 31.12.2003, no specific violation of any rule has been alleged for taking on record the documents during inquiry by the Inquiring Authority. Simply because, some orders were passed by the Inquiring Authority, which were not to the liking of the petitioner and according to the perception of the petitioner those orders were wrong, therefore, it cannot be said that the Inquiring Authority had conducted the inquiry in a biased manner. In the application dated 31.12.2003, it has not been stated that the documents taken on record by the Inquiring Authority have caused prejudice to the petitioner. In the application dated 31.12.2003, there is no allegation that statements of witnesses and documents were not supplied to the petitioner at the proper time. In the application, there is no allegation that Inquiring Authority has not given appropriate opportunity to the petitioner to lead defence evidence. The application dated 31.12.2003 for change of Inquiring Authority was considered by the Disciplinary Authority and was rejected. The rejection was accepted by the petitioner. He did not challenge the order of Disciplinary Authority rejecting the request to change Inquiring Authority. The Inquiring Authority has denied the allegation of bias in his reply. The petitioner has failed to establish that Inquiring Authority was biased against the petitioner."

10. Once the learned Single Judge has come to a categoric conclusion that petitioner had failed to establish that the Inquiring Authority was biased against him, which findings have been upheld by this Court, it is not open for this Court in exercise of its review jurisdiction to interfere with such findings. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher forum, the latter can be corrected by exercise of review jurisdiction. It is settled law that even if a decision is erroneous even then it is not permissible for this Court in exercise of its review jurisdiction to re-hear and correct the same.

11. Lastly, insofar as the third contention regarding violation of Rule 17 of CCS (CCA) Rules is concerned, the same has been dealt with exhaustively by this Court in the following manner:

22. The requirement of Rule 17 on communication of orders infact has laid stress on the communication of the

orders with respect to the findings on each article of charge. In the instant case the disciplinary authority had already communicated the findings on the articles of charge which were established before the inquiry authority.

23. No doubt, right to reason is also one of the facets of the principles of natural justice. However, under the scheme of the disciplinary proceedings as per the CCS (CCA) Rules, though an opportunity to make a representation on the report of the inquiry has been conferred on the delinquent employee, it cannot be said that the representation should be disposed of with reference to all the contentions or on the points urged in the representation. The disciplinary authority having considered the representation in the light of the report of the inquiry officer and having decided to accept and act on the report and having also decided not to dis-agree or reverse any of the findings in the report of inquiry and under the scheme of the proceedings the recommendation for imposition of major penalty being binding on the government which has passed the formal order, it cannot be said that any prejudice has been caused to the delinquent in the process or that there is failure of justice. In other words, reasons of the inquiring authority have only been endorsed by the disciplinary authority and thus requirement of right to reason has been satisfied. Learned counsel for the appellant inviting reference to the decision of the Supreme Court in Pragdas Vrs. Union of India, reported in 1967 MPLJ 868, submitted that the disciplinary authority should have recorded the reasons for the findings. At paragraph 5 of the judgment, it has been held as follows:

> ***" The reasons in support of the order had to be recorded and disclosed to the parties concerned by the Central Government; the reasons could not be gathered from the "notings" made in files of the Central Government. Recording of reasons and disclosure thereof is not a mere formality. The party affected by the order has a right to approach this Court in appeal and an effective challenge against the order may be raised only if the party aggrieved is apprised of the reasons in support of the order."***

24. There cannot be any dispute with regard to the principle of law as stated in the decision. But as already observed above, the disciplinary authority in the instant case has only accepted the report of the inquiring authority and its findings on the findings thus accepted and recorded, which had already been communicated to the petitioner while supplying the inquiry report, the action has been taken. Thus, there is consideration, there is recording of the finding and communication thereof. The reasons leading to the findings are already there in the inquiry report. Nothing

in the report has been added, varied, implied or reversed by the disciplinary authority."

The petitioner has failed to point out as to how there is an error apparent in the aforesaid findings.

12. In case the submissions of the petitioner are tested on the touch-stone of what has been laid down by this Court in ***M/s Harvel Agua India Private Limited*** (supra)**,** it would be seen that under the guise of review the petitioner is seeking re-hearing of the issues, which is impermissible in law. The petitioner under the guise of review is not seeking correction of any mistake but is seeking substitution of a view. Review of judgment is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The judgment sought to be reviewed has to be read as a whole and the petitioner cannot be permitted to pick up or single out a paragraph and juxtapose the same with another paragraph to contend that there is an error apparent on the face of record.

13. In view of aforesaid discussion, the petitioner has failed to make out a case calling for interference under Section 114 read with Order 47 of the Code of Civil Procedure. Accordingly, we find no merit in this review petition and the same is dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Shri Karam Singh ...Petitioner.

Versus

Managing Director & another ...Respondents.

CWP No. 8238 of 2014-D
Decided on: 12.11.2014

Constitution of India, 1950- Article 226- Petitioner was posted in Shimla and was transferred to Reckong Peo, a tribal area- he completed his tenure but was not transferred- respondents directed to consider the case of the petitioner for transfer within one week and to take disciplinary action against the transferred employee who have failed to join the duty within stipulated period. (Para- 4 and 5)

For the petitioner: Mr. S.D. Gill, Advocate.
For the respondents: Mr. B.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

It is contended that the petitioner was appointed as Conductor in the year 2007, was posted at Shimla till 21st January, 2010, thereafter, was transferred to Reckong Peo, District Kinnaur, which is a tribal area, on 21st January, 2010, has completed his normal tenure, as given in the transfer policy, on 21st January, 2013, but despite that, the respondents have not transferred him and is still working on the said post.

2. Issue notice. Mr. B.N. Sharma, Advocate, waives notice on behalf of the respondents.

3. We hope and trust that learned Advocate General will advise all the departments to strictly follow the transfer policy, particularly in case of the persons, who are posted at hard/tribal areas.

4. At this stage, learned Advocate General stated that all the departments concerned be directed to ensure that the employee(s), who is/are transferred to tribal/hard areas, join(s) forthwith, in default, the departments are to draw disciplinary action.

5. We deem it proper to dispose of this writ petition by directing the respondents to consider the case of the petitioner for his transfer within one week. Respondents are also directed to draw disciplinary action against the transferred employee(s), who fail(s) to join within the stipulated period.

6. Learned Advocate General is at liberty to convey this direction to the Heads of all the Departments.

7. The writ petition is disposed of accordingly alongwith all pending applications.Copy **dasti.**

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No.8149 of 2010 a/w CWPs
No.8284 of 2010, 653 of 2003 and
CWPIL No.34 of 2011
Date of order : 12.11.2014

1. CWP No.8149 of 2010

People for Animals Kasauli and another .....Petitioners

Versus

Union of India & others ..... Respondents

2. CWP No.8284 of 2010

Animal and Birds Charitable Trust .....Petitioner

Versus

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

3. CWP No.653 of 2003

Kanwar Rattanjit Singh .....Petitioner

Versus

Union of India & others ..... Respondents

4. CWPIL No.34 of 2011

Court on its own motion .....Petitioner

Versus

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

Constitution of India, 1950- Article 226- PCCF (Wildlife)-cum-Chief Wildlife Warden, H.P., Shimla had written a letter to Additional Director General(Wildlife), Government of India, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi, to deal with the monkey menace - Authority of Union of India was also directed to take decision but no decision was taken- therefore, Union of India directed to file compliance report as well as report regarding the steps taken in terms of letter. (Para-2 and 3)

For the petitioners: Mr. Gaurav Sharma, Advocate vice Ms. Vandana Kuthiala, Advocate, for the petitioners in CWP No. 8149 of 2010.

Mr. R.L. Sood, Senior Advocate with Mr. Sanjeev Kumar, Advocate, for the petitioner in CWP No. 653 of 2003.

Mr. Arvind Sharma, Advocate, for the petitioners in CWP No.8284 of 2010.

For the respondents: Mr. Ashok Sharma, ASGI, for Union of India.

Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr.V.S. Chauhan, Additional Advocates General and Mr. J.K. Verma Deputy Advocate General, for the respondents-State.

Mr. Hamender Chandel, Advocate, for Municipal Corporation.

Mr. Y.K. Thakur, Advocate, for the Animal Welfare Board.

Mr. Bhupinder Kanwar, Advocate, for the applicants.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

CWP No.653 of 2003 is in the docket of this Court for the last 11 years and other writ petitions are pending for the last more than four years. Speaking orders have been passed from time to time but despite of that neither the State of Himachal Pradesh nor the Union of India has taken requisite steps to do the needful in order to prevent monkey menace and also to take steps how to manage stray dogs.

2. It appears that the letter dated 13th November, 2013, made by PCCF (Wildlife)-cum-Chief Wildlife Warden, H.P., Shimla to Additional Director General(Wildlife), Government of India, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi, deals with the subject. On noticing the said letter, concerned Authority of Union of India was directed to make decision and to do the needful, has not taken steps till today. The growth of monkeys is at peak and also the number of stray dogs is increasing day by day, which is causing threat to everybody and it is shocking to record that in the last week we have lost a precious life of young woman.

3. Keeping in view the orders passed from time to time and the above circumstances, this Court has to pass coercive orders to save human lives and property of the State of Himachal Pradesh, but we refrain to pass such orders at this stage and deem it proper to direct Mr.Ashok Sharma, learned Assistant Solicitor General of India to file compliance report in terms of orders passed by this Court from time to time and also file report as to what steps were taken in terms of letter (supra).

4. Mr. R.L. Sood, Senior Advocate, has filed suggestions, which are taken on record. Learned Advocate General and learned Assistant Solicitor General of India and other Advocates present are at liberty to file response.

List on 9th December, 2014. **Dasti copy**.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

LPA Nos. 4074 of 2013 and 186 of 2014.
Judgement reserved on: 28.10.2014.
Date of decision: 12.11.2014.

1. LPA No. 4074 of 2013.

State of H.P. & ors. ..... Appellants.

Vs.

Dr.(Mrs.) Man Mohini Sharma & anr. ..... Respondents

2. LPA No. 186 of 2014.

State of H.P. & ors. ..... Appellants.

Vs.

Dr. Bharat Bhushan Sharma & anr. ..... Respondents

Constitution of India, 1950- Article 226- Petitioners were appointed as Assistant Surgeon and Assistant Professor in the department of Health and Medical Education, Jammu and Kashmir – they had applied through proper channel for the post of Lecturer/ Assistant Professor at IGMC, Shimla- they made representation for counting the services rendered by them in Jammu and Kashmir for the purpose of pensionary benefits- Govt. refused to do so on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir- held, that as per CCS (Pension) Rules, 1972 anddecision No. 5(2)(b) of Rule 14liability is to be borne in full by the Central/ State department and no recovery is to be made from Central/State Government under whom employee had served, therefore, it was not open for the State Government to decline the claim of the petitioners on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir. (Para-12 to 14)

For the appellants : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Additional Advocate Generals, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, in both the appeals.

For the respondents : Mr. K.D.Shreedhar, Senior Advocate with Mr. Yudhvir Singh Thakur, Advocate, for respondent No. 1, in both the appeals.

Nemo for respondent No.2 (in both appeals).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and fact is involved in both these appeals, the same are taken up together for disposal.

2. The respondents- writ petitioners had worked as Assistant Surgeon and Assistant Professor, respectively, in the department of Health and Medical Education, Jammu and Kashmir. Dr. Man Mohini Sharma served the government of Jammu and Kashmir from 1967 to 1983, while Dr. Bharat Bhushan served there from 1966 to 1980. Undisputedly, both of them applied through proper channel for the post of Lecturer/ Assistant Professor at Indira Gandhi Medical College (IGMC), Shimla and after being relieved on 12.4.1983 and 10.12.1980 joined immediately on 12.4.1983 and 12.12.1980, respectively. After joining at

Shimla, the petitioners made various representations for counting the service rendered by them with the Jammu and Kashmir Government for the purpose of pensionary benefits. Pursuant to which various inquiries were held and government of Jammu and Kashmir vide letter dated 29.7.1999 unequivocally and unconditionally gave their no objection in case the service of the petitioners rendered by them with the government of Jammu and Kashmir is counted for the purpose of pension.

3. Thereafter the State Government appears to have sought a clarification from the Principal, Indira Gandhi Medical College to the effect as to whether the resignation tendered by the writ petitioners was required for administrative reasons or for satisfying a technical requirement. The State of Jammu and Kashmir informed that the resignation was on account of administrative reasons for satisfying the technical requirement and not for any other reason. Despite all these communications, when the appellants failed to count the service rendered by the writ petitioners in the State of Jammu and Kashmir for the purpose of pension, they filed the Original Applications before the erstwhile Tribunal.

4. Out of them, one of the petitions being OA No. 1837 of 2008 preferred by Bharat Bhushan Sharma came to be dismissed on 3.5.2006 on the ground that unless and until there was reciprocal arrangement or unless the government of Jammu and Kashmir agreed for proportionate contributory liability, the services of the petitioners therein could not be counted.

5. Against this finding, Civil Review (T) No. 20 of 2008 was preferred by Bharat Bhushan Sharma respondent herein, which came to be allowed on 25.10.2010, wherein this court observed as under:-

> *"….Inviting reference to 14(2)(b) of CCS (Pension) Rules, it is submitted that liability is to be borne by the government under whom the petitioner served at the time of retirement. This aspect of the matter has not been considered in the order. Therefore, the review petition is allowed and the order dated 3.5.2006 is recalled."*

Upon closure of the Administrative Tribunal, these petitions were transferred to this court and were registered as CWP(T) No. 33 of 2010 and CWP(T) No. 3073 of 2008 respectively. The petition filed by Bharat Bhushan Sharma was disposed of with the following observations:-

> *"The petition is filed with the following prayer:-*
>
> > *"(i) That respondents No. 1 to 3 be directed to count the service of 14 years, 4 months and 4 days (with effect from 15.8.66 to 11.12.80) rendered by the applicant under the State of Jammu and Kashmir prior to the joining the service of respondent No. 1 for the purpose of all pensionary benefits and after doing so, the necessary instructions be conveyed to the respondent No. 4 for calculating revised pension and gratuity and any other benefit payable to the applicant on this account."*

2. It is stated in the reply at Paras 6(i) to 6(xii) as follows:-

"Matter of record and hence not denied. However, it is stated that the request of Dr. Bharat Bhushan Sharma (applicant) for counting of his past service rendered under the Jammu & Kashmir Govt. is under consideration of the Govt. under the rules with the clear condition/understanding that the doctor concerned was appointed in IG Medical College, Shimla on the basis of his application received through proper channel in the H.P. Public Service Commission and that he was relieved by his parent organization in J&K for joining the new assignment in HP and was governed under GPF rules in his parent organization. From the perusal of copies annexed by the applicant with his application, it is evident that the replying respondent is processing the case for counting his past service rendered under the J&K Govt. on the above lines and will arrive at a decision at the earliest after completion of all formalities. It is wrong to say that the J&K Govt. has supplied the entire information sought by the Replying respondent as alleged by the applicant. In fact, the J&K Govt. has not responded to the specific query raised by the Replying Respondent through Principal IG Medical College Shimla to the effect whether the State Govt. of J&K will bear the proportionate pensionary liability in respect of service rendered by the applicant under the J&K Govt. to the extent such service would have been qualified for the grant of pension under the rules on service share basis. Similarly, the J &K Govt. has not informed whether the amount of GPF alongwith interest thereon was transfferrr4ed by the AG J&K to AGHP or not and if yes, the detail of transfer and if not reasons thereof. The Replying Respondent have no objection to the counting of past service rendered by the applicant for pensionary benefits in case the J&K Govt. gives its specific acceptance to bear the proportionate pensionary liability on service share basis. The Principal IGMC in his letter annexed at Annexure RA has informed that reply of the J&K Govt. is awaited and will be supplied as and when received.

From the position narrated above, it is evident that request of the applicant is under consideration of the Govt. and appropriate decision will be taken as and when specific information called for is received. The Replying Respondent has again taken up the matter with the J&K Govt. vide copy of letter annexed at R'B' to expedite the information enabling the Replying Respondent to take a decision at the earliest. The Replying Respondent is keen that the case is processed at the earliest in order to redress the grievances of the applicant under the rules."

3. Reference is invited to Government of India decision No. 5(2)(b) below Rule 14 of the CCS(Pension) Rules, 1972, which reads as follows:-

> *"The liability for pension including gratuity will be borne in full by the Central/State Department to which the Government servant permanently belongs at the time of retirement. No recovery of proportionate pension will be made from Central/State Government under whom he had served."*

> *"4. It is submitted that the petitioner is entitled to get full pension of the services rendered in Jammu and Kashmir. There will be a direction to the first respondent to take a final decision in the matter and settle the pension case of the petitioner in the light of the Government of India's decision (No. 5(2)(b) below Rule 14 of the CCS (Pension) Rules, 1972), if not already taken, within two months from the date of production of copy of this judgement by the petitioner. Needless to say, eligible benefits, if any, to which the petitioner is entitled, shall be disbursed to him within another one month. The question of interest is left open."*

6. In compliance to the aforesaid orders of this court, the appellants after reproducing the orders of this court, decided the matter in the following terms:-

> *"FD observes that the H.P. Govt. do not have any reciprocal agreement with J&K Govt. for sharing person and leave salary contribution and J&K Govt. has refused to bear proportionate pensionary liabilities of both these doctors."*

7. Aggrieved yet again by the orders passed by the appellants, the petitioners approached this court by filing CWP Nos. 4295 of 2012 and 4296 of 2012 challenging the orders passed by the appellants. The learned single Judge allowed these petitions by observing as under:-

> *"6. This is no decision in the eyes of law. The only ground urged by the State is to deny pension to the petitioners on grounds which are untenable and against the very provision of the Pension Regulations. I find it extremely distressing that the direction issued by this Court should be left to the judgment of some lower rank Clerk in the secretariat who recommends to the Secretary (Health) to the Govt. of H.P. that there is no agreement with Jammu & Kashmir Government for sharing proportionate pensionary liability of both doctors. Rule 14 (2) (b) clearly provided that:*
>
> ***"2.....***
>
> ***(a).....***
>
> ***(b) Pension**: The liability for pension including gratuity will be borne in full by the Central/State Department to which the Government servant permanently belongs at the time of retirement. No recovery of proportionate pension will be made from Central/State Government under whom he had served"*
>
> *7. Learned counsel appearing for the petitioner relies upon the decision in Prof.Dr.R.R.Sharma (Retd.) Vs. Post Graduate Institute of Medical Education and Research, Chandigarh, 2000(1)SCT 565, holding:*

> *"12. The writ petition is allowed. The Post Graduate Institute is directed to pay to the petitioner the full amount of pension and the full amount of gratuity counting his qualifying and continuous combined service from September 25, 1954. This shall be done without any more waiting for the receipt of the proportionate amount from the Uttar Pradesh Government and the Karnal Institute. The arrears shall be paid to the petitioner within three months from the date of this order with interest at the rate of 12% per annum from November 1, 1991 till the date of payment. The Post Graduate Institute shall be at liberty to recover the amount of proportionate liability from the Uttar Pradesh Government and the Karnal Institute. It is further ordered that the Uttar Pradesh Government and the Karnal Institute shall pay the proportionate amount towards pension and gratuity to the Post Graduate Institute within three months from the date of this order." (P.567)*

8. It is against this judgement that the appellants are before this court and alleged that the findings recorded by the learned single Judge are contrary to the provisions of CCS (Pension) Rules, 1972, which were inapplicable to the case of the petitioners, since they were erstwhile employees of the Jammu and Kashmir Government and governed by Jammu and Kashmir Civil Service Regulations.

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

9. It is extremely distressing to note that despite the repeated observations of the court, the respondents have again rejected the claim of the writ petitioners only on account of their being no reciprocal arrangement with Jammu and Kashmir government for sharing person and leave, salary contribution and that the government of J&K had refused to bear proportionate pensionary liability of both these writ petitioners. What is more shocking is that this opinion is not even that of the employer i.e. Secretary (Health) who was to decide the case, but is in fact an opinion of the Finance Department.

10. Admittedly, the appellants herein did not challenge the findings recorded in the review petition which have attained finality and are now therefore clearly estopped from rejecting the claim of the writ petitioners on a ground which was already held to be not tenable.

11. Having said so, we still proceed to test the argument of the appellants that the writ petitioners were not entitled to counting of service rendered by them in the State of Jammu and Kashmir in view of CCS (Pension) Rules not being applicable to them and they being governed by the Jammu and Kashmir Civil Services Regulations.

12. We find no merit in the contention raised by the appellants for more than one reason. Firstly, the appellants were required to comply with the directions passed by the Division Bench of this Court in

CWP(T) No. 33 of 2010, wherein after taking into consideration the respective stand of the parties, this court had issued specific direction to the appellants to settle the pension case of the writ petitions in light of the Government of India's decision contained in decision No. 5(2)(b) below Rule 14, which reads thus:-

> *"The liability for pension including gratuity will be borne in full by the Central/ State Department to which the Government servant permanently belongs at the time of retirement. No recovery of proportionate pension will be made from Central/ State Government under whom he had served."*

Once this is the position, it was not open to the appellants to have rejected the claim of the writ petitioners on any other ground and the decision was required to be taken strictly in accordance with the directions so issued.

13. Secondly, this very plea of the appellants had already been negated by this court while allowing Civil Review (T) No. 20 of 2008.

14. Thirdly, decision No. 5(2)(b) of Rule 14 of CCS (Pension) Rules, 1972 categorically provides that liability for pension including gratuity will be borne in full by the Central/ State Government to which the government servant permanently belongs at the time of retirement and no recovery of proportionate pension will be made from Central/ State Government under whom he has served. The provisions of the rule are absolutely clear and unambiguous and do not contemplate any reciprocal agreement between two States for sharing persons and leave, salary contribution. Even otherwise the State of Himachal Pradesh is always at liberty to recover the proportionate liability from the State of Jammu and Kashmir. The mere fact that the State of Himachal Pradesh has not been able to recover the proportionate liability from the State of Jammu and Kashmir or that the State of Jammu and Kashmir has refused to bear proportionate pensionary liabilities of the respondents cannot be a ground to deny the benefit of the rule to the respondents.

15. Accordingly, we find no merit in these appeals and the same are dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Suresh Kumar ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No. 8235 of 2014-D
Decided on: 12.11.2014

Constitution of India, 1950- Article 226- petitioner was transferred from Pangi, a tribal area to GHS Tippar fro where he was transferred to

GMS Jhaniker and again to tribal area- transfer policy framed by the Government provides that employee who served in Tribal/ Hard/Difficult Areas as well as in Remote/Rural Areas are not to be transferred to the same area again- hence, respondents directed to examine the case of the petitioner afresh and to pass appropriate order. (Para-3 and 4)

For the petitioner:	Mr. Kulbhushan Khajuria, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma & Ms. Parul Negi, Deputy Advocate Generals

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

It is contended that the petitioner was posted at GHS Sural, Tehsil Pangi, District Chamba, which is a tribal area, was transferred on completion of his normal tenure to GHS Tippar, District Hamirpur, was again transferred to GMS Jhaniker under complex GHS Barara, and, as on today, is at GMS Bhebar under complex GSSS Biar, District Hamirpur, now has been transferred, on the behest of MLA, in terms of order, dated 15th October, 2014, to again a tribal area, which is in violation of the transfer policy.

2. Issue notice. Mr. Romesh Verma, learned Additional Advocate General, waives notice on behalf of respondents No. 1 to 3.

3. It appears that the impugned order has been passed in violation of the transfer policy. It is apt to reproduce clause 12 of the said policy, dated 10th July, 2013, herein:

> *"**12. Posting of Employees in Hard/Difficult/ Remote/Hard Areas:** In view of the observations made by the Hon'ble High Court vide judgment dated 27-08-2007 in CWP No. 1105/2006 titled as Sushila Sharma, Head Teacher V/s State of H.P. & others, every department will ensure that all the employees are treated fairly and equally in the matter of transfer and posting. The Departments may also ensure that every employee during his tenure of service, serves in Tribal/ Hard/Difficult Areas and also in Remote/Rural Areas. While making transfers the Department shall ensure that the employees who have already served in Tribal/Hard Areas as well as in Remote/Rural Areas are not again sent to these Areas and there may be a continuous process of change whereby all the employees have a chance to serve in Tribal/Hard Areas as well as Remote/Rural Areas and measures shall be taken to ensure that employees remained posted in the Urban Areas/Cities*

for a long period, are transferred and posted to Rural/Remote Areas and Hard/Tribal Areas in the transfer season when the transfers are made. It will be the responsibility of concerned Head of Department/competent authority to relieve the officer/official transferred to tribal / difficult / hard / remote / rural areas.

12.1 All the Departments will ensure that all employees during their entire period of service will serve for at least single tenure in the Tribal/Difficult/Hard areas and remote/rural areas. In order to earn their promotion, service in such areas will be mandatory. This would be subject to adequate number of posts being available in such areas. However, this will not apply to those employees who have less than 5 (Five) years to superannuate. This stipulation is to be incorporated in R&P Rules wherever applicable. A common provision to this effect has been devised by the Department of Personnel after having obtained the approval of competent authority. No Government employee can claim his transfer or posting as a matter of right. It will be the discretion of the State Government to post/transfer any employee anywhere in the State keeping in view of the administrative exigencies/convenience."

4. In the given circumstances, we deem it proper to dispose of this writ petition by directing the respondents to examine the case afresh and pass orders within four weeks. Till then, the impugned order is stayed.

5. The writ petition is disposed of accordingly alongwith all pending applications. Copy **dasti.**

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

H.P. State Electricity Board Ltd. .....Appellant

Versus

Sh. Jeet Ram Panwar and others ...Respondents.

LPA No. 93 of 2011.

Date of decision: 13th November, 2014.

Constitution of India, 1950 - Article 226- Appellants were directed to remove the anomaly in the pay scale by giving benefits of stepping up of the pay along with interest @ 7 % per annum- held, that the order

passed by the Writ Court does not suffer from any infirmity- appeal dismissed. (Para-2 and 4)

Case referred:
Er. Gurcharan Singh Grewal and another vs. Punjab State Electricity Board and others, 2009 (1) Scale 535

For the appellant: Mr. Satyen Vaidya, Advocate.
For the respondents: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The challenge in this Letters Patent Appeal is to the judgment and order dated 27.10.2010, passed by the learned Single Judge of this Court in CWP(T) No.5138 of 2008, titled *Jeet Ram Panwar and others vs. Himachal Pradesh State Electricity Board*, whereby impugned letter dated 11.1.2000 was quashed and the appellant-Board was directed to remove the anomaly by giving the benefit of stepping up of pay to the petitioners from due date alongwith interest @ 7% per annum, for short "the impugned judgment."

2. We have gone through the impugned judgment and are of the considered view that the Writ Court has rightly made the impugned judgment. 3. The learned counsel for the appellant was asked to carve out a case for interference by this Court but he failed to do so.

4. The Writ court has specifically made the mention of the case of the writ petitioners in paras 1 and 2 of the impugned judgment and also rightly discussed the ratio of the judgment of the apex Court in ***Er. Gurcharan Singh Grewal and another vs. Punjab State Electricity Board and others, 2009 (1) Scale 535.***

5. In view of the above stated position, no case for interference is made out. The appeal merits dismissal and is accordingly dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Miss Lata Sharma .....Appellant
Versus
The H.P. State Electricity Board and others ...Respondents.

LPA No. 34 of 2010.
Date of decision: 13th November, 2014.

Constitution of India, 1950- Article 226- Petitioner sought regularization of her services- respondent contended that the services of

the petitioner were not terminated and she has abandoned her job voluntarily- petitioner had not placed on record any termination letter- held that, the version of the respondent that the petitioner had abandoned her services is more probable, therefore, petitioner is not entitled for any relief. (Para 5 and 6)

For the appellant: Mr. Rajinder Sharma, Advocate.
For the respondents: Mr. Satyen Vaidya, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The challenge in this Letters Patent Appeal is to the judgment and order dated 11.5.2009, passed by the learned Single Judge of this Court in CWP(T) No.4371 of 2008, (OA 1053/97) titled *Miss Lata Sharma vs. The HP State vs. The Himachal Pradesh State Electricity Board and others*, on the grounds taken in the memo of appeal, for short "the impugned judgment."

2. We have gone through the impugned judgment and the petition filed by the petitioner.

3. It appears from the record that the petitioner had invoked the jurisdiction of the Erstwhile Tribunal by filing Original Application and sought reliefs commanding the respondent-Board to re-instate and regularize her services.

4. The respondents have filed the reply. It is stated that she was working with them w.e.f. 12.6.1985 to 25.7.1987 with certain interruptions/ breaks as shown in Annexure RA-2. Thereafter she at her own did not perform her duties w.e.f. 25.7.1987. They have specifically stated that they have not terminated the service of the petitioner. It is apt to reproduce para 2 of the reply on preliminary objections and paras 3, (vi), (ix) and (x) of the reply on merits herein:

> *"2.In this context, the replying respondents submit with utmost respect that the applicant herein was initially engaged by the respondent No. 2 at Panchrukhi (under respondent No.3) on daily wages against the post of bill distributor on 12.6.1985 on the basis of request made by the petitioner received by the respondent No. 2 through the respondent No.1 (Annexed atRA-1). The applicant worked under respondent No. 3 w.e.f. 12.6.1985 to 25.7.1987 with certain interruptions/breaks. A copy of statement showing presence/absence of the applicant is placed on record as (Annexurer-RA-2) and there after applicant left the job of her own accord on w.e.f. 25.7.1987. The respondent No.3 has never terminated the services of the applicant rather she left the service at her own will as back as in the year of 1987 i.e. 10 years back, hence the question of terminating her service*

does not arise at all. Therefore, the original application is not maintainable."

Para-3. Denied to the extent that the services of the applicant were ever dispensed with by the respondent No. 3 rather she abandoned the ob at her own accord. Although she was engaged as bill distributor on daily rated and subsequently she was also performing the duties of MLCS, as and when required but it is incorrect to say that she was paid the wages of daily rated labourer (as per annexed RA-3). In fact she was paid wages of clerk w.e.f. 29.8.85 to 25.7.87 in compliance with the directions of the Hon'ble High Court passed in the CWP 647 titled Sh. Tirath Raj versus HPSEB and @ rates as applicable from time to time and considering that she has oftenly been performing the duties of MLCs,.

4-5…..

6. (i) to (v)……

(vi)That contents of this sub-para as stated are wrong and hence denied. It is submitted respectfully that the respondent No. 3 has never terminated the services of the petitioner rather she abandoned the job of her own accord. It is further added that after completion of 240 days one does not become entitled for appointment on regular basis as claimed by the applicant in t his sub-para.

(vii) to (viii)…….

(ix)The contents of this sub-para are wrong and hence denied. The petitioner was given casual cards for the period she worked with the respondent No.3.However, her name was not included in the seniority list as she had neither put in six months un-interrupted service nor actually worked or 120 days prior to 31.8.1986 as per details annexed RA-3 and was not eligible to be brought on the seniority list according to the principle laid down in the CWP 190 of 1984 communicated vide respondent No. 1 letter No. HPSEB (SECTT)/LWO-7-5/84-60748-907 dated 8.6.1984 in consonance to instructions circulated vide Secretary (Labour & Employment) to HP Govt. Letter No. Shram (I)-8/84-II dated 26.9.1986 (Copy annexed at RA-4. The applicant never requested respondent No.2 and 3 for the issuance of casual cards for full period and seniority list and as indicated in para (vii) above also her services were not terminated by the respondent No. 3 hence question of any malafide intention on the ground that respondent No.3 did not want to regularize her services does not arise as she was initially appointed as Bill Distributor subsequent to her working as MLC from time to time she was paid the wages of the Clerk w.e.f. 29.8.1985 to 25.7.87, because the rates for Clerk were notified w.e.f. 29.8.85.

(x) The contents of this sub-para are wrong and hence denied. It is submitted that the respondent No. 3 had never terminated the services of the petitioner rather she left the job of her own accord. As such, the compliance of Section 25 (g) and 25 (f) of the Industrial Dispute Act, 1947 is not mandatory in this case. However, it is correct that she performed the duties of clerk as and when required and accordingly the wages of Daily rated Clerk has already been paid top her as per details (Annexed RA-1) In fact the rate of Rs10/- per day has only been given to her w.e.f. 12.6.85 to 28.8.85."

5. The petitioner has not filed any rejoinder and has also not been able to place on record the termination order. The petitioner has not stated the reasons why she left/ abandoned the duties right from 25.7.1987. Though, she has filed the writ petition before this Court which was dismissed for want of jurisdiction but no liberty was granted to her. Thereafter OA was filed before the HP State Administrative Tribunal.

6. The petitioner on her own has abandoned the service, so the question of issuance of mandamus directing her re-instatement does not arise at all.

7. The learned Single Judge after going through the pleadings and hearing the arguments rightly made the well reasoned judgment, needs no interference. Accordingly, the appeal is dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Rattan Chand son of Lachho Ram ....Appellant/Defendant

Versus

Pushpa Devi widow of Shri Balwant Singh
and others ....Respondents/Plaintiffs

RSA No. 61 of 2014
Judgment Reserved on 31st October, 2014
Date of Decision 13th November, 2014

H.P. Land Revenue Act, 1954- Section 107- Demarcation- demarcation was conducted on the basis of Aks Shazra- held, that demarcation should be conducted on the basis of Aks Musabi and the demarcation conducted on the basis of Aks Shazra is not permissible. (Para-10)

Case referred:
State of H.P. vs. Laxmi Nand, 1996 Shimla Law Cases page 314

For the Appellant: Mr. Adarsh K. Vashista, Advocate.

For the Respondents: Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellant against the judgment and decree dated 5.2.2013 passed by learned District Judge Hamirpur H.P. in Civil Appeal No. 55 of 2010 titled Rattan Chand vs. Balwant Singh and others whereby learned District Judge Hamirpur affirmed the judgment and decree passed by learned trial Court passed after remand of civil suit.

2. Brief facts of the case as pleaded are that deceased Balwant Singh and Smt. Sansaro Devi plaintiffs filed a suit for fixation of boundaries by way of demarcation of land comprised in Khata No. 107 min Khatauni No. 129 min Khasra Nos. 598, 599 kita 2 area 2 canals 4 marlas as per jamabandi for the year 1995-96 situated in Tika Anu Kalan Mauza Bajuri Tehsil and District Hamirpur with a consequential relief of permanent prohibitory injunction restraining the defendant from raising any construction or changing nature of land and also sought additional relief of possession by way of demolition of construction in case defendant succeed in raising construction over suit land or any part thereof during the pendency of suit. During the pendency of suit Balwant Singh died and his legal representatives brought on record. During the pendency of suit Smt. Sansaro Devi also died and name of Sansaro Devi was ordered to be deleted under Order 1 Rule 10 CPC vide order dated 22.6.1999. It is pleaded that deceased plaintiffs through their legal representatives are owners in possession of land comprised in Khata No. 107 min, Khatauni No. 129 min, Khasra No. 598, 599 measuring 2 canals 4 marlas situated in Anu Kalan, Mauza Bajuri Tehsil and District Hamirpur. It is further pleaded that there are other co-sharers in the suit land but they have not been impleaded as parties and further pleaded that plaintiffs did not deny their right title or interest in the suit land. It is pleaded that no relief is claimed against other co-sharers and it is also pleaded that present suit is filed for their benefit also. It is pleaded that defendant is stranger to the suit land and he has got no right title or interest in or over the suit land. It is pleaded that land of defendant is adjoining to the suit land and defendant had started digging the suit land and has uprooted the boundary and is threatening to raise forcible construction over the suit land and also threatened to dispossess the plaintiffs from the suit land. It is pleaded that plaintiffs requested the defendant on a number of time not to raise construction over the suit land but of no use. Prayer for decree the suit as mentioned in relief clause sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that plaintiffs have no cause of action and further pleaded that other co-sharers are necessary parties. It is pleaded that defendant wanted to raise retaining wall in order to protect his immovable property and plaintiffs are creating interference over the land

of the defendant. It is pleaded that defendant has already filed suit against the plaintiffs and present suit is a counter blast to that suit. It is pleaded that defendant is not raising any construction over the suit land. It is also pleaded that defendant is not interfering over the suit land in any manner and suit has been filed with a malafide intention. Prayer for dismissal of suit sought.

4. Plaintiff filed replication and reiterated his pleadings pleaded in the plaint. As per the pleadings of parties learned trial Court framed following issues on dated 15.6.2002:-

1. Whether the plaintiff is entitled for the relief of fixation of boundaries by demarcation as alleged? …OPP
2. Whether the plaintiff is entitled for the decree of permanent prohibitory injunction as prayed for? …OPP
3. Whether the plaintiff is entitled for the decree of possession by demolition as prayed? OPP
4. Whether the plaintiff has no cause of action as alleged?....OPD
5. Whether the suit is bad for non-joinder of necessary parties as alleged? .....OPD
6. Relief.

5. On dated 14.6.2007 learned trial Court dismissed the Civil Suit No. 354 of 1998. Feeling aggrieved against the judgment and decree passed by learned trial Court Balwant Singh deceased through his legal representatives filed Civil Appeal No. 97 of 2007 titled Balwant Singh deceased through his LRs Pushpa Devi and others vs. Rattan Chand before learned District Judge Hamirpur and on dated 2.3.2009 learned District Judge Hamirpur accepted the appeal without costs and set aside the impugned judgment and decree passed by learned trial Court and remanded the case to learned trial Court for fresh disposal by getting local investigation done under Order 26 Rule 9 of Code of Civil Procedure through the Court and then to dispose of the suit in accordance with law. Thereafter learned trial Court on dated 10.3.2010 decreed the suit filed by plaintiffs for possession of Khasra No. 599/1 measuring 0 canal 5 marlas as per report Ext.PZ-2 and tatima Ext.DW4/A by way of demolition of structure existed upon the suit land at costs and risk of the defendant. Learned trial Court also granted consequential relief of permanent prohibitory injunction in favour of the plaintiffs and against the defendant and defendant was restrained from raising any construction and from changing the nature of suit land and from interfering over the suit land in any manner.

6. Feeling aggrieved against judgment and decree passed by learned trial Court dated 10.3.2010 Rattan Chand filed Civil Appeal No. 55 of 2010 titled Rattan Chand vs. Balwant Singh deceased through his LRs Pushpa Devi and others and same was disposed by learned District

Judge Hamirpur on dated 5.2.2013 and dismissed the appeal filed by appellant Rattan Chand.

7. Feeling aggrieved by judgments and decrees passed by learned trial Court and learned first Appellate Court appellant Rattan Chand filed present Regular Second Appeal and Hon'ble High Court admitted present appeal on the following substantial questions of law on dated 26.2.2014:-

1. Whether the learned Court below while passing the impugned judgment and decree was right in disregarding the demarcation report DW1/A which has been duly proved by the Appellant in accordance with law?
2. Whether the learned Court below while affirming the judgment and decree passed by learned trial Court was right in relying upon the demarcation report Ext.PZ/2 despite the fact that the said demarcation has been conducted in utter violation of the norms fixed for conducting the demarcation?
3. Whether the impugned judgment and decree are sustainable in the eyes of law being based on a demarcation report which is vitiated on account of non-adherence to the mandatory provisions of law governing the conduct of demarcation?

8. Court heard learned Advocates appearing on behalf of the parties and also perused the record carefully.

Evidence adduced by parties

9. PW1 Balwant Singh has stated that he is owner of suit land along with his brothers. He has stated that area of suit land is 2 canals 4 marlas and he has stated that defendant has no legal right title or interest in and over the suit land. He has stated that in the year 1998 defendant started digging the suit land. He has further stated that he requested the defendant not to dig the suit land but defendant did not accept his request and thereafter he filed the civil suit and obtained the ad-interim injunction. He has stated that despite ad-interim injunction defendant started construction of retaining wall, stairs, septic tank and bathroom. He has stated that Local Commissioner has demarcated the suit land and construction was found by defendant upon Khasra No. 599/1. He has stated that defendant agreed that he would exchange 5 marlas of encroachment with Khasra No. 604 but defendant did not give any land in exchange despite assurance. He has denied suggestion that plaintiff has obtained demarcation report in collusion with the concerned authorities.

9.1. PW2 Yog Raj has stated that he has seen the suit property and has further stated that land of defendant is adjoining to the land of plaintiff. He has stated that he was present at the time of demarcation. He has stated that 5 marlas of land was encroached by defendant by way of construction of retaining wall, septic tank and bathroom. He has stated that defendant agreed that he would give 5 marlas of land in

exchange. He has denied suggestion that no compromise was executed between the plaintiff and defendant.

9.2 PW3 Ishwar Chand has stated that lands of parties adjoin to each other and he was present at the time of demarcation. He has stated that Local Commissioner took the statements of parties and further stated that it was found that defendant had encroached 5 marlas of land of plaintiff. He has denied suggestion that he was deposing falsely in Court.

9.3 PW4 Arvind Civil Ahalmad posted in Court No. 3 Hamirpur has tendered the record of file No. 413/98 titled Rattan Chand vs. Balwant Singh.

9.4 PW5 Laxmi Dutt has stated that he was appointed as Local Commissioner and he has submitted report Ext.PW5/A which is correct as per original record. He has stated that tatima is Ext.PW5/B, field book is Ext.PW5/C and statements of parties are Mark X and Y. He has stated that in his presence defendant did not agree to exchange the land. He has stated that he fixed the permanent points ABC from Khasra No. 560, 561 and 559/1. He has stated that he also demarcated Khasra Nos. 560, 561, 562, 563, 445, 1281/589, 1282/589, 559, 556 and 558. He has denied suggestion that he has not properly demarcated the land. He has stated that he has given the demarcation from Aks Musabi. He has denied suggestion that he did not record the statements of parties after demarcation. He has denied suggestion that he did not demarcate the land as per factual position.

9.5 DW1 Dev Raj has stated that on dated 24.11.1998 he went to demarcate the land in case titled Balwant Singh vs. Rattan Chand. He has stated that he demarcated the immovable land in presence of parties and also fixed the boundaries. He has stated that there is road between the lands of parties. He has stated that demarcation report is Ext.DW1/A and copy of Aks Sajra is Ext.DW1/B and copies of statements of parties are Ext.DW1/C and copies of statements of witnesses are Ext.DW1/D. He has stated that he had given the demarcation as per factual position. He has denied suggestion that Balwant Singh was not satisfied with demarcation. He has denied suggestion that he did not conduct demarcation as per demarcation Rules.

9.6 DW2 Besar Chand has stated that he is Pardhan of Gram Panchayat since 17 years and parties are known to him. He has stated that he has seen the suit property. He has stated that a road passes through the lands of parties and further stated that house of Rattan Chand was constructed in the year 1971-72 and he has stated that bathroom and latrine were constructed in the year 1987-88. He has stated that thereafter defendant did not construct anything and further stated that he was present at the time of demarcation. He has also stated that as per demarcation no encroachment on the part of defendant was found.

9.7 DW3 Rattan Chand has stated that he did not raise any construction over the land owned by plaintiffs. He has stated that there is road between the land of plaintiffs and defendant. He has stated that he had old house and further stated that in the year 1988 he had constructed latrine and bathroom. He has stated that in the year 1998 he took the demarcation. He has admitted that he retired as Superintendent from Education Department. He has stated that he served for 37 years and 11 months.

9.8 DW4 Dhyan Singh Kanungo DC Office Hamirpur has stated that he has demarcated the land from triangle system and he also fixed ABC points. He has stated that permanent points were fixed from Khasra No. 555, 589 and 596. He has stated that Khasra numbers of suit land were 598 and 599. He has stated that he demarcated the immovable land from Musabi. He has denied suggestion that he did not properly demarcate the suit land. He has denied suggestion that he did not demarcate the suit land as per instructions of Financial Commissioner. He has stated that he issued notice to the parties Ext.PX on dated 9.6.2006 and recorded the statements of parties Ext.PY. He has stated that copy of Musabi of consolidation for the year 1961-62 is Ext.PZ and copy of musabi of settlement is Ext.PZ-1. He has stated that his report is Ext.PZ-2 which is correct as per original record.

Findings upon Substantial Question of law No.1 framed by Hon'ble High Court:-

10. Submission of learned Advocate appearing on behalf of the appellant that learned trial Court and learned First Appellate Court were not right in disregarding demarcation report Ext.DW1/A dated 24.11.1998 which was proved by appellant in accordance with law is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused demarcation report Ext.DW1/A placed on record. Demarcation vide report Ext.DW1/A was conducted on dated 24.11.1998 by Dev Raj Sharma Tehsildar (Retired). Dev Raj Sharma Tehsildar (Retired) conducted the demarcation report Ext.DW1/A on dated 24.11.1998 on the basis of Aks Sajra Ext.DW1/B placed on record. It is well settled law that demarcation should be conducted through Aks Musabi issued by office of District Collector for demarcation purpose. It is well settled law that any demarcation from Aks Sajra Kishatwar is not proper demarcation because Aks Sajra is prepared from Latha kept in Tehsil. It is well settled law that copy of Aks Musabi is kept in office of District Collector. It was held in case reported in ***1996 Shimla Law Cases page 314 titled State of H.P. vs. Laxmi Nand*** that demarcation from Latha is not permissible. It was further held that in boundary dispute while demarcation following instructions should be followed. (1) If a boundary is in dispute the Field Kanungo should relay it from the village map prepared at the last settlement. If there is a map which has been made on the square system he should reconstruct the square in which the disputed land lies. He should mark on the ground on the lines of the squares the places where the map shows that the disputed boundary intersected those lines and then to find out the position of

points which do not fall on the lines of the squares, he should with his scale read on the map the position and distance of those points from line of a square and then with a chain and cross staff mark put the position and distance of those points. Thus he could set out all the points and boundaries which are shown in the map. But if there is not a map on the square system available he should then find three points from different sides of the place in dispute as near to it as he could. He would chain from one to another of these points and compare the result with the distance given by the scale applied to the map. If the distance when thus compared agree in all cases he could then draw lines joining these three points in pencil on the map and draw perpendiculars with the scale from these lines to each of the points which it is required to lay out on the ground. (II) In the report to be submitted by him, the Kanungo must explain in detail how he made his measurement. He should submit a copy of the relevant portion of the current settlement field map of the village showing the fields if any with their dimensions (Karu Kan) of which he took measurement situated between the points mentioned in Instruction above and the boundary in dispute. This is necessary to enable the Court to follow the method adopted and to check the Field Kanungo's proceedings. (III) If a question is raised as to the position of the disputed boundary according to the field map of the settlement proceeding of the current settlement that also should be demarcated on the ground so far as this may be possible and also shown in the copy of the current field map to be submitted under instruction No. II. (iv) On the same copy should be shown also the limits of existing possession. (v) The areas of the fields abutting on the boundary in dispute as recorded at the time of last settlement and those arrived at as a result of the measurement on the spot should be mentioned in the Field Kanungo's report with an explanation of the cause of increase or decrease if any discovered. (vi) When taking his measurement the field Kanungo should explain to the parties what he is doing and should enquire from them whether they wish anything further to be done to elucidate the matter in dispute. At the end he should record the statements of all the parties to the effect that they have seen and understood the measurements, they have no objection to make to this (or if they have any objection he should record it together with his own opinion) and that they do not wish to have anything further done on the spot. It constantly happens that when the report comes before the Court one or other party impugns the correctness of the measurement and asserts that one thing or another was left undone. This raises difficulties which the above procedure is designed to prevent. (vii) The above instructions should be followed by Revenue Officers or Field Kaungoes whenever they are appointed by a Civil Court Commissioners in suits involved disputed boundaries. There is no recital in document Ext.DW1/B that Aks Sajra was prepared from Aks Musabi. Dev Raj Sharma has given the demarcation on the basis of Aks Sajra prepared from Latha. Hence it is held that demarcation report Ext.DW1/A placed on record could not be relied in view of Ruling cited supra. Hence point No.1 of substantial questions of law is decided against the appellant.

Findings upon Substantial question of law No. 2 framed by Hon'ble High Court.

11. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally relied upon demarcation report Ext.PZ-2 given by Dhyan Singh Sadar Kanungo posted in DC Office is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that after remand learned trial Court appointed Tehsildar Hamirpur as Local Commissioner. It is also proved on record that thereafter Local Commissioner Hamirpur has refused to carry out the demarcation and thereafter learned trial Court appointed Dhyan Singh Sadar Kanungo as Local Commissioner to carry out the demarcation as directed by learned District Judge Hamirpur in Civil Appeal No. 97 of 2007 titled Balwant Singh deceased through LRs Pushpa Devi and others vs. Rattan Chand. It is proved on record that thereafter Dhyan Singh Sadar Kanungo demarcated the suit land and submitted his local commissioner report Ext.PZ-2. Court has carefully perused the report submitted by Dhyan Singh Sadar Kanungo Hamirpur. Dhyan Singh Sadar Kanungo Local Commissioner recorded the statements of parties Ext.PX and Ext.PY and also perused the copy of Aks Musabi issued from the office of District Collector Hamipur and also submitted the Field Book Ext.DW4/A placed on record. It is proved on record that Dhyan Singh has conducted the demarcation from Aks Musabi after fixing permanent points and had also prepared field book strictly in accordance with law. Shri Dhyam Singh has specifically mentioned that Shri Rattan Chand appellant has encroached upon 05 marlas of land comprised in Khasra No. 599/1 by way of construction of retaining wall, bathroom, stairs and gardening as mentioned in field book Ext.DW4/A placed on record. Hence it is held that learned trial Court and learned First Appellate Court have not committed any illegality by way of relying upon report Ext.PZ-2 submitted by Dhyan Singh Sadar Kanungo. Point No. 2 of substantial question of law is decided against the appellant.

Findings upon Substantial question of law No. 3 framed by Hon'ble High Court:-

12. Submission of learned Advocate appearing on behalf of the appellant that impugned judgments and decree passed by learned trial Court and affirmed by learned first Appellate Court are vitiated on account of non-adherence to the mandatory provisions of law governing the conduct of demarcation is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that Dhyan Singh Sadar Kanungo had conducted the demarcation from Aks Musabi by fixing permanent points and it is also proved on record that local Commissioner Dhyan Singh Sadar Kanungo had also prepared field book strictly in accordance with law and it is held that Dhyan Singh Sadar Kanungo had complied the mandatory provisions of law governing the conduct of demarcation properly. Dhyan Singh appeared in witness box and proved demarcation report in accordance with law. It is held that learned trial Court has rightly rejected the objection of appellant filed

upon local commissioner report submitted by Dhyan Singh Sadar Kanungo. Hence point No. 3 of substantial question of law framed by Hon'ble High Court of H.P. is decided against the appellant.

13. In view of above stated facts appeal is dismissed. Judgment and decree passed by learned trial Court in Civil Suit No. 354 of 1998 decided on dated 10.3.2010 and judgment and decree passed by learned District Judge Hamirpur in Civil Appeal No. 55 of 2010 decided on dated 5.2.2013 are affirmed. Parties are left to bear their own costs. Record of learned trial Court and learned first Appellate Court be sent back forthwith along with certified copy of this judgment. Appeal stands disposed of accordingly. All pending miscellaneous application(s), if any, also stands disposed of.

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